Docket: 2006-1045(EI)

BETWEEN:

BLAJ HOSPITALITY INC,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
BLAJ Hospitality Inc (2006-1046(CPP)),
Lucy Dane (2006-1048(CPP)),
and **Barry Dane (2006-1050(CPP))**
on January 17, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant:	George Jorgensen
Counsel for the Respondent:	Andrew Miller

JUDGMENT

The appeal from the assessments made under the *Employment Insurance Act* for the 2003 and 2004 taxation years is allowed and the assessments are referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 20th day of August 2008.

« François Angers »

Angers J.

Docket: 2006-1046(CPP)

BETWEEN:

BLAJ HOSPITALITY INC,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
BLAJ Hospitality Inc (**2006-1045(EI))**,
Lucy Dane (2006-1048(CPP)),
and **Barry Dane (2006-1050(CPP))**
on January 17, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant:	George Jorgensen
Counsel for the Respondent:	Andrew Miller

JUDGMENT

The appeal from the assessments made under the *Canada Pension Plan* for the 2003 and 2004 taxation years is allowed in part and the assessments are referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 20th day of August 2008.

« François Angers »

Angers J.

Docket**:** 2006-1048(CPP)

BETWEEN:

LUCY DANE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
BLAJ Hospitality Inc (2006-1045(EI)) & (2006-1046(CPP))
and **Barry Dane (2006-1050(CPP))**
on January 17, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant:	George Jorgensen
Counsel for the Respondent:	Andrew Miller

JUDGMENT

The appeal from the assessments made under *Canada Pension Plan* for the 2003 and 2004 taxation years is allowed in part and the assessments are referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 20th day of August 2008.

« François Angers »

Angers J.

Docket: 2006-1050(CPP)

BETWEEN:

BARRY DANE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
BLAJ Hospitality Inc (2006-1045(EI)) & (2006-1046(CPP))
and **Lucy Dane (2006-1048(CPP))**
on January 17, 2008, at Moncton, New Brunswick.

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant:	George Jorgensen
Counsel for the Respondent:	Andrew Miller

JUDGMENT

The appeal from the assessments made under the *Canada Pension Plan* for the 2003 and 2004 taxation years is allowed in part and the assessments are referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 20th day of August 2008.

« François Angers »

Angers J.

Citation: 2008TCC398
Date: 20080820
Dockets: 2006-1045(EI)
2006-1046(CPP)
2006-1048(CPP)
2006-1050(CPP)

BETWEEN:

BLAJ HOSPITALITY INC.,
BARRY DANE,
LUCY DANE,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] All four appeals were heard on common evidence. The appellant BLAJ Hospitality Inc. (BLAJ) was assessed for additional EI premiums and CPP contributions in respect of tips and/or gratuities it paid to some of its employees known as the "servers" and in respect of increased pensionable earnings and increased earnings for Barry and Lucy Dane for the periods under appeal, namely the 2003 and 2004 taxation years. For 2003 only, the increased pensionable earnings and increased earnings for Barry and Lucy Dane included amounts each had received in tips, and for 2004 only, the increased pensionable earnings and increased earnings for Barry and Lucy Dane included amounts each had received in tips as well as additional amounts included in respect of employee benefits they received in the form of low rent and meals provided to them by BLAJ. The matter of the amount of the tips and the amount of the CPP contributions for which BLAJ was assessed in respect of these tips was not raised by BLAJ in the notice of appeal.

[2] The Minister of National Revenue (M.N.R.) acknowledged in his pleadings that he erred in his assessment of BLAJ regarding the increased earnings for Barry

and Lucy Dane in that they were not insurable earnings, and thus employment insurance premiums on those increased earnings were not required to be withheld and remitted as the Danes did not hold insurable employment with BLAJ. The assessment should reflect this acknowledgement.

[3] Barry and Lucy Dane were assessed for additional Canada Pension Plan contributions on the value of the benefits described above, namely, low rent and meals (the "employee benefits") for the 2004 taxation year, and on amounts they were paid in tips for 2003 and 2004.

[4] BLAJ is a corporation whose business activities consist in providing accommodations in a heritage inn known as the Marshlands Inn (the "Inn") and operating a restaurant for fine dining. Barry and Lucy Dane are the only shareholders of BLAJ. Servers were obviously hired to work in the restaurant. BLAJ also hired a hostess and staff to work in the kitchen (the "kitchen staff"). All these employees were paid an hourly rate determined according to each individual's level of experience.

[5] All the tips and gratuities in issue are paid by patrons of the restaurant at their discretion. They are either paid in cash left at the table or added to the amount charged for the meal and paid by a credit or debit card, or charged to the room if the patron is a guest at the Inn. BLAJ uses the Five Star Lite hotel management software package to record its revenues and also to break them down into amounts for meals, rooms, the bar, taxes, credit card commission and tips, and the name of the server is also shown. Each dinner bill identifies the server. Only the tips paid by debit or credit card are posted on the software. The cash tips are given directly to the server. All revenues are deposited in BLAJ's bank account but a report is printed daily showing the amount of tips each server received during his or her work shift, for they are not considered as revenues by BLAJ.

[6] When the Danes purchased the business, the employees had previously agreed to a system whereby the kitchen staff was given 30% of the total daily tips. The Danes continued using the same system. At the end of each day, the hostess was given the printed daily report in order for her to break down the tips of the day on a 70 – 30 basis and further break down the 70% for each server according to the amounts indicated on the clients' dinner bills. The 70% was distributed by the hostess to the servers at the end of the day, or the next day at the latest, using cash made available to her by BLAJ. The 30% was accumulated and distributed to the kitchen staff, also by the hostess, at a later date. Barry Dane has on occasion acted as the host.

[7] The system in place at BLAJ was confirmed by Gina Pratt, a hostess for BLAJ. An end-of-shift report was produced in evidence to indicate how the system works and how it keeps track of the tips. The credit card commission is taken off the total tips and the remainder is then divided on the 70 - 30 basis and the 70% is further broken down according to each server's proportion of the tips. The 30% is kept in a box for the kitchen staff while the share of the servers is put in their respective envelopes for pick-up by them. Ms. Pratt could not confirm, though, that the system was used during the two taxation years under appeal, as she has only been employed by BLAJ since 2005.

[8] It is to be noted that only the 70% was assessed, and this was done using only the debit and credit card transactions.

Employee Benefits (Low Rent and Meals) 2004 Taxation Year

[9] BLAJ also owns a two-storey house located next to the Inn, which is used by Barry and Lucy Dane and their two children for living accommodation. The house contains a kitchen, a living room, a dining room, a recreation room, four bedrooms and three bathrooms of which only one is functional. Each floor is approximately 1,200 square feet and the Danes occupy only the second floor, using just three of the bedrooms and the functional bathroom. According to the Danes, the house is primarily used as a place to sleep. All their meals are taken at the Inn and the family spends most of their time there.

[10] The house is in need of repairs and only the exterior was painted. The ground floor is used as storage for the Inn. BLAJ paid all the expenses related to the house but the Danes did pay rent in the amount of $500 a month. The actual cost of heating the house was $4,578 a year for an average of $381 a month, and electricity cost $827 a year for an average of $69 a month, the total average for both was $450 a month. The Minister determined the value of the accommodation to be $1,000 per month by allocating $600 for the actual rent, $300 per month for heating and $100 per month for electricity on the basis that they had exclusive use of the house. The rent was assessed at $6,000 for each of the appellants minus the amount each actually paid.

[11] As for meals, they were all taken at the Inn except for snack foods and fruits that were kept at the rented house and the occasional fast food that was purchased by the Danes. All other meals were paid for by BLAJ. It is estimated that the Danes spent approximately $50 to $60 a week on food items. The meals taken at the Inn

were sometimes prepared by the staff and sometimes by the family members. The dishes and cleaning were done by the staff. In 2004, the children were involved in many activities during which they took meals elsewhere. The Minister assessed the meal benefit for the Danes at $16,800 per year or $8,400 for each of the appellants. The cost per meal was estimated by the auditor using the average food costs per meal in a restaurant less the cost of service. This was calculated to be $1.50 for breakfast, $3 for lunch and $7.50 for dinner per person; for a total of $12 per day per person; this amount was multiplied by 4 times 350 days a year to determine the annual amount for the family. The average grocery cost figure per year for a family of four provided by Statistics Canada was not used by the auditor.

[12] The issues in these appeals are whether BLAJ was required to deduct and remit CPP contributions and EI premiums with respect to the tips and/or gratuities of its servers, including Barry and Lucy Dane, and with respect to the low rent and the meals BLAJ provided to Barry and Lucy Dane as employee benefits. In other words, the issues are whether the tips and gratuities, the low rent and the meals are to be considered income from employment and as forming part of the total remuneration paid by BLAJ to its servers and to Barry and Lucy Dane and should therefore be taken into account in calculating their insurable earnings and CPP contributions. In the Barry and Lucy Dane appeals, the issue concerns only the assessed value of the rent and meals provided to them by BLAJ, on which the additional CPP contributions were assessed.

[13] The relevant statutory provisions in the *Employment Insurance Act* are as follows:

> 2.(1) . . .
>
> "insurable earnings" means the total amount of the earnings, as determined in accordance with Part IV, that an insured person has from insurable employment;
>
> 67. Subject to section 70, a person employed in insurable employment shall pay, by deduction as provided in subsection 82(1), a premium equal to their insurable earnings multiplied by the premium rate set under section 66 or 66.3, as the case may be.
>
> 68. Subject to sections 69 and 70, an employer shall pay a premium equal to 1.4 times the employees' premiums that the employer is required to deduct under subsection 82(1).
>
> 82. (1) Every employer paying remuneration to a person they employ in insurable employment shall

> (*a*) deduct the prescribed amount from the remuneration as or on account of the employee's premium payable by that insured person under section 67 for any period for which the remuneration is paid; and
>
> (*b*) remit the amount, together with the employer's premium payable by the employer under section 68 for that period, to the Receiver General at the prescribed time and in the prescribed manner.

[14] The relevant provisions of the *Insurable Earnings and Collection of Premiums Regulations* (IECPR) are as follows:

> 2. (1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is
>
> (*a*) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, and
>
> (*b*) the amount of any gratuities that the insured person is required to declare to the person's employer under provincial legislation.
>
> 4. (1) Subject to subsections (2), (3), (3.1) and (5), every employer shall remit the employee's premiums and the employer's premiums payable under the Act and these Regulations to the Receiver General on or before the 15th day of the month following the month in which the employer paid to the insured person insurable earnings in respect of which those premiums were required to be deducted or paid under the Act and these Regulations.

[15] The relevant statutory provisions in the *Canada Pension Plan* are as follows:

> 8. (1) Every employee who is employed by an employer in pensionable employment shall, by deduction as provided in this Act from the remuneration for the pensionable employment paid to the employee by the employer, make an employee's contribution for the year in which the remuneration is paid to the employee of an amount equal to the product obtained when the contribution rate for employees for the year is multiplied by the lesser of . . . .
>
> 9. (1) Every employer shall, in respect of each employee employed by the employer in pensionable employment, make an employer's contribution for the year in which remuneration for the pensionable employment is paid to the employee of an amount equal to the product obtained when the contribution rate for employers for the year is multiplied by the lesser of . . .

(*a*) the contributory salary and wages of the employee for the year paid by the employer, minus such amount as or on account of the employee's basic exemption for the year as is prescribed, and

(*b*) the maximum contributory earnings of the employee for the year, minus such amount, if any, as is determined in prescribed manner to be the salary and wages of the employee on which a contribution has been made for the year by the employer with respect to the employee under a provincial pension plan.

12. (1) The amount of the contributory salary and wages of a person for a year is the person's income for the year from pensionable employment, computed in accordance with the *Income Tax Act* (read without reference to subsection 7(8) of that Act), plus any deductions for the year made in computing that income otherwise than under paragraph 8(1)(*c*) of that Act, but does not include any such income received by the person . . . .

21. (1) Every employer paying remuneration to an employee employed by the employer at any time in pensionable employment shall deduct from that remuneration as or on account of the employee's contribution for the year in which the remuneration for the pensionable employment is paid to the employee such amount as is determined in accordance with prescribed rules and shall remit that amount, together with such amount as is prescribed with respect to the contribution required to be made by the employer under this Act, to the Receiver General at such time as is prescribed and, where at that prescribed time the employer is a prescribed person, the remittance shall be made to the account of the Receiver General at a financial institution within the meaning that would be assigned by the definition "financial institution" in subsection 190(1) of the *Income Tax Act* if that definition were read without reference to paragraphs (*d*) and (*e*) thereof . . . .

[Emphasis added.]

[16] The Supreme Court of Canada in *Canadian Pacific Ltd. v. A.G.(Can.)*, [1986] 1 S.C.R. 678, considered the meaning of "insurable earnings" and determined that the term "remuneration" was broad enough to encompass gratuities paid by a customer and then distributed by the employer to its employees. The issue in *Canadian Pacific* was whether the tips paid by customers at banquets and distributed by the hotel to its employees in accordance with the terms of the collective agreement were insurable earnings as defined in the applicable regulations. Paragraph 3(1)(*a*) of the *Unemployment Insurance (Collection of Premiums) Regulations* in force at the time of that decision provided a different meaning for the term "insurable earnings", as follows:

> 3. (1) The amount from which an insured person's insurable earnings shall be determined is the amount of his remuneration, whether wholly or partly pecuniary, paid by his employer in respect of a pay period, and includes
>
> (*a*) any amount paid to him by his employer as, on account or in lieu of payment of, or in satisfaction of
>
> (i) a bonus, gratuity, retroactive pay increase, share of profits, accumulative overtime settlement or an award . . . .
>
> [Emphasis added.]

[17] Mr. Justice Laforest, writing for the majority, held that the word "earnings" was meant to cover more than just a fixed salary attached to the employment and that it included gratuities. It is interesting to note that three judges dissented in the *Canadian Pacific* decision on the basis that the tips were paid by the customers and not by the employer. They concluded that the employer's obligation to deduct premiums was based only on the amounts actually paid by the employer and were not included in the calculation.

[18] It is also interesting to note that the Canada Revenue Agency, in a technical interpretation dated April 18, 2006, sets out some of its views regarding when employers are responsible for withholding taxes from tips. It reads as follows:

> Where tips are controlled by the employer the requirements of subsection 153(1) of the *Income Tax Act* are met. The central question is whether or not the employer was in a position to control the distribution of the tips. Controlled tips include tips the employer pays or that pass through the employer's books before the employee receives them. Some examples of controlled tips are:
>
> - Mandatory service charges added to the client's bill to cover gratuities;
>
> - Percentage added to the total bill, as in the case of banquets or weddings, to cover tips to be paid to servers and the whole team (chef, cook, dishwashers, banquet managers, etc.);
>
> - Tips shared among the staff members according to an agreement provided for in the employment contract and that sets out how the employer will divide up the tips;
>
> - Tips to be divided up according to the conditions of employment determined by the employer; and

> – Tips written on credit cards [*sic*] slips that the employer includes in his income and redistributes to the employees concerned in the form of pay.

[19] A review of the case law supports the Canada Revenue Agency's view that tips paid by the employer are insurable earnings, but the case law does not support the view that tips which the employer keeps track of are insurable earnings. The *Canadian Pacific* decision was followed in *S&F Philip Holdings Ltd. (c.o.b. Sooke Harbour) v. Canada*, [2003] T.C.J. No. 344 (QL). In that case, which bears some resemblance to the present case, the restaurant staff had established a system whereby all tips were placed in a pool for distribution on the basis of certain percentages to all persons who were part of the food service team. The hotel retained ten percent of the total amount of the tips pool to cover the cost of credit card transaction fees and distributed the remaining ninety percent to the workers every two weeks, adding them to their regular wages. Judge Rowe came to the following conclusion at paragraph 22:

> . . . In the within appeals, Harbour House issued cheques to workers – in specific amounts – representing their appropriate share of the total tips received from patrons. The payment was pecuniary in nature and arose totally within the context of employment. Because the arrangement was more casual than the one in Canadian Pacific, supra, case does not mean it is any less significant because it clearly governed the actions of the employees and Harbour House – the employer - with respect to an important facet of their employment. . . .

[20] In a more recent decision of this Court, that of Mr. Justice Hershfield in *Lake City Casinos Ltd. v. M.N.R.*, [2006] T.C.J. No. 175 (QL), affirmed by the Federal Court of Appeal, 2007 FCA 100, a different conclusion is arrived at. In that case, the casino tips were pooled and distributed in accordance with rigidly enforced tip policy procedures set out by the British Columbia Lotteries Corporation. Thus, the employer (the casino) had records showing the amount of tips that went to each employee. The tips were separated and then paid out by casino employees in cash; the casino did not issue cheques to the employees as was done in *Canadian Pacific* and *S&F Philip Holdings*.

[21] Justice Hershfield undertook a detailed review of the relevant case law and legislation and concluded that the casino did not pay the tips to the employees and thus they were not insurable earnings. The important distinction was that the employees received their tips in cash and not by cheque issued by the casino. Justice Hershfield also pointed out that the casino was not directly involved in making the policy regarding tips and that even though the casino required the employees to

distribute tips equitably in accordance with the policy, this did not mean it “paid” the employees the tips; tips were never commingled with casino property. The meticulous cash record-keeping, which included records of tips and the signed (by the employer) approval of tip distributions, did not suggest any interference with, or authority over, the tips.

[22] Justice Hershfield also specifically rejected the argument that tips are insurable earnings when the employer has the necessary information to calculate them. Here is what he said (at paragraph 39):

> That this process affords the Casino the necessary information to calculate deductions and premiums under the subject provisions is also irrelevant. While cases referred to have pointed out that the subject provisions could not readily apply to persons not having the necessary information to comply and that that is a rationale for not imposing liability under such provisions in those cases, does not necessarily suggest that persons having the necessary information should be subjected to those provisions. That cases justifying a literal construction of the subject provisions may have relied to some extent on that rationale does not require extension of the rationale to cases where the employer never actually paid tip entitlement amounts to workers. Imputing liability by virtue of knowledge would be is [*sic*] an extraordinary extension of the principles recognized in such cases as *Canadian Pacific* and *Sooke Harbour*.

[23] Lastly, Justice Hershfield rejected as well a public policy argument advanced by the Crown, namely, that an expansive definition of paid should be applied. It is worth reproducing his full analysis.

> 55 There are two contextual aspects regarding the subject provisions that must be considered. The first is that the EI provisions make express mention of gratuities. The second is that the CPP provisions make reference to a method whereby tips can be included in an employee's pensionable earnings.
>
> 56 Paragraph 2(1)(b) of the *IECPR* requires the inclusion of gratuities as part of one's "insurable earnings" where the employee must declare them to their employer as part of the terms of their employment. Pursuant to section 1 of SOR/98-10, in force as of January 1, 1998, subsection 2(1) of the *IECPR* was amended as follows:
>
> > 2. (1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is

> (*a*) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, and
> (*b*) the amount of any gratuities that the insured person is required to declare to the person's employer under provincial legislation.

57 I suggest that Parliament has deferred jurisdiction over the social assistance net for EI in respect of workers who receive tips not paid by their employer. This is not a suggestion that I pull from thin air. Although not forming part of SOR/98-10, which amended the *IECPR* to include paragraph 2(1)(b), attached to the Regulations was a *Regulatory Impact Analysis Statement* which provided:

> The *Insurable Earnings and Collection of Premiums Regulations* provide, among other things, for the definition of insurable earnings to be used by employers in determining employees' and employers' employment insurance premiums. The amendment to subsection 2(1) of the Regulations provides that gratuities that an employee is required to declare to an employer pursuant to a provincial statute will now be included in the definition of "insurable earnings" and thus employment insurance premiums will be required on the amount that must be declared pursuant to a provincial statute. As a consequence of this amendment, the amount used in the calculation of unemployment benefits will also be increased by the declared amount, thus giving the employee the possibility of obtaining higher unemployment insurance benefits in the event of job loss.

58 The *IECPR* were then amended to take into account Quebec's new system which required the declaration of direct gratuities to employers.

59 Paragraph 2(1)(b) of the *IECPR* does not apply to these appeals since there is no provincial legislative mandate to declare tips/gratuities to the employer in British Columbia. I suggest that it is not for this Court to impose an expanded social net for EI where the province has effectively declined an invitation from Parliament to do so.

60 As to CPP, employees can elect to make a CPP contribution on tip amounts earned in the course of pensionable employment that are found not to be subject to a source deduction.

61 This election is made possible by virtue of subsection 13(3) of the CPP. Again this indicates that Parliament has envisioned that tips

> earned in the course of employment can fall outside the legislative net and that when they do, there is a mechanism to ensure proper benefits to workers. That this is a more expensive access to benefits, in that the worker will pay the employer's contribution, it is, nonetheless, in a contextual sense, reason to accept that Parliament has considered the issue and is satisfied with the language of the subject provisions. It is open to Parliament to extend this type of provision to EI without this Court's intervention.
>
> 62 Accordingly, I reject the Respondent's argument to apply an expansive meaning to the word "paid" so as to include the tips amounts in question in these appeals as insurable or pensionable earnings.

[24] As mentioned earlier, Justice Hershfield's decision was upheld, on appeal, by the Federal Court of Appeal (*supra*). In a very short judgment, that Court held, at paragraphs 2 and 3.

> In order to succeed, it was incumbent upon the Appellant to show that the tips were paid by the employer in the liberal sense attributed to this word by the Supreme Court of Canada in *Canadian Pacific Ltd. v. Canada.*, [1986] 1 S.C.R. 678. This required a demonstration that the tips came into the possession of the employer who then remitted them to the employees.
>
> Having regard to the Agreed Statement of Facts, it was open to the Tax Court Judge to hold that the tips were physically distributed by the employees themselves and not the employer.

[25] In this instance, the evidence reveals that BLAJ had nothing to do with the tips system it had in place during the relevant taxation years. The system was agreed to by the servers before the new owners acquired the business and it was maintained afterwards. BLAJ provided the use of its software to record each transaction and it thus had a record of the amount each server received in tips paid by credit or debit card. The agreement or the system in place allowed BLAJ to recover the 2% commission it paid on credit card transactions. At the end of each day, the hostess, who was an employee, or sometimes Barry Dane, who in his capacity as an employee acted as the host, would balance the cash and the debit and credit card totals. The hostess took an amount of cash equal to the total tips paid by debit or credit card, calculated the amount payable to each server and distributed to each the appropriate amount in cash on the same day the tips were paid by the customers, or the next day at the latest.

[26] The procedure described above is different from that set out in the Minister's assumptions of fact, in which it is alleged that BLAJ kept track of each server's credit card tips in a daily revenue report and that the tips were paid to the servers and the kitchen staff "periodically" by the appellants. The evidence disclosed that BLAJ's daily revenue report kept track of each server's gross tip revenues but that the hostess did the net tip calculation by hand to determine the actual amount of tips it handed over to each server. The actual net tips received by the servers did not form part of BLAJ's records. (See exhibit A-1.)

[27] I therefore find that, in light of the above-described circumstances, which I believe to be the procedure that was in fact followed, the net tips never came into the possession of BLAJ and BLAJ never actually handed them over or paid them to its servers (employees). It was the hostess (an employee) who had the responsibility of actually distributing the net tips in accordance with the system in place and adhered to by all the employees. I also accept the fact that the net tips were distributed in cash by the hostess at the end of each day. There is nothing in the fact situation of this case that would suggest that BLAJ was in a position to control the distribution of the tips as contemplated by the Canada Revenue Agency's technical interpretation. The tips here were paid to the servers and for their benefit and never actually became the property of BLAJ, nor were they distributed to the servers in the form of pay.

[28] At the time of the Supreme Court's decision in *Canadian Pacific* (*supra*), the term "insurable earnings" had a different meaning than it does now, as indicated earlier. (See paragraph 16 of these reasons). Mr. Justice Hershfield noted in *Lake City Casinos* that Quebec was the only province which required that gratuities be reported to employers. See paragraph 58 of his reasons, quoted at paragraph 23 above. That reasoning is, in my opinion, applicable here, as New Brunswick has no legislation requiring that gratuities be reported to employers and so paragraph 2(1)(*b*) of the IECPR has no application to these appeals.

[29] I therefore find that BLAJ is not required to deduct and remit CPP contributions and EI premiums with respect to the tips and/or gratuities of its servers nor to deduct and remit CPP contributions with respect to the tips and/or gratuities paid to Barry and Lucy Dane for the two years under appeal. BLAJ is, however, required to deduct CPP contributions with respect to employee benefits (low rent and meals) it provided to Barry and Lucy Dane for the year 2004 and to do so on the basis of the value determined in these reasons. I also find that Barry and Lucy Dane need not pay additional CPP contributions with regard to amounts they received in tips in 2003 and 2004. It therefore remains to determine the value of the employee benefits (low rent and meals) provided to the Danes by BLAJ in 2004.

RENT

[30] The Danes paid $500 a month for rent in 2004. The Canada Revenue Agency assessed for rent an amount of $1,000 per month. The cost of heating oil and electricity averaged $450 a month and the auditor assessed it at $400 on average per month. He added $600 to that figure and relied on his own experience to determine the value of the rental benefit. There is no set formula for evaluating such a benefit, but a review of cases on this topic suggests that a discount can be applied to take into account a tenant's lack of quiet enjoyment of the property. That discount may vary from twenty to seventy-five percent and is determined according to the circumstances of each case.

[31] The appellants submitted that the amount of rent they paid ($500 a month) was fair and reasonable for the accommodation provided, as there was little privacy and a great deal of inconvenience. I would suggest on the other hand that it was convenient from the landlord's point of view to have the Danes near the Inn on a 24-hour basis even though this landlord had to provide kitchen facilities and the use of its office and a room to accommodate one of the appellants on the night shift.

[32] The appellants and their two children occupy three of the four bedrooms and use one of the three bathrooms on the second floor of the house. They share the house with BLAJ, which uses the ground floor for storage purposes. On the other hand, BLAJ permits the appellants and their two children to use the kitchen and dining facilities and other areas of the Inn as living accommodation for such things as watching television, and doing homework, and one of the appellants is even able to sleep at the Inn to be there to welcome potential guests during the night. This definitely creates an unusual situation but it is one chosen by the appellants as it seems to accommodate their family and business needs.

[33] The house, used for sleeping quarters, and the Inn, used for meals and living accommodation, each forms part of a residential unit for rental purposes and the rental benefit should be looked at in that light. In these circumstances, I do not find the assessed value of $1,000 a month for the rental benefit to be unreasonable considering that the actual cost of heating and electricity was $450 on average per month, even though both the Danes and BLAJ benefited. The same could be said for the same costs at the Inn. The evidence did not disclose the amount of property taxes, insurance and other related expenses nor did it show the average rent paid by a family of four in the Sackville area. I believe, though, that one must take into consideration the fact that the set-up that existed here is not one that allows of the type of quiet

enjoyment one can expect from a residential unit, and I would accordingly discount the rent by 20% such that the rental benefit is $800 per month or $ 9,600 a year, that is, $4,800 for each of the appellants.

MEALS

[34] As regards determining the value of the meals, I find this also to be a difficult exercise considering the number of factors and lifestyles one has to examine. The evidence used by the auditor is based on the cost of meals served at the Inn and provided by BLAJ, but I do not consider that method to be an effective one in determining the value of the meal benefit for a family of four. Granted, the food may at times be prepared by the Inn's staff and the dishes also done by the Inn's staff, but food costs for the operation of a restaurant may be different than for the average family. On the other hand, I do not believe that the appellants' submission that no amount should be assessed in relation to the meal benefit on the basis that the food consumed was surplus and would have been discarded or consisted of food that could not be served to clients on account of errors, is acceptable either. In my opinion, the best evidence would have been to provide figures on what it cost on average in Canada, in 2004, to feed a family of four according to Statistics Canada.

[35] In light of the above circumstances and taking into consideration the evidence heard on this subject, I arbitrarily assess the value of the meal benefit to be $300 a week, less the $50 a week that the appellants spent themselves for fruits and other food items, times 50 weeks, for a total benefit value of $12,500 or $6,250 for each of the appellants. The total benefits on which CPP contributions are to be assessed for each appellant for 2004 are $11,050.

[36] The appeals are allowed in part and the assessments are referred back to the Minister for reconsideration and reassessment in accordance with the terms of these reasons.

Signed at Edmundston, New Brunswick, this 20th day of August 2008.

« François Angers »

Angers J.

CITATION:	2008 TCC 398
COURT FILE NOS.:	2006-1045(EI), 2006-1046(CPP) 2006-1048(CPP). 2006-1050(CPP)
STYLES OF CAUSE:	BLAJ Hospitality Inc. and M.N.R. Lucy Dane and M.N.R. Barry Dane and M.N.R.
PLACE OF HEARING:	Moncton, New Brunswick
DATE OF HEARING:	January 17, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	August 20, 2008

APPEARANCES:

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