Federal Court of Appeal

Cour d'appel fédérale

Date: 20111215

Docket: A-222-11

Citation: 2011 FCA 355

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A

BETWEEN:

JENTEL MANUFACTURING LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on December 14, 2011.

Judgment delivered at Calgary, Alberta, on December 15, 2011.

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: EVANS J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The only issue in this appeal is whether the appellant, Jentel Manufacturing Ltd. (Jentel), is entitled to scientific research and experimental development tax credits (SRED credits) under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act) in relation to its 2005 fiscal year. The Minister of National Revenue (the Minister) denied Jentel's claim for SRED credits on the basis that the work it performed did not meet the definition of "scientific research and experimental development" (SRED) in subsection 248(1) of the Act. Justice D'Arcy of the Tax

Court of Canada (the judge) dismissed Jentel's appeal. The judge's reasons are reported as 2011 TCC 261. Jentel now appeals to this Court.

[2] Jentel develops and manufactures engineered thermoformed plastic products for consumer and industrial uses. In earlier years, it developed Multi-Bins, a small-parts storage system typically used in industrial and shop-floor settings. During its 2005 fiscal year, Jentel set out to overhaul its Multi-Bins concept. Jentel's objective was to improve its existing product by making a redesigned version that would be smaller and significantly lighter.

[3] The judge concluded that the work performed by Jentel, as described in the Agreed Statement of Facts and the evidence of its owner and President, Mr. Ralph Hahn, did not constitute SRED, as defined in paragraph 248(1) of the Act. Paragraph (*c*) of that definition reads:

scientific research and experimental development" means systematic investigation or search that is carried out in a field of science or technology by means of experiment or analysis and that is…	activités de recherche scientifique et de développement expérimental » Investigation ou recherche systématique d'ordre scientifique ou technologique, effectuée par voie d'expérimentation ou d'analyse, c'est-à-dire :
(c) experimental development, namely, work undertaken for the purpose of achieving technological advancement for the purpose of creating new, or improving existing, materials, devices, products or processes, including incremental improvements thereto,	c) le développement expérimental, à savoir les travaux entrepris dans l'intérêt du progès technologique envue de la création de nouveaux matériaux, dispositifs, produits ou procédés ou de l'amélioration, même légère, de ceux qui existent.

[4] Specifically, the judge concluded that Jentel's work was centered on the use of existing manufacturing processes and existing materials in an attempt to improve its existing product. Its work involved routine engineering and standard procedures (judge's reasons at para. 10). Mr. Hahn's evidence simply described "the use of existing manufacturing processes in an attempt to build a better product, while controlling manufacturing costs" (judge's reasons at para. 22). There was no evidence that any of the work involved technological risk or uncertainty (judge's reasons at para. 16). In the judge's view, Jentel did not establish a *prima facie* case that it was attempting technological advancement (judge's reasons at para. 27).

[5] Despite the capable submissions of Mr. Fenton, in my view, the appeal must be dismissed. The judge's finding constitutes a question of mixed fact and law. The standard of review for the legal component of a question of mixed fact and law is correctness. The application of the legal test to the facts is reviewable only for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33. I am not persuaded that the judge erred in law or that any of his factual findings disclose palpable or overriding error.

[6] The jurisprudence establishes the criteria for determining whether work performed constitutes SRED. In *C.W. Agencies Inc. v. Canada*, 2011 FCA 293, this Court adopted the criteria set out in *Northwest Hydraulic Consultants Limited v. The Queen*, 98 D.T.C. 1839 (T.C.C.) (*Northwest Hydraulic*). The judge specifically referred to these criteria (judge's reasons at para. 9) and additionally cited specific passages from *Northwest Hydraulic* (judge's reasons at para.11). The judge concluded that Jentel had not met the first criterion, that is, was there a technological risk or

uncertainty which could not be removed by routine engineering or standard procedures. Since the finding in this respect was dispositive, it was not necessary for him to go further.

[7] Jentel does not suggest that the judge failed to identify the appropriate legal test. Rather, it claims that the judge improperly applied the test to the evidence. In its written submission Jentel argued that the judge ought to have given greater weight to Mr. Hahn's testimony since it was uncontradicted. This argument cannot succeed because the judge considered Mr. Hahn's evidence at length (judge's reasons at paras. 18 through 23). Indeed, it was on the basis of Mr. Hahn's evidence that the judge determined that Jentel's work simply described the use of existing manufacturing processes in an attempt to build a better product, while controlling manufacturing costs (judge's reasons at para. 22).

[8] Jentel submits that the judge's statement that there existed "no evidence" of technological risk or uncertainty constitutes a palpable and overriding error in view of his "finding" in paragraph 19 that "one of the difficulties with this process is that when plastic resin is extruded, the properties of the resin used in the sheet are changed. The actual specifications of the extruded sheet are not known." Contrary to Jentel's submission, the judge did not make such a "finding." The noted statement appears in the judge's summary of Mr. Hahn's evidence and demonstrates that the judge was cognizant of the issue. In any event, the judge concludes that, with respect to the use of different types of plastic resin or materials, he failed to see how this constitutes SRED (judge's reasons at para. 24).

[9] Jentel also contends that the judge erred in finding that attempted improvements to existing processes cannot constitute SRED. In my view, this misconstrues the judge's reasons. The judge did not limit SRED to entirely new products, to the exclusion of improvements. In fact, the judge turned his mind to Jentel's objectives (judge's reasons at paras. 12-14) before concluding that the measurable objectives were not sought to be attained through true technological advance, but through routine engineering. The work performed by Jentel in its development of the product was, in the judge's view, in line with standard product development.

[10] As for Jentel's allegation that the judge erred in concluding that there was no evidence of "an attempt to achieve a technological advancement", and its reliance on Mr. Hahn's testimony that there was no process in existence that could create moulded plastic items with the shapes, features and capabilities sought, Jentel acknowledges that a major part of the manufacturing technology puzzle was pre-existing (Jentel's memorandum of fact and law at para. 85). This recognition that thermoforming and injection moulding techniques and procedures were pre-existing (and therefore accessible to other professionals in the field), coupled with the fact that Jentel had previously used both methods and did not suddenly begin to use them in the 2005 fiscal year, supports the reasonableness of the judge's conclusion that Jentel was using an available, standard manufacturing process.

[11] While the work completed by Jentel undoubtedly required considerable effort, there is ample evidence to support the judge's conclusion that its procedures did not constitute experimental

development, including the fact that the use of a “heat sink” was merely plug-assist forming technology that had “been out there for quite some time” (judge’s reasons at para. 23).

[12] In my view, Jentel’s arguments constitute an invitation to reassess the evidence and substitute this Court’s opinion for that of the trial judge. That is not this Court’s function.

[13] I see no basis for concluding that the judge failed to have regard to all of the evidence in determining whether the work claimed as SRED met the requirements of the Act, as set forth in the jurisprudence. The judge applied the correct legal test and his conclusions were based upon a thorough consideration of the evidence. No palpable or overriding error has been demonstrated. The Court’s intervention is not warranted.

[14] I would dismiss the appeal with costs.

"Carolyn Layden-Stevenson"
J.A.

“I agree
John M. Evans J.A.”

“I agree
Robert M. Mainville J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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