Federal Court of Appeal  Cour d'appel fédérale

Date: 20200626

Docket: A-277-19

Citation: 2020 FCA 113

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

RAY-MONT LOGISTICS MONTRÉAL INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard by online videoconference hosted by the registry

on May 28, 2020.

Judgment delivered at Ottawa, Ontario, on June 26, 2020.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GLEASON J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] Ray-Mont Logistics (the appellant) provides specialized logistics services for the export of agri-food products. To this end, it hires workers whose duties include transloading bags of grain and legumes from trucks or railway cars into sea containers.

[2] On July 26, 2016, the Canada Revenue Agency (the CRA) rendered a decision according to which the workers in question are employed in insurable employment by the appellant for the purposes of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). The appellant challenged that decision, which was affirmed by the CRA on February 24, 2017. The appellant subsequently appealed to the Tax Court of Canada.

[3] Before this Court, the appellant is appealing the judgment of Justice Guy R. Smith of the Tax Court of Canada (TCC) dated June 28, 2019 (2019 TCC 144). In its decision, the TCC determined that the workers in question are not self-employed persons but rather employees of the appellant. Given the existence of an employer-employee relationship, the TCC held that these workers are employed in insurable employment under the Act. However, it allowed the appeal in part with respect to the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP), deciding that one of the workers was employed in pensionable employment under paragraph (6)(1)(*a*) for the period from January 1, 2013, to December 31, 2014, rather than for the entire period in dispute, as argued by the CRA. The Minister did not file a cross-appeal on this issue.

[4] I am of the opinion that the TCC did not commit an error warranting the intervention of this Court. For the following reasons, I would dismiss the appeal with costs.

II. Legislation

[5] The provisions relevant to the dispute are reproduced in the Appendix.

III. Standard of review

[6] In this case, the TCC's decision must be reviewed pursuant to the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. Conclusions of law are reviewable on the standard of correctness, whereas findings of fact and findings of mixed fact and law are reviewable on the standard of palpable and overriding error.

IV. Analysis

[7] First, the TCC addressed the issue of the applicable law in this case. It properly instructed itself on the law by noting the concept of the complementarity of Quebec civil law and federal law under section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21. Specifically, to determine the existence of "insurable employment" within the meaning of the Act with respect to workers working in Quebec, the TCC properly referred to the relevant provisions of the *Civil Code of Québec* (articles 1425, 1426, 2085, 2086, 2098 and 2099). It is important to note that the definition of a contract of employment under article 2085 of the *Civil Code of Québec* places emphasis on the essential characteristic of direction or control (*9041-6868 Québec Inc. v. Minister of National Revenue*, 2005 FCA 334, [2005] F.C.J. No. 1720 (QL)).

[8] In this case, to establish the existence of a contract of employment between the appellant and the workers under article 2085 of the *Civil Code of Québec*, the TCC adopted a "multidimensional approach" and considered a certain number of guiding factors from the common law: the ownership of tools, the chance of profit and risk of loss, and integration into the business. It is settled law that in assessing a working relationship like the one at issue in this

case, while the civil law and common law systems may take a different approach to characterizing a contract of employment (or of enterprise), there is no antimony between the principles of these two systems on this issue, as was observed by this Court in *Grimard v. Canada*, 2009 FCA 47, [2009] 4 F.C.R. 592 at paragraph 43:

> In short, in my opinion, there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.

[9] That statement applies here.

[10] As part of its analysis, the TCC first established the subjective intent of each of the parties to the working relationship in question, which it described as "problematic". While the TCC found that there "certainly is ambiguity" in the parties' intent, it held nonetheless that "the parties believed that they had established a 'contract of enterprise or for services' [and not a contract of employment] as stipulated in article 2098 of the C.C.Q." (TCC reasons at paras. 53–54, 56).

[11] Next, the TCC developed its objective analysis of the working relationship in question. It examined the parties' behaviour in practice, that is, what is revealed by the true nature of their working relationships. In this regard, the TCC referred to the criteria set out in *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553, 70 N.R. 214 (F.C.A.), that is, (i) the degree or absence of control exercised by the alleged employer; (ii) ownership of tools;

(iii) chance of profit and risk of loss; and (iv) integration of the alleged employees' work into the alleged employer's business.

[12] Upon completion of its analysis, the TCC concluded that "the objective reality of the employment relationship, including the factors listed above, indicates that there was an employee/employer relationship" such that the workers were not self-employed persons (TCC reasons at para. 82). On this basis, the TCC consequently held that the workers were employed in insurable employment by the appellant for the purposes of the Act. The appellant is appealing from that decision.

[13] At the hearing before this Court, the appellant raised several arguments to the effect that the TCC committed errors in its decision.

[14] The appellant first argued that the TCC was required to explicitly address the burden of proof and erred by failing to do so. Specifically, according to the appellant, the TCC had to accept the testimony of Mohamed Maarouf, an appeals officer of the Minister of National Revenue, because his testimony, in the appellant's opinion, identified the reasons upon which the Minister's decision was based. According to the appellant, by failing to address this testimony, the TCC dismissed as irrelevant the burden of proof with respect to employment insurance, thus precluding the possibility of reversing this burden (Appellant's Memorandum at paras. 24–25). However, the appellant failed to demonstrate the relevance of Mr. Maarouf's testimony in the case at hand, and it was subsequently open to the TCC to not give it more weight. Moreover, although the TCC did not make explicit reference to said testimony, the presumption remains

that a trial court considered all of the evidence before it, and it is well established that it may prefer the evidence of some witnesses over others (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 66–68; *Housen* at para. 46). The appellant's claim that the TCC erred in this respect consequently cannot be accepted.

[15] The appellant submits that contrary to the TCC's finding, no relationship of subordination exists between it and the workers. In this regard, the appellant mainly criticizes the TCC for having placed too much importance on a document called the "Loading Sheet", which it translated as "*feuille de contrôle*". According to the appellant, this document is used to control the result of the work rather than the manner in which the work is performed. The appellant adds that [TRANSLATION] "[in regards to] this document, the control involved is a control of the goods (number of bags) and client requirements and not a control of the manner in which the workers must render their services" (Appellant's Memorandum of Fact and Law at para. 44). In my view, it matters little whether the "loading sheet[s]" are used to control the manner in which the work is performed or to control the result since, in ruling as it did, the TCC did not focus only on the "loading sheet[s]". The TCC looked at and described a number of control criteria at paragraphs 77 to 79 of its reasons, which establish the existence of a relationship of subordination, namely the following facts established by the evidence:

- The workers showed up at the worksite and almost always accepted the work and the time proposed;
- A worker could face reprisals if he or she did not accept the time proposed by the employer;
- The work schedule was determined by the appellant;
- The workers could not start work without the "loading sheet", and the operations manager or the supervisor was there during the shift.

- The workers could work with other employees; and
- The appellant looked after contacting replacement workers.

[16] It is true, as the appellant notes, that the workers enjoyed some flexibility, such as with regard to break times and certain work techniques. However, to conclude that control exists, it is not necessary for this control to be absolute (*NCJ Educational Services Limited v. Canada (National Revenue)*, 2009 FCA 131, [2009] F.C.J. No. 507 (QL) at paras. 59, 66–67, 69). The appellant also made much of the testimony of one of the workers in question, who stated that he worked with his father for a period during which only the father was paid by the appellant. According to the appellant, this shows undeniably that a worker could bring a third party in to help him with his work and that the TCC consequently erred in stating that the appellant exercised control over the workers. However, the evidence shows that this was an exception and that this isolated practice occurred for learning purposes (Appeal Book, vol. II at pp. 60–61, 70, 134–135, 173–174). In these circumstances and in light of the evidence before the TCC, it was open to the TCC to not assign the appellant's preferred degree of weight to this testimony. The appellant is asking this Court to reassess the evidence and to substitute an entirely different assessment for that of the TCC, which is not our role. In short, I am satisfied that all of the evidence relating to the control criteria and a relationship of subordination led the TCC to conclude that an employment relationship existed.

[17] The appellant further argues that the TCC erred in its analysis of the legal nature of working relationships based on other guiding factors. For the following reasons, the intervention of this Court concerning this aspect of the TCC's analysis is unwarranted.

[18] Specifically, with respect to the criterion of the ownership of tools, the evidence shows that on one occasion, the appellant reimbursed each worker $50 for the purchase of steel-toed boots. More significantly, however, the TCC noted that the most expensive tool, the conveyors, was supplied by the appellant. According to the TCC, "[w]ithout this tool, the work would have been much harder, slower and therefore less profitable for [the appellant]" (TCC reasons at para. 60). The appellant criticizes the TCC for having stated that "the analysis of this factor, in particular that few tools were required, supports the finding that there was an employee/employer relationship" (TCC reasons at para. 61). As the appellant correctly points out, the number of tools indeed depends on the nature of the work to be performed by the workers, and, as the appellant correctly notes, the fact that workers have few, if any, tools does not necessarily support the finding that the workers in question have the status of employees. This being the case, and in light of the evidence in the record concerning the other guiding factors, if this misconception constitutes an error, as the appellant claims, it is not palpable and overriding and is consequently insufficient in itself to invalidate the TCC's findings as to the legal nature of the working relationship between the appellant and the workers.

[19] With respect to the chance of profit and risk of loss, I agree with the respondent that there is no reason to find that the TCC erred in holding that earnings calculated by the piece, that is, the number of bags transloaded, can constitute earnings from insurable employment. In support of this assertion, it is useful to reproduce paragraph (5)(1)(*a*) of the Act:

***Employment Insurance Act* (S.C. 1996, c. 23)**	***Loi sur l'assurance-emploi* (L.C. 1996, ch. 23)**
Insurable Employment	**Emploi assurable**
Types of insurable employment	**Sens de *emploi assurable***
5 (1) Subject to subsection (2), insurable employment is	5 (1) Sous réserve du paragraphe (2), est un emploi assurable :
(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise; [Emphasis added.]	a) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière; [Je souligne.]

[20] Moreover, apart from the isolated cases where a third party came to work with one of the appellant's workers, the evidence fails to show that the workers could contract out work, with the result that the workers were not behaving as if they were running their own business. The most probative piece of evidence in this regard is unquestionably that which shows that the invoices were prepared by the appellant rather than the workers. Indeed, contractors do not normally ask their client to prepare the invoices. Consequently, the TCC did not err in asserting that this factor "suggests" that the workers were integrated into the business, even if the work was seasonal (TCC reasons at para. 74). As for integration of the workers into the business, these persons worked with other employees and remained available for work even during the off-season (Appeal Book, vol. II at pp. 53, 65–66, 75, 118–119, 139–140, 168, 175–177). In short, I see no

error in the application of the legal framework or in the TCC's review of the evidence requiring the intervention of this Court.

[21] Finally, the appellant criticizes the TCC for failing to give any weight to the findings of the Court of Québec in a decision rendered nearly twenty years ago (*Entreprises Yvon Bessette Inc. c. Québec (Sous-ministre du Revenu)*, [2002] R.D.F.Q. 331, [2002] J.Q. No. 10639 (QL) [*Bessette*]) that involved one of the appellant's competitors. However, although the factual background may have certain similarities, it is important to note that in this case, the parties to the dispute and the evidence adduced were different. Contrary to the appellant's arguments, the TCC was consequently not bound by the conclusions of fact of the Court of Québec in *Bessette* (see: *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue*), 2013 FCA 85, [2013] F.C.J. No. 327 (QL) at para. 20). Since the issue at the heart of the dispute of whether the workers are the appellant's employees is essentially one of fact that has to be decided on the basis of the evidence in the record, the TCC did not err in the circumstances by determining that "[a]lthough the facts submitted were similar, this Court is not bound by this decision and must perform a thorough and independent analysis of the case before it" (TCC reasons at para. 49).

[22] Lastly, it is not clear upon reading the notice of appeal, the appellant's memorandum and the relief sought by the appellant whether the appellant is challenging only the TCC's finding in respect of the Act or also its finding under the CPP. Before this Court, counsel for the appellant simply confirmed that he was also challenging the TCC's finding with respect to the fact that one of the workers was employed in pensionable employment, but he did not, however, raise any arguments in that regard. The respondent has not cross-appealed. In its reasons, the TCC

laconically referred to subsection 4(4) and paragraph (6)(1)(*a*) of the CPP as well as to paragraph (5)(1)(*a*) and subsection 5(3) of the Act, and I do not see any palpable and overriding error in its analysis with respect to the evidence before it concerning a worker's pensionable employment.

[23] For all of these reasons, I would dismiss the appeal with costs.

"Richard Boivin"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
Marianne Rivoalen, J.A."

APPENDIX

***Employment Insurance Act*, S.C. 1996, c. 23**	***Loi sur l'assurance-emploi*, L.C. 1996, ch. 23**
Insurable Employment	**Emploi assurable**
Types of insurable employment	**Sens de emploi assurable**
5 (1) Subject to subsection (2), insurable employment is	**5 (1)** Sous réserve du paragraphe (2), est un emploi assurable :
(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;	**a)** l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière;
[. . .]	[. .].
Excluded employment	**Restriction**
(2) Insurable employment does not include	**(2)** N'est pas un emploi assurable:
[. . .]	[. .].
(i) employment if the employer and employee are not dealing with each other at arm's length.	**i)** l'emploi dans le cadre duquel l'employeur et l'employé ont entre eux un lien de dépendance.
Arm's length dealing	**Personnes liées**
(3) For the purposes of paragraph (2)(i),	**(3)** Pour l'application de l'alinéa (2)i) :
(a) the question of whether persons are not dealing with	**a)** la question de savoir si des personnes ont entre elles un lien de

each other at arm's length shall be determined in accordance with the *Income Tax Act*; and

(b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

dépendance est déterminée conformément à la *Loi de l'impôt sur le revenu*;

b) l'employeur et l'employé, lorsqu'ils sont des personnes liées au sens de cette loi, sont réputés ne pas avoir de lien de dépendance si le ministre du Revenu national est convaincu qu'il est raisonnable de conclure, compte tenu de toutes les circonstances, notamment la rétribution versée, les modalités d'emploi ainsi que la durée, la nature et l'importance du travail accompli, qu'ils auraient conclu entre eux un contrat de travail à peu près semblable s'ils n'avaient pas eu de lien de dépendance.

***Canada Pension Plan*, R.S.C. 1985, c. C-8**	***Régime de pensions du Canada*, L.R.C. 1985, ch. C-8**
Interpretation	**Définitions et interprétation**
Definitions	**Définitions**
2 (1) In this Act,	**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.
[. . .]	[. . .]
employment means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office;	***emploi*** L'état d'employé prévu par un contrat de louage de services ou d'apprentissage, exprès ou tacite, y compris la période d'occupation d'une fonction.
[. . .]	[. . .]
PART I	**PARTIE I**
Contributions	**Cotisations**
[. . .]	[. . .]
DIVISION A	**SECTION A**
Contributions Payable	**Cotisations payables**
Pensionable Employment	**Emplois ouvrant droit à pension**
Pensionable employment	**Emplois ouvrant droit à pension**
6 (1) Pensionable employment is	**6 (1)** Ouvrent droit à pension les emplois suivants :
(a) employment in Canada that is not excepted employment;	**a)** l'emploi au Canada qui n'est pas un emploi excepté;

***Interpretation Act* (R.S.C. 1985, c. I-21**	***Loi d'interprétation*, L.R.C. 1985, ch. I-21**
Rules of Construction	**Règles d'interprétation**
Property and Civil Rights	**Propriété et droits civils**
Duality of legal traditions and application of provincial law	**Tradition bijuridique et application du droit provincial**
8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	**8.1** Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.
Terminology	**Terminologie**
8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.	**8.2** Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

***Civil Code of Québec,* chapter CCQ-1991**	***Code civil du Québec,* chapitre CCQ-1991**
BOOK FIVE	**LIVRE CINQUIÈME**
OBLIGATIONS	DES OBLIGATIONS
TITLE ONE	**TITRE PREMIER**
OBLIGATIONS IN GENERAL	DES OBLIGATIONS EN GÉNÉRAL
CHAPTER I	**CHAPITRE PREMIER**
GENERAL PROVISIONS	DISPOSITIONS GÉNÉRALES
[. . .]	[. . .]
DIVISION IV	**SECTION IV**
INTERPRETATION OF CONTRACTS	DE L'INTERPRÉTATION DU CONTRAT
1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.	**1425.** Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.
1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.	**1426.** On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.
[. . .]	[. . .]
TITLE TWO	**TITRE DEUXIÈME**
NOMINATE CONTRACTS	**DES CONTRATS NOMMÉS**
[. . .]	[. . .]

CHAPTER VII

CONTRACT OF EMPLOYMENT

2085. A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.

2086. A contract of employment is for a fixed term or an indeterminate term.

[. . .]

CHAPTER VIII

CONTRACT OF ENTERPRISE OR FOR SERVICES

DIVISION I

NATURE AND SCOPE OF THE CONTRACT

2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him.

2099. The contractor or the provider of services is free to choose the means of performing the contract and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client.

CHAPITRE SEPTIÈME

DU CONTRAT DE TRAVAIL

2085. Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre personne, l'employeur.

2086. Le contrat de travail est à durée déterminée ou indéterminée.

[. . .]

CHAPITRE HUITIÈME

DU CONTRAT D'ENTREPRISE OU DE SERVICE

SECTION I

DE LA NATURE ET DE L'ÉTENDUE DU CONTRAT

2098. Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.

2099. L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et il n'existe entre lui et le client aucun lien de subordination quant à son exécution.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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