Federal Court of Appeal | Cour d'appel fédérale

Date: 20141030

Docket: A-209-13

Citation: 2014 FCA 248

CORAM: **TRUDEL J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

ACANAC INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

and

AARON C. MOULAND

Intervener

Heard at Toronto, Ontario, on October 29, 2014.
Judgment delivered at Ottawa, Ontario, on October 30, 2014.

REASONS FOR JUDGMENT BY: NEAR J.A.
CONCURRED IN BY: TRUDEL J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

[1] Acanac Inc. (the appellant) appeals from the May 16, 2013 decision of the Tax Court of Canada, in which Justice Campbell Miller (the judge) dismissed its appeals made under section

103 of the *Employment Insurance Act*, S.C. 1996, c. 23 and section 28 of the *Canada Pension Plan*, R.S.C., 1985, c. C-8 (2013 TCC 163).

[2] The appellant seeks to overturn the decision of the judge on the basis that he made a series of fundamental errors in his factual determinations and in his weighing of the evidence before him. The appellant further alleges that the judge made procedural errors related to the conduct and management of the trial.

[3] At issue was whether two workers, Mr. Mouland and Mr. Westcott, were insurable and pensionable employees pursuant to the above-noted legislation. In my view, the judge applied the correct legal test: the test set out in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, 70 N.R. 214. As the Supreme Court of Canada has stated, in applying the *Wiebe Door* test, the central question is "whether the person who has been engaged to perform the service is, in actual fact, performing them as a person in business on his own account" (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 at para. 47; see also *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85, 444 N.R. 163 at para. 41).

[4] In large measure, the appellant is asking this Court to re-weigh the evidence considered by the judge in his application of the facts to the proper legal test. The appellant asks this Court to re-consider the evidence as to the nature of the enterprise (an internet-based support service), the degree of control the appellant exercised over the workers, the nature of the tools used, the training and support provided to the workers, and the intention of the parties regarding the nature of the relationship.

[5] The judge's assessment of evidence and the weight accorded to such evidence in applying the legal test are to be given great deference. This Court may only interfere if the judge committed palpable and overriding errors (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 10). In my view, there is no obvious error, or error going to the very core of the outcome of the case, in the judge's assessment and weighing of the evidence with respect to any of the matters raised by the appellant. The conclusions reached on these matters were amply supported by the evidence before the judge. There is no reason to intervene on this basis.

[6] The appellant also asserts that the judge erred in the management of the trial of this case. The appellant submits that the judge should have admitted the entire 183 pages of a document (a Spark chat log) brought to the Court by Mr. Mouland (the intervener and a witness for the respondent) rather than only the first 10 pages, and should have accorded the appellant a longer adjournment to review the document. The respondent submitted this evidence during its examination of Mr. Mouland for the purpose of showing the existence of a communication system between the workers and the supervisors. In addition, the appellant takes issue with the decision of the judge not to hear testimony of its expert witness, Martin Cleaver.

[7] In my view, the decisions of the judge regarding the Spark chat log were fairly made on the circumstances that were presented to him during the trial. Further, it is important to note that this case was conducted pursuant to the informal procedure outlined in section 18 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2. Subsection 18.15(3) of the Act sets out that the strict rules of evidence do not apply in the informal procedure; the overriding consideration is whether the procedure followed by the judge was fair. The judge considered the Spark chat log and the

submissions by counsel, and decided that only the first 10 pages were required for the limited purpose for which the evidence was being tendered. There is no reason to interfere with that exercise of discretion as to either the extent of the Spark chat log accepted or the length of the adjournment granted. It is worth noting that the evidence was adduced by the respondent for the limited purpose of showing an element of control and supervision over the workers by the appellants.

[8] Finally, the appellant submits that the judge should have allowed its expert witness, Martin Cleaver, to testify. The appellant argues that the decision of the judge not to allow its expert to testify precluded the appellant from adducing relevant evidence illustrating the novel circumstances of internet-based support services.

[9] It is evident that the judge was alive to the appellant's argument that knowledge-based work, such as the internet-based support service at issue in this matter, could raise novel considerations and was open to the appellant making submissions in this regard. In my view, the judge was not attempting to limit the appellant's argument with respect to the issue of novelty. Rather, the exclusion of the appellant's expert was premised on the conclusion reached by the judge, after he considered counsel's submissions, that expert testimony was neither necessary nor helpful given that the workers involved could provide similar evidence (see pages 198-200 of the Appeal Book). Put another way, he considered that he could determine the issue with only the workers' evidence before him. Further, the judge waited until he had heard the workers' evidence before making his final decision not to hear the expert's testimony. The judge also had real concerns about the admissibility of the expert report.

[10] I see no reason to disagree with the judge's evaluation. The judge was aware of the correct principles governing the admission of expert evidence and applied those principles in an acceptable way to the circumstances before him. We see no reason to intervene on this basis.

[11] Therefore I would dismiss the appeal with costs to the respondent.

"David G. Near"

J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-209-13

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE CAMPBELL MILLER, OF THE TAX COURT OF CANADA, DATED MAY 16, 2013, DOCKET NOS. 2011 1064 (EI), 2011 1066 (CPP), 2011 1210 (EI), 2012 579 (CPP) AND 2012 580 (EI).

STYLE OF CAUSE:	ACANAC INC. v. THE MINISTER OF NATIONAL REVENUE AND AARON C. MOULAND (INTERVENER)
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 29, 2014
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	TRUDEL J.A. STRATAS J.A.
DATED:	OCTOBER 30, 2014

APPEARANCES:

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