

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20150311**

**Dockets: A-191-14  
A-192-14**

**Citation: 2015 FCA 68**

**CORAM: PELLETIER J.A.  
WEBB J.A.  
BOIVIN J.A.**

**BETWEEN:**

**LOVING HOME CARE SERVICES LTD.**

**Appellant**

**And**

**MINISTER OF NATIONAL REVENUE  
AND  
LA-TOYA LANA BURT**

**Respondents**

Heard at Vancouver, British Columbia, on March 9, 2015.

Judgment delivered at Vancouver, British Columbia, on March 11, 2015.

**REASONS FOR JUDGMENT BY:**

**WEBB J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
BOIVIN J.A.**

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**REASONS FOR JUDGMENT**

**WEBB J.A.**

[1] These are appeals from the judgments of Boyle J. (2014 TCC 71) issued in relation to the appeals of Loving Home Care Services Ltd. (Loving Home Care) under the *Employment Insurance Act*, S.C. 1996, c. 23 and the *Canada Pension Plan*, R.S.C., 1985, c. C-8. By an Order dated June 18, 2014, the appeals in dockets A-191-14 and A-192-14 were consolidated and the

appeal filed in docket A-191-14 is considered the lead appeal. These reasons shall be filed in A-191-14 and a copy thereof shall be filed in A-192-14.

[2] The issue before the Tax Court of Canada was whether six individuals who were retained by Loving Home Care were providing their services as employees or independent contractors. Boyle J. found that the individuals were employees and Loving Home Care has appealed this finding.

[3] Loving Home Care does not submit that the Tax Court Judge applied the wrong legal test but rather argues that the Tax Court Judge erred in making certain findings of fact. In particular Loving Home Care submits that the Tax Court Judge should not have concluded that the schedule that was attached to the unsigned agreement submitted for one worker (Ms. Burt) was applicable to all of the workers. The schedule that was attached to the forms of agreement for the other workers did not include all of the provisions that were included in the schedule attached to the unsigned agreement for Ms. Burt.

[4] In *Zsoldos v. Attorney General of Canada*, 2004 FCA 338, [2004] F.C.J. No. 1658, paragraphs 11 and 12, this Court confirmed that questions of fact in appeals, such as these appeals, under subsection 27(1.2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 are to be determined on the same standard of review as questions of fact determined by the Tax Court of Canada under the General Procedure. Therefore, the standard of review is that as set out by the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. Questions of fact,

which include inferences of fact, are to be reviewed on the standard of palpable and overriding error.

[5] In this case, Loving Home Care introduced into evidence six documents – one for each worker. The title of each document was “Loving Home Care Services Ltd. Subcontract Agreement”. Five of the documents had a short Schedule “A” – Description of Duties and Responsibilities that consisted of only three short paragraphs. Schedule “A” that was attached to the document for Ms. Burt included an additional sentence at the end of the first paragraph and two additional short paragraphs. Most of the documents and Schedule “A” were signed by both parties.

[6] The Tax Court Judge expressed his concerns with respect to the agreements in paragraph 15 of his reasons:

15 The dating of the agreements, whether signed or unsigned, is not clear or complete and remains questionable. The Court's concerns with the dating of the agreements in evidence was fully discussed by the Court with Appellant's counsel during the hearing. The pre-printed fill in the blank agreement forms bear a date of 2010. At least one suggested it was completed before that date. Some schedules' dates do not align with the dates of the agreements they are appended to. Workers did not all recall when they signed this agreement relative to when they started working for Loving Home Care. Workers could not all provide clear or satisfactory answers on the dating, signing and renewing of these agreements. One worker had to change her clear and unequivocal answer to this question when challenged in cross-examination. The agreements appear to have been "renewed" at the request of Loving Home Care in 2012, except for that of the Intervenor, Ms. Burt who had ceased working with Loving Home Care by that time. The Rulings process in respect of the status of these workers arose in 2012.

[7] The inference, which is the issue in this appeal, is drawn by the Tax Court Judge in paragraph 16 of his reasons:

16 The notable and significant difference between Ms. Burt's agreement and the "renewed" agreements of 2012 is that the provisions described above in vii) and viii) dealing with scheduling non-work, family and vacation days, and the daily reporting to Loving Home Care via the detailed log book, are not present in the 2012 schedules. Considering all of the evidence relating to these agreements and their renewals, including my concerns below regarding witness credibility, and considering the apparent spacing gap in the 2012 renewal schedules, the Appellant has certainly not been able to satisfy the Court on a balance of probabilities with satisfactory credible evidence that the agreements as tendered to the Court were those in place in governing the relevant period. I find that such agreements were not generally signed by Loving Home Care and its workers prior to the commencement of work, were not necessarily completed or signed when they said they were or at all, and *in the cases of these workers covered by the Rulings in issue, all included the same scheduled provisions as Ms. Burt's during the relevant periods in question.*

(emphasis added)

[8] As a result of this inference the following additional conditions were found to be in all of the agreements with the workers in question:

- The duties and the responsibilities are described by the Contractor where they can be changed based on the job description.
- Any holidays and family events, the Contractor requires a minimum of two weeks notice in writing.
- The Subcontractor is responsible to update the Contractor with the patient's day to day events using the log book; including health status, household management, and other relevant information.

[9] Loving Home Care submits that the Tax Court Judge committed a palpable and overriding error in concluding that these conditions were in all of the relevant agreements.

[10] In *H.L. v. Canada*, 2005 SCC 25; [2005] 1 S.C.R. 301, Fish J. writing on behalf of the majority of the Supreme Court of Canada noted that:

74 I would explain the matter this way. Not infrequently, different inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot

reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally - or even more - persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.

[11] The onus in this case was on Loving Home Care to establish, on a balance of probabilities, the applicable terms and conditions for each worker. Failing to introduce sufficient evidence to do so does not mean that Loving Home Care should be successful. Because the evidence was sparse and inconsistent in relation to the agreements and what terms and conditions were included in each agreement, the Tax Court Judge drew the inference referred to above. I am not persuaded that the Tax Court Judge committed any error in doing so as this inference is reasonably supported by the evidence. It is not the role of this Court to reweigh the evidence and substitute another inference.

[12] Counsel for Loving Home Care argued that had the Tax Court judge not erred by finding that the Schedule "A" to the agreement for Ms. Burt applied to all of the workers, he would not have drawn the conclusions that he did from the evidence related to the factors as set out in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*, [1986] 3 F.C. 553. Given my conclusion on Schedule "A" I can see no basis for questioning the Tax Court Judge's conclusion with respect to those factors.

[13] As a result I would dismiss the appeal with costs.

"Wyman W. Webb"

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J.A.

"I agree

J.D. Denis Pelletier J.A."

"I agree

Richard Boivin J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-191-14  
A-192-14

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE P. BOYLE OF THE TAX COURT OF CANADA, DATED MARCH 6, 2014, DOCKET NO. 2013-2264(EI).)**

**STYLE OF CAUSE:** LOVING HOME CARE SERVICES LTD. v. MINISTER OF NATIONAL REVENUE AND LA-TOYA LANA BURT

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** MARCH 9, 2015

**REASONS FOR JUDGMENT BY:** WEBB J.A.

**CONCURRED IN BY:** PELLETIER J.A.  
BOIVIN J.A.

**DATED:** MARCH 11, 2015

**APPEARANCES:**

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