Federal Court of Appeal

CANADA

Cour d'appel fédérale

Date: 20091215

Docket: A-545-08

Citation: 2009 FCA 372

CORAM: **BLAIS C.J.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

LES ENTREPRISES UNE AFFAIRE D'ANGLAIS INC.

Respondent

Heard at Québec, Quebec, on December 15, 2009.

Judgment delivered from the Bench at Québec, Quebec, on December 15, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Québec, Quebec, on December 15, 2009)

LÉTOURNEAU J.A.

[1] Once again, the thorny and difficult issue of the insurability of employment is raised before this Court. Was Justice Favreau (judge) of the Tax Court of Canada correct in finding that the worker (John Robert Cheetham) did not hold insurable employment with the respondent from June 30, 2004, to June 30, 2005?

[2] Based on that finding, the judge allowed the respondent's appeal. He then set aside the decision of the Minister of National Revenue (Minister), who had considered the relationship existing between the worker and the respondent to be that of an employer/employee, governed by an employment contract. Instead, the judge concluded that this was a contract of enterprise or for services within the meaning of article 2098 of the *Civil Code of Québec*, R.S.Q. 1991, c. 64 (*Civil Code*).

[3] For a better understanding of these reasons, we are reproducing side by side articles 2085, 2086, 2098 and 2099 of the *Civil Code*, which define both types of contract and specify the main characteristics of each:

2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.	**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. A contract of employment is for a fixed term or an indeterminate term.	**2086.** Le contrat de travail est à durée déterminée ou indéterminée.
…	…
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 carry out physical or intellectual work for another person, the client or to	**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

provide a service, for a price which the client binds himself to pay.	à fournir un service moyennant un prix que le client s'oblige à lui payer.
2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.	**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.

[4] We are satisfied that the judge stated the law on the legal principles governing and distinguishing the two types of contract correctly. He then applied them to the facts of the case. It was during this application that, according to the appellant, the judge committed both errors of law and palpable and overriding ones.

[5] Based on the documentary and testimonial evidence, the judge tried to establish whether there was a relationship of subordination between the worker and the respondent. In compliance with the case law on this point, he therefore weighed a certain number of factors, including the intention of the parties to the contract.

[6] The appellant submits that the judge erred in law by ruling that the criteria of ownership of the work tools, the chance of profit and the risk of loss, and the integration of the worker in the business were not of great help in this case.

[7] The judge did not ignore these criteria. He considered them and provided the reasons for which he found them of little use: see paragraph 16 of the reasons for his decision. It was up to the judge to determine the weight to be given to these criteria. It is also well established that the weight to be given to each of these indicators or factors when analysing the legal nature of the relationship between parties depends on the circumstances of each case. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, at paragraph 48, Justice Major wrote the following:

> [48] It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case. [See also *Combined Insurance Co. of America v. Canada (Minister of National Revenue – M.N.R.)*, 2007 FCA 60, at paragraph 35.]

[8] Basically, the judge concluded that the factors, which were the subject of criticism by the appellant, were less useful for the analysis of the relationship between the parties than those which he had previously identified and discussed. At best, one could speak of an error of mixed fact and law in this case, which if it exists, is not, in our opinion, a palpable and overriding one.

[9] In fact, the appellant is asking us to redo the analysis and re-weigh some of the factors usually taken into consideration when determining the legal nature of a work relationship between parties. But it was the judge's role to ". . . determine the legal nature of the overall relationship between the parties in a constantly changing working world", and "[t]his is what he did:" see *Grimard v. Canada*, 2009 FCA 47, 2009 D.T.C. 5056 (F.C.A.) at paragraph 67, citing *Le Livreur Plus Inc. v. The Minister of National Revenue and Laganière*, 2004 FCA 68, at paragraph 17, *Wolf*

v. Canada, [2002] 4 F.C. 396 (F.C.A.) and *Attorney General of Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54, [2004] F.C.J. No. 238 (QL).

[10] This said, we can but repeat what this Court wrote in *Grimard*, above, at paragraph 67:

> It is possible that, were a microscopic examination of the judge's analysis of some of the indicia to be conducted, it would be necessary to make some distinctions and clarifications. However, [we] cannot find that there is such a palpable and overriding error in this analysis, to paraphrase the standard of the Supreme Court, that requires and warrants our intervention.

[11] For these reasons, the appeal will be dismissed with costs.

"Gilles Létourneau"
J.A.

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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