

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20091214

**Docket: A-639-08
A-640-08**

Citation: 2009 FCA 371

**CORAM: NOËL J.A.
PELLETIER J.A.
LAYDEN-STEVENSON J.A.**

A-639-08

BETWEEN:

D.W. THOMAS HOLDINGS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-640-08

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D.W. THOMAS HOLDINGS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on December 14, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on December 14, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on December 14, 2009)

LAYDEN-STEVENSON J.A.

[1] The appellant, D.W. Thomas Holdings Inc., appeals from the judgment of Valerie Miller J. a judge of the Tax Court of Canada, dismissing two appeals heard together from determinations of the Minister of National Revenue (the Minister). These reasons dispose of both appeals.

[2] The appellant operates a commercial fishing business. During 2004 and 2005, Mr. Richard Devos worked for the appellant as a dive tender and deck hand. The issue before the Tax Court judge was whether, for purposes of the *Canada Pension Plan* and the *Employment Insurance Act*, Mr. Devos worked for the appellant as an employee or as an independent contractor. Miller J. concluded that the terms of the relationship were such that Mr. Devos was an employee during the relevant years.

[3] The standard of review applicable to the Tax Court judge's determination is established by *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. The standard for questions of law is correctness and for all other questions is palpable and overriding error.

[4] We are not persuaded the Tax Court judge's decision was one that was not open to her on the evidence before her. Miller J. analyzed the nature of the relationship between the appellant and Mr. Devos in accordance with the test articulated in *Wiebe Door Service Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553 (F.C.A.) (*Wiebe Door*) and its progeny. She acknowledged that the

appellant considered Mr. Devos to be an independent contractor. She also noted that Mr. Devos reported that he was self-employed on his income tax returns for the years in question.

[5] Contrary to the appellant's assertion, Miller J. did consider the issue of intention. In keeping with the approach set out in *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, [2007] 1 F.C.R. 35 (FCA), she examined the evidence to ascertain whether it supported that intention and concluded that it did not.

[6] The appellant's argument rests essentially on Miller J.'s appreciation of the evidence. Absent palpable and overriding error, which has not been demonstrated here, this Court will not engage in a reassessment of evidence.

[7] The appeals will be dismissed with one set of costs in file number A-639-08. These reasons will be filed in A-639-08 and a copy thereof will be placed as reasons for judgment in file number A-640-08.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-639-08, A-640-08

(APPEALS FROM A JUDGMENT RENDERED BY THE HONOURABLE MADAM JUSTICE VALERIE MILLER DATED NOVEMBER 26, 2008, DOCKET NOS. 2008-889(CPP) AND 2008-890(EI))

STYLE OF CAUSE: D.W. Thomas Holdings Inc. v. Her Majesty the Queen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: December 14, 2009

REASONS FOR JUDGMENT OF THE COURT BY: (NOËL, PELLETIER, LAYDEN-STEVENSON JJ.A.)

DELIVERED FROM THE BENCH BY: LAYDEN-STEVENSON J.A.

APPEARANCES:

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