Federal Court of Appeal | Cour d'appel fédérale

Date: 20091217

Dockets: A-484-08, A-485-08, A-486-08, A-487-08, A-488-08, A-489-08, A-490-08, A-491-08, A-492-08, A-493-08, A-494-08, A-495-08, A-496-08, A-498-08, A-499-08, A-500-08

Citation: 2009 FCA 375

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

A-484-08

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

CONSEIL CENTRAL DES SYNDICATS NATIONAUX DU SAGUENAY/LAC ST-JEAN (CSN)

Respondent

A-485-08

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DANY VIGNEAULT

Respondent

A-486-08

BETWEEN:

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and

PIERRE BHERER

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A-487-08

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Respondent

A-488-08

BETWEEN:

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and

ALAIN THERRIEN

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A-489-08

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GUY GINGRAS

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A-490-08

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JEANNINE GIRARD

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YVES TREMBLAY

Respondent

A-495-08

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DENISE VACHON, EXECUTOR OF THE ESTATE OF ROGER VACHON

Respondent

A-496-08

BETWEEN:

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RÉJEANNE GRAVEL

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A-498-08

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CHANTAL CÔTÉ

Respondent

A-499-08

BETWEEN:

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GILLES BELZILE

Respondent

A-500-08

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

CONSEIL CENTRAL CÔTE-NORD INC.

Respondent

Heard at Montréal, Quebec, on November 19, 2009.

Judgment delivered at Ottawa, Ontario, on December 17, 2009.

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

CONCURRED IN BY: **BLAIS C.J.**
LÉTOURNEAU J.A.

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A-500-08

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and

CONSEIL CENTRAL CÔTE-NORD INC.

Respondent

REASONS FOR JUDGMENT

NOËL J.A.

[1] The Minister of National Revenue (the Minister) and Her Majesty the Queen (collectively, the appellants) are appealing 16 decisions rendered by Justice Archambault of the Tax Court of Canada (the TCC judge) allowing, on the basis of common evidence and the same set of reasons, each of the respondents' appeals and vacating the assessments issued against them for the 2002, 2003 and 2004 taxation years, or one or more of those years, as the case may be.

BACKGROUND

[2] The respondents (appellants before the TCC) are the Conseil central Côte-Nord Inc. and the Conseil central des syndicats nationaux du Saguenay/Lac Saint-Jean (CSN) (the central councils), as well as the 14 individuals identified as such in the style of cause, who are all union officials working for one of the two central councils (the union officials).

[3] The issue involves the tax treatment of certain allowances paid by the central councils to the union officials in the course of their union activities. The Minister originally determined that these allowances were taxable under sections 5 and 6 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), and considered them to be insurable earnings within the meaning of the *Employment Insurance Regulations*, SOR /96-332 (the EIR).

[4] After the Minister's decision was challenged in court, the TCC judge found that the allowances in question were neither taxable nor insurable, since they were paid not in the course of an office or employment but, rather, for the performance of union duties on a volunteer basis. Consequently, he ordered that the assessments be vacated.

[5] The appellants are asking this Court to reverse that decision. They submit that, in rejecting their position, the TCC judge unduly restricted the definition of office and employment, and made several errors of law.

[6] An order was made by this Court on November 28, 2008, consolidating the 16 appeals and designating file A-484-08 as the lead file. In accordance with that order, these reasons will be filed in A-484-08, and a copy hereof will be entered in each of the 15 related files (A-485-08 to A-496-08 and A-498-08 to A-500-08) to stand as reasons in those cases. A formal judgment will also be entered in each file.

FACTS

[7] Each of the union officials was elected to a position within the union as president, treasurer, executive secretary or representative on one of the central councils for a three-year term (reasons, para. 2). Each union official is also employed by a regular employer, for which a local affiliated with the Confédération nationale (CSN) was certified.

[8] Local unions are grouped together in a federation under a regional central council such as the ones in this case, and the regional central councils themselves are grouped together under the CSN (reasons, para. 6).

[9] When elected, union officials undertake to comply with their respective central councils' constitution and by-laws, which provide in particular for the powers and duties of each elected union officer. According to the undertaking form in this constitution, the union officers must, among other things, promise to fulfill the duties of their office, promote the interests of the central council and remain in their position until a successor is appointed (constitution and by-laws, appeal book, Vol. I, pp. 254 to 268).

[10] To carry out their union duties, the union officials had to present in advance a written request for union leave to their regular employers according to the terms of the applicable collective agreement (reasons, para. 2). Although the agreements are worded differently, the leave mechanism is essentially the same.

[11] With their regular employers' approval, the union officials could take time off work and, depending on the position, obtain two to five days' leave per week to carry out their union activities and duties.

[12] The collective agreements provided that, during this absence, the regular employers would continue to pay the union officials an amount equal to the amount which they would have received had they remained at work. According to the collective arguments, this payment was conditional upon the local reimbursing the regular employer for this remuneration as well as all of the fringe benefits and the regular employer's share of the benefit plan. The local would then be reimbursed by the central councils (appeal book, Vol. I, pp. 293, 304, 305 and 310; appeal book, Vol. II, pp. 505, 531, 547, 559 and 567).

[13] Each year, the regular employers would produce on behalf of the union officials the required T4 forms reflecting the remuneration paid to each union official during the period of union leave (reasons, para. 43). The union officials duly declared this remuneration in their tax returns, and the assessment for those amounts is not in dispute.

[14] In addition, the union officials would also receive from the central councils allowances for the meal, travel and child care expenses that they incurred in the course of their union work (reasons, para. 2). These allowances were paid in accordance with union regulations upon a claim being filed. The allowance paid was a fixed amount, and was payable regardless of the expense incurred, and proof of the expenditure was not required (appeal book, Vol. II, p. 426; appeal book, Vol. I, p. 269).

[15] For the relevant period, the Minister issued assessments against the officials in which these allowances were included in their income as benefits from an office or employment, under sections 5 and 6 of the Act. The Minister also considered these allowances to be insurable earnings within the meaning of the *Employment Insurance Act*, S.C. 1996, c. 23 (EIA), and determined, by way of assessments, the amounts owed by the central councils as payers of these insurable earnings.

[16] These assessments were challenged and eventually appealed to the Tax Court of Canada. As noted above, on August 29, 2008, the TCC judge allowed the 16 appeals on the basis that the union officials did not hold an office or employment which could be connected to the allowances that they were paid. That is the decision under appeal.

TCC DECISION

[17] At the very beginning of his reasons, the TCC judge identifies the issue as follows (reasons, para. 3):

> Whether the Minister's assessments are well-founded depends to a great extent on the answer to the following question: Did the 14 officials hold, for the purposes of sections 5 and 6 of the *Income Tax Act* (ITA), an "office" as defined in subsection 248(1) of the ITA, and, for the purposes of the definition of "insurable employment" in the EIA and the purposes of section 6 of the *Employment Insurance Regulations* (EIR), within the meaning of subsection 2(1) of the *Canada Pension Plan* (CPP)? To put it more precisely, the question is whether the elected officials' positions on the central councils entitled them to "a fixed or ascertainable stipend or remuneration" under subsection 248(1) of the ITA or subsection 2(1) of the CPP.

[18] After carrying out an exhaustive review of the facts (reasons, paras. 4 to 31), the TCC judge reproduces the relevant statutory provisions (reasons, para. 32). Among these provisions, the only ones that are contentious are the definitions of the term "office" at subsection 248(1) of the Act and subsection 2(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). These definitions read as follows:

248(1) "office" means the position of an individual entitling the individual to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a member of the Senate or House of Commons of Canada, a member of a legislative assembly or a member of a legislative or executive council and any other office, the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity and also includes the position of a corporation director, and "officer" means a person holding such an office;	**248(1)** « charge » Poste qu'occupe un particulier et qui lui donne droit à un traitement ou à une rémunération fixe ou vérifiable, y compris une charge judiciaire, la charge de ministre de la Couronne, la charge de membre du Sénat ou de la Chambre des communes du Canada, de membre d'une assemblée législative ou de membre d'un conseil législatif ou exécutif et toute autre charge dont le titulaire est élu au suffrage universel ou bien choisi ou nommé à titre représentatif, et comprend aussi le poste d'administrateur de société; « fonctionnaire » ou « cadre » s'entend de la personne qui détient une charge de ce genre, y compris un

	conseiller municipal et un commissaire d'école.
2(1) "office" means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a lieutenant governor, the office of a member of the Senate or House of Commons, a member of a legislative assembly or a member of a legislative or executive council and any other office the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity, and also includes the position of a corporation director, and "officer" means a person holding such an office;	**2(1)** « fonction » ou « charge » Le poste qu'occupe un particulier, lui donnant droit à un traitement ou à une rémunération déterminée ou constatable. Sont visés par la présente définition une charge judiciaire, la charge de ministre, de lieutenant-gouverneur, de membre du Sénat ou de la Chambre des communes, de membre d'une assemblée législative ou d'un conseil législatif ou exécutif et toute autre charge dont le titulaire est élu par vote populaire ou est élu ou nommé à titre de représentant, y compris le poste d'administrateur de personne morale; « fonctionnaire » s'entend d'une personne détenant une telle fonction ou charge.

[Emphasis added by the TCC judge.]

[19] After describing the parties' respective positions (reasons, paras. 33 to 49), the TCC judge begins his analysis by returning to these definitions (reasons, para. 50):

> … in order for the officials to hold an office within the meaning of the two provisions, it is important that their position entitle them to a "fixed and ascertainable stipend or remuneration". Here, the evidence as a whole clearly shows that the CSN central council policy is not to remunerate union officials who agree to serve in various elective positions on central councils. Being committed union activists, the members agree to engage in the CSN's various activities as volunteers, notably in their capacity as elected union officials on central councils.

[20] The TCC judge continues by explaining that the central councils' policy, when reimbursing salaries (reasons, para. 51), or paying allowances for travel expenses (reasons, para. 52) or child care expenses (reasons, para. 53), is not to remunerate the officials but, rather, to ensure that the union officials incur no losses from their union work (*ibidem*).

[21] The TCC judge adds (para. 54):

> … the legal source of the remuneration received by the various union officials is their respective employment contracts, combined with the terms and conditions of their collective agreements, even though their respective employers are reimbursed an amount equal to the applicable salary and fringe benefit costs for the periods of absence on union leave. Consequently, the union officials are not entitled, under any contractual relationship or any central council constitution or by-laws, to a fixed or ascertainable stipend or remuneration under subsection 248(1) of the ITA or subsection 2(1) of the CPP.

[22] The TCC judge adds that the remuneration earned by the union officials during the period on union leave is based on the contractual relationship between the union officials and their regular employers, which accounts for the fact that a treasurer can receive more money for his or her union activities than a president (reasons, para. 56). According to the TCC judge, this shows that the objective is not to remunerate the union officials but, rather, to compensate them (*ibidem*).

[23] In addition, the TCC judge found that two of the three elements essential to the existence of a contract of employment are not present. First, since the union officials provide the central councils with their services on a volunteer basis, there is no remuneration for the services provided. Second, in the performance of their union duties, the union officials are not subject to the control of the central councils (reasons, para. 56). The TCC judge concludes his analysis by repeating that there is no office either, since the union officials' activities within the union do not entitle them to a fixed or ascertainable remuneration.

POSITION OF THE PARTIES

[24] The appellants submit first that, based on the evidence, the TCC judge could not conclude that the union officials were acting on a volunteer basis during their union leave. It is clear that they were entitled to the salary owed to them by their regular employers by reason of their union activities.

[25] Since the central councils bore the cost of the remuneration paid to the respondents for the period during which they were attending to their union duties, the TCC judge had to find that it is the union officials' activities within the union that entitled them to this remuneration. According to the appellants, the regular employers were acting as agents when they continued to pay the union officials their remuneration during this period.

[26] The appellants also submit that the remuneration in question was "fixed or ascertainable" as required by the statutory definitions of the term "office". According to the evidence, the union

officials knew the exact amount that they were entitled to receive for their union activities when they were elected. Therefore, they held a position within the meaning of the Act.

[27] In any event, the appellants maintain that the union officials held employment within the meaning of paragraph 6(*a*) of the EIR, according to which "is included in insurable employment … employment of a union member by the member's union in conducting union business".

[28] The respondents rely essentially on the TCC judge's reasoning. In their opinion, the TCC judge correctly concluded that the union officials are not entitled, under any contractual relationship or any central council constitution or by-laws, to a fixed or ascertainable remuneration (reasons, para. 54, as cited at para. 34 of the respondents' memorandum).

[29] According to the respondents, the Minister had to respect [TRANSLATION] "the characterization of the parties' legal relationships" (respondents' memorandum, para. 22). On this point, they rely on the following passage from the decision of the Supreme Court in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 (*Shell*) (para. 39):

> This Court has repeatedly held that courts must be sensitive to the economic realities of a particular transaction, rather than being bound to what first appears to be its legal form: *Bronfman Trust*, *supra*, at pp. 52-53, *per* Dickson C.J.; *Tennant*, *supra*, at para. 26, *per* Iacobucci J. But there are at least two *caveats* to this rule. First, this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* legal relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal

> effect: *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, at para. 21, *per* Bastarache J.
>
> [Emphasis added]

[30] Also according to the respondents, the TCC judge rightly concluded that the union officials were not entitled to remuneration by virtue of their union activities. The TCC judge was also correct in finding that this remuneration was not fixed or ascertainable.

[31] The respondents conclude that the officials did not hold employment either, since there is no relationship of subordination between the central councils and the union officials.

ANALYSIS AND DECISION

[32] Before proceeding with the analysis, one point should be made. In addition to the arguments I have outlined, counsel for the respondents suggested that the allowances paid by the central councils were not allowances in a legal sense but, rather, reimbursement for expenses, other than personal expenses, which were without tax consequences (respondents' memorandum, para. 10 c)). This argument cannot be considered at this stage of the proceedings.

[33] First, given the terms and conditions under which the amounts were paid (fixed sum, regardless of the expense incurred and with no need of proof of the actual payment), these amounts constitute taxable allowances under the Act. Second, counsel for the respondents agreed before the Tax Court of Canada that, if the officials held an office, the taxability of the

allowances would not be disputed. In this regard, the TCC judge writes the following (reasons, para. 36):

> Consequently, the question of whether the 14 officials received a taxable benefit within the meaning of paragraphs 6(1)(*a*) and 6(1)(*b*) of the [Act] was not disputed …

It is obviously too late to change the basis on which the issue was argued before the Tax Court of Canada.

[34] The only issue is therefore the one that the TCC judge identified at the beginning of his reasons: "whether … the [union]officials held an office within the meaning of subsection 248(1) of the [Act and] … subsection 2(1) of the CPP". If so, the appeals should be allowed; if not, they should be dismissed (reasons, para. 36).

[35] The TCC judge's identification of the legal tests underlying the existence of an office gives rise to a question of law subject to the standard of correctness. However, the TCC judge's conclusion that these tests were not met based on the evidence raises a question of mixed fact and law, and cannot be overturned absent a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[36] In this case, the relevant legal tests underlying the existence of an office are twofold: first, the individuals involved must hold an "office, the incumbent of which is elected by popular

vote or is elected or appointed in a representative capacity" and, second, the position in question must entitle the individual to a fixed or ascertainable stipend or remuneration.

[37] The first test seems to have been met, since the union officials were all elected to the positions that they hold on the central councils. It is the second test that was not met, according to the TCC judge.

[38] There are two requirements for meeting this second test. The office or position held must "entitle" the individual to remuneration, and this remuneration must be "fixed or ascertainable". The fixed or ascertainable aspect of the remuneration seems to have been met, since the union officials knew exactly what the monetary conditions associated with their union leave were when they applied for a union position (Testimony of Pierre Morel, appeal book, Vol. III, p. 707).

[39] However, in the TCC judge's opinion, the requirement that the position or office must "entitle" the individual to this remuneration was not met. The TCC judge drew this conclusion mainly because "the union officials are not entitled, under any contractual relationship or any central council constitution or by-laws, to a fixed or ascertainable stipend or remuneration" (reasons, para. 54).

[40] With respect, that the union officials are not entitled to this remuneration under any contractual relationship or any central council constitution or by-laws is immaterial. The only issue is whether the union officials were paid for their activities as union officers during their

union leave (on this point, see Justice Lamarre Proulx's decision in *Duguay v. Canada*, [2000] T.C.J. No. 381 (QL) at paragraph 37, where she identifies this issue in the same way in a comparable context).

[41] In my humble opinion, the answer is evident. The union officials received their full salaries and all of the fringe benefits set out in their collective agreement, despite the fact that they performed no services for their regular employers. The regular employers were reimbursed by the respective unions, and the cost of this remuneration was ultimately borne by the central councils. Only the services that the union officials rendered as in that capacity can explain why they received their usual remuneration during their union leave, and only the fact that the regular employers were reimbursed explains why they agreed to pay the remuneration even though they received no services.

[42] That the remuneration was paid through the regular employer does not change the analysis. Contrary to the submissions of counsel for the respondents, this is not a case of recharacterization of the legal relationships between the parties (*Shell*, above, para. 39) but, rather, of recognizing these relationships for what they are. It is clear that the regular employers were acting on behalf of the respective unions and, ultimately, the central councils when they agreed to remunerate the union officials during their union leave.

[43] Based on this analysis, the TCC judge's finding that the union officials were acting as volunteers is unfounded and even contrary to the evidence. A volunteer acts

[TRANSLATION] “voluntarily and without pay” (*Le Petit Robert*, French language dictionary). However, the evidence shows that, once elected, the union officials undertook to assume the powers and duties associated with their union positions (union constitution and by-laws, appeal book, Vol. I, pp. 254 and 268), for which they were entitled to their usual remuneration. This is not volunteering.

[44] For these reasons, I would allow the appeals with one set of costs, set aside the decisions of the TCC judge and, rendering the decisions that should have been rendered, dismiss the appeals with one set of costs.

“Marc Noël”
J.A.

“I agree.
Pierre Blais C.J.”

“I agree.
Gilles Létourneau J.A.”

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	**A-484-08**, A-500-08, A-485-08, A-486-08, A-487-08, A-488-08, A-489-08, A-490-08, A-491-08, A-492-08, A-493-08, A-494-08, A-495-08, A-496-08, A-498-08, A-499-08,

(APPEAL OF A JUDGMENT OF THE HONOURABLE MR. JUSTICE ARCHAMBAULT OF THE TAX COURT OF CANADA, DATED AUGUST 29, 2008, DOCKET NOS. 2006-1142(EI), 2006-1966(EI), 2006-1098(IT)G, 2006-1101(IT)G, 2006-1102(IT)G, 2006-1103(IT)G, 2006-1104(IT)G, 2006-1107(IT)G, 2006-1108(IT)G, 2006-1807(IT)G, 2006-1809(IT)G, 2006-1810(IT)G, 2006-1811(IT)G, 2006-1812(IT)G, 2006-1813(IT)G, 2006-1100(IT)G.)

STYLES OF CAUSE:	Minister of National Revenue and Conseil central des syndicats nationaux du Saguenay/Lac St-Jean (CSN), Conseil central Côte-Nord Inc. and Her Majesty the Queen and Dany Vigneault, Pierre Bherer, Maryse Boudreault, Alain Therrien, Guy Gingras, Jeannine Girard, Liliane Dufour, Valois Pelletier, Pierre Morel, Yves Tremblay, Denise Vachon, executor of the estate of Roger Vachon, Réjeanne Gravel, Chantal Côté, Gilles Belzile
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 19, 2009
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Blais C.J. Létourneau J.A.
DATED:	December 17, 2009

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