

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120419

Docket: A-56-11

Citation: 2012 FCA 121

**CORAM: PELLETIER J.A.
GAUTHIER J.A.
STRATAS J.A.**

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

REAL ESTATE COUNCIL OF ALBERTA

Respondent

Heard at Calgary, Alberta, on April 19, 2012.

Judgment delivered from the Bench at Calgary, Alberta, on April 19, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Calgary, Alberta, on April 19, 2012)

STRATAS J.A.

[1] In this case, the Tax Court judge found that Ms. Beverly Andre-Kopp, a member of the respondent, was not engaged in an “office” within the meaning of subsection 248(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and subsection 2(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8: 2011 TCC 5. The primary basis for this finding was that she was entitled in her position to a *per diem* payment but the number of days she worked was not fixed or ascertainable in

advance. She could be paid nothing. Therefore, in the judge's view, upon appointment, she was not entitled to receive anything at all (at paragraph 43).

[2] Since the judgment of the Tax Court, this Court has ruled to the contrary in another case: *Canada (Minister of National Revenue) v. Ontario*, 2011 FCA 314. Those who hold a position and are given a *per diem* payment are given a "fixed or ascertainable stipend or remuneration" within the meaning of the subsections.

[3] In this Court, Mr. Ryder for the respondents gamely seeks to distinguish the *Ontario* case. He contended that *Ontario* stands only for the proposition that *per diem* payments can be "fixed or ascertainable stipend[s] or remuneration." It did not deal with the other requirement found in the definition of "office" found in the subsections, namely that "the position...[must be one] entitling" the individual to "stipend or remuneration." Here, he says, the position does not entitle Ms. Andre-Kopp to stipend or remuneration because she might not receive any pay in the year.

[4] We do not agree that *Ontario* did not decide this point. On its facts, *Ontario* is on all fours with the case at bar and this Court upheld the assessments in issue in *Ontario*.

[5] Nevertheless, in our view, the phrase, "the position...[must be one] entitling" the individual to "stipend or remuneration," means nothing more than a position for pay: *Vachon Estate v. Canada*, 2009 FCA 375 at paragraphs 38-43. Here Ms. Andre-Kopp was in a position for pay. If

there were no tasks for her to perform in a year, she would not be paid in that year. But that takes nothing away from the fact that her position was a position for pay.

[6] As a fallback position, Mr. Ryder also submitted that *Ontario* was “manifestly wrong” and should not be followed: *Miller v. Canada (Attorney General)*, 2002 FCA 370. He did not pursue that submission in detail. We are not convinced that *Ontario* is “manifestly wrong.” We consider ourselves bound by it.

[7] Therefore, we shall allow the appeal, set aside the judgment of the Tax Court, and restore the Minister’s assessments for the 2004, 2005, and 2006 taxation years. At the end of oral argument a dispute arose concerning the Minister’s entitlement to costs. Following brief oral submissions, we decided that if the parties cannot reach agreement on the issue of costs, it may be spoken to by way of motion under rule 369 of the *Federal Courts Rules*, SOR/98-106.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-56-11

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE D.W. ROWE
DATED JANUARY 5, 2011, DOCKET NO. 2010-384(CPP)**

STYLE OF CAUSE: Minister of National Revenue v. Real
Estate Council of Alberta

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: April 19, 2012

REASONS FOR JUDGMENT OF THE COURT BY: Pelletier, Gauthier, Stratas JJ.A.

DELIVERED FROM THE BENCH BY: Stratas J.A.

APPEARANCES:

Arnold Bornstein
Thang Trieu

FOR THE APPELLANT

Thomas Ryder

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan
Deputy Attorney General of Canada

FOR THE APPELLANT

Parlee McLaws LLP
Calgary, Alberta

FOR THE RESPONDENT