Federal Court of Appeal  Cour d'appel fédérale

Date: 20130225

Dockets: A-423-11
A-424-11
A-425-11
A-426-11
A-427-11

Citation: 2013 FCA 53

CORAM: **NOËL J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN: **A-423-11**

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JEAN-PAUL TALBOT

Respondent

BETWEEN: **A-424-11**

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JEAN-PAUL TALBOT

Respondent

BETWEEN: **A-425-11**

THE ATTORNEY GENERAL OF CANADA

Applicant

and

RICHARD TALBOT

Respondent

BETWEEN: **A-426-11**

THE ATTORNEY GENERAL OF CANADA

Applicant

and

RICHARD TALBOT

Respondent

BETWEEN: **A-427-11**

THE ATTORNEY GENERAL OF CANADA

Applicant

and

RICHARD TALBOT

Respondent

Hearing held at Québec, Quebec, on February 20, 2013, in the presence of counsel for the applicant and via teleconference with counsel for the respondents.

Judgment delivered at Ottawa, Ontario, on February 25, 2013.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: TRUDEL J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] These are five applications for judicial review of decisions (CUB 77803, CUB 77802, CUB 77801, CUB 77800 and CUB 77799) by Umpire L.-P. Landry (the Umpire) dismissing in part and for the same reasons the appeals of the Employment Insurance Commission (the Commission) against the earlier decisions of a Board of Referees concerning the calculation of the income earned by Jean-Paul Talbot and Richard Talbot (the respondents) for the purposes of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

[2] More specifically, the issue pertains to the calculation of the income generated by the respondents' snow-clearing business during the period from 2007 to 2010 and the effect of this calculation on their entitlement to benefits.

[3] The five applications were heard during a joint hearing in accordance with an order issued by Chief Justice Blais on February 20, 2012. The reasons that follow dispose of all five applications.

- Legislative provisions

[4] The provisions relevant to the calculation of the income generated by the respondents' business are sections 35 and 36 of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations):

35. (1) The definitions in this subsection apply in this section.

"employment"

"employment" means

. . .

(*b*) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

. . .

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, . . ., are the entire income of a claimant arising out of any employment, including . . .

(10) For the purposes of subsection (2), "income" includes

. . .

(*c*) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

35. (1) Les définitions qui suivent s'appliquent au présent article.

« emploi »

« emploi »

[…]

b) tout emploi à titre de travailleur indépendant, exercé soit à son compte, soit à titre d'associé ou de coïntéressé;

[…]

(2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour vérifier s'il y a eu l'arrêt de rémunération visé à l'article 14 et fixer le montant à déduire des prestations à payer en vertu de l'article 19, […] est le revenu intégral du prestataire provenant de tout emploi, notamment […]

(10) Pour l'application du paragraphe (2), « revenu » vise notamment :

[…]

c) dans le cas d'un prestataire qui est un travailleur indépendant exerçant un emploi non relié aux travaux agricoles, le reste du revenu brut qu'il tire de cet emploi après déduction des dépenses d'exploitation qu'il y a engagées et qui ne constituent pas des dépenses en immobilisations;

. . .	[…]
36. (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.	**36.** (1) Sous réserve du paragraphe (2), la rémunération du prestataire, déterminée conformément à l'article 35, est répartie sur un nombre donné de semaines de la manière prévue au présent article et elle constitue, aux fins mentionnées au paragraphe 35(2), la rémunération du prestataire pour ces semaines.
. . .	[…]
(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.	(6) La rémunération du prestataire qui est un travailleur indépendant ou la rémunération du prestataire qui provient de sa participation aux bénéfices ou de commissions est répartie sur les semaines où ont été fournis les services qui y ont donné lieu.
. . .	[…]

[Emphasis added.]

- The facts

[5] The Commission reviewed the respondents' entitlement to benefits. It concluded that the income they had earned was higher than previously established, which gave rise to a total overpayment of $11,999.00 for Jean-Paul Talbot and $14,708.00 for Richard Talbot.

[6] In this case, the respondents are equal shareholders in an incorporated business that provides snow-clearing services (Reasons, p. 2). The business is normally active from November

to April, or 17 to 21 weeks per year. Most of the expenses of running the business arise during this period, but some are annual in the sense that they are not related exclusively to that period, and these include such things as insurance costs, fees for professional services and advertising expenses.

[7] The Commission, purportedly relying on section 35 of the Regulations, allocated the total gross income from the snow-clearing contracts to the weeks in which the snow-clearing services were rendered (Reasons, p. 2). It did the same for the expenses incurred for, among other things, fuel and subcontracting (*ibid*). As for the so-called annual expenses, it allocated them to a 52-week period, so that only those attributable to the weeks of snow-clearing activity were deducted from the respondents' gross income (*ibid*). It was on the basis of this calculation that the net income of the snow-clearing company was divided between the two respondents (*ibid*) and allocated to the weeks in which the services were performed, in accordance with subsection 36(6).

[8] The respondents contested this calculation. The Board of Referees modified the Commission's decision by allocating the income as calculated by the Commission to a 52-week period instead of the period in which the services were performed (Board of Referees' Decision, p. 4).

[9] The Commission's appeals to the Umpire ensued. The Umpire disagreed with the Commission's calculation of income under paragraph 35(10)(*c*).

[10] According to the Umpire, the first step contemplated by that provision is establishing the business's gross income for a 12-month period, since income is calculated on an annual basis [TRANSLATION] "when business income is involved" (Reasons, p. 3). Next, according to paragraph 35(10)(*c*), operating expenses, other than capital expenditures, must be deducted (*ibid*). In his view, capital cost allowance is a capital expenditure and therefore may not be deducted (Reasons, pp. 4 and 5).

[11] After making this calculation, the Umpire allocated the income to the weeks in which the services were performed rather than to a 52-week period, thus overturning the Board of Referees' earlier ruling on this point (Reasons, p. 5).

- Alleged errors

[12] The applicant is of the opinion that the standard of review is reasonableness (Applicant's Memorandum, para. 26). In his view, there is only one reasonable interpretation of paragraph 35(10)(*c*) (Applicant's Memorandum, para. 43):

> [TRANSLATION]
>
> 43. Because the earnings must be allocated to the weeks in which the services that generated them were performed, it is the expenses relating to those same weeks that must be deducted from the self-employed worker's gross income pursuant to section 35 of the Regulations.

[13] Therefore, according to the applicant, only the expenses for those weeks in which the services were performed may be deducted from the gross income (Applicant's Memorandum, para. 44). The applicant's argument essentially rests on the fact that the employment insurance

regime is based on a week-by-week analysis, as appears from, among other provisions, section 19 of the Act and section 36 of the Regulations (Applicant's Memorandum, paras. 35, 36 and 40).

[14] This interpretation would also appear to be supported by the *Digest of Benefit Entitlement Principles*, which this Court has recognized as constituting an "important factor in the interpretation of statutes" (Applicant's Memorandum, para. 48, citing *Canada v. Greey*, 2009 FCA 296, para. 28).

[15] Furthermore, the applicant submits that the Umpire erred in applying accounting concepts to establish a business's income over a 12-month period. According to the applicant, these concepts are not applicable in an employment insurance context (Applicant's Memorandum, para. 50).

[16] Finally, the applicant contends that the Umpire erred in finding that depreciation costs constituted "capital expenditures" for the purposes of paragraph 35(10)(*c*).

[17] The respondents for their part submit that the only reasonable decision is the one rendered by the Board of Referees, which chose to allocate the income over 52 weeks (Respondents' Memorandum, para. 3). Despite this, they are seeking to have the Umpire's decision upheld.

- Analysis and decision

[18] Before proceeding with the analysis, I note that, in the case of self-employed workers, the Regulations treat their business activities as employment (subsection 35(1) and paragraph 35(10)(*c*)), and in the case of incorporated businesses the profits generated by them are considered as earnings (subsection 36(6)).

[19] This dispute stems from the calculation of income set out in paragraph 35(10)(*c*) of the Regulations. The calculation is in itself quite straightforward, but knowing to which period it should be applied is another matter. According to the Umpire, it is the income generated during a 12-month period that must be calculated pursuant to paragraph 35(10)(*c*) (Reasons, p. 3). Accordingly, this involves subtracting the operating expenses incurred in the course of the year from the gross income generated during the year. The income so calculated is then allocated in accordance with subsection 36(6) over the number of weeks in which the services were performed (Reasons, p. 6).

[20] According to the Commission, what must be calculated pursuant to paragraph 35(10)(*c*) is, rather, the income generated during the period in which snow-clearing services were performed. To that end, the Commission began by identifying the income generated during that period, which matches the amount appearing in the financial statements for each of the years at issue, since the sole income from the respondents' business was that generated during the snow-clearing season. It then deducted from this amount the operating expenses incurred during this period, such as fuel and subcontracting. As for the so-called annual operating expenses, it

divided them by 52 and deducted the portion attributable to the number of weeks in which the services were performed. The income thus determined was allocated in accordance with subsection 36(6) over the number of weeks in which the services were provided (Appeal Book, A-423-11, p. 71; A-424-11, p. 107; A-425-11, p. 88; A-426-11, p. 87; A-427-11, p. 77).

[21] In my view, the period selected by the Commission is the correct one. The income contemplated in paragraph 35(10)(*c*) is not annual income, which is a concept foreign to the Act. Rather, one must calculate the income generated during the period in which the services were performed and allocate that amount to the number of weeks in that period in accordance with subsection 36(6). Under paragraph 35(10)(*c*), it is the amount of income that the respondents earn "from that employment" that must be calculated, and the period of "that employment" is that during which the services were performed (compare *Canada (Attorney General) v. Vernon*, [1995] F.C.J. No. 1394 at paras. 10 and 11).

[22] Now what of the expenses that may be deducted from this amount? The deduction of the operating expenses incurred during the period is obviously permitted. However, was the Commission correct in reducing the so-called annual expenses according to the number of weeks of activity? I do not think so.

[23] According to the wording of paragraph 35(10)(*c*), the expenses that the respondents may deduct in calculating the income from their employment are those that each of them "incurred therein". The characterization of the expense must therefore be based on the object sought in incurring the expense and not the time at which it is incurred. In this case, all of the so-called

annual expenses were incurred for the purpose of generating income during the snow-clearing season, since the respondents' business has no other source of income. It follows that all of these expenses must be taken into consideration for the purpose of calculating the income generated during this period.

[24] It is the income thus calculated that must be allocated to the weeks in which the services were performed, in accordance with subsection 36(6) of the Regulations.

[25] Finally, the Umpire erred in excluding depreciation costs from operating expenses under paragraph 35(10)(*c*) of the Regulations. Only capital expenditures are excluded, and depreciation is not a capital expenditure.

[26] Depreciation, or, more accurately, capital cost allowance, is an annual deduction that recognizes as an expense a percentage of the capital cost of capital property that corresponds approximately to the depreciation of that property during the year in question. Contrary to the Umpire's assertion (Reasons, p. 4), the expense thus recognized is a true expense because it represents a percentage of a cost that has actually been incurred. The purpose of the deduction is to recognize the use of property during a given year and the resulting decrease in its value, which clearly makes this expense an operating expense.

[27] I would therefore allow the applications for review, set aside the Umpire's decisions and refer these matters back to the Chief Umpire or his designate for redetermination on the basis that the periods for which the income is to be calculated under paragraph 35(10)(*c*) of the

Regulations are those in which the snow-clearing services were performed, but that all of the operating expenses reflected in the financial statements must be deducted in calculating that income. With respect to file No. A-425-11, the Commission's concession that only the weeks of March 16, 2008, March 23, 2008, and March 30, 2008, are at issue must also be taken into account.

"Marc Noël"

J.A.

"I concur.
Johanne Trudel J.A."

"I concur.
Robert M. Mainville J.A."

Certified true translation
Erich Klein

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-423-11
STYLE OF CAUSE:	The Attorney General of Canada v. Jean-Paul Talbot
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	February 20, 2013
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A.
DATED:	February 25, 2013

APPEARANCES:

Liliane Bruneau	FOR THE APPLICANT
Pierre Hébert	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPLICANT
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FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-424-11
STYLE OF CAUSE:	The Attorney General of Canada v. Jean-Paul Talbot
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	February 20, 2013
REASONS FOR JUDGMENT BY:	NOËL J.A.
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FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-425-11
STYLE OF CAUSE:	The Attorney General of Canada v. Richard Talbot
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	February 20, 2013
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A.
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FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-426-11
STYLE OF CAUSE:	The Attorney General of Canada v. Richard Talbot
PLACE OF HEARING:	Québec, Quebec
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REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A.
DATED:	February 25, 2013

APPEARANCES:

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FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-427-11
STYLE OF CAUSE:	The Attorney General of Canada v. Richard Talbot
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	February 20, 2013
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A.
DATED:	February 25, 2013

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