

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230120

Docket: A-394-19

Citation: 2023 FCA 12

**CORAM: BOIVIN J.A.
RENNIE J.A.
ROUSSEL J.A.**

BETWEEN:

**ALLAN JAY GORDON
AND JAMES ALLAN DEACUR**

Appellants

and

HIS MAJESTY THE KING

Respondent

Heard by online video conference hosted by the Registry on January 16, 2023.

Judgment delivered at Ottawa, Ontario, on January 20, 2023.

REASONS FOR JUDGMENT BY:

BOIVIN J.A.

CONCURRED IN BY:

**RENNIE J.A.
ROUSSEL J.A.**

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] Allan Jay Gordon and James Allan Deacur, the appellants, challenge the decision of Barnes J. of the Federal Court (the Judge), rendered on June 25, 2019 (Judge's decision, 2019 FC 853). In his decision, the Judge dismissed the appellants' actions in damages against the Government of Canada.

[2] The appellants' civil actions arise out of a Canada Revenue Agency (CRA) criminal investigation that began in 1995. That investigation followed a number of routine audits into scientific research and experimental development (SR&ED) tax credit claims, submitted on behalf of taxpayer clients of James A. Deacur and Associates Ltd. (JAD) in exchange for a contingency fee. The CRA investigation resulted in the indictment and prosecution of James Allan Deacur and Allan Jay Gordon on five counts of fraud, attempted fraud, and possession of the proceeds of crime. The preliminary hearing on these charges occurred over the course of almost 4 years between 1999 and 2003. The appellants were ultimately committed to stand trial; however, on September 24, 2004, the proceedings were stayed.

[3] In March 2006, together with JAD, the appellants instituted proceedings before the Federal Court. They sought several million dollars in damages on the basis of multiple causes of action, including negligent investigation, breach of their rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c. 11* (the Charter), misfeasance in public office, malicious prosecution, and intentional interference with contractual relations (Judge's decision at para. 3).

[4] The trial before the Judge took place between October 15, 2018, and December 20, 2018, followed by oral argument during the week of February 4, 2019. In total, 23 witnesses testified and 461 exhibits were produced.

[5] In a 135-page decision, the Judge found that the CRA investigation was focused on the appellants' use of backdating documents to claim SR&ED expenses, purportedly incurred in

previous years (Judge's decision at paras. 24-47). In some instances, this method involved the creation of a shell corporation and backdated contracts for the SR&ED. Sometimes, the wages of employees allegedly involved in SR&ED work were calculated after the fact according to JAD's assessment of the fair market value for the labour. The Judge found that these methods, used in a variety of contexts and combinations, were indefensible and amounted to misrepresentation (Judge's decision at paras. 77, 80-81, 83, 134, 258, 262).

[6] The Judge recognized that the CRA investigators owed the appellants a duty of care (at paras. 141-66), but found that the investigation was not carried out in a manner that could be characterized as negligent and was not motivated by malice or any other improper purpose (Judge's decision at paras. 243-44, 263). The Judge concluded that there was ample support for the investigation as a whole and that while there may have been some missteps during the investigation, the Judge observed that "there is no such thing as a perfect investigation" (Judge's decision at paras. 270-73). The Judge thus dismissed the actions.

[7] Unsatisfied with this outcome, the appellants ask our Court to set aside the Judge's decision and render judgment in their favour. The appeal of the corporate appellant JAD was dismissed by Order of our Court on January 27, 2021, for failure to obtain legal representation. The appellants before our Court are accordingly Allan Jay Gordon and James Allan Deacur.

[8] On appeal from a first instance decision of the Federal Court, the appellate standards of review apply: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. Following

Housen, questions of law are reviewable for correctness, whereas questions of mixed fact and law as well as questions of fact are reviewable for palpable and overriding error.

[9] Before our Court, the appellants raise a suite of issues, contesting the Judge's findings at every turn. Although some of these issues are framed as questions of law, when the substance of the appellants' arguments is reviewed, they are all questions of fact or mixed fact and law. As such, the issues in this appeal may be distilled into a single question: Did the Judge make any palpable and overriding errors in his assessment of the evidence?

[10] The appellants allege that the Judge's misunderstanding of the legal requirements for a valid SR&ED tax credit claim led him to disregard or fail to give sufficient weight to evidence that demonstrated that the CRA investigation was unfounded, negligently conducted, or motivated by an improper objective, namely, the personal financial gain of individual CRA investigators.

[11] In essence, the appellants contend that the procedures set out in the Taxation Operations Manual (TOM) 11 for CRA investigations were not properly followed. The appellants also argue that certain claims they prepared were accepted by CRA auditors on appeal, either before or after the preliminary inquiry took place, thus validating their method of claiming SR&ED tax credits. The appellants similarly rely on what they characterize as the prior approval of their method of claiming SR&ED credits by a law firm that was later involved in the prosecution of the appellants. The appellants further allege that the CRA's preferred method of valuing labour costs was flawed and therefore, the CRA investigation into suspected inflated wages was negligent.

According to the appellants, the Judge erred in misapprehending these facts and the evidence supporting them, leading him to dismiss their arguments without substantive engagement on his part.

[12] I cannot agree.

[13] The Judge's analysis demonstrates a thorough and careful assessment of the evidentiary record before him. Based on this record, the Judge found that the appellants had not met the burden of demonstrating that the investigation was legally unsound or that CRA officials acted unlawfully, maliciously, or negligently in the conduct of the investigation (Judge's decision at para. 277). In particular, the Judge emphasized the competence and fairness of the lead investigator, contrary to the appellants' assertions otherwise (Judge's decision at paras. 4, 13-15). With respect to the argument in connection with the TOM 11 for CRA investigations, the Judge rightly noted that the TOM 11 "is a set of guidelines that have no binding legal effect and their breach is not evidence per se of a wrongful prosecution or negligence" (Judge's decision at para. 168). The Judge also considered and rejected the appellants' contention that the investigation into inflated wages could be isolated from the way that JAD documented and presented claims to the CRA (at paras. 72-76, 82-83). The Judge found that there is little dispute as to what actually occurred during the investigation at issue: despite the passage of over twenty years, the CRA investigation was well documented and, beyond the appellants' bare assertions, there are few factual disagreements in the record.

[14] In addition, much of the evidence relied on by the appellants before our Court was comprehensively and explicitly addressed by the Judge in his detailed analysis of the parties' submissions. The Judge considered the appellants' evidence that the CRA validated their method of backdating records to establish a value for SR&ED claims (Judge's decision at paras. 85-112). The Judge found that there was never any express endorsement of the methods used by the appellants and that the outcome of those cases did not amount to a repudiation of the criminal investigation (Judge's decision at para. 96). The appellants failed to direct this Court to any evidence demonstrating otherwise.

[15] On this basis, I also cannot conclude that it was an error for the Judge to dismiss each of the appellants' claims, with more or less detailed analysis, including those asserted under the Charter and that for misfeasance in public office (Judge's decision at paras. 244, 269). Not only did the Judge find that there was not sufficient evidence to prove the appellants' claim in negligence, the Judge found that the investigation, while imperfect, was nonetheless conducted diligently and based on substantial evidentiary support. Hence, as the Judge found, the evidence could not establish a Charter violation or misfeasance.

[16] In conclusion, it is recalled that a trial judge's findings of fact are owed a great deal of deference. Palpable and overriding error is a very high standard, which recognizes the privileged position of the trial judge in hearing witness testimony first-hand (*Housen* at paras. 12-14). In this case, the Judge made thoughtful findings as to the credibility of various witnesses as well as findings of fact where testimony conflicted, to which deference is owed. Also, as the respondent underscores, it is a well-established principle that a judge is presumed to have considered all of

the evidence (*Housen* at para. 46, 72; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, 387 C.R.R. (2d) 1 at para. 67). In light of these principles and the failure of the appellants to demonstrate a palpable and overriding error, I am of the view that there is no reason to disturb the Judge's findings.

[17] For all of these reasons, I would accordingly dismiss the appeal, with costs payable by the appellants to the respondent.

"Richard Boivin"

J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-394-19

STYLE OF CAUSE: ALLAN JAY GORDON AND
JAMES ALLAN DEACUR v. HIS
MAJESTY THE KING

PLACE OF HEARING: BY ONLINE VIDEO
CONFERENCE

DATE OF HEARING: JANUARY 16, 2023

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: RENNIE J.A.
ROUSSEL J.A.

DATED: JANUARY 20, 2023

APPEARANCES:

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James Allan Deacur ON HIS OWN BEHALF

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