Federal Court of Appeal

Cour d'appel fédérale

Date: 20180601

Docket: A-317-17

Citation: 2018 FCA 103

[ENGLISH TRANSLATION]

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

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Appellant

and

ROBERT LANGLOIS HARDY

Respondent

Heard at Montreal, Quebec, on May 29, 2018.

Judgment rendered at Ottawa, Ontario, on June 1, 2018.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: PELLETIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The Minister of National Revenue (the appellant) is appealing a decision of Justice Lafleur of the Tax Court of Canada (the TCC) (2016-3104(EI)). The TCC allowed the appeal of Robert Langlois Hardy (the respondent) from the appellant's decision to the effect that he did not hold insurable employment with Réalisation Jade Construction Inc. (RJC) during the periods from November 2, 2009, to April 2, 2010, and from November 22, 2010, to February 26, 2011.

I. BACKGROUND

[2] As the TCC indicates in its decision, the respondent had the burden of proving that he held insurable employment with RJC.

[3] The evidence was limited to the respondent's brief testimony and a letter from the respondent's accountant, Gérard Boudreau, whom the respondent stated was also his intermediary with RJC. The respondent did not actually know where the RJC office was located and had met one of its directors, Steve Morin, only once, in 2010, on a construction site, which he was not able to identify. The respondent also testified that he performed cleaning work (picked up pieces of wood and put materials away) on the construction sites of RJC, a renovation company, during the periods in question. He was paid in cash by one or more persons, but he was not able to identify them by name because he has no pay stubs. In addition, he never deposited his pay in a bank account.

[4] The respondent explained that Mr. Boudreau, who he said also worked for RJC, would tell him on which construction site he would be working. The site foreman would then tell him where to go the next day. It was Mr. Boudreau who gave him two records of employment, apparently signed by Mr. Morin. The respondent also submitted a letter that was written by Mr. Boudreau and sent to the Régie de l'assurance maladie du Québec. In the letter, Mr. Boudreau confirms that the respondent had been employed by RJC since 2008, and that he was then employed by another company, which, like RJC, was the subject of a major investigation conducted by Service Canada, which suspected certain businesses of issuing false

records of employment (when no work was done) in order to claim employment insurance benefits. The respondent also states that Mr. Boudreau prepared his tax returns for the years 2009, 2010 and 2011. If there were mistakes, it was Mr. Boudreau's fault and, according to the respondent, he had been defrauded. The appellant established that the earnings noted on the two records of employment and the amounts declared on said tax returns did not match; the amounts indicated on the records of employment were much higher than the income declared.

[5] The appellant called Ms. Courcy, a Canada Revenue Agency (CRA) appeals officer, as a witness. According to her, the two files on Mr. Langlois that were assigned to her were part of a group of 22 files connected to Service Canada's major investigation. The witness submitted a copy of her report, in which she recounts, among other things, the statement given to her by Mr. Morin, RJC's principal shareholder, during a telephone interview. Mr. Morin apparently told her that even though the company was not dissolved, RJC ceased its operations in 2009. Ms. Courcy verified this information by confirming that RJC did not file a GST return after that date and that the last source deduction was made on June 19, 2009. She also obtained confirmation that the final construction site inspection reports of the Commission de la construction du Québec concerning RJC were dated July 2009. In addition, RJC did not file any tax return for the period in question. There had been no information return filed with the Registre des entreprises since 2009.

[6] Mr. Morin also allegedly stated that he worked outside of Canada, in a factory in South America, from 2009 to 2013. This was corroborated by a copy of his passport, which indicated the dates he entered and left South America. Ms. Courcy also testified that the signatures of

Mr. Morin that appear on the respondent's two records of employment (which look relatively similar) do not match the signature on his passport. Aside from this questionable signature, nothing indicates that Mr. Morin was in Canada when these records were issued. While a copy of the T4 slips presumably issued to the respondent by RJC was not before the TCC, as I noted previously, Ms. Courcy's report shows that the amounts recorded did not correspond to those found in the records of employment. In fact, Ms. Courcy testified that RJC had not sent any T4 slips to the CRA.

[7] Ms. Courcy also submitted a letter that Mr. Boudreau wrote to the CRA in response to questions it had raised. In it, he indicates that he provided RJC with only GST/QST form preparation and consultation services and that he was not otherwise involved in that company's accounting or affairs.

[8] At the hearing before the TCC, the respondent did not raise any objections regarding the admissibility of Mr. Morin's statement or of the letter that Mr. Boudreau sent the CRA on grounds of hearsay. The TCC accepted the submission of Ms. Courcy's report and the letter, indicating with respect to the last piece of evidence that the TCC would determine the probative value to be given to it. No comment to that effect was made when the respondent submitted the other letter from Mr. Boudreau.

II. THE TCC'S DECISION

[9] In its decision, the TCC first addressed the admissibility of the appellant's two pieces of evidence: (i) the portion of Ms. Courcy's testimony and report that deals with Mr. Morin's

statement; and (ii) Mr. Boudreau's letter to the CRA. The TCC concluded that the appellant had not convinced it that Mr. Morin's statement by way of hearsay was necessary and reliable. It therefore declared it inadmissible.

[10] The TCC admitted Mr. Boudreau's letter to the CRA into evidence, but noted that it assigned it very little weight. The TCC did not comment on the weight assigned to Mr. Boudreau's letter to the Régie de l'assurance maladie du Québec, which was submitted by the respondent.

[11] Having determined that the respondent was a credible witness, the TCC concluded that he effectively established on a balance of probabilities that he held insurable employment with RJC during the periods in question. Aside from the comments about the admissibility of the hearsay evidence, the TCC did not say much about the rest of the evidence submitted by the appellant. It noted that it does not see the relevance of the evidence that indicates that RJC did not send T4 slips to the CRA and did not file an income tax return or a sales tax return for the periods in question.

III. ISSUES

[12] The appellant claims that by rejecting his evidence in its decision without notice, the TCC violated his right to be heard and erred in law by declaring that evidence to be inadmissible. He adds that the TCC also committed palpable or overriding errors in its analysis of the evidence. In light of my conclusion regarding the first issues, it is not necessary to describe those errors in detail.

IV. ANALYSIS

[13] Under section 40 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, it is Quebec's law of evidence that applies to proceedings taken in Quebec over which Parliament has legislative authority.

[14] In common law and criminal law the Court can, in principle, *ex officio* raise the inadmissibility of evidence, but that is not always the case in Quebec. The Quebec legislature expressly provided for the admissibility of an extra-judicial statement when the parties consent thereto (article 2869 of the *Civil Code of Québec*, CQLR c CCQ-1991) (CCQ). A party that fails to object to an extra-judicial statement as evidence consents or is deemed to consent to its production. In *Lorrain v. St-Pierre*, 2014 QCCA 1793 at paragraphs 30–31, the Quebec Court of Appeal clearly indicated that a judge cannot state in his or her judgment that the testimony concerning exchanges between a witness and a third party is inadmissible by reason of hearsay in the absence of an objection raised at the hearing. Of course, as the Quebec Court of Appeal indicated in *9055-6473 Québec inc. v. Montréal Auto Prix*, 2006 QCCA 627 at paragraph 41, even if in the absence of an objection the evidence is admissible, it may have little probative value. It will depend on the other evidence, including the evidence that corroborates it.

[15] It should be noted that in *Gestions Shilaem inc. v. Agence du revenu du Québec*, 2017 QCCA 1568 at paragraphs 58–63, the Quebec Court of Appeal found that even when an objection to the evidence is made, said objection must normally be dealt with before evidence (the trial's production of evidence stage) is closed. If applicable, the Court must give the parties

the opportunity to complete their evidence or even to submit arguments with respect to the consequences of the decision. The Court notes that taking objections under advisement until the judgment on the merits should apply only to minor objections that are unlikely to cause irreparable harm to one of the parties.

[16] In this case, the TCC did not discuss article 2869 CCQ and the absence of an objection. Instead, it applied by analogy the rules of evidence prescribed for the informal procedure before the TCC. The purpose of relaxing of the rules of evidence is to facilitate and simplify such informal procedure; it is not to allow the TCC to *ex officio* raise the inadmissibility of evidence in its judgment.

[17] In any case, even if it were accepted that the TCC could *ex officio* raise this question, it was required do so at trial to allow the appellant to present his arguments and his evidence, should there be any, with respect to the necessity and reliability of Mr. Morin's statement. I note that the TCC's discretion in an informal procedure is broader than that described in *R. v. Khan,* [1990] 2 S.C.R. 531. The TCC is not held to the strict application of the necessity test set out in that case (*Selmeci v. Canada*, 2002 FCA 293 at para. 8; *Univers Gym Fitness Inc. v. Canada*, 2015 TCC 216 at para. 37).

[18] This is in itself sufficient to warrant intervention given that the error involves an element that is central to the dispute. In my opinion, that error alone justifies overturning the decision and referring the matter back to the TCC for a new hearing. Under the circumstances, it is therefore not helpful to discuss the effect of article 2873 CCQ; I will limit myself to referring to

Manoir du Fleuve inc. v. Services de santé du Québec, [2000] R.J.Q. 2203 at paragraphs 21–22, 27–28 (C.A.); and *Construction DJL inc. v. Conex Construction routière inc*., 2014 QCCS 3437 at paragraphs 22–23.

[19] Although it is not necessary to address the palpable or overriding errors raised by the appellant, I think it is important to reiterate the principle that a witness's credibility is assessed in light of all the evidence before the Court. Testimony can hardly be credible if it is implausible in light of all the evidence. In this case, several elements raised by Ms. Courcy were corroborated by her inquiries (objective evidence) and raise enough questions that cannot be ignored by the decision-maker. Finally, regarding the relevance of some evidence, it is not a question of knowing whether or not the respondent could verify certain facts but rather a question of determining, in the context of the evidence as a whole, whether it is likely and probable that RJC was actually operating at construction sites during the periods in question.

[20] I therefore suggest that the appeal be allowed, without costs. The TCC's decision should be set aside and the matter referred back for a new hearing.

"Johanne Gauthier"
J.A.

"I agree."
J.D. Denis Pelletier J.A.

"I agree."
Richard Boivin J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-317-17
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PLACE OF HEARING:	MONTREAL, QUEBEC
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REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	PELLETIER J.A. BOIVIN J.A.
DATED:	JUNE 1, 2018

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