

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111201

**Dockets: A-445-10
A-446-10
A-447-10
A-448-10**

Citation: 2011 FCA 336

**CORAM: EVANS J.A.
LAYDEN-STEVENSON J.A.
STRATAS J.A.**

BETWEEN:

**GERALDINE ANTHONY,
JARROD BAKER,
LESLIE MORGAN,
HEATHER FRIESEN**

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 1, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on December 1, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on December 1, 2011)

LAYDEN-STEVENSON J.A.

[1] These reasons relate to Court File Numbers A-445-10, A-446-10, A-447-10 and A-448-10.

The original of the reasons will be filed in A-445-10 and copies will be placed in the other three

files. The subject matter of the appeals relates to the issue of free parking provided by an employer

to its employees. The appellants claim that their free parking is not taxable. However, if it is taxable, they say the determined value is too high.

[2] The appellants are employed at Branksome Hall, a not-for-profit independent girls' school in Toronto, Ontario. They have free parking on the school's campus. In 2007, the Minister of National Revenue (the Minister) reassessed each of the appellants under paragraph 6(1)(a) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended (the Act), for the 2003 and 2004 taxation years, to include an additional \$92 per month as income.

[3] Paragraph 6(1)(a) of the Act is a broadly worded provision that requires the "value of board, lodging and *other benefits of any kind whatever*" received or enjoyed by a taxpayer in respect of "an office or employment" to be included in the taxpayer's income (our emphasis). The meaning to be attributed to the word "benefit" is not in dispute. The Minister considered the appellants' parking spaces to be benefits and calculated the monthly fair market value for each parking space at \$92.

[4] Justice Paris of the Tax Court of Canada (the judge) heard the appellants' appeals from the Minister's reassessments. The judge reviewed the applicable principles regarding "benefit" under paragraph 6(1)(a) of the Act as articulated in *Schroter v. R.*, 2010 FCA 98. Applying the definition to the facts, the judge concluded that the on-site free parking provided to the appellants by their employer is a benefit. With respect to the value of the benefit, the judge rejected the "cost to employer" approach advanced by the appellants in favour of the "fair market value" approach. The judge ultimately disagreed with the Minister's valuation and determined the appropriate monthly

fair market value to be \$75 for 2003 and \$77 for 2004. The Minister does not take issue with those conclusions. The judge's reasons are reported as 2010 TCC 533.

[5] Despite the capable submissions of Mr. Bernier, we are of the view that the appeals must be dismissed. The judge's finding that a benefit exists is a question of mixed fact and law. The valuation of the benefit is grounded in the judge's appreciation and weighing of the evidence. Both attract a standard of review of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33. No such error has been demonstrated. The appellants' arguments with respect to valuation ignore the judge's observations that: (a) even if he had been inclined to accept the "cost to employer" approach, the evidence was insufficient to establish the quantum of those costs (judge's reasons at para. 59); and (b) the evidence did not establish that a fair market valuation of the benefit was in any way inappropriate (judge's reasons at para. 58). Further, many of the appellants' arguments regarding the "cost to employer" approach have been overtaken by this Court's decision in *Spence v. Canada*, 2011 FCA 200.

[6] Counsel submitted to us in oral argument (but not to the judge) that, as a matter of law, the fair market value is an appropriate method of valuation only when there is an open market for the very benefit in issue. We disagree. Here, there was an open market for parking in the area of the school and the experts used this for determining the fair market value of staff parking at Branksome. In these circumstances, it was open to the judge to use the fair market value approach to value the benefit to the employees.

[7] The judge's reasons are detailed, comprehensive and cogent. Basically, the appellants seek to reargue the submissions made to the judge and rejected by him. We agree with the judge's conclusions for substantially the reasons he gave.

[8] The appeals will be dismissed with one set of costs throughout.

“Carolyn Layden-Stevenson”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-445-10, A-446-10, A-447-10, A-448-10

(APPEAL FROM A JUDGMENT OF THE HON. JUSTICE BRENT PARIS, OF THE TAX COURT OF CANADA, DATED OCTOBER 21, 2010, IN TAX COURT FILE NO. 2009-618 (IT) I.

STYLE OF CAUSE: *GERALDINE ANTHONY, JARROD BAKER, LESLIE MORGAN, HEATHER FRIESEN v. HER MAJESTY THE QUEEN*

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 1, 2011

REASONS FOR JUDGMENT OF THE COURT BY: (EVANS, LAYDEN-STEVENSON, STRATAS J.J.A.

DELIVERED FROM THE BENCH BY: LAYDEN-STEVENSON J.A.

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