Docket: 2016-2697(EI)

BETWEEN:

MARIE-ANTOINETTE BOIVIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

9250-6971 QUÉBEC INC.,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on common evidence with the appeal of
9250-6971 Québec Inc., 2016-2699(EI), on
February 17, 2017, at Montréal, Quebec.

Before: The Honourable Robert N. Fournier, Deputy Judge

Appearances:

| | |
|---|---|
| Agent for the appellant: | Sylvain Girard |
| Counsel for the respondent: | Lyne Prince |
| Agent for the intervener: | Sylvain Girard |

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## **JUDGMENT**

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the March 30, 2016, decision of the Minister of National Revenue is upheld, for the reasons given below.

Signed at Montréal, Quebec, this 28th day of February 2017.

"Robert N. Fournier"

Fournier, D.J.

Docket: 2016-2699(EI)

BETWEEN:

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Appellant,

and

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"Robert N. Fournier"

Fournier D.J.

Citation: 2017 TCC 31
Date: 20170228
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MARIE-ANTOINETTE BOIVIN,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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9250-6971 QUÉBEC INC.,

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Docket: 2016-2699(EI)

AND BETWEEN:

9250-6971 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

## REASONS FOR JUDGMENT

Fournier D.J.

[1] This is an appeal by the appellant under the Employment Insurance program of a decision of the Minister of National Revenue (the Minister), concerning the insurability of the employment of the appellant, Marie-Antoinette Boivin. Her spouse, Sylvain Girard, who owns and controls 100% of the voting shares of 9250-6971 Québec Inc., appeared as agent and intervener in this case. During the hearing before this Court, we received documentary and testimonial evidence from

Ms. Boivin and Mr. Girard. We also heard the testimony of Odette Lefrançois, the appeals officer, explaining the grounds for the Minister's decision.

[2] The Minister based her decision on assumptions of fact, most of which were admitted by the appellant. The parties agree that Ms. Boivin worked from home and seemed to have a fairly flexible schedule. She prepared her own records of employment and undoubtedly provided a valuable and essential service to her spouse's company, which operates year-round in construction. The evidence also clearly shows that the appellant and 9250-6971 Québec Inc. were not dealing with each other at arm's length, given that her spouse, Sylvain Girard, was the controlling shareholder in the company.

[3] Under paragraph 5(2)(i) of the *Employment Insurance Act* (EIA), it goes without saying that an employment is not insurable if the employer and employee are not dealing with each other at arm's length. However, paragraph 5(3)(b) of the EIA stipulates that this employee, while not dealing with the employer at arm's length, could be considered to hold an insurable employment if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, it is reasonable to conclude that the parties would have entered into a substantially similar contract of employment. Therefore, the question of whether the employment is insurable remains at issue, but under paragraph 5(3)(b) of the EIA.

## I. Background facts

[4] It is worth noting that the parties agreed on most of the facts. They agreed that the question of insurability concerns two periods of employment, the first from January 19, 2015, to April 4, 2015, and the second from November 2, 2015, to January 2, 2016. They also agreed that on January 28, 2016, the respondent issued a decision that the appellant's employment with Sylvain Girard and his company 9250-6971 Québec Inc. was not insurable under the EIA. Recognizing that the appellant was an employee during the period at issue, rulings officer L. Coudé informed her that, according to the Canada Revenue Agency, she was not dealing with 9250-6971 Québec Inc. [TRANSLATION] "at arm's length". Coudé also stated that [TRANSLATION] "we cannot reasonably deduce that a substantially similar contract of employment would have been entered into between these two people if they had been dealing with each other at arm's length". Consequently, Ms. Boivin's employment was not insurable under [TRANSLATION] "paragraph 5(2)(i) of the EIA".

[5] It goes without saying that this decision was based on the information obtained from Ms. Boivin and her spouse, Sylvain Girard. This information can be found in detail in the respondent's Book of Documents. For the purposes of this matter, I have briefly summarized the events as follows. The payer is a construction company that operates year-round. The worker began working for the company in 2015, after Mr. Girard's niece, who was self-employed and doing accounting work for his company, stopped working for the company upon receiving full-time employment elsewhere. That is when the worker and the payer entered into a verbal agreement in Blainville and Ms. Boivin was hired as an employee. It is agreed that she worked on a regular basis between 8 and 22 hours per week, without a set schedule.

[6] Because she replaced a self-employed worker, it would be correct to say that Ms. Boivin held a position that did not exist before she was hired. She is bilingual with a background in accounting, so she was qualified for the position. Her duties included bookkeeping, handling accounts receivable (billing) and payroll, preparing bids and government remittances, and translating documents. Initially, Ms. Boivin also worked for Berlines Transit Inc. Once her hours there were cut back to 32, Mr. Girard offered to pay her for 8 hours of work per week. Therefore, Ms. Boivin could count on a weekly 40 hours of paid work. But on April 4, 2015, her employment with Berlines Transit Inc. was completely terminated.

[7] According to her pay statements, she worked 8 hours per week from January 19, 2015, to April 4, 2015. In April 2015, Ms. Boivin had to leave her job with Mr. Girard's company due to a personal tragedy involving the passing of her son in a terrible accident. Although her functions at 9250-6971 Québec Inc. were important, the company did not replace her while she was absent from April 2015 to November 2015. However, evidence shows that Ms. Boivin continued to carry out certain essential duties over that period, until she officially returned to work in November 2015. Additionally, the fact that Ms. Boivin [TRANSLATION] "banked her hours" during that period in anticipation of being compensated upon her return is not disputed. But the company was experiencing a slow period and, after losing a major contract, had to lay off some employees, including Ms. Boivin.

[8] That was when she returned to work part-time. She went from working 8 hours per week to 22 without any real reason apparent to the Minister. In her testimony, Ms. Boivin explained to us that this was to [TRANSLATION] "cover the hours banked from January to April". In addition, it seemed that the payer had proposed paying her at a later date for her work on the GST/HST returns (March to May 2015 and June to August 2015) for 22 hours per week. When she returned to

work, the payer allegedly respected the payment agreement for the unpaid hours over two months. Ms. Boivin stated that even though business had slowed during her absence, she volunteered her time to complete the GST/HST returns at issue, knowing that she would be paid later.

II. Law and analysis

[9] Paragraph 5(3)(b) of the EIA provides as follows:

> (b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

In the present case, the Minister relies on the facts admitted by the appellant, as well as those that the respondent assumed in the circumstances. More specifically, the respondent relies on, among other provisions, paragraphs 5(2)(i) and 5(3)(b) of the EIA. Regarding the "remuneration paid", the respondent submits that the amount of the remuneration had been set by the payer as a fixed amount based on an hourly rate, regardless of the hours actually worked. When the other employees were paid when they worked and not when they were laid off, Ms. Boivin took care of emergencies even when business was slow during a period of downtime, knowing that she would be paid later thanks to her preferential agreement with the payer. For this reason, the respondent submits that it is unreasonable to conclude that the payer would have acted the same with an unrelated person, which confirms the existence of a non-arm's-length relationship within the meaning of paragraph 5(2)(i) of the EIA.

[10] In connection with the "terms and conditions", the respondent notes that the employee worked on a regular basis varying from 8 to 22 hours per week and that she did not have a set schedule. Clearly, she worked according to the payer's needs and kept track of her hours herself. When her actual hours exceeded her reported hours worked, she "banked" them so that the wages paid to her were consistently the same. When she returned to work, her hours rose from 8 hours to 22, without any apparent explanation, evidently to camouflage the practice of "banking", a privilege not extended to the other employees. There was no other explanation for such an increase in hours, apart from a banking of hours, since the payer's business had not picked up, nor had the employee's duties been increased. Once again, the

respondent submits that it is unreasonable to conclude that the payer would have acted in the same manner with an unrelated person, which confirms the existence of a non-arm's-length relationship.

[11] Regarding the "duration", the evidence confirms that the employee began offering her services to the payer in 2015, after a self-employed worker resigned. Later, the appellant had to leave her employment because of a personal tragedy. During that period, she was not replaced and continued to perform certain essential tasks. After losing a major contract, the payer laid off a number of people, including the employee. Although the duration of employment was reasonable, the practice of banking hours continued.

[12] Finally, with regard to the "nature and importance of the work", the respondent notes that the employee's position did not exist before she was hired as an employee, as she had replaced a self-employed worker. Although these were important tasks, the payer did not replace the employee during her absence. However, she continued working for the payer without pay while banking her hours, which would be paid to her upon her return. The respondent submits that, in the circumstances, such a practice is unusual in an employer–employee situation, which suggests that there was a non-arm's-length relationship.

[13] In light of the analysis done by the Minister's officers with regard to the criteria for a non-arm's-length relationship, the respondent submits that it is unreasonable to conclude that a person not at arm's length would have had conditions of employment similar to those of the employee. The respondent proposes that, as regards the contract of employment, the circumstances surrounding this work and the conditions of employment are dictated by the non-arm's-length relationship between the parties. The respondent stands by the initial decision that this employment is not insurable under paragraph 5(2)(i) of the EIA.

[14] If we accept the testimony of Ms. Boivin and her spouse, Sylvain Girard, it is clear that they came to an agreement so that she would hold a position as an employee rather than as a self-employed worker. Obviously, the hope was to create a contract of employment that would allow Ms. Boivin to receive Employment Insurance benefits during slow periods or the low season in the payer's business. Such was not the case when Sylvain Girard's niece performed similar work as a self-employed worker. It would appear that a non-arm's-length relationship influenced the conditions of employment that they stipulated in their agreement. Ms. Boivin not only enjoyed employee benefits while the other employees were

being laid off, but also benefited from a relatively common practice known as "time banking" or "bundling of hours".

[15] First, I would note that there is nothing intrinsically nefarious about this process; naturally, it will depend on the intentions and objectives of the parties who engage in it. Sometimes, this method is simply part of an indirect payment in addition to the employee's wages, which together amount to a compensation package that the employee receives in exchange for her work. In such a case, the idea is to offer effective and fair remuneration under a social contract between the payer and the employee. Ms. Boivin submits that the [TRANSLATION] "time banking" agreement in the case at hand is a common practice in the workplace that is not indicative of a non-arm's-length relationship between the parties. She relies on the fact that she has worked in such a situation several times in her career, most recently and more specifically with Berlines Transit inc., and notes that in all those cases, the employer complied with the verbal agreement irrespective of a non-arm's-length relationship. Finally, in support of her argument, she claims that in the public service, the banking of vacation time (directly connected to hours worked) is a common practice that is not indicative of a non-arm's-length situation between the parties.

[16] In regard to the EIA, and specifically in the context of paragraph 5(3)(b) of the EIA, the Court made some highly relevant remarks regarding the "banking" or "bundling" of hours in *Dumais v. Canada*,[1] writing as follows:

> This operation consists in crediting employees with hours of work performed for the payer, often outside the period of paid employment when the employee is receiving unemployment insurance benefits. These hours appear on the record of employment as hours paid by the employer although they were not. Employees consequently increase the number of their insurable hours entitling them to benefits, the amount of their eligible earnings and, consequently, the amount of the benefits they will earn when their seasonal employment comes to an end: *Geoffroy v. Canada (Minister of National Revenue - M.N.R.),* [2003] T.C.J. No. 102, by Justice Tardif, and *Proulx v. Canada (Minister of National Revenue - M.N.R.)*, [2003] T.C.J. No. 100. The employer also benefits because it receives services free of charge during the period in question. When determining an employee's wages and working conditions, payers can also take into account that the employee will be receiving employment insurance benefits for several months.

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1 *Dumais v. Canada (M.N.R.)*, 2008 FCA 301 (2008).

These remarks clearly illustrate the objectives that concern us in these judicial proceedings.

[17] Once again, as the Court explained in *Dumais v. Canada*, above, it is appropriate to note the purpose of paragraph 5(2)(i) and in particular paragraph 5(3)(b) of the EIA. More specifically, I note the following remarks:

> The Act assumes that "persons . . . related by blood, marriage or adoption are more likely to be able, and to want, to abuse the . . . Act": see *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 878 (QL), by Justice Desjardins. Moreover, in the same judgment, at paragraph 29, Justice Décary held:
>
> > [29] I do not think that persons connected by family ties, and so subject to natural and legal obligations to each other, could reasonably be surprised or upset that Parliament felt the need to determine, where a contract of service is concerned, whether such ties, perhaps even without their knowledge, could have influenced the working conditions laid down.
>
> One of the undeniable and undoubtedly laudable objectives of the provision is thus to provide the employment insurance system with protection against claims for benefits based on artifice, fictitious employment contracts or real employment contracts containing fictitious or farfetched conditions: see *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, (1999), 246 N.R. 176, at paragraph 12; *Pérusse v. Canada*, cited above . . . .

After all, these are very well-established legal principles!

[18] During his testimony at the hearing in this case, the intervener, Sylvain Girard, decried the Minister's decision, which in his view prevented him from hiring his spouse, Marie-Antoinette Boivin, as an employee in his business. In response, the Court would remind him that the decision in question only touched on the insurability of her employment in an Employment Insurance context and did not otherwise constitute an impediment to her employment. Once again in this same vein, the Court remarked as follows in *Dumais v. Canada* at paragraph [29]:

> I agree with Justice Archambault of the Tax Court of Canada in *Bélanger v. Canada (Minister of National Revenue - M.N.R.)*, [2005] T.C.J. No. 16, at paragraphs 73 to 75, where he recalls that workers in family businesses can earn up to 25% of their employment insurance benefits without being deprived of the protection offered by employment insurance. Related individuals may work in the family business in the low season when there are fewer working hours and be remunerated by the payer. It is not necessary, to use his expression, to "cheat" by

> colluding to have the employment insurance program bear the cost of the services delivered to the payer at no cost.

[19] As I previously remarked, regarding the banking of her hours, the appellant, Marie-Antoinette Boivin, simply asserted that her agreement with the payer is common practice in the workplace and not indicative of a non-arm's-length relationship between the parties. On this point, I would adopt the words of Justice Bowie in *Birkland v. Canada (Minister of National Revenue – M.R.N.)*, 2005 TCC 291, at paragraph 7, whose opinion on this I share, and I quote:

> The Appellant's bald assertion that the terms of his employment were arm's length terms, totally unsubstantiated as it was, simply does not suffice.

It goes without saying that I do not find the explanations given by the appellant in this case to be persuasive.

III. Conclusion

[20] Finally, it is trite law that the Court cannot substitute its decision for that of the respondent. In *Denis v. Canada (Minister of National Revenue – M.N.R.)*, 2004 FCA 26, at paragraph 5, Chief Justice Richard described the role of the judge as follows:

> The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the Act is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310 . . . .

I must make a decision in light of all the evidence submitted in this case. Also, I cannot disregard the Minister's findings and substitute my own. In any event, all things considered, I share the Minister's opinion that an employee in an arm's-length relationship with Sylvain Girard's business, 9250-6971 Québec inc., would not have entered into a substantially similar contract of employment, having regard to all the circumstances.

[21] In my opinion, such a person would not have agreed to continue working for the payer after being laid off, as was the case with Marie-Antoinette Boivin, unless he or she had been offered very preferential conditions of employment allowing

him or her to optimize his or her Employment Insurance benefits. As for the payer, it too benefitted by having services performed for it free of charge. This was a sham or collusion that flew in the face of the purposes of the EIA. Clearly, the primary intention was to make it easier to claim benefits, essentially on the basis of subterfuge. For these reasons, the appeal is dismissed.

Signed at Montréal, Quebec, this 28th day of February 2017.

"Robert N. Fournier"

Fournier D.J.

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| CITATION: | 2017 TCC 31 |
| COURT FILE NO.: | 2016-2697(EI)<br>2016-2699(EI) |
| STYLE OF CAUSE: | MARIE-ANTOINETTE BOIVIN v. MINISTER OF NATIONAL REVENUE<br>9250-6971 QUÉBEC INC. v. MINISTER OF NATIONAL REVENUE |
| PLACE OF HEARING: | Montréal, Quebec |
| DATE OF HEARING: | February 17, 2017 |
| REASONS FOR JUDGMENT BY: | The Honourable Robert N. Fournier, Deputy Judge |
| DATE OF JUDGMENT: | February 28, 2017 |

APPEARANCES:

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| Agent for the Appellant and the Intervener, 9250-6791 Québec inc.: | Sylvain Girard |
| Counsel for the Respondent: | Lyne Prince |

COUNSEL OF RECORD:

| | |
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