File: 2003-3647(EI)

BETWEEN:

LES ENTREPRISES GUY CHOQUETTE LTÉE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on March 24, 2004, at Montreal, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Antonia Paraherakis

JUDGMENT

The appeal is allowed, and the decision of the Minister is vacated in accordance with the attached reasons for judgment.

Signed at Grand-Barachois, New Brunswick, this 28th day of June 2004.

" S. J. Savoie"

Savoie D.J.

Certified true translation
Colette Beaulne

Reference: 2004TCC442
Date: 20040628
File: 2003-3647(EI)

BETWEEN:

LES ENTREPRISES GUY CHOQUETTE LTÉE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Savoie D.J.

[1] This appeal was heard at Montreal, Quebec, on March 24, 2004.

[2] This is an appeal on the insurability of the employment of Michel Choquette, the worker, with the appellant during the period at issue, that is, from January 1, 2000, to March 12, 2003.

[3] On July 11, 2003, the Minister of National Revenue (the "Minister") had informed the appellant of his decision that the worker had held insurable employment during the period at issue.

[4] The Minister supported his decision on the following assumed facts:

6.a) the appellant was incorporated on October 7, 1974; (admitted)

b) the appellant operated a business that sold and installed hardwood, inlay, ceramic, and linoleum floor coverings; (admitted)

c) the appellant employed approximately 10 to 15 employees; (admitted)

d) the worker was the appellant's manager; (denied)

e) the worker's duties consisted of managing staff, taking care of purchasing, negotiating with customers, and looking after customer service; (subject to amplification)

f) the worker worked in the appellant's facilities; (denied)

g) the worker's work schedule was Monday to Friday, from 8:00 a.m. to 6:00 p.m., that is, approximately 50 hours per week; (denied)

h) the worker had a fixed salary of $43,000 per year; (admitted)

i) the worker and the vendor were entitled to bonuses if the sales were good; (denied)

j) the worker received weekly earnings paid by cheque; (admitted)

k) in carrying out his duties, the worker followed the appellant's instructions; (denied)

l) the worker could not make any major decisions for the appellant; (denied)

m) the majority shareholder came every two days to the appellant's office; (admitted)

n) the appellant had the authority to control the worker's work; (denied)

o) all of the material and equipment the worker used belonged to the appellant; (admitted)

p) the worker had no expenses in carrying out his duties; (admitted)

q) the worker had no risk of loss in carrying out his duties; (admitted)

r) the worker's duties were integrated into the appellant's activities. (admitted)

7.a) the appellant's shareholders with voting rights were

Guy Choquette	80% of the shares
Louise Choquette	10% of the shares
the worker (admitted)	10% of the shares

b) Guy Choquette is Louise's husband and the worker's father. (admitted)

c) The worker was related by blood to a person who controlled the appellant. (admitted)

[5] The appellant's evidence revealed that the worker did nearly everything for the administration of the appellant's business. He looked after its management and administration. His duties consisted of managing staff, taking care of purchasing, negotiating with customers, and looking after customers. He was responsible for hiring and dismissing employees. He was also in charge of the business's sales and development.

[6] The worker carried out his duties using the appellant's facilities, but he also worked from his home, where he engaged in preparing bids, doing blueprint reading, and phoning customers.

[7] He himself determined his work schedule. He could have just as easily worked 15 to 20 hours per week as 60 to 70 hours whenever he wished, based on his duties in the business.

[8] The appellant's agent denied that the worker and the vendor were entitled to a bonus if the sales were good. The evidence revealed that, in contrast to the vendor, the worker was entitled to a dividend.

[9] It had been shown that the worker carried out his duties without being supervised and without following the appellant's instructions, and he was able to make major decisions without the appellant.

[10] The appellant proved that the assumed fact stated in paragraph 6.n) was false by using the testimonies of the worker and his father, Guy Choquette, the 80% shareholder of the appellant's voting shares.

[11] To illustrate the falseness of the Minister's allegation that the worker could not make major decisions for the appellant, the worker and his father gave three

examples where the worker's will had prevailed over his father's. These examples were the project to add the hardwood sales service to the business, the expansion of the plant, and the decision to paint the outside of the appellant's store pink.

[12] It was established that the worker's salary had been determined by Guy Choquette and the business's accountant, but Mr. Choquette made it clear that the worker had the authority to increase his salary if he wanted to. The worker had the authority to hire and dismiss employees. If his father disagreed with him, they discussed the situation, but the final decision was up to the worker. The worker had begun to work at the appellant's business while he was a student. He had grown up in the business. It was shown that the business would one day be passed on to him. The worker's father said that the business was the worker's inheritance.

[13] The worker is the business's only employee that was provided with a car, gas, and a cellular phone. His father acknowledged that he had spoiled him somewhat, which the worker admitted and added that he did what he wanted; he made it clear that if he were not the son of the majority shareholder, he would not have all of those benefits. The father shared that, to replace his son in the business, he would have had to pay someone a salary of $55,000.00 to $60,000.00. He acknowledged that, without his son, he would have had to put the business up for sale.

[14] The appellant exercised no control over the worker, according to the testimony of Guy Choquette, who said that the worker saw to everything. He also took time off without notifying him. He acknowledged that he discussed things with his son; that was all. Mr. Choquette said that he went to the business three or four times per week to assist his son, who told him what to do.

[15] In cross-examination, the Minister's counsel tried to illustrate the appellant's supervisory power over the worker. Guy Choquette said that the worker could only negotiate a loan of $100,000.00 for the business. However, without hesitating, he acknowledged that he could intervene if the worker dared to negotiate a loan of $500,000.00, but he would hesitate to do so. Lastly, he acknowledged that he had the authority to stop him, but he had by no means thought of doing that.

[16] The Minister's counsel tried to question the appellant's figures with regard to the worker's salary by submitting Exhibit A-1, which described the bonus paid to the worker, but the appellant maintained that it was not a bonus, but actually a dividend; the appellant's oral evidence on this matter was very well documented. It was a dividend, not a bonus.

[17] The worker carried out some duties at his home so as to better take care of his family responsibilities, which require that someone be at home for his daughter Rebecca, who has to be accompanied regularly to speech therapy sessions. It was also established that the worker took his son with him to work, again to fulfill his family duty to take care of his son.

[18] It was shown that the worker had had the same salary for four years, whereas the other employees in the business had had regular salary increases. These are some of the conditions that led the appellant to argue that such working conditions would not be acceptable in an arm's length context. On this point, the Minister's counsel simply responded that these conditions are completely normal in the context of a family business. The evidence submitted by the appellant to show the key role the worker had in the business by making major decisions, even against the will of the appellant's majority shareholder, made it clear to the appeals officer that the appellant had simply not spoken about this during the examination. In any case, this Court had to take the evidence presented at the hearing into account.

[19] In his testimony, the appeals officer tried to illustrate how he had conducted his investigation to determine whether it was reasonable to conclude that substantially similar working conditions could exist among unrelated parties using the method, during the interview, of putting himself in the place of the worker at arm's length. Thus, he said, he had asked the employer whether it would have hired the worker under these same conditions. But when he was asked whether he had asked the appellant's agent this question, he acknowledged that he did not remember whether he had used this technique. This implied to the appellant's agent that the appeals officer had not applied himself to reviewing the file in accordance with the criteria established in the case law.

[20] The evidence revealed that the worker was able to devote from 15 to 70 hours per week to his duties. The appellant argued that that was not the schedule of a job at arm's length. He argued that the same was true for the working conditions, such as working at home to accommodate the worker's family duties toward his daughter or working at the appellant's office with his son. The appellant argued that, added to that was the flexibility of the worker's schedule, which allowed him four days of leave during the break week, for personal reasons, and allowed him to take leave as he thought appropriate. The appellant added that an employee at arm's length would receive a regular salary increase like the business's other employees, whereas the worker had received the same salary for four years. The appellant also argued that an employee at arm's length would not have his car, his

gas, and his cellular phone provided by his employer. The appellant asked whether an employee at arm's length who was entitled to six weeks of vacation would make do with taking only three. The appellant's majority shareholder, Guy Choquette, maintained that his son, the worker, did whatever he pleased and had control of the business. He added that, without his son, he would sell the company. He also maintained that replacing his son, who received a salary of $43,000.00 per year, would cost him $55,000.00 to $60,000.00.

[21] This Court had the opportunity to consider an issue similar to this issue in *Planchers de Bois Franc 2000 (Laval) Inc.* v. *Canada (Minister of National Revenue - M.N.R.)*, [2001] T.C.J. No. 479. In that case, as in the instant case, the worker was the daughter of the father, the payer's majority shareholder. The factual situation in that case resembles the situation in the instant case. I am citing paragraphs 19 and 20 of the reasons of Deputy Judge Somers for this Court:

> The worker worked both in and outside the store, that is, she could do the accounting at home in the evenings, on weekends and even during her holidays, or after her regular hours of work, without being remunerated for overtime. According to the witness, the worker regularly worked 50 hours a week. The payer provided the worker with a vehicle for the needs of the company and for her personal needs.
>
> According to Maurice Lepage, the worker's responsibilities increased over the years. Her salary was set at $21,000 a year and she received that same salary during both peak and slow periods. A certain Mr. Blouin, a sales clerk, received a salary of $26,000, even though he had fewer responsibilities than the worker. According to Maurice Lepage, given her responsibilities, the worker should receive $10,000 to $15,000 more per year.

[22] In that situation, Somers D.J. wrote his conclusion in paragraph 24 as follows:

> It is reasonable to conclude that the worker would not have been hired on the same working conditions if she had been dealing with the appellant at arm's length. Having regard to all the circumstances, the Court finds that the worker did not hold insurable employment within the meaning of paragraph 5(2)(*i*) of the *Act* since she and the appellant were not dealing with each other at arm's length.

[23] In support of his claims, the appellant's agent cited *Edward Bergen* v. *Canada (Minister of National Revenue - M.N.R.)*, [2002] T.C.J. No. 73 of this

Court, for which very similar facts to those of the instant case were reviewed by Deputy Judge Porter.

[24] In paragraph 4 of this judgment, Deputy Judge Porter summarized the facts as follows:

> The material facts reveal that the Appellants, between them, controlled 44% of the issued shares in the Corporation through their own separate corporations, and that the remaining 56% of the shares were held by other family members through their respective corporations. The Corporation carried on a farm equipment manufacturing business. Thus, under the combined effect of section 251 of the *Income Tax Act* and paragraphs 5(2)(*i*) and 6(3)(*a*) of the *EI Act*, their employment, Edward as General Manager, and Allan as Director of Operations, was automatically excluded by law from insurable employment, subject to the exception contained in paragraph 5(3)(*b*) of the *EI Act*, whereby they are deemed to deal with each other at arm's length if the Minister is satisfied of the various criteria set out in that section and exercises his discretion to allow them through the gate, so to speak. This the Minister has purported to do and it is those decisions which are now in issue in these appeals.

[25] In that case, as in the instant case, it was established that the workers performed their duties in the business's office as well as in their homes, and their hours were not recorded.

[26] Deputy Judge Porter allowed the appeal and wrote the following conclusion:

> Taking into account all of the circumstances, including in particular the extensive hours and days put in by the brothers, their opportunity to just take leave without permission from anyone and still get paid, their willingness to reduce their paycheques if the company was short of funds, their signing of guarantees for the company, I am of the firm view that there was no independence of thought or purpose prevailing between the company and the brothers, there was no adverse economic interest, their stakes were inextricably woven together and there was not the bona fide type of separate negotiation permeating their relationship that one would expect to find existing between those traders in the marketplace to whom I referred at some length. Accordingly, I hold that neither of them were employed in insurable employment.

[27] In *Bergen*, above, the judge also supported his decision on the fact that the appellants' economic interests were inexorably bound up with those of the company, as is true in this case between the worker and the appellant. The following is his explanation:

> I do not intend to set out all of the evidence again. I have already referred to the significant facts. It is clear in my mind, that the two brothers were the company. Their economic interests were inexorably bound up with those of the company. Although perhaps they signed the guarantees in their capacities as shareholders or directors, the fact that they did so shows an inextricably inter-woven relationship between the company and the brothers. Their economic interests were tied to the company and those of the company were tied to theirs, to such an extent that it could not be said that there was an independent or adverse economic interest existing between them. They were the operating mind of the company; they themselves were related and had a common family economic interest, which was indivisible from that of the Company. This is exactly the situation contemplated by Parliament in setting up the employment insurance scheme, to exclude persons, who are operating or controlling their own businesses, in an entrepreneurial fashion, from participating in that scheme and being able to claim benefits if their employment fails.

[28] The evidence showed that Michel Choquette, the worker, was the business's operating mind. Earlier in these reasons, some examples were given to show how this occurred, but that was not the purpose of the appeals officer's investigation.

[29] Continuing with *Bergen*, above, the judge had considered the appellants' specific schedule, which resembled the worker's schedule in this case. He wrote, and I quote:

> [...] Thus, although their prime role was to manage the business, they had to do whatever it took whenever there was work to be done. Thus, neither of them worked regular hours. They worked in this way because they felt they were the owners of the corporation, as opposed to being regular employees. In assuming the Appellants worked regular hours, the Minister was incorrect. They worked flexible but often long hours.

[30] The appellant's agent thought it was advisable to cite Porter J. again in the above case to illustrate how, in some cases, the Minister was able to support his decision to exclude an employment from insurability on certain facts, whereas

those same facts were used to include employment on other occasions. I am quoting paragraph 55 of *Bergen* here:

> On top of that, there were an endless number of differences between their status and regular arm's length employees. They are typically matters which the Minister cites, in reported cases across the whole of Canada, as being examples of not being in a relationship substantially similar to one that would be entered into by people dealing with each other at arm's length. In this case, the Minister seems to be treating them in a different way. They include such things as the Appellants bringing their own children into the facilities when they worked on Saturdays and let them use corporate equipment, something forbidden to regular employees; being able to use their corporate equipment at any time without reference to anybody else; not being paid overtime or for statutory holidays; being prepared to reduce their pay in bad times; being able to take time off anytime either of them chose, without reference to the corporate schedule of two weeks vacation taken at the same time every summer; and no reduction in their pay if they took time off.

[31] When cross-examined by the appellant's agent, the appeals officer gave his interpretation of the Minister's role in the application of paragraph 5(3)(*b*) of the *Employment Insurance Act* (the "Act"). In his testimony, he said that the Minister must determine whether the working conditions are reasonable. The following is how Porter D.J. analyzed it in paragraph 58:

> Evidence was also given by Janice Affleck, a CPP/EI Rulings Officers with the Canada Customs and Revenue Agency. She had made the original ruling and was called on behalf of the Minister to explain her reasons for that ruling. She said she was aware of the duties and responsibilities of general managers in businesses operating in small towns. She had found nothing unusual in the terms of the employment of the Appellants. That was strange because, with respect, there are a number of unusual aspects, to which I have already referred. She went on to use a curious term. She said that she did not find anything "unreasonable" about the employment "which would exclude it from insurable employment". With respect, the issue here has nothing to do with what is reasonable or unreasonable. Furthermore, the cart seems to be in front of the horse, so to speak in her mind when she approaches it from the point of view of nothing excluding the employment. Rather, when the employment is excluded by law already, the question at this time is what is there that would bring that employment into the fold of the insurable employment under the *EI Act*.

[32] The worker, Michel Choquette, is the son of Guy Choquette, the appellant's majority shareholder. The worker and the employer, that is, the appellant, are therefore related within the meaning of section 251 of the *Income Tax Act*. Therefore, Michel Choquette's employment is not insurable employment under paragraph 5(2)(*i*) of the Act. But paragraph 5(3)(*b*) of the Act prescribes the following:

> (3) For the purposes of paragraph (2)(i),
>
> (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.

[33] Therefore, further to the exercise prescribed in 5(3)(*b*) of the Act, the Minister concluded that the worker's employment was insurable since he was satisfied that, having regard to all the above circumstances, it was reasonable to conclude that the worker and the appellant would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. Furthermore, the evidence revealed that the notion of the Minister's role, in accordance with the instructions of paragraph 5(3)(*b*) of the Act, as described by the appeals officer at the hearing, had led to questions concerning the methodology used by the officer when assessing the file. Therefore, a number of the facts assumed by the Minister were ignored or wrongly appreciated.

[34] In this respect, it is appropriate to emphasize the importance in this case of considering the principles established in *Légaré* v. *Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 878, in which Marceau, J.A. of the Federal Court of Appeal ruled as follows:

> The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power

> of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[35] With regard to the above, this Court must conclude, in light of the legislation and case law cited, that the facts accepted by the Minister were not correctly appreciated in the context in which they occurred, and the Minister's conclusion, considering the facts presented at the hearing, no longer seems reasonable.

[36] Therefore, it is this Court's duty to determine that it was not reasonable to rule that the appellant and the worker would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[37] For these reasons, this Court is compelled to conclude that the worker's employment was not insurable. The Minister's decision is therefore vacated.

Grand-Barachois, New Brunswick, this 28th day of June 2004.

"S. J. Savoie"

Savoie D.J.

Certified true translation
Colette Beaulne

REFERENCE:	2004TCC442
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APPEARANCES:

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