

Docket: 2004-1984(EI)

BETWEEN:

FORESTIER RÉJEAN PARADIS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CHRISTINE SERVAIS,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 8, 2005, at Chicoutimi, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Martin Gentile
Agent for the Intervener:	Alain Savoie

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal under subsection 103(1) of the *Income Tax Act* ("the Act") is allowed and the Minister's decision is varied to reflect the fact that, in conformity with paragraph 5(2)(i) of the *Employment Insurance Act*, the work done by the Intervener for the benefit of Forestier Réjean Paradis Inc. is not insurable employment.

Signed at Ottawa, Canada, this 5th day of October, 2005.

"Alain Tardif"

Tardif J.

Translation certified true
on this 23rd day of March, 2006.

Garth M^cLeod, Translator

Citation: 2005TCC444
Date: 20051005
Docket: 2004-1984(EI)

BETWEEN:

FORESTIER RÉJEAN PARADIS INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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CHRISTINE SERVAIS,

Intervener.

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REASONS FOR JUDGMENT

Tardif J.

[1] On January 28, 2004, the Appellant was informed that the work done by the Intervener Christine Servais during the period of January 1, 2002, to May 27, 2003, was a genuine contract of service and constituted insurable employment, despite the fact that the parties to the employment contract were not dealing with each other at arm's length.

[2] The Appellant, Forestier Réjean Paradis Inc., appeals from this decision.

[3] To explain and justify the determination under appeal, the Respondent made the following assumptions of fact, which are set out in paragraphs 8 and 9 of the Reply to the Notice of Appeal:

[TRANSLATION]

8. Based on the following assumptions of fact, the Minister determined that Christine Servais was employed by the Appellant in insurable employment under a contract of service:

(a) The Appellant is in the forestry business and is involved in the selective cutting of timber. **(admitted)**

(b) Until April 2003, Réjean Paradis was the sole shareholder of the Appellant. Since that date, he has owned 75% of the Appellant's shares. **(admitted)**

(c) Ms. Servais has owned 25% of the Appellant's shares since April 2003. **(admitted)**

(d) Ms. Servais has been working for the Appellant since 1999. **(admitted)**

(e) Ms. Servais is the spouse of Mr. Paradis, the Appellant's majority shareholder. **(admitted)**

(f) The Appellant's place of business is 1274 Roy Street in Normadin — the personal residence of Mr. Paradis and Ms. Servais. **(admitted)**

(g) The Appellant operates year-round. However, during the thaw, that is to say, in March and April, it performs maintenance on its machinery. **(admitted)**

(h) The Appellant operates 24 hours a day from Monday to Thursday. The operations of the business cease on Friday at approximately 1:30 p.m. **(denied)**

(i) On Friday afternoons, Mr. Paradis performs maintenance on the machinery. **(denied)**

(j) Ms. Servais has the following duties within the business, among others: make government remittances; prepare the paycheques, pay invoices, do bookkeeping and accounting for each month's end, and purchase parts for the machinery. **(denied as written)**

(k) She is required to perform the services personally, though Mr. Paradis has sometimes hired additional help. **(admitted)**

(l) The worker carries out her duties at the Appellant's place of business. **(admitted)**

(m) Ms. Servais has never assumed personal liability within the business. She does not share in the business' chance of profit and risk of loss. **(denied)**

(n) Ms. Servais receives fixed weekly pay of \$550. The payment is made by direct deposit into her personal account. **(admitted)**

(o) Ms. Servais is entitled to three weeks of paid vacation per year. **(denied)**

(p) The worker gets annual training on salaries. The Appellant pays for the training. The worker also attends an annual conference on machinery. **(admitted)**

(q) The worker reports to Mr. Paradis regarding her work every three weeks. He sometimes calls during the week to tell her what machine part to purchase. **(denied)**

(r) The Appellant supplies the worker with accounting software, a fax and a hard disk for accounting data. It also provides her with office supplies. **(admitted)**

(s) The worker supplies a computer, a printer and her own vehicle. **(admitted)**

(t) The Appellant issued a T4 Supplementary form to the worker for the year 2002. **(admitted)**

9. The Minister also deemed that the worker and the Appellant were dealing with each other at arm's length with regard to this employment because the Appellant would have entered into a substantially similar employment contract if the worker and the Appellant had been dealing with each other at arm's length, having regard to the following circumstances: **(denied)**

(a) The worker was always paid for the work that she did within the business. **(admitted)**

(b) The worker's remuneration was determined by Mr. Paradis and by the Appellant's accountant based on the work to be performed. **(admitted)**

(c) Ms. Servais works five days per week and her schedule varies from 30 to 40 hours per week, depending on the needs of the business. Her hours are not recorded. **(denied)**

(d) Ms. Servais is subject to the CSST and has personal medical insurance from the Caisse Populaire. **(no knowledge)**

(e) She is entitled to three weeks' paid vacation per year. **(denied)**

(f) The worker never provided unpaid services before or after the period in issue and has always been paid for each pay period. **(denied as written)**

(g) Ms. Servais performs work that is important and necessary in order for the Appellant to operate smoothly. **(admitted)**

[4] Subparagraphs 8(a), (b), (c), (d), (e), (f), (g), (k), (l), (n), (p), (r), (s), (t) and subparagraphs 9(a) and (g) were admitted to. The other assumptions, namely those set out in subparagraphs 8(h), (i), (j), (m), (o) and (q), the beginning of paragraph 9, and subparagraphs 9(b), (c), (d), (e) and (f), were denied or the Appellant had no knowledge of them.

[5] The only people to testify in support of the appeal were the worker's spouse (the majority shareholder of Appellant Forestier Réjean Paradis Inc.) and the Intervener. The person responsible for analysing the file did not testify.

[6] At one point, the worker, who was employed at a reception centre, had her duties completely changed due to budget cuts. Things were so bad that her job caused a major disruption for the family, and, being the parent of two children, the harmony of the family is a fundamental concern for the worker and her spouse.

[7] The business operated by her spouse had expanded somewhat, and was able to afford the services of an employee who would look after all administrative and accounting matters while being readily available to run errands, only some of which had an urgency to them.

[8] The worker estimated that she needed to devote 15 to 20 hours per week to her administrative work, except for a few weeks before the year-end closing. Errands were

irregular because most of that kind of work was prompted by a breakdown of equipment and machinery that the corporation, run by her spouse, operated in the forest.

[9] The worker enjoyed a great deal of autonomy and freedom in the performance of the work for which she was responsible. The work was important, but the predominant concerns were the support and guidance of their two children.

[10] When she was hired, the worker held no shares in the corporation. At one point, Ms. Servais became a shareholder and acquired 25% of the voting shares.

[11] The working relationship between the worker and her spouse, who managed and controlled the corporation, had strictly nothing to do with market conditions. The employment contract was fashioned around and influenced by family concerns. In other words, the Intervener had true influence that enabled her to plan her work on her own and decide independently whether the children's needs or the work for the Appellant was more important.

[12] Ms. Servais' terms and conditions of employment were strictly unrelated to those of the other employees and were not comparable. First of all, she was the only person who could do the work for which she was responsible; and secondly, she was the only person who could decide when and how she would do the work.

[13] The preponderance of evidence has established that the entire aspect related to family concerns, which had numerous direct and significant effects on the time and manner in which the work was performed, was excluded from the analysis.

[14] Only the work, the duration and the remuneration were taken into account; the context, the content and certain elements that essentially resulted from the non-arm's-length dealings were not given the requisite attention and consideration. Indeed, the terms and conditions governing the performance of the work were largely fashioned by family concerns.

[15] The preponderance of evidence is that the corporation controlled and managed by the worker's spouse could afford to offer itself the worker's services. Family life and the upbringing of the children, who were heavily involved in sports, were completely fundamental concerns on which neither the worker nor his spouse were prepared to compromise, even though they had the opportunity. They decided on a custom-tailored job in which all their family and work-related concerns were met.

[16] This is not to say that the employment was a sham; the work was useful and necessary. It could have been performed by a third party, possibly at lesser cost, but certainly not in such an accommodating manner. The work was done responsibly, and was probably done efficiently.

[17] It seemed clear to me that, following the drastic change in Ms. Servais' working conditions at the reception centre, she and her spouse joined efforts to create a custom-made job in which family concerns were the priority.

[18] Since the consideration and analysis failed to take a number of very important factors into account, and, especially, since the finding is in no way a reflection of the entire set of facts that needed to be taken into account, the determination is, having regard to the circumstances, neither reasonable nor consistent. The determination must therefore be reviewed, having regard to all the relevant facts described above.

[19] In fact, the bonus of a few thousand dollars in connection with a vacation in Europe confirms the very special nature of the employment relationship. Another factor, which arose later, validates this conclusion: at one point subsequent to the period in issue, the corporation that was responsible for the Appellant's remuneration reduced its burden and paid only one-half her salary, while another corporation paid the other half.

[20] Another fact which was revealed by the evidence, and which is no less important, is that the Intervener had the authority to sign cheques on her own. Such authority is, in fact, consistent with what the evidence reveals: the worker's powers and authority were significantly broader than what a person at arm's length would generally have.

[21] For all these reasons, the appeal is allowed on the basis that, in conformity with paragraph 5(2)(i) of the *Employment Insurance Act*, the work done by the Intervener for the benefit of Forestier Réjean Paradis Inc. is not insurable employment.

Signed at Ottawa, Canada, this 5th day of October 2005.

"Alain Tardif"

Tardif J.

Translation certified true
on this 23rd day of March, 2006.

Garth M^cLeod, Translator

CITATION: 2005TCC444

COURT FILE NO.: 2004-1984(EI)

STYLE OF CAUSE: Forestier Réjean Paradis Inc.,
v. M.N.R. and Christine Servais

PLACE OF HEARING: Chicoutimi, Quebec

DATES:
Hearing: July 8, 2005
Respondent's written submissions: September 16, 2005
Appellant's reply: September 30, 2005

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: October 5, 2005

APPEARANCES:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Martin Gentile
Agent for the Intervener:	Alain Savoie

COUNSEL OF RECORD

For the Appellant:

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada
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