Docket: 2005-303(EI)

BETWEEN:

GUY CLAVEAU,

Appellant,

And

THE MINISTER OF NATIONAL REVENUE,

Respondent,

And

ENTREPRISES CLAVEAU LTÉE.,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Entreprises Claveau Ltée.* (2005-304(EI)) on March 29, 2006, at Québec, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Counsel for the Appellant:	Jérôme Carrier
Counsel for the Respondent:	Michel Lamarre
Counsel for the Intervener:	Jérôme Carrier

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 30th day of June 2006.

"S.J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 4th day of March 2008.

Brian McCordick, Translator

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ENTREPRISES CLAVEAU LTÉE.,

Appellant,

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Citation: 2006TCC352
Date: 20060630
Docket: 2005-303(EI)

BETWEEN:

GUY CLAVEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LES ENTREPRISES CLAVEAU LTÉE.,

Intervener,

AND

Dossier : 2005-304(EI)

ENTREPRISES CLAVEAU LTÉE.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GUY CLAVEAU

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] These appeals were heard on common evidence in Québec, Quebec, on March 29, 2006.

[2] The appeals are from the decision of the Minister of National Revenue ("the Minister"), dated October 6, 2004, that the worker, Guy Claveau, was employed in insurable employment by the payor, Entreprises Claveau Ltée., during the period in issue, that is to say, from January 1, 2002, to August 1, 2003.

[3] The appeals pertain to the work that the Appellant did for the payor after the Minister determined that the Appellant held insurable employment during the period in issue despite the fact that he and the payor were related within the meaning of the *Income Tax Act*.

[4] In making his decision, the Minister relied on the following assumptions of fact, set out in paragraphs 7, 8 and 9 of the Reply to the Notice of Appeal in docket 2005-303(EI):

> [TRANSLATION]
>
> (a) The payor, which incorporated in 1971, does business in the field of civil engineering — specifically, road, water main and sewer construction.
>
> (b) The payor obtained a major three-year contract worth a total of $34 million from the Ministère des Transports for the construction of a road in the Rivière-du-Loup area.
>
> (c) The payor hires roughly 70 workers, 10 of whom have permanent positions.
>
> (d) The Appellant is an engineer and has been providing services to the payor for some 15 years. He has been full-time since 1994.
>
> (e) He works for the payor as a foreperson and project manager.
>
> (f) He works at the payor's Mont-Joli office, and the workshop, and on various job sites.
>
> (g) The territory in which he works extends from La Pocatière to Gaspé.
>
> (h) He works an average of 60 hours per week.
>
> (i) As part of his work, the Appellant used all the payor's equipment and supplies.
>
> (j) The payor provides him with a pickup truck for transportation to and from the job sites, and when he travels away from home, his lodging and meal expenses are paid by the payor.

(k) The Appellant has the benefit of the payor's group insurance plan, which includes life insurance, short-term and long-term salary insurance, prescription medication insurance, accident and illness insurance and travel insurance.

(l) During the period in issue, the Appellant received weekly remuneration in the amount of $945 in early 2002, and $1040 as of June 2002.

8. The Appellant and the payor are related within the meaning of the *Income Tax Act* because

(a) at December 31, 2002, the payor's voting shares were held as follows:

- Dany Claveau, the brother of the Appellant [Guy Claveau], held 5% of the shares;

- the Appellant held 16% of the shares;

- Lévis Claveau, the Appellant's father, held 67% of the shares;

- Mario Claveau, the Appellant's uncle, held 9% of the shares; and

- Émilienne Claveau, the Appellant's mother, held 3% of the shares; and

(b) the Appellant is related to a person who controls the payor.

9. The Minister also determined that the Appellant and the payor were deemed to be dealing with each other at arm's length in the context of this employment because he was satisfied that it was 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, having regard to the following circumstances:

(a) the Appellant's weekly remuneration was similar to the average salary of a civil engineer, and, like the other employees, he was covered by the payor's group insurance plan;

(b) the Appellant had been working for the payor for 15 years and held a full-time position since 1994, which suited the payor's needs; and

(c) the Appellant's work was integrated into the payor's operations and was essential to those operations.

[5] The Appellants have admitted to the Minister's assumptions of fact, except those set out in subparagraphs 7(b), (c), (e) and (h) and subparagraph 9(a).

[6] There is no dispute as to the existence of an employment contract between the Appellant and the payor. Rather, the question for determination is whether the Appellant's employment is excluded from insurable employment under the *Employment Insurance Act*, which stipulates:

> 5.(2) Insurable employment does not include
>
> (i) employment if the employer and employee are not dealing with each other at arm's length.
>
> 5.(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.

The Minister conducted his investigation and carried out the mandate assigned to him by Parliament under paragraph 5(3)(*b*).

[7] This process resulted in the ministerial determination discussed above.

[8] The employment income that the Appellant received was determined and paid by the payor. The evidence established that a relationship of subordination existed even though the Appellant enjoyed a certain amount of autonomy by reason of his skill; he has a degree in civil engineering and has nothing to learn from the payor about his field, but he is nonetheless accountable to the payor's board of directors, on which he sits as a minority shareholder.

[9] The Minister submits that he exercised his discretion under subsection 5(3) of the Act properly, and that the Appellant's terms and conditions of employment would have been substantially similar if the Appellant and the payor had been dealing with each other at arm's length.

[10] The evidence in the instant case has established that the Appellant grew up with this business, which his grandfather started in the fifties and headed until his father took the reins a few decades later.

[11] The Appellant took an interest in the business at a young age, and he earned his civil engineering degree in 1994, with the intention of taking over the business one day. He entered the family business immediately upon graduating.

[12] The Appellant and the payor are related under the *Income Tax Act*, and the Minister determined that, under paragraph 5(3)(*b*) of the Act, the Appellant and the payor were deemed to be dealing with each other at arm's length.

[13] Thus, there are two components to the Minister's decision. The first is his determination that the Appellant's employment was insurable within the meaning of paragraph 5(1)(*a*) of the Act because it met the requirements of a contract of service. The second is his determination that the Appellant's employment was not excluded from insurable employment within the meaning of paragraph 5(2)(*i*) of the Act.

[14] The circumstances described in paragraph 5(3)(*b*) must be examined in light of the evidence submitted at the hearing.

REMUNERATION PAID

[15] The Appellant's remuneration was $945 per week in January 2002. Effective June 2002, his weekly salary increased to $1040.

[16] At the hearing, the Appellant tendered a document entitled *Ordre des ingénieurs du Québec — Enquête sur la rémunération directe des ingénieurs salariés du Québec* (Exhibit A-6) [A survey of the direct compensation of salaried engineers in Quebec by that province's professional engineering licensing body].

[17] According to the document, the base salary of a civil engineer in 2001 was $48,000 per annum. In 2003, it was $74,600. It must be noted that the Appellant graduated in 1994. Thus, he had seven years of experience in 2001 and nine years of experience in 2003. He was therefore qualified to receive a salary that was higher than the base salary.

[18] For his part, the Minister produced the *Guide des salaires selon les professions au Québec* as Exhibit I-2. The document is dated March 2001 but specifies that it is based on 1996 census data. According to this guide, the weekly salary of a civil engineer was $1034.42, which is on par with the salary paid to the

Appellant as of 2003. It can be assumed that the salary of an engineer would be adjusted substantially upward in 2003 based on same-year data.

[19] The evidence discloses that the Appellant's salary was $53,510 in 2002, and $61,080 in 2003.

[20] The Minister submitted that the Appellant's 2003 salary was increased by a $5,000 bonus, but the Appellant showed that this bonus was granted every three years, not annually.

[21] The Appellant established that the salary earned by his subordinate Mr. Morissette, who has only a civil engineering technician's diploma, is $225 a week higher than his own. His brother, an equipment operator, earns more than the Appellant, as do other members of the company's management. The Appellant noted that his salary was determined following an analysis of the average, and is indexed. He added that his goal was to live comfortably, and that as long as that was achieved, he preferred to keep the funds within the company. At the hearing, the Appellant stated that his salary was roughly $30,000 below the average determined by the Ordre des ingénieurs.

[22] In this Court's opinion, the Appellant has proved that he made sacrifices for the family business by working very long hours for a salary well below the industry average. It was also established that he was destined to take over the family business, and was, in fact, already running many aspects of it.

TERMS AND CONDITIONS AND DURATION

[23] The Appellant has been working full-time for the payor since 1994. He is always the first to arrive at the job site or the office. He does not keep track of his hours. His salary is fixed regardless of the number of hours he works; the hours are not accounted for. During the construction season, from mid-April to mid-December, he is on a job site from 7:00 a.m. to 6:00 p.m. In the evening, he works at the office or from home, or meets clients. He works approximately 65 hours per week. In the winter, he works approximately 50 hours per week. He is never paid overtime. In 2003, he took but a single day of vacation.

[24] The Appellant, alone, directs the work on the job sites. The forepersons follow his orders. He is on site with the subcontractors. No one has control over him. He, alone, determines what his tasks are and how to carry them out. The Appellant is the directing mind of the business, along with his father, whose primary role is to work

with the Appellant on the accounting and the preparation of bids. At the hearing, the appeals officer conceded that the control over the Appellant's work consisted, at most, of control over the result — assuming that such control, which was not proved, truly existed. The Appellant sets his own work schedule and reports to no one.

[25] Émilienne Claveau, the Appellant's mother, is the accounting secretary in the family business. She said that her son Guy Claveau is the future of the business. She spoke of her son with obvious pride, saying: [TRANSLATION] "Without him, we could not have bid on a $15-million contract. But he gave us confidence, and we did very well. We would not be where we are today without Guy. He would already be able to replace his father." Ms. Claveau met the appeals officer in September 2004. She informed him about a $34-million project on which the business had bid. She told him that without the Appellant, the business would not have bid on such a large project.

[26] Lévis Claveau, the Appellant's father, visits the job sites on occasion, but does not interfere in any way. The Appellant decides whether the business will bid, after which Lévis Claveau prepares a draft bid that is completed by the Appellant. The road construction job sites depend totally and solely on the Appellant, and it is on these job sites that the Appellant carries out the work with his staff of workers, forepersons, crew chiefs and surveyors.

NATURE AND IMPORTANCE OF THE WORK PERFORMED

[27] The payor's operations consist in building roads, water mains and sewer systems. As the "operations" engineer, the Appellant was designated and counted on to bring the undertakings to fruition. He testified: [TRANSLATION] "I am not irreplaceable, but it would take several people, and much more supervision, to carry out my duties." This assertion was not contradicted at the hearing.

[28] We must ask ourselves the following question: Would a stranger have worked like the Appellant for a salary that was well below the industry average and was even lower than that of his subordinates? Would this stranger have done that much unpaid overtime, without a vacation or a day off? We must examine this determination by the Minister, and ask ourselves — without repeating all the terms and conditions of the Appellant's employment — whether it is reasonable to conclude that the Appellant and the payor would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[29] Having closely examined all the circumstances of the Appellant's employment, including the remuneration paid, the terms and conditions of employment and the duration, nature and importance of the work performed, this Court is of the opinion that the facts do not support such a conclusion.

[30] In *Légaré v. Canada* (*Minister of National Revenue*), [1999] F.C.J. No. 878, excerpted below, the Federal Court of Appeal enunciated the principles that must be applied in order to solve the problem before this Court:

> 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.

[31] Given the evidence adduced, this Court must find that the facts inferred or relied on by the Minister are not real, and were not correctly assessed having regard to the context in which they occurred. Based on the evidence submitted at the hearing, the conclusion with which the Minister was "satisfied" no longer seems reasonable.

[32] Consequently, the appeal is allowed and the decision of the Minister is vacated.

Signed at Grand Barachois, New Brunswick, this 30th day of June 2006.

"S.J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 4th day of March 2008.

Brian McCordick, Translator

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COURT FILE NOS.:	2005-303(EI) 2005-304(EI)
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REASONS FOR JUDGMENT BY:	The Honourable Deputy Judge S.J. Savoie
DATE OF JUDGMENT:	June 30, 2006

APPEARANCES:

For the Appellants:	Jérôme Carrier
For the Respondent:	Michel Lamarre
For the Interveners:	Jérôme Carrier

COUNSEL OF RECORD:

For the Appellants:	
Name:	Jérôme Carrier
Firm:	Jérôme Carrier, lawyer Lévis, Quebec
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada

For the Interveners:

Name:	Jérôme Carrier
Firm:	Jérôme Carrier, lawyer Lévis, Quebec