Docket : 2006-1785(EI)

BETWEEN:

ROCK LACROIX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GRANIT PLUS INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of
***Yvan Lacroix* (2006-1793(EI))** and ***Pierre Lacroix* (2006-1794(EI))**
on December 1, 2006, at Sherbrooke, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Marie-Claude Landry
Agent for the Intervenor:	Alain Savoie

JUDGMENT

The appeal is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of March 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 4th day of July 2007
Gibson Boyd, Translator

Docket: 2006-1793(EI)

BETWEEN:

YVAN LACROIX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GRANIT PLUS INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of
***Rock Lacroix* (2006-1785(EI))** and ***Pierre Lacroix* (2006-1794(EI))**
on December 1, 2006, at Sherbrooke, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Marie-Claude Landry
Agent for the Intervenor:	Alain Savoie

JUDGMENT

The appeal is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of March 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 4th day of July 2007
Gibson Boyd, Translator

Docket: 2006-1794(EI)

BETWEEN:

PIERRE LACROIX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GRANIT PLUS INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of
***Rock Lacroix* (2006-1785(EI))** and ***Yvan Lacroix* (2006-1793(EI))**
on December 1, 2006, at Sherbrooke, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Marie-Claude Landry
Agent for the Intervenor:	Alain Savoie

JUDGMENT

The appeal is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of March 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 4th day of July 2007
Gibson Boyd, Translator

Citation: 2007TCC81
Date: 20070327
Dockets: 2006-1785(EI)
2006-1793(EI)
2006-1794(EI)

BETWEEN:

ROCK LACROIX,
YVAN LACROIX,
PIERRE LACROIX,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GRANIT PLUS INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Archambault J.

[1] Messrs. Rock, Yvan and Pierre Lacroix (the **Workers**) appealed from a decision by the Minister of National Revenue (the **Minister**) on the insurability of their employment with Granit Plus Inc. (the **Payor**) for the period of January 16, 2004, to May 26, 2005 (the relevant **period**). The Minister determined that the Workers all held insurable employment for the purposes of the *Employment Insurance Act* (the **Act**). The Workers argue that they did not hold such employment because, according to them, the nature of the contractual relationship binding them to the Payor was not that of a contract of employment, but rather that of a contract for services. Alternatively, they argue that if there was a contract of employment between them and the Payor, their employment was, for the purposes of the Act, excluded from the notion of insurable earnings due to the non-arm's length relationship between them and the Payor. Furthermore, they argue that the

Payor wrongly exercised its discretionary power under paragraph 5(3)(*b*) of the Act in that it is not reasonable to conclude that the Workers and the Payor would have entered into a substantially similar agreement had they been dealing at arm's length.

[2] In making his decision in the case of Rock Lacroix, the Minister relied on the following assumptions of fact set out in paragraphs 5, 6 and 7 of the Reply to the Notice of Appeal:

[TRANSLATION]

5. The Minister determined that the Appellant exercised employment for the Payor under a contract of service, relying on the following assumptions of fact:

(a) the Payor was incorporated on February 25, 1992; **(admitted)**

(b) the Payor operated a business that specialized in the production and sale of granite kitchen counters; **(admitted)**

(c) the Payor operated year round, closing the factory for two weeks at Christmas and two weeks during the summer; **(admitted)**

(d) the Payor employed 30 to 35 employees; **(admitted)**

(e) in 2004, the total revenue of the business was approximately 3 million dollars; **(admitted)**

(f) the Appellant was the general manager of the Payor; **(admitted)**

(g) the Appellant's duties were to supervise the office employees and the sales representatives, to verify submissions and look after advertising; **(admitted)**

(h) the Payor had a right of control over the Appellant; **(denied)**

(i) the Appellant worked in the Payor's offices; **(denied)**

(j) the Appellant had to inform the Payor of absences; **(denied)**

(k) the Appellant had a work schedule of Monday to Friday from 7:30 a.m. to 630 p.m., or 11 hours per day for a 55-hour week; **(denied)**

(l) the Appellant had a fixed weekly salary of $830 up until June 13, 2004, after which this salary was $1,000; **(admitted)**

(m) the Appellant's remuneration was decided by the Payor; **(denied)**

(n) the Appellant received his remuneration regularly each week; **(admitted)**

(o) the Appellant took four weeks of paid vacation each year; **(denied)**

(p) the Appellant did not have to incur any expenses in carrying out his duties for the Payor; **(denied)**

(q) all material and equipment used by the Appellant belonged to the Payor including a vehicle for his travel; **(denied)**

6. The Appellant and the Payor are related persons under the meaning of the *Income Tax Act*[1] because:

(a) The Payor's shareholders, each one with one third of the voting shares, were 9101-4399 Québec Inc., 9101-4498 Québec Inc. and 9101-4514 Québec Inc. **(admitted)**

(b) The shareholder of 9101-4399 Québec Inc. with 100% of the voting shares was the Appellant, Rock Lacroix. **(admitted)**

(c) The shareholder of 9101-4498 Québec Inc. with 100% of the voting shares was Pierre Lacroix. **(admitted)**

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[1] Hereafter, the "**Tax Act**".

(d) The shareholder of 9101-4514 Québec Inc with 100% of the voting shares was Yvan Lacroix. **(admitted)**

(e) Rock Lacroix, Pierre Lacroix and Yvan Lacroix are brothers. **(admitted)**

(f) The Appellant and his brothers are members of a related group that controls the Payor. **(admitted)**

7. The Minister also determined that the Appellant was deemed to be at arm's length with the Payor in his employment, as he was satisfied that it was reasonable to conclude that the Appellant and the Payor would have entered into a substantially similar agreement if they were dealing at arm's length, given the following circumstances **(denied):**

(a) the Payor had an active corporate life; **(neither admitted nor denied)**

(b) the Appellant's duties were necessary and essential to the proper operation of the Payor's business; **(admitted)**

(c) the nature and the importance of the Appellant's work were reasonable; **(neither admitted nor denied)**

(d) the Appellant's salary was paid regularly; **(admitted)**

(e) on March 24, 2006, Yvan Lacroix stated to a representative of the Respondent that the Appellant's salary had been determined by the shareholders; **(denied)**

(f) under the shareholder agreement of April 28, 1994, any important decision, such as the remuneration of a shareholder or family member, or the distribution of profits must be voted unanimously; **(neither admitted nor denied)**

(g) the Appellant's salary was approximately $18.20 per hour, that is $1,000 divided by 55 hours; **(denied)**

(h) the two foremen, Stéphane Robert and Éric Filion were paid $17.59 and $16.70 per hour respectively; **(admitted)**

(i) in 2004, the Appellant, the two other directors and the salesman Joël Létourneau received bonuses paid by the Payor; **(neither admitted nor denied)**

(j) gross remuneration of $1,000 per week was reasonable remuneration for the Appellant; **(denied)**

(k) the Appellant was entitled to yearly vacations; **(denied)**

(l) the Appellant provided services year round, which corresponded with the Payor's needs; **(admitted)**

(m) the duration of the Appellant's work was reasonable; **(neither admitted nor denied)**

(n) the nature and importance of the work, the remuneration, the duration of the Appellant's work were reasonable. **(neither admitted nor denied)**

[3] The admissions made in the appeal of Rock Lacroix also apply in respect of the appeals of Yvan and Pierre Lacroix. With regard to the description of the duties of Yvan Lacroix, it is admitted that he was the production manager[2] during the relevant Period, while Pierre Lacroix was maintenance and installation manager[3] during the same period.

[4] The evidence filed at the hearing revealed that the Payor had been in business since 1992 and had merged with another company, Modern Granit, which also belonged to the three Workers and had been in operation since 1989. According to Rock Lacroix, the workers had each invested approximately $5,000 each in the payor company when it was founded. Thereafter, they guaranteed up to 20% of a loan of approximately $350,000 granted to the Payor. They were moreover exonerated from their guarantee once the Payor reimbursed this 20%.

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2 Paragraph 5(g) − which was admitted − of the Reply to the Notice of Appeal of Yvan Lacroix states the following: [TRANSLATION] "the Appellant's duties consisted in preparing production schedules, keeping inventory of raw materials and finished products, and supervising 20 employees."

3 Paragraph 5(g) − which was admitted − of the Reply to the Notice of Appeal of Pierre Lacroix states the following: [TRANSLATION] "the Appellant's duties consisted in preparing machinery maintenance schedules, ordering parts for maintenance and repair, purchasing tools and supervising 2 employees."

[5] Each of the Workers testified at the hearing to describe the role he played within the Payor's business during the relevant period. Mr. Rock Lacroix acted as general manager and looked after management, including management of relations with the banker and the accountant. He supervised the person in charge of labour relations, Ms. Pelchat, who also testified at the hearing. He also looked after sales (marketing) and procurement of raw materials, in particular those that were imported.

[6] In the course of his duties, he had to be absent regularly from the Payor's establishment. He drove at least 1,000 kilometres each week for many years to visit clients and establish business relationships. The Payor's territory covered the Maritimes, Quebec and the Ottawa region. Moreover, the Payor provided Rock Lacroix with a car and paid all fuel and maintenance costs. For 2005, Rock Lacroix acknowledged that 20% of his automobile costs were personal expenses.

[7] He indicated that he could spend 25 to 90 hours per week on his work. His schedule therefore could vary from week to week. He specified that 25 hours per week could be the number of hours during two weeks of the year, while 90 hours could be the number of hours during four weeks. In general, he estimated his hours, without counting them, at 60 or 65 hours per week.

[8] According to Rock Lacroix, no one supervised his work; thus he could be absent for as long as he liked. For example, while his residence was being renovated, Mr. Lacroix was often absent to see to the proper execution of the renovation work. In addition, as he had five children, he could occasionally be absent to attend their activities. He took, at the time of his choice, five to seven weeks of vacation per year.

[9] Yvan Lacroix, production manager, estimated that he provided 60 or 65 hours of work per week to the Payor. Like his two brothers, he did not count his hours. This was just an estimate. He owned a maple grove and a wood lot that occupied part of his time, especially during the sugaring season. When he was absent to see to such activities, he did not have to ask permission from his brothers.

[10] As for Pierre Lacroix, he liked to attend country music and rodeo festivals, such as the Festival de St-Tite. When he was absent, he did not have to ask permission any more than the others, but like them, I presume, he informed his brothers of his absence and took the necessary measures so that all would be in order before his departure. If necessary, he could be reached during his absences.

[11] All of the workers spent time at the Payor's business during their vacation periods. For example, Pierre Lacroix maintained the machinery during the vacations of the Payor's other employees.

[12] With regard to the sick leave policy, the Payor's employees were entitled to one day per year, while the Workers were paid regardless of the number of sick days they took. However, the evidence does not show whether the Workers took many days of sick leave.

[13] Yvan Lacroix used his own car to go to work and did not have a car provided by the Payor. He occasionally had to travel for business purposes, in which case the Payor would reimburse his fuel costs. The evidence did not reveal that Pierre Lacroix had a car provided by the Payor. I assume that he was entitled to the same conditions as his brother Yvan with regard to the use of his car for the Payor's benefit.

[14] With regard to their remuneration, the Workers all received the same base salary, which was $830 per week at the beginning of the relevant period. Starting from June 13, 2004, it was $1,000. On top of this base salary, they received bonuses of $25,000 in 2004 and $10,000 in 2005. According to Rock Lacroix, these bonuses had been paid due to the Workers' needs. He pointed out in particular that his brother Pierre had wished to acquire a recreational vehicle or camper. Yvan Lacroix indicated that the salaries paid by the Payor were decided by the Workers informally, and not necessarily during a formal shareholders meeting. Only one of the Payor's employees received a bonus, a sales representative who received $4,700 in 2004. The Workers did not have a pension fund or registered retirement savings plan funded by the Payor. Rock Lacroix was unaware of the remuneration received by other general managers or service managers in the granite kitchen counter industry in his region.

[15] During the 1990s, Rock Lacroix indicated, the Workers had received remuneration lower than that of the Payor's employees because of the recession experienced at that time. It was important for them that the Payor regain good financial health.

[16] Generally, the Workers discussed important decisions affecting the Payor, but each had significant latitude in the direction of his respective department. For example, it was mentioned that Pierre Lacroix had wanted the Payor to acquire a four wheel drive utility vehicle for the maintenance service, while Rock Lacroix

did not see the point. However he respected his brother's decision. As for Pierre Lacroix, he had certain reservations as to the choice of the location where the showroom was to be set up in Montréal, but he went along with Rock Lacroix's decision. In addition, Yvan Lacroix had had doubts as to whether it was appropriate to purchase computerized machinery, but acknowledged that it had been the right decision. The evidence does not reveal the position of the third brother when these decisions were made. However, Yvan Lacroix acknowledged that it was perfectly normal that there was communication between the three brothers in order to discuss decisions to be taken by the Payor.

[17] The signatures of two of the three Workers was required for the Payor's cheques of $5,000 or more to be issued. Below this amount, a single signature was sufficient.

[18] In her testimony, the appeals officer filed her Report on an appeal (Exhibit I-2). In this report, she confirms that the first issue she had to determine was whether there was a real contract of employment between the Workers and the Payor and the second was whether it was reasonable to conclude that an unrelated person would have been hired under substantially similar conditions to those of each of the Workers during the period at issue.

[19] To address the first issue, she indicated at page 4 of her report:

> [TRANSLATION]
>
> In Quebec, in order to determine whether employment is insurable, for the purposes of the *Employment Insurance Act*, we must refer to the *Civil Code of Quebec,*[4] which dictates the rules of a contract of employment and those of a contract of enterprise or a contract for services.

[20] It was therefore necessary to analyze each worker's performance of work, their remuneration and the relationship of subordination to determine whether there was a contract of employment. Then she had to deal with the issue of the exclusion of the work of each of the Workers under paragraph 5(2)(*i*) of the Act and, in performing her analysis, exercise the powers conferred upon the Minister by paragraph 5(3)(*b*) of the Act.

[21] Here is the appeals officer's analysis, in her Report on an appeal:

---

[4] Hereafter, the "**Civil Code**" or "**CCQ**".

[TRANSLATION]

Anaylysis of non-arm's length dealings:

Since the Workers are three brothers and hold all of the shares of the Payor, this is a situation where the Payor and the Workers are related persons as defined at subparagraph 251(2)(*b*)(i) of the *Income Tax Act*.

Related persons are deemed not to deal with each other at arm's length under paragraph 251(1)(*a*) of this same Act.

Nature and importance of work:

The work of the Lacroix brothers was necessary to the proper functioning of the Payor's business. The volume of work was variable, depending on the time of year, and salary was paid regularly, every week, regardless of the number of hours worked (between 6 and 10 per day).

These conditions could have been agreed upon by persons dealing with each other at arm's length.

Conditions of employment and remuneration:

The Payor had a right of control over the workers and this control was exercised, *inter alia*, through the fact that two of three signatures were required for all expenses over $5,000 and also by the fact that they had to replace one another.

The three Workers held salary insurance and the Payor's other employees did not. This situation could be related to the fact that the three Workers were also shareholders, and as shareholders, they shared a certain financial responsibility with the Payor. These actions as shareholders must be distinguished from their work conditions as employees.

The facts also demonstrated that the bonuses paid ($25,000) were related to their condition of shareholder and the decision to pay them was made by a board of directors based on the financial statements.

As regards the services provided to the Payor, each of the three Workers had the required skills to have a free reign in executing the duties for which he was responsible.

The salary paid to the workers ($1,000 gross per week) is reasonable, given the responsibilities of each of them towards the Payor.

These conditions of employment surely would have been the same between persons dealing with each other at arm's length.

Duration:

The Workers did between 6 and 10 hours per day, always receiving the same fixed remuneration. Each of the three workers then decided to do overtime when the need was felt.

Without the non-arm's length relationship between the parties, the Workers could have entered into a similar agreement with the Payor.

Conclusion from the analysis of non-arm's length relationship:

The analysis of the non-arm's length relationship demonstrates that a similar employment contract could have been entered into, with the same conditions, during the period at issue with a person dealing at arm's length with the Payor.

Conclusion:

The above analysis of the of the components of the contract of employment demonstrate the existence of a contract of service, and that this employment was exercised in Canada, for pay. The requirements of subparagraph 5(1)(*a*) are met and it is therefore insurable employment within the meaning of the Act.

The analysis of non-arm's length dealings also shows that the parties could have entered into a substantially similar contract. The Minister is therefore satisfied that it is reasonable to conclude that the elements analyzed and mentioned at subparagraph 5(3)(*b*) are of a nature to include this employment in insurable employment.

Workers' position

[22] During his submissions, the agent for the Workers argued that there was no contract of employment within the meaning of the Civil Code between the Workers and the Payor. In his opinion, the degree of independence that each of the workers enjoyed revealed the existence of a contract for services. He even went as far as arguing that the corporate veil had to be lifted and that the Payor's business was really that of the three workers.

[23] Alternatively, the Workers' agent argued that even if there was a contract of employment, the Minister had wrongly exercised his discretionary power. It seemed to him unreasonable to conclude that the employment conditions would have been substantially similar if the Workers and the Payor had been dealing with each other at arm's length. In particular, he argued that employees at arm's length would not have accepted a decrease in pay, as had been the case for the Workers in the 1990s, and the bonuses would not have been determined based on the needs of the employees and the employees would not have accepted being disturbed during their vacations, as had been the case for the Workers. Employees at arm's length could not have taken their vacation at the time of their choice outside of the normal vacation periods. They also would not have received calls at home. They would not have used a credit card without a credit limit, as had been the case for the Workers, and they would not have been allowed to be absent from work for personal activities, such as exploiting a maple grove and a wood lot, and they could not have been paid for more than one sick day per year.

[24] The Workers' agent argued moreover that the appeals officer had wrongly applied the provisions of the Act since she had rendered her decision based on what were reasonable conditions and did not examine whether the conditions would have been the same in an arm's length relationship. In addition, analysis of the pay in terms of hourly rate shows that the hourly rate of the Workers was well below the rate that an outsider would have accepted.

Analysis

[25] The relevant provisions for settling the dispute are subsections 5(1) and 5(3) and paragraph 5(2)(*i*) of the Act, which set out the following:

> **5**(1) Subject to subsection (2), insurable employment is
>
> (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> 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*):

(*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and;

(*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.

[Emphasis added.]

Existence of a contract of employment

[26] The appeals officer properly stated the applicable rule of law when she asserted that in Quebec, one must refer to the Civil Code to determine whether a contract constitutes a contract of employment or a contract for services. It should be recalled that the Federal Court of Appeal, in *9041-6868 Québec Inc.* v. *M.N.R.*, 2005 FCA 334, put an end to the existing state of confusion in the application of the Act with regard to the relevant source of law to determine whether employment is insurable for the purposes of the Act when this employment is governed by Quebec law.[5]

[27] The contract of employment is defined at article 2085 C.C.Q. and contract for services is defined at articles 2098 and 2099 C.C.Q. This is what these articles stipulate:

---

[5] For a discussion on this point, see *Jacinthe Garneau and Denise Bellefeuille* v. *M.N.R.*, 2006 TCC 160, paragraph 54. In addition, see the article that I wrote: "Contract of Employment: Why *Wiebe Door Services Ltd*. Does Not Apply in Quebec and What Should Replace It. in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law*, Montréal: Association de planification fiscale et financière (APFF) and the federal Department of Justice, 2005 (**the article on the contract of employement**).

> 2085 A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> 2098 A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.
>
> 2099 The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.
>
> [Emphasis added.]

[28] Here is what I wrote in the article on the contract of employment, at paragraph 38:

> The definition of a contract of employment in article 2085 C.C.Q. identifies the three essential components of this type of contract: (i) the work, (ii) the remuneration and (iii) the relationship of subordination. In the case of a contract for services, there are four conditions to be met, according to articles 2098 and 2099 C.C.Q.: (i) the provision of a service, (ii) for a price, (iii) freedom for the provider of services to choose the means of performing the contract, and (iv) the absence of any relationship of subordination in respect of its performance. Analysis of articles 2088, 2098 and 2099 indicates that the relationship of subordination is not only an essential "component" of a contract of employment but is also the "distinguishing" feature of this type of contract as compared to a contract for services.
>
> [Emphasis added.]

[29] In this case, the evidence clearly establishes the fact that the Workers provided services for the Payor and received remuneration. What is less clear, however, is the issue of whether there was a relationship of subordination between them and the Payor. Here is what I wrote on this issue at paragraph 41 of the article on the contract of employment:

> The employee must do the work under the direction or control of the employer: there can be no contract of employment without a relationship of subordination. It is this condition that generally poses a problem. The concepts of "direction" and of "control" and, from the worker's point of view, of "relationship of subordination" require clarification. According to the usual meaning of these

terms, the employee must do the work under the authority and supervision of a person who leads or conducts the performance of the work as chief or head.

[Footnote omitted.]

[30] Here is the definition of "subordination" provided by Robert P. Gagnon, which I quoted in paragraph 44 of the article on the contract of employment:

[TRANSLATION]

(c) Subordination

90 — *Distinguishing factor* — The most significant feature characterizing a contract of employment is the subordination of the employee to the person for whom he works. It is by this feature that a contract of employment can be distinguished from other onerous contracts which also involve the performance of work for the benefit of another person for a price, such as a contract of enterprise or a contract for services under articles 2098 ff C.C.Q. Thus, while the contractor or the provider of services "is free", under article 2099 C.C.Q., "to choose the means of performing the contract" and while between the contractor or the provider of services and the client "no relationship of subordination exists . . in respect of such performance," it is a characteristic of a contract of employment, subject to its terms and conditions, that the employee personally performs the work agreed upon under the employer's direction within the framework established by the employer.

. . .

92 — *Concept* — Historically, the civil law first developed a so-called strict or classical concept of legal subordination that was used as a test for the application of the principle of the civil liability of a principal for injury caused by the fault of his agents and servants in the performance of their duties (art. 1054 C.C.L.C.; art. 1463 C.C.Q.). This classical legal subordination was characterized by the immediate control exercised by the employer over the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the concept of legal subordination in a broad sense. The diversification and specialization of occupations and work techniques often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work. Thus, subordination has come to be equated with the power given a person, accordingly recognized as the employer, of determining the work to be done, overseeing its performance and controlling it. From the opposite perspective, an employee is a person who agrees to be integrated into the operating environment of a business so that it may receive the benefit of his work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly

> regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over the quantity or quality of the work done, and so on. Work in the home does not preclude this sort of integration into the business.
>
> . . .
>
> **94** — *Result* — In borderline cases, article 2085 C.C.Q. does not exclude resort to an examination of the situation and the parties' economic relationship in order to determine the nature of their legal relationship. However, it does not authorize a characterization as a contract of employment on the basis of economic subordination. The subordination that it contemplates is essentially legal in nature. However, even in its most relaxed and attenuated forms, the situation of legal subordination should suffice to place the worker in the employee category. The exclusion of any relationship of subordination between a client and a contractor or provider of services now legitimizes this conclusion (art. 2099 C.C.Q.). Lastly, it will be noted incidentally that employee status can coexist, in the same person and in connection with the same economic or professional activity, with another status such as shareholder or director of the company, independent contractor or even employer.
>
> [Emphasis added.]
> [Footnotes omitted.]

[31] And, at paragraph 106 of the article on the contract of employment, I added:

> It must be pointed out that the distinguishing feature of a contract of employment is not that the employer actually exercises power or control but that the employer had the power to exercise direction or control. Where the employer has not regularly exercised his power of direction or control, it is not easy to prove the existence of the "power". It is not surprising, then, that in order to solve this problem the common law courts have opted to apply tests other than the control test. However, in Quebec, the courts do not have such leeway. They have to find that a relationship of subordination is either present or absent before they can characterize an agreement as a contract of employment or a contract for services. It is thus necessary to resort to proof by presumption of fact, namely indirect or direct circumstantial evidence.
>
> [Emphasis added.]

[32] This description is based on the comments of Létourneau J.A. in *D & J Driveway Inc. v. Canada (M.N.R.)*, 2003 FCA 453, [2003] F.C.J. No. 1784 (QL), of which paragraph 12 is reproduced at paragraph 73 of the article on the contract of employment:

> Additionally, the duties assumed by the drivers were quite simple and specific: delivering the truck to the address indicated. No control was exercised over the

> way in which they carried out their duties. "The distinguishing feature of a contract of service" (now a contract of employment), Pratte J. wrote in *Gallant v. M.N.R.*, [1989] F.C.J. No. 330, "is not the control actually exercised by the employer over his employee but the power the employer has to control the way the employee performs his duties." In the case at bar, this control over the actual performance of the duties did not exist.

[33] Paragraphs 106 *et seq.* of the article on the contract of employment deal with the circumstantial evidence that may be used to demonstrate the existence of the power of direction or control that a payor could exercise on the employees. These indicia include mandatory presence at a place of work, the requirement of a work schedule, the requirement of an exclusive personal performance of work, the nature of the work to be completed and the degree of integration into the payor's activities. In respect of this last indicator, paragraphs 111 and 114 through 120 of the article on the contract of employment are here reproduced:

> [111] All the indicia that have just been separately analysed could, when considered together, show a high degree of integration of the worker into the activities of the payer. This is a slightly different approach from the one described above. What is looked for in this case are not the indicia of the exercise of a power of direction or control but rather those that show that the work performed by the worker is in large part integrated into the payer's activities. Such integration could, however, be in itself an indication of subordination. That is why it is dealt with separately here.
>
> . . .
>
> (i) Nature of the work
>
> [114] The fact that the worker occupies a line position in the payer's business, as a general manager or sales manager, for example, is an indication of the integration into the business and an indication of subordination.
>
> (ii) Number of hours and payers
>
> [115] If a worker devotes 35 or 40 hours of work a week to a single payer throughout the year — as in the preceding example of the dentist — one may conclude that this worker is integrated into the payer's business and subject to the payer's right of direction and control. This conclusion will be even more obvious if the payer is entitled to the exclusive use of the worker's services. However, if the worker provides his services to a number of payers, as in the case of a housekeeping aide who cleans private homes, it will be easier to conclude that the worker is independent and that the relationship of subordination essential to the existence of a contract of employment is absent. However, the ability to work for

other payers does not necessarily mean that a relationship of subordination does not exist, since it is possible to hold more than one job.

(iii) Location of the work

[116] The power to determine and control the place of performance of the work (the "where") has been discussed above. If there is no evidence to prove that this power has been exercised, the fact that the work was performed in the payer's establishment could be indicative of the integration of the work into the payer's business and, therefore, indicate a power of direction or control over the worker. For example, work performed by seamstresses in the payer's establishment would certainly be indicative of the existence of a relationship of subordination while work done in the seamstresses' homes could be indicative of their independence.

[117] Of course, some tasks require that the work be done outside the payer's establishment. Examples would be truck drivers or sales representatives. The relevance of the workplace is appreciably greater, then, in the case of work that can normally be done in the payer's establishment but is in fact done elsewhere.

(iv) Provision of materials, equipment and staff and reimbursement of expenses

[118] The fact that the payer provides the worker with all the materials, equipment and other things needed to carry out the work (such as staff) or that the payer reimburses the worker for work-related expenses can be yet another element that shows the worker's integration into the payer's business.

(v) Extent of the worker's decision-making power

[119] This element was also discussed earlier, in paragraph 110. It must be noted, however, that a worker's limited decision-making power could also be indicative of a certain degree of integration into the payer's business.

(vi) Ownership of the results of the work done by the worker

[120] Other indicia of the integration of the worker into the payer's business and thus of the existence of a power of direction or control, include the following fact situations:

- the clientele served by the worker is the payer's;
- the payer handles the collection of accounts;

> – the payer holds the intellectual property in the results of the worker's research.
>
> [Emphasis added.]
> [Footnotes omitted.]

[34] If this approach is applied to the facts of this appeal, there is no doubt that we are dealing with a contract of employment rather than a contract for services. Indeed, even if the Workers enjoy a great degree of independence with regard to the execution of their work, this independence is completely justified given the nature of their work: each of them is a department manager for the Payor. The fact that they generally dedicate more than 60 hours of work per week to the Payor's activities, the fact that they occupy senior positions in the hierarchy of the business and the fact that most of their duties are performed at the Payor's establishment, except in the case of Rock Lacroix, are serious indicators of the high degree of integration of the Worker into the Payor's business and, therefore, of the existence of a relationship of subordination between the three Workers and the Payor.

[35] In the case of Rock Lacroix, it is perfectly natural that, in the course of his duties as general manager — he was also responsible for marketing — that he often be required to be absent from the Payor's establishment. Even though the Workers suggested that they did not have to answer to anyone or that they seldom did, I firmly believe that the reality is completely different. Indeed, if one of the Workers ceased to adequately look after the department he was in charge of, — for example if he abused employees — the Payor would exercise its power of direction or control to ensure that the work assigned to the Worker was properly executed. I therefore have no hesitation in concluding that there was a relationship of subordination and therefore a contract of employment.

[36] The argument put forward by the Workers' agent, to the effect that each of them provided his services under a contract for services, seems to me completely groundless. He argued moreover that the corporate veil had to be lifted to conclude essentially that the Payor's business was that of each of the Workers. Taking the agent's reasoning to the extreme, it would have to be concluded that each of the three Workers operated his own business, since they claimed to each work independently from each other. Yet the reality is completely different. There is only one business and it is operated by the Payor. It is in no way justified in this case to raise the corporate veil.

Exclusion due to non-arm's length relationship

[37] As seen earlier, even if the Workers are employed by the Payor, this employment may be excluded from the definition of "insurable employment" for the purposes of section 5 of the Act because they are not dealing with the Payor at arm's length. However subsection 5(3) of the Act grants the Minister the discretionary power to determine whether there is an arm's length relationship for the purposes of the exclusion of paragraph 5(2)(*i*) of the Act.

[38] In this case, it is clear that under the rules of the *Income Tax Act*, the three workers constitute a group of related persons who together control the Payor via their respective holding companies. As a result, they are persons related to the Payor and not at arm's length with the Payor. The Minister therefore must determine whether he is satisfied that it is reasonable to conclude that these persons would have entered into a substantially similar agreement if they had been dealing with each other at arm's length, given all the circumstances, including remuneration paid, conditions of employment as well as the duration, nature and importance of the work performed. As clearly evidenced by the Report on an appeal, the appeals officer exercised this power.

[39] The role vested in this Court has been the subject of several case law decisions, in particular by the Federal Court of Appeal. I dealt with this issue in paragraph 35 of the decision I rendered in *Louis-Paul Bélanger* v. *M.N.R.*, 2005 TCC 36:

> [35] The role vested in this Court is to carry out a two-stage analysis. It must first verify whether the Minister exercised his discretion appropriately. As stated in *Jencan*, to which Malone J. refers in *Quigley Electric*, the decision resulting from the exercise of the Minister's discretion can only be changed if the Minister acted in bad faith, failed to consider all of the relevant circumstances, or took into account irrelevant factors. Where such a situation exists, the Court may decide that "the conclusion with which the Minister was "satisfied" [no longer] seems reasonable" and intervene by ruling on the application of subsection 5(3) of the Act. The Federal Court of Appeal said the following in *Jencan*:
>
> > 31 The decision of this Court in *Tignish, supra*, requires that the Tax Court undertake a two-stage inquiry when hearing an appeal from a determination by the Minister under subparagraph 3(2)(*c*)(ii). At the first stage, the Tax Court must confine the analysis to a determination of the legality of the Minister's decision. If, and only if, the Tax Court finds that one of the grounds for interference are established can it then consider the merits of the Minister's decision.

As will be more fully developed below, it is by restricting the threshold inquiry that the Minister is granted judicial deference by the Tax Court when his discretionary determinations under subparagraph 3(2)(*c*)(ii) are reviewed on appeal. Desjardins J.A., speaking for this Court in *Tignish, supra*, described the Tax Court's circumscribed jurisdiction at the first stage of the inquiry as follows:

> Subsection 71(1) of the Act provides that the Tax Court has authority to decide questions of fact and law. The applicant, who is the party appealing the determination of the Minister, has the burden of proving its case and is entitled to bring new evidence to contradict the facts relied on by the Minister. The respondent submits, however, that since the present determination is a discretionary one, the jurisdiction of the Tax Court is strictly circumscribed. The Minister is the only one who can satisfy himself, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions and importance of the work performed, that the applicant and its employee are to be deemed to deal with each other at arm's length. Under the authority of *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, contends the respondent, unless the Minister has not had regard to all the circumstances of the employment (as required by subparagraph 3(2)(*c*)(ii) of the Act), has considered irrelevant factors, or has acted in contravention of some principle of law, the court may not interfere. Moreover, the court is entitled to examine the facts which are shown by evidence to have been before the Minister when he reached his conclusion so as to determine if these facts are proven. But if there is sufficient material to support the Minister's conclusion, the court is not at liberty to overrule it merely because it would have come to a different conclusion. If, however, those facts are, in the opinion of the court, insufficient in law to support the conclusion arrived at by the Minister, his determination cannot stand and the court is justified in intervening.
>
> In my view, the respondent's position is correct in law... [*Tignish*, *supra*, note 10, par. 8 and 9.].

32 In *Ferme Émile Richard et Fils Inc. v. Minister of National Revenue et al*., this Court confirmed its position. In *obiter dictum*, Décary J.A. stated the following:

> As this court recently noted in *Tignish Auto Parts Inc. v. Minister of National Revenue,* July 25, 1994, A-555-93, F.C.A., not reported, an appeal to the Tax Court of Canada in a case involving the application of s. 3(2)(c)(ii) is not an appeal in the strict sense of the word and more closely resembles an application for judicial review. In other words, the court does not have to consider whether the Minister's decision was correct: what it must consider is whether the Minister's decision resulted from the proper exercise of his discretionary authority. It is only where the court concludes that the Minister made an improper use of his discretion that the discussion before it is transformed into an appeal *de novo* and the court is empowered to decide whether, taking all the circumstances into account, such a contract of employment would have been entered into between the employer and employee if they had been dealing at arm's length. [(1994), 178 N.R. 361 (F.C.A.) at par. 362 and 363].

33 Section 70 provides a statutory right of appeal to the Tax Court from any determination made by the Minister under section 61, including a determination made under subparagraph 3(2)(*c*)(ii). The jurisdiction of the Tax Court to review a determination by the Minister under subparagraph 3(2)(*c*)(ii) is circumscribed because Parliament, by the language of this provision, clearly intended to confer upon the Minister a discretionary power to make these determinations. The words "if the Minister of National Revenue is satisfied" contained in subparagraph 3(2)(*c*)(ii) confer upon the Minister the authority to exercise an administrative discretion to make the type of decision contemplated by the subparagraph. Because it is a decision made pursuant to a discretionary power, as opposed to a quasi-judicial decision, it follows that the Tax Court must show judicial deference to the Minister's determination when he exercises that power. Thus, when Décary J.A. stated in *Ferme Émile, supra,* that such an appeal to the Tax Court "more closely resembles an application for judicial review", he merely intended, in my respectful view, to emphasize that judicial deference must be accorded to a determination by the Minister under this provision unless and until the Tax Court finds that the Minister has exercised his discretion in a manner contrary to law.

. . .

37 On the basis of the foregoing, the Deputy Tax Court Judge was justified in interfering with the Minister's determination under subparagraph 3(2)(*c*)(ii) only if it was established that the Minister exercised his discretion in a manner that was contrary to law. And, as I already said, there are specific grounds for interference implied by the requirement to exercise a discretion judicially. The Tax Court is justified in interfering with the Minister's determination under subparagraph 3(2)(*c*)(ii)-by proceeding to review the merits of the Minister's determination-where it is established that the Minister: (i) acted in bad faith or for an improper purpose or motive; (ii) failed to take into account all of the relevant circumstances, as expressly required by paragraph 3(2)(*c*)(ii); or (iii) took into account an irrelevant factor.

. . .

41 [...]Although the claimant, who is the party appealing the Minister's determination, has the burden of proving its case, [see *Aubut v. Minister of National Revenue* (1990), 126 N.R. 381 (F.C.A.) and *Borsellino and Salvo v. Minister of National Revenue* (1990), 120 N.R. 77 (F.C.A.)] this Court has held unequivocally that the claimant is entitled to bring new evidence at the Tax Court hearing to challenge the assumptions of fact relied upon by the Minister [*Tignish*, *supra*, note 10, at p. 9].

42 Thus, while the Tax Court must exhibit judicial deference with respect to a determination by the Minister under subparagraph 3(2)(c)(ii)-by restricting the threshold inquiry to a review of the legality of the Minister's determination-this judicial deference does not extend to the Minister's findings of fact. To say that the Deputy Tax Court Judge is not limited to the facts as relied upon by the Minister in making his determination is not to betray the intention of Parliament in vesting a discretionary power in the Minister. [[See *Canada (Attorney General) v. Dunham*, [1997] 1 F.C. 462 (C.A.), at pp. 468-469, per Marceau J.A. (in the context of the right of appeal to the Board of Referees from a decision of the Unemployment Insurance Commission)]. In assessing the manner in which the Minister has exercised his statutory discretion, the Tax Court may have regard to the facts that have come to its attention during the hearing of the appeal. . . .

50 The Deputy Tax Court Judge, however, erred in law in concluding that, because some of the assumptions of fact relied upon by the Minister had been disproved at trial, he was automatically entitled to review the merits of the determination made by the Minister. Having found that certain assumptions relied upon by the Minister were disproved at trial, the Deputy Tax Court Judge should have then asked whether the remaining facts which were proved at trial were sufficient in law to support the Minister's determination that the parties would not have entered into a substantially similar contract of service if they had been at arm's length. If there is sufficient material to support the Minister's determination, the Deputy Tax Court Judge is not at liberty to overrule the Minister merely because one or more of the Minister's assumptions were disproved at trial and the judge would have come to a different conclusion on the balance of probabilities. In other words, it is only where the Minister's determination lacks a reasonable evidentiary foundation that the Tax Court's intervention is warranted. [See *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748, at pp. 776-777, per Iacobucci J]. An assumption of fact that is disproved at trial may, but does not necessarily, constitute a defect which renders a determination by the Minister contrary to law. It will depend on the strength or weakness of the remaining evidence. The Tax Court must, therefore, go one step further and ask itself whether, without the assumptions of fact which have been disproved, there is sufficient evidence remaining to support the determination made by the Minister. If that question is answered in the affirmative, the inquiry ends. But, if answered in the negative, the determination is contrary to law, and only then is the Tax Court justified in engaging in its own assessment of the balance of probabilities. Hugessen J.A. made this point most recently in *Hébert, supra*. At paragraph 5 of his reasons for judgment, he stated:

> In every appeal under section 70 the Minister's findings of fact, or "assumptions", will be set out in detail in the reply to the Notice of Appeal. If the Tax Court judge, who, unlike the Minister, is in a privileged position to assess the credibility of the witnesses she has seen and heard, comes to the conclusion that some or all of those assumptions of fact were wrong, she will then be required to determine whether the Minister could legally have entered into as he did on the facts that have been proven. That is clearly what happened here and we are quite unable to say that either the judge's findings of fact or the conclusion that the Minister's determination was not supportable, were wrong.

[Emphasis added.]

[40] Does the decision rendered by the Minister via the appeals officer still seem reasonable after hearing the Workers' evidence? Before answering this question, it is important to again analyze the wording of paragraph 5(3)(*b*) of the Act. What the Minister had to determine was: could it appear reasonable to him that the Workers would have entered into a substantially similar agreement with the Payor if they had been dealing with the Payor at arm's length? It is not a matter of determining whether the work conditions necessarily reflect normal market conditions, although that can generally be a relevant circumstance to be taken into account.

[41] I emphasize this nuance because we are dealing with three workers who, at the same time, through their respective holding companies, each own one third of the Payor. They are in a way the indirect owners of the Payor and its business. When paragraph 5(3)(*b*) of the Act requires that it must be determined whether the contract of employment would have been substantially similar in an arm's length relationship, I believe it must be taken into account that these are three workers who are at the same time the indirect owners of the Payor. Individually, none of the three control the Payor and, therefore, had they not been related, none of the Workers would have been a person related to the Payor within the meaning of the Tax Act and they would then be at arm's length. Indeed, paragraph 5(3)(*b*) of the Act does not indicate that the financial interests that the workers hold in the company must be ignored. Therefore, it is possible to imagine three workers with no family relation between them, each holding one third of the capital stock of the Payor and remaining at arm's length with the Payor.[6] The issue to be determined by the Minister could therefore be expressed as follows: if each of the Workers had

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[6] It is important to stress the fact that because a person is a shareholder of his or her employer does not necessarily mean that they are not dealing with each other at arm's length. An employer's shares could be held by five or ten employees of that employer. Assuming the shares are distributed equally, none of the shareholders would be able to dictate the Payor's course of action and therefore none of them would be able to control it. In this case, unless there are special circumstances, it could not be concluded either that there is a factual non-arm's length relationship. For a disussion of the existence of a factual non-arm's length relationship between shareholders at arm's length with the company, see *Gestion Yvan Drouin Inc.* v. *The Queen*, 2001 DTC 72; [2001] 2 C.T.C. 2315, at paras. 73 *et seq.* and in particular paras. 80 *et seq*. In this case, I do not believe that there are any indicators that could demonstrate the existence of a factual non-arm's length relationship between the Workers and the Payor.

held one third of the Payor's shares while remaining at arm's length with the Payor, would they have entered into a substantially similar agreement?

[42] It is known in law that workers who are both employees and owners (as shareholders) of the employer behave differently from those who are just employees. Indeed, the remuneration of an employee-shareholder may take into consideration the fact that unpaid wages will become non-distributed profits that may, for example, be declared as dividends at a later date. Moreover, employees often prefer to receive dividends rather than a salary when they are shareholders of their employer because that is often more advantageous for taxation purposes. However, to be entitled to contribute to a registered retirement savings plan, it is necessary (in general) that these employee-shareholders receive a salary. That is the context in which employees work who are also shareholders of their business and the context which the Court must take into account. In this case, it is not surprising to note that the income that the Workers receive from a job may vary from one year to the next. As shareholders, the Workers may consider the financial needs of their company, in particular whether it must face a difficult economic situation.

[43] Does the Minister's decision still seem reasonable? Was it reasonable for the Minister to conclude that the worker-shareholders would have entered into a substantially similar contract of employment had they been at arm's length with the Payor? In my opinion, the Workers did not succeed in demonstrating that the Minister's decision seems unreasonable, given the circumstances of this matter. This is not a case where the Court should intervene to substitute its opinion for that or the Minister. If the three Workers had been hired as mere labourers without holding any interests in the Payor, whether as granite workers or machinery maintenance workers, whose work is normally paid by the hour, they would not have accepted, I admit, to work overtime without being paid. However, these are people in positions where the work is not paid by the hour, but rather yearly or at least weekly. It is perfectly normal for workers in such positions to be paid as the Workers were in this case and for them to have a great deal of independence in deciding when to perform their duties. Moreover, due to their involvement as executives of the Payor and as its indirect shareholders, they worked during normal vacation periods. This is perfectly normal behaviour for executives, even when dealing at arm's length with the Payor. However, if one of the Workers had only worked three hours per week throughout the year while receiving the same salary as the others who were working 65, the situation could have been very different. Remuneration determined based on the needs of the employees (supposing this was

indeed the case) is also not unusual for workers who are also owners of the Payor. Furthermore, it is perfectly common for an executive to use a credit card (even without a credit limit) for the benefit of his or her employer.

[44] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 27th day of March 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 4th day of July 2007
Gibson Boyd, Translator

CITATION:	2007TCC81
COURT FILE NUMBERS:	2006-1785(EI), 2006-1793(EI) and 2006-1794(EI)
STYLES OF CAUSE:	ROCK LACROIX v. M.N.R. and GRANIT PLUS INC.; YVAN LACROIX v. M.N.R. and GRANIT PLUS INC. and PIERRE LACROIX v. M.N.R. and GRANIT PLUS INC.
PLACE OF HEARING:	Sherbrooke, Quebec
DATE OF HEARING:	December 1, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	March 27, 2007

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