Docket: 2002-4649(EI)

BETWEEN:

MATÉRIAUX ÉCONOMIQUES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DANIEL ST-PIERRE,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 25, 2003, at Montréal, Quebec

Before: The Honourable J.F. Somers, Deputy Judge

Appearances:

Representing the Appellant:	Alain Savoie
Counsel for the Respondent:	Nancy Dagenais
For the Intervener:	The Intervener himself

JUDGMENT

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

Signed at Ottawa, Canada, this 8th day of July 2003.

"J.F. Somers"

Deputy Judge Somers

Translation certified true
on this 3rd day of February 2004.

John March, Translator

Citation: 2003TCC449
Date: 20030708
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REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] This appeal was heard at Montréal, Quebec, on April 25, 2003.

[2] The appellant institutes an appeal from the decision of the Minister of National Revenue (the "Minister") according to which the employment held by Daniel St-Pierre, the worker, when in its service during the period in issue, from January 1 to December 7, 2001, was insurable because it met the requirements of a contract of service; there was an employer-employee relationship between the appellant and the worker.

[3] Subsection 5(1) of the Employment Insurance Act (the "*Act*") reads in part as follows:

> 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;
>
> [...]

[4] The burden of proof is on the appellant. It had to show on a preponderance of proof that the Minister's decision was unfounded in fact and in law. Each case stands on its own merits.

[5] In making his decision, the Minister relied on the following assumptions of fact, which were admitted or denied:

> [TRANSLATION]
>
> (a) the appellant was incorporated on October 1, 1998, following a merger; (admitted)
>
> (b) the appellant operated two divisions, one in the field of concrete sawing and drilling and the other in water treatment and septic tank manufacturing; (admitted)
>
> (c) the persons who held the voting shares of the appellant were:
>
> | | |
> |---|---|
> | René St-Pierre | 75 percent of shares |
> | the worker | 25 percent of shares (admitted) |
>
> (d) René St-Pierre is the worker's brother; (admitted)
>
> (e) the business is operated year round; (admitted)
>
> (f) the appellant had approximately 40 employees; (admitted)
>
> (g) the worker was the vice-president and person responsible for the water treatment division; (admitted)
>
> (h) the worker worked year round; (admitted)

(i) the worker's duties were to prepare bids, train technicians, design new products and supervise all treatment division staff; (denied)

(j) the worker had no fixed work schedule; (admitted)

(k) the worker rendered services to the appellant 40 to 60 hours a week; (denied)

(l) the worker received fixed remuneration of $1,153.85 a week paid by direct deposit; (admitted)

(m) the worker had an automobile supplied by the appellant; (admitted)

(n) all the worker's expenses related to his duties were borne by the appellant; (admitted)

(o) the worker was not personally liable for the appellant's loans, leases or contracts; (denied)

(p) the worker had no chance of profit or risk of loss apart from his salary; (denied)

(q) the worker worked on the premises of the appellant 90 percent of the time; (denied)

(r) all the equipment that the worker used belonged to the appellant; (admitted)

(s) the services rendered by the worker formed an integral part of the appellant's activities. (admitted)

[6] The appellant was incorporated on October 1, 1998, following a merger. The appellant operated two divisions, one in the field of concrete sawing and drilling and the other in water treatment and septic tank manufacturing. The shareholders of the appellant were René St-Pierre and the worker, who held respectively 75 percent and 25 percent of the voting shares; the two shareholders are brothers.

[7] The business is operated year round and has approximately 40 employees. The worker was the vice-president of the appellant and the person responsible for the water treatment division. He had no fixed scheduled and worked 40 to 60 hours a week year round for fixed weekly remuneration of $1,153.85, which he determined himself. In addition to his salary, he received an RRSP (registered retirement savings plan) from the appellant every year, the amount of which was based on the company's performance. In that year, he received $13,000.

[8] The worker stated in his testimony that he managed the water treatment division, supervised the plant and hired employees, of whom there were 15 in summer and approximately eight to 10 in winter. The worker belongs to a number of associations for the purpose of making his company visible and attends conferences in other countries, including France and the United States.

[9] The worker obtains an identity card and a building contractor's licence every year.

[10] According to the worker's submission, he only takes vacation at Christmas, in addition to a few leave days when he attends conferences, whereas the other, arm's length employees have two to four weeks' vacation a year. He stated that he took three to four days' vacation with his wife and three children during the construction vacation weeks. He added that, because of his responsibilities during peak periods, he could work as much as 80 hours a week, approximately 40 hours during slower periods.

[11] The appellant provided the worker with a vehicle worth approximately $50,000 and paid the related automobile expenses. The worker used the computers, one at home, the other at the office, that were the property of the appellant.

[12] The worker stated that he did not sign personal guarantees for the appellant and added that he had turned down employment offers from American companies offering him annual remuneration of $50,000 to $100,000.

[13] In cross-examination, the worker admitted that he had completed a questionnaire (Exhibit I-1) in which he stated that his hours of work varied between 40 and 60 a week, whereas he said at the hearing that those figures represented an average. The answer to question 2 in that questionnaire reads in part as follows:

> [TRANSLATION]
>
> Any other employee performing the same work would receive less remuneration and fewer benefits than Daniel for similar work and responsibilities.

[14] The worker also stated in cross-examination that, based on their seniority, other employees received RRSPs from the appellant of lesser amounts than his.

[15] The Notice of Appeal (Exhibit I-2) reads:

> [TRANSLATION]
>
> Daniel St-Pierre's salary for such duties, responsibilities and commitments is lower than, and not at all comparable to what is offered in the market; the conditions would not be accepted by a person dealing at arm's length;

[16] The worker admitted that he had had a conversation with the appeals officer whose report was filed as Exhibit I-3. That report reads in part as follows under the heading "WORKER'S VERSION", at page 4:

> [TRANSLATION]
>
> As to his salary, we asked him whether such a salary would be paid to an equally qualified third person.
>
> He thought so. He said that his salary was not unreasonable or too high in view of his duties and responsibilities.
>
> He said that he regularly did business with engineering firms, and he thought that their salaries were appreciably the same.

[17] In cross-examination, the worker stated that he did not remember that part of the questionnaire. He added that only part of his work was done as a consultant.

[18] René St-Pierre, the worker's brother, testified at the hearing of this appeal. He stated that he managed the other division of the business, concrete sawing and drilling, and his annual salary was $75,000.

[19] This witness was not all aware of the worker's movements, despite the fact the two worked in the same administrative offices. He said that the worker had a free hand in managing his division since it was he who had created it.

[20] According to his submission, the administrative decisions were made in a collegial manner at quarterly meetings attended by this witness, the worker and the controller.

[21] Nathalie Dorais-Pagé, an appeals officer with the Canada Customs and Revenue Agency, gave her version of the facts at the hearing of this appeal. She

said that, in preparing her report (Exhibit I-4), she had contacted a certain Nicole Charbonneau of Conseil Taxes - representing the appellant - on May 2 and 3, 2002, June 20, 2002 and July 5, 2002, in addition to the telephone conversations she had with René St-Pierre on May 30, 2002, and the worker on September 18 of that same year.

[22] According to that report, the appeals officer obtained certain information from René St-Pierre and the worker, including the following:

> [TRANSLATION]
>
> Gross monthly sales since January 1, 2001, have amounted to $3,489,681.00 for the sawing and drilling division and $1,731,845.00 for the treatment division.
>
> The worker's remuneration was $1,153.85 a week paid by direct deposit. In determining his remuneration, Daniel St-Pierre considered the profits generated by the treatment division. He increased his salary based on the division's growth.
>
> Mr. St-Pierre worked an average of 60 hours a week to perform all his duties. He spread his work over an entire week. He had no pre-established schedule; he determined his own hours of work without considering those of anyone else.
>
> The business plan and position were created on the basis of Daniel St-Pierre's skills. Mr. St-Pierre is entirely independent in his duties. He is subject to no supervision and is accountable to no one.

[23] The appeals officer also gathered some information during a telephone conversation with the worker, including the following:

> [TRANSLATION]
>
> The company is divided into two business lines, which are entirely independent and self-contained. The treatment division represents approximately 25 percent of the payer's level of business activity.
>
> Mr. St-Pierre works between 60 and 80 hours a week. His home computer is networked with the office.
>
> In addition to the remuneration, the payer buys RRSPs in the names of the two shareholders of the company. The shareholders

> receive group insurance and life insurance. Daniel St-Pierre has a vehicle supplied by the payer. The salaries of the shareholders are based on the divisions' profits.
>
> Daniel St-Pierre considers himself the directing mind of the treatment division. However, he increasingly delegates duties to François Gélinas.

[24] The following information noted in the appeals officer's report comes from the CPT-1 form (Exhibit I-1):

> [TRANSLATION]
>
> Any other employee performing the same work would receive less remuneration and fewer benefits than Daniel for similar work and responsibilities.
>
> Daniel is not supervised in the performance of his duties and responsibilities in the business. He enjoys almost total independence in performing his duties.
>
> Daniel is not responsible for the losses, expenses or damage he might cause, barring obvious wrongful intent.
>
> Daniel's experience in his brother's business is a major contribution to the company's success. Nevertheless, the salary and working conditions in which he performs his duties grant him very special status.

[25] Under the heading "Analysis of Documents", the appeals officer noted that "the number of employees of the payer declined from 46 in 1999 to 41 in 2000, and increased to 80 in 2001" and that, according to the appellant's payroll journal, the treatment division had nine workers and income varying from $12,810 to $57,180 in 2000 and nine workers on the payroll and income varying from $15,363 to $61,124 in 2001. She also noted that the following contributions were made to RRSPs in the shareholders' names for 1999, 2000 and 2001: $6,750, $6,750 and $10,485 respectively for the worker and $13,500, $13,471 and $13,500 for René St-Pierre.

[26] In rebuttal, René St-Pierre stated that, if he had had to hire a person dealing at arm's length to replace the worker, the conditions would not have been the same. He added that the appellant would not pay the same amount into an RRSP for a

person dealing at arm's length with the company. He added that a third party would require more vacation than the worker enjoyed.

[27] The point for determination is whether there was a contract of service between the appellant and the worker, and, for that purpose, the elements that constitute the relationship between the parties must be analyzed.

[28] In Wiebe Door Services Ltd. v. *M.N.R.*, [1986] 3 F.C. 553, the Federal Court of Appeal established four tests for determining the contractual relationship between the parties: (a) control, (b) ownership of the tools, (c) chance of profit or risk of loss and (d) integration of the employee's work into the employer's business.

(a) Control

[29] The evidence revealed that the worker had almost complete freedom of action in his division of the business. The important decisions concerning the business were made by the front office; administrative decisions were made in a collegial manner at quarterly meetings attended by the worker, his brother René St-Pierre and the controller. The two brothers consulted each other if necessary; their offices were located on the same premises. Even if the worker was not in fact supervised, the employer had a sufficient supervisory right for there to be a contract of service.

(b) Ownership of Tools

[30] The evidence is irrebuttable: the equipment and tools belonged to the appellant.

(c) Chance of Profit or Risk of Loss

[31] The worker received a regular salary in addition to other benefits related to his work; there was therefore no chance of profit or risk of loss.

(d) Integration of the Employee's Work into the Employer's Business

[32] The worker worked for the appellant; the appellant could not have operated without his direct management. The worker was therefore integrated into the appellant's operations.

[33] Upon consideration of the four elements cited above, it is reasonable to conclude that there was a contract of service between the appellant and the worker.

[34] The appeals officer examined the worker's conditions of employment because the worker was related to a group that controlled the appellant in accordance with paragraph 5(2)(*i*) and subsection 5(3) of the *Act* and section 251 of the *Income Tax Act*.

[35] In *Roxboro Excavation Inc. v. Canada (Minister of National Revenue - M.N.R.)*, [1999] T.C.J. No. 32, Judge Tardif of our Court wrote as follows:

> In such cases, it is essential to draw a very clear distinction between what is done as a shareholder and/or director and what is done as a worker or non-management employee. In the case at bar, that distinction is especially important.
>
> [...]
>
> Was there a relationship of subordination between the interveners and the company in and as regards the performance of the work they did within their respective roles? I believe that the company, which oversaw the work done by the Théorêt brothers, had the full right and power to influence that work. The fact that the company did not exercise that power to control and that those who performed the work did not think they were subject to such a power or feel like they were subordinate in performing their work does not have the effect of eliminating, reducing or limiting the power to influence their work.
>
> [...]
>
> In the case at bar, all the circumstances of the employment and the terms and conditions suggest that there was a genuine contract of service that was in no way affected by the non-arm's length relationship; in other words, the company did not confer any benefits that it would not have conferred on shareholders who were at arm's length. Conversely, the Théorêt brothers were not penalized because of their family status.
>
> The weight of the evidence is that the Théorêt brothers' concern was the company's interests; they stood together and were determined to do everything they could to maintain the company's financial health. How did the fact that they were brothers change their relationship with the company? There was no evidence adduced on this point.

> [...]
>
> > Furthermore, it is fairly common to see co-shareholders who, because of their status, discipline themselves in the interests of the company in which they are shareholders.

That decision by Judge Tardif was confirmed by the Federal Court of Appeal ([2000] F.C.J. No. 799).

[36] The worker received fixed weekly remuneration of $1,153.85 paid by direct deposit, and his brother, René St-Pierre, was responsible for the other division of the business, received a weekly salary of $1,718; no sound evidence was brought showing that those salaries were unreasonable.

[37] The worker received certain benefits, such as the use of an automobile and the expenses relating to that automobile were borne by the appellant as well as group and life insurance. In addition, the worker received RRSPs paid for by the appellant every year. Other workers employed by the appellant also received an RRSP each year, but the amount was lower than that granted to the two shareholders; this variance in the RRSP amounts may be explained on the basis of the worker's increased responsibilities and work.

[38] The worker took no regular vacation as the appellant's other employees did; he took leave at Christmas and a few days during the year to attend conferences outside the country. This way of taking vacation was not imposed on him by the appellant; it was he who decided on it.

[39] The worker held an executive position in the business and had an interest in its success, which explains why he worked long and irregular hours.

[40] It cannot be found on the evidence brought before the Court that the Minister improperly exercised his discretion. The appellant was unable to show on a preponderance of proof that the Minister acted in a wilful or arbitrary manner; he indeed exercised his discretion in accordance with paragraph 5(2)(*i*) and subsection 5(3) of the *Act*.

[41] The appellant and the worker were related persons; the employment held by the worker is insurable since a similar contract of employment would have been entered into if the parties had been dealing with each other at arm's length.

[42] The appeal is dismissed and the decision rendered by the Minister is confirmed.

Signed at Ottawa, Canada, this day of July 2003.

Deputy Judge Somers

Cases considered

Bayside Drive-In Ltd. v. Canada (Minister of National Revenue - M.N.R.), [1997] F.C.J. No. 1019;
Bérubé v. Canada (Minister of National Revenue - M.N.R.), [1998] T.C.J. No. 1032;
Dockerty v. Canada (Minister of National Revenue - M.N.R.), [2000] T.C.J. No. 690;
Duchesne v. Canada (Minister of National Revenue - M.N.R.), [1995] T.C.J. No. 73;
Industries J.S.P. Inc. v. Canada (Minister of National Revenue - M.N.R.), [1999] T.C.J. No. 423.

Translation certified true
on this 3rd day of February 2004.

John March, Translator