Docket: 1999-3937(EI)

BETWEEN:

ALAIN MÉTHOT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *Edgar Sénéchal* 1999-3939(EI) on May 8, 2003, at Percé, Quebec

Before: the Honourable Judge Alain Tardif

Appearances

Counsel for the Appellant: M[e] Guy Cavanagh

Counsel for the Respondent: M[e] Marie-Claude Landry

[OFFICIAL ENGLISH TRANSLATION]

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed, and the decision of the Minister of National Revenue in respect of the appeal brought before him under section 91 of the *Act* is varied, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 17th day of July 2003.

"Alain Tardif"

Judge Tardif

Translation certified true
on this 30th day of January 2004.

Leslie Harrar, Translator

Docket: 1999-3939(EI)

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And

THE MINISTER OF NATIONAL REVENUE,

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Citation: 2003TCC479
Date: 20030717
Dockets: 1999-3937(EI)
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REASONS FOR JUDGMENT

Judge Alain Tardif

[1] The parties agreed to proceed on common evidence in the two cases. The appeals concern the insurability of the work performed by the appellants when they worked for the company "Fermes de Toit Jomar Inc." In the case of the appellant Alain Méthot (1999-3937(EI)), the period at issue extends from January 12 to December 11, 1998; as for the other appellant, Edgar Sénéchal (1999-3939(EI)), the period at issue is between January 12 and December 18, 1998.

[2] To support and justify the decisions that are the subject of the appeals, the respondent assumed the facts set out as follows:

> [Translation]
>
> (a) the payer, Les Fermes de Toit Jomar Inc., was incorporated on July 9, 1990;

(b) the principal activities of the payer are the manufacture of roof trusses, doors, frames and windows;

(c) the shareholders of the payer are

Marcel Sénéchal	34%
Edgar Sénéchal	33%
Alain Méthot	33%

(d) Alain Méthot is the brother-in-law of Edgar Sénéchal who is the brother of Marcel Sénéchal;

(e) the appellants primarily handled the following tasks: preparing estimates, taking orders and making purchases and helping when the parts were assembled;

(f) the appellants primarily took care of the cutting and assembly of the parts manufactured by the payer;

(g) the plant where the trusses are manufactured is situated on a property belonging to Edgar Sénéchal;

(h) the garage where the doors, frames and other material are stored is the property of Alain Méthot;

(i) the appellants did not collect any rental income from the payer for the property and the garage that they provided;

(j) the appellants each made their own pickup trucks available to the payer, without compensation or reimbursement for the expenses incurred on the payer's behalf;

(k) the appellants purchased tools, namely a press, a large table and a saw, from a bankrupt company for the sum of $3,000 to $4,000, and lent them to the payer, without demanding rent for their use;

(l) a $25,000 line of credit was personally guaranteed by Alain Méthot and Edgar Sénéchal;

(m) the payer's cheques were signed by the appellants;

(n) apart from $34, representing the purchase of $34 shares at $1 each, the other shareholder, Marcel Sénéchal, made no investment in the payer's business;

(o) on the financial statements ending December 31, 1997, there is an interest-free loan owed to the directors for $10,720, which does not provide for any method of payment; only the appellants were responsible for this loan to the payer;

(p) Marcel Sénéchal is the only one of the three shareholders with no expertise in the payer's field of operations;

(q) Marcel Sénéchal claims that he invests more time in the business now that he has retired after being a high school math teacher; he says he works from 6 to 8 hours a week;

(r) the appellants now claim that Marcel Sénéchal supervises them despite the fact that he has no expertise in the field and that the appellants has operated the business for many years without Marcel Sénéchal;

(s) only the appellants are remunerated for their work, and Marcel Sénéchal does not receive a salary or dividends;

(t) Ghislaine Méthot, the wife of Edgar Sénéchal and the sister of Alain Méthot, handled the accounting with Marcel Sénéchal;

(u) the payer's actual control was, in fact, effected by the appellants.

[3] The facts alleged in subparagraphs 5(a), (c), (d), (e), (f), (l), (o), (q) and (t) were admitted; the remainder were denied.

[4] The evidence disclosed that the status of the appellants with respect to their insurability had already been the subject of a ruling. Evidently disappointed and embittered by the experience, the appellants had refused to cooperate with the formula suggested by the person responsible for the file, namely, questions and answers in the course of a telephone conversation.

[5] The appellants' attitude and their conduct in refusing to answer questions by telephone was interpreted adversely by the person responsible for the files who then quickly wound up his investigation and refused to agree with the appellants' request to send them the questionnaire in writing.

[6] The question-and-answer formula is an acceptable method that may prove to be less convincing because of the lack of spontaneity in the answers. On the other

hand, nervousness and intimidation can also impair the quality of answers provided spontaneously in a telephone conversation.

[7] Both methods have one significant defect, however; that is, the complete absence of body language, which is often decisive in assessing the value of the relevant facts in general.

[8] In the case at bar, the Court was able to assess the testimony from every aspect so that it could draw conclusions.

[9] The preponderance of the evidence submitted established that the company, “Fermes de Toit Jomar Inc. had not been incorporated in order to deceive or to be a bogus legal personality. The company grew in a normal way, within quite acceptable parameters considering the shareholders’ education and corporate skills.

[10] The evidence did not highlight any fact or element that was of a nature to discredit the corporate reality. I did not note or see any irregularities or serious misconduct that could give rise to an adverse impact such that the corporate reality needed to be disregarded.

[11] To be sure, the respondent argued a certain number of factors in order to discredit the legitimacy and even the reality of the company. I refer in particular to the following points:

- the lack of an indication that rent was paid for the premises where the financial statements were prepared; and

- the lack of an investment by one of the shareholders;

[12] As for the argument concerning the non-payment of rent, this is the respondent’s interpretation arising from the lack of an indication in the financial statements to that effect for certain years, confirmed by the absence of any acknowledgment of such rental income on the recipients’ tax returns. However, the evidence showed that this was a nominal rent that had been agreed to for a two-year period, supported by cheques corresponding with the amounts agreed to, which were issued and endorsed.

[13] As for the lack of a dollar investment by one of the shareholders, there is nothing in the *Act* that condemns such a practice. It is not uncommon, moreover,

for individual skills or expertise to take the place of a contribution at the time a company is created.

[14] In the case at bar, the personality and education of Marcel Sénéchal, a retired teacher, were an asset for the company. Furthermore, his testimony established that he had a relatively sound acquaintance with the company's affairs, that he took an interest in them and participated actively in them.

[15] The findings highlighted by the respondent do not enable decisive conclusions to be reached. Certainly, the appellants had a formal obligation to report all income sources, including any rental income, regardless of how small it was. Concealing such income could eventually justify notices of reassessment, but is certainly not sufficient to conclude that the company was a sham.

[16] As for the lack of investment, the evidence disclosed that the shareholder, Marcel Sénéchal, did not make a cash investment, and he hastened to add that his investment corresponded with his experience and primarily his training.

[17] A retired teacher, Marcel Sénéchal was clearly an articulate person who was well informed and evidently had ideas about how to organize, administer and supervise the operations of a corporate entity.

[18] As for the appellants, they had considerable experience and cutting-edge skills in the type of work that characterized the company's output. Formerly employed in that sector with businesses that had since closed, they were essential to the operations of the business, whose main income came from the manufacture of roof trusses for which the appellants were the main contractors.

[19] Did they possess the qualities, knowledge and experience to perform the work in the context of the company's operations? Perhaps, but the presence of the shareholder Marcel Sénéchal gave them a sense of security and a feeling of comfort since the latter had greater aptitude for the administrative, clerical and representative sides of the business.

[20] There is no doubt that the involvement and participation of the shareholder Marcel Sénéchal was a very important element, largely making up for the lack of investment.

[21] Concerning the issue of control, it is important, I feel, to remember the importance of making clear distinctions concerning corporate status where the dual functions of workers and shareholders are combined.

[22] To be sure, it may be difficult to separate or compartmentalize the two functions, but this is a fully necessary activity, especially when assessing whether the company had a power of control.

[23] The concept of power of control does not require that the person or persons who collaborate in its exercise be as competent or more competent than those who perform the work that is to be controlled. The authorities have dealt with this issue on a number of occasions. I refer, *inter alia*, to excerpts from the following decisions:

- In *Weibe Door Services Ltd. v. M.N.R.*, (1986) 3 F.C. 533, the Honourable Judge MacGuigan stated the following on this subject:

...

> A principal inadequacy is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.

...

- In *Hennick v. Canada*, (1995) F.C.J. No. 294, at paragraph 7, the Honourable Judge Desjardins states:

...

> While it is true that the element of control is somewhat more difficult to assess in cases of professionals [See Note 5 below], the trial judge completely ignored that, on January 15, 1993, the intervener notified the respondent that she had not fulfilled the minimum teaching requirement as stipulated in the collective agreement and that she was requested to increase her teaching load.[See Note 6 below] While her contract with the intervener did not specify how she was to teach, there were parameters she had to meet with regard to time

> which clearly constituted control. The trial judge erred in failing to consider this piece of evidence. Besides, what is relevant is not so much the actual exercise of a control as the right to exercise a control.
>
> ...

- There are also the comments of the Honourable Judge Sobier in *Whistler Mountain Ski Club v. Canada,* (1996) T.C.J. No. 876, at paragraph 22:

> ...
>
> - Supervision or control of how a professional or expert performs his functions cannot be said to be control since the professional generally knows more about his functions than his employer. He can however exercise control over his employee by setting his hours of employment, his place of employment, whether he can come and go at his own wish.

[24] If this were not the case, it would mean that the performance of any specialized work could not be the subject of any kind of control. The only way to have control over the worker would be if the company employed a natural person to exercise such control who was even more specialized than the worker.

[25] Any work can be the subject of control even if the person who assumes or participates in its exercise has little or no knowledge of the kind of work performed.

[26] It is also important to remember that a shareholder whose work and expertise contribute to the revenues of the company may collaborate in the activity to provide a genuine relationship of subordination between the company that employs him and of which he is a shareholder and the work as an employee that he performs for the company.

[27] In the case at bar, the work performed by the appellants generated the company's revenues. Working in a highly specialized field, they manufactured roof trusses. They had the knowledge and the experience to do this kind of work and they were paid based on the regulations applying to this occupation.

[28] With knowledge and extensive experience in the field, they prepared and submitted tenders to obtain contracts. They were two of the three shareholders, the third being a retired teacher who had little practical knowledge of the work

performed by the appellants. He did, however, have a general knowledge of mathematics and his academic training made him more articulate and perhaps better able to represent the company. He could reassure the appellants whose chief quality was their mastery of their art to the detriment of any general knowledge in commercial and corporate relationships needed for the successful operation of any business.

[29] To be sure, the appellants, who had formerly worked in similar plants, wanted to keep going in the only field they really knew, without being penalized, since the work was mainly seasonal and done in summer.

[30] The chances of obtaining employment in the same sector of activities were very low and they decided to incorporate a company, which in itself was completely legitimate. Did they meet all the requirements?

[31] Generally speaking, the answer to this question is yes. From a modest background, with an apparently limited financial capability, they obtained the interest of their brother and brother-in-law and structured a company according to their respective assets and limitations.

[32] Did they create a bogus business? The answer is no. Their knowledge being limited to their sector, they got Marcel Sénéchal interested so they could enrich the company with a vision that might ensure its successful operation.

[33] The business was created, organized and operated in accordance with the available resources and following the applicable rules.

[34] To be sure, a business that could afford an accountant, a comptroller, a lawyer and an analyst might have presented a more polished case, but the presence of such professionals is by no means mandatory if certain key principles are followed and the operations are in keeping with the legitimate choices that have been made.

[35] For all these reasons, I find that the appellants have discharged the onus on them and have shown that the work performed during the periods at issue met the requirements and conditions for a bona fide contract of service.

[36] The appeals are therefore allowed because the work performed by the appellants for the periods at issue was insurable.

Signed at Ottawa, Canada, this 17th day of July 2003.

"Alain Tardif"

Judge Tardif

Translation certified true
on this 30th day of January 2004.

Leslie Harrar, Translator