Docket: 2003-1050(EI)

BETWEEN:

CONCEPT D'USINAGE DE BEAUCE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 1, 2003, at Québec City, Quebec

Before: The Honourable Deputy Judge S. J. Savoie

Appearances:

Counsel for the Appellant: William Noonan

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

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

Signed at Grand-Barachois, New Brunswick, this 18th day of November 2003.

"S. J. Savoie"

Savoie, D.J.

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

Sharon Moren, Translator

Citation: 2003TCC785
Date: 20031118
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BETWEEN:

CONCEPT D'USINAGE DE BEAUCE INC.,

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REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] This appeal was heard at Québec City, Quebec, on August 1, 2003.

[2] This is an appeal involving the insurability of the work of Guylaine Beaudoin, the worker, when she worked for the Appellant during the period at issue, January 1 to January 30, 2002.

[3] On December 20, 2002 the Minister of National Revenue (the "Minister") informed the Appellant of his decision that the worker's employment met the requirements of a contract of service and that there was an employer-employee relationship between the parties.

[4] As stated in the Reply to the Notice of Appeal, although the December 20, 2002, ruling does not mention the non-arm's length relationship between the worker and the Appellant, the Minister exercised his discretion under paragraph 5(3)(*b*) of the *Employment Insurance Act* (the "Act") and concluded that the worker's employment was insurable.

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

[TRANSLATION]

(a) The Appellant was incorporated on May 10, 1994; (admitted)

(b) The Appellant operated a machining, welding and machinery design business; (admitted)

(c) The business operated year round; (admitted)

(d) During the period at issue, the Appellant's sole shareholder was the company 9078-0602 Québec Inc.; (admitted)

(e) During the period at issue, the sole shareholder of the company 9078-0602 Québec Inc. was Rénald Létourneau; (admitted)

(f) Rénald Létourneau is the worker's spouse; (admitted)

(g) The worker began working for the Appellant in 1999; (admitted)

(h) In 1999, 2000 and 2001, before the period at issue, the worker worked for the Appellant without remuneration; (admitted)

(i) Starting January 1, 2002, the Appellant added the worker to his payroll and began to pay her; (admitted)

(j) The worker's tasks were accounting and cleaning work; (admitted with explanation)

(k) The worker had a flexible timetable for completing her tasks; (admitted)

(l) The worker worked an average of 32 hours per week, or 5-6 hours on cleaning and 26 hours on accounting; (denied)

(m) The worker received $480 gross pay per 32-hour week; (admitted with explanation)

(n) During the period at issue, the worker was remunerated by cheque every week; (admitted)

(o) The worker had no risk of loss or chance of gain; (admitted with explanation)

(p) The worker performed the vast majority of her tasks at the Appellant's premises; (admitted)

(q) The worker used the Appellant's equipment; (admitted)

(r) The services rendered by the worker were an integral part of the Appellant's business. (admitted)

[6] The evidence established that the worker's tasks consisted in doing the Appellant's cleaning, purchasing and accounting. She remitted taxes, was responsible for the office, took care of banking reconciliations and month-end reports. In addition, she took care of files needing the intervention of lawyers, among others, that is, "contentious" matters. Moreover, she was responsible for settling the Appellant's credit worthiness with the bank manager.

[7] It was established at the hearing that the worker did not have set hours. She came to work when she wanted and did not have to account to the Appellant provided her work was done. She received a weekly wage of $480 gross and worked an average of 50 hours per week.

[8] The worker has been on the Appellant's Board of Directors since 2001 and makes the necessary decisions; Rénald Létourneau is informed afterwards.

[9] Since she works approximately 50 hours per week, the worker decided on her own, to raise her salary to $600 per week. She wrote the pay cheque without the Appellant's knowledge.

[10] The Appellant's accountant confirmed that the worker is authorized to sign the Board of Directors' business records on her own and he works with her to prepare the company's accounting books. Since January 2002, the worker has been signing everything: for example, the worker reported that she was able to have the $50,000 surety bond removed from Mr. Létourneau at the bank. Mr. Létourneau confirmed that the worker had carte blanche in the company and as for the banking business, [TRANSLATION] "she, alone" took care of it. He acknowledged that she was better in these matters than he was.

[11] In addition, it was established that the worker had been able to convince the bank to settle the Appellant's banking business with her, without Mr. Létourneau's assistance.

[12] It was acknowledged that the worker and Rénald Létourneau were common-law spouses. Thus, the Appellant and the worker were not dealing with each other at arm's length. In a situation like this, section 5 of the *Employment Insurance Act* specifies:

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

[13] It is thus established in the Act that in a situation like the one under consideration, the worker and the Appellant are deemed to be related as understood in the *Income Tax Act*, unless the Minister, in exercising his discretionary power,

determines that a substantially similar contract of employment could have been entered into by unrelated individuals.

[14] The evidence has demonstrated that, in the case at bar, the Minister concluded that the worker's employment during the period at issue was insurable because it met the requirements of a contract of service.

[15] The Minister then proceeded to an examination of the employment contract between the parties according to the criteria set out in paragraph 5(1)(*a*) of the Act. In my opinion, the Minister should have exercised his power following an analysis of the criteria set out at paragraph 5(2)(*i*) of the *Act* before determining that the worker's employment met the requirements of a contract of service and, further, that there was an employer-employee relationship between the Appellant and the worker. In proceeding as he did, the criteria under paragraph 5(2)(*i*) of the Act were ignored.

[16] In support of the above, let us reproduce paragraphs 9, 10 and 11 of the Reply to the Notice of Appeal, signed on behalf of the Minister. These paragraphs describe the reasons that Counsel for the Respondent intended to present to the Court during the hearing to prove that the Appellant's appeal was wrong in fact and in law:

> [TRANSLATION]
>
> The Respondent maintains that the worker held insurable employment during the period at issue since this employment met the requirements of a contract of service during this period.
>
> Although the December 20, 2002 ruling does not mention the non-arm's length relationship, the Respondent maintains that the Minister exercised his discretion under paragraph 5(3)(*b*) and concluded that the employment was insurable.
>
> He maintains, moreover, that it is reasonable to conclude that, although the Appellant and the worker did not deal with each other at arm's length, they would have entered into a substantially similar contract of employment had they been dealing at arm's length.

[17] As indicated at paragraph 10 above, the Minister's analysis did not take into account the non-arm's length relationship between the parties to the contract of employment.

[18] The evidence brought before the Court was not contradicted by the Minister. In fact, the Minister brought no evidence before the Court except that which was in the file before this appeal was heard. The Appellant called three witnesses, but the Respondent did not cross-examine them.

[19] It has been shown that the worker had carte blanche in the business. She signed the business records of the Board of Directors, she decided on her own her work conditions, her salary, her hours of work and her comings and goings, without the Payor's knowledge. She gave herself a raise in pay without consulting anyone whatsoever and did not have to account to the Payor. All of this is confirmed by the Appellant's accountant and by Rénald Létourneau, the Appellant's sole shareholder.

[20] How can one claim that unrelated parties would have entered into a substantially similar contract of employment?

[21] The preponderance of evidence established that upon analyzing the criteria under paragraph 5(3)(*b*) of the Act, such as the pay and the terms and conditions of employment, the only possible conclusion is that somewhat similar work conditions could not have existed in an arm's length relationship.

[22] Tardiff J. of this Court in *Au Grand Bazar de Granby Inc. v. The Minister of National Revenue* (Docket 199-3992(EI)) relied on a case similar to the one at bar and wrote:

> The evidence showed that the Grondin brothers themselves made the decisions to pay bonuses and determined their number and when they were paid, and above all they determined their amount.
>
> The evidence showed that the Grondin brothers each received more than $80,000 in 1998 and more than $92,000 in 1999 in salary and bonuses.
>
> The evidence established that the Grondin brothers themselves set all the terms and conditions respecting the performance of their work.

[23] In continuing his analysis, Tardif J. wrote in conclusion:

> How can it be reasonably concluded that persons working in retail sales who have an arm's length relationship with their employer set and determine their own conditions of employment?
>
> How can it be claimed that third parties unrelated to their employer could decide on their own compensation based on the performance of the business that employs them? There may of course exist situations in which third parties receive benefits, bonuses, commissions and so on based on performance, but the scales are predetermined by the business and never by the recipients of those performance bonuses.

. . .

> It was shown on a preponderance of evidence that Pierre and Mario Grondin enjoyed benefits and privileges that were justified solely by their non-arm's-length relationship with the business. In the absence of that relationship, they could not have hoped for such advantageous conditions of employment. Consequently, the work performed by the Grondin brothers must be excepted from insurable employment under the *Act*.

[24] The evidence produced by the Appellant at the hearing of this appeal has proven to be sufficient, in my opinion, to conclude as did Tardif J. in *Au Grand Bazar de Granby Inc.*, *supra*, that the Respondent did not judiciously and unimpeachably exercise his discretionary power. Indeed, facts such as these demanded a conclusion that was completely contrary to that expressed by the Respondent.

[25] For the above reasons, the appeal is allowed and the Minister's decision is vacated.

Signed at Grand-Barachois, New Brunswick, this 18th day of November, 2003.

"S. J. Savoie"

Savoie, D.J.

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

Sharon Moren, Translator