Docket: 2003-1134(EI)

BETWEEN:

FERME LORGE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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

Before: The Honourable Deputy Judge S. J. Savoie

Appearances:

Agents for the Appellant:	Georges Boivin Lorraine Duclos
Counsel for the Respondent:	Marie-Claude Landry

JUDGMENT

The appeal is dismissed and the Minister's ruling is upheld 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: 2003TCC792
Date: 20031118
Docket: 2003-1134(EI)

BETWEEN:

FERME LORGE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Savoie, D.J.

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

[2] This appeal involves the insurability of the job of Pascal Boivin, the Worker, while he worked for the Appellant during the period at issue, January 1 to November 29, 2002, as understood in the *Employment Insurance Act* (the "Act").

[3] On February 24, 2003 the Minister of National Revenue (the "Minister") informed the Appellant of his ruling that during the period at issue, the Worker held insurable employment because it met the requirements of a contract of service and that there was an employer-employee relationship between her and the Worker.

[4] In making his ruling, the Minister relied on the following assumptions of fact, which the Appellant admitted or denied:

[TRANSLATION]

(a) the Appellant was incorporated on March 18, 1985; (admitted)

(b) the Appellant operated a hog (110 breeding sows and 540 feeder hogs) and grain production farm; (admitted with explanations)

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

(d) during the period at issue, the Appellant's shareholders with voting shares were

Georges Boivin	41% of the shares
Lorraine Duclos	39% of the shares
the Worker	20% of the shares; (admitted)

(e) Georges Boivin and Lorraine Duclos are the Worker's father and mother; (admitted)

(f) in April 1999, the Worker was hired as a farm worker by the Appellant; (denied)

(g) the Worker's duties were to take care of the maternity, buy and mix mash, repair machinery and maintain buildings; (admitted)

(h) the Worker's duties were set by the Appellant; (denied)

(i) the Worker worked year round; (admitted)

(j) the Worker had a 70 hour schedule per week during the summer and 40 hours during the winter; (admitted)

(k) the Worker received remuneration of $340 gross pay per week; (admitted)

(l) during the period at issue, the Worker was paid every week; (admitted)

(m) according to the guide to wages and salaries in Quebec published in March 2001, the average weekly salary for a farm worker was $388; (admitted)

(n) the Worker had no risk of loss or chance of gain; (denied)

(o) the Worker performed his tasks on the Appellant's farm; (admitted)

(p) the Worker used the equipment and materials belonging to the Appellant; (admitted)

(q) the services rendered by the Worker were an integral part of the Appellant's business; (admitted)

[5] The explanations brought in evidence by the Appellant established that in addition to her operations acknowledged by the Minister, she ran a custom work operation outside as well as doing snow removal.

[6] Ms. Duclos, the Appellant's agent, wished to explain that contrary to the Minister's claim at paragraph (f) above, the Worker had not been hired by the Appellant, but had allegedly become one of her shareholders.

[7] According to her, the Worker's tasks had not been set by the Appellant. The Worker allegedly, rather, assumed the responsibilities of his father, Georges Boivin, as decided by the three shareholders.

[8] She furthermore specified that the worked incurred risk of loss because he had guaranteed the business's loans.

[9] Ms. Duclos admitted almost all of the Minister's assumptions. With regard to the explanations she brought forward, they did not change the fact that the Worker only held 20% of the business's voting shares and, on these grounds, he was subject to the power of the majority shareholders. This situation also explains that the Worker's risk of loss, if in fact there is any risk, is limited to the value of the voting shares that he holds, or 20%.

[10] The question of whether there is a relationship of subordination between the Worker and the Appellant is central to this issue. In other words, did the Appellant have the power to control and intervene in the work performed by Pascal Boivin, the Worker?

[11] To determine whether there was a contract of service, the facts must be examined according to case law, in light of the four specific criteria of which control is by far the most important and decisive. A situation similar to the one under consideration was analyzed by Tardif J. of this Court in *Roxboro Excavation Inc. v. Canada (Minister of National Revenue – M.N.R.),* [1999] T.C.J. No. 32, who stated:

> In this regard, I consider it important to point out that the courts have often said that it is not mandatory or necessary that the power to control actually be exercised; in other words, the fact that an employer does not exercise its right to control does not mean that it loses that power, which is absolutely essential to the existence of a contract of service.

[12] Continuing his analysis, Tardif, J. wrote:

> Assessing whether or not a relationship of subordination exists is difficult when the individuals who hold authority by virtue of their status as shareholders and/or directors are the same individuals who are subject to a power to control or to the exercise of authority in respect of specific work. Put differently, it is difficult to draw a clear line when a person is an employee and in part an employer all at the same time.

[13] Still examining the respective rights and obligations of shareholders who are at the same time workers and shareholders, Tardif J. added:

> I do not think that it is objectively reasonable to require a total, absolute separation between the responsibilities that result from shareholder status and those that result from worker status. The wearing of both hats normally-and this is perfectly legitimate-creates greater tolerance and flexibility in the relations arising out of the two roles. However, combining the two roles produces effects that are often contrary to the requirements of a genuine contract of service.

[14] In the case at bar, nothing in the evidence indicates that Georges Boivin and Lorraine Duclos, the Appellant's majority shareholders, did anything at all to yield to anyone their majority of shares or the degree of control that they had in the business, or their right to vote attached to the shares they hold.

[15] The evidence established that the Appellant is a company controlled by a related group. A company and an individual who is a member of a related group that controls the company, are related persons as defined at section 251 of the *Income Tax Act.* This Act specifies that related persons are deemed to not have an arm's length relationship under paragraph 251(1)(*a*). The *Employment Insurance Act* stipulates that all work in which the employer and the employee do not have an arm's length relationship is excluded from insurable employment under paragraph 5(2)(*i*) except if it is reasonable to conclude that a similar job would have existed in similar conditions if the parties had had an arm's length relationship, under subsection 5(3) of the *Employment Insurance Act.*

[16] The Minister thus began his analysis of the Worker's employment under paragraph 5(2)(*i*) of the Act.

[17] It was established that during the period at issue, the Worker received a wage of $340 per week, which seems normal according to the *Guide des salaries*

des professions au Quebec, published in 2001 for the year 2000, which stipulates that the average wage of a farm worker was $388 per week.

[18] With regard to the terms and conditions of employment and the nature of the work performed, it has been shown that the Worker had a schedule to respect and tasks assigned by Georges Boivin, even if the latter did not always check the work that was performed. The evidence revealed, moreover, that Pascal Boivin's work was critical to the Appellant's operation and that she would have to hire another employee if this Worker ceased to work there.

[19] Moreover, it was established that during the period at issue, the Worker performed jobs every week.

[20] In light of the above, the Minister concluded that, in consideration of the wages paid, the terms and conditions of employment, and the nature and duration of the work performed, it was reasonable to conclude that the contract of employment would have been similar had there been an arm's length relationship between the parties.

[21] Having concluded that Pascal Boivin's work was not excluded from insurable employment under paragraph 5(2)(*i*) of the Act, the Minister continued his analysis of the Worker's employment under paragraph 5(1)(*a*) of the same Act. In so doing, he examined the employment from the perspective of the four criteria established by case law, that is, control, ownership of the tools, the chance of gain and risks of loss, and whether the work performed by the employee was an integral part of the employer's business.

[22] At the end of his analysis, the Minister concluded that the criterion of control is based on the fact that the employer has the right to give direction to the employee and to control how he works as well as, with regard to the final result, the time and the place. In addition, he established that the equipment and work materials used by the Worker belonged to the Appellant. Furthermore, the Minister determined that the Worker, Pascal Boivin, incurred no risk of loss or chance to gain. In this regard, it is important to stress that despite the Worker's guarantee for the Appellant's benefit, the risk that he incurred did not surpass the value of his voting shares in the business, that is, 20%.

[23] According to the analysis of facts according to the Act, especially paragraphs 5(1)(*a*) and 5(2)(*i*), and according to the criteria established by case law in *Montreal v. Montreal Locomotive Works Ltd. (1947), 1 D.L.R. 161* and

Wiebe Door Services Ltd. v. M.N.R., [1986] 3 F.C. 553, it is this Court's opinion that it has been shown that the Worker held insurable employment as understood in the Act, during the period at issue, since during this period, the Appellant and the Worker were bound by a contract of service.

[24] Moreover, the evidence has shown that the Worker's employment was insurable since, in consideration of all the circumstances, *inter alia* the remuneration paid, the terms and conditions of employment, as well as the duration, nature and importance of the work performed, a fairly similar contract of employment would have been entered into even if there had not been an arm's length relationship between the Appellant and the Worker during the period at issue.

[25] For all these reason, the appeal is dismissed and the Minister's ruling is upheld.

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