

Docket: 2006-3747(EI)

BETWEEN:

MARTIN SAVARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Pierre Gélinas*
(2006-3750(EI)) on May 29, 2007, at Québec, Quebec

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision made by the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 22nd day of February 2008.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 7th day of April 2008.

Brian McCordick, Translator

BETWEEN:

PIERRE GÉLINAS,

Appellant:

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Martin Savard*
(2006-3747(EI)) on May 29, 2007, at Québec, Quebec

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision made by the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 22nd day of February 2008.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 7th day of April 2008.

Brian McCordick, Translator

Citation: 2008TCC107
Date: 20080222
Dockets: 2006-3747(EI),
2006-3750(EI)

BETWEEN:

MARTIN SAVARD,
PIERRE GÉLINAS,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Jorré J.

[1] Mr. Savard and Mr. Gélinas are appealing from a decision of the Minister of National Revenue ("the Minister") concerning the insurability of their employment with 9140-5803 Québec Inc. ("the Payor") for the periods from July 19, 2004, to February 4, 2005, and from February 21, 2005, to November 25, 2005. The Appellants submit that they held insurable employment.

[2] The two matters were heard on common evidence.

[3] In order to make these reasons easier to read, I will designate the numbered companies as follows:

- 9140-5803 Québec Inc. will be called "the Payor",
- 9067-6347 Québec Inc. will be called "Diamantex", and
- 9024-8626 Québec Inc. will be called "Forage Béton".

The companies were engaged in the business of concrete drilling and sawing.

[4] It should be noted that "Diamantex S.E.N.C." is a different entity from "Diamantex". Diamantex S.E.N.C. was registered on April 18, 2004, and struck off the register on April 18, 2006.

[5] The Notice of Appeal is very short and states as follows with respect to the disputed points:

[TRANSLATION]

We submit that this decision is not in accordance with the *Employment Insurance Act* or Regulations.

This is because there was a true contract of service between the Payor and the Appellant for the period in issue.¹

[6] Paragraph [8] of these reasons reproduces the Minister's assumptions of fact in the matter of Martin Savard. After each assumption, I have added the Appellant's position in italics, within parentheses. I have also added the text that is in italics within square brackets.

[7] There are no important differences between the Minister's assumptions of fact in both cases. Subparagraph (m) is different, as stated below. It should also be noted that, at subparagraphs (cc) and (dd) of the Minister's assumptions of fact, the number of insurable hours and the amounts of money differ slightly, depending on which appellant is involved. This has no bearing on the result.

[8] In making his decision, the Minister assumed the following facts:

[TRANSLATION]

- (a) The Payor was incorporated on March 29, 2004. (*admitted*)
- (b) The Payor operated a concrete drilling and asphalt sawing business. (*admitted*)

¹ The Notice of Appeal does not comply with subsection 5(3) of the *Tax Court of Canada Rules of Procedure respecting the Employment Insurance Act*, which provides:

5(3) An appeal . . . shall be made in writing and set out, in general terms, the reasons for the appeal and the relevant facts, but no special form of pleadings is required.

Such a summary statement of the facts and reasons would have been helpful.

- (c) According to the Registrar of Businesses, CIDREQ registration number 1162137278, the Payor's first shareholder is Yvon Savard, the second shareholder is Gilles Gélinas and the third shareholder is Marc Lavoie. (*admitted*)
- (d) Yvon Savard is the Appellant's father and Gilles Gélinas is the father of Pierre Gélinas, an appellant in matters related to this appeal. (*admitted*)
- (e) The Payor had no corporate life; there were never any shareholders' meetings. (*denied*)
- (f) On October 24, 2006, the Appellant's representative notified the Respondent's representative that he would not cooperate with the investigation and a decision should be made based on the file as it existed at the time. (*denied*)
- (g) Starting in 1998, the Appellant and Pierre Gélinas each held 50% of the shares of 9067-6347 Québec Inc., which operated a concrete drilling and sawing business under the name Diamantex. (*admitted*)
- (h) Starting in 1995, the Appellant and Pierre Gélinas each held 50% of the shares of 9024-8626 Québec Inc., which operated a concrete drilling and sawing business under various names, including "Forage Béton P.M." (*admitted*)
- (i) 9067-6347 Québec Inc. [*Diamantex*] declared bankruptcy on June 11, 2004. (*admitted*)
- (j) In 2004, 9024-8626 Québec Inc. [*Forage Béton*] made a bankruptcy proposal to its creditors, and it was accepted. (*admitted*)
- (k) The Payor was created in an attempt to rescue 9024-8626 Québec Inc. [*Forage Béton*] financially, following consultation with an accountant specialized in business recovery. (*denied*)
- (l) The Appellant and Pierre Gélinas were managers of the Payor. (*denied*)
- (m) The Appellant's duties consisted in making bids, hiring and laying off employees, verifying the performance of contracts, receiving cheques and making deposits. (*denied*)

[*In Pierre Gélinas' Reply to the Notice of Appeal, subparagraph (m) states: [TRANSLATION] "The Appellant's duties consisted in working at the workshop, maintaining the machinery and occasionally working on the sites."*]

- (n) The Appellant had the same tasks and duties for the Payor, 9067-6347 Québec Inc. [*Diamantex*], 9024-8626 Québec Inc. [*Forage Béton*] and Diamantex S.E.N.C. (*denied*)
- (o) The Appellant and Pierre Gélinas managed the affairs of the Payor and the different legal entities without distinguishing among them. (*denied*)
- (p) In 2004, the Payor transferred \$201,300 to 9024-8626 Québec Inc. [*Forage Béton*]; in 2005, the Payor transferred \$219,150. (*admitted*)
- (q) The work orders, invoices, bids and advertising were produced jointly under the Payor's name and that of Forage Béton P.M., Diamantex or 9024-8626 Québec Inc. (*denied*)
- (r) On April 26, 2006, Yvon Savard, the Appellant's father, told a representative of the Respondent that he signed a "pad" of the Payor's blank cheques and gave it to the accountant. (*denied*)
- (s) On April 5, 2006, in a signed declaration, Pierre Gélinas stated: [TRANSLATION] "Gilles Gélinas got involved in Diamantex S.E.N.C. and 9140-5803 Québec Inc. [*the Payor*]" to help us. He was more of a nominee than anything else. He never invested in either of the businesses. (*denied*)
- (t) The Appellant and Pierre Gélinas controlled all the Payor's activities. (*denied*)
- (u) The work done by the Appellant and Pierre Gélinas was not subject to any instructions or control by the Payor. (*denied*)
- (v) In carrying out his duties, the Appellant used equipment that belonged to the Payor or to 9024-8626 Québec Inc. [*Forage Béton*]. (*admitted*)
- (w) As at March 31, 2005, the Payor's capital assets were worth a total of \$14,448 and the capital assets of 9024-8626 Québec Inc. [*Forage Béton*] were worth more than \$86,000 as at February 28, 2005. (*admitted*)
- (x) The corporations did not work out an amount between themselves for the use of the equipment. (*denied*)
- (y) The Appellant paid himself an hourly wage of \$12, while the employees were paid \$24. (*admitted*)
- (z) The Appellant and Pierre Gélinas, the Payor's managers, were entered for fewer hours in the Payor's payroll journal (18-36 hours per month) than the employees they supervised (120-160 hours per month). (*denied*)
- (aa) The Appellant was not paid for all the hours that he actually worked. (*denied*)

- (bb) On February 10, 2005, the Payor gave the Appellant a Record of Employment (ROE) stating that the first day of work was July 19, 2004, that the last day of work was February 4, 2005, that the number of insurable hours was 800 and that the insurable earnings amounted to \$9,600. (*admitted*)
- (cc) On November 30, 2005, the Payor gave the Appellant an ROE stating that the first day of work was January 10, 2005, that the last day of work was November 25, 2005, that the number of insurable hours was 1215 and that the insurable earnings amounted to \$12,785. (*admitted*)²
- (dd) The Appellant's earnings as reported on his ROE are not consistent with the aggregate total of the paycheques issued by the Payor. Specifically, for 2004, the Appellant's reported earnings were \$8,285 and his paycheques amounted to \$3,100; and in 2005, the Appellant's reported earnings were \$12,785 and his paycheques amounted to \$8,406. (*denied*)
- (ee) During the period in issue, 9024-8626 Québec Inc. [*Forage Béton*] remunerated the Appellant with six cheques in 2004 totalling \$3,550, and 21 cheques in 2005 totalling \$6,215.95. (*admitted*)
- (ff) 9024-8626 Québec Inc. [*Forage Béton*] issued no T4s to the Appellant in 2004 or 2005. (*admitted*)
- (gg) The Appellant and Pierre Gélinas were excluded from insurable employment because [they] each held more than 40% of the voting shares of 9024-8626 Québec Inc. [*Forage Béton*]. (*denied*)
- (hh) The Appellant, Pierre Gélinas and the Payor were part of a scheme to qualify the Appellant and Pierre Gélinas for employment insurance while they continued to work for 9024-8626 Québec Inc. [*Forage Béton*]. (*denied*)
- (ii) The Appellant and Pierre Gélinas were the Payor's directing minds, and their influence over the Payor was such that the type of arm's length relationship needed to create true subordination between the parties could not have existed. (*denied*)

[9] At the hearing, Yvon Savard, Martin Savard, Pierre Gélinas, Pierre Savoie and appeals officer Lyne Courcy testified. The Payor's other two owners, Gilles Gélinas and Marc Lavoie, did not testify.

² I should point out (i) that the judgment faithfully reproduces February 4, 2005 as the date in subparagraph (bb) and January 10, 2005 as the date in subparagraph (cc); and (ii) that, as stated, subparagraphs (bb) and (cc) were admitted to.

[10] Yvon Savard is the Appellant Martin Savard's father. Yvon Savard retired from his career with the Department of Indian Affairs in 1995. During the period in issue, he had a job with the Montagnais band council. He worked 30 to 35 hours a week for the council. In March 2004, his son Martin asked him to meet Myriam Charbonneau, an accountant who had been recommended to Martin by the KPMG trustee. The trustee had said that the situation might be "salvageable". Martin Savard and Pierre Gélinas had already met Ms. Charbonneau.

[11] Ms. Charbonneau told Yvon Savard that she determined that Martin Savard and Pierre Gélinas were indeed in a difficult situation and that at a certain point they had demonstrated an inability to manage a business. She asked Yvon if he wanted to get involved in a business that she would be starting up. This would also require him to invest money.

[12] Yvon Savard knew nothing about running companies in the field of concrete drilling and sawing, but Ms. Charbonneau reassured him that she would look after everything: the paperwork and the creation of the business. After giving the matter some thought, he decided to get involved, on the condition that Ms. Charbonneau would be closely involved in the business.

[13] Yvon Savard wanted to help his son save a business that had been in his son's hands for 12 to 15 years. This is a laudable objective. Yvon Savard did not want to lose his money.

[14] Yvon Savard testified that he invested \$10,000 in the Payor in late March or early April. He also injected \$35,000 into Forage Béton. The latter amount made it possible for Forage Béton to come to an agreement with its creditors, and, unlike Diamantex, Forage Béton did not go bankrupt.

[15] According to Yvon Savard, following the settlement with the creditors, Forage Béton was supposed to shut down no later than June 2004. He expected the Payor to repay him the \$35,000 that he had invested in Forage Béton.

[16] There was no explanation as to why the Payor would have been required to repay him money that was invested in Forage Béton.

[17] Yvon Savard also testified that the Payor was a going concern, that he was the one who managed the business, and that Martin Savard and Pierre Gélinas had to look after the duties described in Exhibits A-1 and A-2 respectively.

[18] He testified that in order to be certain of obtaining the services of Martin and Pierre, the Payor signed documents entitled [TRANSLATION] "Contract of Employment and Conditions of Employment" with each of them (Exhibits A-1 and A-2).

[19] I should note that although the period in issue begins on July 19, 2004, both documents are dated September 27, 2004.

[20] Martin Savard testified that his father managed the business, which contradicts what he said to Pierre Savoie, an employment insurance investigator.

[21] Martin also testified that Ms. Charbonneau, the accountant, recommended that the Payor be created so that the old companies' activities could be continued.

[22] Although Yvon Savard testified that he managed the business, that he was in constant contact with Ms. Charbonneau, that he kept track of the accounts payable and receivable, that he truly asked questions, especially of Ms. Charbonneau, because he felt the situation was going badly, that he asked for balance sheets, that he held meetings, and that he devoted many hours to the business,³ my finding is that Yvon Savard did not manage the business.

[23] My finding is based on several reasons, including the following:

- (a) Yvon Savard's answers were rather general.
- (b) He often said that certain things were done because Ms. Charbonneau told him that this was how they should be done. If he had spent 2000 hours working for the Payor, he would have been able to provide more explanations.
- (c) On his examination-in-chief, he was asked what Forage Béton did. He did not know, and he answered: [TRANSLATION] "[T]he business ... that's a good question. I don't know what the business did. It was supposed to have disappeared in June 2004."

³ On cross-examination, he estimated that he worked 2000 hours over the course of two years, which would have represented an average of 20 hours per week.

Yet, in 2004, the Payor wrote cheques totalling \$120,000 to Forage Béton.⁴ In 2005, the Payor paid nearly \$220,000 to Forage Béton.⁵ A person who was truly managing a business that paid close to \$340,000 to another business would have had an idea of what the other business was engaged in.⁶

- (d) Yvon Savard received no profit and loss statement, balance sheet or income tax return.⁷
- (e) Earlier, he made a statement to Pierre Savoie, an employment insurance investigator with Human Resources and Skills Development Canada (now Human Resources and Social Development Canada). In that statement, he said, among other things, that although the business had its head office at his home, his address served merely as a mailbox; that he brought the mail once or twice a week to the accountant; that he signed cheques prepared by the accountant or that the accountant had him sign blank cheques; that he began to be more interested in the business in September 2005 because he was starting to fear for his investment; that he never got involved in managing the Payor except to safeguard his investment; that he never met with the other shareholders; and that the accountant made arrangements with Martin Savard and Pierre Gélinas for the decision-making.⁸

[24] Yvon Savard, Martin Savard and Pierre Gélinas did not explain why a new company, the Payor, was needed in order to save Forage Béton (which did not go bankrupt and continued to carry on business.) The only answer that I got was that Ms. Charbonneau told everyone that this had to be done. Ms. Charbonneau did not testify.

[25] The Minister assumed that the paycheque amounts received by the Appellants were less than the earnings reported in the Payor's ROEs, and that Forage Béton paid the Appellants remuneration.⁹

⁴ See Exhibit I-3.

⁵ See Exhibit I-4.

⁶ The sum of \$340,000 was significant to the Payor. According to the appeals officer's report, the Payor's financial statements as at March 31, 2005, report sales of \$396,385. See Exhibit I-10, item 41, at page 6.

⁷ Cross-examination of Yvon Savard, transcript, at page 55.

⁸ Testimony of Pierre Savoie, transcript, at pages 121-124, and Exhibit I-9.

⁹ See subparagraphs (dd) and (ee) of the factual assumptions set out at paragraph [8], *supra*.

[26] The Appellants took the position that the amounts from Forage Béton were paid on the Payor's behalf. They testified that this happened because Ms. Charbonneau, the accountant, told them to take Forage Béton's money when she did not have the time to prepare their paycheques. The Appellants could sign Forage Béton cheques.

[27] I do not accept this as evidence showing that these payments were wages that Forage Béton paid on behalf of the Payor. There was no evidence of an agreement between the companies to this effect, or of accounting entries that reflected such an arrangement.

[28] Forage Béton continued to operate during the period in question, and issued T4 slips for wages paid to other people. Forage Béton reported sales and expenses in its income tax returns for the periods ended February 28, 2005, and February 28, 2006, and reported monthly sales for GST purposes during the period from July 31, 2004 to May 31, 2005.¹⁰

[29] The Payor's financial statements as at March 31, 2005, show an \$80,822 loan to Forage Béton as an asset.¹¹

[30] The four pages of Exhibit I-7 show that the documentation for the contracts frequently does not distinguish among the Payor, Forage Béton and Diamantex. Page 1 is a work order bearing all three names. Page 2, an invoice, is under the Payor's name, but the e-mail address is diamantex@globetrotter.net and the website is www.diamantex1998.com. Page 3, a bid, bears the names of Diamantex, Forage Béton and the Payor. Lastly, page 4 contains an advertisement containing the names Forage Béton and Diamantex.

[31] Although the Appellants denied that the Payor and Forage Béton did not work out an amount between themselves for the use of the equipment, they did not prove that the Payor paid Forage Béton for the use of the equipment, or that there was an agreement regarding an amount to be paid for the use of the equipment.

¹⁰ Report of the appeals officer, Exhibit I-10, items 40, 41 and 47 to 53, at pages 6-8.

¹¹ Testimony of the appeals officer, transcript, at page 129.

Conclusion

[32] Yvon Savard was not the Payor's manager. There was no evidence that the Payor's other shareholders were active. Everything having to do with the Payor and Forage Béton was managed by the Appellants with the help of Ms. Charbonneau, the accountant. The legal relationship between the Appellants and the Payor is not very clear, but it was not an employment contract, because the Appellants were not under the Payor's direction or control.

[33] Accordingly, the appeal must be dismissed.

Signed at Ottawa, Canada, this 22nd day of February 2008.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 7th day of April 2008.

Brian McCordick, Translator

CITATION: 2008TCC107

COURT FILE NOS.: 2006-3747(EI), 2006-3750(EI)

STYLES OF CAUSE: MARTIN SAVARD v. M.N.R.,
PIERRE GÉLINAS v. M.N.R.

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: May 29, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré

DATE OF JUDGMENT: February 22, 2008

APPEARANCES:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Marie-Claude Landry

COUNSEL OF RECORD:

For the Appellants:

Name: Jérôme Carrier

Firm: Lévis, Quebec

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada