Docket: 2007-3959(EI)

BETWEEN:

LES PORTES ARCO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 26, 2008, at Québec, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Alain Gareau

JUDGMENT

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

Signed at Ottawa, Canada, this 3rd day of April 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 21st day of May 2008.

Brian McCordick, Translator

Citation: 2008TCC138
Date: 20080403
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BETWEEN:

LES PORTES ARCO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision in which the Minister of National Revenue ("the Minister") concluded that Pierre-André Binette ("Pierre-André"), Patrick Binette ("Patrick") and Chantale Binette ("Chantale") held insurable employment with the Appellant, Les Portes Arco inc., from January 1 to December 21, 2006.

[2] The Minister concluded that the Appellant was deemed to be dealing at arm's length with the workers, Pierre-André, Patrick and Chantale, in the context of their employment. The Minister was satisfied that, having regard to all the circumstances of the employment, it was reasonable to conclude that the Appellant and those persons would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[3] The Minister relied on the following assumptions of fact in making the decision under appeal:

> [TRANSLATION]
>
> 5. . . .
>
> (a) the Appellant was incorporated on June 2, 1977;
>
> (b) the Appellant operated a door and window manufacturing and distribution business and also ran a store that sold doors, hardware, handles, moulding and frames;
>
> (c) the Appellant operated year-round;
>
> (d) the business was open Monday to Friday from 8:00 a.m. to noon and 1:00 to 5:00 p.m.;
>
> (e) the Appellant had sales of about $3 million a year;
>
> (f) the Appellant employed 10 workers, including the three shareholders;
>
> (g) Pierre-André Binette had worked for the Appellant since 1977;
>
> (h) Pierre-André Binette worked as a travelling sales representative; he met with customers and gave estimates;
>
> (i) Patrick Binette had worked for the Appellant since 1999;
>
> (j) Patrick Binette worked as the production manager; he negotiated prices with suppliers, was responsible for purchases and supervised the plant personnel;
>
> (k) Chantale Binette had worked for the Appellant since 1998;
>
> (l) Chantale Binette worked as an administrative secretary and was responsible for the bookkeeping, the payroll and the government remittances;
>
> (m) the workers worked 40 to 45 hours a week for the Appellant;
>
> (n) the workers were each paid $700 a week;
>
> (o) during the period in issue, the workers each received a $15,000 bonus decided on by the board of directors;

(p) the workers were paid their salaries regularly every week by direct deposit;

(q) the workers and all the employees had wage loss insurance and a group drug insurance plan;

(r) the workers had two weeks of vacation in the summer and two weeks in the winter;

(s) decisions that were important for the Appellant were made by the three directors;

(t) a relationship of subordination existed between the Appellant and the workers;

(u) the Appellant had a right of control over the workers, and that control was exercised;

6. . . .

(a) the Appellant's shareholders with voting shares were:

Pierre-André Binette	33 1/3% of the shares
Patrick Binette	33 1/3% of the shares
Chantale Binette	33 1/3% of the shares

(b) Pierre-André Binette is the father of Patrick Binette and Chantale Binette;

(c) the workers are related by blood to a group of persons that controls the Appellant.

7. . . .

(a) the workers' salaries and bonuses had been decided by agreement among the three directors;

(b) each worker's annual remuneration, including bonuses, totalled $52,000;

(c) the workers were responsible for their respective areas of activity;

(d) the workers' remuneration was reasonable in light of their duties and responsibilities for the Appellant;

(e) the workers had been working for the Appellant for several years;

(f) the workers worked for the Appellant year-round;

(g) the duration of the workers' work was reasonable;

(h) the Appellant was the beneficiary under a life insurance policy on the three shareholders and paid the premiums on that policy;

(i) the workers' work was necessary and important to the smooth operation of the Appellant’s business;

(j) the terms and conditions and the nature and importance of the workers' work were reasonable.

[4] First, the following subparagraphs were admitted: 5(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (n), (p) and (q), 6(a), (b) and (c) and 7(a), (c), (e), (f), (h) and (i). The following subparagraphs were denied: 5(m), (n), (o), (r), (s), (t) and (u) and 7(b), (g) and (j).

[5] Only Chantale Binette testified. She explained the work done by her, her father Pierre-André and her brother Patrick.

[6] Briefly, Pierre-André was a sales representative and was in charge of sales. He was responsible for everything associated with the construction sites where the windows manufactured by the company were to be delivered. Patrick Binette was in charge of production.

[7] Finally, Chantale was responsible for administrative management, since she looked after accounts payable, receivables, dealings with bankers, bookkeeping, invoicing, the payroll and the various reports that had to be prepared in operating the business.

[8] According to the witness, although the company operated year-round, its order book was fullest from May to October, which was generally the construction period.

[9] With regard to the number of hours that each of them worked each week, Ms. Binette estimated that Patrick worked 70 to 80 hours, that Pierre-André worked 50 to 60 hours and that she worked 35 to 37 hours.

[10] In principle, the company's working days were Monday to Friday and Saturday until noon. However, Pierre-André and Patrick regularly worked after normal working hours, that is, in the evening and on Saturday.

[11] All three had the following conditions of employment: a life insurance policy for which the company paid all the premiums, six weeks of paid vacation and great freedom in their respective areas of activity.

[12] The plant employees' conditions of employment were not comparable to those of the Binette family. For example, they had much less vacation time, since they were paid on the basis of four percent of their earned income. Their life insurance was also less generous than that of the Binette family.

[13] The employees were paid by the hour, while the Binettes received a fixed weekly amount unrelated to the number of hours they worked. All three of the Binettes received an annual bonus of $15,000.

[14] Pierre-André, the father of Patrick and Chantale, planned to leave the company for good as of November 2009. The parties reached various agreements under which Patrick and Chantale were to gradually acquire their father's shares by that time.

[15] Patrick stopped working for Les Portes Arco inc. after it purchased another company, Acier inc., in November 2007. He has since devoted himself completely to the activities of the new company.

[16] After Patrick left, an existing employee was promoted and took on about 60 percent of Patrick's work for about $620 a week. Ms. Lacroix testified that she and her father had divided up the remaining 40 percent.

[17] When asked for examples to support the position that there was no relationship of subordination, Ms. Binette explained that, apart from her obligation to open and close the business, she did her work autonomously, including when making important decisions. The example she gave to illustrate this was the purchase of a very large investment from a financial institution.

[18] Finally, Chantale Binette explained that two women also worked in the sales department; they were paid $9.75 and $10.50 an hour, plus a commission of one percent on their sales.

[19] When asked what a commission of one percent might represent, she stated that, some weeks, it could represent an annual total of about $4,000. She recalled having filled out a T4 for over $5,000 for commission alone.

[20] The analysis that led to the decision under appeal was based on the same facts, except for the hours worked. It was shown before the Court that the number of hours worked by each shareholder was very different from the number presented at the time of the analysis.

[21] This is a case in which work is excluded from insurable employment because of the non-arm's length relationship between the persons concerned and the business that paid their remuneration.

[22] Work that is excluded in principle will be considered insurable if it is reasonable to conclude, having regard to all the facts and circumstances of the employment, that a substantially similar contract of employment would have been entered into if the persons concerned and the business had been dealing with each other at arm's length.

[23] The relevant provisions, paragraphs 5(2)(*i*) and 5(3)(*a*) and (*b*), read as follows:

> 5. (2) Insurable employment does not include
>
> (*i*) employment if the employer and employee are not dealing with each other at arm’s length.
>
> 5. (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.

[24] In this case, the Minister concluded that the contract of employment was substantially similar to a contract entered into by a third party.

[25] The Appellant argued that the characteristics of the work were such that it was patently unreasonable to conclude that third parties would have been given substantially similar conditions of employment.

[26] In this regard, it stressed that Pierre-André's replacement was paid roughly the same salary even though his workload was only about 60 percent of Pierre-André's.

[27] It also pointed out that the number of hours worked by the three shareholders varied a great deal. Chantal worked 35 to 37 hours, Pierre-André worked 50 to 60 hours and Patrick worked 60 to 70 hours.

[28] Reference was also made to the fact that the Binettes had a more generous vacation package (in time and salary) than the other employees and that the company paid the Binettes' life insurance premiums.

[29] It is clear that these various facts constitute weighty evidence that certainly establishes on a balance of probabilities that the three shareholders' conditions of employment were in no way comparable to those of the other employees, as they were more advantageous in several respects.

[30] However, the real question that must be asked in this case is as follows: is it reasonable to imagine a situation in which three third parties would have been offered conditions of employment comparable or similar to those referred to in the instant case? In this regard, I reiterate what I said in *9022-0377 Québec inc. (Évasion Sports D.R.) v. Minister of National Revenue*, 2004-3731(EI), 2005TCC474, at paragraphs 49-59 inclusive:

> 49 The Appellant made much of the relevance of comparing Roger Gagnon’s status before and after his departure. After the sale of Roger Gagnon’s shares to the two other shareholders, i.e. to his brother, Denis and to Mr. Coiffier—they each now held 50% of the shares—the company had to fill the void created by Roger’s departure, so it retained the services of Pierre Deschênes.

50 In support of its arguments, the Appellant compared the salary, work conditions, the constraints of absences, vacation, etc. of Roger Gagnon and of Pierre Deschênes; after the departure of Roger Gagnon, Mr. Deschênes was given a large part of work performed until that time by Roger Gagnon.

51 I do not find the comparison totally relevant because Pierre Deschênes did not have any shares in the business. What a company demands and requires from its shareholders holding employment in its commercial activities, after having agreed to the terms and conditions of employment, has nothing to do with the salary reserved, offered or agreed to by anyone without any shares in the company.

52 When shareholders in an arm's length or non-arm's length relationship decide to have a salary policy for the shareholders-workers, be it stingy or generous, very permissive or very restrictive, it has nothing to do with the other employees' conditions of employment.

53 If shareholders-workers agreed to the conditions, whether the conditions place them at an advantage or disadvantage vis-à-vis other company employees, it has nothing to with the existence of a non-arm's length relationship. The only relevant question is whether or not there was work, remuneration, power of intervention and control of the company over one or all of the shareholders-workers. If so, a contract of employment exists. In an exclusion as set forth in paragraph 5(2)(*i*) of the *Act*, a comparison of the work must be made between a shareholder-worker in an arm's length relationship, and not with other employees who have no shares, even if shareholder status and worker status are fundamentally different.

54 To argue the contrary would create a serious inconsistency with respect to all SMEs where shareholders who are dealing with each other at arm's length decide to have a particular policy for shareholders-workers. Without being subject to the exercise of discretionary power, given the absence of a non-arm's length relationship, their work agreement would be deemed insurable, even if their conditions of employment were extremely different from those of other workers in the same company.

> 55 The very high level of autonomy shared by the shareholders-workers in the performance of their work, the significance of the employment, the substantially lower or higher salary of the shareholders-workers with relation to the other workers, the total absence of vacation or opportunity to take vacation without greater notice than that of other employees, and so forth, are all elements that shareholders-workers dealing with each other at arm's length cannot invoke to exclude themselves from the obligation to pay premiums on the ground that their work agreement is not a true contract of service.
>
> 56 Parliament made an express stipulation on the issue of work performed by shareholders employed in their business. It appears in paragraph 5(2)(*b*) of the Act, which stipulates that the work performed by a shareholder-worker or an owner of more than 40% of voting shares is automatically excluded from insurable employment.
>
> 57 The status of a shareholder-worker with less than 40% of voting shares is recognized under the Act. Consequently, where one or more comparisons are required in a case where a non-arm's length relationship exists, an analysis and comparisons must be carried out between workers working in the same capacity or capacities, and the shareholder capacity cannot be concealed from the analysis.
>
> 58 When a person invests in an area in which he or she has no or little knowledge and his or her co-shareholders have the skill and expertise, it is completely natural to leave it to them to ensure sound management of the business.
>
> 59 It therefore becomes essential for that person to have some tools of control or intervention. In this case, Denis Coiffier, in addition to the rights conferred upon him through his 40% portion of shares, was probably the instigator of the shareholder agreement that provided him with an additional element to ensure the smooth operation of the company and the viability of his investment.

[31] In the instant case, the Appellant referred to the conditions of employment of the company's employees. This comparison is completely inappropriate, since it is obvious that the differences were important and numerous.

[32] Only similar or comparable situations can be compared. One need only think of a situation in which the founder of a company, after a long and prosperous career, decides to plan his or her retirement and, for this purpose, to come to an agreement with managerial employees with whom the founder has worked for some time and whom he or she trusts completely. The transition scenario could be comparable to the facts disclosed by the evidence.

[33] The analysis on which the decision under appeal was based took account of all the relevant facts, and the Minister's conclusion is entirely reasonable, which means that there are no grounds for intervening.

[34] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 3rd day of April 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 21st day of May 2008.

Brian McCordick, Translator

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APPEARANCES:

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