

Docket: 2008-1157(EI)

BETWEEN:

J. B. DESCHAMPS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on October 23, 2008, at Québec, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jérôme Carrier  
Counsel for the Respondent: Mélanie Bélec

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**JUDGMENT**

The appeal pursuant to 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 19th day of December 2008.

“Alain Tardif”

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Tardif J.

Translation certified true  
on this 19th day of February 2009.  
Bella Lewkowicz, Translator

Citation: 2008 TCC 612  
Date: 20081219  
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### **REASONS FOR JUDGMENT**

Tardif J.

[1] This is an appeal from the determination that the work performed from January 1, 2006, to May 15, 2007, by the Deschamps brothers, Christian, Francis and Jean, for the Appellant corporation J.B. Deschamps inc., was insurable.

[2] Where individuals performing work are related to their employer pursuant to the *Income Tax Act*, the *Employment Insurance Act* (the Act) provides that the work in question is excluded from insurable employment. However, Parliament provided one exception: when the work in question is carried out in circumstances and under conditions similar to those that an employee and an employer dealing with each other at arm's length would accept. In determining whether the exception applies, the Respondent has discretionary power attributed by Parliament that he must exercise by taking certain criteria into consideration, as follows:

5 (3)(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.

([http://www.hrsdc.gc.ca/eng/ei/legislation/ei\\_act\\_insuremp.shtml](http://www.hrsdc.gc.ca/eng/ei/legislation/ei_act_insuremp.shtml))

[3] When this discretionary power is exercised judiciously and unimpeachably, the Tax Court of Canada does not have the power to change the decision.

[4] When an individual institutes an appeal to have a decision set aside and obtain a new evaluation, he or she must first prove that the analysis was conducted improperly and that certain facts or elements were not taken into consideration or that undue importance was attached to insignificant or secondary elements.

[5] In other words, it is the duty of the Court to verify the quality of the work carried out by the Respondent in exercising his discretionary power.

[6] If all the relevant facts were taken into consideration and evaluated objectively and the conclusion reached is reasonable, the Court must simply validate the reasonableness of the conclusion even if another conclusion could be reached given the same facts and circumstances.

[7] To explain and justify the merits of his determination, the Respondent made the assumptions of fact stated in the Reply to the Notice of Appeal. Of these assumptions of fact, counsel for the Appellant admitted or denied the following:

[TRANSLATION]

5. ...

- a) the Appellant incorporated December 31, 1979; **(admitted)**
- b) the Appellant specializes in the commercial printing of confidential documents, such as birth and death certificates; **(admitted)**
- c) as part of its professional activities, the Appellant owns a plant that operates 24 hours a day, 7 days per week and its office hours are Monday through Friday, 7:30 a.m. to 5:00 p.m.; **(admitted)**
- d) the Appellant's sales amount to \$25 million per year and the Appellant employs over 240 employees; **(admitted)**

- e) the workers were shareholders of the Appellant and worked year-round for the Appellant's business; **(admitted)**
- f) each of the workers was a director of one of the Appellant's sectors of activity and all were members of the Appellant's board of directors; **(admitted)**
- g) the workers had worked for the Appellant for over 20 years and held the following positions: **(admitted)**
  - Christian was the Appellant's executive vice-president;
  - Francis Deschamps was the Appellant's vice-president of procurement, research and development;
  - Jean Deschamps was the Appellant's president;
- h) the workers made all major operating decisions for the Appellant's business together; **(admitted)**
- i) the workers had daily meetings at the office and attended the Appellant's annual board meetings; **(admitted)**
- j) the workers did not guarantee any loan or line of credit for the Appellant; **(admitted)**
- k) the workers and their father, Jules Deschamps, have signing authority for the Appellant's bank accounts; **(admitted)**
- l) only one signature is required for the Appellant's chequing account whereas two signatures are required for loans and lines of credit; **(admitted)**
- m) generally speaking, the workers carried out their duties in the Appellant's branch offices located in Québec and Montréal; **(admitted)**
- n) the workers did not have a fixed work schedule; they generally worked the following hours during business hours: **(denied)**
  - Christian worked 35 to 50 hours per week;
  - Francis worked 35 to 55 hours per week;
  - Jean worked 40 to 50 hours per week;
- o) the workers' actual work hours were not recorded or accounted for by the Appellant; **(admitted)**
- p) the workers, like all of the Appellant's executive employees, had wage-loss insurance; **(admitted)**

- q) the workers had a defined-benefits pension plan whereas the Appellant's other employees had a defined-contribution pension plan; **(admitted)**
  - r) each worker had a fixed annual salary determined during board meetings; **(admitted)**
  - s) the workers' remuneration was established based on their respective tasks and responsibilities; **(admitted)**
  - t) the Appellant granted a 2% salary increase to all its employees and the workers got a \$2,000 increase in 2006; **(admitted)**
  - u) in 2006, the workers received the following earnings: **(admitted)**
    - Christian was paid \$117,899 and received \$5,128.44 in taxable benefits,
    - Francis was paid \$109,572 and received \$6,362.45 in taxable benefits,
    - Jean was paid \$146,152 and received \$6,765.14 in taxable benefits,
  - v) the Appellant made an automobile available to the workers and reimbursed all the related expenses; **(admitted)**
  - w) all expenses related to carrying out their tasks were paid for with a credit card provided by the Appellant; **(denied)**
  - x) the workers were entitled to annual vacations of indeterminate length; they took 6 or 7 weeks per year; **(admitted)**
6. ...
- a) the Appellant's only shareholder was Corporation Financière J. Deschamps; **(admitted)**
  - b) Corporation Financière J. Deschamps is a holding company in which the majority shareholder was Jules Deschamps; **(admitted)**
  - c) between January 1, 2004, and the end of the time at issue, the workers each held between 2.72% and 2.84% of the voting shares in Corporation Financière J. Deschamps; **(admitted)**

- d) during this period, Mr. Jules Deschamps held the remaining voting shares in Corporation Financière J. Deschamps (over 91%); **(admitted)**
- e) Mr. Jules Deschamps is the workers' father; **(admitted)**
- f) the workers were related to a person who controlled the Appellant. **(admitted)**

7. ...

- a) the workers did not track their working hours but were subject to the authority of the Appellant as exercised by the board of directors of which they were part with their father; **(admitted)**
- b) even though they did not have a set work schedule, they usually carried out their tasks during the business hours of the Appellant's offices and worked 30-55 hours per week; **(admitted)**
- c) the workers received reasonable remuneration having regard to the tasks assigned to them by the Appellant and their remuneration was decided during the Appellant's annual board meetings; **(denied)**
- d) considering the scope of the Appellant's business and each worker's tasks and responsibilities, their remuneration corresponded to the Appellant's economic and operational needs; **(denied)**
- e) each worker was responsible for his sector of activities and provided services to the Appellant as salaried employees while consulting each other regularly regarding the business's general operation; **(denied)**
- f) each worker's work was essential and necessary to the smooth running of the Appellant's operations as all three held senior executive positions; **(admitted)**
- g) if the workers had special working conditions, it was not as a result of their non-arm's length relationship with the Appellant but as a result of their status as executives of the Appellant; **(denied)**

[8] In the case at bar, Jean and Christian Deschamps testified; the evidence submitted in support of the appeal relies mainly on their testimony. Firstly, Jean Deschamps provided the business's history. He explained that the business had been run by his family for three generations and was now headed by the three Deschamps brothers.

[9] Since it was founded in 1926, the business has gone through several changes. In 1945, the brothers' father took it over from their grandfather in order to run it with his brothers, the uncles of Jean, Christian and Francis.

[10] In 1979, the brothers ran the business with their father and sister.

[11] In 1995, following a major disagreement with respect to the business's direction, the sister sold her shares to the other shareholders, who continued to run the business.

[12] The father held a very large majority of the shares in "J.B. Deschamps inc." and over the years, he gradually withdrew from the corporation's operations.

[13] During the period at issue, Jules Deschamps, then 80 years old, had reduced the time he put into the corporation.

[14] His son, Christian, even said that their father seemed more interested in flowers and flower arrangements than in the corporation's daily activities.

[15] It was also because his father had confidence that his three sons would manage the corporation as though it was their own.

[16] Jean Deschamps provided several examples of major decisions, such as acquisitions, particularly equipment and machinery, which cost a few million dollars. He said that, out of respect, the Deschamps brothers talked to him about it, but usually after the fact.

[17] As a general rule, the father was neither consulted, nor called upon to contribute to corporate activities, even for strategic activities like the modernization that was required to remain competitive.

[18] New market niches were added, which effectively made the corporation unrecognizable in the eyes of Jules Deschamps, the father. It was usually managed through informal meetings which only the three brothers attended and where they made current, important or strategic decisions.

[19] During the period in issue, the corporation had over 200 employees and had annual sales of over 25 million dollars. Operating in the highly specialized area of

printing and executing highly sophisticated tasks, the corporation must regularly acquire cutting-edge equipment to keep up.

[20] The fast and substantial evolution of the industry, the many changes, the addition of new avenues and multiple needs of a growing customer base are factors that, combined with the advanced age of their father, explain why, for all intents and purposes, he has completely withdrawn from the management of the corporation, even though he still has an office and occasionally attends certain meetings, particularly the annual meeting when the financial statements are tendered.

[21] Next, the Respondent called the Appeals Officer, Johanne Potvin, to testify. She explained the work that she had done and emphasized the facts she considered in making her determination.

[22] During cross-examination, it was revealed that a Ms. Poirier had recorded the Appeals Officer's phone calls without her knowledge. The transcription of the recording was submitted to counsel for the Appellant, who apparently had used it for cross-examination. This manner of proceeding is completely inappropriate, even more so because the recording was clearly made without Ms. Potvin's knowledge for the obvious purpose of trapping her.

[23] Incidentally, one of the Deschamps brothers explained that some of his answers were voluntarily incomplete in order to avoid certain fiscal consequences.

[24] The burden of proof before the Court lies with the individual who brings the appeal. On the one hand, it is not easy to discharge this burden; on the other hand, the Court's justification is very limited in that it cannot intervene if the Respondent exercised his discretionary power correctly by taking into consideration all the relevant facts, by interpreting them in a judicious and reasonable manner and by proceeding in an honest and transparent manner.

[25] In some situations where the Appellant is not represented, the Appeals Officer must make a concerted effort to ensure that all the relevant facts have been considered because such an Appellant may very well be unable to recognize the elements relevant to his or her file. In this case, the Respondent would be looked upon with disfavour if he alleged that the information obtained was insufficient or incomplete. This element alone may contribute to discrediting the quality of the Respondent's work and cast doubt on the work in terms of exercising that discretionary power.



[26] However, if an individual is competently represented by one or more persons and voluntarily conceals a relevant element for the purpose of raising it before the Court in order to discredit the Respondent with respect to the exercise of his discretionary power and thereby obtain a revision of this determination, this manner of proceeding must be rejected as it is patently unreasonable. Accepting this manner of doing something or subscribing to it would bring the administration of justice into disrepute by rendering the review stage completely useless.

[27] In the case at bar, the only criticisms or grievances raised with respect to how the discretionary power was exercised stems from a set-up whose sole purpose was to trap the Appeals Officer by hiding information from her or giving her incomplete or false information; as a result, I do not accept this evidence nor any of the grievances and I find that the discretionary power was exercised irreproachably on the basis of the facts that were admitted to by counsel for the Appellant, and that it is appropriate to reproduced them below:

[TRANSLATION]

- a) the Appellant incorporated December 31, 1979; **(admitted)**
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- c) as part of its professional activities, the Appellant owns a plant that operates 24 hours a day, 7 days per week and its office hours are Monday through Friday, 7:30 a.m. to 5:00 p.m.; **(admitted)**
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- b) even though they did not have a set work schedule, they usually carried out their tasks during the business hours of the Appellant's offices and worked 30-55 hours per week; **(admitted)**

[28] I would like to add that even if the Appellant had convinced me that the exercise of power was tainted by certain defects or serious lapses, I would still have confirmed the merits of the decision made regarding the subject of the current appeal.

[29] The Appellant, through its counsel, admitted that the three brothers, Christian, Francis and Jean, effectively assumed control of the corporation. On the basis of this admission, the preponderance of evidence is such that the family ties did not play a role in establishing the working conditions and salaries. The issue is about the characterization of the employment contracts and not the details of the division of shares and associated rights of said shares.

[30] The few comparisons submitted, particularly with respect to the possible use of an asset (in this case, the corporation's trucks) for personal purposes, the taking out of wage-loss insurance, the amount of autonomy enjoyed and the use of an employee's services for personal purposes are the benefits often enjoyed by corporate managers who are not related to their employers.

[31] Moreover, these are taxable benefits that are often the subject of assessments. This kind of assessment is not limited to files where individuals are related to their employers.

[32] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 19th day of December 2008.

“Alain Tardif”

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Tardif J.

Translation certified true  
on this 19th day of February 2009.  
Bella Lewkowicz, Translator

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COURT FILE NO.: 2008-1157(EI)  
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PLACE OF HEARING: Québec, Quebec  
DATE OF HEARING: October 23, 2008  
REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif  
DATE OF JUDGMENT: December 19, 2008

APPEARANCES:

Counsel for the Appellant: Jérôme Carrier  
Counsel for the Respondent: Mélanie Bélec

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