Docket: 2009-3472(EI)

BETWEEN:

RÉJEAN BEAUPORT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 30, 2010, at Montréal, Quebec

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Emmanuel Jilwan

JUDGMENT

The appeal from the decision of the Minister of National Revenue determining that the appellant held insurable employment with Excavation Normand Majeau Inc. (payor) from January 1, 2005, to July 31, 2008, within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* is dismissed on the basis that the appellant held insurable employment from January 1, 2005, to May 21, 2005, and from December 12, 2005, to July 31, 2008. As for the period from May 21, 2005, to December 12, 2005, I find that the appellant did not work for the payor during this period.

Signed at Ottawa, Canada, this 8th day of July 2010.

"Lucie Lamarre"

Lamarre J.

Translation certified true
On this 5th day of August 2010
Monica Chamberlain, Translator

Citation: 2010 TCC 368
Date: 080710
Docket: 2009-3472(EI)

BETWEEN:

RÉJEAN BEAUPORT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from a decision of the Minister of National Revenue (the Minister) that the appellant held insurable employment with Excavation Normand Majeau Inc. (the payor) from January 1, 2005, to July 31, 2008, within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (EIA). The appellant is of the opinion that he was not an employee but a self-employed worker.

[2] The facts relied on by the Minister in his determination can be found in paragraph 5 of the Reply to the Notice of Appeal, which is reproduced below:

> [TRANSLATION]
> 5. The Minister relied on the following assumptions of fact in determining that the appellant was employed by the payor under a contract of service:
>
> (a) the payor was incorporated on April 10, 1985, in accordance with Part 1A of the *Companies Act;*
>
> (b) Michel Majeau is the sole shareholder of the payor;
>
> (c) the payor operates a business specializing in excavation and snow removal; [**admitted**]
>
> (d) the appellant was employed by the payor as a welder;

(e) the appellant used the payor's machinery for welding; [**admitted**]

(f) the appellant worked in the payor's garage in Saint-Gabriel de Brandon and at the payor's sandpit in Sainte-Ursule;

(g) either the payor or the payor's foreman, Richard Frappier, informed the appellant of his workplace;

(h) the payor's foreman who [*sic*] planned what work the appellant would do;

(i) the foreman supervised the appellant's welding work;

(j) the appellant chose his method of work; [**admitted**]

(k) the appellant worked with other welders, employees of the payor;

(l) the appellant used the payor's welding equipment and material; [**admitted**]

(m) the payor provided the appellant with welding gloves and denim overalls; [**admitted**]

(n) the appellant worked from Monday to Friday, 7:30 a.m. to 4:30 or 5 p.m.,

(o) when he first started working for the payor, the appellant worked only 3 days per week, later he asked the payor for and received more days to bring him up to 5 days per week; [**admitted**]

(p) the appellant had 30 minutes for lunch, like the other employees of the payor; [**admitted**]

(q) every day the appellant filled out time sheets on which he entered a number for the machine and the starting and finishing time, like the other employees of the payor;

(r) the payor already knew how many hours would be entered on the invoices submitted by the appellant;

(s) the appellant set his rate at $18 an hour, which the payor accepted. Later he requested and obtained an increase in his rate to $19; [**admitted**]

(t) the invoices submitted by the appellant indicated all of the welding jobs, the number of hours and the hourly rate without any additional charges;

(u) the annual total of the invoices corresponds to the gross income that the appellant declared on his income tax returns;

(v) the appellant is claiming the cost of using his vehicle for the entire period at issue and the cost of using part of his residence for 2006 and 2007; [**admitted**]

(w) during the entire period at issue, the appellant only earned income from the payor;

[3] The evidence reveals that the appellant is a welder and that he was hired by the payor to repair the payor's machinery. He performed the work that he was asked to do by the foreman on a regular basis. He could work at the payor's garage or directly at the two sandpits owned by the payor, depending where there was work.

[4] Together, the payor and the appellant agreed that the appellant would be considered a self-employed worker. Accordingly, the appellant submitted a weekly invoice to the payor, which indicated the number of hours he had worked and the hourly rate agreed upon. These invoices were filed as Exhibit I-1. They reveal that in January 2005, he was paid $16 an hour and that this rate increased to $18 an hour in February 2005. The appellant worked every week, on average 35 to 42 hours per week until the end of May 2005. He started working full time for the payor again in December 2005 until the end of July 2008. According to these invoices, there does not seem to have been any break in work for vacation. From January to April 2006, inclusive, he received $10 an hour for 42-hour weeks. This rate rose again to $18 an hour in May 2006 and he worked between 25 and 42 hours per week in 2006. In 2007, the appellant worked an average of 37 hours per week at a rate of $18 an hour. In 2008, the working hours varied between 29 and 46 hours per week, but were 40 hours on average. The hourly rate increased to $19 in June 2008.

[5] The appellant acknowledged that he followed the schedule of the other employees so that the work was done regularly. He went to the payor's premises in the morning or he was informed in the evening before leaving, of the work to be performed the next day. Assignments could last several days. The appellant could not find someone to replace him but he could occasionally be helped by other welders on site.

[6] He used his own vehicle to travel between the garage and the sandpits, at his own cost. He did not have access to the payor's trucks. The payor provided the necessary machinery and clothing. According to the appellant, he did not have the appropriate equipment, and if he had had to provide it himself, he would have charged a higher hourly rate.

[7] He also worked for the forestry union in 2005 and in 2008 (the total income from this second source apparently was, according to Lise Bérard, the appellant's spouse, $783 in 2005 and $2,264 in 2008). Based on the invoices filed as Exhibit I-1, I calculated that the income the appellant earned from the payor was $15,632 in 2005, $24,787 in 2006, $30,078 in 2007 and $20,842 in 2008.

[8] The appellant claimed his income as a self-employed worker and thus deducted his expenses. He implied that he was not paid for his vacation, but I would note that he does not seem to have taken any.

[9] During his investigation, Victor Girard, decision-making officer for the Canada Revenue Agency (CRA), noticed that the appellant did not submit any bids and that he went to the workplace to be told what work he had to do. The appellant did not advertise and was not registered with any business registry. He did not collect any goods and services tax (GST).

[10] Under article 2085 of the *Civil Code of Québec* (C.C.Q.), a contract of employment exits, and consequently employee status, when there is direction or control by the employer. Article 2085 C.C.Q. reads as follows:

> **2085.** A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

[11] There is a contract of enterprise, and consequently self-employed status, if there is no relationship of subordination between the payor and the appellant in the performance of the contract. Article 2099 C.C.Q. governs the contract of enterprise and reads as follows:

> **2099**. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[12] Under articles 1425 and 1426 C.C.Q., the common intention of the parties must be taken into account.

> **1425**. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

> **1426**. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

[13] However, the behaviour of the parties in performing the contract must concretely reflect this mutual intention or else the contract will be characterized on the basis of actual facts and not on what the parties claim (see *Grimard v. R.*, 2009 FCA 47, at paragraphs 32 and 33).

[14] Subordination exists if the payor has the power of determining the work to be done, overseeing its performance and controlling it. The employee is a person who agrees to be integrated into the operating environment of a business so that it may receive benefit of his work (see *Grimard*, *supra,* at paragraph 36, that cites an excerpt from Robert P. Gagnon's book *Le droit du travail au Québec*, 5th ed. (Cowansville: Éditions Yvon Blais, 2003) at pages 66-67 and cited by the Federal Court of Appeal in *Wolf v. R.*, [2002] 4 F.C. 396.)

[15] In this case, it seems to me that despite the fact that the parties referred to the concept of self-employment, it is not the reality of the situation. The appellant agreed to be integrated into the operating environment of the payor's business, by accepting regular work assignments to be performed from January to the end of May 2005 and from December 2005 to the end of July 2008.

[16] He was paid without fail for every hour worked, and he worked on the premises of the business with equipment provided to him. Those are the indicia of supervision that show a relationship of subordination with the payor.

[17] Other than the small income earned from the forestry union in 2005 and in 2008, during periods when he was clearly not employed by the payor, the appellant earned his income from his contract of employment with the payor who determined the work to be performed by the appellant, and the appellant agreed to perform it within the framework established by the payor.

[18] It is true that the appellant used his own vehicle to travel between the garage and the sandpits. This element alone, in my opinion, is not sufficient to change the legal nature of the working relationship based on the other indicia of supervision described above.

[19] For these reasons, I find that the appellant was an employee of the payor from January 1, 2005, to May 21, 2005, and from December 12, 2005, to July 31, 2008. As

for the period from May 21, 2005, to December 12, 2005, the appellant did not seem to work for the payor during this period.

[20] The appeal is dismissed.

Signed at Ottawa, Canada, this 8th day of July 2010.

"Lucie Lamarre"

Lamarre J.

Translation certified true
On this 5th day of August 2010
Monica Chamberlain, Translator

CITATION:	2010 TCC 368
COURT FILE NO:	2009-3472(EI)
STYLES OF CAUSE:	RÉJEAN BEAUPORT AND M.N.R.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 30, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	July 8, 2010

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Emmanuel Jilwan

COUNSEL OF RECORD:

For the appellant:	
Name:	
Firm:	
For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada