Docket: 2010-3970(EI)

BETWEEN:

PERRY FLAMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on April 28, 2011, at Vancouver, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

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| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Amandeep K. Sandhu |

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**JUDGMENT**

In accordance with the following reasons, the appeal of the decision of the Minister of National Revenue under the *Employment Insurance Act* is allowed and the decision vacated on the basis that during the Period, the Appellant had control of more than 40% of the shares of the employer corporation, MSA Moving & Storage Ltd., and his employment was therefore excluded under paragraph 5(2)(*b*) of the *Act.*

Signed at Ottawa, Canada, this 3rd day of May 2011.

"G.A. Sheridan"

Sheridan J.

Citation: 2011TCC234
Date: 20110503
Docket: 2010-3970(EI)

BETWEEN:

PERRY FLAMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

**REASONS FOR JUDGMENT**

Sheridan J.

[1] The Appellant, Perry Flaman, is appealing the decision of the Minister of National Revenue that he was engaged in insurable employment for the period January 1, 2007 to September 10, 2009 (the "Period").

[2] Applying the two-step test established by the Federal Court of Appeal in *Sexton v. Minister of National Revenue* (1992), 132 N.R. 71, the Minister's position is firstly, that the Appellant's work was insurable employment under paragraph 5(1)(*a*) of the *Employment Insurance Act* because he was engaged under a contract of service with the payor, MSA Moving & Storage Ltd.; and that his employment by MSA Moving & Storage Ltd. was not excluded employment under paragraph 5(2)(*b*) of the *Act* because the Appellant did not control more than 40% of the voting shares of that company.

[3] In making this determination, the Minister relied on the assumptions of fact set out in paragraph 6 of the Reply to the Notice of Appeal:

a) the Payor was in the business of household and commercial moving;

b) the Payor was incorporated on September 25, 2006;

c) the Payor's shares were owned by Ashay Ventures Ltd. ("Ashay") (55%) and JPACT Enterprises Ltd ("JPACT") (45%);

d) during the Period, the Appellant did not have control over the voting shares of JPACT.

e) Ashay's shares were owned equally by Graham Baggaley ("Graham") and Lesley Baggaley ("Lesley");

f) the Appellant and his wife Joan Flaman ("Joan") each own 50% of the voting shares in JPACT;

g) …[1]

h) both the Appellant and the Payor intended for the Appellant to be employed pursuant to a contract of service;

i) during the Period, the Appellant was an employee of the Payor and was issued a T4 in each year;

j) the Appellant held the position of Vice-President and Operations Manager of the Payor;

k) on October 1, 2006, Joan assigned a company resolution as director to enter into a Share Purchase Agreement for the shares of the Payor;

l) on October 1, 2006, Joan, as director of the company, signed a Promissory Note in the amount of $240,000.00 respecting the purchase of shares in the Payor from Baggaley Enterprises Inc.;

m) during the Period, no infringement existed which would restrict Joan's free and independent legal voting rights in JPACT;

n) the Appellant did not control more than 40% of the voting shares of the Payor during the Period; and

o) during the Period, the Appellant was not related to a person who is a member of a related group that control the Payor Corporation.

[4] Turning first to the Appellant's status as an employee or independent contractor, I am satisfied that the Appellant, in his capacity as operations manager, was an employee of MSA Moving & Storage Ltd. The company issued him T-4's during the period, expensed his salary, paid him a fixed salary, and paid for benefits such as medical insurance, sick days and vacation pay.

[5] The real question is with the second prong of the *Sexton* test concerning the Appellant's control of the voting shares of MSA Moving & Storage Ltd. and his

[1] At the hearing of this appeal, the Reply was amended to delete the assumption set out at paragraph 6(g): "the Appellant and the Payor are related pursuant to section 251 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended".

challenge of the assumed facts in paragraphs 6(n) and (o) of the Reply. Briefly summarized, it is not disputed that during the Period, the Appellant and his spouse each owned 50% of the voting shares of their holding company, JPACT Enterprises Ltd., which in turn held 45% of the voting shares in MSA Moving & Storage Ltd. The other 55% of MSA Moving & Storage Ltd. was held by Ashay Ventures Ltd., the holding company of the Appellant's business partner and his wife, Graham and Leslie Baggaley. While acknowledging that his spouse was the legal owner of 50% of the voting shares in JPACT Enterprises Ltd., the Appellant testified that, in fact, they had an understanding that she would vote her shares as he did, the effect of which was to give him *de facto* control of her shares. As a result, he had control of 100% of the voting shares of JPACT Enterprises Ltd. and thereby, control of 45% of the voting shares of MSA Moving & Storage Ltd., a percentage sufficient to bring his employment within the exclusion under paragraph 5(2)(*b*) of the *Act.*

[6] The Appellant was the only witness to testify in this Informal Procedure appeal. I found him credible and do not doubt for a moment his testimony that his spouse was no more involved in the activities of MSA Moving & Storage Ltd. after JPACT Enterprises Ltd.'s acquisition of its 45% interest in that company than she had been when the Appellant was merely employed as its operations manager. I accept his testimony that his spouse's involvement was limited to doing only what was necessary to permit him to convert his role from operations manager as an employee of MSA Moving & Storage Ltd. to operations manager employee and part-owner of the business. For JPACT Enterprises Ltd. to purchase the MSA Moving & Storage Ltd. shares, the Appellant had to borrow $300,000. Because their matrimonial home served as collateral, the Appellant's spouse was required to co-sign the loan and to be a party to the various agreements underpinning the corporate structure of the business.

[7] Counsel for the Respondent argued that such documents established that the Appellant's spouse owned half of JPACT Enterprises Ltd.'s shares, limiting the Appellant's control of that company to 22.5%, well below the threshold for subsection 5(2)(*b*) to apply. Citing *Sexton*, counsel contended that because there were no written agreements restraining the Appellant's spouse from exercising her voting rights in JPACT Enterprises Ltd., the Appellant could not be said to have had control of more than 40% of the voting shares in MSA Moving & Storage Ltd. The first difficulty I have with this analysis is that it overlooks the reality of the relationship between the Appellant and his wife of many years. Further, *Sexton* is distinguishable on the facts in that the Federal Court of Appeal upheld the trial judge's finding that there was an "absence of <u>any</u> evidence that [the shareholders with *de jure* control of

the company] did not have free exercise of the voting right to the shares held by them"[2]. [Emphasis added.]

[8] The same cannot be said in the present case. In this regard, it is more on point factually with another case referred to by counsel for the Respondent in her thorough review of the jurisprudence, *St-Onge v. Minister of National Revenue* 2004 TCC 399. There, the trial judge looked beyond the documentation establishing the legal ownership of the shares to determine who, in fact, controlled the shares of the employer corporation. Based on the evidence of the witnesses before him, he held that the employee shareholders had structured the company to ensure that none would have more than 40% of the voting shares merely to shield their otherwise insurable employment from exclusion under paragraph 5(2)(*b*) of the *Act.*

[9] No such motives were at play in the present matter; my point is simply that in reaching its conclusion as to the applicability of paragraph 5(2)(*b*), the Court must satisfy itself on the evidence before it whether, in the words of *Sexton*, "there are circumstances interfering with the holder's free and independent exercise of his voting right"[3]. In the present matter, there is sufficient evidence of such circumstances to persuade me on a balance of probabilities that the Appellant had *de facto* control of his spouse's voting shares in JPACT Enterprises Ltd. Accordingly, during the Period, he had control of more than 40% of the shares of MSA Moving & Storage Ltd. and his employment was excluded under paragraph 5(2)(*b*) of the *Act.* The appeal is allowed and the determination of the Minister is vacated.

Signed at Ottawa, Canada, this 3rd day of May 2011.

"G.A. Sheridan"

Sheridan J.

[2] At page 75, para. [13].
[3] Above, at page 74, para. [10].

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| CITATION: | 2011TCC234 |
| COURT FILE NO.: | 2010-3970(EI) |
| STYLE OF CAUSE: | PERRY FLAMAN AND<br>M.N.R. |
| PLACE OF HEARING: | Vancouver, British Columbia |
| DATE OF HEARING: | April 28, 2011 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice G. A. Sheridan |
| DATE OF JUDGMENT: | May 3, 2011 |

APPEARANCES:

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| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Amandeep K. Sandhu |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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