

Dockets: 2007-3421(EI)  
2007-4162(EI)

BETWEEN:

LES PANIERS P & P INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on common evidence on August 5, 2008, at Québec, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Anne Poirier

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### **JUDGMENT**

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

Signed at Ottawa, Canada, this 28th day of August 2008.

"Alain Tardif"

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Tardif J.

Translation certified true  
on this 3rd day of October 2008.

Brian McCordick, Translator

Citation: 2008 TCC 463  
Date: 20080828  
Dockets: 2007-3421(EI)  
2007-4162(EI)

BETWEEN:

LES PANIERS P & P INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

### **REASONS FOR JUDGMENT**

Tardif J.

[1] These are two appeals concerning the insurability of the work done for the Appellant, Les Paniers P & P Inc., by Daniel Pépin and Jean Pépin, and by Jacques Pépin and Clermont Allaire, from January 1, 2003, to December 31, 2005. The parties used evidence common to both matters.

[2] In Docket 2007-3421(EI), the Minister of National Revenue ("the Minister") determined that Daniel Pépin and Jean Pépin were employed by the Appellant in insurable employment from January 1, 2003, to December 31, 2005.

[3] In Docket 2007-4162(EI), the Minister determined that Jacques Pépin and Clermont Allaire were also employed by the Appellant in insurable employment from January 1, 2003, to December 31, 2005.

[4] The Appellant is contesting the decisions in both matters, and with respect to all four workers ("the Workers"). It submits that the employments in issue must be excluded from insurable employment under paragraph 5(2)(i) of the *Employment Insurance Act* ("the Act").

[5] Under paragraph 5(2)(i) of the Act, if the employer and employees are not dealing with each other at arm's length, the employment is excluded from insurable employment, unless, in the case at bar, the Workers and the Appellant 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 ... 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.

[6] The Minister's conclusions were based on the following assumptions of fact:

Docket 2007-3421:

[TRANSLATION]

5. (a) The Appellant, which was incorporated on April 12, 1985, operates a business that manufactures wood, cardboard and plastic containers and baskets for produce. **(admitted)**
- (b) The Appellant operates throughout the year and its peak period is from May to September each year. **(admitted)**
- (c) The Appellant's business hours are Monday to Friday from 7 a.m. to 4 p.m. **(admitted)**
- (d) Depending on the time of the year, the Appellant had 14 to 43 employees on its payroll. **(admitted)**
- (e) Decisions concerning the operations of the business are made by the Appellant's directors and managers. **(admitted)**
- (f) In addition to their salaries, the Appellant's shareholders, unlike the other employees, received a \$5,000 RRSP contribution from the Appellant. **(admitted)**
- (g) The Appellant did not pay its shareholders any dividends because the profits were reinvested in the business. **(admitted)**
- (h) During the period in issue, Daniel Pépin worked at the Appellant's plant. **(admitted)**
- (i) His principal duties were to manage the employees' work and look after the maintenance and operation of the machinery. **(denied)**

- (j) Generally, he worked during the Appellant's hours of operation, but occasionally, he worked a few hours in the evening. **(denied)**
  - (k) During the period in issue, Daniel Pépin received fixed remuneration of \$440 per week. **(admitted)**
  - (l) During the period in issue, the main task of Jean Pépin, the Appellant's Vice-President, was management. **(admitted)**
  - (m) He coordinated the employees' work, and was responsible for maintaining the machinery and hiring the requisite staff. **(admitted)**
  - (n) He worked during the Appellant's hours of operations, but also worked 5-10 additional hours per week due to machinery breakdowns and maintenance. **(admitted)**
  - (o) During the period in issue, Jean Pépin received fixed remuneration of \$440 per week. **(admitted)**
6. (a) The owners of the Appellant's voting shares were:
- Jacques Pépin, with 39%
  - Jean Pépin, with 39%
  - Daniel Pépin, with 11%
  - Clermont Allaire, with 11% **(admitted)**
- (b) Jacques, Jean and Daniel Pépin are brothers, and Clermont Allaire is the spouse of Carmen Pépin, the other shareholders' sister. **(admitted)**
- (c) Each shareholder is a member of a group that controls the Appellant. **(admitted)**
- 7 (a) Although the Workers, unlike the Appellant's other employees, did not fill out time sheets, their work schedule corresponded to the Appellant's needs and its hours of operation. **(denied)**
- (b) The duration of their work was consistent with the Appellant's needs during the Appellant's peak and off-peak periods of activity. **(denied)**
- (c) The Workers received fixed weekly remuneration based on a work schedule that was set in accordance with the Appellant's needs. **(denied)**
- (d) The Workers' remuneration, including the Appellant's annual contribution of \$5,000 to their RRSPs, was reasonable having regard to the services rendered to the Appellant. **(denied)**

[TRANSLATION]

7. (a) The Appellant, which was incorporated on April 12, 1985, operates a business that manufactures wood, cardboard and plastic containers and baskets for produce. **(admitted)**
- (b) The Appellant operates throughout the year and its peak period is from May to September each year. **(admitted)**
- (c) The Appellant's business hours are Monday to Friday from 7 a.m. to 4 p.m. **(admitted)**
- (d) Depending on the time of the year, the Appellant had 14 to 43 employees on its payroll. **(admitted)**
- (e) Decisions concerning the operation of the business are made by the four shareholders without regard to the extent of each shareholder's holdings. **(admitted)**
- (f) In addition to their salaries, the Appellant's shareholders, unlike the other employees, received a \$5,000 RRSP contribution from the Appellant. **(admitted)**
- (g) The Appellant did not pay dividends to the shareholders because the profits were reinvested in the business. **(admitted)**
- (h) During the period in issue, Jacques Pépin was the Appellant's President and Chief Executive Officer. **(admitted)**
- (i) His main responsibilities were customer service, contracts, purchasing, and new customer prospecting. **(admitted)**
- (j) During the summer he did deliveries, and during the winter he worked at the plant, planned production and attended various conferences. **(admitted)**
- (k) Generally, he worked during the Appellant's hours of operations, but sometimes, he worked a few hours on evenings. **(admitted)**
- (l) During the period in issue, Jacques Pépin received fixed pay of \$440 per week. **(admitted)**
- (m) During the period in issue, Clermont Allaire was mainly responsible for customer service and the sound operation of the payor's business. **(admitted)**

- (n) He did deliveries during the summer and worked on production in the plant during the winter. **(admitted)**
  - (o) He worked during the Appellant's hours of operation. **(admitted)**
  - (p) During the period in issue, Clermont Allaire received fixed remuneration of \$440 per week. **(admitted)**
8. (a) The holders of the Appellant's voting shares were
- Jacques Pépin, with 39%
  - Jean Pépin, with 39%
  - Daniel Pépin, with 11%
  - Clermont Allaire, with 11% **(admitted)**
- (b) Jacques, Jean and Daniel Pépin are brothers, and Clermont Allaire is the spouse of Carmen Pépin, the other shareholders' sister. **(admitted)**
- (c) Each shareholder is a member of a group that controls the Appellant. **(admitted)**
- 9 a) Although the Workers, unlike to the Appellant's other employees, did not fill out time sheets, their work schedule corresponded to the Appellant's needs and its hours of operation. **(denied)**
- (b) The duration of their work was consistent with the Appellant's needs during its peak and off-peak periods of activity. **(denied)**
- (c) The Workers received fixed weekly remuneration for a work schedule that was based on the Appellant's needs. **(denied)**
- (d) The Workers' remuneration, including the Appellant's annual contribution of \$5,000 to their RRSPs, was reasonable having regard to the services rendered to the Appellant. **(denied)**

[7] Counsel for the Appellant admitted to the contents of several subparagraphs, notably in Docket 2007-4162(EI) and Docket 2007-3421(EI).

[8] The contents of certain subparagraphs, namely 5(i), 5(j) and 7(a) through (d) in Docket 2007-3421, and 9(a) through (d) in Docket 2007-4162, were denied.

[9] The Appellant's evidence consisted solely of Jacques Pépin's testimony. Jacques Pépin went over the history of the business. He explained that it was a family

business created by his father in 1958. His father sold the business to two of his sons in 1983. The sons operated it as co-owners for a few years. Then, brother-in-law Clermont Allaire, and another brother, Jacques, came on board.

[10] At that time, the percentage of shares owned by Daniel Pépin and Jean Pépin was reduced to 39% each. Each of the two newcomers acquired 11%, for a total of 100%.

[11] Jacques Pépin explained that each shareholder had very defined tasks and responsibilities; in other words, each looked after his own field of activity.

[12] Hours of work were neither calculated nor equally distributed. Each person had his responsibilities, discharged them, and devoted to them such time as was necessary to do his work.

[13] Everyone was motivated by the same desire to succeed and grow, and everyone was very concerned about keeping the business in good financial health. In fact, during his testimony, Mr. Pépin said that all the shareholders worked together, happily and dynamically pursuing a shared objective.

[14] Mr. Pépin explained that the business employed nearly 45 people during its peak period. The season ended with the first fall frosts, at which time the staff was reduced to roughly 15 employees.

[15] The company made various packaging products that were primarily used for the sale and presentation of small fruit. Its 52 products were made from wood, cardboard or plastic. The wood, either aspen or birch, was bought in bulk as timber, and was cut and processed by the company. During the cold season, that is to say, in late fall and in the winter, the roughly 15 employees were paid either by the piece or by the hour (minimum wage or slightly above) and they prepared for the coming season.

[16] As for his own duties, Jacques Pépin stated that he was primarily responsible for public relations and new customer prospecting, and for ensuring that customers were happy and satisfied.

[17] His job included attendance at various events and participation in various forums. He also saw to it that the products were of high quality, that they met customers' expectations, and that the prices were competitive.



[18] He explained that, in order to maintain and increase production, the company invested large amounts of money in 2005 to purchase modern, efficient and technologically advanced equipment so that the company could meet its objectives.

[19] All the shareholders, regardless of the number of shares that they owned, had the same salary of \$440 per week; the company also contributed \$5,000 to their RRSPs. In theory, everyone had six weeks' vacation, but it appears that nobody actually took six weeks off.

[20] The court, in an attempt to find out what would happen, raised the possibility of a scenario where some problem interrupts the shareholders' harmony and enthusiasm. But Jacques Pépin responded that the shareholders' agreement, which was not filed or produced, provided for every scenario.

[21] In light of the evidence, I feel that I can say that the shareholders, all of whom are related (initially two brothers, and then a third brother and a brother-in-law who represent the future) were serious, determined and very enthusiastic people who were devoted to the sound operation and development of the family business. Everyone worked as a team.

[22] Most cases of this nature are about situations where the management and shareholders belong to the same family.

[23] Indeed, the rule is that any work done by a person who is not at arm's length from his or her employer is excluded from insurable employment unless the context, facts, terms and conditions and circumstances show that the employment relationship would have been comparable or similar if the parties had been dealing with each other at arm's length.

[24] In order to determine whether this exception applies, one must consider all the relevant facts and considerations. Otherwise, the finding can be debatable or, at any rate, contain an element of randomness.

[25] Where all the facts, terms and conditions have been taken into account, and the determination is reasonable, the Tax Court of Canada cannot intervene, and its role is limited to confirming that the decision under appeal is well-founded.

[26] In the case at bar, like all cases of its kind, the burden of proof was on the Appellant, whose evidence consisted essentially of Jacques Pépin's testimony.

[27] Jacques Pépin correctly and very honestly described how everything was done, and he did so without hesitation or confusion.

[28] He showed, beyond any question, that the shareholders did not get paid the same amount that outsiders would have demanded for the same kind of work; indeed, the responsibilities and hours, particularly during the summer season, would have justified higher pay, even though the company made significant RRSP contributions to the shareholders and the winter period was less busy.

[29] But does this constitute a sufficient basis on which to conclude that outsiders would not have agreed to such terms and conditions of work? I do not believe so.

[30] I say this because there is no evidence that these specificities resulted from the non-arm's length relationships.

[31] Third parties might well have agreed to the same conditions and shared the same objectives and the same philosophy of doing everything they could to ensure that the business survived and developed so that, in the medium and long term, they would collect dividends or other rewards for their efforts, regardless of the fact that the shares were distributed unequally owing to the later arrival of two of the shareholders.

[32] I am especially though not exclusively referring to subparagraphs 5(f), (g), (j) and (k) of the Reply to the Notice of Appeal in Docket 2007-3421

[TRANSLATION]

(f) In addition to their salaries, the Appellant's shareholders, unlike the other employees, received a \$5,000 RRSP contribution from the Appellant. **(admitted)**

(g) The Appellant did not pay dividends to the shareholders because the profits were reinvested in the business. **(admitted)**

(j) Generally, he worked during the Appellant's hours of operation, but occasionally, he worked a few hours in the evening. **(denied)**

(k) During the period in issue, Daniel Pépin received fixed remuneration of \$440 per week. **(admitted)**

and to subparagraphs 7(f), (g), (j) and (k) in Docket 2007-4162:

[TRANSLATION]

- (f) In addition to their salaries, the Appellant's shareholders, unlike the other employees, received a \$5,000 RRSP contribution from the Appellant. **(admitted)**
- (g) The Appellant did not pay dividends to the shareholders because the profits were reinvested in the business. **(admitted)**
- (j) During the summer he did deliveries, and during the winter he worked at the plant, planned production and attended various conferences. **(admitted)**
- (k) Generally, he worked during the Appellant's hours of operations, but sometimes, he worked a few hours on evenings. **(admitted)**

[33] The only problem is that the Minister found that the remuneration that the shareholders were paid, including the annual contribution of \$5,000 to the Workers' RRSPs, was reasonable having regard to the services rendered.

[34] I do not completely agree with that finding. For one thing, it is not a decisive factor, and moreover, it is very easy to imagine a situation in which outsiders would have accepted such remuneration given the context.

[35] I would also note, parenthetically, that reasonableness is a less important element where the decisive aspect stems mainly from a comparison with a situation where the parties to the contract are dealing with each other at arm's length.

[36] In order to illustrate this fact, one need only think of the many situations where outsiders, all of whom are shareholders of the company that hired them, receive pay that is entirely incommensurate with their duties, for the very legitimate purpose of strengthening the financial footing of the company that they own so that it can perform more profitably at some point in the future.

[37] On the other hand, the evidence also disclosed that the people in issue had, in theory, six weeks' vacation, and that the period from October to late April was much less demanding.

[38] Lastly, based on a realistic hope that their shares would increase in value, they gladly agreed to the remuneration that they received.

[39] These elements or characteristics are very frequently present in situations where all the people are at arm's length from each other. Consequently, it was not at all unreasonable to conclude that the remuneration paid was reasonable under the circumstances.

[40] All the other elements of the analysis were relevant facts. I would note that the hearing did not bring any new facts to light. Moreover, none of the evidence that was adduced tends to discredit the quality of the analysis that was done, and the determination made on the basis of that analysis is completely consistent, valid, and, above all, reasonable.

[41] For all these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 28th day of August 2008.

"Alain Tardif"

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Tardif J.

Translation certified true  
on this 3rd day of October 2008.

Brian McCordick, Translator

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REASONS FOR JUDGMENT BY:	The Honourable Justice Alain Tardif
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APPEARANCES:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Anne Poirier

COUNSEL OF RECORD:

For the Appellant:

Name: Jérôme Carrier  
Firm: Attorney, Lévis, Quebec

For the Respondent:

John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Ottawa, Canada