Docket: 2011-1540(EI)

BETWEEN:

HÉLÈNE L. PERRON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LES PLACEMENTS BASQUE INC.,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 22, 2011, at Québec, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Agent for the appellant:	Ulysse Duchesne
Counsel for the respondent:	Marie-France Dompierre

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is dismissed and the decision rendered by the Minister of National Revenue on May 3, 2011, under the *Employment Insurance Act* is confirmed.

Signed at Ottawa, Ontario, this 31st day of January 2012.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 15th day of February 2012.
Elizabeth Tan, Translator

Citation: 2012 TCC 40
Date: 20120131
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REASONS FOR JUDGMENT

Jorré J.

[1] The respondent determined that the appellant was not employed in insurable employment during the period of May 23 to September 25, 2010, when she worked for Les Placements Basque Inc. (the payor).

[2] The appellant challenges this decision.

[3] The respondent does not challenge the fact the appellant was an employee of the payor.

[4] However, the respondent found that the appellant was engaged in excluded employment because a similar contract of employment would not have been entered into if the payor and the appellant had been dealing with each other at arm's length.

[5] The relevant provisions of the *Employment Insurance Act* are subsections 5(2)(*i*) and 5(3):

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

[6] During the period in question, the payor's shareholders were Jean-Marc Carré, Claude Poulin, Gilles Perron, André Perron and the appellant.

[7] Other than the appellant, each shareholder held 23% of the voting shares. The appellant held 8% of the voting shares.

[8] The appellant is Gilles Perron's wife.

[9] The appellant and Gilles Perron are André Perron's parents. Jean-Marc Carré and Claude Poulin are Gilles Perron and the appellant's brothers-in-law.

[10] The appellant did not challenge the fact she is related to the payor within the meaning of the *Income Tax Act*.

[11] Regarding the application of paragraph 5(3)(*b*), the principles are well established.

[12] In *Lavoie v. M.N.R.,*[1] Bédard J. summarized the role of the Court at paragraphs 7 to 9:

> 7 The Federal Court of Appeal has repeatedly defined the role conferred on Tax Court of Canada judges by the Act. That role does not permit the judge to substitute his or her discretion for the Minister's, but does involve an obligation to "verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, . . . decide whether the conclusion with which the Minister was "satisfied" still seems reasonable" (see *Légaré v. Canada (Minister of National Revenue - M.N.R.*), [1999] F.C.J. No. 878 (QL), at paragraph 4).
>
> 8 In other words, before deciding whether the Minister's conclusion still seems reasonable to me, I must verify, in light of the evidence before me, whether the Minister's allegations are in fact correct, having regard to the factors set out in paragraph 5(3)(*b*) of the Act. At issue, then, is whether appellant Lavoie and the payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.
>
> 9 Appellant Lavoie had the burden of proving that the Minister did not exercise his discretion in accordance with the principles that apply in this regard, essentially, that the Minister did not examine all of the relevant facts or failed to have regard to all of the facts that were relevant.

[13] As a result, having heard all the evidence, I must decide whether the Minister's finding that the payor and a person with an arm's length relationship would not have entered into a substantially similar contract is still reasonable.

[14] In rendering his decision, the Minister relied on the following presumptions of fact:[2]

> [TRANSLATION]
> (a) the payor was incorporated on October 15, 1987;
> (b) the payor operated a moose hunting and speckled trout outfitting business in Baie Sainte-Catherine;
> (c) the payor had 8 cottages that could lodge up to 30 individuals when full;
> (d) the payor operates from May 20 to September 25 and during the moose hunting season;
> (e) the payor does not participate in outdoor shows because 75% of its clients return every year;
> (f) the payor is a member of the Fédération des pourvoyeurs, which requires that it have an on-site guardian;

[1] 2010 TCC 580.
[2] Reply to Notice of Appeal, paragraph 6.

(g) the payor's phone number on the advertising flyers corresponds to that of the appellant;
(h) Gilles Perron works outside the region and helps out at the outfitting business by making repairs when he is there;
(i) Jean-Marc Carré and Claude Poulin help occasionally;
(j) André Perron is the payor's guardian; he takes care of the fishing clients and makes repairs during the payor's period of activity;
(k) the payor's cheques can be signed by Gilles Perron and the appellant;
(l) the appellant has worked for the payor for 23 years;
(m) the appellant's duties are to welcome and register the clients, clean the cottages after each departure with André Perron, do the bookkeeping, pay accounts and remit source deductions;
(n) the payroll journal was kept by André Perron's wife, but all the payor's cheques were written by the appellant;
(o) the appellant's work schedule is variable depending on the payor's operational needs, to a total of 45 hours per week;
(p) the hours worked by the appellant were not recorded;
(q) the appellant was paid a fixed weekly salary;
(r) during the period in question, the appellant's pay for the 18 weeks was paid to her in three instalments;
(s) in 2008 the appellant's salary was reduced by $65 a week, from $425 to $360 with no change in the employment conditions;
(t) this reduction in the appellant's salary was allegedly caused by the payor's lack of money, but the employment records issued by the payor to the appellant show that the weeks worked went from 15 to 18 in 2008 and that the total compensation did not change;
(u) according to the different accounts given by the appellant, she worked either 50 hours or 40 hours, whereas the payor's shareholder stated she worked 35 hours;
(v) in February 2009, the appellant took out a line of credit for $25,000 in her name, but for the payor's benefit because the personal interest rate is lower than the commercial rate;
(w) in October 2010 the balance on the line of credit was $20,400;
(x) the monthly payments for this line of credit are $200 and the appellant paid $1,400 of this between March 2009 and September 2010;
(y) during the period in question, the appellant prepared 74 cheques while between October 2009 and May 2010 she prepared 81 with no compensation;
(z) a worker with an arm's length relationship would not agree to work for no compensation or with a reduced salary and increased weeks of work for the same duties;
(aa) a worker with an arm's length relationship would not have accepted a reduced weekly salary with no change in employment conditions.

[15] Gilles Perron, Lily Leblond, the appellant's sister, the appellant and Lucie Asselin, rulings officer for the *Canada Pension Plan* and employment insurance, testified.

[16] Since 1990, Ms. Leblond had been doing the bookkeeping and preparing the payroll journal for free to help her sister.

[17] Among the exhibits submitted was the CPT110 form, "Report on Appeal."[3]

[18] Although there were small discrepancies, there was never really an issue of credibility.[4]

[19] The appellant and her son were the company's two employees. The other shareholders had jobs outside the outfitting business, but they worked there occasionally when they were not at their other jobs; they were not hired employees when they did work for the outfitting business.

[20] At the beginning, the work was divided between them such that the appellant did all the interior work and her son did all the exterior work. The appellant's work included all the office work—welcoming clients, answering the phone, signing cheques, etc.—and cleaning the cottages. She was paid $425 per week.

[21] In 2008, the appellant had an operation and, during that year, she could not do all the work she used to do, in particular cleaning the cottages.

[22] As a result, in 2008, the appellant's salary was reduced to $360 per week and Céline Bouchard was hired at $360 per week to clean the cottages. Ms. Bouchard was not a family relation.

[23] After 2008, the appellant completed her convalescence and returned to her duties but her salary did not increase. However, her son started to help by doing some of her tasks and her son's salary increased.

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[3] Exhibit I-1.

[4] For example, although there were previous statements with variations in the number of hours the appellant worked, it is clear the appellant did not calculate her hours and the company did not keep a record of her hours. I agree with her testimony that the approximate number of hours of 45 hours per week is an average and there could be significant variations from day to day; the total of 45 hours corresponds with the figure indicated in the records of employment. See Exhibit I-1, at page 6 of the Report on Appeal, tab K.

[24] The appellant's total compensation in 2009 and 2010 was slightly higher than her compensation in 2007, because she worked 18 weeks in 2009 and 2010, whereas she worked 15 weeks in 2007 and 2008.[5]

[25] I have no doubt that the appellant worked hard and made a significant contribution to the company.

[26] Although the appellant managed to show that certain presumptions of fact on which the Minister relied were false,[6] there are still some elements that, when considered together, are not consistent with a contract the company would have entered into if there had been an arm's length relationship with the employee.

[27] These elements are:

(a) The fact that during the entire period of May 23 to September 25, 2010, the appellant was only paid three times. Normally we expect an employee to be paid every week, every two weeks or every month.[7]
(b) The fact that nobody kept track of her hours.[8]
(c) The fact the appellant earned less than minimum wage.[9] During the period, she earned $8 an hour whereas minimum wage was $9 an hour.[10]
(d) Aside from the fact her salary was below minimum wage, it is clear that the $360 per week was not established in the same way as a salary that is negotiated with a third party with an arm's length relationship with essentially similar working conditions. It is also clear that the salary is not substantially similar to the salary that would be paid to a third party with an arm's length relationship.[11]

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[5] The appellant's total compensation was $6,375 in 2007, $5,400 in 2008, $6,480 in 2009 and $6,480 in 2010. See Exhibit I-1, at page 6 of the Report on Appeal, tab K.

[6] For example, the evidence showed that the appellant was repaid for the payments she made to the personal line of credit, although the repayments were late.

[7] The appellant's son was paid every two weeks. See transcript, page 32, question 91.

[8] This element, on its own, carries little weight.

[9] This is true even though the hours were highly variable. This variance was largely to accommodate the company's operational needs.

[10] Quebec's *Regulation respecting labour standards*, c. N-1.1, r. 3, a. 3., as it applied during the period in question.

[11] In 2007, the appellant did the office work and cleaned the cottages; she was paid $425 per week for these duties. In 2008 the appellant's duties were split between her and Ms. Bouchard, who were both paid $360 per week, for a total of $720 per week--$295 more per week for the appellant's same duties from the previous year.

Since Ms. Bouchard had an arm's length relationship with the payor, the $360 she received per week to clean the cottages is representative of the salary that would be paid to a third party with an arm's length relationship for such work. As a result, since the previous salary of $425 per week was for everything, the difference of $65 per week cannot be representative of the salary that would be negotiated with a third party for office work for 45 hours.

[28] I must note that certain elements, taken individually, are not necessarily incompatible with a contract between persons with an arm's length relationship, but taken as a whole, they are incompatible with a contract between persons with an arm's length relationship and for this reason, I cannot find that the Minister's decision is unreasonable.[12]

[29] Regrettably, I must dismiss the appeal.

Signed at Ottawa, Ontario, this 31st day of January 2012.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 15th day of February 2012.
Elizabeth Tan, Translator

Similarly, if the $360 salary paid in 2008 for just the office work represented what a third party with an arm's length relationship would be paid, then a $360 salary in 2010 for the office work and cleaning the cottages, even considering her son helped out with these tasks, cannot be representative of what a third party would be paid.

[12] I would like to make a note here. The appellant could take out a loan at a lower interest rate than the company by using her personal line of credit. Although the company repaid the payments the appellant made on the line of credit, these repayments were made significantly late (typically every four months: see transcript, at page 92, question 346). In regard to the use of a personal line of credit, the issue is whether the appellant acted as an employee or as a shareholder. If the appellant acted as a shareholder, this would not support the Minister's finding; however, if the appellant acted as an employee, this would tend to support the Minister's finding because normally, an employee does not lend money to their employer, even temporarily.

Considering the other elements, it is not necessary for me to come to a conclusion on the issue of whether the loan was made as a shareholder. I did not take this element into consideration when making my decision.

CITATION:	2012 TCC 40
COURT FILE NO.:	2011-1540(EI)
STYLE OF CAUSE:	HÉLÈNE L. PERRON v. M.N.R. and LES PLACEMENTS BASQUE INC.
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	August 22, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	January 31, 2012

APPEARANCES:

Agent for the appellant:	Ulysse Duchesne
Counsel for the respondent:	Marie-France Dompierre

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