Docket: 2012-2791(EI)

BETWEEN:

LEONARD PAYNE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 17, 2014, at St. John's, Newfoundland

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Keith Morgan
Counsel for the Respondent:	Devon Peavoy

JUDGMENT

The appeal is dismissed, without costs, and the decision of the Minister is confirmed.

Signed at Vancouver, British Columbia, this 27th day of May 2014.

"Diane Campbell"

Campbell J.

Citation: 2014 TCC 178
Date: 20140527
Docket: 2012-2791(EI)

BETWEEN:

LEONARD PAYNE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant is appealing a determination by the Minister of National Revenue (the "Minister") that he was not engaged by Cloud River Outfitters Ltd. (the "Payer") in insurable employment for various periods commencing January 23, 2006 and ending October 2, 2010. The Minister made this determination after concluding that the Appellant and Payer were not dealing with each other at arm's length and their employment was therefore excluded employment pursuant to paragraph 5(2)(i) of the *Employment Insurance Act* (the "*Act*"). Because the Appellant and the Payer were related persons as defined in subsection 251(2) of the *Income Tax Act* (the "*ITA*"), the Minister concluded that they would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

The Facts

[2] The Appellant holds 34 percent of the Payer's shares. His son and daughter own the remaining shares equally. The Payer's business focuses on providing hunting excursions, primarily to Americans, within the Province of Newfoundland and Labrador during the months of September and October in each year. It also occasionally offers fishing excursions during the summer months. The business is seasonal and according to the evidence of both the Appellant and his daughter, Shelley Payne-House, attendance at trade shows, in the United States throughout the winter months, is required in order to promote the business. According to their

evidence, the trade show attendance was the primary method of advertising because the majority of their clients were from the United States.

[3] Shelley Payne-House is the Payer's administrator as well as one of its shareholders. She stated that her duties included bookkeeping, dealing with clients and licences, coordinating employees and occasionally attending trade shows.

[4] While the Payer maintains only one fishing camp, there are four or five hunting camps maintained. According to the daughter's evidence, in addition to attending the trade shows in the winter months, camp lodges must be maintained and repaired, docks constructed and trails cut. The lodges are all remote and must be accessed by float plane. Employees generally stay at the camps throughout the fall.

[5] The Appellant has been working for the Payer since 2006 pursuant to a verbal agreement. The Payer employs approximately twenty employees, including cooks and guides, who are paid weekly rather than hourly. According to the evidence, the Appellant was paid $50 more weekly than other employees due to his increased responsibilities. The daughter stated that employees' wages were comparable to those paid by other outfitters in the area. She also stated that employees generally did not pick up their weekly paycheques until the end of the season, when they returned from the camps, unless their wives picked them up. Occasionally employees, including the Appellant, required personal items and those items were purchased for them and deducted from their paycheque amounts. No records were produced to support this, nor were other employees called as witnesses to confirm this, and the cheques that were available did not match the earnings listed on the Record of Employment. The Appellant also attended the trade shows and was paid for this in the winter months. His daughter stated that the Appellant attended three to four trade shows yearly. She explained that the Payer chooses the trade shows depending on where the majority of its clients originate.

[6] The Appellant and his daughter also own and operate a second family outfitting company called Portland Creek Outfitters. Family representation at the trade shows was also required for this second company. However, it was unclear from her testimony whether the Appellant would be representing the Payer or this second company at those shows. Although the daughter was vague respecting the number of yearly trade shows they attended in the years 2006 to 2010, it appeared to be in the vicinity of at least three to four yearly. Her evidence was unclear as to the shows that they attended each year and she did not have supporting records with her for reference. She did not provide the payroll register that would have

indicated which of the Payer's employees attended those shows between 2006 and 2010. Neither did she provide records to confirm the Payer's actual attendance at those shows. The Appellant maintained a United States bank account in his own name and when the Payer received payment in U.S. funds, some of those monies were deposited to this personal account to cover future trade show expenses. The Appellant would pay the expenses directly and submit his receipts for reimbursement after the trade shows. He also had a U.S. Visa card in his own name which he used in a similar manner to pay those expenses.

[7] The Appellant testified that, after he finished Grade 10, he worked at Newfoundland Zinc Mine for ten years while doing guide work part-time. In the early 2000's, he was employed as a commercial fisherman. Around 2005, he became involved with the outfitting business. He stated that his duties for the Payer consisted generally of preparing lodges for the hunting season, ordering food, ensuring licences were sold, cleaning lodges after the season, hiring pilots and guides, providing some guide work himself and completing other tasks as required. He did not maintain a set work schedule. His attendance at the trade shows was important for the personal contact with hunters. He stated that he could spend weeks in the United States attending these shows during the winter months.

[8] The Appellant testified that his wages, that he actually received for a period, might not necessarily match his overall rate of pay as he could have amounts deducted for personal items purchased for him while in the camp. While he admitted to sometimes working for the Payer outside the employment periods, he stated that it was only for minimal periods and generally because clients preferred to deal with him directly.

[9] The third witness to testify was Kevin Matheson, the Appeals Officer at the time who dealt with this matter at the objection stage. On direct examination, he testified that he requested the Payer's general ledger, payroll ledger, corporate registry, receipts relating to the Appellant's expenses when he attended U.S. trade shows, bank statements, cancelled cheques, copy of the business card and proof that the Payer had paid for booths at these trade shows.

[10] The payroll ledger would confirm that all employees were treated in the same manner as the Appellant alleges, but Mr. Matheson testified that he received only some portions of the ledger.

[11] Cancelled paycheques were required to show that the Appellant was actually paid but, again, only some cancelled cheques were provided.

[12] The bank statements were required so that they could be matched to the cancelled paycheques to confirm that the amounts, that the Appellant was alleged to have received from the Payer, actually came out of the Payer's bank account. However, he received only the bank statements for 2007 and he was still unable to match those 2007 statements with the limited number of cancelled cheques that the Appellant did provide to him.

[13] Only a few of the expense receipts in respect to travel in the United States in 2007 and 2009 were provided. He received no receipts for the other periods under appeal. This was the only evidence Mr. Matheson received and it did not link the travel to the trade shows. He received no evidence to support the Payer's attendance and registration at those trade shows nor did he have evidence that the Appellant was paid for all of the hours he claimed to have worked.

[14] Although Appellant Counsel, on cross-examination, suggested that Mr. Matheson could have done more to ensure that the Appellant understood what was being requested in terms of specific documents to support their position, Mr. Matheson testified that he did everything he could to assist them in overturning the ruling that he was reviewing.

The Appellant's Position

[15] The Appellant does not contest that he is not dealing with the Payer at arm's length according to subsection 251(1) of the *ITA* and that the employment, therefore, would be excluded employment pursuant to paragraph 5(2)(i) of the *Act*. However, the Appellant submits that his employment with the Payer is insurable for those periods because, even though he was related to the Payer, the parties should be deemed to be dealing with each other at arm's length pursuant to paragraph 5(3)(b) of the *Act* based on the fact that they would have entered into a substantially similar contract of employment had they been dealing with each other at arm's length.

[16] To support this position, the Appellant argued that his contract of employment had been previously reviewed and that it was determined to be in compliance with the regulations; that his rate of pay was similar to the rates of other employees that worked for the Payer; that his rate of pay was comparable to the market rates received by employees of other outfitting companies in the area; and that he did not have a fixed work schedule because it suited the Payer's needs which were dependant upon client needs.

The Respondent's Position

[17] The Respondent argued that the Appellant and Payer would not have agreed to the terms of their employment had they not been dealing with each other at non-arm's length because:

a) Remuneration: An employee, dealing at arm's length with a Payer, would not settle for less wages than originally agreed to. According to information submitted by the Appellant, he received a net pay of $448.76 weekly when he should have been receiving a net pay of $564.11 weekly, according to the source deduction information published by Canada Revenue Agency ("CRA") [Tab 13, Exhibit R-1].

b) Terms and conditions: No documentation was provided to support the Appellant's position that he represented the Payer at U.S. trade shows. The few travel expense receipts that were submitted do not support whether the Appellant was attending the trade shows as a representative of the Payer or of Portland Creek Outfitters. Incomplete records that were submitted did not support the Appellant's claim that he worked generally for the Payer. Only some cancelled cheques were provided and no bank statements. Consequently, it is impossible to determine if the Appellant actually attended all of those shows or whether he worked all the hours he claimed in his Record of Employment or whether he was paid for all the recorded hours.

c) Duration: It cannot be determined if the Record of Employment accurately reflects the Appellant's employment duration with the Payer because of the lack of information and documentation and the absence of a set work schedule.

d) Nature and importance of the work: It is difficult to determine the nature of the additional tasks performed by the Appellant for the Payer because of the lack of information and documentation which was provided.

Analysis

[18] What constitutes insurable employment is dealt with in paragraph 5(1)(a) of the *Act*. Excluded employment is dealt with in paragraph 5(2)(i):

5(2) Excluded employment – Insurable employment does not include

[…]

(i) employment if the employer and employee are not dealing with each other at arm's length.

[19] The term "at arm's length" is referenced further in 5(3)(a) and (b):

5(3) Arm's length dealing – 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.

[20] The relevant portions of subsections 251(1) and (2) of the *ITA* define "arm's length":

251(1) Arm's length. For the purposes of this Act,

(*a*) related persons shall be deemed not to deal with each other at arm's length;

[…]

(*c*) in any other case, it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length.

251(2) Definition of "related persons". For the purpose of this Act, "related persons", or persons related to each other, are

[…]

(*b*) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

> (iii) any person related to a person described in subparagraph 251(2)(*b*)(i) or 251(2)(*b*)(ii); and
>
> […]

[21] The decision of Justice Bowie in *Birkland v M.N.R.*, 2005 TCC 291, [2005] TCJ No. 195, provides a summary of the evolution of the role of this Court as it relates to paragraph 5(3)(i) of the *Act* and the relevant caselaw. At paragraph 2, he provided his understanding of the present state of the law in this area:

> **2** During the hearing before me there was some discussion as to the role of this Court in cases arising under paragraph 5(3)(*b*) of the *Act*. This question has been the subject of a number of decisions of the Federal Court of Appeal during the past decade or so. The earlier cases, decided under paragraphs 3(1)(*a*) and 3(2)(*c*) of the *Unemployment Insurance Act*, held that the Minister's opinion was insulated from appeal in this Court, unless it could be shown that in the course of forming that opinion he had committed what might be termed an administrative law error. As the words of subparagraph 3(2)(*c*)(ii) conferred a discretion on the Minister, this Court had no mandate to simply substitute its opinion for that of the Minister. However, if in the course of the hearing of an appeal the Appellant were able to show that the Minister had erred in law in forming his opinion, then this Court's function was to proceed to a *de novo* determination of the paragraph 3(2)(*c*)(ii) (now 5(3)(*b*)) question whether the terms of the employment contract could reasonably be considered to be those that arm's length parties would have arrived at. In other words, after finding that the Minister's decision was vitiated by an administrative law error, and only then, could this Court substitute its opinion for that of the Minister as to the paragraph 3(2)(*c*) question.

[22] After a discussion of the Federal Court of Appeal decisions in *Légaré v Canada (MNR)*, [1999] FCJ No. 878 (FCA), and *Pérusse v Canada (MNR)*, [2000] FCJ No. 310, Justice Bowie, at paragraph 4, summarizes as follows:

> …At this point, it is sufficient simply to state my understanding of the present state of the law, which I derive principally from paragraph 4 of *Légaré* (re-produced above) and from … the judgment of Richard C.J., concurred in by Létourneau and Noel JJ.A., in *Denie c. Ministre du Revenue national*.
>
> […]
>
> This Court's role, as I understand it now, following these decisions, is to conduct a trial at which both parties may adduce evidence as to the terms upon which the Appellant was employed, evidence as to the terms upon which persons at arm's length doing similar work were employed by the same employer, and evidence

> relevant to the conditions of employment prevailing in the industry for the same kind of work at the same time and place. Of course, there may also be evidence as to the relationship between the Appellant and the employer. In the light of all that evidence, and the judge's view of the credibility of the witnesses, this Court must then assess whether the Minister, if he had had the benefit of all that evidence, could reasonably have failed to conclude that the employer and a person acting at arm's length would have entered into a substantially similar contract of employment. That, as I understand it, is the degree of judicial deference that Parliament's use of the expression "if the Minister of National Revenue is satisfied …" in paragraph 5(3)(*b*) accords to the Minister's opinion.

[23] The *Birkland* decision did not reference the decision of the FCA in *Livreur Plus Inc. v MNR*, 2004 FCA 68, [2004] FCJ No. 267, even though *Birkland* was rendered one year subsequent to that case. There is inconsistent caselaw in respect to whether *Livreur* introduced an additional element to the test set out in *Légaré* and *Pérusse*. In *Khaila v The Queen*, 2013 TCC 370, [2013] TCJ No. 325, Justice Woods was of the view that *Livreur* did introduce an additional element, however, she noted that, since it was not universally applied, she chose to follow *Birkland*.

[24] Respondent Counsel referred me to the case of *Denis v Canada (MNR)*, 2004 FCA 26, [2004] FCJ No. 400, where, at paragraph 5, the then Chief Justice Richard stated the test in the following manner:

> The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the Act is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see *Pérusse v. Canada (Minister of National Revenue – M.N.R.*), [2000] F.C.J. No. 310, March 10, 2000).

[25] If I follow *Birkland* and apply the reasoning in *Légaré* and *Pérusse*, the Appellant has the onus of establishing new facts that were either not before the Minister when the determination was made or that the Minister misunderstood the facts which were known at the time of the determination.

[26] Appellant Counsel submitted that the sworn testimonies of the Appellant and his daughter, being credible, should be sufficient to demolish the Minister's assumptions of fact relied upon in the Reply. Further, the Appellant argued that incomplete records should not be a bar to being successful in the appeal.

[27] While credible oral testimony may be sufficient in certain circumstances, and in the absence of relevant records, to demolish the assumptions of fact, jurisprudence has also established that a negative inference should be drawn against the party who is in the position of being able to provide pertinent evidence to the Court but who, for whatever reason, does not provide it.

[28] At the ruling stage, the Appellant was given the opportunity to provide supporting documentation to CRA but he failed to do so. The evidence supports that the Appeals Officer specifically requested those documents which would support the Appellant's position. Although the Appellant repeatedly promised to provide them to CRA, he never complied. Contrary to Appellant Counsel's suggestions that Mr. Matheson, the Appeals Officer, did not take proactive steps in obtaining the necessary records from the Appellant, the evidence supports that he took reasonable steps in attempting to have the Appellant comply with his requests. At page 82 of the transcript, he testified that he made himself available, telephoned them and left messages giving his phone and fax numbers, inviting the Appellant to contact him if he had questions on the requirements. At page 84 of the transcript, Mr. Matheson stated "…that was my main concern, get the information to be able to overturn the ruling to help the appellants out. … I really tried my hardest, I really did." Appellant Counsel's suggestion that the CRA questionnaire was misleading or that Mr. Matheson had a duty to explain to the Appellant, for example, what a general ledger was is without merit. In a self-assessing system, it is the taxpayer that is responsible for maintaining sufficient records to support their position and to be able to provide those records when called upon to do so. The types of hand-holding exercises, that Appellant Counsel would have CRA officials engage in, are unwarranted and unrealistic. In any event, I am satisfied that Mr. Matheson fulfilled any obligation which he may have had to solicit the appropriate documentation from the Appellant. At page 81 of the transcript, in response to questions concerning the information requests, he stated:

> There's some fax cover sheets in here as proof that we had correspondence and that more information was coming, more information was coming, and I was hoping that that information would come, I really was because I did not want to be sitting here today, so I was really hoping that I would get the information available to overturn this ruling.

[29] Regardless, the hearing before me provided yet another opportunity for the Appellant to provide the additional records that would support his position. The Appellant did provide a few more expense receipts for motel rooms, gas and ferry costs, but only in respect to trade shows in 2006 and 2007. In addition, some cheques, representing salary payments to the Appellant in 2006 and 2007, were

produced. The Appellant also produced a record of his earnings, but for 2009 only. This additional documentation, however, is sketchy. Although it confirms that the Appellant did work for the Payer and received some pay, which the Minister did not dispute, the records remain insufficient to establish and support which actual periods the Appellant worked and the pay amounts he actually received. There is nothing additional that would allow me to reach any different conclusion than the Minister reached. Without pay stubs, all of the cancelled cheques and payroll records and the bank statements, it is impossible to confirm that the Appellant's periods of employment, at the pay rate and hours he claimed he worked, actually occurred. In addition, there were alternate methods of corroborating some of the Appellant's evidence. For example, other employees could have been called to testify in support of his position that the Payer treated him in the same manner as its other employees.

[30] With respect to the trade shows, I believe that the Appellant attended at least some of them, if not all of them. However, the evidence remains unclear which shows and how many he attended in any year, where those shows were located and whether, in fact, even if he attended, he was representing the Payer or his other company, Portland Creek Outfitters. There is nothing before me that would allow me to draw any conclusion respecting whether, even if he attended every one of these shows, he was there as an owner of the Payer or as an employee. I have very little documentation, except for a few receipts in 2006 and 2007, that would support trips on behalf of the Payer to these shows. The evidence also suggests that, on occasion, other employees attended on behalf of the Payer. There is no evidence to support the Appellant's contention that he worked 70 hours weekly as an employee during these trips. The Appellant's use of his own U.S. bank account and his personal U.S. credit card for payment of these trips is not indicative of an arm's length relationship between the Appellant and the Payer. I had no proof of trade show bookings for booths which might have confirmed the Appellant's attendance.

[31] When Respondent Counsel canvassed the lack of documentation with the Appellant's daughter, her response varied from: "Yes, there is records there [*sic*]. I just have to find them." (Transcript, page 23) to: "…my payroll records are home, but I can get them." (Transcript, page 28). When asked about records that would support her testimony that some employee cheques might have deductions for purchase of personal items on their behalf, she testified: "No, I never thought about bringing them." (Transcript, page 34). When asked if she had cheques respecting other employees to support her testimony that the Payer paid the Appellant in the same manner as the other employees, she stated that: "I can get you some. I don't

have them with me today." (Transcript, page 33). When asked if she could produce the payroll records to confirm who the Payer's employees were during the winter months, she stated: "I can get – my payroll records are home, but I can get them." (Transcript, page 28).

[32] By the time the Appellant was before this Court, and with the added benefit of representation by legal counsel, he and his daughter should have been very aware of what would be required by this Court to support their position as opposed to that of the Minister. The daughter testified that she had the documentation, but simply neglected to bring it to Court or could not immediately locate it because the office was under renovations. I suspect that the reason that those documents were not produced in Court was that they did not support the testimony of the Appellant and his daughter.

[33] In addition to the lack of documentation, the testimony of both the Appellant and his daughter was vague and imprecise. The daughter peppered her responses with phrases such as: "it probably would have been the same;" "it's possible;" "I guess to some extent;" "not right off the top of my head;" and "I would have to go back through all the receipts [which were not produced in Court] and that stuff to give you the actual dates."

[34] There was also some conflicting and contradictory information and evidence provided by the parties at both the rulings and appeals levels (Appeals Report, Exhibit R-1, Tab 10). This conflicting information concerned payment for the tasks the Appellant performed.

[35] In summary, without specifics concerning the trade shows, his work and the wages that the Appellant claims he received generally as an employee of the Payer, I can come to no different conclusion than that of the Minister. There is almost a complete lack of documentation, although the parties claim that it exists. Without those supporting records, I am unable to confirm the extent to which the Appellant actually performed the tasks, the length of time he spent on those tasks, including the travel to trade shows, and whether he was actually paid for all the hours recorded in the Record of Employment. The oral testimony is vague and seemingly less than straightforward, leaving me with the impression that documents, which could otherwise substantiate their evidence, were not produced because they, in fact, would not support the Appellant's position.

[36] For these reasons, the appeal is dismissed, without costs, as there is nothing before me that would allow me to draw any conclusion that would be different from the Minister's.

Signed at Vancouver, British Columbia, this 27th day of May 2014.

"Diane Campbell"

Campbell J.

CITATION:	2014 TCC 178
COURT FILE NO.:	2012-2791(EI)
STYLE OF CAUSE:	LEONARD PAYNE and THE MINISTER Of NATIONAL REVENUE
PLACE OF HEARING:	St. John's, Newfoundland
DATE OF HEARING:	April 17, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	May 27, 2014

APPEARANCES:

Counsel for the Appellant:	Keith Morgan
Counsel for the Respondent:	Devon Peavoy

COUNSEL OF RECORD:

For the Appellant:

Name:	Keith Morgan
Firm:	

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada