

Docket: 2005-1773(EI)

BETWEEN:

BOUTIQUE MILITAIRE QUÉBEC INC.,

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 24, 2005, at Québec, Quebec

Before: The Honourable Deputy Justice S.J. Savoie

Appearances:

Agent of the Appellant:

Maurice Lemieux

Counsel for the Respondent:

Stéphanie Côté

JUDGMENT

The appeal is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 30th day of January 2006.

“S.J. Savoie”

Savoie D.J.

Translation certified true
on this 21st day of June 2006.
Monica F. Chamberlain, Translator

Citation: 2006TCC40
Date: 20060130
Docket: 2005-1773(EI)

BETWEEN:

BOUTIQUE MILITAIRE QUÉBEC INC.,

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Savoie D.J.

[1] This appeal was heard on November 24, 2005, at Québec, Quebec.

[2] This is an appeal regarding the insurability of the employment of Pascal Lemieux, the Worker, when employed by the Appellant, from January 1 to September 30, 2004.

[3] The Minister of National Revenue (the Minister) informed the Appellant and the Worker of his decision that the Worker's employment was insurable.

[4] The Minister based his decision on the following presumptions of fact:

[TRANSLATION]

- 5 (a) the Appellant, incorporated on April 1, 1993, runs a business that sells new and used military clothing, work clothes, outdoor clothing and camping equipment;
- (b) in 2003 and 2004, the Appellant grossed approximately \$500,000 and declared a net profit of approximately \$50,000;

- (c) the Appellant employs 4 persons, Maurice Lemieux, father of the Worker, Lisette Gamache, mother of the Worker and Sophie Beaupré, friend of the Worker;
- (d) Maurice Lemieux is responsible for purchases, sales, administration, accounting and any other tasks at the Appellant;
- (e) the Worker is responsible for all of Maurice Lemieux's tasks when he is absent; when his father is there, he does the work with him and is advised by him so that he will be able to replace him;
- (f) there is no written employment contract between the Worker and the Appellant;
- (g) Maurice Lemieux and the Worker have the authority to sign cheques for the Appellant, only one signature is required;
- (h) the Worker is given considerable latitude with respect to the day-to-day operations of the Appellant but he must consult his father about hiring and other important decisions;
- (i) the Appellant's computer file indicates that the Worker worked 40 hours per week whereas Maurice Lemieux specified that the Worker worked more hours each week;
- (j) the Worker had a set schedule established by the Appellant, he worked one 6-day week, Monday, Tuesday, Thursday, Friday, Saturday and Sunday, and one 4-day week, Monday, Tuesday, Thursday and Friday;
- (k) the Worker's hours were not written down in any log or on any time sheet;
- (l) the Worker carried out his tasks on the Appellant's premises, except for accounting, which he did on a computer at the home of Maurice Lemieux and he used the Appellant's materials and equipment;
- (m) when he met with suppliers in the Québec region, he used his own vehicle and when he met with suppliers in Montréal, he used Maurice Lemieux's vehicle;
- (n) his fuel costs were not reimbursed when he worked in Québec but he claimed his travel, meal and lodging costs when he had to go to Montréal;
- (o) for the weeks from January 10 to August 28, 2004, the Worker was paid \$625 a week (\$15.63 an hour) whereas for the weeks from September 4 to 30, 2004, he was paid \$650 a week gross (\$16.25 an hour);

(p) the Worker was covered by CSST accident insurance paid for by the Appellant.

6 (a) 9071-3033 Québec Inc. was the sole shareholder of the Appellant;

(b) Maurice Lemieux was the sole shareholder of 9071-3033 Québec Inc.

(c) Pascal Lemieux is the son of Maurice Lemieux;

(d) the Worker was related to a person who controlled the Appellant.

7 (a) given his tasks and responsibilities, the Worker's salary was reasonable;

(b) the Worker had a permanent position at a company that operated year-round;

(c) the Worker's work was essential to the operations of the Appellant's business.

[5] The Appellant admitted to all the Minister's presumptions set out in paragraphs 5 and 6 in the Reply to the Notice of Appeal.

[6] The Appellant denied the Minister's claims in paragraph 7, but they are the Minister's findings from his analysis.

[7] It should be noted that the facts in this case are almost uncontested, but Maurice Lemieux, sole shareholder of 9071-3033 Québec Inc., and of the Appellant, while admitting the facts set out in paragraph 5(h), rejected this idea somewhat in his testimony.

[8] This is where the matter stands in the instant case. Although the parties agree that they are bound by a contract of employment under the *Civil Code of Québec*, they do not agree that it is insurable employment.

[9] Since the Worker was related to a person who controlled the Appellant, the Minister determined that these people were not at arm's length as set out in the *Income Tax Act*, at subparagraph 251(2)(b)(iii) reproduced below:

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

...

(b) a corporation:

...

(iii) any person related to a person described in subparagraph 251(2)(b)(i) or 251(2)(b)(ii);

[10] In light of the preceding, the Minister maintains that the Worker's employment is excluded under paragraph 5(2)(i) of the *Employment Insurance Act* (the Act), reproduced below:

(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.

[11] Thus the Minister has the discretion to determine whether the Worker's employment is insurable in accordance with the mandate conferred by the legislation under paragraph 5(3)(b) which sets out the following:

(3) **Arm's length dealing** - For the purposes of paragraph (2)(i),

...

(b) if the employer is, within the meaning of [the *Income Tax 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.

[12] The Minister then proceeded to analyze the Worker's employment in relation to paragraph 5(2)(i) of the Act.

REMUNERATION

[13] The Worker, Pascal Lemieux, received a fixed salary of \$625.00 gross per week from January 4 to August 28, 2004; from August 29 to September 30, 2004, his salary was set at \$650.00 gross per week. He was paid weekly by cheque, for an approximately 45 hours of work per week. The Minister determined that the Worker's salary seemed adequate given his responsibilities and the fact that the Appellant wanted him to eventually take over the business. Exhibit I-1, presented at the hearing, contains statistics from Emploi Québec for work similar to the Worker's employment. This document confirms that the Worker's salary, although slightly higher than the statistics, supports the idea examined under this test, that a Worker at arm's length would have accepted a similar salary.

TERMS AND CONDITIONS OF EMPLOYMENT

[14] Pascal Lemieux had a set work schedule that was established based on the Appellant's business hours. He worked one six-day week, specifically Monday, Tuesday, Thursday, Friday, Saturday and Sunday; the following week he worked Monday, Tuesday, Thursday and Friday. He alternated in this way, according to this schedule, with Maurice Lemieux so that they both could have a weekend off every two weeks. It is true that the Worker was not subject to any control of the time worked but this situation was not unreasonable given his responsibilities in the business where he was a manager. The concept of control is practically inexistent in the business with respect to day-to-day decisions. The Worker informed Maurice Lemieux regarding any important decisions; however, he did not wait for approval for transactions. It was established that the Worker was covered by Worker's accident insurance from the Commission de la santé et de la sécurité du travail, paid by the Appellant. Furthermore, the Worker was authorized to use the Appellant's debit card to pay suppliers.

[15] Based on this test, it can be concluded that a person at arm's length would have accepted these terms and conditions of employment for a similar position.

DURATION OF THE WORK PERFORMED

[16] The Worker was hired by the Appellant in 1993 and he has worked for this business since that date. Thus, it was a permanent position at a company that operated year-round.

NATURE AND IMPORTANCE OF THE WORK PERFORMED

[17] It was determined that Pascal Lemieux's work was essential to the operations of the business since he shared the administrative work of the Appellant by taking care of the purchases and sales. Furthermore, it should be noted that without the services rendered by the Worker, the Appellant would have been obliged to find another person to do these tasks.

[18] The Appellant is asking this Court to overturn the Minister's decision. In reviewing this file, the Court's attention was directed to *Industrie J.S.P. Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 423, in which Judge Tardif of this Court summarized the facts, similar to those of the case at issue, in this way:

Marie-Claude Perreault testified and gave a number of examples to describe and explain her interest, enthusiasm and fervour and that of her brothers with respect to the interests of the appellant company, which operates in the difficult and highly competitive field of furniture building.

Sharing major strategic responsibilities in the company controlled by Jacques Perreault, who holds 1,000 voting but non-participating shares, Marie-Claude Perreault and her brothers left nothing to chance in ensuring the company's well-being and development.

Each family member was paid more than a reasonable salary and, at year end, received a bonus that varied depending on the economic performance of the company and the quality of the work performed.

Major decisions were made jointly and by consensus. The family members each devoted at least 60 hours [per week] to their respective duties for the company.

The balance of evidence, therefore, was that the Perreault family members dedicated themselves totally and entirely to the company's business. They invested in it most of their available time (at least 60 hours [per week]) to ensure that the company could succeed in a difficult market where competition is stiff.

Following this analysis, Judge Tardif stated the following:

Contributing to and being a partner in the management, administration or development of a business, particularly a small business, means that a person's job description is strongly marked by responsibilities characteristic of those often fulfilled by actual business owners or persons holding more than 40 per cent of the voting shares in the company employing them. In other words, in assessing remuneration, at this level of responsibility,

caution must be exercised when a comparison is made with the salaries of third parties; often there are advantages that offset the lower salaries.

and concluded that the employment of these members of the same family, although not at arm's length, was not excluded from insurable employment.

[19] It has been established that the sole shareholder of the Appellant never relinquished control of the company. The Worker testified that [TRANSLATION] "my father has the last word... I did not have signing authority...".

[20] According to the case law, the power to control is important to the analysis of the facts under this test, not the actual exercise of control. In this matter, the power to control was demonstrated by ownership of shares in the business. In fact, the Worker's father continues to hold all the shares.

[21] This Court analyzed the facts, in the instant case, in light of the legislation cited above. This Court also examined how the Minister carried out his mandate under the legislation. The Federal Court of Appeal has described the mandate of the Minister and this Court in *Légaré v. Canada (Minister of National Revenue–M.N.R.)* [1999] F.C.J. No. 878, reviewing the Minister's decision, in which Marceau J.A. held the following at paragraph 4:

The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must 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, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[22] At the end of this process, this Court must decide whether the Minister exercised his mandate in accordance with the legislation and case law.

[23] Moreover, I must find that the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred. In my opinion, the conclusion with which the Minister was "satisfied" still seems reasonable to me.

[24] Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois (New Brunswick), this 30th day of January 2006.

“S.J. Savoie”

Savoie D.J.

Translation certified true
on this 21st day of June 2006.
Monica F. Chamberlain, Translator

CITATION: 2006TCC40

COURT FILE NO.: 2005-1773(EI)

STYLE OF CAUSE: BOUTIQUE MILITAIRE QUÉBEC INC.
V. M.N.R.

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: November 24, 2005

REASONS FOR JUDGMENT BY: The Honourable Deputy Justice S.J.
Savoie

DATE OF JUDGMENT: January 30, 2006

APPEARANCES:

Agent for the Appellant: Maurice Lemieux

Counsel for the Respondent: Stéphanie Côté

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