

Docket: 2002-2670(EI)

BETWEEN:

RICHARD GAUTHIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of *Transport Rave Gauthier Inc.*  
(2002-2796(EI)) on March 10 and 12, 2003, at Québec, Quebec

Before: the Honourable Deputy Judge J.F. Somers

Appearances

For the Appellant:

The Appellant himself

Counsel for the Respondent:

M<sup>e</sup> Marie-Claude Landry

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[OFFICIAL ENGLISH TRANSLATION]

JUDGMENT

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

Signed at Ottawa, Canada, this 4th day of June 2003.

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“J. Somers”  
D.J.T.C.C.

Translation certified true  
on this 30th day of January 2004.

Leslie Harrar, Translator

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Appellant,

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Appeal heard on common evidence with the appeal of *Richard Gauthier*  
(2002-2670(EI)) on March 10 and 12, 2003, at Québec, Quebec

Before: the Honourable Deputy Judge J.F. Somers

Appearances

Representative for the Appellant:           Éric Gauthier

Counsel for the Respondent:   M<sup>e</sup> Marie-Claude Landry

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

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Citation: 2003TCC322

Date: 20030604

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### **REASONS FOR JUDGMENT**

#### **Deputy Judge Somers, T.C.C.**

[1] These appeals were heard on common evidence on March 10 and 12, 2003, at Québec, Quebec.

[2] The appellants have appealed the decision of the Minister of National Revenue (the “Minister”) that the employment held by Richard Gauthier, the worker, during the periods at issue, namely, from October 15, 1997, to January 2, 1998, from February 3 to April 22, 1998, from June 1 to November 7, 1998, and from January 4, 1999, to January 5, 2001, with Transport Rave Gauthier Inc., the payer, is not included in insurable employment within the meaning of the

*Employment Insurance Act* the “*Act*”), because the worker and the payer were not dealing at arm’s length.

[3] Subsection 5(1) of the *Act* reads in part as follows:

5.(1) Subject to subsection (2), insurable employment is

- (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[...]

4] Subsections 5(2) and 5(3) of the *Act* read in part as follows:

(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.

[5] Section 251 of the *Income Tax Act* reads in part as follows:

**Section 251: Arm's length.**

- (1) For the purposes of this Act,
- (a) related persons shall be deemed not to deal with each other at arm's length; and

[...]

**(2) Definition of "related persons".**

For the purpose of this Act, "related persons", or persons related to each other, are

- (a) individuals connected by blood, relationship, marriage or common-law partnership or adoption;
- (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 (i) or (ii); and

[...]

[6] The burden of proof lies with the appellants. They must establish, on a balance of probabilities, that the Minister's decision is wrong in fact and in law. Each case must be decided on its own merits.

[7] In making his decision, the Minister relied on the following assumptions of fact set out in paragraph 5 of the Reply to the Notice of Appeal in the record of the appellant, Richard Gauthier (2002-2670(EI)), which were admitted or denied:

[Translation]

- (a) The payer was incorporated in 1988; (admitted)

- (b) The shareholders of the payer are the appellant, Éric, Angelo and Victorien Gauthier; (admitted)
- (c) Victorien Gauthier is the appellant's father; (admitted)
- (d) Éric and Angelo Gauthier are the appellant's brothers; (admitted)
- (e) The payer operates a trucking business; (admitted)
- (f) During the periods at issue, the payer had only one truck; (admitted)
- (g) The appellant's duties consisted of driving and maintaining the payer's vehicle; (admitted)
- (h) The appellant received gross weekly remuneration of \$600 during the weeks when he was entered in the payroll journal as a full-time worker; (denied)
- (i) During the weeks when the appellant collected employment insurance benefits, the payer paid him remuneration in the amount of \$80 a week; (denied)
- (j) On May 13, 1998, the payer issued a record of employment in the appellant's name for the period from February 3, 1998, to April 22, 1998, indicating 96 insurable hours and insurable earnings totalling \$960; (admitted)
- (k) On May 25, 1998, the payer issued a record of employment in the appellant's name for the period from October 15, 1997, to December 29, 1997, indicating 96 insurable hours and insurable earnings totalling \$960; (admitted)
- (l) On November 10, 1998, the payer issued a record of employment in the appellant's name for the period from June 1, 1998, to November 7, 1998, indicating 1,150 insurable hours and insurable earnings totalling \$13,800; (admitted)
- (m) On January 25, 2000, the payer issued a record of employment in the appellant's name for the period from January 4, 1999, to January 21, 2000, indicating 1,557 insurable hours and insurable earnings totalling \$17,862; (admitted)

- (n) On January 8, 2001, the payer issued a record of employment in the appellant's name for the period from January 3, 2000, to January 5, 2001, indicating 1,805.5 insurable hours and insurable earnings totalling \$21,403; (admitted)
- (o) The records of employment issued by the payer to the appellant do not reflect the actual periods worked by the appellant; (denied)
- (p) During the periods when he collected employment insurance benefits, he worked more hours than those recorded in the payer's payroll journal; (denied)
- (q) The appellant and the payer entered into an arrangement to enable the appellant to collect employment insurance benefits to which he was not entitled. (denied)

[8] The payer, Transport Rave Gauthier Inc., was incorporated in 1988, and its shareholders are Éric, Angelo, Victorien and Richard Gauthier.

[9] Victorien is the worker's father, and Éric and Angelo are his brothers; accordingly, they do not deal at arm's length.

[10] During the periods at issue, the payer owned only one truck for the operation of a transportation business.

[11] According to Victorien Gauthier, he formed the company to create employment for his sons. He also owned a farm (Ferme Victorien Gauthier et Fils Inc.) that he managed with his spouse; she looked after the accounting. He stated that only his son Éric worked on the farm and added that Richard, the worker, was not the payer's principal employee.

[12] Having undergone surgery between 1993 and 1996, Victorien Gauthier said that his work on the farm was somewhat limited. However, he admitted that he transported salt for the payer in winter with his truck.

[13] Angelo Gauthier, the worker's brother, stated that he had previously worked for the payer but could not provide the dates. He added that there were other people who worked for the payer and that Richard, the worker, worked for the payer as a trucker and also performed tasks in the garage.

[14] However, Angelo acknowledged that he was not on the list of employees during the period at issue and concluded from this that he had not worked for the payer during these periods. He said that he worked more on the farm than for the payer's business. He added that he worked with his father and mother and sometimes with Éric. There is a contradiction with the testimony of Victorien who stated that Éric was the only one of his sons who worked on the farm.

[15] Angelo stated that he may have signed some safety checklists on behalf of the payer (Exhibit I-3), but on examining them he could not say whether the signature was his or that of Richard Gauthier, the worker.

[16] In his statutory declaration (Exhibit I-4) dated November 15, 2001, Éric said that Richard was the principal driver – 90% - of the payer's only truck.

[17] The worker testified that his weekly pay was as alleged in subparagraph 5(h) of the Reply to the Notice of Appeal, namely, \$600 during the weeks that he was entered in the payroll journal at full time.

[18] The worker further admitted that he received \$80 a week from the payer during the weeks when he collected employment insurance benefits.

[19] The worker said that when he worked for the payer he was paid.

[20] He also admitted the contents of the records of employment for the periods at issue, as alleged in subparagraphs 5(j) to 5(n) of the Reply to the Notice of Appeal.

[21] On cross-examination, the worker admitted that he was the principal driver during his periods of full-time employment but added that, during the periods when he collected employment insurance benefits, it was his father who was the principal driver.

[22] As for the delivery orders (Exhibits I-5 and I-6), the worker acknowledged his signature on some of them but was not convinced that the signature on other orders was his.

[23] In his statutory declaration dated November 1, 2001, (Exhibit I-7), the worker said that he was the only driver of the payer's only truck.

[24] Eddy Normand, an investigator with Human Resources Development Canada, testified at the hearing. He stated that he had met with Richard and Éric Gauthier and had obtained a statement from each of them in which the worker, Richard, was acknowledged to be the principal driver of the payer's only truck.

[25] Mr. Normand explained the income of the business for 1998, 1999, 2000 and 2001 and the hours and dates appearing on the invoices as well as the amounts of the employment insurance benefits collected by Éric, Richard and Angelo Gauthier.

[26] The worker stated that the amounts that appeared were all earned when he was employed with the payer, while Éric and Angelo said that the amounts that appeared had been earned when they worked for other employers.

[27] As Exhibit I-10, Mr. Normand tendered in evidence a summary of purchases of diesel in 1998, 1999 and 2000 and a chart reproducing a table showing the "consumption of litres of diesel vs. salaries paid". The witness concluded that the business was operated throughout the year and that the salaries did not represent the weeks worked.

[28] Mr. Normand made a compilation of the invoices from various diesel distributors (Exhibits A-7, A-14, I-10) and noted that Transport en vrac Charlevois was the payer's chief supplier.

[29] A document entitled [Translation] "Rave, Business Income" filed as Exhibit I-8 shows the payer's monthly income for the years 1998 to 2001.

[30] All of the evidence tendered shows that the business was operated throughout the year and that the worker was the principal driver of the payer's only truck.

[31] At the outset of the hearing of this appeal, namely, on March 10, 2003, the worker was concerned by the fact that he had not seen some of the original invoices; the hearing was therefore adjourned to March 12, 2003, so that the worker and his brothers could review them. After the worker and his brothers had examined those invoices, Eddy Normand acknowledged that there were only two discrepancies that did not tally with his reports.

[32] In *Laverdière v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 124, Judge Tardif of this Court wrote as follows:

Any agreement or arrangement setting out terms for the payment of remuneration based not on the time or the period during which the paid work is performed but on other objectives, such as taking advantage of the Act's provisions, is not in the nature of a contract of service.

This assessment applies to all the periods at issue involving the two appellants. The terms and conditions of a genuine contract of service must centre on the work to be performed, on the existence of a mechanism for controlling the performance of the work and, finally, on the payment of remuneration that basically corresponds to the quality and quantity of the work done.

...Work may be performed on a volunteer basis. All kinds of assumptions and scenarios can be imagined.

Any contract of employment that includes special terms can generally be set up only against the contracting parties and is not binding on third parties, including the respondent.

...There can be no contract of service where there is any planning or agreement that disguises or distorts the facts concerning remuneration in order to derive the greatest possible benefit from the Act.

The Act insures only genuine contracts of service; a contract of employment under which remuneration is not based on the period during which work is performed cannot be defined as a genuine contract of service. It is an agreement or arrangement that is inconsistent with the existence of a genuine contract of service since it includes elements foreign to the contractual reality required by the Act.

[33] In *Tanguay c. Canada (ministre du Revenu national – M.R.N.)*, [2002] A.C.I. no 514, Judge Savoie of this Court wrote

[Translation]

The onus was on the appellant to prove his case and he was entitled to bring new evidence to contradict the facts relied on by the Minister, but he did not do so.

[34] According to the evidence, the appellants did not rebut the Minister's allegations.

[35] The worker admitted all of the assumptions of fact set out in the Reply to the Notice of Appeal, other than those in subparagraphs 5(o), 5(p) and 5(q).

[36] At the outset of the hearing of this appeal, the worker denied subparagraphs 5(h) and 5(i) of the Reply but he admitted them when he testified.

[37] The worker and the payer were not dealing at arm's length during the periods at issue.

[38] The worker's work as the driver of the payer's one and only truck was essential to the operations of the business.

[39] The evidence showed from the reports prepared by the investigator that the worker continued to provide services to the payer while he was not entered in the payroll journal. The evidence also showed that there were transportation operations when no employee appeared in the payroll journal. In 1998, 1999 and 2000, the worker was the only driver entered in the payroll journal.

[40] A number of invoices were signed by a representative of the payer. The worker acknowledged this fact, but testified that he recognized his signature only on some of the invoices but did not adduce any evidence to show that it was not his signature on others, yet he was the only driver or the principal driver for the payer. It must be noted that a number of the invoices bear the worker's signature when he was not entered in the payroll journal.

[41] It must therefore be concluded that the records of employment issued by the payer to the worker do not reflect the actual periods worked by him.

[42] During the periods when he collected employment insurance benefits, the worker worked more hours than were entered in the payer's payroll journal.

[43] The payer and the worker entered into an arrangement to enable the latter to collect employment insurance benefits to which he was not entitled.

[44] The conditions of employment would not have been similar if the worker and the payer had been dealing with each other at arm's length.

[45] The Minister submits that the employment held by the worker was not insurable during the periods at issue because the worker and the payer were not

dealing at arm's length, pursuant to paragraph 5(2)(i) of the *Act* and sections 251 and 252 of the *Income Tax Act*.

[46] The appeals are dismissed.

Signed at Ottawa, Canada, this 4th day of June 2003.

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“J. Somers”

D.J.T.C.C.

Authorities consulted

Respondent

*Attorney General of Canada v. Jencan Ltd.*

Indexed as: *Canada (Attorney General) v. Jencan Ltd.* (C.A.), [1998] 1 F.C. 187

*Tanguay c. Canada (Ministre du Revenu national – M.R.N.)*, [2002] A.C.I. no 514.

*Laverdière v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 124.

Appellants

*Carol Théberge v. Canada (Minister of National Revenue)*, 2002 FCA 123

*Légaré v. M.N.R.*, F.C. A-392-98

Translation certified true  
on this 30th day of January 2004.

Leslie Harrar, Translator