

[OFFICIAL ENGLISH TRANSLATION]

Docket: 2001-2354(EI)

BETWEEN:

BENOÎT LIZOTTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on June 19, 2003, at Jonquière, Quebec

Before: The Honourable J.F. Somers, Deputy Judge

Appearances:

Counsel for the Appellant: Valère Simard

Counsel for the Respondent: Marie-Claude Landry

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 12th day of August 2003.

"J.F. Somers"

D.J.T.C.C.

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Date: 20030812
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BETWEEN:

BENOÎT LIZOTTE,
and
THE MINISTER OF NATIONAL REVENUE,

Appellant,
Respondent.

REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] This appeal was heard at Jonquière, Quebec, on June 19, 2003.

[2] The appellant institutes an appeal from the decision of the Minister of National Revenue (the "Minister") according to which the appellant did not hold insurable employment during the period in issue, from June 19 to September 30, 2000, because he held de facto control of more than 40 percent of the voting shares of the payer, Chez Pâtisserie Diane III Inc. Furthermore, as a result of the terms

and conditions, the employment was not insurable because the appellant and the payer would not have entered into a similar contract if they had been dealing with each other at arm's length.

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

(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 (3) of the *Act* read in part as follows:

(2) Insurable employment does not include

[. . .]

(b) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;

[. . .]

(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*;

[. . .]

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

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;

[. . .]

(2) Relationship defined. For the purpose of this Act

"related persons", or persons related to each other, are

(a) individuals connected by blood relationship, marriage or adoption;

[. . .]

[6] The burden of proof is on the appellant. He has to show on a balance of probabilities that the Minister's decision is unfounded in fact and in law. Each case stands on its own merits.

[7] In making his decision, the Minister relied on the following assumptions of fact, which the appellant admitted or denied:

[TRANSLATION]

- (a) the payer was incorporated in May 2000; (admitted)

- (b) the payer's activities consisted in operating a restaurant which sold prepared dishes, meals and buffets and in operating a french fry stand adjacent to the restaurant; (admitted)

- (c) the payer operated year-round; (admitted)

- (d) according to the share ledger, the shareholders of the payer were purportedly: (admitted)

the appellant	100 voting shares
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Denise Langlais	100 voting shares
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Ginette Bonneau	100 voting shares
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- (e) Denise Langlais is the appellant's spouse; (admitted)

- (f) before the period in issue, the appellant's son, Pierre Lizotte, was the owner of the business and intended to close it because it was operating at a loss; (admitted)
- (g) the appellant, an unemployed forestry technician, asked his son to entrust the management of the business to him; (denied)
- (h) from December 1999 to June 2000, while receiving employment insurance benefits, the appellant rendered services to the business 40 hours a week without any remuneration reported during that period; (denied)
- (i) on May 2, 2001, the Employment Insurance Board of Referees rendered the decision that the appellant was not unemployed but was operating his business on a full-time basis; (admitted)
- (j) in June 2000, the payer purportedly purchased the business of Pierre Lizotte for \$106,000; (denied)
- (k) the payer refused to provide the respondent with documents; (denied)
- (l) an amount of \$11,000 was deducted from the amount owed on the purchase of the business, that amount representing the consideration

to the appellant for the services rendered without remuneration from December 1999 to June 2000; (denied)

- (m) the \$11,000 was converted into a capital payment for the shares of the appellant and his spouse Denise Langlais amounting to \$5,500 each; (admitted)
- (n) Denise Langlais paid nothing for her purported shares; (admitted)
- (o) Denise Langlais signed nothing in the company's book; (admitted)
- (p) Denise Langlais knew nothing of the payer's financial activities; (admitted)
- (q) Ginette Bonneau told the respondent that she did not know the purchase price of the business, whether there were any loans or the appellant's conditions of employment; (admitted)
- (r) Ginette Bonneau declared that she did not manage the business; she had merely made an investment; (admitted)
- (s) the minutes of the payer's incorporation were not signed by Denise Langlais or Ginette Bonneau; (admitted)

- (t) Denise Langlais and Ginette Bonneau never signed the payer's share purchase warrants; (admitted)
- (u) there were no minutes after of the corporation was formed; (admitted)
- (v) the payer had no corporate life; (denied)
- (w) the appellant alone made all the decisions for the payer without consulting the other two shareholders; (denied)
- (x) the appellant was the only shareholder who lent money (\$10,000) to the payer at the time the french fry stand was built by personally repaying some of the payer's suppliers; (admitted)
- (y) the appellant and the payer provided no proof of payment of the appellant's wages; (denied)
- (z) on October 9, 2000, the payer issued the appellant a record of employment for the period commencing on June 19, 2000, and ending on September 30, 2000, stating a shortage of work as the reason for the layoff; (admitted)

(aa) after he was laid off, the appellant continued to render services to the payer without any reported remuneration; (admitted)

(bb) the appellant's purported periods worked did not coincide with the periods actually worked. (denied)

[8] The payer was incorporated in May 2000. The payer's activities consisted in operating a restaurant which sold prepared dishes, meals and buffets and operating a french fry stand adjacent to the restaurant. That business was operated year-round.

[9] According to the share ledger, the shareholders were the appellant, Denise Langlais, the appellant's spouse, and Ginette Bonneau, each of whom held 100 voting shares.

[10] Before the period in issue, the appellant's son was the owner of the business and intended to close it because it was operating at a loss. The appellant asked his son if he could try to make the business profitable. From December 19, 1999 until June 8, 2000, the appellant, a forestry technician, rendered services to the business at a rate of approximately five hours a week without being paid.

[11] In June 2000, the appellant purchased the business from Pierre Lizotte for \$106,000.

[12] An amount of \$11,000 was converted into a capital payment for the shares of the appellant and his spouse Denise Langlais, each receiving \$5,500.

[13] Denise Langlais paid nothing for his shares and signed nothing in the company's book. She knew nothing about the financial activities of the business.

[14] Ginette Bonneau, a shareholder, told the respondent that she did not know the purchase price of the business. Nor did she know whether there were any loans or the appellant's conditions of employment. She declared that she had not managed the business and that she had merely made an investment.

[15] The minutes of the payer's incorporation were not signed by Denise Langlais or Ginette Bonneau. They never signed the payer's share purchase warrants, and there were no minutes after those of the payer was formed.

[16] The appellant testified that the shareholders had met without having a minute book. However, he admitted that the other two shareholders were not involved in the operations of the business.

[17] The appellant was the only shareholder who lent the payer money (\$10,000) at the time the french fry stand was built by personally repaying some of the payer's suppliers.

[18] The appellant stated in his testimony that he had worked at the pastry shop on weekends for a total of approximately 20 hours for wages of \$250 a week and that he had worked at the Ministère des ressources naturelles the rest of the time.

[19] The appellant did not provide any proof of payment of wages. On October 9, 2002, the payer issued the appellant a record of employment for the period in issue stating "shortage of work" as the reason for the layoff.

[20] The appellant filed the decision of the Employment Insurance Board of Referees as Exhibit A-1.

[21] The appellant acknowledged his signature on the resolutions of the payer's board of directors (Exhibit I-1); it should be noted that only the signature of the appellant appears on the said Resolutions.

[22] The appellant also acknowledged his signature on the documents entitled "Purchase Warrant" (Exhibit I-2) and on the share certificates (Exhibit I-3).

[23] In cross-examination, the appellant admitted that he had been unemployed from December 1999 until June 2000. During that period, he was at the business 40 to 50 hours a week, running errands and delivering buffets.

[24] He testified that he had taken a week's vacation in June 2000 and admitted that he had worked at the Ministère des ressources naturelles three days a week.

[25] Sylvie Lavoie, a kitchen steward and witness of the respondent, declared that she had worked at the business with the appellant from December 1999 until June 2000. The appellant was at the business every day performing supervision and making deliveries. She terminated her employment at the end of October 2000.

[26] During the period in issue, the business sold meals and buffets; there was goodwill.

[27] Mona Jean, an investigator, conducted an investigation in this case; she communicated with the appellant, Sylvie Lavoie and Diane Rivard of the Ministère des ressources naturelles.

[28] According to Mona Jean, Sylvie Lavoie told her that the appellant had worked approximately 40 hours a week at the business during the period in issue. Ms. Rivard told her that the appellant had worked three days a week at the Ministère.

[29] The appellant told the investigator that he had rendered services to the payer during the period in issue.

[30] In support of his decision, the Minister claims that the employment held by the appellant was not insurable because he had controlled more than 40 percent of the payer's voting shares within the meaning of paragraph 5(2)(b) of the *Act*.

[31] The appellant was the only shareholder who signed the share certificates, share purchase warrants and resolutions of the board of directors. There is no evidence that the other two shareholders signed any documents whatever.

[32] The evidence showed that the other two shareholders, who did not testify, were not involved in the payer's administration or operations. The payer moreover had no corporate life.

[33] The evidence also showed that the appellant held effective control of more than 40 percent of the payer's voting shares. In the circumstances, under paragraph 5(2)(b) of the *Act*, the employment held by the payer during the period in issue was not insurable.

[34] The Minister claims in the alternative that the employment held by the appellant during the period in issue should be excluded under paragraphs 5(2)(i) and 5(3)(a) of the *Act* because the appellant and the payer were not dealing with each at arm's length.

[35] In *Ferme Émile Richard et Fils Inc. v. The Minister of National Revenue*, [1994] F.C.J. No. 1859, the Federal Court of Appeal held that, in determining

whether subparagraph 3(2)(c)(ii) of the *Unemployment Insurance Act*, now paragraph 5(3)(b) of the *Employment Insurance Act*, applies, the Court must consider whether the Minister's decision resulted from a proper exercise of his discretion. The Court must first require that the appellant "present evidence of wilful or arbitrary conduct by the Minister".

[36] The evidence showed that the appellant and the payer were not dealing with each other at arm's length.

[37] There is no doubt that the appellant worked 40 hours or more a week for the payer without remuneration during the period in issue. The appellant brought no evidence that he was remunerated during the period in issue.

[38] The appellant admitted that he had continued rendering services to the payer without remuneration after he was laid off.

[39] There is no evidence that an amount of \$11,000 was deducted from the amount owed on the purchase of the business, that amount representing the consideration to the appellant for the services rendered without remuneration during the period in issue.

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

[41] The appellant did not show on a balance of probabilities that the Minister's conduct was wilful or arbitrary.

[42] Accordingly, the employment held by the appellant during the period in issue is excluded from insurable employment under paragraphs 5(2)(i) and 5(3)(a) of the *Act*.

[43] The appeal is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 12th day of August 2003.

"J.F. Somers"
D.J.T.C.C.