Docket: 2005-3073(EI)

BETWEEN:

RONALD BONNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 8, 2007, at Edmonton, Alberta

Before: The Honourable M.H. Porter, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Carrie Mymko

JUDGMENT

The appeal is allowed, in part, and the decision of the Minister is varied in accordance with the attached Reasons for judgment.

Signed at Edmonton, Alberta, this 9th day of February 2007.

" M.H. Porter "

Porter D.J.

Citation: 2007TCC79
Date: 20070209
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RONALD BONNER,

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and

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REASONS FOR JUDGMENT

Porter, D.J.

[1] The issue in this case is whether the Minister of National Revenue (the "Minister") has correctly determined that the Appellant was not engaged in insurable employment under the *Employment Insurance Act* (the "*EI Act*") during the period of September 15th, 2001 to December 14th, 2002.

[2] It is clear from the evidence that the Appellant was employed by Hearn Stratton Construction Ltd. ("Hearn") under a contract of service. The father of the Appellant, James Bonner, is the majority shareholder in a numbered company 293594 Alberta Ltd., which in turn owns 100% of Hearn. Thus, the Appellant and Hearn, as related persons, are deemed not to be dealing with each other at arm's length, pursuant to paragraph 5(2)(*i*) of the *EI Act* and the Minister by letter dated October 12, 2004, has indicated his decision to this effect. The Minister has not exercised his discretionary authority under section 5(3)(*b*) of the *EI Act*. The Appellant has appealed that decision to this Court.

The Law

[3] The relevant sections of the *EI Act* read as follows:

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

[4] In the Federal Court of Appeal case of *Légaré v. Canada*, [1998] FCJ No. 878, Marceau J.A. said:

> 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.

[5] In another Federal Court of Appeal case *Denis v. Canada (Minister of National Revenue)*, [2004] FCA 26, Richard C.J. said :

> 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).

[6] As I see it the duty of this Court is not to substitute its view of the situation for that of the Minister but rather to see whether the decision of the Minister, could reasonably, from an objective point of view, have been arrived at, given any new facts revealed by the evidence heard during the appeal. It is only if that is not the case that this Court should review the evidence and make the decision anew.

The Facts

[7] Evidence in the appeal was given solely by the father of the Appellant, James Bonner. The Appellant himself did not appear, despite the hearing having been adjourned previously. James Bonner indicated that his son was in the United States, dealing with an immigration situation there, and could not be present. Nonetheless, he wished to proceed with the hearing.

[8] Accordingly, James Bonner was the sole witness. I found him quite straightforward, albeit somewhat frustrated with the officials with whom he had been dealing with, over this matter. Nonetheless, despite his evidence, being somewhat self serving, I formed the conclusion that he is a very honest man and I accept his evidence as being truthful, to the extent that he has any knowledge of the matter.

[9] The Minister in the Reply to the Notice of Appeal was said to have relied on the following assumptions of fact, with which James Bonner agreed as indicated.

> 7.
>
> (a) the Payor operated a business in the construction industry; **(agreed)**

(b) the share structure of the Payor was as follows:
293594 Alberta Ltd. 100% **(agreed)**

(c) James Bonner (hereinafter "the Shareholder") was the major shareholder of 293594 Alberta Ltd.; **(agreed)**

(d) the Appellant is the son of the Shareholder; **(agreed)**

(e) the Appellant and the Payor were related to each other within the meaning of the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c.1, as amended (the "*Act*"); **(agreed)**

(f) the Appellant was hired as a labourer/manager; **(disagreed)**

(g) the Appellant's duties included manual labour, operating equipment, picking up supplies, preparing bids, getting mail, calculating payroll, distributing paycheques and paying bills; **(agreed)**

(h) the Shareholder was out of the country for a portion of the Period; **(agreed)**

(i) the Appellant earned a set wage of $15.00 per hour which was eventually increased to $20.00 per hour; **(agreed)**

(j) the Payor determined the Appellant's wage rate; **(disagreed)**

(k) the Payor did not pay the Appellant on a regular basis; **(agreed with explanation)**

(l) the Payor did not remunerate the Appellant in the same manner as the Payor's other employees; **(disagreed)**

(m) the Payor provided the Appellant with company funds to distribute wages to other employees and pay company bills; **(agreed)**

(n) the Payor issued the following cheques to the Appellant: **(agreed)**

Date Issued	Amount	Date Cashed
Nov 20, 2001	$1,084.30	Nov 23, 2001
Dec 10, 2001	$ 861.40	Dec 11, 2001
Jan 2, 2002	$ 876.00	Jan 25, 2002
May 27, 2002	$1,000.00	Jun 6, 2002 (loan)
Jun 14, 2002	$1,049.65	Jun 20, 2002
Jul 2, 2002	$1,082.82	Jul 4, 2002
Jul 12, 2002	$ 575.00	Jul 16, 2002
Jul 16, 2002	$ 523.08	Jul 16, 2002
Jul 26, 2002	$1,044.69	Jul 26, 2002
Jul 31, 2002	$1,044.69	Aug 2, 2002
Nov 14, 2002	$9,141.62	Nov 14, 2002 (included other workers' pay)
Jan 2, 2003	$2,871.51	Jan 7, 2003 (included expenses)
Jan 2, 2003	$1,123.99	Jan 7, 2003 (expenses)

(o) the Appellant also received advances;
(agreed with explanation)

(p) the Payor also made a couple of direct transfers to the Appellant's bank account;
(agreed with explanation)

(q) the Appellant provided unpaid services to the Payor;
(disagreed)

(r) the Payor issued a Record of Employment to the Appellant on December 16, 2002 which contained the following information:

First day worked	September 15, 2001
Last day worked	December 14, 2002
Occupation	Manager
Total insurable hours	2103 hours
Total insurable hours	$39,660

(agreed with explanation)

(s) the Appellant filed an Application for Benefits on February 24, 2003 which contained the following information:

Job title	Manager
First day worked	October 15, 2001

Last day worked	December 14, 2002
Normal earnings	$20/hour
Normal hours	40 hours/week, 5 days/week

(agreed with explanation)

(t) the Payor issued T4s to the Appellant which contained the following income:

2001	$ 4,446	
2002	$15,920	**(agreed)**

(u) the Payor's payroll records indicated the following:

Appellant's first day of work	November 8, 2001
Appellant did not work	Jan, Feb, Mar, Apr, and Aug 2002
Total hours worked	1290 hours

(agreed)

(v) when the Appellant worked at the Payor's job site, he normally worked from sunrise to sunset, 6 or 7 days a week; **(agreed)**

(w) the Appellant only worked part-time for the Payor in January, February, March, April and August 2002; **(agreed)**

(x) the Payor supervised the Appellant; **(disagreed)**

(y) the Payor provided the tools and equipment required including a truck, compaction equipment, survey, generators, welders, scaffolding, pumps, heaters and a loader; **(agreed)**

(z) the Appellant provided his own vehicle; **(agreed)**

(aa) the Payor reimbursed the Appellant for business expenses incurred;
(agreed)

(bb) the Payor paid all operating expenses included meals and accommodations for its employees;
(agreed)

(cc) the Appellant did not replace anyone when he was hired and he was not replaced when he left; **(agreed with explanation)**

(dd) the Appellant was employed under a contract of service by the Payor; **(agreed)**

(ee) the Minister considered all of the relevant facts that were made available to the Minister, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, and

(ff) the Minister was satisfied that it was reasonable to conclude that the Appellant and the Payor would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

(ee) and (ff) – not statements of fact

[10] James Bonner explained to the Court, that his company during the time in question entered into two joint venture agreements with one Robert Archibald ("Archibald"). Archibald operated his own company R.A. Enterprises. The arrangement was not reduced to writing but was verbal only. These two men had worked together in similar ways over a period of more than 20 years.

[11] The business was one of excavation. One project was at Waskesieu Prince Albert National Park in Saskatchewan and the other at Carrot Creek. Hearn funded the projects and Archibald set up and supervised the work, seeing it to compaction. James Bonner had nothing to do with the actual work being carried out and visited each project on one occasion. Much of the time he was absent from Canada, as set out by the Minister.

[12] At the end of each project James Bonner described how they would just split the profit fifty-fifty. Thus, Archibald, who did all the hiring and firing of employees, obtaining equipment and operating the projects, had a vested interest, in keeping costs as low as he could.

[13] As the funding of the project was done by Hearn, the contracts were entered into with that company, and the workers were employed by that company.

Archibald himself was appointed as manager and agent of Hearn for these purposes, although he was not himself on the payroll. However, it was Archibald who hired workers and could fire them if he thought necessary.

[14] James Bonner when asked by counsel for the Minister, if he felt that his son was hired only because he was his father's son, vehemently denied that suggestion. He said that Archibald had approached the Appellant directly and the latter had asked him, if he should take on the work or not. James Bonner said that he told his son that it was up to him to make his own decision. Obviously he decided to take on the work.

[15] It was clear to me from the evidence of James Bonner that he had absolutely nothing to do with his son's employment, how he worked, when he worked or how much he was to be paid. This was totally in the realm of Archibald. It also seems clear to me that the Minister has completely overlooked this aspect of the matter, in making his decision.

[16] There has been a great deal of confusion in this case about when the Appellant started work, when he finished and pay advances. I will deal with all of these issues shortly. They frankly have more to do with how his time might be calculated for the purpose of obtaining EI benefits than whether or not he was at arm's length with his father's corporation. The fundamental fact that the Minister seems to have overlooked is that Archibald had a different economic interest to Hearn. Archibald and Hearn were clearly working at arm's length. The cost of the Appellant's pay and benefits was clearly a cost to Archibald, who was in full control of the situation.

[17] According to James Bonner assumption (f) was incorrect as he said that in all the years he had known Archibald, the latter never put a label on anyone he hired. A person just came and worked for him and did what work was needed. Nothing particular turns on this.

[18] James Bonner said that it was Archibald who set the Appellants wage rate. Strictly speaking it was Hearn, as all the workers including the Appellant were employed by the company and Archibald acted on behalf of the company in hiring them, but the company had no involvement in setting the amount, nor did James Bonner. Archibald did that.

[19] With respect to assumption (k), James Bonner said none of the workers worked regularly. Sometimes they worked two or three weeks straight. Other times they took a week or so off. The projects were shut down in December when the ground froze and they could no longer work. That is why they were paid irregularly.

[20] Clearly this was not the common situation seen in these types of cases where an employer does not pay for members of his own family when funds are short. All the workers were paid in the same way including the Appellant, so there is nothing irregular or particular with respect to the way the Appellant was paid.

[21] Assumption (l) according to James Bonner was effectively incorrect. The only difference between the way the Appellant was paid and the other workers, was that towards the latter part of 2002, the Appellant took on the work of doing the payroll. Also, funds from Hearn were provided to him so he could through is Bank of Nova Scotia account pay the other workers. It was easy to transfer funds to his account and he then paid the other workers their due amounts. This was done for convenience only and was of no advantage to the Appellant.

[22] Assumption (o) dealt with advances. Before going to Saskatchewan to work James Bonner loaned $300.00 to the Appellant to buy gas to get out to the worksite. That amount was taken off his pay cheque and paid back to James Bonner. Similarly on one other occasion James Bonner's wife had bought something on behalf of the Appellant and she was repaid directly out of his pay before he received it.

[23] James Bonner said that all the other workers would have had advances from time to time from Archibald and this was perfectly normal in the industry. I accept that evidence.

[24] With respect to assumption (q): James Bonner said that the family members all did things for each other for which they were not paid. These things as I understood him had nothing to do with the Appellant's work on the projects for which he was paid, as dictated by Archibald, in the usual way, similar to other employees. There is absolutely no evidence of the Appellant working on the

projects for nothing or providing additional unpaid services; the evidence seemed quite to the contrary.

[25] The Minister was correct with respect to the Record of Employment, assumption (r) and the Application for Benefits, assumption (s). Dates, times and amounts are totally incorrect in these documents. The Minister seems to have ignored the fact that amended documents were filed showing more correct dates, times and amounts. Nonetheless, it is a disturbing feature of this case. James Bonner could not explain how the mistakes came to be made. They were so glaring that I cannot think they were intentional and he said they were changed before anything went anywhere.

[26] James Bonner sought to impute some bad faith to the officials making the decision on the part of the Minister. He considered that the decision on the appeal to the Minister was made prior to the facts being provided. I see no bad faith. I find James Bonner is just confused about the process which was followed. A decision was made initially by a rulings officer. That decision was appealed to the Minister. One Diane Burton did work on behalf of the Minister. She received a fax setting out the CPP/EI rulings decision in October 2003. In March 2004, Ms. Burton indicated in correspondence that she was conducting her enquiries. In October 2004 the decision was forthcoming. Mr. Bonner seemed to think that the October 2003 fax was from Ms. Burton, and that someone already decided the case before conducting her enquiries. I am absolutely satisfied that this was not the case. The fax is simply a record of the decision of the Rulings Officer, the decision being appealed to the Minister.

[27] Those are the salient facts.

Conclusion

[28] I cannot but think that, if the Minister had had before him evidence of the intermediary standing between Hearn and the father, James Bonner, on the one hand and the Appellant on the other, in the form of Archibald, he could only reasonably have come to a different conclusion. It is clear from the evidence before me, which was not before the Minister for some obscure reason, as otherwise it would have been set out in the assumptions of fact, that the working conditions, the remuneration paid, the duration of the work, its nature and importance were all set and directly under the control of Archibald. Hearn and the father, had nothing to do

with all of that but simply provided funding. All the evidence from the payroll records shows that the Appellant worked the same kind of hours as the other workers. It is clear from the evidence of James Bonner that no favourable treatment was being given to the Appellant by Archibald. He was not that kind of supervisor. He had an arm's length economic interest from Hearn albeit they were in a joint venture and he was in charge of the working conditions; he controlled the "circumstances of the employment" of the Appellant, not Hearn and not James Bonner.

[29] The Minister has understandably been put off by the errors in the records, i.e., the records of employment and the application for benefits. When these things are wrong it is disturbing and the Minister was rightfully suspicious. It is clear from close examination they are so glaringly wrong, that they can only be very bad mistakes, as pointed out by James Bonner and they were not done fraudulently.

[30] I am not of the view, that if the Minister had the same evidence before him, as the Court has had at the hearing of this appeal, that he could reasonably and objectively have come to the conclusion that the circumstances of the employment, including the matters referred to in section 5(3)(*b*) of the *EI Act*, were such that the parties would not have entered into a substantially similar contract if they had been dealing with each other at arm's length. This situation was just about as arm's length as it could possibly be.

[31] For those reasons the appeal is allowed, in part, the decision of the Minister is varied, on the basis that the employment of the Appellant by Hearn Construction between November 8, 2001 and December 8, 2001, and between May 1st 2002 and December 14, 2002, was insurable employment under the *EI Act*.

Signed at Edmonton, Alberta, this 9th day of February 2007.

" M.H. Porter "

Porter D.J.

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COURT FILE NO.:	2005-3073(EI)
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PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	February 8, 2007
REASONS FOR JUDGMENT BY:	The Honourable M.H. Porter, Deputy Judge
DATE OF JUDGMENT:	February 9, 2007

APPEARANCES:

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Counsel for the Respondent:	Carrie Mymko

COUNSEL OF RECORD:

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Name:

Firm:

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