Docket: 2006-3764(EI)

BETWEEN:

MOHAMED YAHYAOUI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 31, 2007, at Rimouski, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Jean-Pierre Chamberland
Counsel for the Respondent:	Stéphanie Côté

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 17th day of July 2007.

"François Angers"

Angers J.

Translation certified true
on this 8th day of August 2007.
Francie Gow, Translator

Citation: 2007TCC392
Date: 20070717
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BETWEEN:

MOHAMED YAHYAOUI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from a decision by the Minister of National Revenue (the Minister) dated September 5, 2006, to the effect that the employment held by the Appellant with 9115-2421 Quebec Inc. (the payer) was not insurable during the period from January 1 to April 30, 2005, on the grounds that the Appellant and the payer were not dealing with each other at arm's length in the context of this employment. The Minister was satisfied that it was not reasonable to conclude that they would have entered into a substantially similar employment contract if they had been dealing with each other at arm's length.

[2] It is admitted that the payer and the Appellant are related within the meaning of the *Income Tax Act*. The payer was incorporated on April 3, 2002, and operates a used car dealership in Matane. At the time the Minister rendered his decision, the enterprise registrar indicated that the Appellant's spouse, Samira Selbane, was the payer's majority shareholder. In 2003, Habib Rezaigui and his spouse allegedly purchased 75 shares from Ms. Selbane, 20 shares and 55 shares respectively. The Appellant's spouse therefore holds 25 shares.

[3] The Appellant acknowledged that on May 31, 2006, he had told a Departmental representative that the payer's business operated year-round but that business tended to slow down as of December. Opening hours were 8:00 a.m. to 8:00 p.m. Monday to Friday, and sometimes Saturday. It is admitted that the

company's gross revenues were $61,900 in 2003 and $53,405 in 2004 and that it had run deficits of $17,103 and $2,557 respectively in each of those years. The quarterly goods and services tax (GST) returns indicated that the revenues in 2005 were $23,100 at the end of March, $15,250 at the end of June, $25,550 at the end of September and $15,669 at the end of December.

[4] It is also admitted that since 2003, the payer has reported no employee other than the Appellant during the period at issue. It is further admitted that on May 31, 2006, the Appellant reported to a Departmental representative that he was receiving a salary of $600 a week and that he was paid biweekly, by cheque or in cash. Finally, it is admitted that after laying off the Appellant, the payer did not hire any other employees.

[5] Habib Rezaigui is a nurse who lives in Rimouski, approximately 80 kilometres from Matane. He is the Appellant's half-brother and the husband of Samira Aouachri. Together, they hold 75% of the payer's shares. He works full time as a nurse in Rimouski. He testified that in early December 2004, he had contacted Benoît Proulx to offer him a job as a manager for the payer. He was to begin January 1, 2005. The three shareholders apparently offered him a weekly salary of $600 to work six days a week from 8:00 a.m. to 9:00 p.m. His duties would be managing the business and clearing snow. On December 28, 2004, Mr. Proulx informed them that he would not be able to work for health reasons. The three shareholders then decided to contact the Appellant because they needed somebody to clear the snow. The Appellant was waiting for a contract from the Commission scolaire Monts et Marées (the School Board) but was able to postpone it and agreed to work on the same terms offered to Benoît Proulx. Mr. Rezaigui testified that the Appellant worked from January until May 12, 2005, after which he went to work for the School Board for a month or a month and a half and then returned to work for the payer on July 9, 2005. At that point he began receiving a $200 commission for every car sold.

[6] According to Mr. Rezaigui, his wife and the Appellant's had managed the business from the beginning. However, they both gave birth in the fall of 2004, one in October and the other in November. It became necessary to hire someone.

[7] Benoît Proulx confirmed that Habib Rezaigui had made him an offer of employment in the fall of 2004. Mr. Proulx is 71 years old and has more than 27 years' experience selling cars, having worked mainly for the previous owners of the payer's business. He was offered $600 a week to manage the business 6 days a week. For that amount, he was to be responsible for the cost of commuting

(approximately $100 to $145 a week, since he lived outside of Matane) and of renting a room in Matane if winter weather conditions made it necessary for him to stay overnight. His physician advised him not to return to work because of his health.

[8] The Appellant teaches marketing and how to start up a business and has worked for the School Board since 1994. He also works as a cook in a restaurant. He comes from Tunisia, where he worked in sales at a car dealership. In 2003, his spouse bought shares from the payer and managed the business with her sister-in-law. Because they were both pregnant and gave birth in October and November 2004, the only person remaining was his brother-in-law, who was only available to work for the payer two days a week. They therefore made Benoît Proulx an offer with the above-mentioned terms.

[9] The Appellant testified that because Mr. Proulx was no longer available, the three shareholders asked him to help them out. The Appellant was able to postpone the project he was working on with the approval of the School Board. He was offered the same terms as Mr. Proulx. He was responsible for managing the business, buying and selling the cars, cleaning them and doing minor mechanical repairs. He said that he worked between 60 and 70 hours a week, from 8:30 a.m. to 9:00 p.m., Monday to Saturday. He returned to the School Board in May and June. When he returned, he was offered a commission for every car he sold. He did not like that arrangement and returned to work for the School Board in the fall of 2005.

[10] The Appellant filed as evidence a series of receipts recording the salary he received when he was paid in cash during part of his employment period, for each week from January 8 to March 12, 2005. He also filed copies of two cheques made out in his name, one for $1,123.50 dated March 31, 2005, and the other for $2,227 dated April 8, 2005. On the latter was written [TRANSLATION] "wages paid in cash". Also filed were the pay stubs prepared by Harold Simard, the payer's accountant. Each pay week is indicated, with the number of hours worked per day. According to those documents, the Appellant worked 6 hours on Mondays and Tuesdays each week and 7 hours the other four days of the week, for a total of 40 hours a week during the first four months of 2005.

[11] The payroll record was also filed as evidence. It indicates the same days, the same hours and the same source deductions for the pension plan and employment insurance. No deductions were made for income tax. The Appellant did not work in May or June and apparently worked 20 hours a week for two weeks in July. All of this documentary evidence was introduced for the first time the morning of the

hearing. However, in a letter dated July 6, 2006, and addressed to the Appellant's legal representative, the appeals officer asked to be sent the payer's monthly revenues for 2004 and 2005, the payer's minute books, the Appellant's pay stubs for 2005, the payer's payroll record for 2004 and 2005 as well as its financial statements. None of these documents were provided to the appeals officer, and she had to make her recommendations to the Minister without that information. In my opinion, an Appellant is not entitled to claim that the Minister failed to exercise his discretionary power correctly on the grounds that he was lacking highly relevant documents that only the Appellant himself could provide and that he failed to provide after a request had been made.

[12] That said, the Appellant explained that he had returned to work for the School Board on May 12, 2005, for four weeks. He said that he had taken a three-week vacation and then returned to work for the payer on commission. He denied having said, during a telephone conversation, that he had been paid every week until July 2005. The Appellant acknowledged that his insurable hours in 2004 amounted to about 350, which was insufficient to entitle him to employment insurance benefits, and that his wages from the payer did entitle him thereto.

[13] Jacynthe Bélanger is the appeals officer assigned to this file. She filed her report and summarized its preparation. She conducted a telephone interview with the Appellant and his legal representative. She had tried to contact the Appellant's wife and the wife of Mr. Rezaigui, but it was Mr. Rezaigui himself who had answered her questions because he had time to do so. The interview only lasted 14 minutes. Mr. Rezaigui became impatient and terminated the interview. He told the officer that the Appellant was not responsible for purchasing vehicles, that he was the manager, that he worked Monday to Friday from 8:00 a.m. to 8:00 p.m. for a fixed salary and that he could receive $50 for every car sold.

[14] Ms. Bélanger relied on the results of an audit performed by the Canada Revenue Agency to analyze the payer's revenues and financial situation and to try to determine whether the Appellant had indeed worked in May and June 2005. She believed that the Appellant had said that he had not been paid. Ms. Bélanger analyzed the terms and conditions of employment, the nature, importance and duration of the work performed and the remuneration, and she recommended that the work be excluded for employment insurance purposes. I am reproducing below an excerpt of her findings.

[TRANSLATION]

Terms and conditions of employment and nature and importance of the work performed

Before hiring the worker, the payer had not hired any other employees to work at the business because Samira Aouachri, Samira Sebbane and Habib Rezaigui had divided the work among themselves. The worker was hired after both Samira Aouachri and Samira Sebbane gave birth in the fall of 2004.

Mohamed Yahyaoui began working as manager on January 1, 2005, from Monday to Friday, from 8:00 a.m. to 8:00 p.m. He was hired to take care of sales, perform minor mechanical work, and locate and inspect vehicles. He said that before closing a major transaction, he would contact the shareholders for their authorization. As far as he was concerned, the person in charge of the business was Samira Aouachri.

After the worker left in July 2005, he was not replaced. Samira Aouachri, Samira Sebbane and Habib Rezaigui once again divided the work among themselves. When he talked to the insurance officer, the worker had said that his wife was the only person who worked for the business. On the other hand, Samira Aouachri had said that it was her husband, Habib Rezaigui, who took care of everything.

Our opinion is that the job was not essential to the payer, since the payer had never hired anybody except during the worker's period of employment.

Remuneration

The worker said he had worked continually from January to July 2005, received a salary of $600 a week, was paid biweekly by cheque or in cash, and received pay stubs for all the weeks he worked. However, when he talked to the auditor, he said he had begun working on commission in May 2005. Habib Rezaigui also mentioned that the worker received an additional $50 for every car sold. Unfortunately, no documentation demonstrating such payments to the worker was provided by the parties.

In December 2004, Benoît Proulx was offered employment as manager of the payer's business on the same terms and conditions that were offered to the worker. Unlike the worker, who had no experience in the field, Benoît Proulx had 27 years' experience in car sales and had already established a good client base.

In 2003 and 2004, the payer closed its fiscal years with losses of $17,103 and $2,257 respectively. During the worker's period of employment, the payer's revenues were $23,100 in the first quarter and $15,250 in the second. During the

> interview with Habib Rezaigui, he confirmed that the payer's sales were low because Matane was a quiet town.
>
> Our opinion is that a foreigner with no experience in automobile sales would not normally receive the amount of remuneration paid to the worker. Because the payer did not provide documentation for 2005, we have no documentary evidence showing that it had the financial capacity to pay that salary.
>
> **Duration**
>
> According to the worker, he received a salary of $600 a week for the period from January 1 to July 22, 2005, for a total of $15,600. However, the T4 issued by the payer for the 2005 taxation year was for $11,232. It should be noted that the months for which the payer remitted employment insurance contributions were January, February, March, April and July 2005.
>
> By verifying the payer's quarterly remittances, we observed that the worker had not been employed during the periods when the payer's revenues were at their highest levels. During the third quarter, when revenues were increasing, nobody was hired to replace the worker.
>
> Our opinion is that the worker's period of employment did not correspond to the real needs of the business.

[15] The comments of the Revenue Agency auditor were admitted as evidence by consent. The audit took place in June 2005. He met the Appellant and the accountant. He determined that the sole shareholder at the time of his audit was the Appellant's wife. No paycheques corresponding to wages distributed from July 2004 to February 2005 were found. He found no cheques issued to the Appellant as an employee. He also noted that no income tax deductions were recorded in the payroll record for the gross pay of $600 a week from January to April 2005 and advised the accountant to deduct the income tax in the future.

[16] Eric Richard is an employment insurance investigator. He filed as evidence three of the Appellant's employment records for the periods from September 13, 2004, to May 20, 2006. Two of the employment records are from the School Board and the other is from the payer. He observed from the records that the Appellant worked for the School Board for two weeks in May 2005. He also noted that the Appellant had not received wages from the School Board between May 22 and October 8, 2005. Moreover, he determined that the Appellant had received remuneration from the School Board for the weeks from February 20 to 26, 2005, and March 13 to 19, 2005, even though he was working for the payer.

[17] The Appellant, in rebuttal, explained the last fact by stating that he had not been working. It was a training session and he had prepared the syllabus, but he had not worked. He explained that for budgetary reasons, he had been paid only after the syllabus was approved. He also talked about the reimbursement of moving costs referred to in Exhibit A-11. However, the amounts are not the same, and such a reimbursement is not normally found in an employment record.

[18] Did the Minister properly exercise, in this case, the discretion conferred on him by the Act? The Federal Court of Appeal defined the functions of the Minister and the Court in *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, No. A-392-98, May 28, 1999, [1999] F.C.J. No. 878 (QL). Mr. Justice Marceau summarized the approach in the following terms 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.

[19] The Federal Court of Appeal reiterated its position in *Pérusse v. Canada*, A-722-97, March 10, 2000, [2000] F.C.J. No. 310 (QL), where Marceau J.A., referring to the above excerpt from *Légaré*, added as follows at paragraph 15:

> The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and

> witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.

[20] The provisions of the Act by which employments are excluded from insurable employment where the employer and employee are not dealing with each other at arm's length, and the provisions that apply to situations where such non-arm's length dealing is deemed not to have existed, are drafted as follows:

> 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.
>
> 5(3) **Arm's length dealing. —** For the purposes of paragraph (2)(*i*),
>
> (*a*) . . .
>
> (*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.

[21] In *Louis-Paul Bélanger v. M.N.R.*, 2005 TCC 36, Judge Archambault of this Court analyzed a set of decisions of both the Federal Court of Appeal and this Court on the issue of non-arm's length dealing and on the process that the Court must follow in an appeal from a decision of the Minister based on the statutory

provisions cited above. I will analyze the facts of the instant appeal based on all those instructions.

[22] The Appellant's documentary evidence certainly provided a more detailed picture of the duration of his employment, in contrast with what he had reported to the appeals officer during his telephone interview. He told her that he had worked continually from January to July 2005 at a salary of $600 a week, had been paid biweekly and had received pay stubs for the weeks he had worked. The documentation, and particularly the pay receipts (Exhibit A-9), were prepared for each work week, which would seem to indicate that he was paid weekly and not biweekly, and the receipts are numbered successively, giving the impression that no other receipts were issued during that period, at least for the receipts that were filed, which cover up to March 19 (Exhibit A-6). However, there were cars sold during that period. As for the pay stubs, there is one pay stub for each work week until the end of April 2005 and not for every two weeks; they indicate a total of 40 hours worked per week, while the Appellant claims to have worked 60 to 70 hours per week.

[23] Those documents and some others that were filed as evidence at the hearing were among those that the appeals officer had asked to receive in her letter to the Appellant's counsel dated July 6, 2006, and that she had never received. In my opinion, the documentary evidence contradicts what was said by the Appellant and Mr. Rezaigui about the conditions and duration of the Appellant's work. In fact, there are several contradictions between the versions of the Appellant and his witnesses and the documents and the versions given to the appeals officer. Mr. Rezaigui mentioned during the proceedings that the Appellant had been hired from January to May 2005 at $600 a week. During the investigation, he said that the Appellant could receive an additional amount of $50 for every car sold. However, that additional amount of $50 per car sold was never paid to the Appellant, and the employment period ended on April 30, 2005. According to Mr. Rezaigui, the Appellant left for a month and a half to work for the School Board and returned to the payer on July 9, 2005, to begin working for a commission of $200 per car sold. According to the Appellant, he had worked only two weeks for the School Board then taken three weeks' vacation before returning to the payer.

[24] The Appellant told the appeals officer he had worked for the payer from January until July; at the proceedings, he said it was only from the beginning of January to April 30 and for two weeks in July, at 20 hours per week. He said that he had been paid biweekly while his pay stubs indicate that he was paid weekly. There was also a paycheque for $2,227 that represented two weeks' pay. He said he

had worked 60 to 70 hours a week, while the pay stubs and payroll record indicated 40-hour weeks, and the number of hours worked each day was recorded. He told the appeals officer that he had worked Monday to Friday from 8:00 a.m. to 8:00 p.m., but at the proceedings he said Monday to Saturday from 8:30 a.m. to 9:00 p.m. Mr. Rezaigui also testified that the hours of work were from 8:00 a.m. to 8:00 p.m. The Appellant claims that he worked two weeks in July on commission. However, the payroll record indicates that he worked 20 hours for each of those two weeks, and nothing seems to indicate that the new method of remuneration upon his return to work in July was based on commissions.

[25] The appeals officer also noted contradictions with respect to the issue of who was really in charge of the business. The Appellant told the appeals officer that Samira Aouachri was the boss. He told the employment insurance inspector that his wife was the only one who worked for the business, while Ms. Aouachri supposedly said that it was her husband, Mr. Rezaigui, who took care of everything. It should be noted that the Rezaiguis live in Rimouski and that the payer's business is located in Matane, approximately 80 kilometres away.

[26] The Appellant also testified that he had been asked to come and help and that he had left after his return because he did not want to be paid on a commission basis. I have very hard time believing that a wife would contact her husband to help her with her business and that he would leave because he did not like being paid on commission. We must remember that the Appellant teaches marketing and how to start up businesses. It is therefore difficult to believe that he did not contribute to his wife's business in one way or another without being asked.

[27] The Appellant's work conditions and remuneration were similar to those offered to Benoît Proulx. However, there is a distinction to be made between the qualifications of Mr. Proulx, who was sure to bring an established client base, and those of the Appellant. Mr. Proulx also had to cover his own commuting and accommodation costs, which reduced his earnings significantly. The Appellant did not have the same level of experience, nor was he faced with the same expenses. It is therefore reasonable to conclude that the conditions of work were not exactly the same and that an arm's length employee with no experience or client base would not have earned that level of remuneration.

[28] Therefore, the evidence as a whole contains too many contradictions, uncertainties and unanswered questions, such as how the business operated when the Appellant was not working there, to allow me to conclude that the Minister's decision is unreasonable in the circumstances and in light of all the factors to be

considered. The Appellant has therefore failed to satisfy me on a balance of probabilities that the Minister's decision was unreasonable. The appeal is therefore dismissed.

Signed at Ottawa, Canada, this 17th day of July 2007.

"François Angers"

Angers J.

Translation certified true
on this 8th day of August 2007.
Francie Gow, Translator

CITATION:	2007TCC392
COURT FILE NO.:	2006-3764
STYLE OF CAUSE:	Mohamed Yahyaoui v. M.N.R.
PLACE OF HEARING:	Rimouski, Quebec
DATE OF HEARING:	May 31, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	July 17, 2007

APPEARANCES:

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