

Docket: 2007-4478(EI)

BETWEEN:

MONUMENTS B.M. INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on common evidence with the appeal  
of **Gestion G.D.R.R. Inc. (2007-4480(EI))**  
on August 26, 2008, at Québec, Quebec

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Jérôme Carrier  
Counsel for the Respondent: Dany Leduc

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### **JUDGMENT**

The appeal from the decision of the Minister of National Revenue finding that the workers held insurable employment under a contract of service within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act* is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 17th day of September 2008.

"François Angers"

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Angers J.

Translation certified true  
on this 14th day of November 2008.

Brian McCordick, Translator

Docket: 2007-4480(EI)

BETWEEN:

GESTION G.D.R.R. INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Before: The Honourable Justice François Angers

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Signed at Edmundston, New Brunswick, this 17th day of September 2008.

"François Angers"

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Angers J.

Translation certified true  
on this 14th day of November 2008.

Brian McCordick, Translator

Citation: 2008 TCC 502  
Date: 20080917  
Docket: 2007-4470(EI)

BETWEEN:

MONUMENTS B.M. INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

### **REASONS FOR JUDGMENT**

Angers J.

[1] These are two appeals from a decision by the Minister of National Revenue ("the Minister") finding that the employment of Guy Martin, Daniel Martin and Richard Martin ("the Workers") with the Appellant Monuments B.M. Inc. ("BM") from January 1, 2004, to December 31, 2006, and with Gestion G.D.R.R. Inc. ("GDRR") from January 1 to December 31, 2003, was insurable employment within the meaning of paragraphs 5(1)(a) and 5(2)(b) of the *Employment Insurance Act* ("the Act"). The appeals were heard on common evidence.

[2] When the hearing began, the Appellants admitted that the three Workers were employed by them under a contract of service and that they and the Workers were related persons within the meaning of the *Income Tax Act*.

[3] The Appellants argued that the employment was excluded from insurable employment because of this non-arm's length relationship and that the Minister had improperly exercised his discretion under paragraph 5(3)(b) of the Act, since it was not reasonable for him to conclude that the Workers and the Appellants would have entered into a substantially similar contract of employment if they had been dealing

with one another at arm's length. This conclusion by the Minister created a presumption that the Appellants were dealing with the Workers at arm's length in the context of their employment.

[4] For the purposes of this case, and although there is no longer any issue as to the non-arm's length relationship and the existence of a contract of service, I will reproduce the presumptions of fact on which the Minister relied and state whether the Appellants admitted or denied them.

Monuments B.M. Inc.

[TRANSLATION]

- (a) The Appellant was incorporated on January 14, 1970. [admitted]
- (b) The Appellant made funerary monuments. [admitted]
- (c) Business at the Appellant's monument shop was seasonal from April to November; the Appellant could not deliver monuments in the winter. [admitted]
- (d) The Appellant's administrative office was open year-round. [admitted]
- (e) The Appellant had sales of about \$1.5 million a year.
- (f) In addition to the 3 shareholders, the Appellant employed 15 seasonal workers and about 70 sales representatives.
- (g) Guy Martin had worked for the Appellant since 1976, and Richard Martin and Daniel Martin had worked for the Appellant since 1980.
- (h) Guy Martin was the Appellant's general manager. [denied as written]
- (i) Guy Martin's work involved financial management, bookkeeping, accounting and supervising a secretary. [denied as written]
- (j) Daniel Martin was responsible for customer service and for engraving the monuments in cemeteries. [admitted]
- (k) Daniel Martin's work involved managing the salespersons' activities, customer relations and lettering. [admitted]
- (l) Richard Martin was the production manager. [admitted]
- (m) Richard Martin's work involved supervising the production of deliveries of monuments. [admitted]
- (n) Richard Martin supervised about 10 employees in the monument shop. [admitted]
- (o) The Workers had no fixed work schedule. [admitted]
- (p) The Workers worked 50 to 70 hours a week for the Appellant during the busy season and 25 to 30 hours a week during the winter months. [denied]
- (q) The Workers' remuneration was determined by the Appellant in accordance with the shareholders' unanimous agreement. [denied]
- (r) Guy Martin's annual remuneration was \$120,780 in 2004, \$110,828 in 2005 and \$112,938 in 2006. [admitted]
- (s) Daniel Martin's annual remuneration was \$74,545 in 2004, \$74,743 in 2005 and \$75,923 in 2006. [admitted]

- (t) Richard Martin's annual remuneration was \$66,214 in 2004, \$66,246 in 2005 and \$67,256 in 2006. [admitted]
- (u) The Workers were paid their salary regularly every week by direct deposit. [admitted]
- (v) The Appellant had an active corporate life. [denied]
- (w) Important decisions for the Appellant were made by the directors or by the shareholders in accordance with the unanimous shareholder agreements limiting the directors' powers, which were dated January 27, 1986. [denied]
- (x) there was a relationship of subordination between the Appellant and the Workers. [denied]
- (y) the Appellant had a right of control over the Workers, and that control was exercised. [denied]

The Appellant and the Workers are related persons within the meaning of the *Income Tax Act* because:

- (a) The Appellant's shareholders with voting shares were:

Guy Martin                    33 ⅓ percent of the shares;  
Daniel Martin                33 ⅓ percent of the shares;  
Richard Martin 33 ⅓ percent of the shares.

- (b) Guy Martin, Daniel Martin and Richard Martin are brothers.
- (c) The Workers are related by blood to a group of persons who control the Appellant.

The Minister also determined that the Appellant was deemed to deal with the Workers at arm's length in the context of their employment because the Minister was satisfied that it was reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with one another at arm's length, having regard to the following circumstances:

- (a) The Workers' salaries and bonuses had been determined by agreement among the Appellant's shareholders. [admitted]
- (b) Each Worker was responsible for his own area of activity. [denied]
- (c) The Workers held managerial positions and their earnings were reasonable given their duties and responsibilities with the Appellant. [denied]
- (d) The Workers had worked for the Appellant year-round for more than 25 years. [admitted]
- (e) The duration of the Workers' work was reasonable. [denied]
- (f) The Workers' work was essential and important to the smooth operation of the Appellant's business. [admitted]
- (g) The Workers were never absent for an extended period of time. [admitted]
- (h) The nature and importance of the Workers' work were reasonable. [denied]
- (i) The terms and conditions of employment reflected the demands of the Workers' managerial positions. [denied]

- (j) The Workers' terms and conditions of employment were reasonable. [denied]

Gestion G.D.R.R. Inc.

[TRANSLATION]

- (a) The Appellant was incorporated on May 16, 1986. [admitted]  
(b) During the year in issue, the Appellant paid the Workers even though they worked for their true employer. [admitted]

...

- (r) Guy Martin's annual remuneration was \$101,677 in 2003. [admitted]  
(s) Daniel Martin's annual remuneration was \$72,471 in 2003. [admitted]  
(t) Richard Martin's annual remuneration was \$64,301 in 2003. [admitted]

...

- (w) Important decisions for the Appellant were made by the directors or by the shareholders in accordance with the unanimous shareholder agreements limiting the directors' powers, which were dated June 5, 1987. [denied]

[5] Only Guy Martin testified at the hearing. He is BM's general manager. Obviously, BM is a family business. His testimony served largely to confirm the assumptions relied on by the Minister in determining the question at issue and admitted by the Appellants. However, he corrected one of those admissions, namely that he and his two brothers are equal shareholders in BM. In fact, all of BM's voting shares are owned by GDRR. The three brothers are equal owners of GDRR's voting shares, although Guy Martin's management company has owned his shares since 2006. The witness also admitted that, during the period of January 1 to December 31, 2003, the Workers were paid by GDRR but their true employer was BM.

[6] Guy Martin also clarified some things about BM's operation and especially his own responsibilities and duties in BM. In addition to being the general manager, Mr. Martin works as a commission salesperson one day a week in a defined territory. This explains the difference between his income and that of his two brothers. As well, the Workers' salaries as shown in the Reply to the Notice of Appeal include an amount paid as a bonus. The workers received dividends from the Appellant GDRR during the four periods in question, but those amounts were not included in their respective total earnings. Two of the three brothers therefore had about the same salary, within \$10,000 of each other, while Guy Martin received an average of \$40,000 more a year in commissions for the years in question. It must be recalled that



BM has about 70 travelling salespersons who are all self-employed and do the same work as Guy Martin.

[7] The brothers' salaries were determined by the shareholders in accordance with an agreement they had reached limiting the powers of the directors of BM and GDRR over such things as declaring and setting the rate of a dividend and determining and paying any salary, bonus, premium or other type of remuneration.

[8] The duties of each Worker as described in the Reply to the Notice of Appeal indicate that each of them held a key position in the business. The hours they spent performing their respective duties were similar, except in the case of Guy Martin, who worked as a self-employed salesperson one day a week. He therefore devoted slightly fewer hours to his managerial position than the other two Workers, but, based on the description, his work as general manager seems to have been more demanding during the evenings and on the weekends. There was thus no set schedule, since each Worker preferred to adapt to the situation in order to meet the company's needs.

[9] BM paid each Worker a disability insurance premium, but the benefits were not payable until six months after the event causing the disability. BM therefore undertook to continue paying the three Workers' salaries during that initial six-month period following the occurrence of the risk. Each Worker was entitled to six weeks of vacation a year, and it was agreed that they had to take their vacation during the least busy time of the year and that there could be no overlap in their vacation time.

[10] According to Guy Martin, his departure as general manager would lead to the creation of a new management structure and would require BM to hire a comptroller and an accountant to replace him. BM would also have to hire a sales representative to cover his territory. Relationships of trust would also have to be re-established to ensure the smooth operation of the business, and it might be difficult to demand the same devotion and trust from a stranger.

[11] The relevant legislative provisions are in paragraphs 5(2)(i) and 5(3)(b). Paragraph 5(2)(i) reads 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.

[12] Based on this paragraph, the employment of the three Workers in the case at bar is, *prima facie*, excluded from insurable employment. However, if the employer is, within the meaning of the *Income Tax Act*, related to the employee, the Minister has a discretion under paragraph 5(3)(b) which may be exercised in accordance with the following criteria:

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.

[13] The question that must be answered is whether the Minister's decision in this case still seems reasonable in light of the evidence heard. In other words, it must be asked whether the three Workers/shareholders would have entered into a substantially similar contract of employment if they had been dealing with BM at arm's length.

[14] This Court has already rendered several decisions concerning this type of situation involving workers who are both shareholders and employees, including *Lacroix v. Canada*, [2007] T.C.J. No. 81, in which Archambault J. summarized this type of situation as follows at paragraph 41 of his decision:

I emphasize this nuance because we are dealing with three workers who, at the same time, through their respective holding companies, each own one third of the Payor. They are in a way the indirect owners of the Payor and its business. When paragraph 5(3)(b) of the Act requires that it must be determined whether the contract

of employment would have been substantially similar in an arm's length relationship, I believe it must be taken into account that these are three workers who are at the same time the indirect owners of the Payor. Individually, none of the three control the Payor and, therefore, had they not been related, none of the Workers would have been a person related to the Payor within the meaning of the Tax Act and they would then be at arm's length. Indeed, paragraph 5(3)(b) of the Act does not indicate that the financial interests that the workers hold in the company must be ignored. Therefore, it is possible to imagine three workers with no family relation between them, each holding one third of the capital stock of the Payor and remaining at arm's length with the Payor.<sup>6</sup> The issue to be determined by the Minister could therefore be expressed as follows: if each of the Workers had held one third of the Payor's shares while remaining at arm's length with the Payor, would they have entered into a substantially similar agreement?

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<sup>6</sup> It is important to stress the fact that because a person is a shareholder of his or her employer does not necessarily mean that they are not dealing with each other at arm's length. An employer's shares could be held by five or ten employees of that employer. Assuming the shares are distributed equally, none of the shareholders would be able to dictate the Payor's course of action and therefore none of them would be able to control it. In this case, unless there are special circumstances, it could not be concluded either that there is a factual non-arm's length relationship. For a discussion of the existence of a factual non-arm's length relationship between shareholders at arm's length with the company, see *Gestion Yvan Drouin Inc. v. The Queen*, 2001 DTC 72; [2001] 2 C.T.C. 2315, at paras. 73 *et seq.* and in particular paras. 80 *et seq.* In this case, I do not believe that there are any indicators that could demonstrate the existence of a factual non-arm's length relationship between the Workers and the Payor.

[15] In my opinion, this is exactly the question that arises here. Among the criteria the Minister must consider, namely the terms and conditions, the importance of the work performed, the remuneration paid and the duration of the employment, is there something that makes their contract of employment different because of the non-arm's length relationship between them and BM?

[16] Nothing in the evidence I heard could lead me to conclude that the Minister's decision is not reasonable. Each Worker held a managerial position in which his activities were essential to BM's smooth operation. The terms and conditions they accepted were consistent with their status as shareholders (owners) and managers. The same was true of their hours of work, vacations and benefits, such as the payment of their salaries for six months before they became eligible for benefits under the wage loss insurance provided by BM. These were all terms and conditions

that the three partners or shareholders who were employees would have agreed to abide by even if they had been dealing with the employer at arm's length.

[17] With regard to the Appellants' argument that the Workers continued working during the off-season between November and April, in my view, this made up for the long hours they worked the rest of the year, and the evidence shows that this was not wasted time, since there was work to be done.

[18] Their financial stake in the smooth operation of the business is really what accounts for their devotion and for the fact that, if they left the business, two employees might have to be hired to perform the same duties, and this would probably be the case for any shareholder who is an employee. This has nothing to do with the existence of a non-arm's length relationship.

[19] It seems to me that the non-arm's length relationship may have played a role when Guy Martin was authorized to spend one day a week working for himself, namely the day he worked as a salesperson who was self-employed like BM's 70 other salespersons. This had the effect of reducing his working hours compared with the other two Workers and thus enabling him to earn additional income. Indeed, the Appellants argued that the Minister had not considered this factor in exercising his discretion.

[20] However, the evidence shows that Guy Martin, as the general manager, had to be more available to BM than the other two Workers, especially evenings and weekends, and that this appears to be how he made up for the time he devoted to being a salesperson. The amount of the commissions paid to Guy Martin may seem high, but the return derived by BM directly and by its shareholders in the form of income was very satisfactory.

[21] Having regard to the circumstances and the evidence, the Appellants have failed to show that the Minister's decision seems unreasonable. The appeals are dismissed.

Signed at Edmundston, New Brunswick, this 17th day of September 2008.

"François Angers"

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Angers J.

Translation certified true  
on this 14th day of November 2008.

Brian McCordick, Translator

CITATION: 2008 TCC 502

COURT FILE NOS.: 2007-4478(EI)  
2007-4480(EI)

STYLES OF CAUSE: Monuments B.M. Inc. and M.N.R.  
Gestion G.D.R.R. Inc. and M.N.R.

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: August 26, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice François Angers

DATE OF JUDGMENTS: September 17, 2008

APPEARANCES:

Counsel for the Appellants: Jérôme Carrier  
Counsel for the Respondent: Dany Leduc

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