Docket: 2008-854(EI)

BETWEEN:

F. MÉNARD INC.,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard October 22, 2008, at Québec, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellant: Jérôme Carrier

Counsel for the respondent: Mélanie Bélec

JUDGMENT

Appeal filed under subsection 103(1) of the *Employment Insurance Act* (the Act) is dismissed on the ground that the employment held by the workers, François Ménard, Luc Ménard and Pierre Ménard, for the appellant, from January 1, 2005, to March 14, 2007, was insurable employment within the meaning of the Act for the reasons stated below.

Signed at Ottawa, Canada, this 24th day of April 2009.

"Alain Tardif"

Tardif J.

Translation certified true
on this 8th day of June 2009.
Elizabeth Tan, Translator

Citation: 2009 TCC 208
Date: 20090424
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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision in which the respondent determined the work carried out by François Ménard, Luc Ménard and Pierre Ménard from January 1, 2005, to March 14, 2007, for the appellant, F. Ménard Inc. (the appellant), was insurable.

[2] The legal basis for the decision is paragraph 5(2)(*i*) of the *Employment Insurance Act* (the Act). Under this provision, work carried out by a person related to the employer within the meaning of the *Income Tax Act* is not insurable.

[3] However, Parliament provided an exception under which the work is insurable if it was performed in a manner similar and under terms and conditions comparable to those that would have existed if the parties had had an arm's length relationship. This exception states:

> 5(3)(*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] Thus, if there is no arm's length relationship, the Minister must analyse the file in more detail than a simple verification for the presence of the classic conditions, which are compensation, the performance of work and the relationship of subordination.

[5] He must decide whether the non-arm's length relationship influenced the performance of work; in other words, the analysis must consider whether the work in question was carried out in a manner similar and under conditions comparable to those that would have existed with a person with an arm's length relationship with the employer.

[6] This is unusual in another respect; the case law has established that the Tax Court of Canada does not have jurisdiction to review such a decision when the discretionary power was exercised correctly and lawfully.

[7] In other words, when the discretionary power is exercised responsibly and judiciously, all the relevant facts were taken into consideration and the conclusion is reasonable, the Tax Court of Canada cannot amend the decision, even if the Court does not necessarily agree with it.

[8] In reaching the decision that is under appeal, the respondent relied on a great number of presumptions of fact, many of which were admitted. These are:

> [TRANSLATION]
> 5. (a) the appellant was incorporated on November 26, 1989;
>
> (j) the workers had signing rights on behalf of the appellant; Fulgence Ménard alone could sign the appellant's cheques whereas in the workers' case, two signatures were required on cheques issued on behalf of the appellant;
>
> (k) the workers, shareholders of the appellant, participated and made all the decisions regarding the major and daily operations for the appellant's management and operations;
>
> (l) each of the workers could be called upon to be involved in employee management, to make financial decisions, communicate with the clients, establish prices or act as a resource person on behalf of the appellant;

(m) each of the workers had great autonomy when carrying out his duties, but ultimately had to answer to the appellant's board of directors;

(n) none of the workers had personally invested any money in the appellant's business and none had guaranteed or endorsed a line of credit or loan on behalf of the appellant;

(o) the workers rendered services to the appellant continually and without interruption;

(p) the workers rendered services to the appellant daily in the appellant's offices;

(q) during the period in question, each of the workers received an annual gross salary of $75,000.00 from the appellant;

7. (d) the work of each of the workers was indispensible to the proper operations of the appellant's activities;

(f) the workers have been employed by the appellant for many years, they perform their duties year-round and their work corresponds to the appellant's operational needs.

[9] However, the appellant denied the following:

[TRANSLATION]
5. (b) the appellant operates a mill and more than 20 pig and poultry farms has some crops;

(c) the appellant's annual sales figure is more than $100 million, generating profits of around $1.3 million;

(d) the appellant hires more than 400 people yearly;

(e) the workers were, either directly or indirectly, shareholders of the appellant and worked year-round for the appellant's business;

(f) the workers were the directors of the appellant's areas of activity and were members of the appellant's executive committee;

(g) François was the director of the mills and assets;

(h) Luc was the director of animal production;

(i) Pierre was the director of the fleet or logistics;

(r) the workers, as the appellant's other employees, had group insurance; they had more coverage than the other employees because of their responsibilities;

(s) the workers' remuneration corresponded to the actual time each spent to carry out his duties and was established according to the experience and ability of each;

7. (a) the workers did not calculate their hours of work but were subject to the appellant's power, exercised by its board of directors, of which they were members;

(b) the workers received a reasonable remuneration considering the duties the appellant assigned them;

(c) each of the workers was responsible for his area of activities and rendered services to the appellant as an employee, in addition to having the status of managing shareholder;

(e) if the workers had particular working conditions, it was not due to their non-arm's length relationship with the appellant, but because of their status as the appellant's director.

[10] Luc Ménard and the accountant, Yvon Paquette, both testified. Their testimony consisted essentially of the evidence submitted in support of the appeal.

[11] Luc Ménard testified first. He first gave the background of the appellant, which was created by his father. Founded in 1961, the business never stopped expanding.

[12] During the period in question, the company and its affiliates employed around 700 people, its assets were close to $150 million and its total sales figure was close to $250 million.

[13] Activities included the sale of feed from the operation of two mills, and pig farming; this production had two components: one was the production from the business itself, and the other was production with the participation of some ten other private farms, a widespread practice in pig production in Quebec.

[14] Over the years, the business expanded considerably in the agricultural field. Many businesses joined in, including a very important component with the slaughterhouse where, in addition to slaughter, the transformation of part of the production to different products was carried out, the other part simply being sold. This is a very brief summary of the activities of this very important agricultural business.

[15] Until 2005, the business and its affiliates were administered and managed by Fulgence Ménard and his four sons, François, Luc, Pierre and Bertrand.

[16] In 2005, a disagreement arose and Bertrand remained at home with full salary, to consider his future with the business. Relations with the other shareholders had become difficult.

[17] During this period, he received the same salary and did not perform any work. In fact, he never returned; the disagreement was taken to court and in the end, a settlement was reached.

[18] The case was about the value of the shares and the severance pay; one side claimed that it should be paid according to market value while the other side claimed a buy-sell agreement, to which all the shareholders were a party, should be referred to. Bertrand's case is not under appeal.

[19] Mr. Ménard also explained the nature of his work and that of his two brothers. He acknowledged that their compensation was less than that of certain executives at the company. He also stated that they enjoyed certain benefits in terms of group insurance, and had great freedom and independence when carrying out their respective duties.

[20] In particular, he stated that if a work stoppage was required for medical reasons, their salary would still be paid in whole with no intervention by the insurer. He indicated that his salary and that of his brothers had generally been established so that they could make maximum contributions to their respective RRSPs.

[21] He explained that the business respected each person's desires, which varied. In his case, his son's golf skills required him to take leave in order to support and encourage him during competitions, often in far away locations.

[22] For one brother, hunting was his favourite hobby. One owned a plane, and the appellant paid for part of the operating costs.

[23] Luc Ménard stated that he and his brothers were free, autonomous and responsible; they had great independence. He did, however, acknowledge that this freedom and independence could have been restricted if there had been any abuse on their part.

[24] All comparisons of advantages and disadvantages were made in relation to the appellant's other executives.

[25] As for the accountant, he essentially confirmed Luc Ménard's testimony, in particular that compensation for the Ménard brothers was established based on the amount each required to make maximum RRSP contributions.

[26] As for their salary, the accountant's and Luc Ménard's explanations were coherent, and actually identical.

[27] The quality of work during the investigation that led to the finding at the base of the appeal was challenged, to discredit the process. The appellant stated that the investigation was incomplete and botched because of inaccurate and missing information, admitting his responsibility in this regard.

[28] Moreover, the appellant also noted that the decision was unreasonable, which justified a review by this Court.

[29] Many facts listed in the Reply to the Notice of Appeal were admitted. Some were denied; however, these concerned more secondary facts, such as the sales figure, number of sub-contractors and number of employees. As for the facts denied, the evidence showed that they were true, but incomplete or generally misinterpreted. One thing is for sure, the vast majority of the facts denied were of limited importance.

[30] However, the issue of compensation could have raised some concerns, because it is clear the shareholders deserved a higher compensation than the business's executives.

[31] Is this a determining factor in itself? Although it is an important element, it must be evaluated in the specific context of a particular person's status, which combines two qualities: employee and shareholder.

[32] I often state that a distinction must be made between the status of employee and that of shareholder; admittedly, these are two distinct qualities, and must not be confused.

[33] However, Parliament provided an obligation to make comparisons when certain employees have a non-arm's length relationship with their employer. Generally, in a small or medium-sized business (SME), a shareholder employee, with

or without an arm's length relationship with the business, very often has different working conditions than the other people who work for the same business but are not shareholders.

[34] The differences are often advantages, but are just as often disadvantages. A true comparison would require access to truly comparable elements.

[35] A true comparison consists of comparing the work carried out by a shareholder employee with an arm's length relationship to that carried out by an employee with a non-arm's length relationship.

[36] In general, being a shareholder comes with powers that result in advantages that largely compensate for any potential salary gaps with executives. In other words, the shareholder employee managers of a company often receive very different compensation than that of other non-shareholder employees in the same company; sometimes it is a benefit and sometimes a disadvantage. I have in mind dividends, deductions, advances, increases in share value, etc.

[37] However, persons with an arm's length relationship who are shareholders of a company have specific concerns that directly and significantly affect their contracts of employment with the company in which they hold shares. Shareholders may therefore prefer dividends to compensation or may accept a lower salary to set an example or to improve or balance the finances. Third parties would not accept this, aside from third party shareholders.

[38] Therefore, many scenarios are possible, all while respecting the essential components of a contract for services, which is composed of three elements: (1) salary, (2) work performance, (3) relationship of subordination.

[39] As a result, a lesser salary, particular conditions, different terms of employment are definitely not the automatic result of a non-arm's length relationship that might exist.

[40] In fact, any employee who holds shares, with or without an arm's length relationship with the employer, theoretically and generally has many different concerns that distinguish him or her from an employee at the same company who does not have any shares.

[41] In other words, the mere fact of being a shareholder changes the worker's expectations. This reality has nothing to do with the essential elements of a contract

of employment, nor does it have anything to do with the fact that the qualities of shareholder and worker are different.

[42] Confusing the two qualities could, for example, result in work performance including duties carried out as shareholder and not as a worker.

[43] Any comparison must be based on valid and relevant elements of comparison. Comparing the work carried out by a shareholder with that carried out by a non-shareholder employee is not relevant. The reasonable and appropriate method is to make the comparison with workers with an arm's length relationship in a similar context.

[44] Such a reality does not make light of the legal distinction that must be made between the shareholder's role and that of a party to a contract of employment.

[45] Any person who holds shares in a business for which he or she works could have different levels of participation, with the relationship of dependence having nothing to do with these concerns.

[46] In the present case, persons with an arm's length relationship carrying out similar duties and responsibilities could very well have had similar working conditions to those of the Ménard brothers.

[47] The result of the analysis at the basis of the appeal and the purpose of which was to determine whether the employment conditions had been influenced by the non-arm's length relationship was a rather hypothetical and theoretical exercise, given the lack of reliable comparable data to support any reasonable conclusion.

[48] The business took off and expanded considerably; this success was due to the many management qualities of the shareholders, mainly the father, who made smart decisions and chose a good team to support him.

[49] Many questions raised by counsel for the appellant were to show that the people targeted by the appeal had benefitted from some advantages and benefits, but also faced some inconveniences and disadvantages.

[50] At first, the exercise might seem relevant and very interesting; however, I do not believe it was a determining factor, given that comparisons with executives at the company are not relevant.

[51] The value of comparisons is based essentially on the quality of the comparable data. When the quality of comparable data is questionable, the quality of the result of the comparison is equally questionable.

[52] The work of a person who owns shares should be compared to that of another person who owns shares, one with an arm's length relationship and the other without. Moreover, the responsibilities, terms and conditions and context must also be comparable.

[53] When there is no valid or acceptable comparison, the only option is to answer the following question: is it reasonable, likely or possible that a person with an arm's length relationship who has shares in the company would carry out the same type of work in similar conditions and under similar terms?

[54] In this type of business, commitment, honesty, dynamism, generosity, enthusiasm, devotion, zeal, availability and flexibility are the qualities ofttен noted as being specific to businesses managed and led by family members.

[55] This is a very faulty perception, which in no way corresponds to reality. Family businesses are not sheltered from the problems that affect all businesses of the same type. Clearly, there are situations where the family relationship is an important asset, but the family reality is also often a problem that leads to the loss of the business, since managers often feel they are sheltered from all problems and thus neglect to put preventive measures in place, such as purchase-sale agreements in cases of internal conflict, to avoid disaster.

[56] This aspect could clearly be determining when assessing the influence of the family factor.

[57] Compensation is therefore an essential element, but there are many elements of compensation that can vary according to the conditions to which the parties agreed in the contract of employment. For example, it is common for a person to accept a lower salary to keep a job, to gain experience, in consideration of other benefits, for a better future, better quality of life, and so on.

[58] Trying to show that all the characteristics, inequalities, injustices, etc. are attributed to the fact it is a family business is an incomplete exercise and most of the time it is not a determining factor, nor is it realistic.

[59] I believe the best approach is to establish all the terms and conditions of the work in question, and then ask whether a similar situation would have been possible and reasonable if there had been an arm's length relationship. In other words, would a similar contract of employment have been reasonably possible if there had been an arm's length relationship?

[60] In this case, it is clear that the father always maintained control and intervention rights. Moreover, this situation became obvious with the case of Bertrand, where the father clearly led the situation.

[61] Also, the accountant, Mr. Paquette, used the word "boss" when speaking about Mr. Ménard, the father. He also asked him how to handle an expense related to user fees for the airplane of one of his sons, thus validating the true authority of the father.

[62] There is no doubt that the father trusted his sons, who benefitted from great independence and the right to make important decisions in their respective fields; however, Mr. Ménard, the father, never waived his authority and maintained his control and intervention rights, as in similar situations when there is an arm's length relationship.

[63] To be able to exercise his discretionary power judiciously, the Minister must take reasonable measures in the context and circumstances to collect all the relevant facts to come to a conclusion as to the influence of the non-arm's length relationship.

[64] If the Minister presumes that his finding is unassailable by the Tax Court of Canada unless an abuse of power or serious breach of trade practices are shown, then the approach is inappropriate. Moreover, this could be sufficient justification for this Court to interfere.

[65] However, if the taxpayer knowingly boycotts the process for no reason, he must take responsibility and, particularly, will not be well placed to claim that the person in charge of the investigation did not do his job properly.

[66] If it were otherwise, the effect would be to approve bad faith or encourage it, while discrediting the effective administration of justice, particularly by disregarding the actual purpose of the review process of the initial decision.

[67] Any decision regarding the insurability of the work may be subject to a review within a set period. This is an essential step, required before filing an appeal before

the Tax Court of Canada. This is not a frivolous step that can be ignored, bypassed or ridiculed. It is a serious, legal and unavoidable step.

[68] In this case, the appellant believed it could abstain from cooperating under various pretexts, including that it did not believe in the objectiveness of the process.

[69] The appellant's written argument refers to a case that has become a classic, which states, at page 3:

> [TRANSLATION]
> In *Légaré*[2], the Federal Court of Appeal tells us, among other things, that the Tax Court of Canada cannot purely and simply substitute its opinion for that of the Minister. However, the Court must verify whether the facts the Minister relied on are real and were properly interpreted while considering the context in which they occurred. Once this verification is completed, the Court must make a ruling on the reasonableness of the Minister's conclusion.
>
> This statement by the Federal Court of Appeal allows the Tax Court of Canada to appreciate the true value of any evidence it receives, whether documentary, testimonial or other. This is true even if the respondent was not made aware that the evidence existed before the hearing before the Tax Court of Canada
>
> It would be unreasonable to conclude that any new evidence brought before the Tax Court of Canada without the respondent's knowledge could be disregarded; this would, in our opinion, be a miscarriage of justice for the appellant.
>
> Of course, the Tax Court of Canada could consider the context in which the appellant's refusal or lack of cooperation took place and come to the appropriate conclusions.
>
> [Emphasis added]

[2] *Légaré v. M.N.R.*, [1999] F.C.J. 878.

[70] In this case, there were not very many facts to be considered; clearly, there would have needed to be more facts gathered from the investigation. Is this sufficient to discredit the work achieved during the exercise of the discretionary power? Having refused to cooperate in the investigation, the appellant must take responsibility for the part of the investigation file it feels is incomplete.

[71] Refusing to cooperate in an investigation, claiming to not trust the respondent's representatives, hiding or withholding relevant information, or voluntarily transforming or hiding certain facts constitutes behaviour that cannot be

the ground for grievances that are intended to discredit the quality of the exercise of the discretionary power.

[72] To accept such a method would lead to the invalidation of the provisions that provide for the exercise of a discretionary power, because the hearing before the Tax Court of Canada would quickly reveal many errors, in particular regarding the coherence of the facts and their likelihood.

[73] The appellant correctly claims that the respondent has the obligation to take all reasonable steps to complete an investigation that allows for conclusions to be made. Such an obligation does not, however, require an unreasonable investment of time, money and energy.

[74] Any person targeted by an investigation has the fundamental right to be heard and to be represented or assisted by a lawyer. Waiving this right cannot result in more rights being granted than those a person who cooperates in good faith has.

[75] Many Federal Court of Appeal decisions confirm that the Tax Court of Canada cannot intervene when the decision is a result of the exercise of the discretionary power under the *Employment Insurance Act* unless that exercise is fraught with serious breaches or was carried out in a non judicious way. An incomplete investigation, caused entirely by the worker involved or falsehoods deliberately transmitted by that worker, are non-relevant factors in the analysis of the investigation that led to the conclusion reached.

[76] Admitting that such grievances are sufficient to justify the Court’s intervention would be discrediting the healthy administration of justice, because the lack of cooperation, bad faith, disclosure of incomplete facts, refusal to respond, sharing falsehoods, recording phone conversations without notice or permission, etc. Would allow the appellant to avoid an important part of its burden of proof.

[77] During his investigation, the Minister must deal with certain constraints in terms of means, availability, etc. It is essentially an administrative investigation that must still respect the trade practices and the fundamental rights of those being investigated.

[78] Conversely, any person who is the subject of an investigation must cooperate and provide the responses and documents required for a determination under the terms and provisions of the Act.

[79] The penalty for the non-respect of any one of these obligations will be a new analysis and a new assessment if the Minister has not acted judiciously by not allowing the taxpayer to exercise his rights reasonably or legally. Conversely, if the taxpayer deliberately prevents the normal review of the case, the sanction could be more severe, since the Minister's finding could be reasonable given the facts available and taken into consideration.

[80] In this case, the appellant has essentially boycotted the revision step, claiming to not trust the process or those in charge. In such a case, claiming that the exercise of the discretionary power was fraught with serious breaches, that the conclusion reached is unreasonable and must be vacated is an aberration I refuse to validate.

[81] The appellant admitted the following:

> [TRANSLATION]
> 5. (a) the appellant was incorporated on November 26, 1989;
>
> (j) the workers had signing rights on behalf of the appellant; Fulgence Ménard alone could sign the appellant's cheques whereas in the workers' case, two signatures were required on cheques issued on behalf of the appellant;
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> (k) the workers, shareholders of the appellant, participated and made all the decisions regarding the major and daily operations for the appellant's management and operations;
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> (l) each of the workers could be called upon to be involved in employee management, to make financial decisions, communicate with the clients, establish prices or act as a resource person on behalf of the appellant;
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> (m) each of the workers had great autonomy when carrying out his duties, but ultimately had to answer to the appellant's board of directors;
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> (n) none of the workers had personally invested any money in the appellant's business and none had guaranteed or endorsed a line of credit or loan on behalf of the appellant;
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> (o) the workers rendered services to the appellant continually and without interruption;
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> (p) the workers rendered services to the appellant daily in the appellant's offices;
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> (q) during the period in question, each of the workers received an annual gross salary of $75,000.00 from the appellant;

7. (d) the work of each of the workers was indispensible to the proper operations of the appellant's activities;

(f) the workers have been employed by the appellant for many years, they perform their duties year-round and their work corresponds to the appellant's operational needs.

[82] The facts admitted by the appellant are sufficient to justify the decision under appeal; moreover, the decision is completely reasonable and I can confirm its validity. As a result, the appeal is dismissed.

Signed at Ottawa, Canada, this 24th day of April 2009.

"Alain Tardif"

Tardif J.

Translation certified true
on this 8th day of June 2008.

Elizabeth Tan, Translator

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APPEARANCES:

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