Docket: 2008-2581(EI)

BETWEEN:

QUINCAILLERIE LE FAUBOURG (1990) INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ANDRÉE ROY,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 4, 2009, at Quebec, Quebec.
Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the appellant:	Sylvie Beaulieu
Counsel for the respondent:	Dany Leduc
Agent for the intervenor:	Sylvie Beaulieu

JUDGMENT

The appeal filed under subsection 103(1) of the *Employment Insurance Act* (the Act) is dismissed on the ground that Andrée Roy's employment with the appellant, from January 4, 2007, to January 4, 2008, was not insurable employment within the meaning of the Act for the reasons stated below.

Signed at Ottawa, Canada, this 21st day of August 2009.

"Alain Tardif"

Tardif J.

Translation certified true
on this 26th day of October 2009.

Elizabeth Tan, Translator

Citation: 2009 TCC 411
Date: 20090821
Docket: 2008-2581(EI)

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision regarding the insurable nature of the work of the intervenor, Andrée Roy, from January 4, 2007, to January 4, 2008.

[2] In the decision under appeal, the respondent found that Andrée Roy's work for the company Quincaillerie Le Faubourg (1990) Inc. was not insurable because she held shares in the employer, giving her 1,025 of 2,100 votes, or 48.81%, from January 4 to May 1, 2007; 1,100 of 2,400 votes, or 45.83%, from May 2 to July 16, 2007, and 1,000 of 2,400 votes, or 41.67%, from July 17, 2007, to January 4, 2008.

[3] The parties admitted all facts, including those concerning the company's shares. I find it relevant to reproduce these facts, attached to the notice of appeal:

> [TRANSLATION]
> **A. STATEMENT OF FACTS**
>
> 1. During the period in question, January 4, 2007, to January 4, 2008, Andrée Roy was an employee of Quincaillerie Le Faubourg (1990) Inc.
>
> 2. During the period in question, Andrée Roy was also a shareholder in Quincaillerie Le Faubourg (1990) Inc.
>
> 3. The capital stock, **issued and paid for,** in Quincaillerie Le Faubourg (1990) Inc. for the relevant period, was composed of:
>
> - participating, category "A" voting shares, at one vote per share, on par with category "AA" shares and including a restrictive clause protecting the redemption value of the other share categories;
>
> - participating, category "AA" voting shares, at two votes per share, on par with the category "A" shares and including a restrictive clause protecting the redemption value of the other share categories;
>
> - non-participating, category "B" voting shares, at 100 votes per share, with no dividend rights; redeemable at the option of the holder or the company in the amount paid;
>
> - non-participating, category "C" non-voting shares (including a veto right), giving the right to a non-preferential and non-cumulative dividend to a maximum of 1% per month calculated on the redemption value; redeemable at the option of the holder or the company for the amount paid plus a bonus, plus the unpaid declared dividends;
>
> - non-participating, category "F" non-voting shares (including a veto right), giving the right to a non-preferential and non-cumulative dividend to a maximum of 2/3 of 1% per month, calculated on the redemption value; redeemable at the option of the holder or the company at $1 per share plus unpaid declared dividends;

- non-participating, category "G" non-voting shares (including a veto right), giving the right to a non-preferential and non-cumulative dividend to a maximum of 2/3 of 1% per month, calculated on the redemption value; redeemable at the option of the holder or the company for the amount paid plus a bonus and unpaid declared dividends;

- non-participating, category "H" non-voting shares (including a veto right), giving the right to a non-preferential and non-cumulative dividend to a maximum of 1/2 of 1% per month, calculated on the redemption value; redeemable at the option of the holder or the company for the amount paid plus a bonus and unpaid declared dividends.

4. The capital stock in Quincaillerie Le Faubourg (1990) Inc. was held as follows:

Number and Category of Shares Held During the Period in Question

Holder	January 4, 2007, to May 2, 2007	May 2, 2007, to July 17, 2007	July 17, 2007, to January 4, 2008
Andrée Roy	25 "A" 10 "B" 4,800 "C"	50 "AA" 10 "B" 4,800 "C" 52,000 "F" 1,000 "G"	10 "B" 4,800 "C" 52,000 "F" 1,000 "G"
Jean-Yves Côté	25 "A" 10 "B" 4,800 "C"	50 "AA" 10 "B" 4,800 "C" 52,000 "F" 1,000 "G"	10 "B" 4,800 "C" 52,000 "F" 1,000 "G"
Rémy Côté	50 "A" 200 "C"	100 "AA" 200 "C" 1,000 "H"	100 "AA" 200 "C" 1,000 "H"
Marie-Claude Côté	200 "C"	200 "C"	100 "AA" 200 "C"

5. Voting shares in Quincaillerie Le Faubourg (1990) Inc. are distributed as follows:

Holders	January 4, 2007 to May 2, 2007	Percentage of voting shares	May 2, 2007, to July 17, 2007	Percentage of voting shares	July 17, 2007 to January 4, 2008	Percentage of voting shares
Andrée Roy	25 "A" 10 "B"	29.17	50 "AA" 10 "B"	27.27	10 "B"	4.54
Jean-Yves Côté	25 "A" 10 "B"	29.17	50 "AA" 10 "B"	27.27	10 "B"	4.54
Rémy Côté	50 "A"	41.66	100 "AA"	45.46	100 "AA"	45.46
Marie-Claude Côté					100 "AA"	45.46
Voting shares	120	100	220	100	220	100

The percentages are established based on the number of voting shares and not on the number of votes.

6. During the period in question, Andrée Roy always held and controlled less than 40% of the voting shares in Quincaillerie Le Faubourg (1990) Inc.

7. In a March 6, 2008, decision, the Canada Revenue Agency determined that Andrée Roy's employment was not insurable for the period of January 4, 2007, to January 4, 2008, under paragraph 5(2)(*b*) of the *Employment Insurance Act.*

8. The appellant duly objected to this decision and on May 14, 2008, the Minister of National Revenue issued a notice confirming that Ms. Roy's employment was not insurable because she controlled more than 40% of the corporation's voting shares.

[4] I will also reproduce paragraph 8 of the Reply to the Notice of Appeal.

[TRANSLATION]

8. When rendering his decision, the Minister determined that during the period in question, the worker was a person working for a corporation who controlled more than 40% of the voting shares in that corporation; he relied on the following presumptions of fact:

(a) the appellant was incorporated on February 20, 1990;

(b) the appellant operated a hardware store under the name "Unimat";

(c) during the period in question, the capital shares (voting shares) issued to and paid for by the appellant were as follows:

- category "A" voting shares, at one vote per share,
- category "AA" voting shares, at two votes per share,
- category "B" voting shares, at 100 votes per share;

(d) during the period in question, the appellant's voting shares were distributed as follows:

from January 4 to May 1, 2007:

- Andrée Roy with 25 category "A" shares and 10 category "B" shares,
- Jean-Yves Côté with 25 category "A" shares and 10 category "B" shares,
- Rémy Côté with 50 category "A" shares;

from May 2 to July 2, 2007:

- Andrée Roy with 50 category "AA" shares and 10 category "B" shares,
- Jean-Yves Côté with 50 category "AA" shares and 10 category "B" shares,
- Rémy Côté with 50 category "AA" shares,
- Marie-Claude Côté with 50 category "AA" shares,

from July 17, 2007, to January 4, 2008:

- Andrée Roy with 10 category "B" shares,
- Jean-Yves Côté with 10 category "B" shares,
- Rémy Côté with 100 category "AA" shares,
- Marie-Claude Côté with 100 category "AA" shares;

(e) during the period in question, the worker held insurable employment with the appellant as a secretary/accountant;

(f) during the period in question, the worker held effective control over the voting shares of the appellant in the following proportions:

from January 4 to May 1, 2007:

she held 1,025 of the 2,100 votes attached to the appellant's voting shares, or **48.81%**;

from May 2, to July 16, 2007:

she held 1,100 of the 2,400 votes attached to the appellant's voting shares, or **45.83%**;

from July 17, 2007, to January 4, 2008:

she held 1,000 of the 2,400 votes attached to the appellant's voting shares, or **41.67%**;

(g) at all times during the period in question, the worker held and controlled more than 40% of the voting shares of the appellant.

[5] The appellant and the intervenor claim that Andrée Roy's employment is insurable under paragraph 5(2)(*b*) of the *Employment Insurance Act* (the Act), which states:

(2) Insurable employment does not include

…

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

[6] The appellant claims that the court must apply this provision strictly and using the literal meaning. It claims that the clarity of the text does not allow for interpretation, adding that the context and Parliament's intent do not need to be considered because of the text's clarity and the complete lack of ambiguity regarding the terms used.

[7] The respondent claims that Parliament's intent did not target the number of shares but the number of votes a person has.

[8] First, I think it is clear to say this is social legislation, the ultimate goal of which is to provide financial assistance to individuals who lose their jobs for various periods of time.

[9] Parliament provided a series of very specific conditions in order to benefit from this financial support but also to avoid abuse. One of the fundamental elements related to the application of the Act is, clearly, the insurability of the employment. The way to determine this has been the subject of thousands of decisions. A person with no employer cannot perform insurable employment.

[10] To be insurable, the employment must be carried out under a contract of employment; the relationship of subordination is one of the essential elements. How can it be determined whether a contract of employment exists?

[11] There are two approaches, which have been discussed at length in the past few years. Some claim that, in Quebec, the only possible approach is that set out in the Civil Code of Québec at article 2085, which states:

> **2085.** A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

[12] Others claim that the common law approach is as valid and must not be dismissed. I believe this is a theoretical debate.

[13] The issue is never about the absolutely mandatory requirements, namely that work must be performed on one hand, and there must be remuneration on the other. Things start to get complicated in regard to control, the relationship of subordination and the authority that must exist.

[14] The civil-law approach requires three elements, the performance of work, remuneration and a relationship of subordination.

[15] The other approach relies on different criteria, namely integration, chance of profit and risk of loss, ownership of tools, and the power of control.

[16] Some decisions note that certain criteria are more important than others. All decisions acknowledge that it is not necessary for all the criteria to be met.

[17] To determine whether an employment is insurable, it must therefore be determined whether there is a relationship of subordination, whether there is a power of control by a boss, either a physical person or a corporation. The law and the power of control distinguish a contract of employment from a contract for services, where the parties have comparable independence; in other words, authority is an essential element of a contract of insurable employment under the Act.

[18] Parliament also provided certain exceptions, cases in which it clearly wanted to decide the fate of certain workers itself.

[19] It therefore excluded from insurable employment cases where the worker has a non-arm's length relationship with the employer. This exclusion is set out in paragraph 5(2)(*i*) of the Act.

[20] Parliament also excluded the employment of a person who controls more than 40% of the voting shares in the employer corporation. Paragraph 5(2)(*b*) states:

> (2) Insurable employment does not include
>
> …
>
> (*b*) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;

[21] I believe I can state that these exceptions are based on the issue of authority, subordination and the power of control.

[22] It is clear that a family relationship might have a deciding influence on the working relationship, to the point that authority is presumed to be non-existent.

[23] It is also clear that a person with a large number of voting shares has a decisive influence on the work he or she does for the company in which the shares are held.

[24] However, the importance of control does not depend on the number of shares, but the number of votes.

[25] Moreover, many decisions make note of the need for the shareholder to be able to express the voting rights related to the shares held.

[26] In terms of authority, power and control, the number of shares is not determining; what matters, what grants the authority, power and capacity to decide, is essentially the number of votes.

[27] In other words, absolute control belongs to the person who holds 50% of the votes plus one. A person with 10 votes has less power than someone with 20, and a person with 40 has more power than someone with 30, etc.

[28] The appellant claims that the text refers to the number of voting shares and not the number of votes each share grants. I agree that a literal interpretation could lead to the conclusion that the number of shares is to be calculated, not the number of votes; however, the text does not necessarily exclude the interpretation that the determining element is the number of votes rather than the number of shares.

[29] Is the appellant's interpretation the only possible approach? Does it exclude the respondent's interpretation that, basically, what is important is not the number of shares but the number of votes held?

[30] Applying the appellant's interpretation would render the provision completely null because to bypass the clear exclusion Parliament intended, one could simply create shares with multiple votes. Therefore, a person could hold one single share and 99% of the voting rights.

[31] Of course, the law is for Parliament and not the courts, which essentially just apply them. Is this sufficient to allow the appeal? To answer this question, I think it is important to conduct a brief overview of the situation regarding statutory interpretation.

[32] In *Dupuis v. M.N.R.*, [1988] F.C.J. No. 556, the Federal Court of Appeal stated:

> As this Court pointed out in *Cloutier* (1987), 74 N.R. 396, this provision does not speak of control of a corporation but of control of shares: it might now be added that it also does not speak of ownership, but of control. It is quite clear that a person who controls 100% of the shares of a corporation which, in its turn, controls over 40% of the shares of a second corporation controls over 40% of the latter's shares.

[33] In his book, *The 2008 Annotated Employment Insurance Statutes*, T. Stephen Lavender wrote the following at page 22:

> The provision does not speak of control of a corporation but of control of shares. Control includes both *de jure* control and effective control. Effective control means control "that can be freely exercised and is not impeded by circumstances independent of the person having control." Thus, shares deposited in a trust were not in the effective control of the registered owner, so the person's employment was insurable.

[34] Therefore we can see that the wording of paragraph 5(2)(*b*) does not mention control of the corporation, as is the case in tax matters, but control of the shares. The control in question is not only *de jure* control, but also, and more importantly, effective control.

[35] The Federal Court of Appeal confirmed this idea in *Cloutier* at pages 225 and 226:

> The Pension Appeals Board, in *Jacqueline Pilon* (NR 713), and the Umpires in *Thomas Higginson* (NR 172), *Ernest Bogaert* (NR 564) and *Thomas Mignault* (NR 761) have held that for purposes of s. 14(*a*) (formerly 55(*a*)), a *de facto* control would suffice to cause employment to be excepted. I do not think that it is possible to reverse such a proposition without qualification and to say that the absence of "de facto control" results from application of the provision: the legislator could not have intended to cover all factual situations that might arise in the particular circumstances in which individuals find themselves, and certainly there could be no question of covering the whims, indifference or simple refusal of the holder of a share to exercise his right. However, I think that in order to respect the letter and the spirit of the provision as well as the requirements of fairness, control has to be interpreted as being not only de jure control but also, and most importantly, effective control, which means control that can be freely exercised and is not impeded by circumstances independent of the person having control. Cloutier certainly did not have "effective control" over the 150 shares deposited in trust.

[36] Regarding the interpretation of tax laws, the Supreme Court in *Imperial Oil Limited. v. Canada*, [2006] 2 S.C.R. 447 summarized the principles best:

> D. *Principles of Interpretation Applicable to Tax Statutes*
>
> [24] This Court has produced a considerable body of case law on the interpretation of tax statutes. I neither intend nor need to fully review it. I will focus on a few key principles which appear to flow from it, and on their development.
>
> [25] The jurisprudence of this Court is grounded in the modern approach to statutory interpretation. Since *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, the Court has held that the strict approach to the interpretation of tax statutes is no longer appropriate and that the modern approach should also apply to such statutes:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act . . . .
>
> (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; Stubart, at p. 578, per Estey J.*; Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62 (CanLII), [2001] 2 S.C.R. 1082, 2001 SCC 62, at para. 36, per Iacobucci J.)

[26] Despite this endorsement of the modern approach, the particular nature of tax statutes and the peculiarities of their often complex structures explain a continuing emphasis on the need to carefully consider the actual words of the *ITA*, so that taxpayers can safely rely on them when conducting business and arranging their tax affairs. Broad considerations of statutory purpose should not be allowed to displace the specific language used by Parliament (*Ludco*, at paras. 38-39).

[27] Court recently reasserted the key principles governing the interpretation of tax statutes — although in the context of the "general anti-avoidance rule", or "GAAR" — in its judgments in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, and *Mathew v. Canada*, [2005] 2 S.C.R. 643, 2005 SCC 55. On the one hand, the Court acknowledged the continuing relevance of a textual interpretation of such statutes. On the other hand, it emphasized the importance of reading their provisions in context, that is, within the overall scheme of the legislation, as required by the modern approach.

[28] In their joint reasons in *Canada Trustco*, the Chief Justice and Major J. stated at the outset that the modern approach applies to the interpretation of tax statutes. Words are to be read in context, in light of the statute as a whole, that is, always keeping in mind the words of its other provisions:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [para. 10]

> [29] The Chief Justice and Major J. then addressed the underlying tension between textual interpretation, taxpayers' expectations as to the reliability of their tax and business arrangements, the legislature's objectives and the purposes of specific provisions or of the statute as a whole:
>
> > As a result of the Duke of Westminster principle (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe. [para. 11]

[37] The Federal Court of Appeal also stated, in the above-mentioned decision:

> To begin with, I do not think it is appropriate in interpreting social legislation like the Unemployment Insurance Act to adopt an approach similar to that required to give effect to fiscal legislation, the reason being that the same considerations do not apply in giving effect to these two types of legislation.

[38] At first, this approach appears to validate the appellant and intervenor's interpretation. However, in the same case and same paragraph, the Court states the following:

> Finally, and most importantly, I consider that the reason for the exception - based on the notion that a person who exercises a controlling influence in a corporation is not dealing with that corporation "at arm's length", as there is to some extent a dependent relationship between the two - only applies if the control in question is not in any way contradicted by the facts.

[39] In *St-Onge v. Canada*, 2006 FCA 109, the Federal Court of Appeal stated:

> 2 As stated by this Court in *Canada (Attorney General) v. Cloutier*, [1987] 2 F.C. 222, at page 225, the reason for this disqualification from Employment Insurance benefits is based on the notion that the person who has a controlling influence in a corporation is not dealing at arm's length with it. In addition, this rationale "only applies if the control in question is not in any way contradicted by the facts" *ibid.* This control may be contradicted by the facts when, as in this case, there is an allegation and evidence of a mock transaction or a sham: see *Sexton v.*

The Minister of National Revenue and the Tax Court of Canada, A-723-90, May 10, 1991 (F.C.A.).

[40] The reconciliation between what seems to be incoherent can be explained (see *The Interpretation of Legislation*, 3rd Edition, Pierre-André Côté, les Éditions Thémis, pages 377 to 378, 380, 387, 389, 401 and 501):

> Section 12 of the federal *Interpretation Act* and section 41 of the Quebec act codify the Mischief Rule, first formulated in the *Heydon Case.* The provision of the federal Act reads as follows:
>
> > s. 12. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> …It would appear that Parliament, by codifying the Mischief Rule, wanted to rectify an overly strict and literal interpretation of the enactment.
>
> …the federal and Quebec Parliaments seem to have intended to neutralize principles promoting strict interpretation by providing that all statutes be deemed remedial and therefore subject to "large and liberal" construction.
>
> Parliament also appears to have had another preoccupation, namely that too much importance is attributed to the letter of the law and too little to its spirit. Hence the focus in the relevant sections of the Interpretation Acts on promoting the aim and purpose of legislation.
>
> …
>
> Nevertheless, sections 12 and 41 have at least provided a counterweight. A judge looking for some way to justify a liberal interpretation has an additional argument available in the Interpretation Acts.
>
> …
>
> Has codification of the Mischief Rule helped the purposive method? Undoubtedly its application by the courts is on the increase while the grammatical method, to which it is often juxtaposed, seems to be on the decline.
>
> …
>
> > To-day there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

> Such a compromise seems appropriate. Interpretation founded on text alone is unacceptable, if only because words have no meaning in themselves, Meaning flows at least partly from context, of which the statute's purpose is an integral element. Not only does the strictly literal approach ask more of language than it can offer, but it also overestimates the foresight and skill of the drafter. The separation of powers should not necessarily exclude collaboration between them. Drafters are not clairvoyant, they cannot anticipate all circumstances to which their texts will apply. Courts should do more than simply criticize, and the drafter should be able to rely on their positive cooperation in fulfilling the goals of legislation. Lord Denning, said that the judge, because of the special nature of his role, cannot change the fabric from which the law is woven, but he should have the right to iron out the creases. Alain-François Bisson is right to state that all interpretation, whether we realize it or not, is fundamentally oriented towards the purpose of the statute.
>
> …
>
> …"a literal and stringent interpretation of the texts, while it may be acceptable in tax law, is definitely out of place in matters of civil law." In the civil law tradition, the spirit of the law always trumped the letter of the law and courts have not hesitated to side-step it in favour of the legislature's intention.
>
> …
>
> Given the difference of opinion as to the proper role of the courts, and as to the primacy of the letter versus the spirit of the law, the case law is not surprisingly divided on the authority of the courts to correct lacunae.
>
> …
>
> To this effect, the Supreme Court of Canada applied a guideline of liberal interpretation to the *Unemployment Insurance Act*. In *Canadian Pacific Ltd. v. Attorney General of Canada*, Justice La Forest (at page 689) wrote that "a law dealing with social security should be interpreted in a manner consistent with its purpose". Liberal interpretation of this same statute was proposed by Justice Wilson in *Abrahams v. Attorney General of Canada* and by Justice L'Heureux-Dubé in *Hills v. Attorney General of Canada.*

[41] There can be two types of control: *de jure* or *de facto*; to avoid confusion, the courts have found that effective control must be considered, which clearly means the analysis must be more thorough than a simple consideration of *de jure* control. This *de jure* control remains relevant in the absence of proof to the contrary, since it is extremely difficult to prove effective control is in the hands of a person other than the one with *de jure* power. As a result, unless there is evidence to the contrary, *de jure* control confers *de facto* control.

[42] In this case, the issue of *de facto* control was not raised; the parties addressed the issue of percentage of shares versus percentage of votes.

[43] There are a multitude of share categories because of planning projects that are becoming more and more popular, particularly in succession matters.

[44] The share category is not important under paragraph 5(2)(*b*) of the Act; only voting shares, regardless of category, are to be considered.

[45] As a result, when paragraph 5(2)(*b*) of the Act is involved, the number of votes must be assessed, regardless of the number or category of shares; this will identify the holder or holders with *de jure* control, which obviously includes *de facto* control unless there is evidence to the contrary.

[46] In this case, the analysis is rather easy, since, on one hand, the parties stated that the number of voting shares should be considered, and on the other, it was submitted that the number of shares is a secondary element because the number of votes held is the determining factor when applying paragraph 5(2)(*b*) of the Act.

[47] For all these reasons, I feel that paragraph 5(2)(*b*) of the Act essentially targets the person or persons holding voting shares who can participate in decisions at a proportion higher than 40%; in other words, it must be determined whether the person whose employment is in question holds more than 40 % of the effective control over the company. Effective control, authority, the power to control are not dependent on the number of shares, but essentially on the number of votes held by a person.

[48] The concept of authority is essential in terms of the insurability of employment. It is also the basis of the relationship of subordination or the power of control. To this end, the number of shares has no importance; only the number of votes should and must be taken into consideration.

[49] The fundamental and inescapable importance of authority completely discredits the appellant's theory, and validates the respondent's hypothesis, which I support.

[50] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 21st day of August 2009.

"Alain Tardif"

Tardif J.

Translation certified true
on this 26th day of October 2009.

Elizabeth Tan, Translator

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