Docket: 2016-2851(EI)

BETWEEN:

9215-9144 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 27, 2017, at Chicoutimi, Quebec,
and decision delivered orally by teleconference
on November 21, 2017, at Ottawa, Canada.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	Pierre Allard
Counsel for the Respondent	Valerie Messore

AMENDED JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (the "Act") is allowed without costs, and the decision by the Minister of National Revenue is set aside, such that Pierre Allard did not hold insurable employment, while working for the appellant, for the period from January 1, 2013 to November 9, 2015, within the meaning of paragraph 5(2)(i) and subsection 5(3) of the Act.

Signed at Ottawa, Canada, this **18th** day of **December** 2017.

"Guy Smith"

Smith J.

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REVISED VERSION OF THE TRANSCRIPT OF THE REASONS FOR JUDGMENT DELIVERED ORALLY BY CONFERENCE CALL

I request that the attached revised transcript of the reasons for judgment delivered orally by conference call on November 21, 2017, at Ottawa, Canada, be filed. I have revised the transcript certified by the official stenographer to improve the style and clarity, and to make only a few minor corrections to it. I have not made any changes as to the substance.

Signed at Ottawa, Canada, this 18th day of December 2017.

"Guy Smith"

Smith J.

Citation: 2017 TCC 253
Date: 20171218
Docket: 2016-2851(EI)

BETWEEN:

9215-9144 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Appeal heard on September 27, 2017, at Chicoutimi, Quebec
and decision delivered orally by conference call on
November 21, 2017, at Ottawa, Canada.

Smith J.

I. Introduction

[1] Corporation 9215-9144 Québec Inc., the appellant in this case, is appealing a decision by the Canada Revenue Agency (hereinafter the "Agency") on November 10, 2015, which was delivered under the provisions of the *Employment Insurance Act* (hereinafter the "Act"). The Agency found that Pierre Allard's employment was insurable employment under subsection 5(1) of the Act for the period from January 1, 2013 to November 9, 2015.

[2] More specifically, the Agency found that although Mr. Allard was not dealing at arm's length with the employer, according to the exception set out in paragraph 5(2)(i) of the Act, it was reasonable to find, given all the circumstances, that the employer and Mr. Allard would have entered into a substantially similar contract of employment if they were dealing with each other at arm's length, as set out in paragraph 5(3)(b) of the Act.

[3] For its part, the appellant is appealing the decision and maintains that Mr. Allard directly or indirectly controlled the employer, either as a shareholder or creditor, or even as an administrator—and secondly, given his role and all the circumstances, it was unreasonable for the Minister to find that the employer would have entered into a rather similar work contract had they been dealing with each other at arm's length.

[4] Before reviewing the facts, I will first point out that it is well-established that the Tax Court of Canada has the authority to review the Minister's decision, but that it does not involve substituting its assessment of the facts for that of the Minister, but rather to verify whether the facts retained by the Minister are real and have been correctly assessed. Ultimately, the Court must decide whether the conclusion with which the Minister was satisfied still seems reasonable in light of the facts. This is the approach that was explained by the Federal Court of Appeal in *Légaré v. Canada*, [1999] F.C.J. No. 878 (QL), which the respondent cited.

A. The relevant facts

[5] The basic facts are not being challenged. Mr. Allard, his brother Gaston, and his sister Nicole were the owners of a building in Chicoutimi in which there was a restaurant operated by third parties.

[6] In the 1990s, Mr. Allard and his brother incorporated a corporation, Pizza Rodi Resto Inc., which acted as the purchaser of business capital. Each brother held 50% of the shares, although only Pierre Allard had an active part as administrator and manager of the restaurant. He oversaw all aspects of management, including cooking, with the help of some of his family members, including his son, his daughter, and his son-in-law. In particular, his son was in charge of deliveries.

[7] After a period of about 10 years, until 2009, the restaurant enjoyed some success, such that Mr. Allard and his brother decided to incorporate a new corporation—the appellant in this case—to open a second restaurant in Jonquière.

[8] In terms of the corporation's organization, Mr. Allard was still the sole administrator, but a third of the shares were granted to his son Karl, not due to a capital contribution, but to give him the chance to build wealth.

[9] The restaurant in Jonquière had the same menu as in Chicoutimi. Mr. Allard still assumed the role of manager, even though he also had to deal with multiple tasks as needed, such as cooking.

[10] It was financially difficult in the beginning, and the Chicoutimi corporation had to advance up to $300,000 in funds. During that time, Mr. Allard was managing both restaurants and was on call seven days a week, but eventually, business improved.

[11] During the period in question, Mr. Allard received a salary from the corporation Pizza Rodi and, as indicated in Exhibit A-1, he received the following amounts from the appellant:

2010	$18,110
2011	$1,785
2012	$13,719
2013	$20,451
2014	$26,520
2015	$50,561

[12] Following the Minister's decision, which is the subject in this case, Mr. Allard reduced his salary from the appellant to $2,900 for 2016, as he conducted a transfer of profits from the appellant to the corporation Pizza Rodi.

[13] I will add that the appellant challenged certain assumptions of fact upon which the Minister relied, including paragraph 8(f)—that is to say, that the three shareholders made all the important decisions for the appellant by consensus; paragraph 8(i) that the worker and the appellant had entered into a verbal agreement in Chicoutimi; paragraph 8(j) that the worker was working as the appellant's director/manager; paragraph 8(r) that the worker was remunerated according to a set annual salary; paragraph 8(u) that the worker's annual salary corresponded to the median hourly wage of the job market in Quebec for workers who perform similar duties to those carried out by the worker—and finally, paragraph 8(bb) under which, if the worker could not perform his duties, the appellant had to find a replacement for him.

[14] Mr. Pierre Allard and his certified accountant, Mr. Potvin, testified for the appellant, whereas Mr. Luc Falardeau testified for the respondent.

B. The question of control — paragraph 5(2)(b) of the Act

[15] The first issue in dispute is whether Pierre Allard directly or indirectly controlled more than 40% of the appellant's voting shares.

[16] According to Mr. Falardeau's testimony, the Minister found that Mr. Allard only held 33% of the shares, so no one had *de jure* control of the corporation. There was no shareholder agreement that could have granted legal control to a shareholder.

[17] However, Mr. Allard clearly testified that not only was his brother inactive, but that his son had received shares not in exchange for a cash contribution, but to allow him to build wealth following the corporation's potential success. According to Mr. Allard's testimony, he had control of the corporation due to his role as administrator and the non-arm's length dealing between him and his son. In other words, even though he only held 33% of the shares, he effectively had control of the corporation—at least, up to 66% of the shares. I accept Mr. Allard's testimony on this matter.

[18] However, jurisprudence has clearly established that the notion of control under paragraph 5(2)(b) of the Act is a mixed question of law and fact. First, it must be determined who the shareholder is, and then see if there are circumstances hindering the shareholder in the free and independent use of his right to vote and, if applicable, to see who can legally exercise that right in the shareholder's place.

[19] It is also well established that whoever has administrative and operational control of a corporation does not necessarily control its -shares.

[20] In this case, it is acknowledged that Mr. Allard only hold 33$^{1}/_{3}$% of the shares and that there is no evidence that would allow to conclude that his son, Karl Allard, was stripped of his right to vote, or hindered the free exercise of that right to vote in any way.

[21] As for the fact that Mr. Allard holds 50% of the shares of the corporation Pizza Rodi Resto, which made a loan to the appellant corporation, it is my view that without any further evidence, these facts are not relevant in analyzing the appellant's question of control.

[22] Consequently, I believe that the Minister's conclusion on this question was reasonable and supported by the facts, so there are no grounds to conclude that Pierre Allard was excluded under paragraph 5(2)(b) of the Act.

II. <u>Non-arm's length and arm's length dealing</u>

[23] I now turn to the second issue in dispute, i.e. whether notwithstanding the non-arm's length dealing between the appellant and Mr. Allard, it was reasonable to conclude that a substantially similar contract of employment would have been entered into if they were dealing with each other at arm's length, pursuant to paragraph 5(3)(b) of the Act.

[24] As explained above-, Mr. Falardeau testified for the respondent. He explained that he had reviewed the criteria in that paragraph, including i) the remuneration paid, ii) the terms and conditions of the employment, as well as the duration, nature, and importance of the work performed—before finding that Mr. Allard's employment was similar to that of a manager in food services, making around $50,000 a year, according to Exhibit I-1.

[25] I understand Mr. Allard's arguments that he was the sole administrator and that he could not enter into a contract with himself. That said, I accept the respondent's arguments that legally, Mr. Allard wore two hats—that of the corporation's administrator, but also that of employee.

[26] That said, the issue is still whether it was reasonable to find that a substantially similar contract would have been entered into at arm's length.

[27] With respect in particular to the salary paid, even if Mr. Allard received an amount via direct deposit every other week like the other employees, there is no evidence that would allow the Court to find that a third party would have accepted the salary paid for the years 2010 to 2014, especially for the years 2011 and 2012, when he only received $1,785 and $13,719.

[28] According to Mr. Allard's testimony, he had a broad discretion with respect to the amount paid, and that despite the regularity of the payments on a yearly basis, it was in fact payment of the available profits.

[29] Even if the Court finds that the amount paid in 2015, the sum of $50,561, is an amount that the appellant could have paid to a third party, the fact remains that the salary paid in 2016, $2,900, indicates once again that it was rather a

distribution of profits that did not arise from insurable employment, but rather from the administrative role assumed by Mr. Allard.

[30] In my opinion, it would be artificial to find that the appellant would have entered into a substantially similar contract with a third party. Rather, it is my view that no third party would have accepted these conditions of employment.

[31] I therefore find that the Minister's decision was in fact unreasonable, given all the circumstances.

[32] I distinguish this situation from the decision by the Tax Court of Canada in *F. Ménard Inc. v. M.N.R.*, 2009 TCC 208, in which during the period in question, the payor had paid a sum of $75,000 to three brothers, who were also shareholders and administrators of a corporation that had been founded by their father. I note that the salary had been paid continuously and without interruption, and that each brother had a well-established role in the company, which led the Tax Court of Canada to find that they were insurable employment. In this case, the appellant was in the start-up phase. There were large fluctuations in the salary, and it is highly unlikely that a third party would have accepted such conditions.

[33] The respondent also drew the Court's attention to *Puni v. M.N.R.*, 2013 TCC 172—a decision by the Tax Court of Canada in which the Court found that a shareholder held insurable employment during the period in question. I draw a distinction with this decision, noting that the Court had also found that the role of shareholder was distinct from that of an employee, and that in fact, it was clear that the employee in question was not a member of a group connected to control of the corporation. This was obviously not the case in this matter, where Mr. Allard did in fact control the appellant as an administrator.

III. Conclusion

[34] In view of the foregoing, I arrive at two conclusions. The first is that Pierre Allard's employment cannot be exempt under paragraph 5(2)(b) of the Act because he did not control more than 40% of the shares with the appellant's right to vote. The second conclusion is that Mr. Allard and the appellant were not dealing at arm's length within the meaning of paragraph 5(2)(i) of the Act — but that it was unreasonable for the Minister to conclude, given all the circumstances, that a substantially similar contract of employment would have been entered into if they were dealing with each other at arm's length, within the meaning of paragraph 5(3)(b) of the Act.

[35] For the reasons above, the appeal is allowed.

Signed at Ottawa, Canada, this 18th day of December 2017.

"Guy Smith"

Smith J.

CITATION:	2017 TCC 253
COURT FILE NO.:	2016-2851(EI)
STYLE OF CAUSE:	9215-9144 QUÉBEC INC. AND M.N.R.
PLACE OF HEARING:	Chicoutimi, Quebec
DATE OF HEARING:	September 27, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
REASONS FOR JUDGMENT DELIVERED ORALLY BY CONFERENCE CALL:	November 21, 2017
DATE OF AMENDED JUDGMENT AND CERTIFIED REASONS FOR JUDGMENT:	December 18, 2017

APPEARANCES:

For the Appellant:	Pierre Allard
Counsel for the Respondent	Valerie Messore

COUNSELOFRECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada