Docket: 2010-1776(EI)

BETWEEN:

MARTIN SAUNDERS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 10, 2011, at Gander, Newfoundland

Before: The Honourable Justice L.M. Little

Appearances:

Agent for the Appellant:	Reverend Karl Arnold
Counsel for the Respondent:	Jill Chisholm

JUDGMENT

The appeal is dismissed, without costs, and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 19th day of July 2011.

"L.M. Little"

Little J.

Citation: 2011 TCC 355
Date: July 19, 2011
Docket: 2010-1776(EI)

BETWEEN:

MARTIN SAUNDERS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The Appellant was represented by Reverend Karl Arnold, a United Church Minister.

[2] Marts Construction Limited ("Construction") was incorporated on June 23, 2009 under the laws of Newfoundland and Labrador.

[3] The period under review is the period from July 6, 2009 to December 11, 2009 (the "Period"). It will be noted that the Period is approximately 23 weeks in length.

[4] Construction was in the business of carrying out small construction jobs, including renovations, carpentry and painting.

[5] The shares of Construction were owned as follows:

The Appellant	-	35 per cent
Sharon Howse	-	35 per cent
Mildred Seaward	-	30 per cent

[6] The Appellant and Sharon Howse have been common-law partners for 33 years. Mildred Seaward is not related to either of the other shareholders.

[7] The Appellant's duties included:

a) preparing cost quotations for work carried out for Construction and quotes for jobs;
b) picking up materials;
c) performing the construction work;
d) cleaning up the job site; and
e) keeping a record of time spent and expenses per job.

[8] The Appellant was Construction's only employee. (Note: Construction hired a worker on a temporary basis in 2010.)

[9] The Appellant had at least 20 years' experience working as a carpenter in the construction industry.

[10] The Minister of National Revenue (the "Minister") stated in the Reply that Construction purportedly paid the Appellant $800 per week for 50 hours of work.

[11] The Minister stated in the Reply that, for the Period under appeal, Construction's revenue was not enough to pay the Appellant's salary.

[12] The Minister also stated in the Reply that the work performed by Construction during the Period did not justify 50 hours of work per week for the Appellant.

[13] The Minister maintained that the Appellant rarely received any pay from Construction.

[14] The Minister maintained that, if the Appellant did receive pay from Construction, it was only when a customer paid for a job.

[15] The Minister said that the Appellant did not receive vacation pay or paid vacation leave from Construction.

[16] The Minister said that the Appellant scheduled his own hours of work for Construction.

[17] The Minister said that the Appellant's working hours were not tracked or recorded. (Note: The Appellant said that he tracked his working hours but he did not provide this information to officials of the Canada Revenue Agency (the "CRA").)

[18] The Minister said that the Appellant was not supervised.

[19] The Minister said that the Appellant purchased tools for Construction and did not receive reimbursement for these purchases. (Note: The Appellant said that he was sometimes reimbursed by Construction for the tools that he had purchased.)

[20] During the hearing, the Appellant said that he agreed with all of the points outlined in paragraphs [7] to [19] above, except where noted.

B. ISSUE

[21] Was the Appellant engaged in insurable employment during the Period within the meaning of subsections 5(2) and 5(3) of the *Employment Insurance Act* (the "*Act*")?

C. ANALYSIS AND DECISION

[22] Subsections 5(2) and 5(3) of the *Act* read as follows:

> **[5.]** (2) Excluded employment - Insurable employment does not include
>
> (*a*) employment of a casual nature other than for the purpose of the employer's trade or business;
>
> (*b*) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
>
> (*c*) employment in Canada by Her Majesty in right of a province;
>
> (*d*) employment in Canada by the government of a country other than Canada or of any political subdivision of the other country;
>
> (*e*) employment in Canada by an international organization;

> (*f*) employment in Canada under an exchange program if the employment is not remunerated by an employer that is resident in Canada;
>
> (*g*) employment that constitutes an exchange of work or services;
>
> (*h*) employment excluded by regulations made under subsection (6); and
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> (3) Arm's length dealing - For the purposes of paragraph (2)(*i*),
>
> (*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and
>
> (*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.
>
> (Emphasis added)

[23] In a letter dated May 6, 2010, Ghislaine Després, of the Appeals Section of the CRA in Saint John, New Brunswick, said:

> This letter is about the appeal filed by you of the ruling dated January 27, 2010 regarding the insurability of your employment with Marts Construction Limited during the period from July 6, 2009 to December 11, 2009.
>
> After conducting a complete and impartial review of all of the information relating to the appeal, it has been determined that this employment was excluded from insurable employment. After considering all of the circumstance of the employment, the Minister is not satisfied that a substantially similar contract of employment would have been entered into if you had been dealing with each other at arm's length. You were not dealing at arm's length with Marts Construction Limited. Therefore, your employment was excluded from insurable employment.
>
> The decision is issued in accordance with subsection 93(3) of the *Employment Insurance Act* and is based on paragraph 5(2)(*i*) of the *Employment Insurance Act*.
>
> …

[24] During the hearing, Counsel for the Respondent said:

> The appellant is here today to appeal a determination of the Minister that his employment with Mart's Construction Limited during the period of July 6th, 2009 to December 11th, 2009 was not insurable in light of paragraph 5.2(1) [*sic*] and subsection 5(3) of the Employment Insurance Act. Those passages are found at Tab 2 of the Respondent's Book of Authorities and specifically Tab 2, page two.
>
> The Minister is not satisfied that it was reasonable to believe, having regard to all the circumstances included in paragraph 5(3)(b), that the worker and payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length and the facts before the Court today support that conclusion. In fact, the assumptions as set out at paragraph seven of the Respondent's Reply have either been agreed to or have not been disproven and I bring attention to the three assumptions which the appellant on the stand took issue with.
>
> Assumption Q, the appellant's working hours are not tracked or recorded. He stated that's incorrect. However, there's no evidence here today and he produced no documents to support that his hours were recorded or tracked. So he has failed to disprove that assumption. He says he was supervised with respect to Assumption R. However, on closer examination, he said well, he was the boss, so he was the one supervising. He stated that his common law partner sometimes attended the work – where he was working to see how work was going, but only himself and the client checked the work.
>
> Finally, he stated at Assumption S when asked whether it was correct that the appellant purchased tools for the payer and did not receive reimbursement for these purchases, he said he was sometimes reimbursed. However, he's produced no documentation to support that he was ever reimbursed. In fact, the documents we do have, he readily admitted, the two receipts from Wal-Mart, that he paid those expenses personally. So I would submit to you that the assumptions have not been disproven and the majority of the assumptions have -- the appellant quite readily agreed to.
>
> Now, if we get back to the legislation, because that's what we are here to rely on today, that if we look at section and paragraph specifically 5.2.1 [Note: the correct subsection is 5(2)(i)] of the Employment Insurance Act, which is found at page two, Tab 2, or excuse me, it starts – the section starts at two, but we're relying on I [*sic*]which is "insurable employment does not include employment if the employer and the employee are not dealing with each other at arm's length." … 251(a) defines related persons as individuals connected by blood relationship, marriage or common law partnership or adoption.
>
> The payer is controlled by the appellant and his common law spouse. Therefore the corporation and the appellant are related persons in accordance with the Income

> Tax Act and even though the appellant and payer are related persons, Section 5, paragraph 5(3)(b) of the Employment Insurance Act provides that the employer and employee may be deemed to operate at arm's length as follows. If the employer is, within the meaning of that Act, related to the employee, they are deemed to be – 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.
>
> (Emphasis added)
>
> (Transcript, page 131, line 11 to page 133, line 25 and page 134, line 15 to page 135, line 16)

[25] In reviewing the facts as outlined above, I have concluded that the Appellant and Construction did not operate in a normal, commercial business relationship in this situation.

[26] I cite the following example:

> 1. Exhibit R-1, Tab 14, contains a Record of Employment prepared by the accountant, Snowdon Parsons. The Record of Employment indicates that the Appellant received $800 per week from Construction for 17 weeks of the 23 week Period. However, the Appellant did not provide copies of any of the 17 cheques that were allegedly issued by Construction to the Appellant during the Period.

2. Tab 14 of Exhibit R-1 contains the following information:

ONLY COMPLETE IF THERE HAS BEEN A PAY PERIOD WITH NO INSURABLE EARNINGS. COMPLETE ACCORDING TO CHART ON REVERSE.					
P.P.	INSURABLE EARNINGS	P.P.	INSURABLE EARNINGS	P.P.	INSURABLE EARNINGS
1	800.00	2	800.00	3	Ø
4	800.00	5	800.00	6	Ø
7	800.00	8	800.00	9	800.00
10	800.00	11	800.00	12	800.00
13	800.00	14	Ø	15	Ø
16	Ø	17	800.00	18	800.00
19	Ø	20	800.00	21	800.00
22	800.00	23	800.00	24	--------
25	--------	26	--------	27	--------

3. In addition, Exhibit R-1, Tab 4, contains copies of pages of Construction's bank account. There is no indication in the banking records that any cheque in the amount of $800 per week was ever issued by Construction to the Appellant from the bank account.

4. The Appellant said that there was no ledger or payroll account maintained by Construction to show when he was paid.

(Transcript, page 59, lines 21 to 25)

[27] At page 63 of the transcript, the following question was asked by Counsel for the Respondent:

Q. Was anything run through the business account?

A. Like what? I don't understand what you mean, was anything run –

Q. Well, was there cheques written on this account to you for payroll?

A. A cheque to me?

Q. Yeah.

A. For what?

Q. For your work, for your salary, your $800?

A. No, it wasn't, no.

Q. Okay. So how did you get your money?

A. Pardon me?

Q. How'd you get your money?

A. I told you, in most cases, I was paid cash.

Q. Okay. And –

A. I told you I did not receive a cheque. Most cases, I was paid cash.

(Transcript, page 63, lines 8 to 25)

[28] Counsel for the Respondent called Brigitte Gagnon as a witness. Ms. Gagnon is an appeals officer with the CRA in Saint John, New Brunswick.

[29] Counsel for the Respondent asked the following questions:

Q. You never saw a payroll ledger?

A. No, I did not.

(Transcript, page 112, lines 13 and 14)

Q. Did you have documents to support the fact that he was paid $800?

A. No. I had no documents to support the fact that he was paid at all. In fact, I requested personal bank statements, just to see if I could – you know, to have a flow or a record of cash being deposited and not just that. I mean it's reasonable in this industry to get paid cash and it's reasonable to go pay your bills with cash and so on, but for a business, you have to be able to have a – be able to follow the flow of cash to a certain extent. There has to be deposits in the business bank account. If it was the business that was being paid, not just him personally, that money, again, should go into the business bank account and be withdrawn as wages. But there was absolutely no way to trace any of this and that was the difficulty.

(Transcript, page 120, line 19 to page 121, line 13)

[30] I also wish to note that the Appellant admitted the point, made by the Minister, that he rarely received any pay from Construction (see paragraph [13] above).

[31] My comment is that this was not a normal commercial business relationship between the Appellant and Construction. In other words, the financial arrangement between the Appellant and Construction regarding remuneration paid was not a normal financial arrangement which would be entered into by parties who were dealing at arms length.

[32] What is being challenged in this appeal is the decision of the Minister that he was not 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 the importance of the work performed, it would have been 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.

[33] The position of a Judge of the Tax Court of Canada in this type of appeal was, in my opinion, correctly outlined by Chief Justice Richard of the Federal Court of Appeal in *Denis v Canada (Minister of National Revenue – M.N.R.)*, [2004] F.C.J. No. 400. Chief Justice Richard said:

> 5. The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the *Act* is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see *Pérusse v. Canada* (Minister of National Revenue - M.N.R.), [2000] F.C.J. No. 310, March 10, 2000).

[34] Based on these comments, I believe that the role of the Tax Court Judge is to conduct a trial at which both parties may adduce evidence as to the terms upon which the Appellant was employed, evidence as to the terms upon which persons at arm's length doing similar work were employed by the same employer, and evidence relevant to the conditions of employment prevailing in the industry for the same kind of work at the same time and place. In the light of all that evidence, and the Judge's view of the credibility of the witnesses, the Tax Court Judge must then assess whether the Minister, if he had had the benefit of all that evidence, could reasonably have failed to conclude that the employer and a person acting at arm's length would

have entered into a substantially similar contract of employment. That, as I understand it, is the degree of judicial deference to which Parliament's use of the expression "... if the Minister of National Revenue is satisfied ..." in paragraph 5(3)(*b*) accords with the Minister's opinion.

[35] I also agree with the comments of my colleague, Justice Bowie in *Birkland v Canada (Minister of National Revenue – M.N.R.)*, [2005] T.C.J. No. 195.

[36] In my opinion, it is not reasonable to conclude that the Appellant and Construction, if they were dealing at arms length, would have entered into this type of arrangement. I note, in particular, the various points noted above regarding the "remuneration paid" by Construction to the Appellant.

[37] I have concluded that the Minister was correct in determining that the income in issue was "excluded employment" as defined in subsections 5(2)(i) and 5(3) of the *Employment Insurance Act*.

[38] The appeal is dismissed, without costs.

Signed at Vancouver, British Columbia, this 19th day of July 2011.

"L.M. Little"

Little J.

CITATION:	2011 TCC 355
COURT FILE NO.:	2010-1776(EI)
STYLE OF CAUSE:	Martin Saunders and The Minister of National Revenue
PLACE OF HEARING:	Gander, Newfoundland
DATE OF HEARING:	May 10, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	July 19, 2011

APPEARANCES:

Agent for the Appellant:	Reverend Karl Arnold
Counsel for the Respondent:	Jill Chisholm

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada