

Docket: 2011-848(EI)

BETWEEN:

PROWATT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 23, 2011, at Chicoutimi, Quebec.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Agent for the appellant:	Rémi Fournier
Counsel for the respondent:	Marie-France Dompierre

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (**EIA**) is allowed and the decision of the Minister of National Revenue dated December 23, 2010, is varied on the basis that Rémi Fournier was not employed in insurable employment within the meaning of paragraph 5(1)(a) of the EIA while working for the appellant. He was engaged in excluded employment within the meaning of paragraph 5(2)(b) of the EIA as he controlled over forty per cent of the appellant's voting shares for the periods from January 1, 2007, to December 31, 2007, and from January 1, 2008, to December 31, 2008.

Signed at Ottawa, Canada, this 28th day of September 2011.

“Johanne D’Auray”

D’Auray J.

Translation certified true
on this 10th day of November 2010.
Daniela Possamai, Translator

Citation: 2011 TCC 458
Date: 20110928
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REASONS FOR JUDGMENT

D'Auray J.

[1] The issue in question is whether Mr. Fournier was engaged in insurable employment from January 1, 2007, to December 31, 2007, and from January 1, 2008, to December 31, 2008, while working for the appellant.

[2] If I determined that Mr. Fournier controlled forty per cent of the appellant's voting shares, Mr. Fournier's employment would not be insurable within the meaning of paragraph 5(2)(b) of the *Employment Insurance Act* (EIA).

[3] The respondent submits that Mr. Fournier does not control 40% of the appellant's voting shares.

[4] It is clearly set out in the Reply to the Notice of Appeal that Mr. Fournier held 24.19% of the appellant's voting shares and through the 9166-0241 Québec Inc., he held 48.38% of the appellant's voting shares.

[5] During the periods in issue, Mr. Fournier was shareholder and on the board of directors of the appellant and 9166-0241 Québec Inc. He was also president of the appellant.

[6] In employment insurance, it is not a matter of holding *de jure* control but rather of controlling over forty per cent of the voting shares of the corporation in question. My colleague, Tardif J. clearly explains that in *Quincaillerie Le Faubourg (1990) Inc. v. Minister of National Revenue*, 2009 TCC 411. He indicates as follows in paragraphs 32 and 34 of his decision:

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.

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.

[7] In that case, Tardif J. concluded that the intervenor controlled more than 40% of the votes granted by the various types of shares she owned, her employment was not insurable employment under paragraph 5(2)(b) of the EIA.

[8] I also examined the following two decisions of the Federal Court of Appeal:

a. *Sexton v. MNR*, [1991] F.C.J. No. 417.

b. *Attorney General of Canada and Acier Inoxydable Fafard Inc.*, 2002 FCA 214.

[9] In *Sexton*, the appellants only controlled 17% of the voting shares, and consequently, their jobs were insurable. Their arguments as to effective control were not considered by the Court.

[10] As indicated by Hugessen J. in that decision, at page 2,

In my view, the judge made an error of law in considering only the administrative or operational control of the company. What the regulatory provision speaks of is 40 per cent control of the voting shares of the company, which is not at all necessarily the same thing.

...

Determining the control of voting shares in a company is a mixed question of law and fact. To begin with, it must be determined who is the holder of the shares; then, the question is whether there are circumstances interfering with the holder's free and independent exercise of his voting right, and if applicable, who may legally exercise that right in the holder's place.

[11] In *Attorney General of Canada and Acier Inoxydable Fafard Inc.*, the respondent argued that Mr. and Ms. Fafard held *de facto* control and that therefore, Ms. Fafard was not employed in insurable employment.

[12] Létourneau J. for the Court indicated at paragraph 12:

The testimony of Mr. and Ms. Fafard clearly shows that the equality or parity that they spoke of was an equality in managing the company's operations--in short, that they had in fact adopted and implemented a principle of joint management of the company: Applicant's Record, Testimony of Mr. Fafard, pp. 34, 35 and 38:

...

And he concluded at paragraph 13:

Nevertheless, an indisputable fact remains: Mr. Fafard held 99% of the company's voting shares while his wife controlled only 1%, and by no means did Mr. Fafard give up his voting right in the shares for the benefit of his wife. As a result, the requirements for applying paragraph 5(2)(b) were never satisfied. Ms. Letendre Fafard therefore held insurable employment within the respondent's business during the period in dispute.

[13] In that case, Ms. Fafard only controlled 1% of the voting shares and by no means did her husband, Mr. Fafard, give up his voting right in the shares for her benefit.

[14] In the present case, it is not a *de facto* control as argued by the respondent, that is, control of the management of the company. Mr. Fournier controlled 40% of the voting shares and there was no circumstance affecting the right of Mr. Fournier to vote as he wished.

[15] Consequently, the appeal is allowed and the decision of the Minister of National Revenue is varied on the basis that Mr. Fournier was not employed in insurable employment while working for the appellant.

Signed at Ottawa, Canada, this 28th day of September 2011.

“Johanne D’Auray”

D’Auray J.

Translation certified true
on this 10th day of November 2010.
Daniela Possamai, Translator

CITATION: 2011 TCC 458

COURT FILE NO.: 2011-848(EI)

STYLE OF CAUSE: PROWATT INC. AND THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Chicoutimi, Quebec

DATE OF HEARING: September 23, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice Johanne D'Auray

DATE OF JUDGMENT: September 28, 2011

APPEARANCES :

Agent for the appellant: Rémi Fournier
Counsel for the respondent: Marie-France Dompierre

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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