Docket: 2012-1640(EI)

BETWEEN:

JACQUELINE THÉRIAULT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 24, 2013
in Québec, Quebec
Before: The Honourable Justice B. Paris

Appearances:

Counsel for the appellant:	Jérôme Carrier
Counsel for the respondent:	Simon Vincent

JUDGMENT

The appeal pursuant to section 103 of the *Employment Insurance Act* is allowed and the decision rendered by the Minister of National Revenue is vacated, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of November 2013.

"B. Paris"

Paris J.

Translation certified true
on this 9th day of January 2014.
Elizabeth Tan, Translator

Citation: 2013TCC374
Date: 20131127
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Appellant,

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REASONS FOR JUDGMENT

Paris J.

[1] Ms. Thériault is appealing from the decision by the Minister of National Revenue (the Minister) that Raymond Bernier's employment of from June 3, 2010, to June 10, 2011, at the sugar bush owned and operated by Ms. Thériault was not insurable employment under the *Employment Insurance Act* (the Act).

[2] The Minister decided that Mr. Bernier's employment was excluded under paragraph 5(2)(*i*) of the Act, which states that employment if the employer and employee are not dealing with each other at arm's length is not insurable employment. It was not challenged that Ms. Thériault and Mr. Bernier were not dealing with each other at arm's length, since Mr. Bernier is Ms. Thériault's husband.

[3] Paragraph 5(2)(*i*) states:

> (2) Insurable employment does not include
>
> ...
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.

[4] When applying paragraph 5(2)(*i*), the Minister must take into account the exception set out in paragraph 5(3)(*b*) of the Act whereby if the Minister is satisfied that such employment would have existed with similar working conditions between parties with an arm's length relationship, then the employment is insurable.

[5] Paragraph 5(3)(*b*) of the Act states:

> 5(3) For the purposes of paragraph (2)(*i*),
>
> ...
>
> (*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.

[6] In this case, after reviewing the circumstances of Mr. Bernier's employment, the Minister concluded that it was not reasonable to find that Ms. Thériault and Mr. Bernier would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[7] The role of the Tax Court of Canada when considering a discretionary decision by the Minister under paragraph 5(3)(*b*) of the Act has been the subject of many decisions, in particular by the Federal Court of Appeal. The comments by Justice Létourneau in *Livreur Plus Inc. v. Canada*[1] clearly define the role of this Court in cases regarding employment insurance:

> 12. As already mentioned, the Minister assumed in support of his decision the existence of a number of facts obtained by inquiry from workers and the business he considered to be the employer. Those facts are taken as proven. It is for the person objecting to the Minister's decision to refute them.
>
> 13. The function of a Tax Court of Canada judge hearing an appeal from the Minister's decision is to verify the existence and accuracy of those facts and the assessment of them by the Minister or his officials, and after doing so, to decide in light of that whether the Minister's decision still seems to be reasonable: *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 878; *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310;

[1] [2004] F.C.J. No. 267, 2004 FCA 68.

> *Massignani v. Canada (Minister of National Revenue - M.N.R.)*, 2003 FCA 172; *Bélanger v. Canada (Minister of National Revenue - M.N.R.)*, 2003 FCA 455. In fact, certain material facts relied on by the Minister may be refuted, or the view taken of them may not stand up to judicial review, so that because of their importance the apparent reasonableness of the Minister's decision will be completely destroyed or seriously undermined.
>
> 14. In exercising this function the judge must accord the Minister a certain measure of deference, as to the initial assessment, and cannot simply substitute his own opinion for that of the Minister unless there are new facts or evidence that the known facts were misunderstood or wrongly assessed: *Pérusse v. Canada (Minister of National Revenue - M.N.R.), supra*, paragraph 15.

[8] As Justice Campbell summarized in *Porter v. Canada (Minister of National Revenue–M.N.R.)*[2]: "... the function of this Court is to verify the existence and accuracy of the facts relied upon by the Minister, consider all of the facts in evidence before the Court, including any new facts, and to then assess whether the Minister's decision still seems "reasonable" in light of the findings of fact by this Court. This assessment should accord a certain measure of deference to the Minister."[3]

[9] Therefore, the only issue is to determine whether, in light of all the facts, the Minister's decision rendered pursuant to paragraph 5(3)(*b*) seems reasonable.

[10] The facts relied upon by the Minister to render his decision are listed at paragraph 6 of the Modified Reply to the Notice of Appeal, and state the following:

> [TRANSLATION]
> a. since 1978[4], the appellant has been the sole owner of a sugar bush that she operates; **(admitted)**
>
> b. the sugar bush has 2,000 taps and a woodlot; **(admitted)**
>
> c. the appellant bought maple sap from a neighbouring lot that had 3,000 taps, which brought the amount of sap to boil to 5,000 taps; **(admitted)**
>
> d. the appellant sells in bulk to La Citadelle, her main client; **(admitted)**

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[2] [2005] T.C.J. No. 266, 2005 TCC 364.
[3] *Ibid*., at para. 13.
[4] The notice of appeal states 1978. However, the appellant testified that the sugar bush began operating in 1988.

e. the sugar bush is a seasonal business, whose maple-related work begins around February and ends around May, followed by cleanup and woodcutting; **(denied)**

f. until two years ago, the appellant took care of the transformation of sap into maple products and her husband [Mr. Bernier], took care of cutting the wood used for the fires that boil the sap; **(denied)**

g. until two years ago, [Mr. Bernier] was not paid when he cut the wood for the appellant, which he did during the evenings and weekends since he worked elsewhere as a mechanic; **(admitted)**

h. as of 2010, because the appellant was taking care of her daughter's child, [Mr. Bernier] took care of all the work at the sugar shack, including the woodcutting; **(admitted)**

i. [Mr. Bernier]'s duties were to tap the trees, collect tubes, pump machines and store the sap, repair (sic) the sap through boiling and evaporation, filter the syrup and put it into barrels; in short, [Mr. Bernier] did all the work related to the sugar bush and when the barrels were stored, he would clean the tubes and then begin cutting wood for the following year **(admitted)**

j. [Mr. Bernier] did not have a schedule to keep because his hours of work were dependent on the weather and the sap flow; **(denied)**

k. the hours [Mr. Bernier] worked were not recorded; **(denied)**

l. [Mr. Bernier] had experience with sugar bush work; **(admitted)**

m. [Mr. Bernier]'s work was not supervised, and he did not have to report to the appellant because the work he performed was ascertainable; **(denied)**

n. the appellant and [Mr. Bernier] together decided that his hourly rate would be $10; **(denied)**

o. [deleted]

p. [Mr. Bernier]'s pay was based on 50 hours of work per week when he performed work directly related to the sugar bush and when he cut wood; **(denied)**

q. [Mr. Bernier] received gross compensation of $500 per week regardless of the hours actually worked; **(denied)**

r. at times, as [Mr. Bernier] admitted, his pay was delayed; **(denied)**

s. a review of the paycheques shows that [Mr. Bernier] either received his cheques late or in bulk, often in sequence; **(denied)**

t. [Mr. Bernier] did not receive any benefits, vacation pay or 4% during layoffs; **(admitted)**

u. [Mr. Bernier] performed his duties for a period of 21 weeks in 2010 as opposed to 7 weeks in 2011. **(denied)**

[11] The appellant admitted there was no arm's length relationship within the meaning of paragraph 5(2)(*i*) of the Act, but she claims the exception under paragraph 5(3)(*b*) renders Mr. Bernier's employment insurable.

[12] The appellant submits that she decided to hire an employee because she had to take care of her daughter's children, who lived in Lac-Beauport. Since Mr. Bernier had lost his previous job and had experience in the maple industry, the appellant hired him. The appellant stated that if Mr. Bernier had not been available to do the work, she would have hired another employee. The appellant feels that the Minister's finding that Mr. Bernier's employment is not insurable is a wrongful exercise in facts and in law of his discretionary power.

[13] The appellant claims that Mr. Bernier enjoys compensation and working conditions that conform to those in the maple industry and the pay rate is reasonable for the seasonal work of the maple industry.

[14] Specifically, the appellant claims that although no exact record was kept of Mr. Bernier's hours of work, she did control his hours of work by talking with Mr. Bernier every evening on the phone and going to the sugar bush every weekend. According to the appellant, the work performed is ascertainable and she can assess the number of hours Mr. Bernier actually worked because she herself performed these same duties for many years.

[15] The appellant claims that the sap flow varies a great deal and this is why Mr. Bernier's schedule fluctuated from week to week. The 50-hour work week represents an average and if Mr. Bernier worked less one week, he would make up the hours the following week.

[16] The respondent claims that it is hard to accept that the missing hours of work would actually be made up in the subsequent weeks unless there was an effective accounting of the hours of work, that the hours of work for each week were not

recorded by Ms. Thériault and Mr. Bernier, and that unrelated parties, acting in their own interests, would have insisted on accurate weekly accounting.

[17] I do not agree with the respondent. Although Ms. Thériault did not have a record of Mr. Bernier's hours of work, I accept that she was in a good position to know whether the work was done or not and, as such, she controlled the work carried out by Mr. Bernier. I also feel that Mr. Bernier was paid for a 50-hour work week, namely $500, even though these hours could vary from week to week, but this is not because there was no arm's length relationship. I accept Mr. Bernier's and Ms. Thériault's uncontradicted testimony to the effect that Mr. Bernier worked an average of 50 hours per week, which makes his compensation reasonable. This situation is similar, in part, with regard to hours of work and compensation to *Théberge v. Canada*,[5] in which the applicant worked 40 to 80 hours per week for a set salary and his hours were not recorded. The Federal Court of Appeal decided that these factors were not sufficient to find that there was no arm's length relationship because the applicant's salary was established based on an average of 60 hours of work per week.

[18] The appellant also denies that she paid Mr. Bernier late or gave him his cheques in bulk. She stated that he gave him his paycheques weekly, that he cashed them in bulk. The appellant and Mr. Bernier testified that the appellant never paid late and never instructed Mr. Bernier to wait before cashing his cheques. Moreover, during the period in question, the appellant's bank account always had sufficient funds to cover Mr. Bernier's pay. Mr. Bernier testified that the appellant paid all the expenses related to the cottage at the sugar bush where he lived, such that he only had to pay for food. Thus, Mr. Bernier claims that he simply did not need this money to support himself.

[19] During her testimony, the appellant explained that the reason the paycheques frequently had consecutive numbers was simply because she did not write any other cheques in between these paycheques.

[20] In my opinion, Ms. Thériault's and Mr. Bernier's testimony is sufficient for me to conclude that the cheques were not prepared in bulk and there was no delay in the payment of Mr. Bernier's salary. The copies of the statements produced by Ms. Thériault clearly show that she had the funds necessary to pay Mr. Bernier at all times. Therefore, she would have no reason to delay his paycheques.

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5 [2002] F.C.J. No. 464, 2002 FCA 123, at paragraphs 8 and 10.

[21] The respondent claims that Mr. Bernier's work periods were highly influenced by the non-arm's length relationship between the appellant and Mr. Bernier. Whereas the appellant claims it was she who established Mr. Bernier's periods of employment, the Minister feels that they were determined by Mr. Bernier based on the depletion of his employment insurance benefits.

[22] However, according to an analysis by the respondent submitted as Exhibit I-1, tab 3, when Mr. Bernier started working for the appellant in February 2010, his employment insurance benefits had not been exhausted. Moreover, from February to May 2010, he worked 700 hours for the appellant although he only needed 490 hours of work to re-qualify for benefits. Additionally, he still had benefits when he began working for the appellant again in November 2010. Lastly, the appellant also showed that the Minister erred in presuming that Mr. Bernier only worked 7 weeks in 2011 as opposed to 21 weeks in 2010. The 7 weeks in 2011 only takes into consideration the weeks during the period in question, which ends on June 10, 2011. However, Mr. Bernier went back to work on November 1, 2011. Therefore, it was not 7 weeks but 14 that Mr. Bernier worked in 2011. All these elements convince me that Mr. Bernier's periods of work corresponded to the needs of Ms. Thériault's business.

[23] Ms. Thériault also successfully showed that Mr. Bernier's hourly rate roughly complied with applicable standards. The respondent did not challenge that the hourly rate of workers in the maple industry was between $10 and $15 in 2010, but claims that Mr. Bernier did not receive vacation pay of 4% of his gross pay. Mr. Bernier and Ms. Thériault both testified that the hourly rate of $10 included the vacation pay and I accept this testimony.

[24] The respondent also noted that Mr. Bernier had worked for Ms. Thériault without pay before the period in question and after the sugaring season in 2010. The evidence showed that Mr. Bernier and his son-in-law voluntarily cut around 45 cords of wood for Ms. Thériault in the years before 2010. Mr. Bernier allegedly also cut wood on a smaller scale during the summer of 2010. The issue is whether this volunteer work is relevant in this case. In *Théberge*, the Federal Court of Appeal stated at paragraph 19:

> What a claimant does outside the period during which he or she is employed in what the Minister considers to be insurable employment can be relevant, for example, to verify that the claimant is unemployed, to determine the amount of his or her benefits, or to establish his or her period of unemployment. However, for the purposes of the exception provided in paragraph 3(2)(*c*) of the Act, what a claimant does outside of his or her period of employment will be of little relevance when, as in this case, it is not alleged that the salary paid during the

> period of employment took into account the work performed outside of that period, that the applicant had included, in the hours spent on his or her insurable employment, hours worked outside of the period, or that work performed outside of his or her period of employment had been included in the work performed during his or her period of employment. It seems to me to be self-evident, and this is confirmed by the evidence, that in the case of family businesses engaged in seasonal work, the minimal amount of work that remains to be done outside the active season is usually performed by family members, without pay. Excepting seasonal employment, in a family farm business, on the ground that cows are milked year-round amounts, for all practical purposes, to depriving family members who qualify by working during the active season of unemployment insurance and to overlooking the two main characteristics of such a business: that it is a family business and a seasonal business.

[25] In my opinion, these principles apply in the present case because Ms. Thériault's business is a seasonal family business and the work Mr. Bernier performed without pay was neither continuous nor significant. Before 2010, he cut wood during his free time after his work elsewhere and with the help of his son-in-law. As for the period after May 2010, it seems the amount of work performed was very limited because he did most of the woodcutting in November and December that year. Since the respondent is not claiming that the salary paid to Mr. Bernier during the period of employment took into consideration this work performed outside the period or that the work performed or hours worked outside this period were included in any way in the work during the period of employment, I find that the work performed outside his period of employment is not relevant.

[26] For all these reasons, after reviewing all the evidence, the Minister's finding in this case does not seem reasonable to me. Ms. Thériault convinced me that she would have entered into a substantially similar contract with a person with whom she had an arm's length relationship. The appeal is therefore allowed and the Minister's decision is vacated on the ground that, during the period in question, Mr. Bernier held insurable employment.

Signed at Ottawa, Canada, this 27th day of November 2013.

"B. Paris"

Paris J.

Translation certified true
on this 9th day of January 2014.
Elizabeth Tan, Translator

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APPEARANCES:

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