

Docket: 2003-3575(EI)

BETWEEN:

FRANCE GARNEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on common evidence with the appeal of  
*Peinture et décoration Léopold Lapointe Inc.* (2003-3577(EI))  
on June 17, 2004, at Québec City, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Marlène Jacob

Counsel for the Respondent: Agathe Cavanagh

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JUDGMENT

The appeal brought pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the Minister's decision is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this XX day of July 2004.

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Tardif J.

Translation certified true  
on this 27<sup>th</sup> day of August 2004.

Ingrid B. Miranda, Translator

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

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### **REASONS FOR JUDGMENT**

#### **Tardif J.**

[1] These are two appeals brought under the *Employment Insurance Act* (the “*Act*”) concerning the work performed by the Appellant “France Garneau” for “Peinture et Décoration Léopold Lapointe Inc.” The work performed by Ms. Garneau was excluded from insurable employment because she did not deal at arm’s length with the Appellant company: her spouse controlled the shares of the Appellant company.

[2] These are the periods at issue in these appeals:

- (a) from June 9 to October 3, 1997,
- (b) from June 15 to October 9, 1998,
- (c) from June 14 to October 8, 1999,
- (d) from June 12 to October 6, 2000,
- (e) from June 11 to September 28, 2001, and
- (f) from June 16 to September 21, 2002.

[3] The parties agreed to proceed on common evidence. Firstly, a number of assumptions of fact were admitted:

*France Garneau – 2003-3575(EI):*

[TRANSLATION]

- (a) The Payor, incorporated on June 28, 1978, runs a business providing painting services to residential, commercial, industrial and institutional buildings;
- (b) the Payor operates the business year-round, with one peak period between the months of June and September;
- (c) the directors of the Payor are Léopold, Sonia and Pascal Lapointe;
- (d) during the periods at issue, the Payor usually had three plasterer-painters working;
- (e) in 1997, the Payor had sales of \$88,666 and in 2002, it had sales of \$143,955. Between 1997 and 2002, the Payor realized total profits in the amount of \$28,687.
- (f) the Appellant provided services to the Payor. Her main tasks were: mixing the paint to be used by the painters; doing errands (delivering submissions, buying material, picking up plans); answering the telephone; preparing cheques, deposit slips and client invoices;
- (g) the Payor retains the services of an external accountant who is in charge of preparing payroll cheques (the Appellant signs them), bookkeeping, accounting and preparing financial statements for the Payor;

- (h) the Appellant generally works from home; the house belongs to her and she receives no compensation from the Payor for using her residence as a place of work;
- (i) the Appellant claims to work 40 hours per week, but the Payor does not keep a record of her working hours;
- (j) during the performance of her duties, the Appellant used to drive the Payor's truck to do errands and all the expenses resulting from the truck were covered by the Payor;
- (k) since 2002, the Appellant has owned her own car that she now drives for work; the expenses resulting from the use of her car are not repaid by the Payor;
- (l) the Appellant claims that she has never invested in the Payor's business, but it seems that she issued cheques (in the amount of \$5,000 in July 1997 and September 2001) to the Payor and that she lent money to the Payor at other points in time during the periods at issue;
- (m) during the periods at issue, the Appellant received a fixed salary varying between \$624 and \$742 per week, depending on the year, regardless of the number of hours she actually worked;
- (n) during the periods at issue, the Appellant would sometimes wait for two or three months before cashing her pay cheques, at the Payor's request;
- (o) in a statutory declaration dated November 18, 2002, the Appellant stated:

“I admit that I do errands outside the working hours entered in my Records of Employment. I am also in the habit of filling in the deposit slips for the two companies outside the working hours entered in my Records of Employment. This is also the case for cheques that I prepare on my own. I admit that I prepare cheques all year long, regardless of the weeks of work appearing on my Records of Employment.”;

“Even if I work, I am not compensated for the work performed outside the period from June to October of each year.”;

- (p) the periods of time when the Appellant did actually work differ from the working periods claimed in the Appellant's Records of Employment.

*Peinture et Décoration Léopold Lapointe Inc., - 2003-3577(EI):*

[TRANSLATION]

- (a) The Appellant, incorporated on June 28, 1978, runs a business providing painting services to residential, commercial, industrial and institutional buildings;
- (b) the Appellant operates the business year-round, with a peak period between the months of June and September;
- (c) the directors of the Payor are Léopold, Sonia and Pascal Lapointe;
- (d) during the periods at issue, the Appellant usually had three plasterer-painters working;
- (e) in 1997, the Appellant had sales of \$88,666 and in 2002, it had sales of \$143,955. Between 1997 and 2002, the Payor realized total profits in the amount of \$28,687.
- (f) the Worker provided services to the Payor. Her main tasks were: to mix the paint to be used by the painters; to do errands (deliver submissions, buy material, pick up plans); to answer the telephone; to prepare cheques, deposit slips and client invoices;
- (g) the Appellant retains the services of an external accountant who is in charge of preparing payroll cheques (the Worker signs them), bookkeeping, accounting and preparing the Appellant's financial statements;
- (h) the Worker generally works from home; the house belongs to her and she receives no compensation from the Appellant for using her residence as a place of work;
- (i) the Worker claims to work 40 hours per week, but the Appellant does not keep a record of her working hours;



- (j) during the performance of her duties, the Worker used to drive the Appellant's truck to do errands and all the expenses resulting from the truck were paid by the Appellant;
- (k) since 2002, the Worker has owned her own car that she now drives for work; the expenses resulting from the use of her car are not repaid by the Appellant;
- (l) the Worker claims that she has never invested in the Payor's business, but it seems that she issued cheques (in the amount of \$5,000 in July 1997 and September 2001) to the Appellant and that she lent money to the Appellant at other points in time during the periods at issue;
- (m) during the periods at issue, the Worker received a fixed salary varying between \$624 and \$742 per week, depending on the year, regardless of the number of hours she actually worked;
- (n) during the periods at issue, the Worker would sometimes wait from two to three months before cashing her pay cheques, at the Appellant's request;
- (o) in a statutory declaration dated November 18, 2002, the Worker stated:

“I admit that I do errands outside the working hours appearing in my Records of Employment. I am also in the habit of filling in the deposit slips for the two companies outside the working schedule appearing in my Records of Employment. This is also the case for cheques that I prepare on my own. I admit that I prepare cheques all year long, regardless of the weeks of work appearing on my Records of Employment.”;

“Even if I do work, I am not compensated for the work performed outside the period from June to October of each year.”;
- (p) the periods of time when the Appellant did actually work differ from the working periods claimed in the Appellant's Records of Employment.

[4] The Appellants denied paragraphs (l) and (p).

[5] Ultimately, the Appellants admitted some of the assumptions of fact, while reserving the right to supplement and modify the content: these assumptions are found at paragraphs (f), (i), (k), (m) and (o).

[6] Léopold Lapointe, controller and director of the company Peinture et Décoration Léopold Lapointe Inc., was the sole witness on behalf of the Appellant company; the Appellant, France Garneau, his spouse, did not testify, although she was present at the hearing.

[7] The testimony of Léopold Lapointe closely follows the parameters established by the Respondent in a letter dated December 12, 2002, where the Respondent sets out his reasons:

[TRANSLATION]

...

When we examined the terms of your employment, we were unable to conclude that:

- your employer would have offered the same working conditions to a person with whom he was dealing at arm's length.
- your employer would have paid the same amount of money for the same work to a person with whom he was dealing at arm's length, with the same delay.
- your employer would have hired a person with whom he was dealing at arm's length for the same periods of time.
- your employer would have hired a person with whom he was dealing at arm's length to perform the same type of work.

[8] Mr. Lapointe has affirmed repeatedly that he would indeed have hired another person to perform the same work, under the same working conditions, if the Appellant had not been available. He pointed out that the job description is close to the following description set out in the Reply to the Notice of Appeal (the "Reply"):

[TRANSLATION]

- (f) the Appellant provided services to the Payor. Her main tasks were: to mix the paint to be used by the painters; to do errands (deliver

submissions, buy material, pick up plans); to answer the telephone; to prepare cheques, deposit slips and client invoices;

- (g) the Payor retains the services of an external accountant who is in charge of preparing payroll cheques (the Appellant signs them), bookkeeping, accounting and preparing the Payor's financial statements;

[9] However, he added with great intensity that there is one other task that was not mentioned in the Reply nor in the statutory declarations filed in the case, that his spouse was in charge of cleaning up the worksites once the painting was completed; she was also in charge of cleaning the warehouse. In addition, this task was described as one of the most important tasks.

[10] Léopold Lapointe was very articulate. He justified his spouse's work by pointing out that she performed necessary tasks that would normally be performed by the painters if she had not been available; she performed these tasks for a significantly lower remuneration than the salary he would have to pay the painters to do the same work.

[11] The company was open for business year-round; the summer season was the busiest period because several schools would hire the Appellant during the summer for painting jobs.

[12] Even though business was slower during other periods of the year, the company remained open for business; most of the time, the Appellant's spouse performed all the work by himself, without hiring anybody else.

[13] Mr. Lapointe pointed out that he did not draw a salary from his company, only bonuses when the business was doing well.

[14] For the last period or periods, the Appellant was paid a salary of over \$18 per hour, a salary of \$742 a week, while the painter received a salary of approximately \$23 per hour.

[15] France Beaulieu was the investigating officer in charge of the file; she explained how she proceeded in this investigation. She first gathered all the pertinent documents: payroll books, invoices, cheques, Records of Employment, etc. Then she prepared a rather pertinent compilation to better illustrate her various findings. The statement she prepared shows that the Appellant was on the payroll during all the periods at issue; however, it does show above all that she worked on a yearly basis and not in the capacity of a mere seasonal or secondary employee. Her work at the company was continuous and important.

[16] Ms. Beaulieu entered a dot for every task accomplished by the Appellant outside the periods at issue; she totalled all the dots, and she prepared the following:

1997 (Period at issue: June 9 to October 3, 1997)

Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
x	x	x	x	1	5	19	24	12	21	4	11

1998 (Period at issue: June 15 to October 9, 1998)

Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
14	11	16	21	26	30	12	27	27	22	21	10

1999: (Period at issue: June 14 to October 8, 1999)

Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
43	35	24	15	43	34	25	38	28	35	30	18

2000 (Period at issue: June 12 to October 6, 2000)

Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
23	23	16	28	14	32	45	37	38	33	26	23

2001 (Period at issue: June 11 to September 28, 2001)

Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
20	13	14	22	32	35	38	42	63	29	37	25

2002 (Period at issue: June 16 to September 21, 2002)

Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
28	13	14	19	13	29	26	22	21	x	x	x

Periods at Issue

[17] Ms. Beaulieu also reported the following:

- the cheques received did not correspond to or did not balance with either the Records of Employment or the payroll books;
- cheques were deposited with time delays;

- the Appellant advanced loans without interest to the company controlled by her spouse;
- the expenses she incurred while using her own vehicle during the performance of her work for the company were not reimbursed;
- she did not receive any compensation for using a room (converted into an office) located in her own residence.

[18] When the Respondent decided to investigate the Appellants' file, her purpose was to determine whether the work performed during the periods at issue, although expressly excluded by the *Act*, could still qualify as insurable employment. She had to proceed objectively and draw appropriate conclusions on the basis of all the facts and documents gathered.

[19] In the case at bar, it is apparent from the record that the Appellant and her spouse voluntarily provided all the pertinent documents used in the investigation. Moreover, both of them agreed to provide statutory declarations, which the Appellants filed as Exhibits A-1, A-3, A-4 and A-5.

[20] The evidence reveals that, outside the periods at issue, the Appellant probably performed many more tasks than those found in the course of the investigation. Effectively, Appellant France Garneau doubtless performed several tasks of which there is no record, such as greeting clients, answering the telephone,

doing errands. The investigator could only show and inventory those chores that were traceable, i.e. by means of a signature.

[21] Following the testimony of Ms. Beaulieu, Léopold Lapointe testified again to justify a number of invoices and documents that appear in the charts and reflect significant tasks accomplished by the Appellant outside the periods at issue.

[22] It was clearly apparent that some of the invoices related to personal interests and were not connected with the company at all. On the other hand, he testified that many of them did relate to the business “Peinture et Décoration Léopold Lapointe Inc.” It would have been interesting to hear the Appellant’s point of view.

[23] Some excerpts of the statutory declaration sworn by Mr. Lapointe on November 20, 2002 (Exhibit A-5) are also rather significant with respect to the special relationship between the Appellant and her employer.

[TRANSLATION]

...

Q. Why did France issue a \$5,000 cheque dated July 31, 1997, to Peinture & Décoration?

A. The Caisse Pop. granted a loan to France and she lent me the money. She was reimbursed in cash.

Q. Did France extend other loans to the company?

A. Fairly often, there were other loans in 2001 after her mother passed away. In September 2002, I gave her \$6,000 back.

Q. Why did France perform some work outside the periods of employment entered in the Records of Employment?

A. She volunteers to help me Saturday or Sunday evenings. She is not remunerated for these services; she does it as a hobby.

...

[24] Appellant France Garneau, in her statutory declaration dated October 21, 2002 (Exhibit A-3), declared:

[TRANSLATION]

... I use my own car. My car expenses are not reimbursed; they are included in my salary.

... I work from 8 a.m. to 5 p.m., 40 hours per week, five days, from Monday to Friday. My hours differ from one day to the other. Sometimes I work evenings, if the men need material. In fact, I am paid 40 hours, but I keep no record of my time.

[25] Later, in a second statutory declaration dated November 18, 2002 (Exhibit A-4), she declared:

[TRANSLATION]

... I prepare client invoices, I type them. I also sign the acknowledgments of receipt on behalf of the company when shipments come in. I do errands. I agree that the other employees also do errands and go to pick up material when needed. When the investigator showed me all the invoices issued to clients at points in time where I was not employed, I did not prepare them. Léopold did. He prepares the invoices the same way I do. I acknowledge that I did some errands outside the dates of employment entered in my Records of Employment. I also prepared the deposit slips for both companies outside the dates of employment entered in my Records of Employment. And I did so throughout the year, regardless of the



weeks of employment entered in my Records of Employment. My spouse and I have a MasterCard . . .

. . . I extended a \$6,000 loan to Peinture & Décorations Léopold Lapointe in 2001 and was reimbursed in September 2002. In July 2002, I received a \$2,000 cheque from Peinture & Décorations Léopold Lapointe but I cannot remember the reason . . .

. . . It is true that I cashed my paycheques with . . . to three-month delays. This is due to the fact that there were no funds in the account and Léopold would ask me to wait a bit.

[26] The circumstances surrounding the statutory declarations were such that the Court must give adequate weight to the evidence therein contained: Mr. Lapointe had expressed significant conditions in that respect, as we can see from the two following excerpts (Exhibit A-5):

[TRANSLATION]

. . . Mr. Lapointe prefers that the questions be asked first and he will answer them later . . .

Mr. Lapointe asked for a coffee break at 10 a.m. and came back at 10:45 a.m. to read and sign the declaration. I read the said declaration, it has been signed freely and voluntarily, without any threat and it represents the truth.

[27] In spite of all the opportunities he had to mention the famous clean-up jobs performed by his spouse, it is rather strange that he did not mention this task for which she was responsible, a task he described as very important during his testimony.

[28] Moreover, Mr. Lapointe acknowledged that a stranger or a third party would not agree to extend interest-free loans or display such good will as to wait several weeks before cashing pay cheques.

[29] Ms. Beaulieu completed an adequate investigation and she gathered all the pertinent, available documentary evidence. She examined all the data with discernment and, to substantiate her conclusions, she drew up a chart that removes any doubt one may have as to the accuracy and reasonableness of her conclusions.

[30] On the other hand, the evidence presented by Mr. Lapointe, the Appellant's spouse, who was present at the hearing but chose to refrain from testifying, validates the reasonableness of the conclusions drawn by the Respondent.

[31] Counsel for the Appellants argued that the employment of Appellant France Garneau had been assessed on May 7, 1985, and was deemed to be insurable.

[32] The Respondent immediately responded that at the time of such determination, legislative provisions other than those applicable to the present determination concerning the six periods of time at issue were in effect.

[33] In the initial determinations, the Respondent had examined the facts in light of the legislative provisions corresponding to the current paragraph 5(1)(a) of the *Act*.

[34] Since 1990, Parliament has specifically decided to exclude from insurable employment any work performed in situations in which the worker and the employer are in a non-arm's length relationship. The Respondent had valid grounds for examining the work performed by the Appellant under paragraph 5(2)(i) of the *Act*, which reads as follows:

5. (2) Insurable employment does not include

...

(i) employment if the employer and employee are not dealing with each other at arm's length.

(3) 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.

[35] Although it is very unfortunate that a determination created expectations, and almost constituted an unconditional guarantee, any employment is nonetheless subject to examination at all times as to its insurability, with respect to any period of time.

[36] When the examination relates to several periods or several years, the result may have serious financial consequences. In the case at bar, the Respondent examined six periods of time between June 9, 1997 and October 21, 2002.

[37] The Appellants put together the evidence for which they had the burden to prove from the assumptions of fact alleged in the replies to the Notices of Appeal; the Appellants did not object that the Respondent failed to take certain facts into account.

[38] The interpretation of the facts presented by Counsel for the Appellants entails a conclusion contrary to that of the Respondent. Does this mean that the interpretation of the facts proposed by the Respondent is unreasonable or unacceptable?

[39] There are a number of factors in this case that may very well have an effect on the nature of a contract of service, such as performing the same type of work; sometimes performing certain tasks voluntarily, and sometimes for remuneration; issuing an interest-free loan to her own employer and waiting before cashing her paycheques.

[40] It is not possible to make an absolute comparison between a contract of employment entered into between two persons in a non-arm's length relationship and a contract between third parties. The fact that two parties are not dealing with each other at arm's length add and will always add particular elements to a contract: this is perfectly normal, legitimate and, perhaps, desirable. However, such particularities should not tailor or influence the contract of employment to the extent that the employer would not grant similar conditions to a third-party employee, whether these conditions are favourable or unfavourable for the employee. This particularly relates to the remuneration of employees at the beginning and at the end of working periods, and the performance of free services for which third parties would obtain compensation.

[41] Oftentimes, it is neither easy nor possible to identify the specific and determinative facts upon which a valid conclusion may be drawn. However, often the only way to obtain a valid result is to consider the facts as a whole, along with the circumstances of the case and other details.

[42] Counsel for the Appellants brilliantly pointed out that it is lawful and normal for spouses to cooperate and to contribute voluntarily to the performance of certain tasks, to issue interest-free loans, to act generously. I agree entirely with this observation. However, when persons who are not dealing with each other at arm's length decide to enter into a contract of employment, it becomes essential to make every effort to minimize the importance of the family connection. In this vein, Parliament wisely provided tests of similarity and comparison expressly applicable to such cases.

[43] In the case at bar, Mr. Lapointe acknowledged that he would have been unable to find an employee to provide interest-free loans and to delay cashing numerous pay cheques. On the other hand, would he have paid a salary to an employee while the company could not afford to do so? Would he have surrendered his own salary in order to finance the salary of a third party? Would he

have paid such a salary to a third party? These are questions the Appellants, who bore the burden of proof, did not answer.

[44] This is not about a new company in which the main shareholder is maximizing his capital in order to establish a solid foundation for his business. This is a company that is several years old; under similar circumstances, the main shareholder would doubtless have considered closing if the company he controlled did not generate sufficient profits to provide him with a decent income. It is equally certain that the compensation of the Appellant would have been re-evaluated and reduced. With respect to the type of work, it is clear that a third party would never have paid such a salary for this type of work.

[45] Considering the way the company operated, it seems that Mr. Lapointe benefited from France Garneau's salary as much as the Appellant did herself.

[46] Mr. Lapointe claimed that he never felt the need to record the Appellant's hours of work and that the results were his only concern. I do not think one may claim or affirm that this is a rule in this field, particularly if the business does not produce sufficient funds to provide a reasonable salary for its owner who himself performed most of the profit-generating work.

[47] The working periods all commenced and finished around the same dates and always included a sufficient number of weeks to qualify for employment insurance benefits. Also, the salary paid during the said weeks permitted the highest available rate of benefits.

[48] Considered separately, these facts are not determinative; however, the systematic re-occurrence of the same scenario seems to justify the conclusion that the working arrangement was seriously affected by the fact that the parties were not dealing with each other at arm's length. Ms. Garneau's statutory declaration is rather meaningful in this respect. This is not a case of an isolated coincidence. The fact is that the coincidence reoccurred with respect to all the periods at issue.

[49] A genuine contract of employment does not permit compensation for the same work only during some periods of time, and then to be performed gratuitously during other periods. Further, in a contract of employment between two people dealing with each other at arm's length, parallel agreements are not legitimate since Parliament has also provided that any contract entered into with the purpose of rendering a person eligible for employment benefits does in fact disqualify the contract in this respect.



[50] When there is a legitimately insurable contract of service, the work performed is justifiable with respect to the needs of the employer; the work is compensated according to applicable standards; the work is paid on schedule and is terminated when the business need ceases to exist.

[51] In cases where an agreement provides that the work will be terminated when the worker is eligible for employment insurance benefits and that the worker will resume his employment voluntarily or with a reduction of salary, the difference being fully or partially compensated for by employment benefits, then the work will be excluded from insurable employment even where the parties were in an arm's-length relationship.

[52] Even though the Appellants argued that they had no reason to doubt the insurability of the work that was performed, since the Respondent had already expressly determined that this work was insurable, the proof, on the balance of probabilities, confirms the correctness of the determination.

[53] It is common for laws to be modified. For this reason, every person must remain attentive to the laws that govern their businesses. Ignorance of the *Act* does not constitute a valid excuse or defence.

[54] The appeal is dismissed.

Signed at Ottawa, Canada, this XX day of July 2004.

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Tardif J.

Translation certified true  
on this 27<sup>th</sup> day of August 2004.

Ingrid B. Miranda, Translator