File: 2003-2243(EI)

BETWEEN:

ARMOIRES G. BARON INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

NICOLAS BARON,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 27, 2003 at Québec, Quebec

Before: The Honourable Deputy Justice S. J. Savoie

Appearances:

Agent for the Appellant:	Gabriel Baron
Counsel for the Respondent:	Stéphanie Côté
For the Intervenor:	The Intervenor himself

JUDGMENT

The appeal is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand Barachois, New Brunswick, this 13th day of April 2004.

"S. J. Savoie"

Deputy Justice Savoie

Translation certified true
on this 18th day of August 2004.

Shulamit Day, Translator

Citation: 2004TCC238
Date: 20040413
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REASONS FOR JUDGMENT

[1] This appeal was heard at Québec, Quebec, on November 27, 2003.

[2] It must be determined whether the employment of the "Worker" Nicholas Baron, during the period from January 1, 2002 to February 4, 2003, was insurable within the meaning of the *Employment Insurance Act* (the "Act").

[3] On January 13, 2003, the Appellant asked an authorized employee of the Canada Customs and Revenue Agency (CCRA) to make a decision regarding the eligibility of the employment of the Worker, Nicolas Baron, when he was employed by the Appellant for the period beginning November 1, 1999.

[4] On February 4, 2003, the authorized official notified the Appellant that the Worker's employment with him, from January 1, 2000 (*sic*) to February 4, 2003, was insurable under paragraph 5(1)(*a*) of the Act.

[5] In addition, it was notified that, in accordance with the Act, a request for a decision must be made prior to June 30 of the year following the year to which the

question relates; as a result, the right of appeal was granted only for the period from January 1, 2002 to February 4, 2003.

[6] On February 18, 2003, the Appellant appealed the decision with respect to the insurability of the Worker's employment to the CCRA Appeals Division, without specifying the periods.

[7] On February 26, 2003, the Respondent notified the Appellant that, since the Act did not give him the right to appeal for the period from January 1, 2000 to December 31, 2001, he would only consider the request for the period from January 1, 2002 to February 4, 2003.

[8] By letter dated May 23, 2003, the Respondent informed the Appellant of his decision that the employment from January 1, 2002 to February 4, 2003, was insurable, since it met the requirements of a contract of service, and there was thus an employer-employee relationship between the parties.

[9] Furthermore, the Minister notified the Appellant of the decision that, despite the non-arm's-length relationship between it and the Worker within the meaning of subsection 251(2) of the *Income Tax Act*, it was reasonable to conclude, given the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, that it and the Worker would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length during that period.

[10] In making his decision, the Minister relied on the following presumptions of fact which were admitted or denied by the Appellant:

> [TRANSLATION]
>
> (a) The Appellant operated a business that manufactured kitchen and bathroom cabinets and custom-made furniture. (admitted)
>
> (b) Gabriel Baron, the Worker's father, was the Appellant's sole shareholder. (admitted)
>
> (c) Gabriel Baron monitored activities and made administrative decisions on behalf of the Appellant. (admitted)
>
> (d) The Worker never signed for or made himself personally liable for business or other loans; Gabriel Baron is the business' only authorized signatory. (admitted)

(e) Before the Worker was hired, Gabriel Baron was the only employee of the Appellant. (admitted)

(f) In 2002, the Appellant hired seven employees including Gabriel Baron, the Worker, and some temporary employees during the summer. (denied)

(g) The Worker's main responsibilities were: (denied)

- To prepare, build and finish furniture.
- To manage the Appellant's workshop.
- To manage the projects and supervise the workshop employees.
- Occasionally assemble plans and projects with the assistance of his father.
- To order materials.
- To deliver orders with installers.
- To collect cheques from the Appellant's clients.

(h) The Worker carried out the majority of the Appellant's workshop tasks. (admitted)

(i) At the beginning of 2002, the Worker was paid between $10 and $11/hour because he was finishing his cabinet-making course. (admitted)

(j) At the beginning of the summer of 2002, his pay increased to $12.50/hour and, at the beginning of 2003, to $15/hour. (admitted)

(k) The Worker could work between 30 and 50 hours per week, but on average worked 40 hours per week. (denied)

(l) The Worker was paid by cheque for 40 hours of work per week. (admitted)

(m) The Worker incurred no expenses as part of his work. (denied)

(n) The Worker received a fixed weekly pay and did not share in the Appellant’s chance of profit or risk of loss. (denied)

(o) The Appellant's other workers were paid between $10 and $15/hour based on their experience. (admitted)

[11] At the hearing, the Appellant had the worker, Nicolas Baron, testify. He testified that with his father, he had participated in hiring seven of the Appellant's employees in 2002. He wanted to clarify that with his father he assembled manufacturing plans and projects more than occasionally. He added that on average he worked, not 40 hours per week, but between 50 and 60.

[12] The Worker incurred no expenses except for his travel to get the necessary materials from suppliers, which represented between 15 and 30 kilometres per week.

[13] In his testimony, the Worker stated that his father had the last word in the operation of the business, but that he still had control over his decisions. The Worker confirmed that he had no signing authority. He described the Appellant as a family business that had no written employment contracts. He added that bad debts were the responsibility of the company, and the company provided him with all of the work tools.

[14] The Appellant disputes this decision and writes in a letter of appeal to CCRA that [TRANSLATION] "Nicolas is the business' successor. He is beginning to take on management responsibilities (he manages two employees) and is consulted when important decisions are made . . . Nicolas receives bonuses based on the company's performance." According to the Appellant's statements, another employee would not have had similar working conditions if there had been an arm's-length relationship between them.

[15] Furthermore, the following facts were collected by the investigators and are part of the appeals officer's report that was filed as Exhibit I-1.

[16] When the Worker installs furniture, he is paid approximately $18/hour in accordance with the standards of the Commission de la construction du Québec. The Worker is paid by cheque always made out to his name. The rate of pay is set by the Appellant. The Worker was always paid for each pay period. He has two weeks paid vacation in summer, as do the other employees, and one week in the fall, in September. The Worker has never provided services or performed work without being paid.

[17] At the beginning, the Worker received an hourly wage between $8 and $10, while he was taking cabinet-making courses. However, for several months, he has been paid $15/hour.

[18] Business days and hours are Monday to Friday, from 7:30 a.m. to noon, and 1 p.m. to 4:30 p.m. The Worker is at his job from Monday to Friday and sometimes on the weekend, he might go to the workshop to see if everything is under control. His work hours are from 7:00 a.m. or 7:15 a.m. to 4:45 p.m. or 5:00 p.m. He always comes in a bit before the other employees in order to prepare the jobs and he closes the workshop at the end of the day. The work hours were set by the company and Nicolas keeps those hours, but he always arrives before the workshop opens and he closes the workshop at the end of the day. The hours of work were not recorded anywhere. The Worker was always paid for 40 hours per week. If he works more than 40 hours, he would work less another week. The Worker's length of employment was not pre-determined; one day he will take over for his father.

[19] The Worker took a cabinet-making course for two years, from 2000 to 2002, and obtained his trade school diploma. His father gave him this practical training.

[20] When the Worker's father is at the factory, he supervises and approves the Worker's work. He say that his son supervises himself when he is not at the factory, which happens, since certain weeks he could very well be there only two or three days because he often visits a showroom he opened in Québec.

[21] In his report, the appeals officer states that the Appellant could have terminated the Worker's services if there had not been enough work or if there had been fraud or another similar incident. The equipment and the tools required by the Worker for his carpentry work are provided free of charge by the Appellant and the Worker incurs no expenses when performing his duties.

[22] The Appellant decides whether the work must be redone, provides the materials, is responsible for the cost of bad debts, guarantees the quality of the work and pays the liability insurance premiums.

[23] The Appellant does not share the chance of profit and the risk of loss with the Worker, but, if they complete a good contract, the Appellant might give him a bonus. The Worker is personally responsible for rendering services to the Appellant.

[24] Other workers performed the same duties at the business as did Nicolas Baron, but they were not supervisors. They were assigned only to manufacturing. Depending on their experience, they earned between $10 and $11/hour, but one of them earned $15 because he had 20 years of experience. All these workers were paid by cheque and there was no difference in how these other workers were treated.

[25] The Worker stated to the investigators that he was not responsible for reporting to the Appellant since they all worked together. He stated that he could hire assistants without the consent of his father, but that he could not fire them without his consent. He added that he had, in fact, hired two assistants in 2002 and, at the beginning of 2003, he had hired another.

[26] The Worker and the Appellant's sole shareholder are related persons under subparagraph 251(2)(*b*)(iii) of the *Income Tax Act*. Related persons are deemed not to deal with each other at arm's length under subsection 251(1) of this same Act.

[27] The Act states that all employment under which the employer and employee are not at arm's length is excluded from insurable employment except when it is reasonable to conclude that such employment would have existed under similar working conditions if the parties had dealt with each other at arms' length.

[28] Subsection 5(1) of the Act reads in part:

> 5. (1) Subject to subsection (2), insurable employment is
>
> (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> . . .

[29] Subsections 5(2) and (3) of the Act read in part:

> 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.

[30] Section 251 of the *Income Tax Act* contains the following particular section:

251. (1) For the purposes of this Act,

(*a*) related persons shall be deemed not to deal with each other at arm's length; and

. . .

(2) For the purpose of this Act, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or adoption;

(*b*) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described in subparagraph 251(2)(*b*)(i) or 251(2)(*b*)(ii);

[31] The burden of proof is on the Appellant. The latter must establish on the balance of probabilities that the Minister's decision is unfounded in fact and in law. Each case is unique.

[32] The Appellant is asking this Court to overrule the Minister's decision. In carrying out this mandate, this Court is subject to the rules established by the Federal Court of Appeal, which are outlined in the following cases: *Canada (Attorney General) v. Jencan Ltd. (C.A.)*, [1998] 1 F.C. 187, and *Massignani v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 542.

[33] In this context, the Federal Court of Appeal, in *Jencan*, *supra*, stated the following at paragraphs 31 and 37:

> The decision of this Court in *Tignish*, *supra*, requires that the Tax Court undertake a two-stage inquiry when hearing an appeal from a determination by the Minister under subparagraph 3(2)(*c*)(ii). At the first stage, the Tax Court must confine the analysis to a determination of the legality of the Minister's decision. . . .
>
> . . . The Tax Court is justified in interfering with the Minister's determination under subparagraph 3(2)(*c*)(ii)-by proceeding to review the merits of the Minister's determination-where it is established that the Minister: (i) acted in bad faith or for an improper purpose or motive; (ii) failed to take into account all of the relevant circumstances, as expressly required by paragraph 3(2)(*c*)(ii); or (iii) took into account an irrelevant factor.

[35] It is also appropriate to note the statement of Justice Létourneau of the Federal Court of Appeal in *Massignani*, *supra*, at paragraph 2:

> First, the deputy judge failed to consider and fulfill his role under the *Unemployment Insurance Act*, S.C. 1970-71-72. c. 48 (the "Act"), paragraph 3(2)(*c*), a role that this Court described in *Légaré v. Canada* (1999), 246 N.R. 176 and *Pérusse v. Canada* (2000), 261 N.R. 150, which were followed in *Valente v. Minister of National Revenue*, 2003 FCA 132. This role does not allow the judge to substitute his discretion for that of the Minister, but it does encompass the duty to "verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, ... decide whether the conclusion with which the Minister was 'satisfied' still

> seems reasonable": see *Légaré*, *supra*, at page 179, *Pérusse*, *supra*, at page 162.

[36] In compliance with paragraph 5(3)(*b*) of the Act, it is appropriate to determine whether the Minister, when exercising his mandate, correctly assessed the facts that he retained or assumed, considering the context in which they occurred. A review of the Worker's employment, in light of paragraph 5(2)(*i*) of the Act, revealed the following facts: the Worker's pay, at the beginning of the period at issue, it was $12.50/hour and at the end of the period, at the beginning of 2003, it was $15.00/hour, all paid by cheque. On occasion the Worker received bonuses from the Appellant when the business completed a good contract. The evidence revealed that this occurred one to three times per year and that the bonus could vary between $100 and $150. The Worker's salary was slightly less that the average pay of a cabinetmaker at the beginning of the period at issue, but at the end of the period, it was equal to it. The Worker enjoyed three weeks of paid vacation per year but did not have any fringe benefits. The other workers of the Payor received an hourly wage that varied between $10 and $15 according to their experience and they were all paid by cheque. They had two weeks paid vacation per year during the holiday season. The salary of all workers was determined by the Appellant. According to the evidence, the Worker's salary was reasonable and in accordance with established standards.

[37] With respect to the terms and conditions of employment, it was established that the workers' schedules were 40 hours per week, but the Worker was scheduled for between 50 and 60 hours per week. All the employees, including Nicolas Baron, the Worker, worked from Monday to Friday and they all worked in the Appellant's workshop.

[38] Gabriel Baron supervised his employees' work daily, since he worked with them and he could speak to them when a situation arose. The Worker had the skills required for his job, since the Appellant's sole shareholder had given him the practical training and he had a trade school diploma in cabinet making and millwork.

[39] With respect to the duration of the employment, it was established that business operated year round, manufacturing kitchen and bathroom cabinets and custom-made furniture. Before July 2002, the business' workshop was at the home of the Payor's sole shareholder, Gabriel Baron, and his son, the Worker, had always been involved in this field. When he finished secondary school, the Worker began to work for the Appellant and over the ensuing two years, he took a

cabinet-making course for professional development. One day, the Worker will take over the family business. With respect to the nature and importance of the Worker's work, the evidence showed that it related to the Appellant's operations, which had sales of $202,384.00 as of February 28, 2002. In 2001, the Appellant had two employees, including the Worker, but in 2002, it had seven. Thus the business was growing both in terms of employees and of working space. The Appellant had rented an office in July 2002 and opened a showroom in Québec. Since the Worker had been in contact with the business continuously since he was young, he was very familiar with its operation and his duties were very important. Also, according to the evidence, if he had not been available, the Appellant would have had to hire another person to do this work.

[40] It must therefore be concluded that if they had been at arm's length, the Appellant and the Worker would still have reached a similar contract of employment.

[41] Since the employment is not excluded from insurable employment, it must now be determined whether the Worker's work is truly insurable employment within the meaning of paragraph 5(1)(*a*) of the Act, in accordance with the tests in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 in which the Federal Court of Appeal listed four basic elements that distinguish a contract of service from a contract for services. These are: a) degree of control; b) ownership of the tools; c) chance of profit and risk of loss; and d) the degree to which the employee is integrated in the employer's business.

[42] The evidence clearly showed that the Appellant owned the tools. The Worker received a regular salary plus bonuses according to the company's performance; there was therefore no chance of profit or risk of loss for the Worker. Moreover, the Worker was integrated into the company's operations; he did not work for himself.

[43] In *Industries J.S.P. Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 423, Justice Tardif of this Court summarized the facts, similar to those of the case at issue, in this way:

> Marie-Claude Perreault testified and gave a number of examples to describe and explain her interest, enthusiasm and fervour and that of her brothers with respect to the interests of the appellant company, which operates in the difficult and highly competitive field of furniture building.

> Sharing major strategic responsibilities in the company controlled by Jacques Perreault, who holds 1,000 voting but non-participating shares, Marie-Claude Perreault and her brothers left nothing to chance in ensuring the company's well-being and development.
>
> Each family member was paid more than a reasonable salary and, at year-end, received a bonus that varied depending on the economic performance of the company and the quality of the work performed.
>
> Major decisions were made jointly and by consensus. The family members each devoted at least 60 hours [per week] to their respective duties for the company.
>
> The balance of evidence, therefore, was that the Perreault family members dedicated themselves totally and entirely to the company's business. They invested in it most of their available time (at least 60 hours [per week]) to ensure that the company could succeed in a difficult market where competition is stiff.
>
> The family members affected by the Minister's decision held important, essential positions and were paid salaries probably lower than those the company should have paid to third parties for performing similar duties. This fact alone led the agent for the appellant company to state and conclude that their employment was excluded from insurable employment under paragraph 3(2)(*c*) of the *Unemployment Insurance Act* ("the Act").
>
> . . .
>
> Contributing to and being a partner in the management, administration or development of a business, particularly a small business, means that a person's job description is strongly marked by responsibilities characteristic of those often fulfilled by actual business owners or persons holding more than 40 per cent of the voting shares in the company employing them. In other words, in assessing remuneration, at this level of responsibility, caution must be exercised when a comparison is made with the salaries of third parties; often there are advantages that offset the lower salaries.

and concluded that the employment of these members of the same family, although not at arm's length, was not excluded from insurable employment.

[44] It was established that the Appellant's sole shareholder never gave up control of the business. The Worker testified that [TRANSLATION] "My father has the final word . . . I did not have the authority to sign . . ."

[45] According to the case law, the power of control is important to the analysis of the facts under this test, not the actual exercise of control. In this matter, the power of control was demonstrated by the ownership of shares in the business. In fact, the Worker's father always held all the shares.

[46] The evidence revealed that all the work tools were the Appellant's property. In addition, it was proven that the Worker had no chance of profit or risk of loss, except that he could receive bonuses according to the business' performance. Finally, the Worker's employment was an integral part of the business and his salary was not business income.

[47] This Court must conclude that the Minister made his decision according to the tests mentioned above. He exercised his power legally and in compliance with the case law contained in *Jencan* and *Massignani*, *supra*, and *Métal Laurentide Inc. c. Canada (Ministre du Revenu national - M.R.N.)*, [2003] A.C.I. no 263.

[48] As a result, this Court determines that the Worker's employment during the period at issue was insurable, since the Worker was bound to the Appellant by a contract of service, within the meaning of paragraph 5(1)(*a*) of the Act.

[49] In addition, despite the non-arm's-length relationship between the Appellant and the Worker, this Court is convinced that it is reasonable to conclude that the Appellant and the Worker would have entered into a substantially similar contract if they had been dealing with each other at arm's length.

[50] The appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand Barachois, New Brunswick, this 13th day of April 2004.

"S. J. Savoie"

Deputy Justice Savoie

Translation certified true
on this 18th day of August 2004.

Shulamit Day, Translator