Docket: 2004-3681(EI)

BETWEEN:

JEAN-PAUL LÉVESQUE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 27 and October 28, 2005, at Matane, Quebec

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Denis Tremblay
Counsel for the Respondent:	Jean Lavigne

JUDGMENT

The appeals for the 2000, 2001 and 2002 periods are dismissed and the decision of the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

The appeals for the periods of 1997 to 1999 are allowed and the decision of the Minister of National Revenue is set aside in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of February 2006.

"François Angers"

Angers J.

Translation certified true
on this 29th day of November 2006.
Monica F. Chamberlain, Reviser

Citation: 2006TCC86
Date: 20060224
Docket: 2004-3681(EI)

BETWEEN:

JEAN-PAUL LÉVESQUE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from a decision of the Minister of National Revenue ("the Minister") dated July 19, 2004, in which he determined that the Appellant and Motel Le Campagnard de Matane Inc. ("the payer") were not dealing with each other at arm's length and that it was reasonable to believe that, but for this non-arm's length dealing within the meaning of paragraph 5(2)(*i*) and subsection 5(3) of the *Employment Insurance Act* ("the Act"), they would not have entered into a substantially similar employment contract. The periods in issue are as follows:

- January 5 to October 31, 1997;
- November 11, 1997, to February 12, 1998;
- February 17 to November 27, 1998;
- March 2 to December 3, 1999;
- April 25 to October 14, 2000;
- October 23, 2000, to February 3, 2001;
- April 27 to October 5, 2001; and
- November 21, 2001, to November 22, 2002.

[2] It is admitted that the Appellant and the payer are related persons within the meaning of the *Income Tax Act*. Jocelyne Thibault, the sole shareholder and

directing mind of the payer, is the Appellant's spouse. It is also admitted that the payer was incorporated on May 18, 1985, and operates a 26-room motel that includes a restaurant which serves breakfasts only. The Appellant denies, in whole or in part, the following subparagraphs of the Reply to the Notice of Appeal, where the assumptions on which the Minister based his decision are listed:

> [TRANSLATION]
>
> . . .
>
> (c) The front desk was open from 8 a.m. to 10 p.m., 7 days a week, for a total of 98 hours per week.
>
> (d) Ms. Thibault was the receptionist.
>
> (e) The restaurant is operated only during the tourist season, which is from late April to late October or November.
>
> (f) From May 31, 1997, to May 31, 2003, the payer's gross revenues were stable, varying from $220,000 to $230,000 per year.
>
> (g) The Appellant's principal duties were to maintain the building, including repairs, and work at the motel's front desk.
>
> (h) During the years in issue, the Appellant also did renovations: he redid the panelling and part of the plumbing and electrical wiring, laid tile and painted.
>
> (i) The Appellant also repaired a few fireplaces.
>
> (j) The Appellant devoted only 20% of his time to the front desk and spent no time there during the summer.
>
> (k) Neither the Appellant nor the payer took account of the hours actually worked by the Appellant.
>
> (l) In 1997, the Appellant received no remuneration from the payer for four weeks. This was the case for 16 weeks in 1998, 11 weeks in 1999, 18 weeks in 2000, 22 weeks in 2001 and 36 weeks in 2002, even though the payer's business activity was the same each year.
>
> (m) The number of hours of work for which the Appellant was paid fell from 1415 hours in 1997 to 640 hours in 2002, even though the Appellant's workload did not diminish.
>
> (n) The payer's maintenance, repair and supply expenses were the same from 1997 to 2000 and then increased considerably in 2001, 2002 and 2003, and yet the number of hours that the Appellant reported having worked diminished year after year.
>
> (o) During the years in issue, the Appellant rendered services to the payer, without reported remuneration, outside the periods in which he was on the payer's payroll journal.
>
> (p) In a statutory declaration that she signed on May 22, 2003, Jocelyne Thibault specifically stated that the Appellant rendered unpaid services to the payer while drawing unemployment benefits.

(q) Also, in a statutory declaration that he signed on May 22, 2003, the Appellant stated that he rendered services to the payer during periods in which he drew unemployment benefits.

(r) The Appellant's purported periods of work did not correspond to the periods in which he actually worked.

(s) Given the nature of the Appellant's duties, the payer required his services throughout the year.

[3] All the circumstances which caused the Minister to conclude that the contract of employment in the case at bar would not have been substantially similar but for the non-arm's length dealing are disputed. Ms. Thibault acknowledges that the gross revenues during the years in question were stable, standing at approximately $220,000 per year, but that 50% of her revenues were earned during the tourist season, which begins in June and runs through September. During this season, the payer has seven employees. During the rest of the year, the payer has only four employees. To operate its motel, the payer needs a night watchman who works 10 hours a day every day of the week; a cook for the restaurant, who works 4 hours every day of the week; housekeepers and laundry workers, whose number depends on the time of the year; and a front desk attendant every day of the week. The only position not filled throughout the year is that of the Appellant, who works on maintenance and at the front desk as needed. Certain other employees were hired during the periods in question to help at the front desk.

[4] The motel was built in 1967. It needed major repairs, and, from the years following its purchase until 2002, the payer renovated two or three rooms each year. In the first two years, Ms. Thibault assigned the renovation work to the night watchman or to contractors. Thereafter, she gave them to the Appellant, who had just retired. The Appellant began working for the payer in 1987. The bulk of his work was done during the tourist season. The Appellant renovated rooms in June and then worked on lawn maintenance, repairs and regular maintenance.

[5] The Appellant's hours were Monday to Friday from 8 a.m. to 5 p.m. and he was paid $15 per hour. The Appellant worked full-time during the tourist season and part-time the rest of the year. I will explore the details of the Appellant's periods of work as entered in the payroll journal during the years in question later. For her part, Ms. Thibault looked after the front desk every day throughout the year from 8 a.m. to 10 p.m. Her office is located close to the front desk and restaurant, and a chime notifies her each time the door opens. She and the Appellant eat their meals in the restaurant throughout the year.

[6] According to Ms. Thibault, all the hours that the Appellant worked for the payer were entered in the payroll journal and reported to the employment insurance authorities. However, Ms. Thibault does acknowledge that the Appellant might occasionally have responded to a guest who arrived at the front desk, and might have done odd jobs outside his period of employment. She says that the Appellant was on the motel property because he ate his meals at the motel restaurant. The Appellant was assigned to the front desk for roughly 20% of his hours and this percentage was lower during the tourist season. The Appellant, for his part, claimed that he worked at the front desk from 10 to 15 hours per week and that the rest of his time was devoted to renovations and regular maintenance.

[7] In 1997, the Appellant worked 40 hours a week for the payer from early April to the first week of November, except for two weeks when he worked 44 hours, for a total of 31 weeks. During a total of 17 other weeks, he worked from 5 to 15 hours per week. He did not work for 4 weeks. Thus, he worked 1415 hours in total, and his hourly rate was $15. His work is described as maintenance and front desk work. According to the payroll journal for 1997, someone was assigned to the front desk 40 hours per week from April to August.

[8] According to Ms. Thibault, the Appellant was hired earlier in 1997 because Ms. Thibault was away for four months to work as a federal returning officer and census coordinator. This explains why the Appellant had to work the number of hours reported. Ms. Thibault decries the fact that, during the investigation, none of the officers asked her to explain the number of additional hours worked by the Appellant or the type or nature of the work. The number of additional hours worked by the Appellant was roughly 400 hours. The Appellant confirmed that 1997 was an election year and that he replaced his spouse at the front desk in addition to looking after the maintenance of the motel.

[9] In 1998, the Appellant worked from January to March for a total of 11 weeks. During 2 of these weeks, he worked 6 hours per week, and during the other 9 weeks, he worked 10 hours per week. He returned to work full-time in mid-June and stayed on until November for a total of 24 weeks at 40 hours per week. He was paid $15 per hour for a total of 1062 hours. Thus, he went 16 weeks without pay. Ms. Thibault explained that the Appellant was absent in April and May because she did not need his services, and that he was hired to work from June to November because of the work that needed to be completed and because of an extended tourist season. From January to June, a receptionist worked at the hotel part-time for 94.5 hours per month.

[10] In 1999, the Appellant worked 40 hours per week for 27 weeks, beginning in the second week of June and ending on the first week of December. He was not paid in the last three weeks of December and in January and February. From March to early June, he was paid for 6 or 9 hours of work per week. He worked a total of 1182 hours at a rate of $15 per hour. According to Ms. Thibault, the small repairs in January and February were done by the night watchman, and all the Appellant's hours of work were reported.

[11] In 2000, the Appellant did not work until the last week of April, when he began working nine hours per week until late May. From June to mid-October, he worked 40 hours per week. After that, he worked 18 hours per week, except the last week of December. Thus, he went 18 weeks without pay, and worked 20 full-time weeks and 14 part-time weeks, for a total of 1023 hours at a rate of $15 per hour. This was an election year, and Ms. Thibault was a returning officer; she carried out her duties in October and November. Ms. Thibault said that the Appellant worked at the front desk with the night watchman, who was assigned to the day schedule. Ms. Thibault was there in the evenings and hired another part-time employee for the entire year, except July. This employee staffed the front desk in October and November and worked 39 to 52 hours per week, except for two 7-hour weeks.

[12] In 2001, from January to April, the Appellant worked part-time for five weeks. During four of those weeks, he worked 8 hours a week, and for one week, he worked 25 hours. In May and June, he was paid for 2 eight-hour weeks, 6 twenty-five hour weeks, and a single 40-hour week. From July to the first week of October, he worked full-time 40 hours per week. At year's end, he was paid for only 2 eight-hour weeks. Thus, he was unpaid for 22 weeks, paid for 15 forty-hour weeks and 15 part-time (8 to 25-hour) weeks. Thus, he worked for 839 hours at a rate of $15. The night watchman worked all year and another employee worked part-time all year. Ms. Thibault explained that the annual room renovations began in May but that during that year, she had to obtain more materials because of a sewer backflow and had to do business with private contractors, some of whom supplied the materials. She acknowledged that in 2001, most of the renovations had been completed and only regular maintenance remained to be done, except perhaps in one room. She said that this explains the reduction in the Appellant's hours in 2001 and 2002.

[13] In 2002, the Appellant worked a total of 640 hours. He worked only 16 forty-hour weeks, beginning in mid-July and ending in late September, plus 2 weeks in October and 3 weeks in November. His hourly rate remained $15.

However, there were more employees, including one part-time front desk attendant. According to Ms. Thibault's explanations, the Appellant worked fewer hours because the renovations were finished.

[14] For 2003, the payroll journal tendered in evidence ends on May 17 and states that the Appellant worked two weeks in May: 15 hours during the first week and 18 hours during the second, for $15 per hour.

[15] The Appellant considers himself the payer’s handyman. He has been working for the payer since 1987 and his employment was always considered insurable until 1997. His home is five minutes by car from the motel and he goes there every day because his wife works there from 8 a.m. to 10 p.m. He eats his meals at the motel and replaces his wife at the front desk when she has to be away.

[16] The annual room renovations began in June, and once they were done, the Appellant looked after grounds maintenance, flowers, landscaping, painting and general maintenance. He says that he worked all the hours stated in the payroll journal throughout the year. In addition, he claims that he never banked hours in order to qualify for employment insurance. He says that his hourly rate is consistent with the type of work that he did and was acceptable to him. He says that his hours declined because there was less renovation work to do as the years went by, leaving only maintenance work. He adds that he sometimes performed a few services outside paid hours, but that this consisted of very light work such as replacing a light bulb. If a repair was going to take hours to complete, the payer would enter the hours in the payroll journal.

[17] In a written declaration dated May 22, 2003, Mr. Lévesque acknowledged performing services for the payer during the winter, while he was receiving employment insurance benefits. In the statement, he explained that the expenses during these months exceeded revenues. At the hearing, he tried to explain what he meant: he could not be employed full-time throughout the year because the payer’s income did not allow for this, and in any event, the work in question was very light. This issue was raised after one or more employees stated that the Appellant rendered services during the winter months.

[18] In a written declaration dated May 23, 2003, Therèse Desrosiers confirmed that the Appellant worked for the payer on a regular basis throughout the year. She modified her answer at trial by explaining that she had answered the question without thinking, because she only saw the Appellant work from time to time in 2002 and 2003, and before those years, she did not work during the winter and was

therefore unable to confirm what she had written in her statement. She said that she receives instructions from Jocelyne Thibault regarding her work. No other employee testified to confirm the affirmation that the Appellant worked full-time throughout all or some of the years in question.

[19] Denis Hamel is the appeals officer who made the ministerial recommendations in this matter. In addition to reviewing the results of the investigation by Daniel Levesque, regional major investigations specialist, he interviewed the Appellant and Jocelyne Thibault over the telephone in the presence of their counsel for approximately two and one-half hours. He tendered his CPT110 report, in which he stated the problems that this approach caused him. Despite these problems, he managed to obtain enough information to make his findings and report to the Minister on the terms and conditions of the Appellant's employment with the payer. With regard to the terms and conditions of employment, Mr. Hamel attempted, for all the periods in issue, to reconcile the Appellant's work schedules based on the time he spent at the front desk in relation to the time he spent on maintenance and renovation. He had to clear up the statutory declarations and the information obtained during the telephone interview that he felt were inconsistent. He also tried to clarify the issue of whether the Appellant had indeed rendered services at the front desk while he was receiving employment insurance benefits. This issue was raised by Lise Desrosiers, a housekeeping employee, who had stated that the Appellant worked with her during the winter months. Lise Desrosiers did not, however, testify at the hearing of this matter, and her declaration is not in evidence. Based on the foregoing, Mr. Hamel found that it was difficult to establish the Appellant's work schedule, and that the terms and conditions of his employment would not have been the same if the parties had been dealing with each other at arm's length.

[20] Mr. Hamel made the same finding with respect to the duration of the employment. After analyzing the maintenance expenses during the periods in question and the minimum number of hours worked during periods in which the motel was less busy, he determined that the duration of the Appellant's employment does not reflect the actual work that he did. He found it strange that, even though the Appellant's services were needed throughout the year because of the nature of his duties, he was presumably the only employee with regular duties who was not remunerated on a regular basis. According to Mr. Hamel, the duration of the Appellant's work is explained by the fact that the motel could not function properly without his important maintenance and front desk work year-round.

[21] On the subject of remuneration, given the Appellant's dual function, the appeals officer did not accord much importance to the hourly rate, but he questioned the fact that the Appellant was not given a raise since the first period, whereas most of the other employees were given the prescribed increase in the minimum wage. Lastly, the appeals officer also took account of the fact that the Appellant borrowed money to help his wife buy the motel, though I must say that this was a relatively minimal amount in relation to the purchase price. The Appellant made this loan before he was hired.

[22] During his testimony, the appeals officer acknowledged that he did a global analysis of all the periods in question. In fact, as an example of this, he admitted that while he is convinced that the Appellant's employment was not insurable in 2002, he determined that it was insurable from 1997 to 2001. He claimed that he did not get all the answers to his questions during the telephone interview, and that he doubted Jocelyne Thibault's credibility, particularly with regard to her claim that she worked 14 hours a day, 7 days a week, considering that she reported income from other sources that same year. However, he admitted that he was unaware of the fact that, in 2000, a night watchman also worked at the front desk during the day, thereby freeing Jocelyne Thibault and enabling her to do something else. The appeals officer ended his testimony by insisting that all the periods have to be examined globally, but acknowledging that if the facts that arose in 1997 had been the only facts in issue, we would not be in court today.

[23] The roles of the Minister and the Court in cases where the former must determine if an employment is excluded from insurable employment by reason of non-arm's length dealing were defined by the Federal Court of Appeal in *Légaré v. Canada*, A-392-98, May 28, 1999, [1999] F.C.J. No. 878 (QL) where Marceau J.A. summarized in the following terms, at paragraph 4, the approach that must be adopted:

> The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same

> kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must 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, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[24] In fact, the Federal Court of Appeal reiterated its position in *Pérusse v. Canada*, A-722-97, March 10, 2000, [2000] F.C.J. No. 310 (QL). Marceau J.A., referring to the following excerpt from *Légaré,* added the following at paragraph 15:

> The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.

[25] The provisions of the Act under which employment is excluded from insurable employment where the employer and employee are not dealing with each other at arm's length, and the provisions that apply to situations where such non-arm's length dealing is no longer deemed to exist, are worded as follows:

> 5. . . .
>
> Excluded employment
>
> (2) Insurable employment does not include
>
> . . .

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

[26] In *Louis-Paul Bélanger v. M.N.R.*, 2005 TCC 36, Archambault J. of this Court analyzed a set of decisions of both the Federal Court of Appeal and the Tax Court of Canada on the issue of non arm's length dealing and the process that the Court must follow in an appeal from a decision of the Minister based on the statutory provisions quoted above.

[27] This appeal spans several periods, and the Minister's decision was based on a broad approach that encompassed all these periods and compared them and analyzed them as a whole. The evidence clearly shows that these successive periods did not necessarily resemble each other. It is clear simply from looking at the Appellant's hours during each period in issue that his workload diminished greatly from year to year and that there are undoubtedly explanations for this situation. Those explanations are at the heart of this matter, and the weight that they will be given depends on the veracity of the testimony and other evidence concerning the payer's activities.

[28] The business in question was operated throughout the year and its activities increased during the tourist season. According to the evidence, seven employees are needed in order to operate during the tourist season, and no fewer than four employees are needed during the low season. The front desk must be staffed at all times, that is to say, 24 hours a day. Room service must be provided on a regular basis, and a cook is needed for breakfast. The front desk is staffed by owner Jocelyne Thibault from 8 a.m. to 10 p.m. and by the night watchman the rest of the time. The front desk has occasionally been staffed by students, and the Appellant

has worked at the front desk part-time during the low season and occasionally during the tourist season, contrary to the Minister's finding on this issue. The Appellant is the employee responsible for building maintenance, repairs, grounds maintenance and the front desk. During the earlier periods, he did renovation work in the rooms, notably replacing walls, plumbing, and electrical equipment, as well as retiling and repainting.

[29] According to Ms. Thibault and the Appellant, contrary to the Minister's claims, all the Appellant's hours were entered in the payroll journal. This statement of theirs seems credible to me in relation to the earlier periods in issue because the payroll journal indicates that, in addition to his full-time work, the Appellant worked part-time during several periods throughout the year, resulting in a small number of unpaid weeks at the beginning of the periods — 4, 16 and 11 weeks — a figure that increases to 18, 22 and 36 weeks for the last three years. As for the hours worked, it decreased from 1415 in 1997 to 640 in 2002. Considering the number of hours that Ms. Thibault worked at the front desk seven days a week, in relation to the number of employees listed in the payroll journal, there is reason to believe that the Appellant worked more hours than were entered in the payroll journal.

[30] The Minister does not appear to have accepted Ms. Thibault's explanations regarding the reduction in her hours and weeks of work, or her explanations to the effect that the Appellant was called upon more often to do replacement work during the election and census years. Nor does the Minister appear to have accepted Ms. Thibault's explanations to the effect that she did her work in her own office, close to the front desk, without calling on the Appellant during these periods. It appears that the Minister preferred the theory that the Appellant worked without counting his hours. The Minister did not believe the statement that an employee named J.F. Audet, not the Appellant, worked at the front desk when Ms. Thibault needed to be away.

[31] One of the explanations given for the Appellant's allegedly reduced hours of work was that the room renovations ended in late 1999 and that certain other work was given to contactors later on, specifically from 2001 to 2003. All of these explanations are credible in my view, and account very well for the reduction in the Appellant's hours of work from year to year. If one believes the allegation that Ms. Thibault spent a huge amount of time at the front desk, it is plausible that the Appellant's services were not required as often as the Minister seems to believe.

[32] However, the questions that the appeals officer might have had regarding the hours actually worked by the Appellant appear to have arisen because of the statements that the Appellant made when he was asked to explain why certain employees of the payer had stated that the Appellant worked at the motel during the winter while on unemployment. Without directly answering the question, he said that one simply needed to look at the revenues: when it costs $16,000 to operate the motel, and revenues total $10,000 or $11,000, it is difficult. One of the employees able to report on this subject is Thérèse Desrosiers, who explained that she could not have seen the Appellant at work during the winter months because she did not work then. She was only there in the winters of 2002 and 2003, at which time she only saw the Appellant occasionally. The other employee who might have seen the Appellant work did not testify. As for the Appellant, he acknowledges that he rendered services while receiving benefits. Based on all this, it seems clear to me that the terms, conditions and duration of the Appellant's employment changed over the years to such an extent that the Minister was justified in concluding that the Appellant's periods of employment did not correspond to the periods that he actually worked, particularly during the last periods in question.

[33] It must be acknowledged that with this type of business, it is difficult to establish a work schedule for an employee who does maintenance and repair work outside the tourist season. However, the fact that his services are required by the payer throughout the year on an as-needed basis must be taken into account. The periods when the Appellant was paid for part-time work during the years in issue varied from 11 to 18 weeks. However, this part-time work was done during the winter months in 1997, 1998 and 1999. Ms. Thibault explained that the night watchman did repairs during this period. In 2000, the Appellant worked for only five weeks during the winter months, and in 2001 and 2002, the Appellant did not work at all during the winter months. The Appellant provided no explanation for these last three years.

[34] For these reasons, the Minister's conclusion regarding the periods of April 25 to October 14, 2000, October 23, 2000 to February 3, 2001, April 27, 2001 to October 5, 2001, and November 21, 2001 to November 22, 2002, seem reasonable to me. Thus, I find that the Appellant was not employed in insurable employment within the meaning of the Act during these periods. The Appellant did not discharge the burden of proof. With respect to the periods of January 5 to October 31, 1997, November 11, 1997 to February 12, 1998, February 17, 1998 to November 27, 1998, and March 2, 1998 to December 3, 1999, the Minister's conclusion does not appear reasonable to me

under the circumstances because there is insufficient evidence to support it. The appeals are therefore dismissed for the 2000, 2001 and 2002 periods, and allowed for the 1997 to 1999 periods inclusively.

Signed at Ottawa, Canada, this 24th day of February 2006.

"François Angers"

Angers J.

Translation certified true
on this 29th day of November 2006.
Monica F. Chamberlain, Reviser

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