Docket: 2004-3957(EI)

BETWEEN:

MARCHÉ DUCHEMIN & FRÈRES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

RICHARD DUCHEMIN,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 22, 2005 at Montréal, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Agathe Cavanagh
Agent for the Intervener:	Alain Savoie

JUDGMENT

The appeal is allowed and the decision of the Minister is vacated, in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 5th day of May, 2005.

" S.J. Savoie"

Savoie, D.J.

Translation certified true
on this 31st day of March, 2006.
Garth McLeod, Translator

Citation: 2005TCC274
Date: 20050505
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REASONS FOR JUDGMENT

Savoie, D. J.

[1] This appeal was heard at Montréal, Quebec on February 22, 2005.

[2] This appeal concerns the insurability of the employment of Richard Duchemin, the worker, while in the service of the Appellant, from January 1, 2003, to January 29, 2004, the period at issue. On July 5, 2004, the Minister of National Revenue (the "Minister") informed the Appellant of his decision, according to which the worker held insurable employment during the period at issue.

[3] In his decision, the Minister found that the worker held insurable employment with the Appellant under the terms of a contract of service, basing his decision on the following assumptions of fact:

> 5.(a) the Appellant was incorporated on January 6, 1984; (admitted)
>
> (b) the Appellant operated a grocery store under the IGA banner; (admitted)

(c) the opening hours of the Appellant are from 6 am to 11 pm, 7 days a week; (admitted)

(d) the Appellant hired approximately sixty (60) employees per year; (denied)

(e) the Appellant had a turnover of approximately $17 million; (unknown)

(f) since 1996, the worker had served as manager of the store; (admitted)

(g) the duties of the worker consisted of organizing and controlling all the operations of the store, hiring and supervising the section managers, drawing up schedules and supervising marketing; (to be completed)

(h) Normand Duchemin, the majority shareholder of the Appellant, devoted between and 2 and 3 hours of work per day on behalf of the Appellant; (admitted)

(i) the worker made the operational decisions for the Appellant; (admitted)

(j) the worker was required to report to the Appellant at formal meetings; (denied)

(k) the worker performed his duties at the Appellant's place of business; (to be completed)

(l) the worker worked from 7 am to 6 pm, 5 days a week, for the Appellant, and had Wednesdays and Sundays free; (denied)

(m) the worker had five weeks' paid annual vacation; (denied)

(n) the worker worked between 45 and 55 hours per week for the Appellant; (denied)

(o) the worker was paid $1,565 a week; (admitted)

(p) the Appellant never renounced his authority over the worker; (denied)

(q) the worker incurred no expenses in the performance of his duties; (denied)

(r) the worker incurred no financial risk in the performance of his duties for the Appellant; (denied)

(s) all the materials and equipment used by the worker belonged to the Appellant; (denied)

(t) the duties of the worker formed an integral part of the operations of the Appellant; (admitted)

6. The Appellant and the worker are related within the meaning of the *Income Tax Act* since:

(a) the shareholders of the Appellant were Normand Duchemin, majority shareholder and Les Placements DJR Duchemin Inc.; (admitted)

(b) the shareholders with voting rights of Les Placements DJR Duchemin Inc. were:

Normand Duchemin	55 % of the shares
Daniel Duchemin	15 % of the shares
Jean Duchemin	15 % of the shares
the worker	15 % of the shares; (admitted)

(c) Normand Duchemin is the father of the worker and Daniel and Jean Duchemin are the brothers of the worker; (admitted)

(d) the worker was related by blood to a person who controlled the Appellant; (admitted)

7. The Minister also determined that the Appellant and the worker were deemed to be at arm's length in the context of this employment, as the Minister was satisfied that it was reasonable to conclude that the Appellant and the worker would have concluded a virtually similar contract of employment had they been at arm's length, having regard to the following circumstances:

(a) the worker’s salary was reasonable in view of the work performed and the ability of the Appellant; (denied)

(b) the worker had no taxable automobile benefits and the Appellant paid none of the worker's personal expenses; (to be completed)

(c) the worker had a flexible work schedule which corresponded to the needs of the Appellant; (denied)

(d) the worker had invested no money, nor had he guaranteed any of the Appellant’s loans; (admitted)

(e) the Appellant allowed the worker considerable freedom in performing his duties, but the Appellant had the last word on major decisions; (denied)

(f) the worker's conditions of employment were not unreasonable in light of the position he held in the business, i.e., the worker received five weeks' vacation and had unlimited sick days, whereas the other employees had four weeks' vacation and four days of sick leave per year; (denied)

(g) the period of employment coincided with the operations of the Appellant; (to be completed)

(h) the work performed by the worker was essential to the business of the Appellant. (admitted)

[4] The following was revealed by the evidence submitted at the hearing.

[5] The Appellant hired between 90 and 100 employees per year. The duties of the worker consisted of looking after the planning, development and control of the business. He was the one who looked after customer service and who directed the entire management side of the business. He was also the one who managed all the staff, with the help of the department managers. It was established that the worker was involved in everything. He would even do the sweeping and pick up things that had fallen on the floor. He was the one who hired and supervised the department managers and established the schedules and the marketing of all food products. During the period at issue, he shared management responsibilities of the business with his brother, Jean Duchemin. They received the same salary. It was also established that the three brothers, Daniel, Jean and the worker, received the same salary. This produced the comment from the Appellant and from the shareholders that they found it strange that the jobs of the brothers of the worker had been found non-insurable, while the Minister maintained that the employment of the worker was insurable.

[6] During the period at issue, the salary of the worker and of his brothers was $1,065 per week. Their salaries had been determined by the worker and his brothers, in light of their individual needs and were not in any way tied to their duties or to their performance. The three brothers had also increased this salary by $500 a week as a bonus. The bonus was also determined on the basis of the needs of the worker and of his brothers. The evidence showed that the worker and his brothers had the authority to adjust this salary and the bonus as they saw fit. Within the company, they were the only ones to benefit from such an arrangement.

[7] The work of the worker was not supervised in any way. He had no schedule, worked the hours that he wanted to, was absent when he wanted, and for as long as he wanted, and did not have to report to anyone. He was, with good reason, considered the owner of the business, as was acknowledged by his father, the majority shareholder.

[8] In contrast to the other employees, the worker's hours of work were not recorded, but this does not mean that the company did not benefit from his long hours of work. Sometimes, during renovations to the store, he would remain in the store for up to 36 hours straight. Depending on the season, he could work up to 100 hours in a week. He was the one who often had to get up at night to check whenever the alarm system was triggered. He also, on occasion, had to stay up all night supervising repairs to equipment, such as compressors.

[9] Normand Duchemin, the father of the worker and the majority shareholder, stated at the hearing that he did not know the worker's schedule, but that he knew that he took more time to be with his children. Moreover, Mr. Duchemin, the father, stated that he did not know how many employees the company had. He acknowledged that work, such as that performed by the worker, was never finished. He also confirmed that the worker did not have to report to anyone, that he had a free hand in everything, that he was the one who made all the decisions and that he was in agreement with that, because it was his business: "It's the children's business" he stated.

[10] The majority shareholder acknowledged that the worker spent time at the business owned by his mother and his sister, and in Chomedy, where his brothers operated another food store. The evidence also revealed that the worker visited Alimentation Duchemin et Lacase on a regular basis in an advisory capacity. That business is operated by his father and an associate.

[11] It was established that the worker did a lot of work at his home, where he was equipped with a computer which he used over 50% of the time for the business. That was also where he prepared his advertising for the ethnic products that he stocked in the store. He had acquired a digital camera at a cost of over $500 and took between 500 and 1,000 photos during the period at issue, all in preparing the advertising for his products. He did all that at his own expense. When he was at home, in the evenings and on weekends, he responded to emergencies caused by mechanical breakdowns and the triggering of the alarm.

[12] The worker uses his own vehicle in the performance of his duties, although he occasionally also uses the vehicles belonging to the Appellant. He has a company credit card for his personal use and is not supervised or controlled in any way; he is the one who controls it.

[13] The evidence revealed that the worker receives four weeks' vacation annually but, unless he is travelling abroad, he visits the store anyway. He, himself, decides when he takes his vacation. He also receives unlimited sick leave, while the other employees are entitled to only four days' paid sick leave per year. The worker has sole signing authority for the business.

[14] Normand Duchemin testified at the hearing that since 1993 he no longer had the final say, but the worker and his brothers did. With regard to the Appellant, Mr. Duchemin, the father, acknowledged that the worker has a free hand: "If he makes mistakes, regardless at what level, that's his problem," he stated. He also stated that the worker had made a number of decisions with which he disagreed, even though these decisions had, in the final analysis, proved to be farsighted and profitable. He gave as an example the decision to launch into the ethnic food market, which was the reason for the purchase of the food store in Chomedy, an initiative which he considered much too big for the worker and his brothers. When he was asked during the cross-examination whether he believed that the work of the worker outside the business had been detrimental to the Appellant, he replied that, in his opinion, it had had a detrimental effect on the operations, but he had nonetheless allowed him to do so. He added that since 1993 he had never opposed any of the worker's plans. He stated: "I have not contradicted him on a single occasion since 1993".

[15] In his Reply to the Notice of Appeal, the Minister states that the worker had no financial risk in the performance of his duties for the Appellant. The worker expressed his total disagreement with this statement and maintained that performing his duties was crucial to the business and to his personal financial interest, since if the business did not operate efficiently, it would have to cease operations, which could potentially result in his own financial ruin.

[16] The evidence revealed that the position held by the worker commanded a salary at this point of approximately $1,100 a week, without bonuses, while the worker with his salary earned approximately $1,950 a week, and that he set his own salary. The majority shareholder acknowledged in his testimony that he earned that much because he was his son, quite simply.

[17] The Deputy Attorney General cited paragraphs 5(1)(*a*) and 5(2)(*i*) and sections 91 and 93 of the *Employment Insurance Act,* S.C. (1996) c. 23 (the *"Act"*), as well as sections 251 and 252 of the *Income Tax Act,* R.S.C. (19850, c. 1 (5th supplement), amended.

[18] He maintains that the worker held insurable employment during the period at issue, as this employment was performed under the terms of a contract of service, within the meaning of paragraph 5(1)(*a*) of the *Act.*

[19] He further maintains that this employment was insurable as it was not covered by paragraph 5(2)(*i*) of the *Act.* In fact, the Appellant and the worker are deemed to be at arm's length in the context of this employment, as the Minister was satisfied that it was reasonable to conclude, having regard to all the circumstances, that they would have concluded a virtually similar contract of work had they been dealing at arm's length.

[20] The Appellant is asking this Court to overturn the decision of the Minister. But before proceeding to analyze the employment of the worker under paragraph 5(1)(*a*) of the *Act,* it is necessary to examine it from the perspective of paragraph 5(3)(*b*) of the *Act,* since the worker and the Appellant are related within the meaning of section 251 of the *Income Tax Act,* as the Minister agreed, since the employment of the worker is excluded under paragraph 5(2)(*i*) of the *Act.* The following is an excerpt from the applicable *Act*:

INSURABLE EMPLOYMENT

5. (1) Subject to subsection (2), insurable employee 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;

...

(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*):
>
> ...
>
> (*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.

[21] The circumstances of the employment of the worker were the subject of the testimony of the worker and of the majority shareholder at the hearing. I have reproduced above in these reasons the relevant portion of this testimony. I must say that the Appellant submitted evidence which successfully refuted many of the assumptions of fact stated by the Minister.

[22] This Court, faced with a task similar to the one, in the instant case, expressed itself as follows in *Putter v. Canada (Minister of National Revenue – M.N.R.)* [2000] T.C.C. No. 92, in the words of Judge Rowe:

> I do not intend to reiterate the evidence in the within appeals because I have examined it in the course of the process leading up to my decision to intervene. It is reasonable to conclude that after 21 years and 15 years with the corporation, David and Daniel Putter, respectively, were not employed under circumstances – including consideration of their payment of salary (below industry standard), the amount of work performed, lack of holiday time, the ability to control their remuneration, the absence of any need to follow dictates of corporate structure in accordance with majority shareholding by others and, over the course of many years, putting themselves at personal risk for company debt, clearly established that they would not have entered into a similar contract of employment with Equinox if they had been dealing with the corporation at arm's length. It strikes me as difficult – on an objective basis – to assess whether it is reasonable to conclude that the parties would have entered into a substantially similar contract of employment unless there is some evidence before the Minister as to comparable salaries or working conditions within

> the same – or related – industry. There is obviously room for using a yardstick against which a particular employment is to be measured because the alternative would be to permit the parties themselves to put forward the proposition that, notwithstanding the deviation from normal business practices in a similar marketplace, they would still have entered into the contract of employment on a purely subjective basis. Certainly, that is how the process works when the shoe is on the other foot and benefits have been denied to claimants because their conditions of work for a related employer do not - when all the facts have been considered – measure up to the usual or normal conditions that applied – or could be expected to apply - to non-related workers under a substantially similar contract of employment.

[23] The preceding passage is particularly relevant in view of the fact that Counsel for the Minister at the hearing cast doubt on the statements by the witnesses for the Appellant, because they had not made them known beforehand.

[24] The Federal Court of Appeal in *Légaré v. Canada (Minister of National Revenue – M.N.R.),* [1999] F.C.A. No. 878 ruled on the role of that Court, which was entrusted with deciding a case like that in the case at bar, in the following terms:

> ... 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 based 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.

[25] Judge Archambault of this Court also added his clarifications as to the rights and duties of an Appellant when he disputed the Minister's assumptions. He wrote as follows in paragraph 33 of *9033-9979 Québec Inc. v. Canada (Minister of National Revenue – M.N.R.),* [2000] T.C.J. No. 788:

> [TRANSLATION]
>
> Paragraph 41 of the same decision also specifies on whom it falls to challenge the assumptions of fact on which the Minister relied in

making his decision: [*Attorney General of Canada v. Jencan Ltd.*, [1998] 1 F.C. 187, [1997] F.C.J. 876]:

> Although the claimant, who is the party appealing the Minister's determination, has the burden of proving its case, this Court has held unequivocally that the claimant is entitled to bring new evidence at the Tax Court hearing to challenge the assumptions of fact relied upon by the Minister.

[26] Judge Margeson of this Court in *Bayside Drive-In Ltd. v. Canada (Minister of National Revenue – M.N.R.)* [1997] T.C.J. No. 1212, described at paragraph 33 a situation analogous to that being analyzed by this Court in the case at bar, when he wrote as follows:

> In argument, the agent for the Respondent took the position that all of the shareholders performed services for the business when they were not on the payroll. All related employees were paid on the basis of salaries irregardless of the number of hours that they worked. All related employees received vacation. Unrelated employees were paid on an hourly basis. Their records of hours were kept. They were only paid for the hours that they worked. They were paid the minimum wage. They were paid a vacation pay under the *Vacation Pay Act* rather than being given vacation like the related employees were. There were no set hours for the Appellants and no record of their hours was kept. They received the same pay regardless of the hours that they worked.

[27] Judge Alain Tardif, of this Court, ruled similarly when he found that the work of the Intervener more closely resembled that of the owner of a business than that of an employee in *D'Orsay Restaurant Pub Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2004] T.C.J. No. 465, in the following terms:

> [7] She was responsible for hiring, training and dismissing most of the employees of the business.
>
> [8] She could be absent at any time and plan her work around her family and personal concerns, as she wished and at her own convenience, without having to ask anyone's permission.
>
> [9] Whereas all employees' absences due to illness had to be justified by a medical certificate, the Intervener did not have to explain or give reasons for absences due to medical or any other reasons.

> [10] When absent, employees saw their wages cut by an amount consistent with the duration of the absence. The Intervener stated that she had received the same salary regardless of her hours of work or the duration of her absence.
>
> [11] At one point, the Intervener received a $17,000 pay increase justified on the grounds of an improved standard of living in view of the fact that business was good. The wages of the other employees were based on their experience and ability, not at all on the prosperity of profits of the business.
>
> [...]
>
> [20] The weight of the evidence is that the work performed by the Intervener for the Appellant was in no way similar or comparable to that which the other employees performed or which a person responsible for the same administrative work should or could have performed. The Intervener's conditions of employment were much more comparable to those of an owner or co-owner of a business than those of an employee.

[28] In support of his claims, the agent for the Appellant cited *Edward Bergen v. Canada (Minister of National Revenue – M.N.R.)*, [2002] T.C.J. No. 73 of this Court, where facts very similar to those in the case at bar were reviewed by Deputy Judge Porter.

[29] In reaching his decision, in *Bergen*, *supra,* the Judge also relied on the fact that the economic interests of the Appellants were inextricably linked to those of the corporation, as is the case here, between the worker and the Appellant. He expressed himself in these terms:

> [63] I do not intend to set out all of the evidence again. I have already referred to the significant facts. It is clear in my mind, that the two brothers were the company. Their economic interests were inexorably bound up with those of the company. Although perhaps they signed the guarantees in their capacities as shareholders or directors, the fact that they did so shows an inextricably inter-woven relationship between the company and the brothers. Their economic interests were tied to the company and those of the company were tied to theirs, to such an extent that it could not be said that there was an independent or adverse economic interest existing between them. They were the operating mind of the company, they themselves were related and had a common family economic interest, which was indivisible from that of the company. This is exactly the situation contemplated by Parliament in setting up the

> unemployment insurance scheme, to exclude persons, who are operating or controlling their own businesses, in an entrepreneurial fashion, from participating in that scheme and being able to claim benefits if their employment fails.

[30] This Court again addressed a situation involving an arm's-length relationship in *Marché du Faubourg Ste-Julie Inc. v. Canada (Minister of National Revenue – M.N.R.)* [2003] T.C.J. No. 513, where Judge Dussault excluded from insurable employment the work of employees who were working in the following circumstances:

> [19] When talking about the tasks or the responsibilities that are given to them, the remuneration, the salary and bonus, (both items must be taken into account), the work timetable, sick leaves, the advantages they enjoyed, courses, conventions, trips, use of credit cards, all these conditions, I have seen almost nothing in the evidence that I have heard today that make the work conditions of these two individuals similar to those of the other managers in the same store.
>
> [20] We could also discuss the guarantees that were given by these individuals, of life insurance, all in all, I am not going to repeat all the evidence that I heard today. In my opinion, there is almost nothing similar.
>
> [21] So, why do they have all these conditions that are very different from those of the other employees? Well, it is by virtue of the non-arm's length relationship, obviously, this non-arm's length relationship coming from the fact that they are related to the company.

[31] Of course, each case is a separate one. I believe, however, that the decisions cited, are sufficiently similar, barring a few differences, to produce the same result.

[32] In concluding this analysis, the Court must conclude that the Appellant has discharged the burden of proof that was upon it by proving that several of the Minister's assumptions were wrong, such that this Court, after checking the facts assumed or retained by the Minister, must conclude that these were not properly evaluated, in view of the context in which they occurred. Therefore, the conclusion with which the Minister was satisfied no longer seems reasonable.

[33] For the reasons cited above, the Court concludes that the employment of the worker is excluded from insurable employment in accordance with paragraph 5(2)(*i*) of the *Act* and that the Minister erred in concluding that the Appellant and

the worker should be deemed to be dealing with each other at arm's length in the context of this employment, in accordance with paragraph 5(3)(*b*) of the *Act.*

[34] For all these reasons, the appeal is allowed and the decision of the Minister is vacated.

Signed at Grand-Barachois, New Brunswick, this 5th day of May, 2005.

"S.J. Savoie"

Savoie, D.J.

Translation certified true
on this 31st day of March, 2006.
Garth McLeod, Translator

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APPEARANCES:

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