

Docket: 2002-2561(EI)

BETWEEN:

GASTON LELIÈVRE AND DIANE FALARDEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeals of *André Lelièvre*
(2002-2562(EI)) and *Nicole Côté* (2002-2563(EI))
on January 28, 2003, at Québec, Quebec

Before: The Honourable Deputy Judge J.F. Somers

Appearances:

For the Appellants: The Appellants themselves

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

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

Signed at Ottawa, Canada, this 4th day of March 2003.

"J.F. Somers"

D.J.T.C.C.

Translation certified true
on this 3rd day of February 2004.

John March, Translator

Docket: 2002-2562(EI)

BETWEEN:

ANDRÉ LELIÈVRE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE

Respondent,

and

GASTON LELIÈVRE AND DIANE FALARDEAU,

Interveners.

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Docket: 2002-2563(EI)

BETWEEN:

NICOLE CÔTÉ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GASTON LELIÈVRE AND DIANE FALARDEAU,

Interveners.

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Citation: 2003TCC55
Date: 20030304
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Docket: 2002-2562(EI)

ANDRÉ LELIÈVRE,
Appellant,

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THE MINISTER OF NATIONAL REVENUE,
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GASTON LELIÈVRE AND DIANE FALARDEAU,
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Docket: 2002-2563(EI)

NICOLE CÔTÉ,
Appellant,

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THE MINISTER OF NATIONAL REVENUE,
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GASTON LELIÈVRE AND DIANE FALARDEAU,
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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] These appeals were heard on common evidence at Québec, Quebec, on January 28, 2003.

[2] The appellants instituted appeals from the decisions of the Minister of National Revenue (the "Minister") according to which the employment held by the worker André Lelièvre during the periods in issue, that is from August 28 to November 7, 1997, from July 27 to October 30, 1998, from July 5 to October 15, 1999, from July 3 to October 20, 2000, and from July 2 to October 19, 2001, and by the worker Nicole Côté during the periods in issue, that is from July 6 to November 27, 1998, from July 5 to October 15, 1999, from July 3 to October 20, 2000, and from July 2 to October 19, 2001, with Gaston Lelièvre and Diane Falardeau, the payers, are excluded from insurable employment within the meaning of the *Employment Insurance Act* on the ground that the workers and the payers were not dealing with each other at arm's length.

[3] Subsection 5(1) of the *Employment Insurance Act* (the "*Act*") reads in part as follows:

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;

[...]

[4] Subsections 5(2) and 5(3) of the *Employment Insurance Act* read in part as follows:

(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*;

(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.

[5] Section 251 of the *Income Tax Act* reads in part as follows:

Section 251: Arm's length

(1) For the purposes of this Act,

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

[...]

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

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

[...]

[6] The burden of proof is on the appellants. They have to show on a preponderance of proof that the Minister's decisions are ill-founded in fact and in law. Each case stands on its own merits.

[7] In making his decisions, the Minister relied on the following assumptions of fact stated in paragraph 14 of the Reply to the Notice of Appeal in docket 2002-2561(EI), which were admitted or denied:

[TRANSLATION]

- (a) The appellants acquired a farm in Saint-Michel-de-Bellechasse in 1996; (admitted)
- (b) In 1996, the appellants began to breed rabbits and started producing vegetables and small fruits the following year; (admitted)
- (c) The appellants did business under the style and trade name "Ferme de Fadi"; (admitted)
- (d) Production was sold at the farm and at a public market; (admitted)
- (e) The appellants' only employees were Nicole Côté and her spouse, André Lelièvre; (admitted)
- (f) André Lelièvre is the appellants' son; (admitted)
- (g) For the years in issue, the reported turnover of the business and the wages paid by the appellants to their son and his spouse were: (denied)

	Turnover	Wages
1997	\$22,996	\$ 7,920 (all to André Lelièvre)
1998	\$14,326	\$14,388
1999	\$15,331	\$12,540
2000	\$22,811	\$13,376
2001	\$37,909	\$13,376

- (h) Nicole Côté's work was to pick the fruits and vegetables and sell them at the Montmagny stall; (admitted)
- (i) André Lelièvre's work was to do the planting, harvesting, ploughing and watering; (denied)

- (j) Nicole Côté had worked for the appellants since 1996 but was put on the payroll in 1998; (denied)
- (k) During the periods in issue, Nicole Côté received gross weekly remuneration of \$328; (denied)
- (l) During the periods in issue, André Lelièvre received gross weekly remuneration of \$508; (denied)
- (m) The appellants did not keep a record of the hours of work of Nicole Côté and André Lelièvre; (denied)
- (n) On November 30, 1998, the appellants issued a record of employment in Nicole Côté's name for the period from July 6 to November 27, 1998, showing 924 insurable hours and insurable earnings totalling \$6,468; (denied)
- (o) On November 30, 1998, Nicole Côté needed 910 insurable hours to qualify for employment insurance benefits; (denied)
- (p) On October 18, 1999, the appellants issued a record of employment in Nicole Côté's name for the period from July 5 to October 15, 1999, showing 660 insurable hours and insurable earnings totalling \$4,620; (denied)
- (q) On October 18, 1999, Nicole Côté needed 630 insurable hours to qualify for employment insurance benefits; (denied)
- (r) On October 28, 2000, the appellants issued a record of employment in Nicole Côté's name for the period from July 3 to October 20, 2000, showing 704 insurable hours and insurable earnings totalling \$4,928; (denied)
- (s) On October 28, 2000, Nicole Côté needed 700 insurable hours to qualify for employment insurance benefits; (denied)
- (t) On October 22, 2001, the appellants issued a record of employment in Nicole Côté's name for the period from July 2 to October 29, 2001, showing 672 insurable hours and insurable earnings totalling \$4,928; (denied)
- (u) On October 22, 2001, Nicole Côté needed 704 insurable hours to qualify for employment insurance benefits; (denied)
- (v) On November 7, 1997, the appellants issued a record of employment in André Lelièvre's name for the period from July 28 to November 7,

- 1997, showing 660 insurable hours and insurable earnings totalling \$7,920; (denied)
- (w) On November 7, 1997, André Lelièvre needed 630 insurable hours to qualify for employment insurance benefits; (denied)
 - (x) On November 6, 1998, the appellants issued a record of employment in André Lelièvre's name for the period from July 27 to October 30, 1998, showing 616 insurable hours and insurable earnings totalling \$7,392; (denied)
 - (y) On November 6, 1998, André Lelièvre needed 595 insurable hours to qualify for employment insurance benefits; (denied)
 - (z) On October 18, 1999, the appellants issued a record of employment in André Lelièvre's name for the period from July 5 to October 15, 1999, showing 660 insurable hours and insurable earnings totalling \$7,920; (denied)
 - (aa) On October 18, 1999, André Lelièvre needed 630 insurable hours to qualify for employment insurance benefits; (denied)
 - (bb) On October 28, 2000, the appellants issued a record of employment in André Lelièvre's name for the period from July 3 to October 20, 2000, showing 704 insurable hours and insurable earnings totalling \$8,448; (denied)
 - (cc) On October 28, 2000, André Lelièvre needed 700 insurable hours to qualify for employment insurance benefits; (denied)
 - (dd) On October 22, 2001, the appellants issued a record of employment in André Lelièvre's name for the period from July 2 to October 19, 2001, showing 672 insurable hours and insurable earnings totalling \$8,448; (denied)
 - (ee) On October 22, 2001, André Lelièvre needed 700 insurable hours to qualify for employment insurance benefits; (denied)
 - (ff) On November 5, 2001, the appellants corrected the record of employment of October 22, 2001, to increase the number of insurable hours to 704; (denied)
 - (gg) The records of employment issued by the appellants to Nicole Côté and André Lelièvre do not reflect the actual periods worked by them; (denied)

(hh) Nicole Côté and André Lelièvre rendered services to the appellants between the periods covered by the records of employment while receiving employment insurance benefits. (denied)

[8] The payers acquired a farm in Saint-Michel-de-Bellechasse, Quebec, in 1996.

[9] The payers began breeding rabbits in 1996 and producing vegetables and small fruits the following year. The production was sold at the farm and at a public market.

[10] The only two employees and the payers did not deal with each other at arm's length: Nicole Côté is the spouse of André Lelièvre, who is the son of Gaston Lelièvre and Diane Falardeau, the payers.

[11] Nicole Côté's work was to pick the fruits and vegetables and to sell them at the Montmagny stall. According to Gaston Lelièvre's submission, André Lelièvre's work was to do a single planting of two or three days in the spring and do the harvesting, distribution to the two stalls, ploughing and watering.

[12] Gaston Lelièvre said that Nicole Côté had not worked for the payers in 1996, that she started in 1998, when his spouse Diane Falardeau was ill, and that she had received gross weekly remuneration of \$328 for 44 hours of work.

[13] André Lelièvre received gross weekly remuneration of \$508 for 44 hours of work.

[14] According to Gaston Lelièvre's submission, a record was kept of the employees' hours of work starting in 2001.

[15] In cross-examination, Gaston Lelièvre stated that the number of hours of work unrecorded until 2001 was 44, but that they had worked more than 44 hours.

[16] André Lelièvre worked seven days a week, while Nicole Côté worked six days a week. Gaston Lelièvre stated that the employees did not work outside the periods in issue, but he admitted that they might have signed invoices.

[17] The planting was done in the spring by Gaston Lelièvre, his spouse and his grandchildren. According to Gaston Lelièvre's submission, the farm expanded after 1997, but the business has operated at a loss since that time.

[18] Diane Falardeau corroborated the testimony of her spouse Gaston Lelièvre. She said that she had done the planting for two days with her spouse and family, including André Lelièvre and Nicole Côté.

[19] The workers, André Lelièvre and Nicole Côté, corroborated the preceding testimony.

[20] Yvon Comtois, an appeals officer with the Canada Customs and Revenue Agency, was the respondent's only witness. He filed his report on an appeal dated March 26, 2000, in evidence (Exhibit I-1).

[21] His investigation consisted in meeting the payers and the workers and examining the documents, financial statements, invoices and pay records.

[22] In his report, Yvon Comtois prepared the following table of income and expenditure based on the payers' 1997 to 2000 returns of income:

Year	Income	Expenditures	Net income (loss)	Wages
12/31/2000	\$22,811	\$54,521	(\$31,710)	\$13,376
12/31/1999	\$15,332	\$56,483	(\$41,151)	\$14,406
12/31/1998	\$14,327	\$62,574	(\$46,974)	\$16,705
12/31/1997	\$22,996	\$50,069	(\$27,072)	\$ 8,204

[23] A table prepared by Mr. Comtois filed as Exhibit I-2 shows that the worker Nicole Côté received no wages in 1997. According to that same table, the worker André Lelièvre received weekly wages of \$528 from July to November 1997. It should be noted that sales are recorded in the table from July 6 to 26, 1997, whereas no amounts of money appear in the "Wages" column. Furthermore, for the period from October 5 to November 8, 1997, the worker purportedly received wages without there being any sales.

[24] Invoices filed as Exhibit I-7 were signed by the worker André Lelièvre between January 5 and July 12, 1997, when he was not on the payroll. The worker Nicole Côté occasionally signed invoices when she was not on the payroll. Roughly the same situation occurred from 1998 to 2001.

[25] The appeals officer found during his investigation that there were no documents proving that wages had been paid because, according to the payers, the

workers had been paid cash out of amounts received from sales. Wages appear only on the payroll.

[26] During the periods in issue, the workers worked a few hours more than the number of hours required to qualify for employment insurance benefits. According to Exhibits I-1 to I-6, the workers worked weeks during which there were no sales.

[27] The payers told the investigators that the workers had not been paid for certain hours when they were not on the payroll. The payers further admitted to the investigators that the workers had sometimes worked on a volunteer basis and that they would not hire other employees on the same terms and conditions.

[28] The workers lived free of charge in the residence located on the payers' farm in 1996 and 1997. The payers lived elsewhere, approximately 20 minutes away from the farm by car.

[29] It was not until 1998 that the workers paid rent of \$600 a month, including heat and light. The workers were entitled to consume products from the farm at no charge.

[30] The payers submitted for the Court's assessment the decision of the Federal Court of Appeal in *Théberge v. Canada (Minister of National Revenue - M.N.R.)*, [2002] F.C.J. No. 464, per Décary J.A. (dissenting reasons by Noël J.A.), who wrote as follows at paragraph 19:

What a claimant does outside the period during which he or she is employed in what the Minister considers to be insurable employment can be relevant, for example, to verify that the claimant is unemployed, to determine the amount of his or her benefits, or to establish his or her period of unemployment. However, for the purposes of the exception provided in paragraph 3(2)(c) of the Act, what a claimant does outside of his or her period of employment will be of little relevance when, as in this case, it is not alleged that the salary paid during the period of employment took into account the work performed outside of that period, that the applicant had included, in the hours spent on his or her insurable employment, hours worked outside of the period, or that work performed outside of his or her period of employment had been included in the work performed during his or her period of employment. It seems to me to be self-evident, and this is confirmed by the evidence, that in the case of family businesses engaged in seasonal work, the minimal amount of work that remains to be done outside the active season is usually

performed by family members, without pay. Excepting seasonal employment, in a family farm business, on the ground that cows are milked year-round amounts, for all practical purposes, to depriving family members who qualify by working during the active season of unemployment insurance and to overlooking the two main characteristics of such a business: that it is a family business and a seasonal business.

[31] That judgment of the Federal Court of Appeal cannot apply in the instant case. Each case stands on its own merits.

[32] The evidence showed that the worker Nicole Côté worked in the years prior to 1998 without remuneration. Nicole Côté's wages were paid out of sales. However, the pay records show that she received wages during the periods in issue, when there were no longer any sales. Sales represented 90 percent of Nicole Côté's work.

[33] The same is true of the worker André Lelièvre. That worker signed invoices while he was an employment insurance claimant. Nicole Côté occasionally signed invoices.

[34] The payers admitted that the workers had worked more hours than the number entered in the records of employment. André Lelièvre and Nicole Côté worked seven and six days a week respectively during the periods in issue.

[35] There are no documents proving that wages were paid or any bank statements for the periods in issue. The fact that the business operated at a loss is significant. Why pay wages to workers when there were no sales? I do not believe that the payers would have paid wages for a number of weeks when there were no longer any sales and especially when the business was operating at a loss.

[36] The whole of the evidence, the remuneration, the terms and conditions and the duration of the employment must be considered. The evidence tended to show that there was an arrangement to supplement wages paid.

[37] In *Théberge v. Canada, supra*, Noël J.A. writes as follows at paragraph 61 of the decision:

Moreover, a person who receives unemployment insurance benefits and continues to work, without remuneration, after his or her termination of employment enables the employer to benefit from

labour that is paid for not by the employer, but by the government. However, unemployment insurance is not a business support program; it is essentially a social measure that protects people who were genuinely employed and have lost their job.

[38] The terms and conditions would not have been similar if Nicole Côté, André Lelièvre and the payers had been dealing with each other at arm's length.

[39] Having regard to all the circumstances of the instant case, I am satisfied that the appellants were unable to show on a preponderance of proof that the Minister acted in a wilful or arbitrary manner.

[40] Accordingly, the employment held by the appellant workers during the periods in issue was not insurable within the meaning of paragraph 5(2)(i) and subsection 5(3) of the *Employment Insurance Act*.

[41] The appeals are dismissed.

Signed at Ottawa, Canada, this 4th day of March 2003.

"J.F. Somers"

D.J.T.C.C.

Cases considered

Théberge v. Canada (Minister of National Revenue - M.N.R.), [2002] F.C.J. No. 464

Dubé v. Canada (Minister of National Revenue – M.N.R.), [2001] F.C.J. No. 874

Gray v. Canada (Minister of National Revenue – M.N.R.), [2002] F.C.J. No. 158

Canada (Attorney General) v. Jencan Ltd. (C.A.), [1998] 1 F.C. 187

Cantin v. Canada (Minister of National Revenue – M.N.R.), [2002] T.C.J. No. 495

2759-4605 Québec Inc. v. Canada (Minister of National Revenue – M.N.R.), [2002] T.C.J. No. 566

Bérubé v. Canada (Employment and Immigration) (F.C.A.), [1990] F.C.J. No. 137

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John March, Translator