Docket: 2011-2718(EI)

BETWEEN:

ODETTE BOUCHARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with *Forage Val-Brillant Inc. and Serge Fournier* (2011-2719(EI)), on March 1, 2012, at Rimouski, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the appellant: Éric Tremblay

Counsel for the respondent: Gabriel Girouard

JUDGMENT

The appeal under subsection 103 of the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue is vacated, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of June 2012.

"François Angers"

Angers J.

Translation certified true
on this 10th day of August 2012.
Daniela Possamai, Reviser

Docket: 2011-2719(EI)

BETWEEN:

FORAGE VAL-BRILLANT INC.
AND SERGE FOURNIER,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with
Odette Bouchard (2011-2718(EI),
on March 2, 2012, at Rimouski, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the appellants: Éric Tremblay

Counsel for the respondent: Gabriel Girouard

JUDGMENT

The appeal under subsection 103 of the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue is vacated, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of June 2012.

"François Angers"

Angers J.

Translation certified true
on this 10th day of August 2012.
Daniela Possamai, Reviser

Citation: 2012 TCC 145
Date: 20120605
Dockets: 2011-2718(EI),
2011-2719(EI)

BETWEEN:

ODETTE BOUCHARD,
FORAGE VAL-BRILLANT INC.
AND SERGE FOURNIER,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] These appeals were heard on common evidence and concern a decision of the Minister of National Revenue (the Minister) that appellant Odette Bouchard did not hold insurable employment from June 1 to August 22, 2010, and from September 13 to November 7, 2010, when she worked for appellant Forage Val-Brillant Inc. (the payer). The Minister established that the appellant and the payer were not dealing with each other at arm's length in the context of this employment and that it was not reasonable to conclude, having regard to the circumstances, that the appellant and the payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[2] It was admitted that the appellant and payer are related within the meaning of the *Income Tax Act*. Serge Fournier is the husband of the appellant and the sole shareholder of the payer. The Minister relied on the following assumptions of fact:

[TRANSLATION]

(a) The appellant was incorporated on July 8, 2004; (**admitted)**
(b) The appellant operated a company specializing in all types of well drilling; **(admitted)**
(c) The sole shareholder of the appellant worked full-time for Béton Provincial, Monday to Friday from 7:00 a.m. to 4:00 p.m.; (**denied)**
(d) From 2004 to 2009, the appellant did not have any business activity; **(denied)**
(e) While there was no business activity, the worker prepared the appellant's tax returns and issued the same, monthly response that no government remittance would be made; **(admitted)**
(f) The worker spent about 2 weeks preparing the appellant's tax returns and was not paid for such work; **(denied)**
(g) In 2010, the appellant obtained a contract with Marzcorp Oil and Gas to clean a 480-foot well; **(denied)**
(h) In 2010, the appellant only had the one contract that brought in $128,500; **(denied)**
(i) The job site for the contract was in the woods accessible by a logging road. No telephone or radio communications were possible; **(denied)**
(j) To perform the contract, the appellant had a loader, welders, a lift truck, generator and 2 trailers; **(denied)**
(k) To perform the contract, the appellant hired 4 employees, i.e. a foreman, Régis Sirois, 2 welders, Réjean Sirois and William Angell and the worker; **(admitted)**
(l) Bernard Gagnon, shareholder of Marzcorp Oil and Gas Inc., went to the job site almost every day and in the evening stopped at the home of Serge Fournier to talk about the work being done; **(denied)**
(m) The offices of the appellant were located in the shareholder’s home and that of the worker; **(admitted)**
(n) Before working for the appellant during the periods at issue, the worker was unemployed; **(admitted)**
(o) The worker's duties mainly involved bookkeeping as she had to prepare invoices, the payroll, government remittances, records of employment, T4 slips, month-ends and bank deposits. She also occasionally had to purchase parts and deal with 2 suppliers of leased equipment and prepare progress reports every 2 weeks at the request of the appellant's client; **(denied)**
(p) All the decisions were made by the appellant's sole shareholder; **(admitted)**
(q) The worker's hours of work were 5 or 6 hours a day until 4:00 p.m. as well as nights and weekends, as needed; **(denied)**
(r) The worker worked 8 hours a day and at least 5 days a week; **(denied)**
(s) The hours worked by the worker and by the other employees of the appellant were not recorded in a register; **(admitted)**
(t) The worker was always paid for 50 hours of work per week regardless of the number of hours she actually worked; **(admitted)**
(u) In fact, the appellant respected the rules established by the Commission des normes du travail by paying its employees their regular salary for 40 hours of work and time and a half for overtime; **(admitted)**

(v) This way of proceeding meant the worker earned $16.50 per hour because she always received the same amount, i.e. $907.50 plus 4% vacation pay, which for the first work period had been paid at the end of the period, while for the second, the 4% vacation pay had been paid on each pay cheque; **(admitted)**

(w) The appellant hired workers at different times in 2010, as follows: **(admitted)**

	June	July	August	September	October	November
Worker	X	X	Ended on August 22	Began on the 13th	X	Ended on the 7th
Réjean Sirois	August 1 to August 27	Began on the 21st	Ended on the 1st	Began on the 13th	X	Ended on the 14th
Régis Sirois	X	X	Ended on the 1st	Began on the 13th	Ended on the 10th	N/A
William Angell	X	Ended the 22nd	N/A	N/A	N/A	N/A

(x) During the three-week period from August 1 to August 22, 2010, the worker continued working for the appellant despite the fact that the appellant had shut down the job site on August 1; **(admitted)**

(y) To qualify for employment insurance, the worker need 910 hours of insurable work; **(admitted)**

(z) The periods at issue total exactly 20 weeks of employment; **(denied)**

(aa) If the appellant had considered the worker to have worked 40 hours per week for 20 weeks, the worker would not have qualified for employment insurance benefits; **(denied)**

(bb) The worker was routinely paid for 10 hours of overtime each week; **(admitted)**

(cc) On August 25, 2010, the appellant gave the worker a record of employment indicating her first day of work as June 1, 2010, and her last day as August 22, 2010. The number of insurable hours was 580 and she was paid $10,989.60; **(admitted)**

(dd) On November 18, 2010, the appellant gave the worker a record of employment indicating her first day of work as September 13, 2010 and her last day as November 7, 2010. The number of insurable hours was 400 and she was paid $7,550.40; **(admitted)**

(ee) The worker's records of employment do not correspond to the appellant's operating needs or to reality in terms of the first period of work and the number of hours actually worked; **(denied)**

[3] Serge Fournier has worked for Béton Provincial for 22 years. As a resident of Ste-Paule, he must travel to Matane, Québec, where his employer's plant is located. His work hours are from 6:00 a.m. to 4:00 p.m. and it is nearly impossible to reach him while he is at work. He is also the shareholder of the payer.

[4] The payer obtained a contract in 2004 and did not secure another one until 2010. On April 30, 2010, the payer entered into an agreement with Marzcorp Oil & Gas Inc. (Marzcorp) to perform cleaning and assessment work of a well 4,700 feet deep, and not 480 feet deep as assumed by the Minister in paragraph (g). The cost of the work was $552,003.90. The written agreement was only signed by the payer.

[5] Since Mr. Fournier worked full-time, the payer needed someone to handle administrative matters for the business. Since the appellant holds an administrative technician certificate and since she had already done this work for the payer in 2004, she was the right person for the job. Her job description is included in Exhibit A-3 but suffice it say that she had to be at work 40 hours per week and had to work nights and weekends, as needed. She was the receptionist and had to be the liaison between the workers on the job site and the payer as well as handle all the accounting (statements, deposits, etc.) She performed this work from an office in the home she shared with Mr. Fournier. She also had to meet with the Marzcorp representative every day.

[6] To perform the work, the payer hired a foreman and two other general labourers. The foreman was paid $20 per hour for 60 hours per week and the two men received $14.50 per hour for 72 hours per week. However, they were paid overtime for hours worked in excess of 40 per week. The well in question was in a remote location and the employees stayed on site in trailers. They did not have to keep track of their work hours and were paid on a regular basis.

[7] For her part, the appellant, like the other employees, did not have to keep track of her work hours. She was paid $16 per hour for 40 hours and received time and half for 10 hours of overtime per week. This was therefore the case for all the employees. In the case of the appellant, she was paid for 50 hours per week regardless of the hours worked. The payer stated it followed the same method as its employer Béton Provincial.

[8] The work began in early June 2010. The scope of the work is apparent from the photos filed as evidence. Under the agreement, Marzcorp was to pay the sum of $276,001.95, i.e. half of the total cost of the work, but did not do so. Still, the payer began the work and the payments from Marzcorp were slow in coming or were only small amounts. In light of the foregoing, the payer decided to stop the work at the end of July and to lay off its employees. However, the appellant continued to work for three weeks to complete her administrative work and especially to continue her efforts to get paid by Marzcorp. She was laid off three weeks later on August 22, 2010, and the payer removed the equipment from the job site.

[9] In mid-September, the Marzcorp representatives convinced the payer to resume the work. They therefore paid out funds; the job site was re-opened and the employees were brought back to work. The situation did not last. The payer continued to have difficulty getting paid and decided to terminate the contract. The job site was shut down and everyone left the premises. The appellant left her job on November 7 and on November 14, 2010, the last employee left.

[10] The appellant received two records of employment indicating a total of 980 hours of work. Had the payer not terminated his contract with Marzcorp, the appellant would have worked much longer.

[11] The payer received $128,500 from Marzcorp for his work. It sued Marzcorp for the balance of $140,000.

[12] The appellant described her duties, which were primarily managerial rather than merely clerical. She handled everything; more specifically, she was the liaison between the payer and the Marzcorp representative. Her hours of work were from 7:00 a.m. to 4:00 p.m. and sometimes a few hours later. The payer set her hours of work at 50 per week and the appellant was happy because it compensated her for the unpaid hours she spent each year preparing the payer's income tax returns and handling other small administrative tasks. In the case of the payer, this had nothing to do with the established work hours.

[13] What the appeals officer noticed was that when the employees were laid off at the end of July, the appellant stayed on the job for three additional weeks before she was laid off, such that her work hours did not correspond to the other workers'.

[14] The appeals officer also stated in his report that the payer's agreement with Marzcorp had not been signed by the latter, which suggests that the agreement was not valid and that the labour costs planned by the payer did not include a general secretary position. He also noted that the appellant worked for the payer without being paid at other times besides the period at issue, i.e. for about two weeks per year. He concluded that the payer and the appellant had decided to compensate the unpaid work, which would explain why she was paid for 50 hours per week. He also concluded that while the hourly rate was below average, the appellant earned $47,000 during the year, which is higher than the $32,000 usually paid for comparable work according to the Institut de la statistique du Québec.

[15] The role of the Court with regards to the Minister's decision is to verify whether the facts on which the Minister based his assumptions are true and whether they were weighed correctly taking into account the context in which they occurred and following such verification, the Court must decide whether the conclusion of which the Minister was "convinced" still seems reasonable (see *Légaré v. Canada*, 1999 CanLII 8105 (FCA)). The role of the judge was also defined by the Federal Court of Appeal in *Pérusse v. Canada*, 2000 CanLII 15136, at paragraph 15, which reads as follows:

> 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.

[16] I would first like to point out that the credibility of the appellant and her husband are not at issue. Both testified honestly and presented the facts without qualification.

[17] Since the payer had obtained a contract with Marzcorp, it had to fulfill the obligations to which he had agreed. Besides the employees on the job site, the payer needed a manager to handle administrative matters. Mr. Fournier, the appellant's husband, is the sole shareholder of the payer, and by his own admission, unable to handle paperwork and needed the services of someone who could take care of this aspect of the business. Moreover, he worked full-time, which made him difficult to reach. He therefore hired the appellant, who was clearly qualified to perform such work. According to the payer, it would have needed two employees to replace the appellant. Given the appellant's managerial skills and the fact that her work was administrative in nature, the importance of her work is obvious.

[18] The appellant was paid $16 per hour for her services. The appeals officer admitted at the hearing that this hourly rate was below average according to the Institut de la statistique du Québec. However, he said that since the appellant worked 50 hours per week, her salary was much higher than the usual pay for comparable work. This is obviously explained by the additional 10 hours of work per week for

which she was paid. While it is true that these 50 hours per week may be suspect, in the circumstances, Mr. Fournier explained the working conditions and those of the workers with whom he was dealing with at arm's length. It must also be recognized that the payer's other employees had similar working conditions and that ultimately none of the employees kept track of their hours of work. It was estimated that the appellant worked 50 hours per week and that the other two employees worked 60 and 72 hours, respectively, at the regular rate for 40 hours and at time and a half for overtime. In the circumstances, the fact that the appellant worked 50 hours per week becomes less questionable.

[19] I accept the appellant's explanation when she testified that the 10 hours of overtime per week were not intended to compensate her for the unpaid work she performed at other times besides the period at issue. For her, it was a form of compensation, but that really was not the case. In fact, Mr. Fournier was very clear on this matter. The work performed at other times involved preparing the corporation's tax return and annual return; these tasks did not require two weeks' work as the appeals officer concluded. The appellant performed this work on a volunteer basis.

[20] In his analysis, the appeals officer also concluded that the 50 hours per week for which the appellant was paid entitled her to employment insurance. She worked for 980 hours and needed 910 hours to be entitled to employment insurance. If she had been paid for 40 hours per week, she would not have been entitled. In my view, what the appeals officer failed to take into account was that the payer had to terminate the contract for non-payment midway through the work and that if the situation had been different, the appellant would not have been laid off because the contract work was not completed. It is therefore wrong to conclude that the duration of the appellant's employment was intended to allow her to collect employment insurance.

[21] The appeals officer prepared a table indicating the payer's income as well as the salaries paid to show that the appellant's work did not require 50 hours per week. In my view, it is difficult to draw a connection between the payer's income and the salaries paid. It must be remembered that in the case at bar, the payer was having trouble getting paid and that it still had to pay its employees in the hope that Marzcorp would respect its obligations. It must also be remembered that the appeals officer assumed that the payer's contract with Marzcorp was not valid because the latter had not signed it. He therefore placed little importance on the contract and seemed to compare the payer's income to sales revenue.

[22] In my view, the appeals officer minimized the scope of the payer's contract with Marzcorp. There was much more job site equipment than he thought and the contract was for $552,003.90 and not $128,500, as indicated in paragraph (h) of the assumptions of fact. The depth of the well was 4,700 feet and not 480 feet as indicated in paragraph (g).

[23] After considering the testimonies of the payer and the appellant as well as the facts established during the hearing, I conclude, with deference, that the decision of the Minister in the case at bar was not reasonable. The terms of said employment, its duration, remuneration, nature and importance are such that it is reasonable to conclude that similar conditions would have existed between two arm's length parties. The appeal is allowed.

Signed at Ottawa, Canada, this 5th day of June 2012.

"François Angers"

Angers J.

Translation certified true
on this 10th day of August 2012.
Daniela Possamai, Reviser

CITATION:	2012 TCC 145
COURT FILE NO.:	2011-2718(EI) 2011-2719(EI)
STYLES OF CAUSE:	Odette Bouchard v. M.R.N. Forage Val-Brillant Inc. & Serge Fournier v. M.N.R.
PLACE OF HEARING:	Rimouski, Quebec
DATE OF HEARING:	March 1, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	June 5, 2012

APPEARANCES:

Counsel for the appellant:	Éric Tremblay
Counsel for the respondent:	Gabriel Girouard

COUNSEL OF RECORD:

For the appellant:

Name:	Éric Tremblay
Firm:	Tremblay & Tremblay, Avocats Matane, Quebec

For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada