Docket: 2012-2034(EI)

BETWEEN:

MARTIN JUNIOR GUILBAULT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

FROMAGERIE DU CHAMP À LA MEULE INC.,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 23, 2013, at Montréal, Quebec.
Before: The Honourable Justice Lucie Lamarre

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Mounes Ayadi
Agent for the intervener:	Martin Guilbault

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (the Act) is allowed and the decision of the Minister of National Revenue is vacated such that the appellant did not hold insurable employment when he worked for the appellant company for the period from January 1, 2010, to August 10, 2011, pursuant to paragraph 5(2)(*i*) and subsection 5(3) of the Act.

Signed at Ottawa, Canada, this 20th day of September 2013.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 6th day of November 2013
Margarita Gorbounova, Translator

Citation: 2013 TCC 296
Date: 20130920
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REASONS FOR JUDGMENT

Lamarre, J.

[1] The appellant is appealing from a decision of the Minister of National Revenue (Minister) based on which the appellant held insurable employment when he worked for Fromagerie du Champ à la Meule Inc. (the payer) during the period from January 1, 2010, to August 10, 2011. The Minister first concluded that the appellant held insurable employment under a contract of service pursuant to paragraph 5(1)(*a*) of the *Employment Insurance Act* (EIA) and then determined that the appellant and the payer were deemed to have an arm's length relationship in the context of this employment under paragraph 5(2)(*i*) and subsection 5(3) of the EIA. Exercising the discretion conferred on him by this provision of the EIA, the Minister was satisfied that it was reasonable to conclude, taking into account 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] Paragraphs 5, 6 and 7 of the Reply to the Notice of Appeal summarizes the facts that the Minister took into account in making his decision and are reproduced below:

> [TRANSLATION]
>
> (5) In making his decision, the Minister determined that the appellant held employment under a contract of service based on the following assumptions of fact:
>
> (a) Martin Guilbault Senior purchased his father's farm in 1987; **admitted**
>
> (b) In 1994, a cheese dairy was added to the farm; **admitted**
>
> (c) The payer was incorporated on March 10, 2000, and its sole shareholder was Martin Guilbault; **admitted**
>
> (d) On November 1, 2009, the payer's share ownership was divided as follows: Martin Guilbault held 75% of the voting shares of the payer and Martin Junior Guilbault held 25% of the payer's voting shares; **admitted**
>
> (e) Martin Guilbault is the father of Martin Junior Guilbault; **admitted**
>
> (f) The payer's activities are processing milk for the production of cheese, wholesaling and retailing of cheese, and in the summer, organically growing soya, corn and oats; **admitted**
>
> (g) The cheese dairy operates all year round and its hours of operation vary depending on the season, namely, from September to November: six days per week, Monday to Saturday, 7:30 a.m. to 4 p.m., and the rest of the year: four days per week, Tuesday to Friday, 7:30 a.m. to 4 p.m. This is also the schedule of the retail sales counter; **admitted**
>
> (h) In addition to the two shareholders, the payer employs three full-time and two casual employees; **admitted**
>
> (i) The appellant was hired by the payer as an administrator; **admitted**
>
> (j) The appellant's duties are to be responsible for quality control; procurement; research and development; staff management with his father, the majority shareholder; assisting in production; and, in the summer, sowing and harvesting; **admitted**
>
> (k) The appellant has always worked at the family farm and because of this has a great deal of experience in the type of work that is done there; **admitted**
>
> (l) The appellant's work schedule varies throughout the year based on the season and the payer's needs; **admitted**

(m) The appellant works from Monday to Friday and tries to work a minimum of 45 hours per week;

(n) The appellant filled out timesheets like the other employees of the payer;

(o) The payer's payroll journal for the period at issue shows that the appellant most often worked 40 hours per week, but it has happened that he worked only 29 hours;

(p) Because of his experience in the payer's work, the appellant did not need to be supervised directly, but he deferred to the majority shareholder for, among other things, all questions related to agricultural work;

(q) The appellant consulted with the payer's majority shareholder in making decisions; **admitted**

(r) All of the equipment needed to perform the appellant's tasks was provided by the payer: **admitted**

(s) The appellant's salary was established by the two shareholders at an hourly rate of $16; **admitted**

(t) The appellant was remunerated by the payer by direct deposit based on the hours actually worked each week;

(u) The appellant and the majority shareholder decided on the increases of their salaries based on the payer's ability to pay; **admitted**

(v) The appellant has two weeks of vacation per year, but does not take them; **admitted**

(w) The two shareholders use a credit card paid by the payer; **admitted**

(x) The two shareholders of the payer have life insurance paid by the payer, while the other employees participate in an RRSP program; **admitted**

(y) The appellant may use the payer's equipment for personal purposes; **admitted**

(z) The salary grade paid by the payer to the appellant is similar to the average salary indicated for 2008 to 2010 in an Emploi Québec publication;

(6) The appellant and the payer are related persons within the meaning of the *Income Tax Act* because

(a) the payer's shareholders were Martin Guilbault with 75% of the voting shares and Martin Junior Guilbault with 25%; **admitted**

(b) Martin Guilbault is the father of Martin Junior Guilbault; **admitted**

(7) The Minister determined that the appellant and the payer were deemed to have an arm's length relationship in the context of this employment because he was satisfied that it was reasonable to conclude 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, considering the following circumstances:

(a) The remuneration paid to the appellant was reasonable and consistent with the labour market standards;

(b) Martin Guilbault, the payer's president, fulfills his role of majority shareholder and performs his supervisory duties when necessary;

(c) The tasks performed by the appellant meet the payer's needs and expectations and are essential to it.

[3] The appellant stated in court that he also worked on weekends and that he banked his hours to be generally paid on average for 40 hours per week. In other words, if he worked less one week to take care of personal obligations, he compensated with the banked hours in order to receive more regular remuneration. He explained that he was still taking courses in administration at university during the period at issue and that he could be absent from the business for one or two days per week and could work more on weekends. He stated that, because this was the first year he worked full time (he had worked there part time since the age of 12), he filled out timesheets merely to know how many hours he worked on average in order to establish the final remuneration that he would attribute to himself in consultation with his father.

[4] The appellant stated that he had paid $25 for 25% of the shares of a business worth $2 million. He said that it is only because he is the son of Martin Guilbault that he was entitled to those shares. He was only 23 years old and had just graduated from CEGEP and would never have been treated this way in another business. He was responsible for quality control, the IT system and day-to-day management. Apparently, the payer has increased its production capacity five-fold since his arrival.

[5] The appellant said that he filled out no statements of work and had no contract of employment. His father and he trusted each other. He prepared financing or grant files, which he presented to the Caisse populaire Desjardins or to the government. Sometimes his father was not informed of this in advance. However, for employee management, he asked advice from his father because he was in training in a way.

[6] The appellant had a child, but was not absent from the business very much because he had too many responsibilities, while other employees used their maternity or paternity benefits as set out in current legislation. He also did not take any vacation.

[7] The appellant concluded by saying that his father and he were indispensable to the business because each had his own expertise. The payer could not function without one or the other. The business works precisely because of their non-arm's length relationship, and he argues that no other person would have worked under the same conditions. The appellant's father testified simply to say essentially that he approved everything that his son had said.

Analysis

[8] In his Notice of Appeal, the appellant disputes the Minister's decision only on the issue of the arm's length relationship. Indeed, the appellant argues that it was not reasonable for the Minister to conclude that a similar contract of employment would have been concluded with an arm's length worker, taking into account the remuneration paid, the terms and conditions, the duration and the nature and importance of the work and that, accordingly, he was deemed to be dealing with the payer at arm's length within the meaning of the EIA.

[9] The relevant statutory provisions read as follows:

EMPLOYMENT INSURANCE ACT

INSURABLE EMPLOYMENT

. . .

5(2) Excluded employment - Insurable employment does not include

. . .

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

5(3) Arm's length dealing – For the purposes of paragraph (2)(*i*),

(*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and

(*b*) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[10] Counsel for the respondent cited the Federal Court of Appeal decision in *Légaré v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 878 (QL), at paragraph 4, where the Court explains the role of our Court when a determination made by the Minister on arm's length dealing is being appealed. Thus, our Court cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's 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.

[11] In *F. Ménard Inc. v. Canada (Minister of National Revenue)*, [2009] T.C.J. No. 208 (QL), 2009 TCC 208, cited by the respondent, Justice Tardif of our Court maintains at paragraph 43 that, in exercising his discretion, the Minister was justified in not comparing the work of a shareholder employee with that of a regular non-shareholder employee. In *Lacroix v. Canada (Minister of National Revenue)*, [2007] T.C.J. No. 87 (QL), 2007 TCC 81, rendered by Justice Archambault of our Court on March 27, 2007, he maintains at paragraph 41 that the issue that the Minister had to decide on could have been reformulated as follows (with the adaptations necessary for this case): if the worker had held 25% of the payer's shares while remaining at arm's length with the other shareholder, would the worker and the payer have entered into a substantially similar contract of employment?

[12] In this case, based on the Reply to the Notice of Appeal, the Minister considered three points. First, the Minister determined that the remuneration paid to the appellant was reasonable and consistent with labour market standards. However, the appellant stated that the Minister had made a comparison with an agricultural worker, while the appellant's duties were in administration. He said that his remuneration was lower than what he could have asked for on the market. In addition, the Report on Appeal, filed as Exhibit I-3, indicates at page 5 of 8 that the appellant did not receive dividends from 2008 to 2010.

[13] The Minister also retained the fact that Martin Guilbault, the appellant's father and president of the payer, holding 75% of the shares, fulfilled his role as the majority shareholder and performed his supervisory duties when needed. The appellant argued that his father had no more influence over him than he had over his father. All decisions were taken by both of them on consensus. In addition, the appellant specified in his testimony that he could apply for financing or grants at the institutions concerned before even speaking with his father about it. For staff management, he consulted his father given that he had more experience.

[14] Finally, the Minister considered that the tasks performed by the appellant met the needs and expectations of the payer and that they were essential. I must say that I find this statement obvious for both an employee, whether he is a shareholder or not, and a contract employee hired by the payer. I do not see in what way this statement necessarily makes the appellant an employee. In any case, if such a statement embodies the notion of the integration of the worker in the business (*Lacroix, supra*, paragraph 33), it would apply to determining whether the worker is an employee under a contract of service, not whether there is an arm's length relationship. In this case, the appellant does not appear to be disputing the existence of a contract of service. Rather, he questions the Minister's conclusion that the appellant and the payer are deemed to be dealing with each other at arm's length.

[15] In the Report on Appeal (Exhibit I-3), the appeals officer analyzed the nature and the importance of the work performed and considered that the appellant's work was integrated in the payer's commercial activity and that the fact that the appellant took no vacation and that he worked from home during paternity leave showed that his work was important to the payer. He added that the only person who could replace him was the majority shareholder, who did the same work as the appellant. From this, he deduces that it is reasonable to conclude that an employer at arm's length would have hired the worker to perform the same duties. To this I reply that it is quite obvious that an employer would like an employee of the type that dedicates himself, body and soul, to the business without, however, getting paid more for it. The question that should be asked instead is whether another worker would have agreed to work under the same or almost the same conditions. According to the appellant, he is the only one who did not take paternity leave provided by applicable legislation and he did not take vacation to which he was entitled, which was not the case of other workers.

[16] Regarding the terms and conditions of employment, the appeals officer acknowledges in his report that the appellant had a different schedule from that of the other workers, that he had some autonomy and had benefits that other employees did not have. The appeals officer concluded, however, that it is normal for workers to make efforts or to obtain benefits from the mere fact that they have shareholder status, and that an arm's length person who is also a shareholder would have agreed to the same treatment. As for the duration of employment, he concluded that a third party would have agreed to such full-time work with a consistent workload. Regarding remuneration, the appeals officer deemed the remuneration to be reasonable in comparison with an average salary of a labourer in food processing. The fact that the two shareholders' salaries did not increase in 2010, unlike those of

the other workers, was reasonable, according to the appeals officer, and he concluded that any other shareholder would have accepted the same treatment.

[17] In my view, it was unreasonable of the Minister to compare the appellant to any other person who would have agreed to invest in 25% of the payer's shares and come to the conclusion that that other person would have accepted the same treatment. The circumstances are not comparable. A person who really invests and pays for 25% of the shares and who works in the business with the other shareholder, namely, the majority shareholder, would probably not accept the same workload as that majority shareholder with remuneration below that of the market, without dividends, even if he may expect a future benefit from the sale of those shares. Indeed, why would this investor dedicate as much time to the business as the majority shareholder, who will then receive 75% of the future benefits? That is not logical.

[18] In my view, the mere fact that the appellant did not have to pay for a quarter of the shares of the business (valued at $2 million in this case) and that he makes all decisions in agreement with his father, who held the rest of the shares is enough to not be able to compare his situation with another shareholder, who would have to pay his fair share for the acquisition of those shares. There would not have been the same balance and the shareholder would probably not have been as involved in the business as the appellant. Indeed, it is precisely because of his non-arm's length relationship that he had obtained his shares. As the appellant pointed out, it is permissible to doubt that an arm's length person fresh out of CEGEP at the age of 23 would have gained the trust of his father so much so that he would give him a quarter of the business and let him make important decisions including on financing without necessarily obtaining his approval first. This in itself is preferential treatment that would not have been given to a third party shareholder and which, in my opinion, is part of the circumstances that the Minister should take into account in exercising his discretion. This is why I do not think that in such a situation the appellant's contract of employment may be compared with that of a third party shareholder. The issue is whether a third party would have been hired in similar conditions or, to use the EIA wording, whether the payer and the appellant would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[19] The appellant's uncontradicted testimony, confirmed by his father, clearly shows that other employees were treated differently. This is also revealed by the facts noted by the appeals officer in his report filed as Exhibit I-3. For example, the appellant took care of personal business during work hours while that was not

possible for others. In 2010, the appellant did not increase his salary while the other workers received a raise. The appellant used the business's property (tractor, truck), while the others were not entitled to use it. The appellant's salary should not have been compared to that of an agricultural worker because he performed administrative work.

[20] In my opinion, all of this shows that the Minister did not take into account all of the relevant circumstances in making his decision. I consider that the appellant showed that the facts used by the Minister were not assessed correctly, taking into account the context in which they had occurred, and, consequently, his decision does not seem reasonable.

[21] I believe that I am justified in intervening, and I am of the view that a substantially similar contact of employment would not have been entered into by the payer and the appellant if they had been dealing with each other at arm's length.

[22] The appeal is allowed and the Minister's decision is vacated in that the appellant did not hold insurable employment during the period at issue under paragraph 5(2)(*i*) and subsection 5(3) of the EIA.

Signed at Ottawa, Canada, this 20th day of September 2013.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 6th day of November 2013
Margarita Gorbounova, Translator

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PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 23, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	September 20, 2013

APPEARANCES:

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Agent for the intervener:	Martin Guilbault

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Firm:

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