Docket: 2003-746(EI)

BETWEEN:

DENIS BOUDREAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Marguerite Comeau (2003-747(EI))* on July 10, 2003, at Bathurst, New Brunswick

Before: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant: Terrence Lenihan

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the Minister's decision in respect of the appeal to him under section 91 of this *Act* is affirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of November 2003.

"C. H. McArthur"

McArthur J.

Translation certified true
on this 6th day of March 2009.

Brian McCordick, Translator

Docket: 2003-747(EI)

BETWEEN:

MARGUERITE COMEAU,

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and

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Citation: 2003TCC823
Date: 20031124
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BETWEEN:

DENIS BOUDREAU,

Appellant,

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Docket: 2003-747(EI)

AND BETWEEN:

MARGUERITE COMEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

McArthur J.

[1] These are appeals concerning the insurability of work performed by the Appellant Denis Boudreau from October 7, 2001 to January 5, 2002 and by the Appellant Marguerite Comeau from January 6, 2002 to April 6, 2002. Together, the appeals cover the period from October 7, 2001 to April 6, 2002.

[2] The two appeals were heard on common evidence.

[3] The work in dispute was performed on behalf and for the benefit of the Dalhousie Island Lake Club Inc. ("the Payor"). The evidence showed that the Payor operated a hunting and fishing club in the Dalhousie region in New Brunswick.

[4] In refusing to recognize that the Appellant Denis Boudreau's employment was insurable employment within the meaning of the *Employment Insurance Act* ("the *Act*"), the Minister of National Revenue ("the Minister") relied on the following assumptions of fact:

[TRANSLATION]

(a) The Payor is a not-for-profit company incorporated on or about May 13, 1986.

(b) The Payor is a hunting and fishing club with about 300 members, located some 30 miles from Dalhousie.

(c) The Payor is managed by a committee of eight individuals.

(d) The Payor has a main building with a bar and kitchen and six cabins that are available for rent.

(e) The site is occupied mainly in the summer and fall; it is also used in winter by snowmobilers who come mainly on weekends.

(f) The Payor hires janitors year-round for supervision and maintenance of the camp, including the Appellant and his spouse Marguerite Comeau.

(g) The Payor provides the janitors with a room with access to a kitchen, a bathroom and a washing machine; the Payor does not provide a dryer or food.

(h) The Appellant and his spouse live on site for six months each year, and did so during the period in issue.

(i) During the period in issue, the Appellant and his spouse were both living full-time in the camp.

(j) During the period in dispute, the Appellant and his spouse shared the duties, which consisted in looking after the rental of the cottages, doing the housework in the main building, washing dishes and serving in the bar.

(k) Food, cleaning of the rental cabins and supervision during the club's social events are handled by volunteers and by not the janitors.

(l) Concerning the period in issue, the Appellant was paid from October 6, 2001 to January 5, 2002 and received a weekly salary of $486.60 for the first three weeks and $525.00 thereafter.

(m) The Appellant's spouse was paid from January 6, 2002 to April 6, 2002, and received a weekly salary of $525.00.

(n) Someone else replaced the Appellant and his spouse beginning April 7, 2001 [*sic*] for the following six months.

(o) The same arrangement existed for several years between the Appellant, his spouse and the Payor.

(p) The terms of employment are an artificial arrangement to enable the Payor to obtain two workers for the salary of one person while the other person collected employment insurance benefits.

(q) The Appellant and the Payor demonstrated a common interest when the conditions of work were negotiated.[1]

[5] The Respondent initially argued that there was a non-arm's length relationship between the Appellants and the Payor and that consequently these were employments that were excluded under paragraph 5(2)(*i*) of the *Act*. The Reply to the Notice of Appeal was amended and the Respondent now argued that the Appellants' jobs were not insurable employments within the meaning of paragraph 5(1)(*a*) of the *Act*. The Appellants' jobs were not performed under a contract of service, it was alleged.

[6] The Respondent is of the opinion that the Payor and the Appellants made arrangements designed to take advantage of the *Act*. It was alleged that the terms and conditions of the contracts therefore did not reflect reality. In theory, the Appellants each worked for three months and were paid individually for those three months. The three-month periods were consecutive, so that when the Appellant Denis Boudreau was performing his work, his wife, the Appellant Marguerite Comeau, was on the premises, and vice versa. However, Ms. Comeau told the investigator from the Canada Customs and Revenue Agency, before she learned of the decision concerning their employments, that even after their respective three-month periods had elapsed, they were each continuing to do the same tasks. In reality, the Payor was getting 80 hours of work per week for the price of 40 hours for six months (40 hours worked by Mr. Boudreau and 40 hours worked by Ms. Comeau). The other 40 hours were paid by employment insurance. The effect of this arrangement designed to take advantage of the *Act*, in the Respondent's submission, was to vitiate the contract of service, and since it was vitiated these were not insurable employments within the meaning of the *Act*.

[1] Reply to the Notice of Appeal, docket 2003-746(EI), at paragraph 5.

[7] The Appellants state that these were indeed contracts of service. The hunting and fishing camp was situated in the middle of the woods and was worth about $800,000. The Payor had to hire a couple as janitors since it was essential that someone be present at all times; otherwise, there were serious risks of fire and theft. Furthermore, the hours worked by the Appellants over and above their 40 hours per week constituted volunteer work on their part.

[8] Did the Appellants hold insurable employment within the meaning of the *Act*?

[9] Paragraph 5(1)(*a*) of the *Act* reads as follows:

> 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

[10] To determine whether a worker was employed under a contract of service, it is appropriate to refer to the tests laid down in *Wiebe Door Services v. M.N.R.*[2] These tests are: (i) control; (ii) ownership of the tools; (iii) chance of profit and risk of loss, and (iv) integration. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,[3] the Supreme Court of Canada confirmed the currency of these tests while adding that this was not an exhaustive list and that the courts should not apply these tests blindly. It is important not to lose sight of reality. Consequently, many other factors may be considered in determining whether the employment was performed under a contract of service.

[11] There is a trend in the case law which holds that a misrepresentation of reality made for the purpose of taking advantage of the *Act* means that the employment cannot be considered as having been performed under a contract of service. Here is what various judges have said on the matter:

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[2] [1986] 3 F.C. 553.

[3] [2001] 2 S.C.R. 983.

[12] Tardif J., in *Thibeault v. Canada*,[4] stated:

> Genuine employment is employment remunerated according to market conditions, which contributes in a real and positive way to the advancement and development of the business paying the salary in consideration of work performed. These are basically economic factors that leave little, if any, room for generosity or compassion.
>
> ...
>
> Of course, it is neither illegal nor reprehensible to organize one's affairs so as to profit from the social program that is the unemployment insurance scheme, subject to the express condition that nothing be misrepresented, disguised or contrived and that the payment of benefits occur as a result of events over which the beneficiary has no control. Where the size of the salary bears no relation to the economic value of the services rendered, where the beginning and end of work periods coincide with the end and the beginning of the payment period and where the length of the work period also coincides with the number of weeks required to requalify, very serious doubts arise as to the legitimacy of the employment contract. Where the coincidences are numerous and improbable, there is a risk of giving rise to an inference that the parties agreed to an artificial arrangement to enable them to profit from the benefits.[5]

This decision of Tardif J. was upheld by the Federal Court of Appeal, which dismissed the applications for judicial review, with costs, on June 15, 2000.

[13] Tardif J. pursued his analysis in *Laverdière v. Canada*,[6] stating:

> Of course, a contract of employment may be lawful and legitimate even if it sets out all kinds of other conditions, including remuneration much higher or lower than the value of the work performed; some contracts may even involve work performed gratuitously. Work may be performed on a volunteer basis. All kinds of assumptions and scenarios can be imagined.
>
> Any contract of employment that includes special terms can generally be set up only against the contracting parties and is not binding on third parties, including the Respondent.

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[4] [1998] T.C.J. No. 690 (Q.L.).

[5] Ibid., at paragraphs 22 and 29.

[6] [1999] T.C.J. No. 124 (Q.L.).

> This is the case with any agreement or arrangement whose purpose and object is to spread out or accumulate the remuneration owed or that will be owed so as to take advantage of the *Act*'s provisions. There can be no contract of service where there is any planning or agreement that disguises or distorts the facts concerning remuneration in order to derive the greatest possible benefit from the *Act*.[7]

Finally, in *Duplin v. Canada*,[8] he added:

> The parties may agree on whatever they wish between themselves, but the Respondent has no obligation to respect or accept what they choose. The insurability of work depends on certain fundamental conditions being met. In some cases, even where the parties have agreed on or imposed certain conditions or features, these are in no way enforceable against third parties, including the Respondent.
>
> Only the real facts are to be taken into account in determining whether or not a genuine contract of service existed. Often, the facts have been falsified, disguised or even hidden, which is why the Court must rely on the whole of the available tendered evidence. The only relevant facts and information are those relating to the performance of work, to the remuneration paid and to the existence or non-existence of a relationship of subordination.
>
> In other words, the intention of the parties to a work agreement is in no way conclusive for the purpose of characterizing that agreement as a contract of service. It is basically one factor among many.[9]

[14] Charron D.J.T.C.C., in *Martineau v. Canada*,[10] stated for his part:

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[7] Ibid., at paragraphs 48 to 50.

[8] [2001] T.C.J. No. 136 (Q.L.).

[9] Ibid., at paragraphs 28 to 30.

It should be noted that the Federal Court of Appeal considers it redundant to use the expression "genuine contract of service", as Tardif J. did in *Duplin*:

> The use of the word "genuine" to modify "contract" in this context may be redundant, but it does not suggest the application of an extra-statutory legal test. In my view, the quality of "genuineness" of the contract of service is implicit in paragraph 3(1)(*a*). If, for example, there is an allegation that there is such a contract and the allegation fails because evidence is not believed, or because a document that purports to set out the terms of the contract is not genuine, the conclusion must be that there is no contract of service. Perhaps that conclusion is best stated in those words, but it would not be incorrect to say that there is no genuine contract of service. [*Candor Enterprises Ltd. v. Canada*, [2000] F.C.J. No. 2110 (Q.L.), at paragraph 23.]

[10] [2000] T.C.J. No. 270 (Q.L.).

> Every agreement or arrangement providing for terms and conditions of payment of remuneration on the basis not of the time or period of performance of the remunerated work, but of other objectives such as benefiting from the provisions of the *Act* vitiates the nature of the contract of service.
>
> Furthermore, there is no room for other considerations such as generosity or convenience. It has often been said that unemployment insurance is a social measure designed to assist those who actually lose their employment and not a subsidy program to assist business or benefit claimants who bend or alter the structure and terms and conditions of payment of the remuneration which their work performance calls for.
>
> Every agreement or arrangement to accumulate or spread out hours has the effect of vitiating the contract of service, particularly since this creates a contractual relationship which is not very or not at all conducive to the existence of a relationship of subordination, an essential component of a contract of service.[11]

[15] The onus is on the Appellants to persuade the Court that the Minister erred in finding that they did not hold insurable employment within the meaning of the *Act*.

[16] In the instant case, the Appellants do not deny any of the Minister's factual assumptions, other than that "the terms of employment are an artificial arrangement to enable the Payor to obtain two workers for the salary of one person while the other person collected employment insurance benefits."[12] The Appellants argue that the arrangement was made in this way owing to special circumstances having to do with the isolation of the hunting and fishing camp.

[17] On the one hand, we have the testimony of the Appellants. We note that on certain points Ms. Comeau altered her version of the facts when the Minister refused to recognize her employment as insurable employment. On the other hand, we have an arrangement that, oddly enough, gives the clear impression that an attempt was made to benefit wrongly from the *Act*. It is of course permissible to take advantage of the *Act*. However, it is not permissible to misrepresent reality in order to benefit from it. The Payor could have paid each of the Appellants a weekly salary of $262.50 for six months. The evidence has shown that the two janitors, the Appellants, were working during both three-month periods. Consequently, the reality is that they were each earning $262.50 per week for 40 hours of work. But that was not what the Payor

[11] Ibid., at paragraphs 11 to 13.

[12] Reply to the Notice of Appeal, docket 2003-746(EI), at paragraph 5(p).

and the Appellants had agreed to, and even if it had been otherwise, the Appellants would not have qualified for employment insurance benefits since they would not have been unemployed. Had they nevertheless qualified, the benefits would at the very least have been lower, since their salaries would have been lower.

[18] The facts lead me to conclude that it is more probable that the terms and conditions of employment were designed to artificially take advantage of the *Act*. The courts have held that when this is the situation, the contract of service is vitiated. Since the contract of service is vitiated, there cannot be insurable employment within the meaning of paragraph 5(1)(*a*) of the *Act*. There had to be evidence, on a balance of probabilities, that the Appellants held insurable employment. The Appellants have not discharged their burden of proof.

[19] The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 24th day of November 2003.

"C. H. McArthur"

McArthur, J.

Translation certified true
on this 6th day of March 2009.

Brian McCordick, Translator

CITATION:	2003TCC823
COURT FILE NOS.:	2003-746(EI) and 2003-747(EI)
STYLES OF CAUSE:	Denis Boudreau and Marguerite Comeau and the Minister of National Revenue
PLACE OF HEARING:	Bathurst, New Brunswick
DATE OF HEARING:	July 10, 2003
REASONS FOR JUDGMENT BY:	The Honourable Justice C. H. McArthur
DATE OF JUDGMENT:	November 24, 2003

APPEARANCES:

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Counsel for the Respondent:	Stéphanie Côté

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