Docket: 2003-1849(EI)

BETWEEN:

TIP INVESTMENT ADVISORS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on January 20, 2004, at Montreal, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Counsel for the Appellant: Anthony Giammaria

Counsel for the Respondent: Agathe Cavanagh

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JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* from the decision of the Minister of National Revenue dated March 7, 2003, is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 22nd day of March 2004.

"Louise Lamarre Proulx"

Lamarre Proulx, J.

Translation certified true
on this 6th day of January 2005.

Wendy Blagdon, Translator

Citation: 2004TCC236
Date: 20040322
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## REASONS FOR JUDGMENT

**Lamarre Proulx, J.**

[1] This is an appeal from a decision of the Minister of National Revenue (the "Minister") dated March, 7, 2003, to the effect that the employment of Mr. Jean-Charles Dubois with the Appellant was insurable employment from January 1, 2002 to August 26, 2002, within the meaning of the *Employment Insurance Act* (the "Act").

[2] The Minister's decision was based on the facts described in paragraph 5 of the Reply to the Notice of Appeal (the "Reply") which read as follows:

a) the Appellant was incorporated on April 23, 1990;

b) the Appellant ran an investment fund advisory firm;

c) the worker was hired as vice-president of operations and the data processing system;

d) the worker's annual salary when he was hired was $72,000 and he had four weeks of vacation a year;

e) the worker's work schedule was from 9:00 a.m. to 5:00 p.m., Monday to Friday;

f) the worker worked in the payer's offices;

g) the worker's comings and goings as well as the number of hours he worked were controlled by the payer;

h) the payer gave the worker specific instructions and objectives to achieve;

i) the payer provided the worker with all the equipment required as well as a computer and a cellular telephone;

j) the worker was paid $6,000 a month;

k) the worker was entitled to sick leave;

l) the payer reimbursed the worker's travelling expenses;

m) the worker did not have chance of profit or risk of loss in the course of his duties with the payer;

n) the worker's duties were fully integrated into the payer's activities.

[3] The following facts are provided in the notice of appeal:

RELEVANT FACTS

Mr. Jean-Charles Dubois was a director at TIP INVESTMENT ADVISORS LTD ("TIP ADVISORS") and at the public investment fund company TIP FUNDS CANADA LTD ("TIP FUNDS") and his role was to complete the transfer of the electronic fund management system (back-office) and the electronic pricing system (pricing).

TIP FUNDS CANADA LTD is a public entity, which means that pursuant to the *Quebec Securities Act* it is an issuer required to rigorously comply with this Act. Consequently, in order to hold the position Mr. Dubois held, under the Act, the candidate must be an executive or director of the company, not an employee. Although Mr. Dubois held this position, he in fact managed his own computer consulting firm, ARISKA INC, and he was hired as a consultant. Mr. Dubois' main occupation was President of ARISKA Inc., an information technology management consultancy firm specializing in risk management strategy and decision-making. This information is available in public documents and on SEDAR (on-going disclosure service for public companies).

During the period at issue, Mr. Dubois was required under the Act to be a director, which he was. Mr. Dubois also acted as a consultant on behalf of his firm in the back-office and pricing transfer. Mr. Dubois was asked to carry out the specified transfer to the best of his abilities. As a computer professional, TIP ADVISORS gave him the freedom to manage his own time and he was not required to work a mandatory schedule set by TIP ADVISORS. Further, since Mr. Dubois owned his own firm, which had other clients, his sole income was not from TIP ADVISORS.

GROUND OF APPEAL

Based on the foregoing relevant facts, the Minister of Revenue's decision is erroneous because there is no subordinate relationship between TIP ADVISORS and Jean-Charles Dubois. The latter was hired by TIP ADVISORS as a consultant for the specific purpose of managing the computer system and carrying out the back-office and pricing transfer. He managed his own firm; TIP ADVISORS did not dictate his hours of work; and above all, he was not required to work on TIP premises because he could do the work from his home. Further, he had his own clients and there was no economic dependency between him and TIP ADVISORS. Finally, for the time he spent managing the computer system, Mr Dubois acted not only as a consultant but also as a director of TIP ADVISORS and TIP FUNDS.

[4] Mr. Paul Gagné, President and principal shareholder of the Appellant, testified on the Appellant's behalf. Paragraphs 5 (a) and 5 (b) were accepted. Paragraphs 5 (c), 5(f), 5(h), 5 (i) and 5(l) were denied as written. Paragraphs 5 (d), 5 (e), 5 (g), 5(j), 5 (k), 5 (m) and 5 (n) were denied.

[5] Mr. Gagné explained that the Appellant is a portfolio management firm or an advisor with unrestricted practice pursuant to the *Quebec Securities Act.* Mr. Gagné explained the Appellant's activities in more detail, but since these activities are neither essential nor required for determining the outcome of this appeal, I will not provide a description that would not be accurate.

[6] Mr. Gagné has known Mr. Dubois since 1998. In May 2001, he asked him to join the Appellant corporation as a director on the board of directors. He also retained the services of Ariska, a corporation controlled by Mr. Dubois. This corporation had been hired to do the Appellant's bookkeeping and to develop a computer system.

[7] Mr. Gagné explained that toward the end of September or early October of 2001, Mr. Dubois told him that he had not received other contracts and would be

interested in becoming a full-time employee of the Appellant. At that point, he was allegedly hired as the Appellant's operations manager.

[8] Exhibit A-2 contains an unsigned contract dated October 10, 2001, which confirms the fact that Mr. Dubois was hired as operations manager and that he continued to hold his director position on the board of directors. Mention is made in this document that the salary would be paid the consulting firm as professional fees. Mr. Gagné said that Mr. Dubois asked to continue to work as a consultant until the end of 2001.

[9] In December 2001, Mr. Gagné said that he suggested he pay Mr. Dubois about $6,000 a month the next year. He did not find this proposal, despite the fact that he looked everywhere for it. Nevertheless, starting in January 2002, Mr. Dubois was paid directly, not his corporation.

[10] However, in mid-January, the Appellant's lawyers pointed out that pursuant to the *Quebec Securities Act*, two of the three directors of the Appellant, in its capacity as funds manager, were required to be to some extent independent. They could not be the Appellant's employees. The three directors were Messrs. Gagné, Antoine Dagher and Dubois.

[11] Mr. Gagné told Mr. Dubois in late January or early February that it would be better if Mr. Dubois' corporation were paid instead of Mr. Dubois himself. However, Mr. Dubois told him he would rather be paid personally and he wanted the Appellant to make source deductions. The Appellant's accountant allegedly told Mr. Gagné that he would issue Mr. Dubois a T4A instead of a T4 which would mean that he was a self-employed worker, not an employee. No documents were provided in this regard.

[12] Mr. Gagné entered a few documents as Exhibit A-3 in connection with an employee's request for certification in order to be entitled to the partial tax exemption for employees of international financial centres. Mr. Gagné stated that Mr. Dubois never obtained this confirmation because the Appellant never applied for it for him. The Appellant therefore did not consider him an employee.

[13] Mr. Gagné stated that Mr. Dubois set his own work schedule. His hours were not controlled. Mr. Gagné also stated that Mr. Dubois was not entitled to any vacation. He had allegedly not worked during the month of July after his father died, and then took a few weeks of vacation.

[14] In the office, Mr. Dubois had a workstation equipped with a computer. When he travelled, the Appellant provided him with a laptop computer. The Appellant reimbursed his traveling expenses. Mr. Dubois had his own equipment at home. He had access to the office server. The software belonged to the Appellant. The Appellant provided his high-speed Internet access.

[15] Mr. Dubois is still paid $6,000 a month, less source deductions.

[16] A meeting was held in February with Mr. Dubois, Mr. Gagné and the other director, Mr. Antoine Dagher. Messrs Gagné and Dagher allegedly explained to Mr. Dubois that he could be a consultant, but not the Appellant's employee. He was given a letter to this effect dated February 12, 2002 at this meeting (Exhibit A-4).

[17] Exhibit A-5 contains documents provided to the securities commission which Mr. Dubois signed in his capacity as director of the Appellant's board of directors.

[18] A bundle of documents was entered as Exhibit A-6; one of these documents is a photocopy of a letter handwritten by Mr. Dubois to Mr. Gagné dated August 8, 2002. This letter reads as follows:

> I would hereby like to confirm my resignation from my position at Tip Investment Advisors Ltd.
>
> I would also like to confirm my resignation as director of Tip Funds Canada Ltd. and from Tip Investment Advisors Ltd.
>
> These resignations are effective today.

[19] Mr. Gagné responded to Mr. Dubois in a letter dated August 13, 2002 (Exhibit A-6), which reads as follows:

> As discussed recently, we do not accept your letter of resignation dated August 8. You have not completed your current contract or allowed an employee to replace you to be properly trained.
>
> I feel that this will take approximately 10 to 15 business days, after which time your resignation may be accepted.

> We also discussed our surprise at your decision. I strongly suggest that you consult accounting and legal advisors, after which we should schedule a meeting to identify the cause of your hasty decision.

[20] Mr. Dubois wrote another letter dated August 30 (Exhibit A-6) which he typed. It reads as follows:

> Further to your letter of August 13 last, I am writing to confirm my resignation as an employee and a director of the above-mentioned corporations. This resignation is effective August 8, 2002 as indicated in my original letter of resignation dated August 8.
>
> As discussed, by departure was made necessary following the discovery of a number of irregularities in the management and administration of TIP funds.
>
> After a discussion, I agreed, for the good of the above-mentioned corporations and their shareholders, to continue to work as an employee solely for TIP INVESTMENT ADVISORS LTD until August 29. This should be in no way interpreted as an extension of my employment or my functions as a director, but solely to delay my departure and allow for a seamless transition. Notwithstanding this undertaking, you asked me on August 26 to leave the office immediately and I did.
>
> Consequently, I consider my relationship with the above-mentioned corporations to be terminated and I await the amounts and shares I am owed.

[21] In the cross-examination phase, counsel for the Respondent entered Exhibit I-1, a photocopy of an e-mail message dated March 20, 2002, which reads as follows:

> As discussed, your employment will be maintained at Tip Advisors. This includes four weeks of paid vacation. The base salary is $72,000 per annum plus benefits, such as profit sharing, etc.
>
> Paul Gagné

[22] Mr. Gagné stated that he never sent this e-mail message, that it is a forgery.

[23] He said that the worker worked where he wanted in order to carry out his mandate. He admitted that the Appellant had given Mr. Dubois a cellular telephone, but it was so that he could be reached at any time.

[24] During his testimony, Mr. Dubois stated that Exhibit I-1, the e-mail message received from Mr. Paul Gagné, is authentic. He said he worked from 9:00 a.m. to 5:00 p.m. He sometimes worked in the evening or on weekends in crisis situations, but usually worked regular office hours. He explained that it was practically impossible to do the work at home; a few minor tasks occasionally when he was sick, but he normally worked at the office. Because of the work involved, he had to have a computer with specialized software which was only on the computer in the office.

[25] When he started working as an employee in January 2002, he was paid $6,000 a month, $72,000 a year. His paycheque was made out to him personally, not his corporation.

[26] He entered as Exhibit I-2 a computer printout of his bank account which shows the monthly deposits received from the Appellant. Exhibit I-3 contains information on source deductions. From Mr. Dubois' $6,000 monthly salary, the Appellant deducted $892.45 in federal taxes, $131.95 for the employee's share of employment insurance, $510.52 in Quebec income tax, and $134.62 for the Quebec pension plan, for a total net paycheque of $4,330.46. The employer's share of employment insurance was $79.51 and for the Quebec pension plan, $134.62. When he received his cheques, no stubs were attached.

[27] He was entitled to four weeks of vacation. He took three weeks of vacation which, in fact, coincided with the death of his father.

[28] A copy of Mr. Dubois' business card was entered as Exhibit I-5. This was the card that the Appellant gave him. Mention is made on it that Mr. Dubois is the Vice-President of Systems and Operations.

[29] He received the certificate for employees of international financial centres. It was one of the reasons he wanted to be a permanent employee of the organization. The manager registered the candidates and he was still waiting for this confirmation, which in the end he never received. However, we noted that among the deductions, the provincial salary deduction takes into account 50% of the tax reduction, so he thought he had indeed been registered.

[30] Mr. Dubois said that when he received the A-4 letter, he went away for a few weeks, but then reiterated to Mr. Gagné that he wanted to be an employee, which was confirmed by Exhibit I-1, the e-mail message he was sent dated March 20, 2002.

[31] Mr. Antoine Dagher testified. He sat on the Appellant's board of directors. He attended a meeting with Mr. Dubois and Mr. Gagné in early February 2002. The purpose of this meeting was to inform Mr. Dubois that they no longer wanted him to be an employee. He could stay on as a consultant and complete his mandate, but he could no longer be an employee. Mr. Gagné allegedly did not suggest Mr. Dubois be an employee without consulting him in this regard. According to the witness, the letter dated February 12, 2002, was provided at that meeting.

[32] Counsel for the Appellant referred to *Groupe Yoga Adhara inc. c. La coopérative de travail Le Collège de Saint-Césaire*, [1998] J.Q. No 4780 (Q.L.), a Quebec Superior Court decision dated July 15, 1998. He referred to paragraph 23 of that decision:

> [Translation]
>
> With regard to the last two criteria specified in Article 2099, it must first be noted that the plaintiff herself admitted that she was free to choose the means of performing the contract, which excludes a relationship of subordination. Further, the fact that the pupils, schedule and premises were provided by the respondent could not, in the opinion of the Court, be recognized as a criterion in assessing a relationship of subordination, since the plaintiff undertook in fact, in the contract, to provide the R.E.M. program to the Collège pupils from Monday to Thursday every week and the respondent undertook in consideration to provide proper premises. The plaintiff, the client, establishes the result and retains the right to ensure that the services rendered are in compliance with the contract. There does not have to be an absolute arm's length relationship between the client and the provider of services.

[33] Counsel for the Appellant also cited *Canada (Attorney General) v. Rousselle (F.C.A.)*, a Federal Court decision, [1990] F.C.J. No 990 (Q.L.), at page 3:

> In my view, it is clear that the judge did not understand the meaning of the word "control". Fixing the amount of remuneration or defining the purpose of the exercise is not controlling work. These aspects exist in a contract for services as much as in a contract of service. It is still more the case that control does not lie in the act of payment, whether by cheque or otherwise.

> Finally, the fact of giving instructions on the type of wood to be cut and checking it when it is measured does not in itself create a relationship of subordination like that which exists between an employer and an employee.

[34] Counsel for the Respondent cited the Federal Court of Appeal decision in *Groupe Desmarais Pinsonneault & Avard Inc. v. Canada (Minister of National Revenue)*, [2002] F.C.J. No 572 (Q.L.), at paragraphs 4 to 6:

> 4] In concluding that there was no relationship of subordination between the workers and the defendant, the trial judge does not appear to have taken into account the well-settled rule that a company has a separate legal personality from that of its shareholders and that consequently the workers were subject to the defendant's power of supervision.
>
> 5] The question the trial judge should have asked was whether the company had the power to control the way the workers did their work, not whether the company actually exercised such control. The fact that the company did not exercise the control or that the workers did not feel subject to it in doing their work did not have the effect of removing, reducing or limiting the power the company had to intervene through its board of directors.
>
> 6] We would add that the trial judge could not conclude there was no relationship of subordination between the defendant and the workers simply because they performed their daily duties independently and without supervision.

[35] The evidence was proven in all of the facts described in the Reply. However, I feel that the statements in paragraphs 5(g) and 5(h) may not be as absolute as they are in the document. These statements are merely the comings and goings of the worker, the number of the hours worked that were controlled by the payer, and the fact that the payer gave the worker specific instructions and objectives to be achieved. The Appellant had confidence in Mr. Dubois's professionalism. His hours did not seem to be closely monitored. At any rate, this control over hours does not seem to be a bone of contention between the parties. I feel, however, that he went in to the office as he indicated from 9 a.m. to 5 p.m. The software he used was in the office.

[36] In 2001, Mr. Dubois may, as a self-employed worker for his corporation Ariska Inc., have carried out duties very similar to those carried out in 2002. It is possible that they may have been duties that can be carried out by sub-contractors or by employees.

[37] They are, then, working conditions that are rather neutral. Under these circumstances, based on the recent Federal Court of Appeal ruling, the mutual intention of the parties must be examined. See *Wolf v. Canada*, [2002] F.C.J. No. 375 (Q.L.), *Poulin v. Canada* (*Minister of National Revenue)*, [2003] F.C.J. No. 141 (Q.L.) and *D & J Driveway Inc. v. Canada* (*Minister of National Revenue*), [2003] F.C.J. No. 1784 (Q.L.).

[38] The parties' mutual intention here is unclear. One party wanted to have employee status and the other wanted him to have consultant or self-employed worker status.

[39] What I can, however, see from the evidence is that Mr. Dubois always asked that he carry out his duties as an employee and that the Appellant let him believe by its actions that such was the case. As of January 2002, Mr. Dubois was paid personally. The source deductions were made, including employment insurance. The T4A slip mentioned in paragraph 11 of these Reasons was not provided. It is a prescribed form. I can therefore refer to it. On the front of the form itself, there is no box for employment insurance deductions, but there is one on the T4 slip for employment income. The federal tax deducted was twice the amount of the provincial tax deduction, which indicated to Mr. Dubois that he was an employee for whom the Appellant had requested an exemption for an employee of an international financial centre.

[40] He was provided with a computer and software at the office. The Appellant also provided him with a laptop computer when he traveled. He was also given a cellular telephone.

[41] Mr. Dubois did not have any other duties than those he carried out for the Appellant. He did not have any employees and he was not replaced by anyone else. He had duties to carry out and he did so at the office, during office hours. The evidence did not show any entrepreneurial activities on the worker's part.

[42] The worker's work terms, conditions and circumstances as accepted by the Appellant to obtain services from the worker were normal for an employee. I must therefore conclude that during the period at issue, Mr. Dubois was the Appellant's employee.

[43] The appeal is therefore dismissed.

Signed at Ottawa, Canada, this 22nd day of March 2004.

"Louise Lamarre Proulx"

Lamarre Proulx, J.

Translation certified true
on this 6th day of January 2005.

Wendy Blagdon, Translator