Docket: 2005-1741(EI)

BETWEEN:

STEVE ROUSSEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 31, 2006, at Québec, Quebec.

Before: The Honourable S.J. Savoie, Deputy Judge

Appearances:

Agent for the Appellant: Gaston Sylvain

Counsel for the Respondent: Michel Lamarre

JUDGMENT

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

Signed at Grand-Barachois, New Brunswick, on this 30th day of June 2006.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 4th day of December 2006.
Gibson Boyd, Translator

Citation: 2006TCC350
Date: 20060630
Docket: 2005-1741(EI)

BETWEEN:

STEVE ROUSSEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] This is an appeal concerning the insurability of the Appellant's employment when he was working for Gilles Rousseau, the Payer, for the periods from June 15 to October 30, 1998, from June 14 to November 12, 1999, from July 3 to October 13, 2000, and from September 13 to 27, 2002, the periods at issue.

[2] On January 17, 2005, the Minister of National Revenue (the "Minister") informed the Appellant of his decision that he did not hold insurable employment during the periods at issue. In rendering his decision, the Minister relied on the following presumed facts:

> [translation]
>
> (7) The Minister determined that the Appellant and the Payer had a non-arm's length relationship in the context of the employment. Indeed, the Minister was satisfied that it was not reasonable to conclude that the Appellant and

the Payer could have entered into a substantially similar contract of employment if they had not been dealing with each other at arm's length, given the following circumstances:

(a) the Payer operated a bee farm of 48 hives since 1993;

(b) in 1998, the Payer decided to operate a small fruit and market gardening business on 3 hectares of land;

(c) on August 17, 1998, the Payer registered the company name "Ferme horticole Rousseau";

(d) the Payer was the sole owner of the business;

(e) the Payer sold his fruit and vegetables to the local food markets Metro, IGA and Provigo;

(f) the Appellant had completed a horticulture course in 1996;

(g) in 1998, the Appellant was hired by the Payer as an agricultural worker;

(h) the Appellant's tasks were to plant seed, prepare the soil for planting, look after fruit and vegetable production, maintain machinery, deliver vegetables, assist in the operation of the hives and the production of honey;

(i) the Payer did not impose a work schedule on the Appellant;

(j) the Appellant's actual work hours were not verified by the Payer;

(k) on March 4, 2004, in a signed declaration to HRDC, the Payer stated that the Appellant was the boss, the Payer gave him a free hand and the liberty to make all decisions concerning market gardening;

(l) on March 4, 2004, in a signed declaration to HRDC, the Payer declared that he had started the business in order to help the Appellant;

(m) the Appellant was listed on the Payer's payroll for weeks of 43 hours;

(n) from 1998 to 2000, the Appellant received compensation of $440.23 for 43 hours of work, that is $10.24 per hour;

(o) year after year, the Payer's business declared the following losses:

Years	**Net revenue**	**Losses**
1998	$11,489	-$8,750
1999	$14,055	-$8,750

2000	$6,362	-$8,750
2001	$4,579	-$4,152
2002	$9,800	-$ 50

(p) Considering the revenues generated by the business, the extent of the annual losses and the significance of salary expenses, it is unreasonable to believe that an arm's length worker would be compensated at the Appellant's hourly rate;

(q) in 2001, the Appellant was not listed in the Payer's payroll;

(r) on November 2, 1998, the Payer gave the Appellant a record of employment indicating June 15, 1998, as first day of work and October 30, 1998, as last day of work for 860 insurable hours and $8,806.40 in insurable earnings;

(s) on November 15, 1999, the Payer gave the Appellant a record of employment indicating June 14, 1999, as first day of work and November 12, 1999, as last day of work for 946 insurable hours and $9,687.04 in insurable earnings;

(t) on October 16, 2000, the Payer gave the Appellant a record of employment indicating July 3, 2000, as first day of work and October 13, 2000, as last day of work for 645 insurable hours and $6,604.80 in insurable earnings;

(u) on September 30, 2002, the Payer gave the Appellant a record of employment indicating September 13, 2002, as first day of work and September 27, 2002, as last day of work for 71 insurable hours and $639.00 in insurable earnings;

(v) the Appellant started tomato seedlings in mid-March and started transplanting them 6 weeks later;

(w) before planting, in May, the Appellant tilled and harrowed with the tractor and spread fertilizer on the growing land;

(x) also in May, the Appellant cleaned and prepared the hives;

(y) on April 21, 2004, in a signed declaration to HRDC, the Appellant stated: "I did provide services to the business on a volunteer basis, because the business couldn't always afford to pay me;

(z) the Appellant was listed on the payroll from the first day for which he received compensation and not the first day of work;

(aa) on April 21, 2004, in a signed declaration to HRDC, the Appellant stated: "I never declared the work done at the business during my periods of unemployment because I was not paid. I didn't consider this work to be employment.";

(bb) the Appellant's records of employment do not reflect the actual number of hours worked or the periods worked;

(cc) a person at arm's length would not have had compensation, duration of work or employment conditions similar to those of the Appellant.

[3] The Appellant has admitted all the facts presumed by the Minister except those listed in subparagraphs 7.(b), (h), (i), (j), (k), (l), (m),(p), (r), (s), (t), (u), (y), (aa), (bb) et (cc).

[4] It must be pointed out, from the start, that the Appellant's evidence was unsuccessful in disproving any of the Minister's presumed facts.

[5] The Appellant admitted in his declaration and in his testimony that he does work for the Payer on a volunteer basis each spring, from March until June or July to prepare the seeding.

[6] The Appellant and the Payer both testified at the hearing. Unfortunately, this exercise merely corroborated the Minister's thesis and decision. On several occasions they contradicted their statutory declarations. Their memories often failed. They were frequently unable to answer the relevant questions they were asked.

[7] The Minister determined that the Appellant's employment was not insurable pursuant to paragraph 5(2)(*i*) and subsection 5(3) of the *Employment Insurance Act* (the "Act"), since he was satisfied that, having regard to all the circumstances, it was not reasonable to conclude that the Appellant and the Payer would have would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. It is appropriate to reproduce an excerpt of the Act that is applicable to the case before the Court.

5. (1) Subject to subsection (2), insurable employment is

(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*; 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.

[8] It is therefore a matter of analyzing the exercise performed by the Minister in accordance with the legislative mandate under paragraph 5(3)(*b*) of the Act aimed at determining whether the Appellant's employment is excluded from insurable employment due to a non-arm's length relationship between him and the Payer.

REMUNERATION PAID

[9] During the period from 1998 to 2000, the Appellant was compensated at a salary of $440.32 per week for 43 hours of work, or $10.34 per hour. The Appellant and the Payer affirmed that the Appellant was compensated at such a rate due to his skills, given his knowledge of beekeeping. It was also explained that there was a real labour shortage in this field. This prompted the Minister to say that he had difficulty reconciling this salary with the one paid to the Appellant in 2002, i.e. $319.50 per week for 35 hours of work, or $9.12 per hour. Moreover, it was established that the hourly rate paid to the Appellant by other arm's length employers was $9.00 in 2001 and $9.36 in 2002.

[10] At the hearing, the Appellant admitted the Payer's revenues and losses for the years 1998 to 2002, listed in paragraph 7. (o) of the Reply to Notice of Appeal, the data of which is reproduced in the table below:

Years	Net revenue	Losses
1998	$11,489	- $8,750
1999	$14,055	- $8,750
2000	$6,362	- $8,750
2001	$4,579	- $4,152
2002	$9,800	- $50

[11] The evidence demonstrated that the losses incurred by the business were heavier than those indicated in the income tax returns due to the regulatory restrictions on the amount of deductible losses permitted. The documents filed by the Minister at the hearing demonstrated that the actual losses incurred by the Payer came to $20,956.68 in 1998, $17,450.24 in 1999 and $23,360.45 in 2000.

[12] Considering the low revenues generated by the business, the annual losses and the significance of salary costs in the annual losses, the Minister considered that it was unreasonable to believe that an arm's length worker would be compensated at such an hourly rate for 43 hours of work per week.

TERMS AND CONDITIONS OF THE EMPLOYMENT

[13] In his testimony, Gilles Rousseau stated that he had worked full-time for another employer from 1993 to 1996 and that he looked after his beekeeping production after work and on weekends. He added that his son, Steve, had taken a course in horticulture, which he finished in 1996. He then decided to add market gardening to his beekeeping production in 1997 and to hire his son to take care of production. Moreover, he intended to turn this business over to his son if it was successful.

[14] In 1997, the Payer borrowed $40,000 to purchase machinery, increase the number of hives and pay Steve's salary. He also had a line of credit of $6,800, which was also used to pay the Appellant's salary from 1997 to 2000. From 1998 to 2000, the Payer's agricultural business generated annual revenues varying between $6,362 and $14,055 and declared yearly business losses of $8,750. From 1997 to 2000, the Payer sold his fruits and vegetables to local food markets. During the periods at issue, the Appellant looked after fruit and vegetable production, machinery maintenance, vegetable delivery, the hives and honey production, tasks in preparation for growing and end of season work. In his statutory declaration of April 21, 2004, the Appellant stated that he provided services to the business on a volunteer basis because it could not always afford to pay him, but that as compensation, he stayed with his parents without having to pay board.

[15] It was established that the Payer did not impose a work schedule on the Appellant. Moreover, the Appellant's actual work hours were not verified by the Payer. The Payer declared on March 4, 2004, to HRDC, that the Appellant was the

boss. He added that he gave his son, the Appellant, a free hand and the liberty to make all decisions concerning market gardening. In the same statutory declaration, the Payer stated that he had started the business in the aim of helping his son.

[16] It was demonstrated that during the seeding season, i.e. March until June, the Appellant worked for the Payer on a voluntary basis. Indeed, the Appellant admitted subparagraph 7.(v) of the Reply to Notice of Appeal, which reads as follows:

> [TRANSLATION]
>
> 7.(v) the Appellant started the tomato seedlings in mid-March and started transplanting them 6 weeks later.

[17] The records of employment issued to the Appellant by the Payer indicated employment periods starting in June. When the investigators questioned the Payer about his business losses and low revenues, he affirmed that he only did it to help his son. After his review, the Minister concluded that the terms and conditions of employment were unreasonable and that they would not be offered to a stranger in the same circumstances.

NATURE AND IMPORTANCE OF THE WORK

[18] The tasks give to the Appellant were integrated into the Payer's activities. However, it is odd to note that when employed by another employer in 2002, Gilles Rousseau still produced sold $3,000 in vegetables, while in 2000, the Appellant was compensated for 43 hours per week for 15 weeks and the Payer only sold $5,630 in vegetables.

[19] The Minister considered that the Payer's low revenues and the significant annual losses he incurred starting in 1997 could not justify hiring an arm's length worker in the same circumstances.

DURATION OF THE EMPLOYMENT

[20] In his statutory declaration of April 21, 2004, the Appellant stated that his mother filled in the first paid day of work on the record of employment and not the first actual day of work. The facts then confirmed this affirmation since it has been established that the work started in March and required 15 to 20 hours of work per week once the hives were brought out, generally in May.

[21] In 1997, the Appellant's period of paid employment started the first week of June and ended the second week of November, totalling 23 weeks. This is the period concerned in the first application for employment insurance benefits. The agricultural revenues totalled $4,994.00 and the net loss incurred was $8,750.00. In 1998, the employment period, according to the record of employment, started the second week of June and ended the last week of October, representing 20 weeks of employment. That year, agricultural revenues totalled $11,489.00, of that $8,638.88 representing the proceeds of vegetable sales, $2,315.00 representing the proceeds of fruit sales and $536.50 representing the proceeds of honey sales, while the net loss came to $8,750.00 $ and the Appellant received $9,834.79 in salary. In 1999, the Appellant's period of paid employment started the second week of June and ended the second week of November, totalling 22 weeks of employment while the net revenues totalled 14,055.00, of that $10,475.21 representing the proceeds of vegetable sales, $2,928.00 representing the proceeds of fruit sales and $652.04 representing the proceeds of honey sales, while the net loss came to $8,750.00 and the Appellant received a salary of $10,715.43. In 2000, the Appellant's period of paid employment started the first week of July and ended the second week of October for a total of 15 weeks of employment. During that year, agricultural revenues totalled $6,362.00, of that $5,630.41 from vegetable sales, $0 from the proceeds of fruit sales and $732.24 in proceeds from honey sales, and the net loss came to $8,750.00, while the Appellant received a salary totalling $7,262.89. In 2001, the Appellant worked for another payer from May until August. He then went back to school. That year, the Payer's agricultural revenues were $4,579.00 and the net loss came to $4,152.00. On September 13, 2002, the Appellant filed an application for employment insurance benefits following his layoff from Équipement G. Comeau Inc. He was notified that he lacked insurable hours to qualify for the benefits. In October 2002, he presented a new record of employment for two weeks of work for the Payer Gilles Rousseau. In 2002, the Payer's agricultural revenues came to $9,800.00, $2,975.71 in proceeds from vegetable sales, $0 in proceeds from fruit sales and $6,825.00 in proceeds from honey sales, while the net loss came to $50.00. The Payer stated that he hired his

son because he was sick and hospitalized; however it was established that his transportation by ambulance took place on November 11, 2002.

[22] In the opinion of this Court, the Minister rightly exercised his discretion under subsection 5(3) of the Act.

[23] The Appellant had the burden of proving the Minister's presumptions to be false. He did not.

[24] In the circumstances, it is appropriate to cite Mr. Justice Pratte in *Elia v. Canada* (Minister of National Revenue – M.N.R.), [1998] F.C.J. No. 316, in which he held the following:

> Contrary to what the judge believed, he therefore could have intervened and should have intervened if, as he asserted, the evidence established that the Minister's decision was unreasonable. However, it seems to us that the judge's assertion is also inaccurate and based on an error of law, since the judge did not take into account the well-settled rule that the allegations in the reply to the notice of appeal, in which th Minister states the facts on which he based his decision, must be assumed to be true as long as the appellant has not proved them false.

[25] This Court has no reason to intervene in the Minister's decision.

[26] Consequently, the appeal is dismissed and the decision by the Minister is confirmed.

Signed at Grand-Barachois, New-Brunswick, this 30th day of June 2006.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 4th day of December 2006.
Gibson Boyd, Translator

CITATION:	2006TCC350
COURT FILE NO.:	2005-1741(EI)
STYLE OF CAUSE:	Steve Rousseau v. M.N.R.
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	March 31, 2006
REASONS FOR JUDGMENT BY:	The Honourable S.J. Savoie, Deputy Judge
DATE OF JUDGMENT:	June 30, 2006

APPEARANCES:

Agent for the Appellant:	Gaston Sylvain
Counsel for the Respondent:	Michel Lamarre

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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