

Docket: 2004-3105(EI)

BETWEEN:

GESTION RÉJEAN MASSON INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CHANTAL MASSON,
JACINTHE MASSON,
ANDRÉ ST-PIERRE,

Interveners.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 22, 2005, at Montréal, Quebec

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Simon Petit
Agent for the Interveners:	Alain Savoie

JUDGMENT

The appeal from the assessment made by the Minister of National Revenue under the *Employment Insurance Act* for the period of January 1, 2002, to June 6, 2003, is allowed, and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 15th day of July 2005.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 3rd day of November 2006.
Monica F. Chamberlain, Reviser

Citation: 2005TCC445

Date: 20050715

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REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] The Appellant is appealing from decisions in which the Minister of National Revenue ("the Minister") determined that André St-Pierre, Chantal Masson and Jacinthe Masson were employed in insurable employment from January 1, 2002, to June 6, 2003.

[2] The facts on which the Minister relied in making these decisions are set out in paragraphs 5, 6 and 7 of the Reply to the Notice of Appeal ("the Reply"):

[TRANSLATION]

(a) The Appellant was incorporated on January 31, 1980.

(b) The Appellant operated a Métro grocery store in Cap-de-la-Madeleine.

- (c) The Appellant employed approximately 80 employees.
- (d) In 2002, the Appellant's revenues were approximately \$11 million.
- (e) The Appellant employed three managers: grocery department manager Philippe H. Lambert; meat department manager François Charel; and produce department manager André Beaudoin.
- (f) On March 26, 2004, in a statement to a representative of the Respondent, Jacinthe Masson said that the department managers were responsible for hiring and firing the employees in their department.
- (g) The workers rendered services to the Appellant throughout the year.
- (h) Each worker had defined duties.
- (i) Chantal Masson's duties can be summarized as follows:
 - looking after payroll
 - looking after group insurance
 - filling out managers' analysis forms
 - taking telephone orders
- (j) Jacinthe Masson's duties can be summarized as follows:
 - looking after billing, accounts payable and accounts receivable
 - entering the Appellant's sales on the computer
 - making deposits
 - doing the banking reconciliations
- (k) André St-Pierre's duties can be summarized as follows:
 - managing the staff
 - preparing the budgets
 - changing the computer software
 - purchasing the equipment
 - looking after the training
- (l) The workers had a variable schedule during the week.

- (m) On June 4, 2003, in a statement to a representative of the Respondent, Jacinthe Masson said that her workload easily kept her busy for 40 hours a week.
 - (n) The Appellant's payroll journal entries state that the workers worked 40-hour weeks, but they actually worked up to 60 hours a week.
 - (o) The workers worked on the Appellant's premises.
 - (p) The workers were paid a fixed salary of \$675 per week.
 - (q) The workers were paid by direct deposit.
 - (r) The Appellant had the power to control the workers' hours.
 - (s) The Appellant controlled the workers' conditions of employment.
 - (t) All the equipment and supplies that the workers used belonged to the Appellant.
 - (u) If the worker André St-Pierre used his car to perform his duties, the Appellant reimbursed him for his expenses.
 - (v) The workers bore no financial risk in the performance of their duties for the Appellant.
 - (w) The workers' duties were integrated into the Appellant's activities.
6. The Appellant and the workers are related persons within the meaning of the *Income Tax Act* because
- (a) the Appellant's voting shareholders were
 - Réjean Masson 51% of shares
 - Jacinthe Masson 25% of shares
 - Chantal Masson 19% of shares
 - André St-Pierre 5% of shares
 - (b) Réjean Masson is Jacinthe Masson and Chantal Masson's father;
 - (c) André St-Pierre is Chantal Masson's husband; and
 - (d) the workers are part of a related group that controls the Appellant.

7. The Minister also determined that the Appellant and the workers were deemed to deal with each other at arm's length in the context of this employment because he was satisfied, having regard to the following circumstances, that it was reasonable to conclude that the workers would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length:
- (a) the workers did not pay money for the Appellant's shares;
 - (b) in 1991, Réjean Masson gave part of his shares to the two workers as a gift;
 - (c) the workers' remuneration was set by the Appellant;
 - (d) grocery department manager Philippe H. Lambert's salary, \$802 per week gross, was higher than that of the workers;
 - (e) the workers' schedules were variable and took the nature of the Appellant's business into account;
 - (f) Réjean Masson went to the store daily examined the financial reports regularly;
 - (g) the workers had to account to the Appellant with regard to the results obtained;
 - (h) the workers worked for the Appellant all year long; and
 - (i) the Appellant's important decisions were made by all the shareholders.

[3] At the beginning of the hearing, the Appellant's agent admitted to subparagraphs 5(a) to 5(l), 5(p), 5(q), 5(t), 5(u) and 5(w). He denied subparagraphs 5(m) to 5(o), 5(r) and 5(s). He admitted to paragraph 6 in its entirety. He admitted to subparagraphs 7(a), 7(b), 7(d) and 7(h) and denied subparagraphs 7(c), 7(e), 7(f), 7(g) and 7(i).

[4] André St-Pierre and Jacinthe Masson testified for the Appellant.

[5] André St-Pierre and Chantal Masson have been married since 1979. In 1987, they began working for the grocery store of Réjean Masson, Ms. Masson's father.

[6] In 1990, Réjean Masson more or less retired from the management of the store, and Mr. St-Pierre became its chief executive officer. In 1995, Mr. St-Pierre decided to expand the store without really consulting with Mr. Masson. Since February 1, 2004, he and his wife have owned 75.1% of the Appellant's shares through Gestion Chambray Inc., whose shares they hold.

[7] Mr. St-Pierre and Chantal Masson secured a \$480,000 loan taken out by the Appellant, and a \$225,000 line of credit, with their private home.

[8] Mr. St-Pierre explained that his work schedule varies. He usually works 80-hour weeks, but he sometimes works 30-hour weeks. Unlike the employees, who punch in and out, he does not have to adhere to a set schedule.

[9] In 2001, he had to undergo heart surgery. His wife took over at that time. Since he was not being paid his full salary, he got the difference from a private salary insurance policy.

[10] He, his wife Chantal and his sister-in-law Jacinthe determined the salaries collectively. With respect to salaries, I quote the relevant excerpts of the appeals officer's report, which was tendered as Exhibit A-3:

[TRANSLATION]

Compensation

André St-Pierre's salary was \$744 per week gross in the year 2002. It was later revised downward by 9% to \$675 gross in order to avoid arguments with Chantal and Jacinthe Masson, the other shareholders, who got \$675 per week gross. As for majority shareholder Réjean Masson, his salary was \$480 per week gross.

Furthermore, by way of comparison, a sampling of the salary journal for the year 2003 shows that grocery department manager Philippe H. Lambert's salary was \$802 per week gross for 40 hours; meat department manager François Charel's salary was \$630 per week gross, and produce department manager André Beaudoin's salary was \$602 per week gross.

Being shareholders, they were responsible for determining their own salaries, which were determined based on the company's ability to pay. Salaries were paid by direct deposit.

André St-Pierre was always paid the same salary, regardless of the number of hours worked (always more than 40 hours, and up to 75 hours a week, despite the fact that the payroll journal says 40 hours). This is common practice when a

worker is also a shareholder: to ensure the success of the business, hours worked are not counted.

Thus, André St-Pierre's salary is reasonable having regard to the facts stated above.

Compensation

Chantal Masson's salary was \$675 per week gross, for a work week that ranged from 40 to 45 hours depending on the payer's needs, despite the fact that the payroll journal says she worked 40 hours a week. Shareholder Jacinthe Masson was paid \$675 per week gross, as was shareholder André St-Pierre (following a cut in 2002 to avoid arguments). As for majority shareholder Réjean Masson, his salary was \$480 per week gross.

Furthermore, by way of comparison, a sampling of the payroll journal for the year 2003 shows that grocery department manager Philippe H. Lambert's salary was \$802 per week gross for 40 hours; meat department manager François Charel's salary was \$630 per week gross; and produce department manager André Beaudoin's salary was \$602 per week gross.

Being shareholders, they were responsible for determining their own salaries, which were determined based on the company's ability to pay. Salaries were paid by direct deposit.

Thus, Chantal Masson's salary is reasonable having regard to the facts stated above.

...

Compensation

Jacinthe Masson's salary was \$675 per week gross, for a work week which ranged from 15 to 20 hours depending on the payer's needs, despite the fact that the payroll journal says she worked 40 hours a week. Shareholder Chantal Masson was paid \$675 per week gross, as was shareholder André St-Pierre (following a cut in 2002 to avoid arguments). As for majority shareholder Réjean Masson, his salary was \$480 per week gross.

Furthermore, by way of comparison, a sampling of the payroll journal for the year 2003 shows that grocery department manager Philippe H. Lambert's salary was \$802 per week gross for 40 hours; meat department manager François Charel's salary was \$630 per week gross; and produce department manager André Beaudoin's salary was \$602 per week gross.

Being shareholders, they were responsible for determining their own salaries, which were determined based on the company's ability to pay. Salaries were paid by direct deposit.

Thus, Jacinthe Masson's salary is reasonable having regard to the facts stated above.

[11] Mr. St-Pierre said that he gave himself a bonus of approximately \$10,000 in 2004.

[12] He usually takes one or two weeks off, as does Chantal Masson, though managerial employees are entitled to four weeks' vacation.

[13] He brings office work home regularly. For example, he prepares budgets at home. He has a notebook computer, which he brings home and connects to his store computer. This enables him to control refrigerator fluctuations and everything else that is essential to a grocery store.

[14] Unlike the other employees, such as the grocery, meat and produce department managers, the Interveners did not record their overtime.

[15] Jacinthe Masson sometimes works two days a week and sometimes works five. There is no control over her hours. She works roughly 15 to 20 hours a week.

[16] Chantal Masson describes herself as the deputy CEO. She looks after workers' compensation claims and the inventory analyses for each department. Her work schedule is set at her convenience. She is autonomous. She can work 20, 45 or 60 hours a week. No week is the same. The hours are based on her own needs and the needs of the business. For example, if there is a collective agreement to negotiate, she works longer hours.

[17] She plays sports like golf, and has taken courses. She has three children who are currently 21, 17 and 13 years old. She signs the cheques for the business. Only one person needs to sign such cheques.

[18] She confirmed that André St-Pierre is the one who makes the important decisions.

[19] She stated that if she stopped working for the Appellant, she would not be replaced, and André would assume all the duties.

[20] The interveners' agent argued that this is a family business and that the various working conditions do not conform to the rules of the normal labour market as far as salary amounts, security for potential business debts, and reduced vacations are concerned. Remuneration is based on the workers' personal decisions. The workers' conditions of employment are determined by the workers themselves.

[21] Counsel for the Respondent referred to the case law regarding the respect that must accorded the Minister's exercise of discretion under paragraph 5(3)(b) of the Act and, *inter alia*, the decision of the Federal Court of Appeal in *Miller v. Canada*, [2002] F.C.J. No. 1498 (QL), at paragraphs 3-4:

At the first stage of the inquiry, the Tax Court Judge must assess the legality of the Minister's determination. In doing so, the Tax Court Judge must accord judicial deference to the Minister's discretionary decision unless the Tax Court Judge finds that the Minister has exercised his discretion in a manner contrary to law. In assessing whether the Minister has exercised his discretion properly, the Tax Court Judge need not defer to the Minister's findings of fact, but have regard to the facts raised before the Court during the hearing of the appeal.

The Tax Court Judge may only proceed to the second stage and consider the merits of the Minister's decision if one of the following grounds for interference is established: (i) the Minister acted in bad faith or for an improper purpose or motive; (ii) the Minister failed to take into account all of the relevant circumstances, as expressly required by subparagraph 3(2)(c)(ii); or (iii) the Minister took into account an irrelevant factor. [See Note 1 below.] Therefore, it "is only where the Minister's determination lacks a reasonable evidentiary foundation that the Tax Court's intervention is warranted." [See Note 2 below.]

Conclusion

[22] In my view, the message that must be drawn from the above statements of the Federal Court of Appeal is that that when the Minister's decision is not reasonably based on the evidence, the Court is justified in intervening.

[23] With respect, and for the following reasons, I find that it is not reasonable to conclude, based on the evidence, that the Intervenors' terms and conditions of employment would have been substantially similar if they had been dealing with each other and the employer at arm's length.

[24] The fact that three workers are paid the same salary for very dissimilar duties is not in line with labour market standards. These duties differ in terms of

the number of hours worked, the importance of the work and the guarantees assumed.

[25] Moreover, I do not believe that it is normal for the workers themselves to determine their remuneration and hours of work.

[26] Consequently, the appeal is allowed.

Signed at Ottawa, Canada, this 15th day of July 2005.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 3rd day of November 2006.
Monica F. Chamberlain, Reviser

CITATION: 2005TCC445

COURT FILE NO.: 2004-3105(EI)

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André St-Pierre.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 22, 2005

REASONS FOR JUDGMENT BY: The Honourable Justice Louise
Lamarre Proulx

DATE OF JUDGMENT: July 15, 2005

APPEARANCES:

Agent for the Appellant:	Alain Savoie
Counsel for the Respondent:	Simon Petit
Agent for the Interveners:	Alain Savoie

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