

Dockets: 2005-481(EI)
2005-482(EI)

BETWEEN:

LORRAINE MALENFANT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on September 1, 2005, at Québec, Quebec
Before: The Honourable Justice Pierre R. Dussault

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Martin Gentile

JUDGMENT

The appeals filed under subsection 103(1) of the *Employment Insurance Act* are dismissed, and the decisions of the Minister of National Revenue are confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, the 25th day of October 2005.

“P. R. Dussault”

Dussault J.

Translation certified true
on this 26th day of October 2006.
Monica F. Chamberlain, Reviser

Citation: 2005TCC686
Date: 20051025
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Appellant,

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REASONS FOR JUDGMENT

Dussault J.

[1] Docket 2005-482(EI) concerns an appeal from a decision of the Minister of National Revenue (“the Minister”) that the Appellant was not engaged in insurable employment with Jean-Yves Malenfant (“the Payer”) during the following periods:

- January 25 to May 14, 1999
- July 26 to October 13, 1999

[2] Docket 2005-481(EI) concerns an appeal from a decision of the Minister of National Revenue that the Appellant was not engaged in insurable employment with Érablière Jean-Yves Malenfant inc. (“the Payer”) during the following periods:

- October 14 to December 17, 1999
- February 28 to May 26, 2000
- February 1 to June 1, 2001
- January 15 to June 21, 2002

- September 16 to September 27, 2002
- January 26 to June 16, 2003
- July 17 to 2003 to December 4, 2003
- February 16 to June 11, 2004

[3] The assumptions of fact on which the Minister based these two decisions are essentially the same except that the periods are different and Jean-Yves Malenfant incorporated a corporation to operate a business effective October 14, 1999. For the sake of convenience, I will therefore reproduce only paragraphs 5 and 6 of the Reply to the Notice of Appeal in docket 2005-481(EI). Those paragraphs read:

[TRANSLATION]

5. The Appellant and the Payer are related persons with the meaning of the *Income Tax Act* because:
 - (a) the Payer was incorporated on October 14, 1999;
 - (b) during the periods in question, the sole shareholder of the Payer was Jean-Yves Malenfant;
 - (c) Jean-Yves Malenfant is the Appellant's husband;
 - (d) the Appellant is related by marriage to a person who controls the Payer.

6. The Minister determined that the Appellant and the Payer were not dealing with each other at arm's length in respect of the employment. The Minister was satisfied that it was unreasonable 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 given the following circumstances:
 - (a) the Payer operated a sugar bush and a business that sold firewood;
 - (b) the Payer's sugar bush had 13,000 taps in 1999 and 33,000 taps in 2004;
 - (c) the Payer operated year round;
 - (d) the Payer employed between three and six people depending on the year;

(e) the Payer's revenue was as follows:

	Maple Products	Wood Sales
31/12/00	\$12,006	\$48,104
31/12/01	\$85,766	\$24,479
31/12/02	\$62,166	\$75,539
31/12/03	\$91,791	\$66,647

(f) the Appellant had worked for the Payer as a maple grower and as a manager and bookkeeper since 1981;

(g) during sugaring season, the Appellant's tasks consisted of tapping trees, washing the tank and machinery, boiling the maple sap, and producing syrup, sugar and finished products; year-round, the Appellant took care of the accounting, cheques, invoices, deposits, employees' hours and correspondence;

(h) on June 28, 2004, in a signed statutory declaration to the Commission, the Appellant stated, "[TRANSLATION] Jean-Yves Malenfant cannot read or write other than to sign his name. In order to run the business, I tell him what has to be done.";

(i) the Appellant received a weekly salary based on 40 hours of work and an hourly rate of \$10 that was increased to \$11.58 in 2004;

(j) on May 27, 2004, in a statement to an HRDC officer, the Payer's sole shareholder stated that during sugaring season, the Appellant worked 12 hours a day seven days a week; that the other employees, who are not related to the family, worked only their regular hours; and that the Appellant was not paid for the work she did over and above her regular hours; she was working for the business for free;

(k) the Appellant was paid by cheque;

(l) each year, the Appellant delayed cashing her cheques in order to accommodate the Payer's lack of cash flow;

(m) the Appellant deposited her pay cheques into her personal account, into the account of the sole shareholder or into a joint account;

(n) on May 27, 2004, in a statement to an HRDC officer, the Payer's sole shareholder stated that when he had more money tied up in the

business, the Appellant would delay cashing her pay cheques; some payments were thus made outside the employment periods;

- (o) on June 28, 2004, the Appellant told an HRDC officer that an outsider would not accept such deferral of pay and also would not work extra hours without being paid;
- (p) on June 28, 2004, the Appellant further stated that she agreed to these conditions because she, as manager of the business, could see that the Payer was unable to pay her;
- (q) the Appellant did not keep records of the hours she devoted to management and accounting;
- (r) the Appellant worked for the Payer year round;
- (s) the Appellant prepared deposits, cheques, invoices and other documents every week between 1999 and 2003;
- (t) on December 17, 1999, Érablière Jean-Yves Malenfant issued to the Appellant a record of employment showing July 26, 1999, as the first day of work and December 17, 1999, as the last day of work and indicating 882 insurable hours and \$10,079.16 in insurable earnings;
- (u) on February 23, 2001, the Payer issued to the Appellant a record of employment showing February 28, 2000, as the first day of work and May 26, 2000, as the last day of work and indicating 546 insurable hours and \$6,266.52 in insurable earnings;
- (v) on June 1, 2001, the Payer issued to the Appellant a record of employment showing February 1, 2001, as the first day of work and June 1, 2001, as the last day of work and indicating 565 insurable hours and \$6,800.56 in insurable earnings;
- (w) on June 21, 2002, the Payer issued to the Appellant a record of employment showing February 15, 2002, as the first day of work and June 21, 2002, as the last day of work and indicating 641 insurable hours and \$7,722.40 in insurable earnings;
- (x) on January 27, 2003, the Payer issued to the Appellant a record of employment showing September 16, 2002, as the first day of work and September 27, 2002, as the last day of work and indicating 80 insurable hours and \$964.08 in insurable earnings;

- (y) on July 17, 2003, the Payer issued to the Appellant a record of employment showing January 26, 2003, as the first day of work and June 16, 2003, as the last day of work and indicating 562 insurable hours and \$6,720.56 in insurable earnings;
- (z) on February 26, 2004, the Payer issued to the Appellant a record of employment showing October 6, 2004 [*sic*], as the first day of work and December 4, 2004 [*sic*], as the last day of work and indicating 21 insurable hours and \$214 in insurable earnings;
- (aa) on July 12, 2004, the Payer issued to the Appellant an amended version of the February 26, 2004, record of employment showing July 17, 2003, as the first day of work and December 4, 2003, as the last day of work and indicating 22 insurable hours and \$224 in insurable earnings;
- (bb) on June 11, 2004, the Payer issued to the Appellant a record of employment showing February 16, 2004, as the first day of work and June 11, 2004, as the last day of work and indicating 680 insurable hours and \$8,194.68 in insurable earnings;
- (cc) the hours of work claimed by the Appellant did not match the hours she actually worked;
- (dd) the Appellant's records of employment do not reflect the actual periods worked or the actual number of hours worked;
- (ee) a person with an arm's-length relationship would not have had pay, periods of employment or conditions of employment similar to the Appellant.

[4] Subparagraphs 6(f), (g), (h), (j), (l) to (s), (cc), (dd) and (ee) are denied.

[5] Jean-Yves Malenfant, the Appellant and Jacynthe Bélanger, the officer for appeals regarding insurability, testified.

[6] In his testimony, Mr. Malenfant described the activities related to maple growing which take place primarily from February 15 to late May each year and in which the Appellant has been actively involved since the sugar bush was purchased in 1980. Since 2000, Mr. Malenfant, who also describes himself as a forestry worker, has, from mid June to early December, engaged in the cutting of

timber, which he sells to various businesses. He also produces a small quantity of firewood to meet the needs of the maple growing business and the family.

[7] During sugaring season, the Appellant is involved in tapping maple trees, checking the tubing, washing the tanks and manufacturing maple products. She generally performs all the tasks assigned to her by Mr. Malenfant, because as he says, there is always something that needs doing. Their son, René, also works at the sugar bush during sugaring season. His main task is to boil the maple sap to produce the syrup. From late February to late May, Mr. Malenfant and the Appellant live at the sugar bush, and the Appellant does the housekeeping and cooks for the family. According to Mr. Malenfant, the Appellant usually worked 40 hours a week during the season. However, during the two weeks when the sap was running, the Appellant could work up to 50 hours a week, which was taken into account during the other weeks in order to “even out the hours.”

[8] At the end of the season, around late May or early June, the Appellant also split the firewood needed for the next season. The wood was fuel for the stove used to make maple products, including maple butter, taffy, maple sugar, candy and caramel.

[9] Once, in the fall of 1999, the Appellant helped Mr. Malenfant tap maple trees and install tubing for two other maple growers.

[10] Mr. Malenfant said that the Appellant also handled the accounting for the business, but it was their daughter who lived in Québec who input the data on a computer using Fortune 1000 software. The Appellant was also the person who wrote cheques to pay bills and wages, looked after the mail, prepared deposit slips and ensured that taxes were remitted.

[11] Mr. Malenfant said that most of the maple syrup was sold to the Fédération des producteurs (“the Federation”) in 32-gallon barrels. Maple products would be sold to customers who came to the sugar bush or to the house, where the products were kept frozen once the season ended.

[12] Mr. Malenfant said that the Federation did not pay for its purchases immediately and that it owed him money for syrup purchased in previous seasons. However, he usually received an advance or initial payment upon delivery at the end of a season, and it was not until then that they – he and the Appellant – could draw wages for the work they did during the season. Mr. Malenfant admitted that

other employees were paid regularly during the season and that he used a \$20,000 line of credit to pay them.

[13] Mr. Malenfant said that the Appellant did not work for the business year round, that she did not work without pay during sugaring season and that she was always paid for her work, even if she was paid later.

[14] On May 27, 2004, Mr. Malenfant signed a statutory declaration drafted by Paul Dessureault, an investigator for the Department of Human Resources Development Canada (Exhibit I-1). The statement reads on pages 2 and 4:

[TRANSLATION] ...When she works for me during sugaring season (February, March, April, May) she does the tapping, she washes the tanks and machinery, she keeps the shack clean, looks after the equipment, and she even said she will probably paint the outside of the sugar shack this year. She boils sap, makes sugar and finished products, and when the season is over, she washes everything.

...My wife is the one who does the hiring, pays wages and does the accounting for the business....Lorraine sometimes works other than during sugaring season, and at those times she mainly repairs lines. She is able to do that on her own, and I cut wood on my lots with René in order to make ends meet because there are problems getting paid by the Federation, which still owes me \$10,000.00 for 2001 and \$23,000.00 for 2003, for a total of \$33,000.00. That means that I paid my expenses in order to be able to produce all the syrup. This year, Lorraine did not take any pay; she was not paid any wages because there was no money, and we received money about a week ago.

...

The extra work my wife does is volunteer work, whereas my son, my wife says to me, "René did so many hours of overtime and was paid" and he is allowed to get his time. Lorraine is like me: we both work for free. The employees' wages and even Lorraine and René and I are always paid by cheque. The times when there is no money for Lorraine and me to draw any pay, when enough money comes in, we pay ourselves later, so the cheques are dated after the period in which the work was done and the other employees paid, in my opinion.

...

[15] In her testimony, the Appellant said that she was the one who, during the season, made the maple butter, taffy, sugar, candy, caramel and other products and that most of those products were sold in the spring. At the end of the season, she split wood for the next season because the maple products were made using a wood stove, whereas oil stoves were used to produce the maple syrup.

[16] The Appellant said that she was always paid for the work she did for the Payer, that she did not work for free and that if she worked 12 hours a day in some weeks during sugaring season, that included the time spent cooking, cleaning and doing laundry, since she and Mr. Malenfant lived at the shack during the season.

[17] With regard to management or accounting, more specifically the preparation of invoices, cheques and deposit slips outside her work periods, the Appellant said that if a task took her five minutes, she would keep track of her time in order to make up an hour and that the hours she accumulated were paid and declared, although she did admit that she may have forgotten to get paid. She also said that if she was not “paid right away”, she would “pick up the hours again” in the fall.

[18] The Appellant confirmed that the other employees were paid regularly during sugaring season, but some may have sometimes been paid in the form of smaller advances. Regarding her own wages, the Appellant acknowledged that she issued the cheques several months late but indicated the date on which they should have been issued. She said that, by all indications, even if the cheques had been issued regularly every week as they were for the other employees, she would not have had time to cash them. In 2004, the Appellant’s wages for the period from February to May 21 were paid with a single cheque for \$4,767.36 issued on May 20, 2004. The Appellant said that she would have agreed to be paid the same way by any other company had the company been solvent.

[19] The Appellant signed two statutory declarations drafted by the investigator, Paul Dessureault. Pages 2 to 4 of the first declaration (Exhibit I-2), signed on June 28, 2004, read:

[TRANSLATION] ...I take care of the cheques – pay and bills; I keep a record that an employee worked in such and such week, so many hours, and I give it to my daughter, Martine Malenfant, who enters it on the computer. I do records of employment, T-4s and TP-4s; I take care of bills, and I am the one who prepares deposits and I go and deposit them, but sometimes Jean-Yves deposits them. ...Some falls I take care of the tubing, work on installation, too, check the lines in the fall. The bulk of my work is done in February, March, April and May, because I remove taps, too, and do the final clean-up when the sap stops running. I even help split wood. If the shack needs to be painted or there are other jobs to be done, I take care of it and do orders, too. I cook for the family at the shack and also for the other employees who are getting organized. As far as employees’ wages are concerned, employees are paid weekly with no delay, and it has been that way for years, so when Jean-Yves talks about delayed wages, it is just for the family,

more specifically Jean-Yves and me. This year, because of problems with the Federation, which owed us money, I was only paid on time once at the beginning, and I did not get paid again until April 2004, when we received another payment from the Federation that allowed us to pay my back and current wages. Because the business has been doing poorly, Jean-Yves Malenfant has not drawn any salary since 2004; we live on my wages and eventually my unemployment benefits and my salary as mayor of the municipality of Ste-Rita...

I realize that an employee who is not family would not be willing to be paid late and work more hours than the hours for which he or she was paid, and the reason I was willing to do it, that is, work for no pay, is that I knew I would not lose any money, and working unpaid hours did not bother me. In addition, because I manage the business, I saw that it could not afford to pay me, that there was no money...

[20] The following excerpts from pages 2 to 5 of the second statutory declaration dated July 27, 2004 (Exhibit I-3), seem pertinent to the Appellant's more administrative duties:

...Billing customers, preparing products, preparing and shipping orders, and following up unpaid invoices are part of the duties for which I am paid... There are other duties included in the accounting work for which I am paid other than billing for customers' orders from 99 to now. I have to check bills before writing cheques to pay them and then I record, I check the statements, I take care of any corrections that have to be made when something is wrong, contacting customers, I prepare the deposits and go and make them, and sometimes Jean-Yves is the one who goes; I prepare records of employment, T-4s and TP4s, and as far as GST and QST returns are concerned, I get the papers by mail and all I have to do then is write in the figures my daughter Martine gives me, Martine calculates the remittances and deductions, and I make the payments, which I record. My duties from year to year are managing the business... I don't have any specific periods for accounting, I do it as needed, I set my own hours for that work, and I have no specific times during the day. I might do it early in the morning, at night or on weekends. I don't have an office for the business; I do the accounting work on the kitchen table. If I declare an hour to unemployment, I pay myself. Sometimes I wait to get two or three paydays for part-time work before issuing a paycheque to myself, because at 75 cents a cheque... When you tell me that according to your calculations, I work a lot more than the equivalent of one month if I string my accounting work for the business together... In my opinion, one month is reasonable for what work I do in that area. When you tell me that over several weeks from 99 until now and even several months, you see on your tables that I worked at least part time, whereas I did not claim any hours of work or pay for myself, I can't explain, because I do not have my calendars, and also I was able to

accumulate several weeks of work before issuing a paycheque to myself, I don't know...

[21] In her testimony, the Appellant implied that some parts of her statutory declarations did not reflect the actual situation and that she was in a way compelled to sign them. However, appeals officer Jacynthe Bélanger states in her report that she met with Jean-Yves Malenfant, the Appellant and their counsel, Jérôme Carrier, on December 22, 2004. During that meeting, Ms. Bélanger read back to Mr. Malenfant and the Appellant the statutory declarations they had signed in May, June and July 2004 and noted that both made a only a few clarifications (Exhibit A-6, Report CPT 110, paragraphs 43 and 44). My understanding essentially is that the Appellant confirmed her previous statements and pointed out that her hours of work varied, but she usually worked 40 hours a week. As I noted, the Appellant said at the hearing that she did not work for the business for free and that if she said she worked 12 hours a day some weeks during sugaring season, it was because she also cooked, cleaned the shack and did other household chores when Mr. Malenfant and she lived there during sugaring season.

[22] During the cross-examination of the Appellant, several batches of documents were adduced to demonstrate the scope of the administrative work performed by the Appellant year round (Exhibits I-5 to I-17). The documents were cheques, deposit slips, invoices for the sale of maple products and documents related to the business's purchases for the years 2000 to 2003. Most of the documents, apart from a few cheques and bills for purchases, were prepared by the Appellant personally. However, the cheques were signed by Mr. Malenfant. The bills for purchases were signed by the Appellant. Because Mr. Malenfant cannot read or write but is able to sign his name, it is understandable that the Appellant was the person who took care of general management of the business year round.

[23] In her report (Exhibit A-6, Report CPT 110, paragraph 49), Ms. Bélanger wrote, [TRANSLATION] "Despite the frequency of services rendered outside periods of full-time employment, the worker declared very few hours of part-time work." She made the following observations:

- In 1999, the worker declared between one and three hours of work in the weeks of January 24 and January 31, 1999, and May 30 and June 6, 1999. She worked full time in the spring and between July 25 and December 18, 1999. (Tab J1)

- In 2000, the worker did not declare any hours of part-time work outside her spring period of full-time employment. She did not work in the summer or fall. (Tab J2)
- In 2001, the worker declared one and two hours of work in the weeks of January 14, February 4, and February 18, 2001. She worked full time in the spring and between October 21 and November 3, 2001. (Tab J3)
- In 2002, the worker declared one hour of work in the week of February 10, 2002. No other hours of part-time work were declared. She worked full time in the spring and from September 15 to September 28, 2002. (Tab J4)
- In 2003, the worker declared between one and six hours of work in the weeks of January 26, June 15, July 13 and October 12, 2003. She worked full time in the spring only. (Tab J5)

[24] I note that a summary of the pay book indicates a smaller number of hours of part-time work in 1999 and 2003. No hours of work were declared in the fall of 2000, 2001 or 2003 (Exhibit I-19).

[25] In her testimony, the Appellant stated that her pay cheques bore the date on which they should have been issued, but were actually issued late when the funds were available and she was able to cash them. Her testimony in that regard is confirmed by the statutory declaration signed on June 28, 2004. During Ms. Bélanger's testimony, a table listing the cheques issued to the Appellant and the dates on which they were cashed for the years 2000 to 2004 was produced (Exhibit I-18). The table shows beyond a shadow of a doubt that the cheques were usually cashed several weeks and even as long as a month after the date indicated as the issue date. Further, each year, several cheques bearing different dates of issue were cashed the same day; this is confirmed by the declaration signed by the Appellant on June 28, 2004, and also the Appellant's testimony concerning the delay in the payment of her salary, since the cheques were not issued until the Payer had received funds. In 2004, a cheque for \$368.38 was issued to the Appellant in February and cashed on March 25. No cheques were issued in March or April, then a cheque for \$4,767.36 was issued on May 20 and cashed on May 27, even though the Appellant had worked continuously from February 16, 2004, onward (Exhibits I-4 and I-18).

[26] According to Ms. Bélanger, only one other employee, a man by the name of Francis Jean, did not receive his full salary for two weeks at the start of his period

of employment in 2002 and 2003, although he did receive a large advance on his wages at the time.

[27] Ms. Bélanger ultimately observed that the Appellant provided services to the Payer year round and was rarely paid outside her periods of full-time employment during sugaring season. While she did not actually quantify the value of that work, Ms. Bélanger said she referred to a table prepared by investigator Dessureault and confirmed that information with the documents prepared by the Appellant, which in her opinion showed that the Appellant's management work was not insignificant (Exhibits I-5 to I-17).

[28] On the subject of pay, Ms. Bélanger determined that the Appellant was treated like Mr. Malenfant, the Payer until October 1999 and the sole shareholder of the Payer thereafter, in the sense that the Appellant's salary was always paid late, often several weeks late, in contrast to the other employees' salary.

[29] Counsel for the Appellant argued that the Respondent's discretion was not "judiciously" exercised, since Ms. Bélanger ought to have taken into consideration the specific circumstances of the business regarding the date on which the Appellant could receive her pay, that is, after the Payer was paid by the Federation for the maple syrup it sold. He said that while she may have been paid late, she was always paid for the work she did.

[30] As far as work during other periods is concerned, counsel for the Appellant stated that in 1999, the only months in which the Appellant did not work were June and July. Regarding 2004, he contended that the Respondent did not provide any evidence that the Appellant worked during other periods. For the other years, he argued that no quantitative analysis was done to fully assess the extent of the work done in order to manage the business.

[31] On the subject of the conclusion that the Appellant's management work was essential to the Payer, counsel for the Appellant noted that it was the Appellant's daughter who did the bookkeeping on a computer using Fortune 1000 software and that that work was not quantified in relation to the work performed by the Appellant herself.

[32] Meanwhile, counsel for the Respondent argued that the body of evidence presented shows that the decision made by Ms. Bélanger is still reasonable, foremost because every year, the Appellant's salary was paid several weeks, if not

several months, late, while the other employees were paid on time using the Payer's line of credit.

[33] Counsel for the Respondent further argued that the many documents entered in evidence tend to show that the Appellant managed the business and looked after the sale of maple products year round and outside her periods of full-time employment and that that work was by no means insignificant. However, each year, very few hours were recorded in the pay book after the activities related to maple growing ended.

[34] According to counsel for the Respondent, a person with dealing at arm's length with the Payer would not have agreed to substantially similar conditions of employment.

[35] Paragraph 5(2)(i) of the *Employment Insurance Act* ("the Act") states that employment is not insurable employment "if the employer and employee are not dealing with each other at arm's length."

[36] Subsection 5(3) of the Act reads:

(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.

[37] In the case at bar, the Appellant and the Payer were, during the periods in question, related persons within the meaning of paragraph 251(2)(a), paragraph 251(2)(b) and subparagraph 251(2)(a)(iii) of the *Income Tax Act*. Under paragraph 251(1)(a) of the *Income Tax Act*, these persons were therefore deemed not to be dealing with each other at arm's length. That being so, the Minister had grounds to make a determination as to the application of paragraph 5(3)(b) of the Act, which he did. Based on an analysis of the situation, it was decided that it was "unreasonable 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.”

[38] In paragraph 4 of his reasons for judgment in *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.A. No. 878 (Q.L.), Marceau J.A. of the Federal Court of Appeal described the role of the Tax Court of Canada as follows:

4. The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called 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.

[39] In *Pérusse v. Canada (Minister of National Revenue – M.N.R.)*, [2000] F.C.A. No. 310 (Q.L.), Marceau J.A. reiterated that analysis and added in paragraph 15 of his reasons for judgment:

15. The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems “reasonable” (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.

[40] These comments were reiterated more recently by Richard C.J. of the Federal Court of Appeal in paragraph 5 of the reasons for judgment in *Denis v. Canada (Minister of National Revenue – M.N.R.)*, [2004] F.C.A. No. 400 (Q.L.).

[41] The Respondent's decisions cover specific periods of employment. However, the fact that a person provides services to a Payer year round for several years cannot be ignored in assessing the relationship between the parties.

[42] The documents entered in evidence show unequivocally that the Appellant managed the Payer's business year-round. However, it is impossible to determine exactly how much time was actually spent on management of the business compared with work related to production *per se* during sugaring season. However, by her own estimate in the statutory declaration she signed on July 27, 2004, the Appellant said that the duties she described as "accounting" for the business may have amounted to the equivalent of one month's work. The few hours declared or indicated in the pay book outside the periods of full-time employment, where they were so declared or indicated in some years, surely did not represent the work done by the Appellant in managing the business. The only conclusion to be drawn is that the Appellant was not always paid for the services provided to the Payer.

[43] During the hearing, both Mr. Malenfant and the Appellant said that she did not work for free and that she was always paid for her services, contradicting their earlier statements on that subject. There is a possibility that this about-face is attributable to the fact that they realized later that their statements could hurt their case. At a minimum, such contradictions cast serious doubt as to whether the Appellant was actually paid for all the hours she worked during the periods of full-time employment, usually in the spring, and on the basis of which the Minister made his decisions.

[44] The other important factor on which the Minister's decisions were based is the consistent delay in paying the Appellant's salary each year. That factor was amply demonstrated both by the statutory declarations and by the testimony and the documents entered in evidence. While it may be that an employee occasionally agrees to or tolerates a delay in the payment of his or her salary, I believe that a consistent delay of several weeks and even several months year after year is not a situation that would be acceptable to a person dealing at arm's length with a payer. Mr. Malenfant himself said that the other employees were paid regularly using a line of credit and not, like him and the Appellant, when he received a payment from the Federation for the maple syrup it purchased.

[45] I believe that these factors carry sufficient weight to allow me to conclude that the decisions made by the Minister still seem reasonable and that intervention by the Court is not warranted in the circumstances.

[46] Consequently, the appeals are dismissed and the Minister's decisions are confirmed.

Signed at Ottawa, Canada, this 25th day of October 2005.

“P. R. Dussault”

Dussault J.

Translation certified true
on this 26th day of October 2006.
Monica F. Chamberlain, Reviser

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