Docket: 2005-3433(EI)

BETWEEN:

GUYLAINE OUELLET,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 8, 2006, at Chicoutimi, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Simon-Nicolas Crépin

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* concerning the decision of the Minister of National Revenue is dismissed and the Minister's decision is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 31st day of May 2006.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 27th day of April 2007.
Gibson Boyd, Translator

Citation: 2006TCC307
Date: 20060531
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BETWEEN:

GUYLAINE OUELLET,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] The issue is whether the Appellant held insurable employment for the periods from April 14 to September 12, 2003, and from March 29 to August 20, 2004, with Groupe Rénovatech Inc., the Payor or the Company, within the meaning of paragraph 5(2)(*i*) and subsection 5(3) of the *Employment Insurance Act* (the "Act").

[2] These provisions read as follows:

> 5(2) Insurable employment does not include:
>
> ...
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> 5(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.

[3] Paragraphs 5 and 6 of the Reply to the Notice of Appeal (the "Reply") read as follows:

[TRANSLATION]

5. The Appellant and the Payor are related persons within the meaning of the *Income Tax Act* because:

(a) during the periods in issue, the voting shares of the Payor were held by:

- Gaétan Lévesque, with 65% of the shares
- the Appellant, with 35% of the shares;

(b) the Appellant is the spouse of Gaétan Lévesque;

(c) the Appellant was related to a person who controlled the Payor.

6. The Minister determined that the Appellant and the Payor were not at arm's length in the employment relationship. Indeed, the Minister was satisfied that it was not reasonable to conclude that the Appellant and the Payor would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, considering the following circumstances:

(a) the Payor was incorporated on February 20, 2002;

(b) the Payor offered various renovation and roof repair services;

(c) the Payor operated its business seasonally, generally from April until the beginning of October;

(d) the Payor employed 5 to 6 employees, including the shareholders;

(e) the Payor had a sales figure of $86,000 for the fiscal year ending October 31, 2003, and $156,000 for the period from January to August, 2004;

(f) the Payor stopped its operations in 2004 and made an assignment of property on January 5, 2005;

(g) the Appellant performed secretarial services for the Payor, and her main duties were:

- writing letters and submissions,
- preparing invoicing and payroll (5 or 6 per week),
- answering the telephone and setting appointments,
- making bank deposits,
- looking after Payor's accounting;

(h) as shareholder of the Payor, the Appellant could perform the following tasks:

- visiting clients to prepare submissions,
- hiring and dismissing employees,
- checking on work on job sites when her spouse could not,
- meeting clients to find out their level of satisfaction during and after work,
- travelling to pick up cheques from clients;

(i) during the periods in issue, the Appellant worked 40 hours per week and received gross weekly compensation of $624;

(j) the Appellant claimed that all employees were laid off at the same time as her, while the Payor's payroll shows the opposite on several occasions during the periods in issue;

(k) in 2003, from the end of June to mid-September, there were three workers on the payroll at the same time as the Appellant, while from mid-November on, there were three workers on the payroll, but the Appellant was no longer on it;

(l) in 2004, there were five workers on the payroll at the same time as the Appellant, three workers were on it, yet the Appellant was no longer on it;

(m) In 2004, during the two months where the Payor's revenues were the highest (June and July), the Appellant received no compensation for six weeks;

(n) Before returning to work on March 29, 2004, the Appellant received employment insurance benefits for 26 weeks, i.e. the maximum she was entitled to;

(o) the periods where the Appellant was on the Payor's payroll did not correspond with the Payor's real needs.

[4] The Appellant admitted paragraph 5, as well as subparagraphs 6 (a) to 6 (i) and 6 (n) of the Reply.

[5] It should be noted from the start that the Appellant received the employment insurance benefits mentioned in sub-paragraph 6(n) of the Reply following the period from April 14 to September 12, 2003.

[6] The Appellant believes she mentioned, in her benefit application, that she was related to the Payor.

[7] Under subsections 5(2) and 5(3) of the Act, this is excluded employment unless the Minister is satisfied that it is reasonable to conclude that substantially similar that employment would have taken place between unrelated parties. This provision therefore appears to require a prior determination by the Minister.

[8] This begs the question whether the Minister can appeal his own determination. However, as this point has not been the subject of judicial debate and since I know of no decision on this subject, I simply bring it up.

[9] On another level, it must be noted that it is not doing any favours to a worker to accept his or her application for benefits and ask for justification two years later. If the worker knew from start that the insurable employment was being challenged, he or she would have made arrangements accordingly.

[10] With regard to the allegations in subparagraphs 6(j) to 6 (m), the Appellant states that these were uncommon events and that normally she worked at the same time as the other workers. She explained that she went without a salary for six weeks in July and August 2004, because the Company was out of cash assets. She could not even do what she usually did, i.e. take out her salary and put it back into the Company's assets. She insisted on paying the salaries of the few foreign workers that the business had hired. She now works as a secretary for an unrelated business and does not believe that she would work for six weeks without salary.

[11] The job description found in subparagraphs 6(g) and 6(h) of the Reply comes from the Appellant. She is the one who divided her work between that of secretary and that of shareholder. She stated that the shareholder duties were not performed during the hours dedicated to secretarial work.

[12] Gaétan Lévesque explained that he had already owned other companies and that he had always required a secretary. However, there is no evidence of the compensation paid to this person.

[13] Nathalie Bédard, appeals officer, explained why she considered that this employment should remain excluded.

[14] She used records of payment of salaries for 2003 and 2004, (Exhibits I-2 and I-3) to plot a descriptive table of the employment periods for each worker in 2003 and 2004 (Exhibit I-4).

[15] It shows that for 2003, of the 23 weeks worked by the Appellant, there were 15 weeks where the Appellant and Gaétan Lévesque were the only employees. There were seven weeks where there was one additional employee. There was one week where there were four. Except for one employee, they all completed 40 hours in their week. The Appellant did not work in a month where the business received $6,630 in gross revenue and started in a month where the revenue was less.

[16] In 2004, the Appellant started to work immediately after her employment insurance benefits ran out. For the first two weeks of work, there were no other employees. Even then, there were very few employees. Over this period, the Appellant was not paid for seven weeks of work.

Analysis and conclusion

[17] Concerning the compensation paid, the Payor did not have the financial means to truly pay the Appellant's salary. She immediately put it back into the assets of the business. At a certain point, this was no longer even possible and the Appellant still continued to work for the Payor.

[18] A business does not employ a secretary full-time for long periods when the only other employee is the owner of the business. The analysis made by the appeals officer of each worker's employment periods reveals circumstances that

suggest that the Appellant would not have been employed if she had not been a person related to the Payor.

[19] I am therefore of the opinion, considering the compensation paid and the work conditions of the Appellant, that the Minister's decision under paragraph 5(3)(*b*) of the Act was reasonable. Accordingly, the appeal must be dismissed.

Signed at Ottawa, Canada, this 31st day of May 2006.

"Louise Lamarre Proulx"

Lamarre Proulx J

Translation certified true
on this 27th day of April 2007.
Gibson Boyd, Translator

CITATION:	2006TCC309
COURT FILE NO.:	2005-3433(EI)
STYLE OF CAUSE:	GUYLAINE OUELLET v. THE MINISTER
PLACE OF HEARING:	Chicoutimi, Quebec
DATE OF HEARING:	May 8, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice Lamarre Proulx
DATE OF JUDGMENT:	May 31, 2006

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Simon-Nicolas Crépin

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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