Docket: 2004-2328(EI)

BETWEEN:

PARIS LADOUCEUR & ASSOCIÉS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 24, 2005, at Montréal, Quebec

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Agent for the Appellant:	André Brunet
Counsel for the Respondent	Agathe Cavanagh

JUDGMENT

The appeal from the assessment made under the *Employment Insurance Act*, notice of which is dated October 31, 2003, is allowed and the assessment is vacated, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of February 2005.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 13th day of July 2005.

Daniela Possamai, Translator

Citation: 2005TCC107
Date: 20050208
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BETWEEN:

PARIS LADOUCEUR & ASSOCIÉS INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] This is an appeal from an assessment made under the *Employment Insurance Act* (the "Act") on the ground that Vincent Ladouceur and Réjean Paris were in insurable employment with the Appellant.

[2] The main issue is whether each of the workers controlled more than 40% of the voting shares of the Appellant within the meaning of paragraph 5(2)(*b*) of the Act. A subsidiary issue is whether the workers were in insurable employment within the meaning of paragraphs 5(1)(*a*) and 5(2)(*i*) of the Act.

[3] To make his decision concerning the main issue, the Minister of National Revenue (the "Minister") relied on the facts described in paragraph 6 of the Reply to Notice of Appeal (the "Reply") as follows:

> (a) During the year at issue, Vincent Ladouceur and Réjean Paris were employed by the Appellant;
>
> (b) Gestion Paris Ladouceur Inc. was the Appellant's only shareholder;
>
> (c) The shareholders of Gestion Paris Ladouceur Inc. were as follows:

Gestion Réjean Paris Inc. with 50% of the shares,
Gestion Vincent Ladouceur Inc. with 50% of the shares;

(d) Réjean Paris was the only shareholder of Gestion Réjean Paris Inc.;

(e) Vincent Ladouceur was the only shareholder of Gestion Vincent Ladouceur Inc.;

(f) Réjean Paris controlled Gestion Réjean Paris Inc.;

(g) Vincent Ladouceur controlled Gestion Vincent Ladouceur Inc.

(h) Neither Vincent Ladouceur nor Réjean Paris controlled Gestion Paris Ladouceur Inc.

(i) Neither Vincent Ladouceur nor Réjean Paris controlled the voting shares held by Gestion Paris Ladouceur Inc.;

(j) Neither Vincent Ladouceur nor Réjean Paris controlled the voting shares of the Appellant.

[4] To make his decision concerning the finding that the workers' employment was employment under a contract of service for the purposes of paragraph 5(1)(*a*) of the Act, the Minister relied on the facts described in paragraph 7 of the Reply:

(a) The Appellant operated a business specializing in the appraisal of real estate;

(b) The business was operated year-round;

(c) In 2002, the Appellant generated about $850,000 in sales;

(d) The company's business hours were 9 a.m. to 5 p.m., Monday to Friday;

(e) Réjean Paris and Vincent Ladouceur are both chartered appraisers;

(f) Both workers were employed by the Appellant;

(g) The main duties of Réjean Paris were to

— handle the records of financial institutions;
— supervise current operations;
— verify and approve the appraisers' records, occasionally assist Vincent Ladouceur and testify in court;

(h) The main duties of Vincent Ladouceur were to

— handle the records of cities and municipalities,
— supervise current operations;
— verify and approve the appraisers' files, occasionally assist Réjean Paris and testify in court;

(i) They worked on the Appellant's premises;

(j) They worked more than 40 hours per week; their hours were not accounted for by the Appellant;

(k) Each of the workers received $1,000 per week plus two bonuses including one for RRSP purchases;

(l) The workers' wages were established based on the number of hours worked by each of them as well as the company's financial performance.

[5] Vincent Ladouceur admitted to subparagraphs 6(a) to 6(g) of the Reply and denied subparagraphs 6(h) to 6(j) of the Reply. He admitted to subparagraphs 7(a) to 7(j) of the Reply and denied subparagraphs 7(k) and 7(l) of the Reply.

[6] The assessment is for 2002. Messrs. Ladouceur and Paris are chartered appraisers.

[7] Mr. Ladouceur stated that he began to work for Mr. Paris in 1977. In 1987, he became Mr. Paris' partner. He held 42% of the shares and Mr. Paris held 58%. In 2002, they each held 50% of the shares. In 2003, Mr. Ladouceur became the holder of 100% of the shares and Mr. Paris became an employee of the corporate Appellant.

[8] With respect to subparagraph 7(d) of the Reply, Mr. Ladouceur stated that the company's business hours were those mentioned in subparagraph (d) but that he and Mr. Paris exceeded those hours on evenings and weekends. He mentioned that the company had 18 employees and that the employees generally worked

during the company's business hours although on occasion some exceeded those hours.

[9] With respect to subparagraph 7(k), he explained that his and his partner's weekly wages were $1,000. The bonuses were paid in the form of dividends and were based on the company's financial performance. Occasionally, the two shareholders did not claim a pay depending on the company's cash flows. He denied that their wages were established based on the number of hours worked.

[10] With respect to the description of Mr. Paris's and Mr. Ladouceur's duties in subparagraphs (g) and (h), he said they each had their niche but that they would often go beyond that niche. It can be said that 80% of their duties were performed within the niches mentioned in subparagraphs (g) and (h).

[11] The witness added that he and Mr. Paris were compatible partners. They never had any decision-making problems. He also explained that the premises where the Appellant operated were 50% owned by the two shareholders' collective societies. They hired employees together. Cheques were signed either by one or the other or by both. The line of credit endorsement was carried out by the two shareholders themselves. Neither directed the other one's work. The amount of the salary was mutually agreed upon.

Analysis and conclusion

[12] Paragraphs 5(2)(*b*), 5(2)(*i*) and 5(1)(*a*) of the Act read as follows:

> 5(2) Insurable employment does not include
>
> ...
>
> *(b)* the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
>
> *(i)* employment if the employer and employee are not dealing with each other at arm's length.
>
> **5**(1) Subject to subsection (2), insurable employment is
>
> *(a)* employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person

> are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[13] The Appellants' agent relied on the decision of the Federal Court of Appeal in *Canada* v. *Dupuis*, [1988] F.C.J. no. 556 (Q.L.). This decision was rendered in accordance with paragraph 14(*a*) of the *Unemployment Insurance Regulations* which reads as follows:

> The following employments are excepted from insurable employment:
>
> *(a)* employment of a person by a corporation if he or his spouse, individually or in combination, controls more than 40% of the voting shares of that corporation . . .

[14] The Federal Court of Appeal ruled as follows:

> As this Court pointed out in Cloutier (1987), 74 N.R. 396, this provision does not speak of control of a corporation but of control of shares: it might now be added that it also does not speak of ownership, but of control. It is quite clear that a person who controls 100% of the shares of a corporation which, in its turn, controls over 40% of the shares of a second corporation controls over 40% of the latter's shares.

[15] The Federal Court of Appeal noted this does not involve the *de jure* or *de facto* control of a corporation but the control of more than 40% of the voting shares.

[16] Counsel for the Respondent relied on two decisions of the Court, *Boughen* v. *Canada*, [1996] T.C.J. no. 757 (Q.L.) and *Highland Roofing Ltd.* v. *Canada*, [1998] T.C.J. no. 922 (Q.L.).

[17] She cited paragraph 7 in *Boughen*:

> Neither Ron nor Chris controlled more than 40% of the shares of Opco. Because Holdco owned 100% of the shares of Opco, it controlled Opco. Each of Ron and Chris needed the other of them or his father to vote Holdco shares in the same fashion as he did in order to control Opco. As I explained at the hearing, Opco was simply an

> asset of Holdco. Holdco's decisions directed Opco. The ability to vote more than 50% of the shares of Holdco, whether through ownership or some voting arrangement, was necessary for a shareholder of that company to be able to control Opco and, accordingly, more than 40% of the shares of Opco. There was no evidence that this was the case.

[18] She cited paragraph 12 in *Highland Roofing Ltd.*:

> However, the Court is reluctant to accept this argument. Wentland only owned 50% of the shares in Lorna. Hence, he was not in a majority position and therefore, could not single-handedly determine how the company would vote the shares it held in the Appellant. In other words, Wentland lacked de jure control. Consequently, it would be erroneous to conclude that Wentland indirectly controlled 25% of the Appellant by virtue of his shareholdings in Lorna. Given this fact, the Court must conclude that the Appellant only controlled 20% of the shares of the Appellant and therefore does not fall within paragraph 5(2)(b) of the EI Act.

[19] The reasons for these two decisions are not on their face easy to decipher. However, I need to understand that there was no confusion between the control of a corporation and the control of more than 40% of the voting shares. The employment exempt is that of a worker employed by a corporation of which the worker holds more than 40% of the voting shares and not employed by a corporation of which the worker has *de jure* or *de facto* doctor. The Act does not require a control of this nature to exempt the employment. It is well known that *de jure* control is exercised with more than 50% of the voting shares. The holding of more than 40% of the voting shares does not equal *de jure* control of the corporation.

[20] In this appeal, each worker controlled 100% of the shares of a corporation that controlled 50% of the shares of another corporation which in turn controlled 100% of the Appellant’s shares. It seems obvious to me that in keeping with the reasoning of the Federal Court of Appeal in *Dupuis*, *supra*, each of the workers in question controlled more than 40% of the Appellant’s voting shares. The fact that it goes a step further than the decision of the Federal Court of Appeal in *Dupuis* cannot change the reasoning.

[21] Furthermore, with respect to the insurable employment under paragraph 5(1)(*a*), it is difficult to understand the relationship of subordination necessary for insurable employment between the two workers and the Appellant. The two

workers set the amount of their own salary, their workload, their working hours as well as the dividends they granted themselves to increase their pay. They owned the Appellant.

[22] In addition, the two workers and the Appellant were clearly not dealing with each other at arm's length within the meaning of tax law. Their employment is therefore necessarily excepted under paragraph 5(2)(*i*) of the Act. In order for the employment not to be excepted, a determination by the Minister is required. This determination was not made.

[23] The appeal is allowed.

Signed at Ottawa, Canada, this 8th day of February 2005.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 13th day of July 2005.

Daniela Possamai, Translator

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APPEARANCES:

Agent for the Appellant:	André Brunet
Counsel for the Respondent:	Agathe Cavanagh

COUNSEL OF RECORD:

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Name:

Firm:

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