Docket: 2001-1805(EI)

BETWEEN:

CLAUDETTE DECHAMPLAIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 28, 2002, at Matane, Quebec

Before: the Honourable Deputy Judge S.J. Savoie

Appearances

Counsel for the Appellant: M^e^ Gaétan Gauthier

Counsel for the Respondent: M^e^ Marie-Claude Landry

[OFFICIAL ENGLISH TRANSLATION]

JUDGMENT

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

Signed at Grand-Barachois, New Brunswick, this 31st day of March 2003.

"S.J. Savoie"

D.J.T.C.C.

Translation certified true
on this 30th day of January 2004.

Leslie Harrar, Translator

Citation: 2003TCC128
Date: 20030331
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CLAUDETTE DECHAMPLAIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Deputy Judge Savoie, T.C.C.

[1] This appeal was heard at Matane, Quebec, on October 28, 2002.

[2] This is an appeal concerning the insurability of the appellant's employment when employed with Robert Lévesque, the payer, during the periods at issue, namely, from August 2 to November 29, 1997, from May 4 to October 2, 1998, from May 31 to October 16, 1999, and from May 1 to August 25, 2000.

[3] On February 16, 2001, the Minister of National Revenue (the "Minister") informed the appellant of his decision that this employment was not insurable during the periods at issue, because he was of the opinion, after examining the terms and conditions of the employment, that she and the payer would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. He also informed the appellant that this employment was not insurable because it did not meet the requirements of a contract of service.

[4] The Minister's decision is based on the following facts set out in paragraph 8 of his Reply to the Notice of Appeal:

[Translation]

(a) During the periods at issue, the appellant and the payer were common-law spouses.

(b) On May 14, 1997, the appellant and the payer purchased "Cantine 3 Dimensions".

(c) The purchase price was $57,000.

(d) Initially, the operating permit for the canteen was in the names of the appellant and the payer. On August 12, 1997, the appellant had her name removed from the operating licence so that she could collect employment insurance.

(e) Before the purchase of the canteen, the appellant had worked there as a cook for three seasons.

(f) The canteen had a counter and a few tables outside as well as four tables inside.

(g) In 1997, the appellant worked as the manager of the establishment; the payer went out to work and the appellant handled everything.

(h) The payer suffered an automobile accident on March 20, 1998, and was disabled (he could no longer walk); from that time on, he entrusted the entire management of the canteen to the appellant.

(i) During the periods at issue, the appellant handled purchases, meal preparation and the supervision of the establishment's employees.

(j) The appellant claimed that she always worked 40 hours a week whereas she had no work schedule that she had to follow and no record was kept of her hours.

(k) The appellant provided services without pay to the establishment; she provided services outside the periods at issue so that she could collect employment insurance benefits.

(l) During the periods at issue, the appellant received an alleged salary of $8.50 an hour in 1997 and 1998, and $9.00 thereafter, for a 40-hour week.

(m) During the periods at issue, the appellant was sometimes paid by cheque, sometimes in cash directly from the canteen till.

(n) In an affidavit dated September 29, 2000, the appellant acknowledged that the records of employment for the periods in 1999 and 2000 were false with respect to the periods actually worked.

(o) On September 20, 2000, the appellant transferred, by notarial act, her interest in “Cantine 3 Dimensions”.

[5] The appellant admitted the assumptions of the Minister set out in subparagraphs (a) to (c), (e), (f), (l), (m) and (o) and denied subparagraphs (d), (g) to (k) and (n) as written.

[6] It is important to note that the appellant contented herself with simply denying some of the assumptions on which the Minister based his decision. It is safe to conclude, then, that those assumptions of the Minister whose falsity was not demonstrated have been proved true, following the principle established by the Federal Court of Appeal in *Elia v. Canada (Minister of National Revenue - M.N.R.)*, [1998] F.C.A. No. 316.

[7] However, the evidence from the hearing and the statutory declarations introduced into evidence by counsel for the Minister established the following facts:

1. During the periods at issue, the appellant was an equal partner with Robert Lévesque, the payer.

2. She worked at the canteen as manager from May 4 to October 2, 1998. In 1999, she worked from May 31 to August 28. After that, she worked without pay until the canteen closed on about October 16. She also worked without pay at mealtimes to keep her eye on the business, while collecting employment insurance benefits at the same time.

3. She was entered in the payroll journal on June 4, 2000, although she had already worked without pay at mealtimes since early in May, but without receiving employment insurance benefits. She did not report her unpaid work on her unemployment cards and she made false declarations.

4. The appellant controlled her own work schedule and gave her hours to the accountant, Lucette Algerson, to enter in the payroll journal.

5. She was often paid in cash from the canteen's till. She had always managed the canteen because the payer had been employed full time as a janitor until 1998 when he was injured in an automobile accident.

6. She acknowledged that her records of employment with respect to the first and the last days of work were false.

7. She had sole signing authority for the cheques of the business.

8. The appellant received no compensation, except $1.00, from Robert Lévesque when she transferred her shares in the business to him in September 2000. The canteen was in fact owned by both of them during the periods at issue.

9. When Mr. Lévesque and the appellant bought the canteen, they paid the sum of $11,000 from their joint account.

10. The payer, Mr. Lévesque, knew nothing about the canteen's income; the appellant and the accountant handled it.

[8] The appellant maintained that, despite the documentation introduced into evidence confirming the acquisition of the business and the guarantees signed by herself and her spouse, she did not consider herself an owner. She stated that her spouse, the payer, was the one who decided everything, and that all she had to do was sign. She added that that is why she sold her share of the business to the payer for the sum of one dollar ($1.00) in September 2000.

[9] However, the documents introduced into evidence do in fact bear her signature, freely obtained, as confirmed by M^{e} Nadine Rioux, Notary, who testified at the hearing. The evidence further disclosed that the appellant had signed, as joint guarantor with Robert Lévesque, the mortgage taken out to purchase the canteen.

[10] In paragraph 9 of the Reply to the Notice of Appeal, the Minister laid out the legislative provisions on which he had relied in the performance of his duties under paragraph 93(3) of the *Employment Insurance Act* (the "*Act*"). He relied, *inter alia*,

on paragraph 5(1)(*a*) and subsections 2(1) and 93(3) of the *Act*. In other words, the Minister submitted that the appellant did not hold insurable employment within the meaning of the *Act* during the periods at issue, since, during those periods, she carried on her own business. Article 2186 of the *Civil Code of Québec* defines a contract of partnership as follows:

> A contract of partnership is a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits.

[11] This Court had to decide a case similar to the instant case in *Parent v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 83. This Court, per Judge Archambault, ruled as follows, at paragraph 38:

> [...] Unlike a joint-stock company, a partnership is not considered to be a person separate from its partners. The partnership's business is that of the partners. The partnership's assets belong to the partners. François Parent was thus working for himself. His work was therefore not done according to the instructions and under the direction or control of another person as required by article 2085 of the C.C.Q. Accordingly, there was no contract of employment between Mr. Parent and the DN partnership.

[12] Judge Lamarre of this Court in *Carpentier v. Canada (Minister of National Revenue – M.N.R.)*, [1996] T.C.J. No. 502 repeated the same idea, stating:

> In view of the features associated with a contract of partnership both under the C.C.L.C. and under the C.C.Q. and the tests used by the courts to determine whether a contract of service exists, it seems clear to me that a partner cannot be an employee in his own partnership. Since as partner he participates in the decision-making of the partnership in pursuit of the common goal of the partnership and shares in profits and losses, he is automatically in control and therefore cannot at the same time act as a subordinate to himself, even if there are several partners.

[13] On considering the evidence adduced, the conclusion that the Minister's finding that the appellant was carrying on her own business has been confirmed appears to me to be appropriate. She could therefore not be an employee of her own business under the *Act*, the *Civil Code of Québec* and the authorities referred to above.

[14] In light of the above, particularly the evidence gathered, the appellant's admissions, the unrefuted assumptions of the Minister, the contradictions between the evidence at the hearing and the prior statements, this Court does not see any merit in interfering with the Minister's decision.

[15] Furthermore, this Court is of the opinion that, even if it had found that there was a contract of service, it would have held that the appellant's employment was not insurable because she and the payer were not dealing at arm's length, according to paragraph 5(2)(*i*), subsection 5(3) of the *Act* and sections 251 and 252 of the *Income Tax Act*.

[16] For all these reasons, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois, New Brunswick, this 31st day of March 2003.

"S.J. Savoie"

D.J.T.C.C.

Translation certified true
on this 30th day of January 2004.

Leslie Harrar, Translator