Docket: 2002-2945(EI)

BETWEEN:

KATY BÉLISLE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 28, 2003, at Québec, Quebec

Before: The Honourable Deputy Judge S. J. Savoie

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Marie-Claude Landry

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 18th day of November 2003.

"S. J. Savoie"

Savoie, D.J.

Translation certified true
on this 26th day of April 2004.

Sharlene Cooper, Translator

Citation: 2003TCC788
Date: 20031118
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REASONS FOR JUDGMENT

Savoie, J.

[1] This appeal was heard at Québec, Quebec, on July 28, 2003.

[2] This appeal concerns the insurability of the employment held by the Appellant when she was engaged by Sylvain Dionne, the Payor, during the periods at issue, namely from March 19 to October 12, 1998, and from March 26 to October 1, 1999, within the meaning of the *Employment Insurance Act* (the "Act").

[3] On June 10, 2002, the Minister of National Revenue (the "Minister") informed the Appellant of his decision that, for the periods at issue, this employment was not insurable because the Appellant and the Payor would not have entered into a similar contract of employment if they had been dealing with each other at arm's length.

[4] In rendering his decision, the Minister relied on the following presumptions of fact, which the Appellant admitted or denied:

> [TRANSLATION]
>
> (a) The Payor carried on business under the firm name Poissonnerie S. Dionne; (admitted)
>
> (b) The Payor is the sole owner of Poissonnerie S. Dionne; (admitted)

(c) The business began its operations in March 1997; (admitted)

(d) The business was seasonal, from March to October every year; (admitted)

(e) The business was open seven days a week; (admitted)

(f) The Appellant is Sylvain Dionne's spouse; (denied)

(g) The Appellant worked as the manager of the fish market; (admitted)

(h) The Appellant was responsible for the accounting, the employees, purchasing, sales, and for the business in general; (admitted)

(i) The Appellant received a fixed salary of $400 per week in 1998, and of $500 and $725 per week in 1999; (admitted)

(j) The Appellant rendered services to the Payor from 40 to 70 hours per week; (denied)

(k) The Appellant received the same salary regardless of the number of hours she actually worked during the week; (denied)

(l) On August 17, 1998, the Payor issued a record of employment to the Appellant, for the period starting on March 29, 1998 and ending on August 15, 1998, indicating 1,000 insurable hours and total insurable earnings of $8,000.00; (admitted)

(m) On August 30, 1999, the Payor issued a record of employment to the Appellant, for the period starting on April 4, 1999 and ending on August 21, 1999, indicating 800 insurable hours and total insurable earnings of $12,700.00; (admitted)

(n) On December 1, 2000, in a statutory declaration signed at HRDC, the Payor stated: [TRANSLATION] "Nonetheless, Katy was responsible for purchasing fish for the duration of the business's operations, that is, from the end of March to the beginning of October every year"; (denied)

(o) On December 1, 2000, in a statutory declaration signed at HRDC, the Payor stated: [TRANSLATION] "We agreed to record on the payroll that she was receiving a higher salary than the other employees to compensate for the periods in which she did not take

> a salary, at the beginning when the business first opened, and at the end, a few months before it closed; (denied)
>
> (p) The records of employment do not reflect reality in terms of the periods the Appellant actually worked; (denied)
>
> (q) The Appellant rendered services to the Payor, without declared earnings, before and after the dates listed on the records of employment; (denied)
>
> (r) The Payor's payroll journal did not reflect reality in terms of the periods the Appellant actually worked; (denied)
>
> (s) The weeks the Appellant allegedly worked do not correspond to the weeks she actually worked. (denied)

[5] The Appellant admitted all of the Minister's presumptions except for those listed in paragraphs (f), (j), (k), (n) and (o) to (s).

[6] The Appellant denied paragraphs (n), (o), (p) and (q). However, the Minister proved the merits of these presumptions, particularly during the Payor's testimony, through the Payor's statutory declaration, dated December 1, 2000, and filed in evidence as Exhibit I-16, as well as the table filed as Exhibit I-17 by Paul Dessureault, the investigating officer.

[7] Using this material, which the Minister filed in evidence, as well as the documentation reviewed during the investigation, Officer Paul Dessureault prepared a table illustrating the chronology of the duties the Appellant performed outside the employment periods. This exercise proved that the Appellant's records of employment were false in terms of the periods worked and that she had rendered services to the Payor, without pay, before and after the dates listed on the records of employment. In this regard, the same observation can be made upon reading the statutory declaration of Sylvain Dionne, the Payor, filed in evidence as Exhibit I-16, a relevant passage from which is reproduced below:

> [TRANSLATION]
>
> . . . I was the sole owner of Poissonnerie S. Dionne Enrg. from March 1997 to November or December 1999. The business opened its doors on or around March 26, 1997. In passing . . . with regard to all of the accounting, the ledgers, payroll journals, and all the rest, I know absolutely nothing about that. Katy Bélisle, my former spouse, was solely responsible for all of that, except for preparing

income tax returns every year, which were prepared by Louis Ouellet, an accountant with the firm Chabott . . . etc. from Rivière-du-Loup. Katy was responsible for deposits, for preparing most of the cheques, for filing invoices, etc. In addition, every year, from 1997 to 1999 inclusive, she operated the business upon opening and near the end when I reached my fishing quotas I joined Katy at the fish market. Nonetheless, Katy was responsible for purchasing fish for the duration of the business's operations, that is, from the end of March to the beginning of October every year, because I wanted her to continue doing so, as I was not as good as she was at bargaining and negotiating prices with suppliers. Although she was on-site during the periods in which she was not listed in the payroll journal in 1998 and 1999, namely from 26/03/99 to 03/04/99, from 22/08/99 to 01/10/99, from 19/03/98 to 28/03/98, and from 16/08/98 to 12/10/98, Katy Bélisle was not paid any wages under the table and she did not receive any benefits whatsoever. Since money was extremely tight and we were unable to pay all of our accounts, we agreed that Katy would start working at Poissonnerie at the end of March and, when she saw that sales were increasing with the work, she would pay herself a salary and be listed on the payroll. For a while, she listed a salary in her name. Katy had previously informed me that she would not take a salary for such and such a week, and you tell me that it is clear that she redeposited a paycheque into Poissonnerie's account in 1998. She probably stopped paying herself a salary by cheque because there was not always enough money for her to take a salary. We agreed to record on the payroll that she was receiving a higher salary than the other employees to compensate for the periods in which she did not take a salary, at the beginning when the business first opened, and at the end, a few months before it closed: the salary listed on the payroll compensated her somewhat for those hours; thus, the only salary she received covered the end of March to the beginning of October in 1998 and 1999. Clearly, an outside employee would not have agreed to such conditions and to being responsible for all of the accounting as well, without being paid accordingly, but Katy was my spouse until the business closed at the beginning of October 1999, and she agreed to these conditions because she was my spouse. I cannot tell you whether she frequently listed a salary for herself in the payroll journal in 1998 and 1999, without being able to draw the full salary, if any at all, as she was solely responsible for paying the salaries and she is the only one who is aware of this, but I know it happened. In 1997, Katy Bélisle worked full-time, seven days a week, throughout the entire season that Poissonnerie was open, namely from 26/03/97 until the beginning of October. The same is true for the period in which the business was open in 1998 and 1999, but if she took a

> salary, it was a very low one in 1997. Furthermore, she had a lot of problems with her credit cards, but there would not have been enough income for her to pay them off and she lost them all. Since she was my spouse, she always took her salary, during all three years, based on the amount of money that was available. She could tell you what percentage of the salaries listed in the books she actually took, and it was not to pay for luxuries, but strictly to buy essential household items, to pay our bills, electricity, telephone, etc. . . .

[8] The Appellant denied the Minister's presumption listed in paragraph 5(f), that she was the spouse of Sylvain Dionne. In addition, the Appellant and the Payor testified that they were not common-law spouses during the periods at issue. They pointed out that they might have called themselves spouses in the beginning to legitimize living together under the same roof and to comply with the accountant's recommendation for tax reasons.

[9] It is relevant to note that they were somewhat self-conscious, hesitant, reticent and evasive when testifying with regard to their status.

[10] The Appellant confirmed that she left in September 1999, because Sylvain Dionne had someone else in his life. In her statutory declaration (Exhibit I-1), the Appellant made the following statements, among others:

> [TRANSLATION]
>
> . . . I worked for Poissonnerie S. Dionne in 1998 and 1999. When I worked for this business, I was living with Mr. Sylvain Dionne as a common-law spouse. We separated over a year ago and we signed a paper releasing me from any liability with regard to the documents of Poissonnerie S. Dionne . . .

[11] The Appellant signed this declaration on November 15, 2000. Sylvain Dionne's comments concerning their status as a couple were cited, *supra*, in the passage from his declaration, which was filed in evidence as Exhibit I-16.

[12] In addition, the Payor's sister, Patricia Dionne, in her statutory declaration dated December 5, 2000, (Exhibit I-18), made the following statements, among others, and I quote:

> [TRANSLATION]
>
> . . . in the beginning, there was an agreement between my brother, Sylvain Dionne, and his spouse at the time, Katy Bélisle, that since the latter had no idea how a fish selling business operated . . . I would work at Poissonnerie for two or three weeks to teach Katy how it operates. . . .

Common-law spouses

[13] Investigator Paul Dessureault confirmed that the Appellant and the Payor both stated that they were common-law spouses until the business closed. The Payor's sister, Patricia Dionne, told him the same thing. Therefore, this investigator determined, upon reviewing the case and interviewing the parties, that the Appellant and the Payor were common-law spouses, which explains the terms and conditions of the Appellant's employment; that is, the same salary regardless of the number of hours worked, the fact that she worked without pay in 1997, and the work performed before and after the periods at issue. Mr. Dessureault stated that this is a frequent occurrence in cases involving spouses.

[14] Witness Dessureault, the investigator who prepared the table filed in evidence as Exhibit I-17, testified that the Payor, Sylvain Dionne, had told him that the Appellant operated the business throughout the entire season, that is, from the end of March to the beginning of October every year. He used the payroll journal to prepare the said table. He did so for 1997, when the Appellant worked the entire season without pay. In addition, it was shown that the Appellant did accounting for the Payor from 1997 to 1999.

[15] It is important to emphasize that the preceding information calls into question the truth of the testimony provided by the Appellant and the Payor.

[16] In addition, the Appellant testified that her declaration to the investigator was obtained under duress. Indeed, when confronted with her declaration in which she stated, and I quote:

> [TRANSLATION]
>
> . . . When I worked for this business, I was living with Mr. Sylvain Dionne as a common-law spouse . . .

she testified:

> [TRANSLATION]
>
> The investigator wrote that, not me. The investigator threatened . . . if I did not sign it, he would take me to Court.

[17] However, Investigator Dessureault denied making any threats. He explained the procedure he always follows in every investigation, which takes the form of questions and answers, whereby he writes out the question as well as the answer provided by the person being questioned. Subsequently, he rereads everything, asks the person he is questioning to do the same, and then he asks if there are any corrections to be made. If the person makes corrections, the investigator corrects the text and then the declaration is signed. In this case, the declaration was signed on November 15, 2000, nearly three years ago. The Minister argued that the Appellant's memory would be more accurate at the time, than when she testified at the hearing, and that the investigator's testimony should, in theory, be more objective. It is important to add that the Minister argued that Mr. Carrier, Counsel for the Appellant, did not cross-examine Mr. Dessureault concerning any threats.

[18] Payor Dionne testified that no promises or threats were made to encourage him to sign the declaration. Indeed, he did not mention any threats. Furthermore, the Minister wondered why the issue of threats had not been raised prior to the date of the hearing.

[19] In light of the foregoing, this Court must determine, as did the Minister, that the Appellant and the Payor were common-law spouses during the periods at issue; thus, they were related within the meaning of section 251 of the *Income Tax Act*. This section states that related persons shall be deemed not to deal with each other at arm's length. Paragraph 5(2)(*i*) of the *Employment Insurance Act* states that insurable employment does not include employment if the employer and employee are not dealing with each other at arm's length. Paragraph 5(3)(*b*) specifies that 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 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.

[20] In this case, the Minister determined, having exercised his discretion under paragraph 5(3)(*b*) of the Act, that the Appellant's employment was not insurable because the Appellant and the Payor were not dealing with each other at arm's length.

[21] The Appellant asked this Court to set aside the Minister's decision. In *Attorney General of Canada v. Jencan Ltd.*, [1998] 1 F.C. 187, the Federal Court of Appeal described the authority and role of this Court in such cases. This frequently cited case represents the state of the law on this matter. At paragraph 29, Isaac CJ., addressed the issue as follows:

> . . . The critical issue in this application for judicial review is whether the Deputy Tax Court Judge erred in law in interfering with the discretionary determination made by the Minister under subparagraph 3(2)(*c*)(ii). This provision gives the Minister the discretionary authority to deem "related persons" to be at arm's length for the purposes of the UI Act where the Minister is of the view that the related persons would have entered into a substantially similar contract of service if they had been at arm's length. . . .

[22] Continuing his analysis, Isaac CJ., stated the following at paragraph 31:

> The decision of this Court in *Tignish*, . . . requires that the Tax Court undertake a two-stage inquiry when hearing an appeal from a determination by the Minister under subparagraph 3(2)(*c*)(ii). At the first stage, the Tax Court must confine the analysis to a determination of the legality of the Minister's decision. If, and only if, the Tax Court finds that one of the grounds for interference are established can it then consider the merits of the Minister's decision. As will be more fully developed below, it is by restricting the threshold inquiry that the Minister is granted judicial deference by the Tax Court when his discretionary determinations under subparagraph 3(2)(*c*)(ii) are reviewed on appeal. Desjardins J.A., speaking for this Court in *Tignish, supra*, described the Tax Court's circumscribed jurisdiction at the first stage of the inquiry as follows:

> Subsection 71(1) of the Act provides that the Tax Court has authority to decide questions of fact and law. The applicant, who is the party appealing the determination of the Minister, has the burden of proving its case and is entitled to bring new evidence to contradict the facts relied on by the Minister. The respondent submits, however, that since the present determination is a discretionary one, the jurisdiction of the Tax Court is strictly circumscribed. The Minister is the only one who can satisfy himself, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions and importance of the work performed, that the applicant and its employee are to be deemed to deal with each other at arm's length. Under the authority of *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, contends the respondent, unless the Minister has not had regard to all the circumstances of the employment (as required by subparagraph 3(2)(*c*)(ii) of the Act), has considered irrelevant factors, or has acted in contravention of some principle of law, the court may not interfere. Moreover, the court is entitled to examine the facts which are shown by evidence to have been before the Minister when he reached his conclusion so as to determine if these facts are proven. But if there is sufficient material to support the Minister's conclusion, the court is not at liberty to overrule it merely because it would have come to a different conclusion. If, however, those facts are, in the opinion of the court, insufficient in law to support the conclusion arrived at by the Minister, his determination cannot stand and the court is justified in intervening.

[23] In *Ferme Émile Richard et Fils Inc. v. M.N.R.*, [1994] F.C.J. No. 1859, Décary J., of the Federal Court of Appeal, used similar wording.

[24] In *Jencan*, *supra*, Isaac CJ., continued his analysis, stating the following at paragraph 33:

> . . . The jurisdiction of the Tax Court to review a determination by the Minister under subparagraph 3(2)(*c*)(ii) is circumscribed because Parliament, by the language of this provision, clearly intended to

> confer upon the Minister a discretionary power to make these determinations. . . .

[25] At paragraph 37 of that case, Isaac CJ., described the authority of this Court in such circumstances in the following terms:

> On the basis of the foregoing, the Deputy Tax Court Judge was justified in interfering with the Minister's determination under subparagraph 3(2)(*c*)(ii) only if it was established that the Minister exercised his discretion in a manner that was contrary to law. And, as I already said, there are specific grounds for interference implied by the requirement to exercise a discretion judicially. The Tax Court is justified in interfering with the Minister's determination under subparagraph 3(2)(*c*)(ii)–by proceeding to review the merits of the Minister's determination–where it is established that the Minister: (i) acted in bad faith or for an improper purpose or motive; (ii) failed to take into account all of the relevant circumstances, as expressly required by paragraph 3(2)(*c*)(ii); or (iii) took into account an irrelevant factor.

[26] It must be acknowledged that this Court is bound, under the *stare decisis* principle, by the authority of the Federal Court of Appeal. *Tignish* specifies that:

> . . . the jurisdiction of the Tax Court is strictly circumscribed. The Minister is the only one who can satisfy himself, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions and importance of the work performed, that the applicant and its employee are to be deemed to deal with each other at arm's length. Under the authority of *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, contends the respondent, unless the Minister has not had regard to all the circumstances of the employment (as required by subparagraph 3(2)(*c*)(ii) of the Act), has considered irrelevant factors, or has acted in contravention of some principle of law, the court may not interfere. . .

[27] In light of the foregoing, particularly the evidence collected, the Appellant's admissions, the unrefuted assumptions of fact relied on by the Minister, and the contradictions between the evidence submitted at the hearing and the previous declarations, this Court is of the view that it would be entirely inappropriate to interfere.

[28] In addition, it is the opinion of this Court that, in exercising his discretion under subsections 5(3) and 93(3) of the Act, the Minister met the requirements

therein, by having regard to all of the circumstances surrounding the Appellant's employment, as explained in *Jencan*, *supra*.

[29] The Appellant had the burden of proving her case and she was entitled to bring new evidence to contradict the facts relied on by the Minister in support of his determination. She did not do so.

[30] Therefore, this Court must conclude, having regard to all of the circumstances, that it was reasonable for the Minister to determine that the Appellant and the Payor would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length within the meaning of paragraph 5(3)(*b*) of the Act.

[31] Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois, New Brunswick, this 18th day of November 2003.

"S. J. Savoie"

Savoie, D.J.

Translation certified true
on this 26th day of April 2004.

Sharlene Cooper, Translator