Docket: 2003-850(EI)

BETWEEN:

SERRES LACOSTE 2000 INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GABRIEL LACOSTE, DANIEL LACOSTE, LUCIE BEAUCHAMP,

Intervenors.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on 31 July 2003 at Québec, Quebec

Before: The Honourable Deputy Judge S. J. Savoie

Appearances:

Representatives for the Appellant:	Daniel Lacoste Lucie Beauchamp
Counsel for the Respondent:	Ms. Marie-Claude Landry
Representative for the Intervenors:	Lucie Beauchamp

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.

Gerald Woodard, Translator

Citation: 2003TCC802
Date: 20031118
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REASONS FOR JUDGMENT

Savoie, D.J.

[1] This appeal was heard at Québec, Quebec on 31 July 2003.

[2] This is an appeal in respect of the insurability of the employment held by Gabriel Lacoste, the worker, while employed by the Appellant during the period at issue, from April 15 to November 25, 2002.

[3] On February 18, 2003, the Minister of National Revenue (the "Minister") informed the Appellant of his decision that, during the period at issue, the worker held insurable employment because that employment met the requirements of a contract of service and there was an employer-employee relationship between it and the worker. The Minister also determined that there was no dispute between him and Daniel Lacoste or Lucie Beauchamp because, according to the Minister's decision, those individuals did not hold insurable employment with the Appellant, in accordance with the Appellant's claims.

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

[TRANSLATION]

(a) the appellant was incorporated on January 4, 2001; (admitted)

(b) the appellant operated a greenhouse tomato and perennial production company; (admitted)

(c) the company operated throughout the year; (admitted)

(d) from its creation to October 24, 2002, the shareholders in the Appellant, holding voting shares, were:

Daniel Lacoste	50% of shares
Lucie Beauchamp	50% of shares (admitted)

(e) as of October 25, 2002, the shareholders in the Appellant, with voting shares, were:

Daniel Lacoste	40% of shares
Lucie Beauchamp	40% of shares
the worker	20% of shares (admitted)

(f) Daniel Lacoste and Lucie Beauchamp are the worker's father and mother; (admitted)

(g) prior to incorporation of the Appellant, Daniel Lacoste had run a personal business since 1975; (denied)

(h) on October 25, 2002, Daniel Lacoste and Lucie Beauchamp each gave 10% of the shares in the Appellant to the worker; (denied)

(i) the Appellant hired the worker to benefit from the $20,000 grant from the Ministère de l'Agriculture's Relève agricole program, (denied)

(j) the worker was trained as a programmer-analyst and had no experience in management or operating an agricultural business; (denied)

(k) the appellant allowed 6 months to train the worker in the intricacies of the company; (denied)

(l) on November 25, 2002, Daniel Lacoste stated to a representative of the Respondent that the worker was still being coached by him or his mother; (denied)

(m) the worker's duties consisted of administration, purchasing, technical monitoring of tomato production and production work; (denied)

n) the appellant had an alternating work schedule with his father of 10 consecutive days to ensure a 24-hour presence in the event of greenhouse breakage, followed by 4 days off and the following 10 days at 10 hours per day; (admitted)

o) the worker's father received an annual salary of $16,300; (denied)

p) the worker rendered services for the entire year; (admitted subject to clarification)

q) the worker lived in the family home; (admitted)

r) the worker received an annual salary of $35,000 over 26 pay periods; (admitted)

s) the worker had no risk of loss or chance for profit other than his salary; (denied)

t) the worker worked at the Appellant's site; (admitted subject to clarification)

u) all equipment used by the worker belonged to the appellant; (admitted subject to clarification)

v) the services rendered by the worker were an integral part of the appellant's activities. (admitted subject to clarification)

[5] The evidence revealed that Daniel Lacoste had operated a business since 1978 and that the Appellant was incorporated in 2001. On October 25, 2002, Daniel Lacoste and Lucie Beauchamp each sold 10% of the shares that they held in the corporation to the worker, making them eligible for a $15,000 start-up grant from the Ministère de l'Agriculture. The worker also received a $20,000 grant from the Ministère de l'Industrie et du Commerce. The worker was trained as a programmer-analyst and held a position as such in Montréal. In early 2002, the worker wanted to change careers. He approached his parents to offer his services and know-how to the company with a view to eventually becoming owner. The parties agreed to a six-month trial period.

[6] Having grown up around his parents' business, the worker had learned some of its operations. Very early, he learned a lot about growing tomatoes. For accounting, he relied on his mother.

[7] The worker claims that, like others, he is not an employee of the Appellant. The evidence demonstrated that, as a minority shareholder with a certain independence in carrying out his duties, he must be deemed a management employee.

[8] By associating himself with his parents' company, the worker provided the company with the benefits of his knowledge, which resolved certain company problems regarding storage, material orders and inventory.

[9] The evidence demonstrated that, in addition to the duties recognized by the Minister, the worker managed and supervised employees, met with agronomists and participated in decisions as part of the company's operations.

[10] The worker feels he has access to the company's profits because of his shareholder status and that his situation involves a risk of loss because he guaranteed the loans.

[11] The evidence revealed that, during the period at issue, the worker was trained by his father and mother in several aspects of the company operations, although, in many ways, he was familiar with them, having grown up watching his parents run it.

[12] It was demonstrated that several decisions were made by the three parties around the table, during what Daniel Lacoste refers to as "mini BOD meetings" (board of directors).

[13] The evidence furthermore revealed that major decisions, such as large purchases, were made at the Board of Directors level. Daniel Lacoste also admitted that he always kept an eye on the entire company in case there were any major problems.

[14] Because Gabriel Lacoste, the worker, is the son of Lucie Beauchamp and Daniel Lacoste, the three shareholders are members of a related group that control the corporation in accordance with subparagraph 251(2)(*b*)(ii) of the *Income Tax Act*.

[15] The Minister began his assessment of the file by examining the facts in light of paragraph 5(2)(*i*) of the *Employment Insurance Act* to first determine if the employment held by Gabriel Lacoste, the worker, was excluded from insurable employment.

[16] The Minister first examined the worker's terms of employment based on the criteria set forth in the sections indicated previously.

[17] In addition to the worker's duties indicated previously, he was in charge of the greenhouse irrigations system, developed a computer program to monitor employee performance per square metre, participated in tomato production, made purchases, maintained equipment and managed the warehouse. Since beginning with the company, he shared responsibility for controlling greenhouse temperature with Daniel Lacoste.

[18] In terms of pay, he received an annual salary of $35,000. The Minister determined that the salary was reasonable in light of the number of hours worked. Furthermore, in 2002, the salaries paid to Lucie Beauchamp and Daniel Lacoste were $16,300 each, the same as in 2001.

[19] It was determined that, since April 15, 2002, Gabriel Lacoste worked the full year and played a full part in the company's activities, and was necessary for the company's proper operation.

[20] Following this examination, the Minister determined that Gabriel Lacoste's employment was not excluded from insurable employment under paragraph 5(3)(*b*) of the *Employment Insurance Act*.

[21] It remains to be determined whether Gabriel Lacoste meets the requirements for a contract of service. It was determined that, if Gabriel Lacoste had not joined the company as shareholder, the Appellant would have had to hire an agronomist or technician and offer a share of profits in light of the low wages offered in the agricultural field.

[22] With the arrival of Gabriel Lacoste and the government financing obtained, the company's share capital was redistributed according to the terms indicated previously and the Appellant was able to expand its greenhouses.

[23] The evidence revealed that, despite having learned about the company when he was young, Gabriel Lacoste was trained in the intricacies of the business by Lucie Beauchamp and Daniel Lacoste and is still in training.

[24] Although he took part in decision-making since October 25, 2002, the worker's participation in those decisions is limited to the 20% of shares that he holds. For their part, with 40% of voting shares each and $255,182 in preferred shares, Lucie Beauchamp and Daniel Lacoste control the Appellant and its future.

[25] The evidence revealed that the time and effort of Gabriel Lacoste was thus controlled by the two main shareholders, although often from a distance or without constraint. It was established that such control exercised, although minimally, under the circumstances, was enough to establish a relationship of subordination between the worker and the Appellant.

[26] In terms of opportunity for profit and risk of loss, the evidence revealed that a payor's loans ($678,000 in 2001 plus $900,000 in 2002) were guaranteed by property, land, equipment and personal guarantees from the three shareholders proportional to their voting shares. As a result, the worker's opportunity for profit and risk of loss in carrying out his duties are attributable to the Appellant and the personal guarantee of the Appellant's loans by each of the three shareholders in proportion to the number of shares that they hold stems from their status as shareholders, not employees.

[27] It was determined that the worker used the Appellant's tools and equipment and that Gabriel Lacoste's work was part of the Appellant's business, not his own business.

[28] Because of the worker's shareholder status, the control criteria require a specific interpretation of caselaw. In *J.S.P. Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 423, Tardif J. of this court, faced with a situation similar to the case at bar, stated the following:

> Contributing to and being a partner in the management, administration or development of a business, particularly a small business, means that a person's job description is strongly marked by responsibilities characteristic of those often fulfilled by actual business owners or persons holding more than 40 per cent of the voting shares in the company employing them. In other words, in assessing remuneration, at this level of responsibility, caution must

> be exercised when a comparison is made with the salaries of third parties; often there are no advantages that offset the lower salaries.

[29] The same principle was established by the Federal Court of Appeal in *Groupe Desmarais Pinsonneault & Avard Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 572, per Noël J., who stated the following:

> In concluding that there was no relationship between the workers and the defendant, the trial judge does not appear to have taken into account the well-settled rule that a company has a separate legal personality from that of its shareholders and that consequently the workers were subject to the defendant's power of supervision.
>
> The question the trial judge should have asked was whether the company had the power to control the way the workers did their work, not whether the company actually exercised such control. The fact that the company did not exercise the control or that the workers did not feel subject to it in doing their work did not have the effect of removing, reducing or limiting the power the company had to intervene through its board of directors.
>
> We would add that the trial judge could not conclude there was no relationship of subordination between the defendant and the workers simply because they performed their daily duties independently and without supervision. The control exercised by a company over its senior employees is obviously less than that exercised over its subordinate employees.

[30] Based on this analysis, it is thus reasonable to conclude, under the circumstances in the case at bar, i.e., the remuneration paid, the terms of employment and the duration, nature and importance of the work performed, that the Appellant and the worker would have entered into a quite similar work contract had they been dealing at arm's length.

[31] The criteria used to determine whether the worker's employment meets the requirements of a contract of service were set forth in the following decisions: *Montreal v. Montreal Locomotive Works Ltd.* (1947), 1 D.L.R. 161; *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (F.C.A.); *Tignish Auto Parts Inc. v. M.N.R.*, [1994] F.C.J. No. 1130. In the case at bar, it is a question of control, ownership of tools, opportunity for profit, risk of loss and integration.

[32] Having examined the facts in this case according to each criteria, I must conclude that the worker's employment meets the requirements of a contract of service and, as such, is insurable within the meaning of paragraph 5(1)(*a*) of the *Income Tax Act*.

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

Gerald Woodard, Translator