Docket: 2005-2531(EI)

BETWEEN:

EDMONTON EXTERMINATORS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on December 12, 2006, at Edmonton, Alberta

Before: The Honourable M.H. Porter, Deputy Judge

Appearances:

Counsel for the Appellant:	Deryk W. Coward
Counsel for the Respondent:	Darcie Charlton

JUDGMENT

The appeal is allowed and the decision of the Minister is vacated in accordance with the attached Reasons for judgment.

Signed at Edmonton, Alberta, this 25th day of January 2007.

"M.H. Porter"

Porter D.J.

Citation: 2007TCC15
Date: 20070125
Docket: 2005-2531(EI)

BETWEEN:

EDMONTON EXTERMINATORS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Porter, D.J.

[1] The issue in this case is whether the Minister of National Revenue (the "Minister") has correctly determined that one Jim Schultz (the "Worker") was engaged in insurable employment under the *Employment Insurance Act* (the "*EI Act*") during the period January 1, 2001 to December 31, 2003.

[2] It is agreed between the parties that the Worker was employed by the Appellant under a contract of service. The worker's mother owns 59% of the shareholdings of the Appellant. His brother Tom Schultz owns the other 41%. *Prima facie* the Worker was in "excluded employment" under the *EI Act* as a "related person". However, the Minister by letter of July 8, 2005, indicated in his decision that pursuant to paragraphs 5(1)(*a*) and 5(3)(*b*) of the *EI Act*, he was satisfied that the Appellant and the Worker would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. Pursuant to subsection 93(3) of the *EI Act*, the Minister accordingly dismissed the Appellant's appeal from the rulings officer that the Worker was employed in insurable employment. The Appellant has subsequently appealed that decision to this Court.

The Law

[3] The relevant sections of the *EI Act* read as follows:

> 5(2) Insurable employment does not include

(*a*) …

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.

[4] In the Federal Court of Appeal case of *Légaré v. Canada*, [1998] FCJ No. 878, Marceau J.A. said:

> The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[5] In another Federal Court of Appeal case *Denis v. Canada (Minister of National Revenue)*, [2004] FCA 26, Richard C.J. said :

> The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the Act is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion

> for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see Pérusse v. Canada (Minister of National Revenue - M.N.R.), [2000] F.C.J. No. 310 March 10, 2000).

[6] As counsel for the Appellant pointed out in his closing submissions the standard is of course the same whether an appellant (often the employee) is attempting to be included in the fold of "insurable employment" or striving to stay outside the fold. Nonetheless, the cases seem to show a greater readiness on the part of the Minister is to exercise his discretion then when a party is seeking to be excluded then when a party is wishing to claim benefits. In these latter cases a much more stringent standard seems often to have been applied whereas in the former cases the standard has often appeared to be quite lax. As I see it, the duty of this Court is to ensure that this degree of subjectivity does not creep into the decision making process and to ensure that the decision of the Minister could reasonably, from any objective point of view, have been arrived at, given any new facts revealed by the evidence heard during the appeal.

The Facts

[7] Evidence at the appeal was given solely by the Worker. Neither his mother nor his brother were called and counsel for the Minister pointed out that there is no collaborative evidence. However, I found the Worker quite straightforward and I viewed him as being a credible witness, albeit his evidence was somewhat self serving. I find myself quite prepared to accept his evidence, and I do accept it.

[8] The questionnaire signed by the Worker was also entered in evidence. It was partly at least, on the basis of this questionnaire that the Minister appears to have made his decision.

The assumption of facts upon which the Minister also was said to have relied in paragraph 9 of the Reply to the Notice of Appeal are as follows:

a) the Appellant operated a pest control business;

b) the share structure of the Appellant was as follows:

Tom Schultz	41%	(son)
Gladys Schultz	59%	(mother)

c) Tom Schultz and Gladys Schultz were the directors of the Appellant;

d) the Worker was the son of Gladys Schultz;

e) the Worker and the Appellant were related to each other within the meaning of the *Income tax Act*, R.S.C. 1985 (5th Supp.) c.1, as amended (the "*Act*");

f) the Worker performed the duties of an exterminator;

g) the Worker's duties included pest control services to residential and industrial clients;

h) the Worker had been working for the Appellant since August of 2000;

i) the Worker earned a set wage of $2,000.00 per month which was gradually increased to $2,6000.00 per month;

j) the Appellant paid the Worker on a semi-monthly basis;

k) the Appellant determined the Worker's wage rate;

l) the Appellant's arm's length employee was also paid a monthly wage;

m) the Worker also received bonuses as follows:

June 2001	$3,500.00
June 2002	$4,000.00
June 2003	$5,000.00

n) the Worker's wage rate was comparable to industry standards;

o) the Worker's wage rate was reasonable;

p) the Appellant issued T4s to the Worker containing the following earnings:

2001	$29,432
2002	$31,346
2003	$36,122

q) the Worker took paid vacation leave;

r) none of the Appellant's employees, including the Worker, received overtime pay;

s) the Worker had not provided unpaid services to the Appellant;

t) the Appellant paid the Worker on a regular and consistent basis;

u) if the Appellant's revenue was low the Worker would still be paid;

v) if the Worker were unable to perform his services for a period of time he would still get paid, however, this did not occur during the period under review;

w) the Worker normally worked from 8:00AM to 4:00PM;

x) the Worker was also on-call;

y) the Appellant determined the Worker's hours of work;

z) the Worker worked an average of 40 hours per week;

aa) the Worker's hours were not recorded or monitored;

bb) the Appellant's arm's length employee's hours were not recorded or monitored;

cc) the Appellant's retained the right to control the Worker;

dd) the Appellant assigned work to the Worker;

ee) the Appellant provided the Worker with a list of duties;

ff) the Worker was not supervised as he was fully trained;

gg) the Worker could not come and go as he pleased;

hh) when the Worker was away from work other employees performed his duties;

ii) the Worker performed his services at the Appellant's client's premises;

jj) the Worker did not incur any expenses in the performance of his duties;

kk) the Worker was employed under a contract of service by the Appellant;

ll) the Minister considered all of the relevant facts that were made available to the Minister, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, and

mm) the Minister was satisfied that it was reasonable to conclude that the Worker and the Appellant would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[9] The Worker appeared to agree with items a) to m) but disagreed in his evidence with items n), o), q), v), w), x), y), z), dd), ee), ff), gg), hh) and agree with the remainder.

[10] Having listened to the Worker's evidence and found him to be a credible witness, particularly where his evidence contradicted the assumptions relied upon by the Minister. I find that the Minister relied on incorrect facts in arriving at his decision.

[11] The whole thrust of the evidence given by the Worker was that when he became unhappy with his management job at Canada Post in 2000, his mother, in particular, took him into the family business. She was the major shareholder and had taken control of the business upon the death of her late husband. She obviously ruled the roost with somewhat of an iron fist. However, the Worker was the baby of the family, and it is apparent that his mother had a soft spot for him and was prepared to allow him to do pretty well whatever he wanted in the business, in order to keep him in it.

[12] Thus, although the Worker received what might be a standard wage in the industry, he was paid on a monthly salary basis, as were other employees in the company, unlike Workers in competing businesses who were generally paid by the hour or by the piece.

[13] Where the difference came in, was how he worked and how much he worked for that salary. Thus, although the office was open from 8:00 am to 4:00 pm and the non family workers worked during those hours, and were expected to do so, the Worker himself only took for example two assignments each day instead of the regular four assignments.

[14] He admitted he was lazy, and said that when he had completed his assignments, rather than checking in with the office (his mother) as the other non related employees were required to do, he would just take off for the afternoon. He would go off and play or coach soccer, he would go fishing or he would go to the used car depot and strip off parts for sale on e-bay. He thus indicated that he, as often as not, just worked half time for a full time salary.

[15] More than that, when he was off sick for five weeks, he received full pay as well as for the sixth week when he was invalided and only worked part time. Other Workers, he said, would not have been treated in this way. The Minister said this did not occur in the period under review, but in 2001 it clearly did take place. In this the Minister was wrong (idem v).

[16] The Minister said the Worker was on call (item x). Clearly he was never on call; nobody was on call at any time.

[17] The Minister said the Appellant determined the Worker's hours of work (item y). Clearly this was wrong as the Worker came and went as he wished. It was also clear he did not work 40 hours per week, but more like 25 to 30 hours. He was paid however on the basis of working 40 hours per week.

[18] Whilst his mother had the right to control the Worker as an employee in fact she did not, and just accepted how and when he chose to work. A regular employee he said, would have been fired by his mother if she or he worked liked he the Worker did.

[19] It is true that the mother assigned work to the Worker by leaving assignment slips for him, however, she only assigned him half the normal amount of work given to other employees.

[20] The Worker was fully trained and licensed by the Alberta government, after taking his study courses and completing his tests. However, he said that was not the reason why he was not supervised (item ff) but rather because he was family.

[21] The Minister was incorrect when he assumed that the Worker could not come and go as he pleased (item gg). In fact the Worker did just that.

[22] Similarly, when the Worker was away his brother would take over one or two of his regular contracts; however, other work would just get put off to another day;

[23] In addition to the above the Worker said that his brother purchased a computer through the company for him. The purpose of the computer was so that he could trade used car parts on e-bay. He said he did that on company time. That is not at all consistent with an arm's length employee situation.

[24] The Worker said that he even stored items at the business premises, namely sets of comics that he had collected and his used car parts, as it made it easier for

him to sell them on e-bay, if they were right there. He also had full use of his company truck for personal use and the same with respect to his cell phone. The regular employees did not have theses privileges.

[25] The Worker also received an annual bonus which had nothing to do with any objective appraisal of his work and the results achieved. Moreover, it seems to have been larger than the bonus given to other employees. He used it to pay his annual property taxes.

[26] The Worker received from the company the shortfall of his prescription charges; that is the amount that he had to pay after putting his prescriptions through his fiancée's medical benefits plan. Other non-related employees did not get this benefit.

[27] His mother trusted him with signed blank cheques to pay invoices to suppliers. Other employees were not so trusted. Such was sufficient in other cases cited, before this Court, to be included in reasons for finding that an employee was not in insurable employment.

Conclusion

[28] I cannot help but reflect, that if one was looking at this situation from the other end of the telescope and the Worker was seeking to be included in the fold of insurable employment, the Court would have absolutely no difficulty in supporting the Minister's decision, if the latter had decided that it was not reasonable to conclude that they would have entered into a substantially similar contract of employment, had they been dealing with each other at arm's length.

[29] I take counsel's point, speaking for the Minister, that the legislation does not say "exactly the same" but rather "substantially similar". However, having now heard all the evidence that was presented, it would be hard to envision a clearer case of an employee not dealing with his employer at arm's length. As the Worker said throughout his evidence, it was all because he was family that he was able to operate as he did and particularly because he was and always had been the baby in the family.

[30] It is clear that many of the salient facts were not before the Minister when he made his decision and that many of his assumptions of fact are totally incorrect.

[31] It would be inconceivable to me that if the Minister had before him all the correct facts, as outlined in the evidence presented at trial, that he could reasonably and lawfully have come to the conclusion that he did, looking at it from an entirely objective point of view. As I say it would be would hard to find a clearer case of a situation which should fall into "excluded employment". These people ran their own business and assumed the risk of looking after themselves if bad times came along.

[32] For all of the above reasons the appeal is allowed and the assessment is vacated.

Signed at Edmonton, Alberta, this 25th day of January 2007.

"M.H. Porter"

Porter D.J.

CITATION:	2007TCC15
COURT FILE NO.:	2005-2531(EI)
STYLE OF CAUSE:	EDMONTON EXTERMINATORS LTD. AND M.N.R.
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APPEARANCES:

Counsel for the Appellant:	Deryk W. Coward
Counsel for the Respondent:	Darcie Charlton

COUNSEL OF RECORD:

For the Appellant:

Name:	Deryk W. Coward
Firm:	D'Arcy & Deacon LLP

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada