Docket: 2006-2897(EI)

BETWEEN:

NIAGARA PRE-HUNG DOORS LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on August 24, 2007 at Hamilton, Ontario

Before: The Honourable Justice T. O'Connor

Appearances:

Counsel for the Appellant:	Deryk W. Coward
Counsel for the Respondent:	Samantha Hurst

JUDGMENT

The appeal of the decision of the Minister of National Revenue made under the *Employment Insurance Act* is allowed, and the decision that Mark Beeke was engaged in insurable employment by Niagara Pre-Hung Doors Limited during the period from January 1, 2002 to December 31, 2004 is vacated.

Signed at Ottawa, Canada this 7th day of September, 2007.

"T. O'Connor"

O'Connor, J.

Citation: 2007TCC531
Date: 20070907
Docket: 2006-2897(EI)

BETWEEN:

NIAGARA PRE-HUNG DOORS LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

O'Connor, J.

[1] This is an appeal by Niagara Pre-Hung Doors Limited ("Employer") of a decision of the Minister of National Revenue that Mark Beeke ("Worker") was engaged in insurable employment for purposes of the *Employment Insurance Act* ("*Act*") during the period from January 1, 2002 to December 31, 2004 ("Period"). That decision was to the effect that notwithstanding that the Worker and the Employer were not at arm's length, they would have entered into a substantially similar contract of employment had they been dealing at arm's length. The position of the Employer is that the decision was incorrect, that the Worker was not insurable and that consequently no employment insurance premiums were exigible.

[2] The decision of the Minister was based on paragraphs 5(2)(*i*) and 5(3)(*b*) of the *Act*. They read as follows, so far as material:

> 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 the *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.

[3] It is not disputed that the Worker and the Employer are not at arm's length, the Worker, being the son of John Beeke ("John") and the brother of Jeff Beeke ("Jeff") and Tim Beeke ("Tim"), who together owned 100% of the shares of the Employer, John 60%, Jeff 20% and Tim 20%. It is also agreed that the relationship between the Worker and the Employer is a contract of service not a contract for services. The only issue in this appeal is the correctness of the Minister's decision that he was satisfied, 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 was reasonable to conclude that the Employer 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. The corollary of that decision is that notwithstanding the non-arm's length relationship, the Worker was insurable and the insurance premiums were properly exigible.

[4] There has been some considerable development in this area which bears repeating. The earlier cases held that the Minister's opinion could not be interfered with on an appeal to this Court unless it could be shown that in the course of forming that opinion the Minister had committed what might be termed "an administrative law error". As the *Act* confers a discretion on the Minister, this Court had no mandate to simply substitute its opinion for that of the Minister. However, if in the course of the hearing of an appeal the Appellant were able to show that the Minister had erred in law in forming his opinion, then this Court's function was to proceed to a *de novo* determination and question whether the terms of the employment contract could reasonably be considered to be those that arm's length parties would have arrived at. In other words, after finding that the Minister's decision was vitiated by an

administrative law error, only then, could this Court substitute its opinion for that of the Minister.

[5] In *Légaré v. Canada*, [1999] F.C.J. No. 878 Marceau J.A., speaking for himself and Desjardins and Noel JJ. A., said at paragraph 4:

> 4 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.

[6] It appears that *Légaré, supra*, has overruled the earlier cases. For example in *Pérusse v. Canada*, [2000] F.C.J. No. 310, Marceau J.A. wrote the following, concurred in by Décary J.A.

> 13 It is clear from reading the reasons for the decision that, for the presiding judge, the purpose of his hearing was to determine whether the Minister, in the well-known expression, had exercised "properly" the discretion conferred on him by the Act to "recognize the non-exception" of a contract between related persons. He therefore had to consider whether the decision was made in good faith, based on the relevant facts disclosed by a proper hearing, not under the influence of extraneous considerations. Accordingly, at the outset, at p. 2 of his reasons, the judge wrote:
>
> > The determination at issue in the instant appeal results from the discretionary authority provided for by the provisions of s. 3(2)(c) of the Act, [now 5(3)(b)] which reads as follows:
> >
> > ...
> >
> > The appellant was required to discharge the burden of proof, on the balance of probabilities, that the respondent in assessing the matter had not observed the rules applicable to

> ministerial discretion, and if this could not be done this Court would not have no [*sic*] basis for intervening.
> ...

[7] In *Birkland v. M.N.R.* 2005 T.C.C. 291, Bowie J. summarized the current state of the law as follows:

> This Court's role, as I understand it now, following these decisions, is to conduct a trial at which both parties may adduce evidence as to the terms upon which the Appellant was employed, evidence as to the terms upon which persons at arm's length doing similar work were employed by the same employer, and evidence relevant to the conditions of employment prevailing in the industry for the same kind of work at the same time and place. ... In the light of all that evidence, and the judge's view of the credibility of the witnesses, this Court must then assess whether the Minister, if he had had the benefit of all that evidence, could reasonably have failed to conclude that the employer and a person acting at arm's length would have entered into a substantially similar contract of employment. That, as I understand it, is the degree of judicial deference that Parliament's use of the expression "... if the Minister of National Revenue is satisfied ..." in paragraph 5(3)(b) accords to the Minister's opinion.

Against this background I must weigh the facts in this appeal because most appeals of this nature, if not all, are fact driven.

Facts

[8] For the purposes of determining this appeal I find the following to be the most important facts:

(a) The Employer is in the business of assembling and installing residential doors. Business hours were 8:00 a.m. to 5:00 p.m., six days a week.

(b) The Employer and the Worker are not at arm’s length because of the relationships and shareholding discussed above.

(c) The Worker was hired under a verbal contract.

(d) The Worker in 2002 only worked from May to September and during school breaks, mainly at Christmas, starting to work permanently after graduating from Reformed Bible College in the spring of 2003.

(e) The Worker's duties included cutting out steel doors, hinging doors, putting on hardware, ordering materials and customer assistance and help with sales.

(f) The Worker was paid on the basis of timesheets.

(g) The Worker's hours of work were not clearly established by Exhibit R-2 but, on average, in the periods worked in 2003 and 2004 his hours were about eight hours per day.

(h) The Worker’s father, John, originally owned 100% of the shares of the Appellant. About the year 2004, his sons, Jeff and Tim, who had worked in the business, each received from John 20% of said shares. John’s intention was to treat the Worker in the same manner as Jeff and Tim if the Worker continued with the business.

(i) The Employer had six unrelated employees plus the Worker, and the Worker’s father and the said two brothers.

(j) The Worker’s hours were flexible. John stated the Worker could work whenever he wanted to, even in the years 2003 and 2004. The Worker took time off during the Period for trips to Zambia and South Africa and from time to time, to play golf.

(k) The Worker had keys to the business premises whereas the unrelated employees did not. The Worker used the Employer’s equipment.

(l) The Worker estimated he worked overtime hours of about three hours per week with no pay, whereas unrelated workers received time-and-a-half for overtime.

(m) The Worker had use of the Employer’s truck at times for personal matters such as going to and from work.

(n) The Worker was frequently on call without pay.

(o) The worker used the Employer’s credit card and blank cheques to make purchases for the Employer.

(p) The Worker attended “Home Show” conventions without pay.

(q) The Worker postponed cashing pay cheques about 5 to 10 times although this is contradicted in the Questionnaire, Exhibit R-4.

(r) The Worker was privy to the finances of the Employer and participated in some business decisions.

(s) The paramount interests of the Worker’s father were devotion to the business, his family (he had thirteen children) and his religion. He clearly does not come across as one who is attempting to take advantage of the employment insurance system.

(t) The Worker’s father testified categorically that unrelated workers were not treated in the same way as the Worker.

Submissions

[9] It is the position of counsel for the Employer that the Employer and the Worker are not at arm's length, are therefore consequently excluded from the application of the *Act* unless paragraph 5(3)(b) of the *Act* applies, which counsel contends does not, that therefore the Minister’s decision should be vacated and that any employment insurance premiums are not exigible. It is the position of counsel for the Respondent, based mainly on the Questionnaires filed as Exhibits R-3 and R-4, that notwithstanding that the Employer and the Worker are not at arm's length, the Employer would have entered into a similar contract of employment with an arm's length party, i.e., that paragraph 5(3)(b) of the *Act* applies.

[10] After reviewing the evidence, considering the assumptions of the Minister, considering the Questionnaires and the clarifications given by the Worker and the Worker’s father with respect thereto, I conclude that the decision of the Minister was incorrect for the following principal reasons:

1. I accept wholly the credibility of the Worker and his father and their evidence sworn to in Court.

2. I agree with the Employer's Counsel's submissions that an arm's length worker would not have worked the many overtime hours the

Worker worked without being paid, nor have the perks and involvement mentioned above.

3. I submit further that the facts of no benefits, no on call pay, using the Employer's credit card and blank cheques are not indicative of an employment contract with an arm's length worker.

4. I add that the Minister is at a disadvantage in being required to rely almost totally on Questionnaires. In this regard, in *Primo Trailer Sales Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2005] T.C.J. No. 264 Lamarre, T.C.J. stated as follows:

> 21 I do not share the respondent's view. I find that both witnesses were credible. At trial, they explained the real factual situation. I agree with the appellant that the questionnaires are not always clear, that they are vague and that when people fill them in, they do not attach all that much importance to it, as they consent to fill them in while they are busy with their own work. I do not find that it is their responsibility to call the agents of the Minister to obtain clarification on the questionnaires. In my view, their responsibility does not extend beyond answering those questionnaires to the best of their understanding and knowledge.

5. I agree with the remarks of Bowie, T.C.J. in *Glacier Raft Co. v. Canada*, [2003] T.C.J. No. 450 where he states:

> ... when related parties enter into employment contracts they must be scrupulous to see that the terms do not differ from those on which the employer employs other workers, or on which the workers could find work with other employers, if they wish the employment to be insurable under the Act.

6. The opposite is true here. The Employer and the Worker were certainly not scrupulous in desiring insurability. They did not want an insurability situation.

[11] For the above reasons, I conclude that the terms and conditions of employment of the Worker were not substantially similar to what they would have been if the Worker had been dealing at arm's length with the Employer.

[12] Consequently, the appeal is allowed and the decision of the Minister that the Worker, Mark Beeke, was engaged in insurable employment by the Employer,

Niagara Pre-Hung Doors Limited during the period from January 1, 2002 to December 31, 2004 is vacated.

Signed at Ottawa, Canada this 7th day of September, 2007.

"T. O'Connor"

O'Connor, J.

CITATION:	2007TCC531
COURT FILE NO.:	2006-2897(EI)
STYLE OF CAUSE:	Niagara Pre-Hung Doors Limited v. M.N.R.
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APPEARANCES:

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