Docket: 2007-3293(EI)

BETWEEN:

ROBIN LESSARD,

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on February 14, 2008, at Chicoutimi, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Christina Ham

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the determination by the Minister of National Revenue is affirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of March 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 16th day of April 2008.

Brian McCordick, Translator

Citation: 2008TCC122
Date: 20080304
Docket: 2007-3293(EI)

BETWEEN:

ROBIN LESSARD,

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a determination relating to the insurability of the work done by the Appellant during the period from May 29 to November 4, 2006, for the company 9163-5102 Québec Inc.

[2] In making his determination, the Respondent relied on the following assumptions of fact:

> [TRANSLATION]
> 5. ...
>
> (a) Lili Maltais was the sole shareholder of the payor; **(admitted)**
>
> (b) the Appellant is the spouse of Lili Maltais; **(admitted)**
>
> (c) the Appellant is related to a person who controls the payor. **(admitted)**

6. ...

(a) the payor, which was incorporated on December 7, 2005, operates a restaurant under the business name Restaurant Desbiens-Venue; **(admitted)**

(b) the restaurant is a snack bar with 35 seats and has a glassed-in area that seats 20 more in summer; **(admitted)**

(c) the restaurant was generally open from 8:00 a.m. to 10:00 p.m., seven days a week; **(admitted)**

(d) before the payor was incorporated, the Appellant operated the same restaurant under the business name Restaurant Desbiens-Venue; **(admitted)**

(e) the Appellant operated the restaurant for about 10 years as sole proprietor; **(admitted)**

(f) the payor employed only the Appellant and Lili Maltais, but it also employed an assistant cook from July 23 to September 21, 2006; **(admitted)**

(g) Ms. Maltais claims that she operated the payor only from the end of May to the end of October, while previously the Appellant operated the restaurant year-round; **(admitted)**

(h) the building housing the payor's restaurant is owned by the Appellant, who allegedly rented it to the payor for $600 a month; **(admitted)**

(i) the Appellant's main job consisted in serving customers at the tables; he occasionally helped in the kitchen and helped clean the restaurant; **(admitted)**

(j) although the Appellant told the rulings officer that his hours varied and that they were not recorded, Ms. Maltais said that the Appellant worked 60 hours a week and that his hours were recorded on a time sheet; **(admitted)**

(k) the Appellant received fixed remuneration of $750 per week: $540 in regular wages and $210 in tips; **(admitted)**

(l) the Appellant was paid by cheque every week; **(admitted)**

(m) before the payor was incorporated, the roles of Ms. Maltais and the Appellant were reversed, and Ms. Maltais received earnings of only $300 per week for 45 hours of work, for doing the same job as the Appellant; **(admitted)**

(n) while the assistant cook was employed, she worked 50 hours a week and earned $7.75 an hour; **(admitted)**

...

(p) although the payor claimed not to have started operations until May 29, 2006, the income reported by the payor for GST shows that the restaurant was operated, without interruption, from the time the payor was incorporated, in December 2005; **(admitted)**

(q) the Appellant said that his hours of work varied, depending on when it was busy, while his time sheets show that he always worked 60 hours a week, throughout the period in issue; **(admitted)**

(r) the Appellant said he received $600 a month from the payor, in cash, as rent for the building, while Ms. Maltais said that the payor did not pay the Appellant rent because the business was not profitable enough; **(admitted)**

(s) in spite of that contradiction, the payor sent the Respondent rent receipts showing that since January 2006 the payor had paid the Appellant $600 a month in cash; **(admitted)**

(t) in addition, as at June 30, 2006, the payor identified the rent paid as $1,000 a month, recorded by the payor as "owed to shareholder", when Ms. Maltais is officially the payor's sole shareholder; **(denied)**

(u) Ms. Maltais claimed she had invested $15,000 cash in the business when it was incorporated, while the payor's external accountant said that it was the Appellant who invested almost all of that money in the company. **(admitted)**

(v) the accountant said that the payor paid Ms. Maltais a $5,000 dividend in 2006, although Ms. Maltais did not report any dividend in 2006 and the Appellant reported a taxable dividend of $6,290 ($5,000 times 1.25), although allegedly he was not a shareholder in the payor; **(denied)**

(w) the Appellant is the only worker who received tips and the payor allegedly always paid him the same amount in tips every week, regardless of the volume of sales, which were much higher during the two summer months; **(admitted)**

(x) all of the facts and documents obtained tend to show that the Appellant has always been very involved in the operation of the payor’s business and his conditions of employment could not be the same as those of a person unrelated to the payor. **(denied)**

[3] After being sworn, the Appellant admitted to almost all of the assumptions of fact: paragraphs 5(a) through (c) and 6(a) through (n), (p) through (s), (u) and (w). The Appellant denied paragraphs (t), (v) and (x).

[4] The Appellant first described the history of the small business. He said that had it not been for his spouse, he would have stopped operating the restaurant. However, his spouse proposed to continue operating the business, but on certain conditions, to which he agreed.

[5] He said that things were extremely difficult, financially, outside the summer months, except when new businesses opened or major construction sites were in operation.

[6] He said that his spouse and he employed as few people as possible, other than a cook during the period in question, preferring to work up to 90 hours a week to make up for the dead season.

[7] The Appellant stated very candidly in his testimony that the employment insurance benefits were absolutely essential if the business was to continue operating, and this is probably an accurate reflection of the reality.

[8] The Appellant's spouse, Lili Maltais, also testified. She confirmed her spouse's testimony, and added that they had to put all their efforts into the business during the summer, since there were almost no customers in the spring, fall and winter months.

[9] She also said that over a dozen restaurants in the area had closed because they had hired too many people; in Ms. Maltais' opinion, a restaurant like theirs cannot afford the cost of employing people at the usual pay rates.

[10] Lili Maltais and the Appellant testified frankly; the evidence presented to the Court is consistent with the facts collected in the investigation. The only difference between the Appellant's position and the Respondent's is their interpretation of those facts.

[11] The Court certainly feels sympathy for the Appellant, and the future of the business certainly may depend on the decision the Court must make.

[12] Unfortunately, I cannot allow myself to be influenced or give free rein to my sympathy. Essentially, I must rely on the parameters laid down by Parliament.

[13] Paragraph 5(2)(*i*) of the Act provides that any employment where the parties have entered into a contract of employment and are not dealing with each other at arm's length is excluded from insurable employment.

[14] However, Parliament has provided an exception: the parties are deemed to deal with each other at arm's length if the analysis shows that the work was done on terms and conditions, for remuneration and for a duration that is comparable to what they would have been if the parties had been dealing with each other at arm's length. The provision in which the parameters are set out reads as follows:

> (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.

[15] In this case, I could have found that the determination was correct immediately after completing the exercise with the Appellant regarding his admission to the Respondent's factual assumptions.

[16] Indeed, the Appellant admitted to many of the assumptions; he provided certain details and nuances, but clearly admitted that there was very little probability that he could have found a third party who would have agreed to do the same work on the same conditions and for the same remuneration.

[17] The Appellant also admitted that the restaurant did not close down completely outside the summer months, and that he sometimes helped his spouse, particularly when there were reservations.

[18] It is entirely to be expected that people will help out in a small family business. Family members are more flexible, more generous and more prepared to

lend a hand than employees of a business who have no family connection with the owner or are dealing with the owner at arm's length.

[19] However, that willingness to help out, generosity and flexibility must not lead the Court to find that it is obvious that a third party would never have agreed to the same conditions. Some inconsequential services may be provided on a voluntary basis, but when the voluntary assistance is significant, the Court is entitled to find that a third party would not have agreed to the situation, and in particular to the many hours of unpaid work, the many hours of overtime worked, and so on.

[20] In this case, the Appellant and his spouse put all of their efforts into their small business so that they could earn a living from their restaurant.

[21] In conclusion, there is nothing to criticize in the quality or the analysis of the facts collected in the investigation. Those facts are in all respects consistent with the essential elements of the evidence submitted by the Appellant and his spouse, Lili Maltais. There is therefore no need for the Court to make any findings of fact.

[22] In the circumstances, the appeal must be dismissed.

Signed at Ottawa, Canada, this 4th day of March 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 16th day of April 2008.

Brian McCordick, Translator

CITATION:	2008TCC122
COURT FILE NO.:	2007-3293(EI)
STYLE OF CAUSE:	ROBIN LESSARD AND M.N.R.
PLACE OF HEARING:	Chicoutimi, Quebec
DATE OF HEARING:	February 14, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Alain Tardif
DATE OF JUDGMENT:	March 4, 2008

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Christina Ham

COUNSEL OF RECORD:

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