

TAX COURT OF CANADA

Citation: 2008 TCC 622

2007-3364(EI)

BETWEEN:

CHON LE,

Appellant;

- and -

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Held before Mr. Justice Paris in Courtroom No. 305, 35 Front  
Street, Nanaimo, B.C., on Wednesday, August 13, 2008.

APPEARANCES:

Mr. C. Le,

Appearing on his own behalf;

Mr. M. Canzer,

For the Respondent.

THE REGISTRAR: F. Richard

Allwest Reporting Ltd.  
#302-814 Richards Street  
Vancouver, B.C.  
V6B 3A7

Per: K. Bemister

1 **REASONS FOR JUDGMENT**

2 (Delivered Orally in Nanaimo, B.C. on August 13th, 2008)

3 JUSTICE: These are the reasons for  
4 judgment in Chon Le versus The Queen, 2007-3364(EI).

5 The issue in this appeal is whether the  
6 appellant was in insurable employment with Max Oysters  
7 Ltd. between May 9<sup>th</sup> and August 15<sup>th</sup>, 2003, July 8<sup>th</sup> and  
8 September 4<sup>th</sup>, 2004, and July 7<sup>th</sup> and September 5<sup>th</sup>, 2005.

9 During the periods in issue the appellant  
10 had a clam-farming licence issued by the Department of  
11 Fisheries. He seeded clams each year and harvested clams  
12 that had reached the age of three to four years. He  
13 apparently had this licence for many years.

14 He also took clams and oysters from outside  
15 the area covered by his clam-farming licence under a  
16 different licence issued by Fisheries. This was referred  
17 to as an "open catch". The areas for collecting the clams  
18 and oysters were opened to licence holders only about six  
19 or seven days per year. The appellant sold all of the  
20 oysters and clams he collected under both licences to Max  
21 Oysters. At the end of each season he was issued a Record  
22 of Employment by Max Oysters that showed he was a self-  
23 employed fisher.

24 The appellant claimed and was paid  
25 Employment Insurance benefits each winter following the

1 periods in issue. The Minister of National Revenue later  
2 determined that he was not entitled to the benefits and  
3 that he would be required to repay them, because the  
4 Minister found that he was not a "fisher" as defined in  
5 Section 1 of the *Employment Insurance Fishing Regulations*.

6 The assumptions made by the Minister in  
7 making the determination are set out in paragraph 6 of the  
8 Reply and shall form part of these reasons, these  
9 assumptions read as follow:

- 10
- 11 a) the Appellant was involved in clam farming and  
12 harvesting;
  - 13 b) the Appellant was not a "Fisher" as defined in  
14 the *Employment Insurance (Fishing) Regulations*;
  - 15 c) the Appellant was in possession of his own clam  
16 farming license;
  - 17 d) the Appellant was required to submit a  
18 management plan to the Province of British  
19 Columbia each year indicating how much he would  
20 seed and harvest during the year;
  - 21 e) the Appellant sold his harvested clams to the  
22 Payor;
  - 23 f) the Appellant was responsible for finding his  
24 own clients;
  - 25 g) the Appellant was responsible for most tools

- 1 and equipment necessary for the harvesting of  
2 his product;
- 3 h) the Appellant was responsible for all expenses  
4 associated with running his operation;
- 5 i) the Appellant was not required to report to the  
6 Payor;
- 7 j) the Appellant did not take direction from the  
8 Payor;
- 9 k) the Appellant was not required to sell his  
10 harvest to the Payor;
- 11 l) the Appellant was remunerated for each load  
12 delivered to the Payor;
- 13 m) the Appellant was free to hire his own helpers;
- 14 n) the Appellant had the opportunity for profits  
15 from his decisions with respect to operations  
16 and could incur substantial loss due to a poor  
17 harvest season;
- 18 o) the Appellant claimed business expenses on his  
19 tax returns for the Periods;
- 20 p) the Appellant and the Payor considered their  
21 relationship to be one of independent  
22 contractor, i.e., a contract for services; and
- 23 q) the Appellant was in business for himself.

24 The appellant was self-represented at the  
25 hearing. He felt it was unfair for the Minister to

1 require him to repay the benefits he had received because  
2 he was given the Records of Employment by Max and relied  
3 on those forms. He said he received assistance in filling  
4 out the application for benefits in the Employment  
5 Insurance office and felt that he should have been told in  
6 the first year that he was not eligible. The repayment of  
7 the benefits will cause him substantial hardship. He did  
8 not make any submissions on any substantive issue.

9           The respondent took the position that the  
10 appellant was not in insurable employment under Section  
11 5(1) of the *Employment Insurance Act* because he was not  
12 employed by Max Oysters under a contract of service.  
13 There was no evidence led to show that such a contract  
14 existed between the appellants and Max, and I agree with  
15 the respondent that the appellant operated as an  
16 independent contractor. The respondent also said that the  
17 appellant did not fall within Section 2 of the *Employment*  
18 *Insurance Fishing Regulations*, which includes self-  
19 employed fishers as insured persons under the *Employment*  
20 *Insurance Act*.

21           The respondent said that the appellant did  
22 not meet the definition of "fisher" set out in Section 1  
23 of the *Regulations*, the relevant parts of which read:

24           "Fisher means a self-employed person engaged in  
25 fishing and includes a person engaged other



1 product of the sea, or of any other body of  
2 water, caught or taken by a crew and includes  
3 fresh fish, cured fish, Irish moss, kelp and  
4 whales, but does not include fish scales or  
5 seals, and

6 (a) where only a portion of a catch is  
7 delivered to a buyer, means the portion  
8 delivered; and

9 (b) where more than one catch or portion of a  
10 catch is delivered to a buyer at one time,  
11 means the catches or portions that are  
12 delivered.

13 I agree with the respondent that the clams  
14 taken from the appellant's lease area would not be a catch  
15 because the clams had been seeded by the appellant and  
16 therefore would not be an actual product of the sea.

17 The word "natural" connotes something that  
18 exists or occurs without human intervention and the  
19 definition found in the *Concise Oxford Dictionary* includes  
20 the following:

21 "Existing in or by nature; not artificial;  
22 innate; inherent; self-sown; uncultivated."

23 The French version of the definition of  
24 "catch" uses the phrase "*produit naturel*" which is  
25 identical to the English version. There is no apparent

1 ambiguity in the relevant wording and the ordinary  
2 definition would exclude the clams farmed by the  
3 appellant.

4           There does not appear to be any reason not  
5 to give the term "fishing" in the definition of "fisher"  
6 which I referred to earlier its ordinary meaning of taking  
7 fish from the water.

8           The *Oxford Concise English Dictionary*, 10<sup>th</sup>  
9 Edition, defines the verb "to fish" as follows:

10           "to catch fish with a net or hook and line."

11 I can see no ambiguity in the wording of the definition of  
12 the term fisher in the *Regulations* and that definition  
13 would not cover the activities of the appellant in  
14 harvesting farmed clams.

15           To his credit, respondent's counsel brought  
16 to my attention a decision of Deputy Judge Leger of this  
17 Court in *Blanchard v. MNR*, [1993] T.C.J. No. 187, in which  
18 the court concluded that harvesting cultivated oysters  
19 constituted making a catch. Unfortunately the court  
20 reached that conclusion without setting out its analysis  
21 of the definition of "catch" and so its persuasive value  
22 is extremely limited.

23           The respondent has conceded that the open  
24 harvesting of clams and oysters by the appellant would be  
25 within the definition of "catch", and I agree. Those clams



1 and oysters would be a natural product of the sea. There  
2 is some evidence from the appellant that the amount of  
3 those harvests was about \$400 to \$500 a day for five to  
4 six days a year. I am satisfied that he would have earned  
5 \$2,500 each year from that activity.

6 I would therefore allow the appeal in part  
7 on the basis that the appellant earned \$2,500 a year from  
8 insurable employment with Max Oysters in each of the  
9 periods under appeal.

10 I am aware that the appellant faces great  
11 difficulties with respect to the collection of the  
12 overpayment of benefits. Unfortunately I do not have the  
13 power to vary the amounts of the repayments. However, I  
14 would urge the Minister to consider granting the appellant  
15 whatever relief is possible in the circumstances.

16 Thank you.

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