

Docket: 2008-691(EI)

BETWEEN:

LES INDUSTRIES ET ÉQUIPEMENTS LALIBERTÉ LTÉE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 21, 2008, at Québec, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Mélanie Bélec

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* ("the Act") is dismissed on the ground that the employment of the workers Jean-Charles, Lionel, Raynald and Marcienne Laliberté with the Appellant from January 12, 2006, to June 13, 2007, was insurable employment under the Act, for the reasons set out below.

Signed at Ottawa, Canada, this 18th day of December 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 17th day of February 2009.

Brian McCordick, Translator

Citation: 2008 TCC 611
Date: 20081218
Docket: 2008-691(EI)

BETWEEN:

LES INDUSTRIES ET ÉQUIPEMENTS LALIBERTÉ LTÉE,
Appellant,
and
THE MINISTER OF NATIONAL REVENUE,
Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a determination by the Respondent that the work done by Jean-Charles, Lionel, Raynald and Marcienne Laliberté for the Appellant, Les Industries et équipements Laliberté Ltée, from January 12, 2006, to June 13, 2007, was insurable employment.

[2] The legal basis for the determination is paragraph 5(2)(i) of the *Employment Insurance Act* ("the Act"), which provides that work performed by a person related to the employer within the meaning of the *Income Tax Act* is excluded from insurable employment. However, Parliament has provided for an exception under which such work is insurable if it was performed in a manner similar and under terms and conditions comparable to those that would have existed if the parties had been dealing with each other at arm's length. The exception reads as follows:

5(3)(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.

[3] Thus, if there is a non-arm's length relationship, the person responsible for analyzing the file must conduct an analysis that is much broader than merely checking for the presence of the classic conditions, which are remuneration, the performance of work and a relationship of subordination. The person must determine whether the non-arm's length relationship affected the performance of the work.

[4] Another particular aspect of the matter is that the case law has established that the Tax Court of Canada does not have jurisdiction to set aside a decision where the discretionary authority has been exercised correctly and lawfully.

[5] In other words, if the discretionary authority was exercised in a responsible and sound manner and all the relevant facts were taken into account and the conclusion is a reasonable outcome, the Tax Court of Canada cannot amend the decision, even if the Court does not agree with the conclusion drawn.

[6] To explain his determination, the Respondent relied on a number of assumptions of fact, many of which were admitted to by the Appellant. Among the facts admitted to are the following:

[TRANSLATION]

5. (a) The Appellant was incorporated on December 31, 1981.
- (b) The Appellant operates a manufacturing business; it manufactures and distributes agricultural equipment, especially for pig farming.
- (c) The Appellant is also developing a line of products for the dairy sector and operates another, entirely different, division that cuts metal for Prévost Car.
- (d) The Appellant has sales of between \$19 and \$20 million and between 110 and 120 employees.
- (e) Each of the workers holds, through his or her own company, 25% of the Appellant's voting shares.

(f) According to the CIDREQ business registry, Jean-Charles was president, Marcienne and Raynald were vice-presidents and Lionel was secretary-treasurer of the Appellant.

(h) The workers/shareholders, and the director of finance, all have authority to sign cheques in the Appellant's name; two signatures are required.

(i) All major decisions concerning the operation of the Appellant's business were made by the four shareholders.

(j) Since 2000, the workers claim that they have left their positions as directors and consider themselves managers (executives) of the Appellant's business.

(k) Since 2000, the Appellant has hired three directors – two division directors and a director of finance – reporting to the workers.

(l) According to the workers, their jobs consist mainly in attending management meetings every Tuesday and Thursday as well as meetings of the board of directors and of several committees.

(m) About four years ago (in 2004), at the request of the four workers/shareholders, the Appellant hired a consultant to advise the workers in their approach to managing the business and help them to resolve differences of opinion.

(p) According to the workers, none of them had to follow a specific work schedule; they attended meetings of shareholders and management twice a week, on Tuesdays and Thursdays, and generally went to the office on the other two days [TRANSLATION] "with no particular assignment".

(q) The meetings on Tuesdays and Thursdays usually lasted from 10:00 a.m. to 4:00 p.m.

(r) The Appellant did not keep track of the workers' hours.

(t) In subsequent telephone conversations with an authorized officer of the Respondent, the workers said that they worked the following hours per week:

- Jean-Charles Laliberté: roughly 25 hours;
- Lionel Laliberté: 20 to 25 hours;
- Marcienne Laliberté: 25 to 30 hours;
- Raynald Laliberté: 25 to 30 hours.

(u) The workers received gross remuneration of \$60,199 per year (\$1,157.67 per week).

- (v) The workers were paid by direct deposit each week.
6. (a) During the period in issue, the voting shares of the Appellant were held by the following:
- 2966-5742 Québec Inc. with 25% of the shares;
 - J.R.L.M. Laliberté Inc. with 25% of the shares;
 - Gestion R. Laliberté Inc. with 25% of the shares;
 - 9155-2547 Québec Inc. with 25% of the shares.
- (b) Lionel Laliberté was the sole shareholder of 2966-5742 Québec Inc.
- (c) Jean-Charles Laliberté was the sole shareholder of J.R.L.M. Laliberté Inc.
- (d) Raynald Laliberté was the sole shareholder of Gestion R. Laliberté Inc.
- (e) Marcienne Laliberté was the sole shareholder of 9155-2547 Québec Inc.
- (f) Lionel, Jean-Charles, Lionel and Marcienne Laliberté are brothers and sister.
- (g) The workers were part of a group that controlled the Appellant.
7. (a) The workers received fixed annual remuneration of \$60,199, spread over 52 weeks, for, according to the first version given, 30 to 40 hours of work per week, and, according to the second version, 25 to 30 hours per week.
- (b) The workers/shareholders determined their annual remuneration themselves.

[7] On the other hand, the Appellant denied the facts alleged in subparagraphs 5(g), (n), (o), (s), (w) and (x), and in subparagraphs 7(c), (d) (e), (f), (g) and (h), which read as follows:

[TRANSLATION]

5. (g) Before 2000, the workers held the following positions with the Appellant:
- Jean-Charles was responsible for sales and marketing;
 - Lionel was responsible for production and information technology;
 - Marcienne handled purchasing;

- Raynald was responsible for the truck fleet, transportation and buildings;

(n) During the period in issue, the workers generally worked Monday to Thursday and took Friday off.

(o) The workers rendered their services at the Appellant's place of business and used all the materials and equipment placed at their disposal by the Appellant.

(s) During their initial telephone conversations with an authorized officer of the Respondent, the workers said that they worked the following number of hours per week:

- Jean-Charles Laliberté: 25 to 30 hours over three or four days;
- Lionel Laliberté: 30 to 40 hours over three or four days;
- Marcienne Laliberté: 30 to 40 hours over three or four days;
- Raynald Laliberté: 30 to 40 hours over three or four days.

(w) If their work required them to travel, the workers were reimbursed for their travel expenses.

(x) The workers were entitled to five or six weeks of annual vacation (compared with four for most other employees) and received life and drug insurance coverage, as did the Appellant's other employees.

7. (c) The workers did not count their hours of work but were subject to the Appellant's authority as exercised by its board of directors, of which they were members.

(d) The workers received reasonable remuneration having regard to the duties they were assigned by the Appellant.

(e) All of the workers remained responsible for their respective areas of activity and rendered services to the Appellant as salaried employees in addition to their status as executives and shareholders; also, they had to train those who would succeed them.

(f) The work of each of the workers was essential to the smooth operation of the Appellant's business.

(g) If the workers had special terms and conditions of employment, it was due not to their non-arm's length relationship with the Appellant but to their status as shareholders of the Appellant.

(h) The workers have been employed by the Appellant for over 20 years, they perform their duties year-round and their work meets the Appellant's operational needs.

[8] Only Lionel Laliberté testified in support of the appeal. He went over the history of the Appellant business. He explained that at the very beginning, his father had initially been a salesperson in the poultry farming sector. At the time, he also sold cages to customers who bought his poultry. At one point, he was offered the cage manufacturing business. This happened in the 1950s. After acquiring the business, he moved the facilities to the location where the Appellant has operated ever since.

[9] At a certain point, the way of doing this type of production was turned upside down, and the business shifted its focus to equipment needed for pig farming. The entire Laliberté family was then involved in the business, that is, ten brothers and sisters along with the father.

[10] At that time, all ten children and their father were partners in the business.

[11] After the major shift to manufacturing pig farming equipment, the business added a John Deere dealership in 1978.

[12] In 1981, the farm was sold and the father and one of the sisters retired, leaving six of the children – four brothers and two sisters – to run the business, until the eldest died. At that time, the shares of the deceased and of one of the two sisters were acquired by the four family members concerned by the instant appeal.

[13] At the end of the 1990s, pig farming suffered setbacks as a result of stricter regulation and a moratorium that initially targeted over 150 municipalities and was then broadened to cover all of Quebec.

[14] With its growth and development in jeopardy, the business started an industrial division. It acquired digitally-controlled laser cutters and a punching machine – highly sophisticated and technologically advanced equipment. The three brothers and their sister saw the business grow rapidly, to the point where they found themselves in a rather awkward organizational situation.

[15] They called in a management support team. The business took advantage of a program identified as "CAMO", which Mr. Laliberté described as a personalized program and plan to improve the efficiency and profitability of the business. A

specific consultant then joined the business in order to make the changes necessary to turn it into a well-structured, highly efficient company, with, especially, a very modern approach to management.

[16] A true human resources department was set up and the consultant remained involved in managing the business.

[17] A number of changes were implemented, to the point where the workers concerned by the instant appeal saw their situation altered completely, in that they no longer worked in manufacturing.

[18] The period in issue is from January 12, 2006, to June 13, 2007. During that period, the Laliberté brothers and their sister defined themselves as managers with a considerably reduced workload of approximately 30 hours per week.

[19] Lionel Laliberté explained that their duties were now, and had been for several years including the period in issue, related more to management than to manufacturing at the plant, as had been the case at the beginning.

[20] Skilled people had taken over and were in charge of production, their job being to manage the development and overall smooth operation of the business with modern and highly efficient tools and methods.

[21] Mr. Laliberté said that in 2004 he retained the consulting firm Saucier to evaluate the appropriate salary for the positions held by the brothers Lionel, Raynald and Jean-Charles and their sister Marcienne.

[22] The consultants concluded at the time that the salaries should be between \$60,000 and \$125,000. Lionel deserved the highest salary because of his responsibilities. This period is neither relevant nor helpful because it precedes the period in issue and because the work is no longer the same, and work is a fundamental element in a case concerning insurability.

[23] Without going into details, Mr. Laliberté said that the shareholders whose work is in issue had more generous insurance coverage than the other employees. In addition, the shareholders had signed a purchase and sale agreement covering all possible situations in the event of the death, disagreement or departure of one of them. He said that his brothers and their sister had no children able to take over or interested in doing so.

[24] He also explained that the business had made use of a very effective support and follow-up program. Under that program, a Mr. Bherer acted as consultant and mentor. He first set up a true human resources structure. Then, he continued to act at all management levels. Recently, he recommended abandoning the formula of paying salaries to the shareholders concerned by the instant appeal and replacing it with a system of director's fees.

[25] Mr. Laliberté was very clear about the major changes that occurred regarding their performance of work for the Appellant business. He explained in several ways that since the beginning of the period in issue, the business has been structured to be autonomous, so that the shareholders have become managers who oversee, control and plan activities according to the various reports prepared by the people put in place.

[26] Mr. Laliberté said that their work was management work. He stressed the nature of a manager's work, clearly believing that such responsibility could not constitute work subject to the Act.

[27] For a start, the significant differences among the salaries established by the consultant are not relevant because, first of all, this was a situation that preceded the period in issue, and, second, the people concerned no longer did the same work. And work is unquestionably the key element in a case concerning insurability.

[28] The cross-examination of the Appeals Officer, Hélène Venne, dealt mainly with the facts stated in the report that she prepared. I will reproduce the facts in question:

[TRANSLATION]

10. The four shareholders withdrew from operations in 2000 and now hold management positions.

28. The worker tells us that if he had to be absent for a long period, that would not disrupt operations.

57. Ninety percent of their work is attending meetings.

59. He himself decides what to do on Mondays and Wednesdays. If he feels like delivering goods, he does so.

60. However, he is not obliged to do so, since there are drivers to do that work.

[29] The evidence adduced by the Appellant is itself a clear indication of the considerable effect of the non-arm's length relationship at the outset, when it was a small family-run business, even something of a cottage industry, that later became, and was during the period in issue, a large and prosperous enterprise, very well structured and in competent hands.

[30] Everything was done to make the business entirely independent of family influence.

[31] During the period in issue, the Appellant became an autonomous business, to the point where Lionel Laliberté stated clearly that the business now operates very well without their presence or during their prolonged absence. The decisions made regarding the salary and the number of hours devoted to the business are essentially business decisions and the non-arm's length relationship in no way influenced how things are done.

[32] This approach is in fact entirely consistent with a situation where an arm's length relationship would exist. Lionel Laliberté said that the business offered them life insurance, disability insurance, and so on. There again, the evidence adduced in that regard did not show that the situation would have been different if the workers had been dealing with the business at arm's length.

[33] Ms. Venne said, in fact, that she learned nothing new from the testimony of Lionel Laliberté.

[34] The report does indeed set out the principal relevant elements. According to the testimony of Lionel Laliberté himself, the facts denied proved to be accurate with the exception of the allegations that were based on interpretation, for example, with regard to whether the remuneration was reasonable or whether there was or was not a power of control.

[35] The evidence therefore does not discredit the analysis performed, and in both quality and quantity, the facts gathered were those that were relevant and helpful in drawing a conclusion.

[36] That conclusion, which corresponds to the determination under appeal, is also reasonable. It is certainly not an unreasonable outcome. Consequently, the Court does not have to intervene. The appeal is therefore dismissed.

[37] If the analysis was sound and above reproach, the conclusion reached cannot be revised by the Tax Court of Canada. In the case at bar, the evidence has not shown, on a balance of probabilities, that there were any serious lapses or significant oversights in the discretionary exercise that was performed. The conclusion drawn is validated by the evidence, and even if the evidence had shown that there were serious lapses, which is not the case, I would still have come to the same conclusion regarding insurability.

[38] Indeed, the evidence showed, on a balance of probabilities, that during the period in issue the Appellant structured its activities so that the family dimension or the fact that the shareholders were related under the provisions of the Act would have no effect on the employment contracts in issue.

[39] Over the years, the business structured and organized itself in such a way as to obscure entirely the influence or consequences of the family dimension.

[40] The terms and conditions of employment, workload and remuneration were totally consistent with those in a situation where the shareholders are at arm's length.

[41] Lionel Laliberté clearly stated, in fact, that the Appellant business had become autonomous in its operations, to the point where consideration was being given to replacing the remuneration paid as salary with a system of director's fees given for attendance at meetings, which could obviously affect the nature of the employment contract having regard to the circumstances and context.

[42] During the periods in issue, the members of the Laliberté family performed work as managers, each with a different but very useful area of expertise, to which they devoted a similar number of hours and for which they received identical remuneration. All of the elements for the existence of a contract of service were present, and those contracts were not influenced or shaped by the non-arm's length relationship.

[43] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 18th day of December 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 17th day of February 2009.

Brian McCordick, Translator

CITATION: 2008 TCC 611

COURT FILE NO.: 2008-691(EI)

STYLE OF CAUSE: LES INDUSTRIES ET ÉQUIPEMENTS
LALIBERTÉ LTÉE AND M.N.R.

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: October 21, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: December 18, 2008

APPEARANCES:

Counsel for the Appellant:	Jérôme Carrier
Counsel for the Respondent:	Mélanie Bélec

COUNSEL OF RECORD:

For the Appellant:

Name:	Jérôme Carrier
Firm:	Lévis, Quebec

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada