Docket: 2009-3401(EI)

BETWEEN:

FABIEN MÉNARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 15, 2010, at Québec, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the appellant:	Gilles Savard
Counsel for the respondent:	Marjolaine Breton

JUDGMENT

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

Signed at Ottawa, Canada, this 19th day of April 2010.

"Paul Bédard"

Bédard J.

Translation certified true
on this 20th day of June 2010

François Brunet, Revisor

Citation: 2010 TCC 207
Date: 20100419
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REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal from a determination according to which the respondent decided that the work performed by Fabien Ménard (the worker) from January 1, 2007, to December 31, 2007, and January 1, 2008, to February 24, 2009, for Transport GMS Ménard Inc. (the payer) met the requirements of a contract for services, despite the absence of an arm's length relationship between the parties.

[2] The respondent's determination was based on the following facts set out in paragraphs 5, 6 and 7 of the Reply to the Notice of Appeal:

> [TRANSLATION]
> a. The payer was incorporated on December 12, 1985. (**admitted**)
>
> b. The payer operated a wood-transporting business in Quebec and Ontario using flatbed trucks, that is, trucks with trailers without sides. (**denied**)
>
> c. The payer owned seven ten-wheel trucks. (**denied**)
>
> d. During the period at issue, the payer employed up to 35 people. (**admitted**)
>
> e. The appellant was the payer's manager. (**denied**)

f. The appellant's tasks included obtaining contracts, hiring employees, distributing trucks, seeing to their mechanical maintenance and helping the truckers. (**denied as worded**)

g. The appellant worked around 40 hours per week for the payer. (**denied**)

h. The payer's truckers worked over 40 hours per week. (**denied as worded**)

i. The appellant also worked about 25 hours per week for the company Transport Lauri Inc. (**denied**)

j. Transport Lauri Inc. was a subsidiary of the payer whose share capital was held entirely by the payer. (**admitted**)

k. The business offices of the payer and Transport Lauri Inc. were at the same place. (**admitted**)

l. The appellant worked at the payer's office, in the yard, at the garage or on the road as needed. (**denied as worded**)

m. The appellant was paid $790 per week by the payer and $450 per week by Transport Lauri Inc. (**admitted**)

n. The appellant was paid weekly. (**admitted**)

o. The appellant had one or two meetings per year with the other shareholders in addition to telephone ones as needed. (**denied**)

p. The shareholders received copies of monthly financial statements in order to follow the payer's development. (**denied**)

q. The payer's important decisions were made by all the shareholders. (**denied**)

r. There was no shareholder agreement. (**admitted**)

s. The shareholders' voting rights were not impeded. (**denied**)

6. The appellant and the payer were not dealing with each other at arm's length within the meaning of the *Income Tax Act*, because

(a) The following shareholders held voting shares in the payer: (**admitted**)

the appellant	25%
Guillaume Ménard	25%
Simon Ménard	25%
Normand Ménard	25%

(b) The appellant is the brother of Guillaume, Simon and Normand Ménard. (**admitted**)

(c) The appellant is related to a related group that controls the payer. (**admitted**)

7. The Minister also determined that the appellant was deemed to be dealing with the payer at arm's length in the context of his employment because he was satisfied that it was 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, taking into account the following circumstances:

(a) The appellant worked as the manager of the payer and had to ensure that everything was working well. (**denied as worded**)

(b) The appellant's tasks were essential to the payer's activities. (**admitted**)

(c) It is reasonable to believe that an arm’s-length shareholder would have performed similar work. (**denied**)

(d) Since 1997, the appellant worked full time year round. (**admitted**)

(e) The appellant was paid for his tasks. (**admitted**)

(f) It is reasonable to believe that an arm's-length person would work year round. (**denied**)

(g) The appellant did not have a set schedule. (**admitted**)

(h) An unrestrictive schedule is often used for management positions. (**denied as worded**)

(i) An arm's-length person could have had the appellant's work hours. (**denied**)

(j) The shareholders determined the appellant's salary. (**denied**)

(k) The appellant's salary of $790 per week was indexed and increased on the same schedule as employee salaries. (**denied**)

(l) The appellant's salary was reasonable given his management tasks. **(denied)**

[3] It must be noted again that the respondent determined that the employment was insurable because it was not subject to paragraph 5(2)(*i*) of the *Employment Insurance Act* (the Act). In fact, the worker and the payer were found, under paragraph 5(3)(*b*) of the Act, to have an arm's-length relationship in the context of this employment, since the respondent found it was reasonable to conclude that the worker and the payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[4] The worker testified. I note that Sylvain Mercier, the payer's internal accountant, and Wilbrod Poulin, the payer's external auditor, testified in support of the worker's position, while only Réginald Côté, the insurance officer who determined that the worker's employment was insurable within the meaning of the Act for the relevant periods, testified in support of the respondent's position.

[5] The Federal Court of Appeal has repeatedly defined the role conferred on Tax Court of Canada judges by the Act. That role does not allow a judge to simply substitute his or her discretionary decision for that of the Minister of National Revenue (the Minister). Rather, it requires that the Court "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." (see *Légaré v. Canada (Minister of National Revenue – M.N.R.*), [1999] F.C.J. No. 878 (QL), at paragraph 4).

Testimony of Sylvain Mercier

[6] Mr. Mercier, who has been employed by the payer since 1999, basically explained the following in his testimony:

(i) The worker was the only manager for the payer and its subsidiary.

(ii) He practically never met with the other shareholders of the payer in the context of his job and therefore never discussed the payer's business with them.

(iii) He received instructions only from the worker.

(iv) He gave the monthly financial statements for the payer and its subsidiary only to the worker.

Testimony of Wilbrod Poulin

[7] Mr. Poulin's testimony basically states that

(i) Since 1975, he has been the external auditor and senior consultant for all businesses belonging to the worker and his brothers.

(ii) The worker and his brothers Guillaume and Simon held equal parts of the shares of Les Entreprises Forestières St-Magloire Inc. (Enterprises FM).

(iii) Simon Ménard (the worker's brother) was employed as a mechanic by Entreprises FM.

(iv) Guillaume Ménard (the worker's brother) was employed by Entreprises FM as president and chief executive officer.

(v) Normand Ménard (the worker's brother) was also employed by Entreprises FM, but only as a truck driver.

(vi) The worker could do as he pleased within the payer's business and subsidiary and make any decisions he deemed appropriate. For example, Mr. Poulin explained that the payer acquired its subsidiary in 2004 for $500,000, on the worker's initiative, who, to his knowledge, did not even consult with his brothers before buying it. In addition, Mr. Poulin explained that he and the worker had negotiated and obtained for the payer a bank loan of $450,000 to enable it to purchase the subsidiary without obtaining the consent of the payer's Board of Directors.

(vii) To his knowledge, the payer's shareholders and directors met very rarely.

(viii) He gave the payer's financial statements to Guillaume, the payer's brother.

Testimony of the worker

[8] The worker testified that

(i) He was the president and chief executive officer of the payer.

(ii) He had no specific work schedule to follow, but usually worked 69 hours per week, namely, from 8 a.m. to 8 p.m. Monday to Friday and from noon to 7 p.m. on Saturday. The worker also explained that he dedicated about 95% of his time to the payer and about 5% of his time to its subsidiary.

(iii) He could do as he pleased within the business of the payer and its subsidiary and take any decisions he considered appropriate. Accordingly, the worker explained that he determined his work schedule (and could change his work hours as he pleased) and that he determined his pay. To illustrate his autonomy within the business, the worker explained that he had even acquired the payer's subsidiary at the price of $500,000 and financed that acquisition with the help of Wilbrod Poulin without obtaining the approval of his co-shareholders and co-directors or even consulting them. At most, the worker admitted that he had informed his brother Guillaume of that acquisition. His brother had apparently asked him the following question: [TRANSLATION] “Did you consult with Wilbrod [Poulin]?”

(iv) The last meeting of the payer’s shareholders or directors took place in 2006.

(v) He had frequent telephone conversations with his brother Guillaume. In regard to that, the worker explained that those conversations were in regard to the exchanges of service between the payer and Entreprises FM (of which he held a third of the share capital), which was managed by his brother Guillaume.

[9] I should immediately note that the worker's testimony in paragraphs (ii) to (v) above simply does not seem credible to me given the initial statements that he made to Mr. Côté on February 24, 2009 (which were repeated by his brother Guillaume on the same day). In fact, Mr. Côté, whose credibility is not to be doubted, testified and indicated in his report (see Exhibit I-2) that the worker had told him the following:

(i) The worker's salary was set by all of the payer’s shareholders;

(ii) All the important decisions concerning the payer's business were made by the payer's shareholders (who I repeat were also the payer's directors).

(iii) The payer's four shareholders, who were also its directors, met once or twice per year.

(iv) They also met informally (by telephone) with their brothers as needed.

(v) The shareholders received monthly financial statements.

I would add that, in any case, it seems implausible to me that a worker, even if he is a shareholder of his business, could determine his own salary or make decisions regarding the payer's business without the consent of the other shareholders or directors of the payer. I am of the view that, in this case, the worker would informally advise the other shareholders and directors of the payer of the important decisions that he intended to make with regard to the payer's business to obtain their agreement. I am of the opinion that the worker interpreted his brothers' silence as tacit agreement with the decisions that he intended to make. I am also of the opinion that the other shareholders and directors, in this case, almost never prevented the worker from making important decisions concerning the payer's business simply because they relied on the worker's good judgment and on his good management, which was at the root of the good financial results generated by the payer.

[10] In addition, the evidence disclosed the following:

i) The cheques drawn on the bank account of the payer and its subsidiary had to be signed by the worker and by Mr. Mercier (director of finance for the payer and its subsidiary) to be issued validly.

i. The payer's shareholders had each granted the payer a $5,000 loan without interest when the payer's business was incorporated. Those loans have not yet been repaid by the payer.

ii. In addition to the $5,000 loan mentioned above, the worker granted other loans without interest to the payer including a loan of $50,000 in 2004 granted to the payer to enable it to buy the subsidiary. The loan has not yet been repaid. In regard to this, I note that the loans granted the payer by the worker totalled $66,418 as of September 30, 2009.

iii. The payer's obligations with respect to the use of credit cards were guaranteed by the worker.

Analysis

[2] The first question I will have to answer is this: was the worker employed by the payer under a contract of service?

[3] When the courts must define concepts from Quebec private law for the purpose of applying federal legislation such as the *Employment Insurance Act*, they must follow the rule of interpretation in section 8.1 of the *Interpretation Act*. To determine the nature of a Quebec employment contract, the relevant provisions of the *Civil Code of Québec* (the Civil Code) must be relied on, at least since June 1, 2001.

[4] In the Civil Code a separate chapter is dedicated to the "contract of employment" (articles 2085 to 2097).

[5] According to the definition of Article 2085, a contract of employment

> . . . is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

[6] In this case, it seems evident that the worker worked for the payer in exchange for remuneration. However, the worker maintains that there was no relationship of subordination between him and the payer. In other words, he maintains that his work was not supervised and that, moreover, he could do as he pleased within the business and make any decisions he deemed appropriate. The evidence showed, of course, that the worker had great autonomy in carrying out his tasks, but that for all important decisions concerning the payer and its subsidiary, he had to consult informally with the three other shareholders of the payer, who were also the payer's directors. Indeed, did the worker not tell Mr. Côté during the first telephone interview on February 24, 2009, that his salary was established by the payer's shareholders? Did the worker not also state during that interview that all the important decisions were made by all the payer's shareholders? Did Guillaume Ménard not also confirm those facts to Mr. Côté during a telephone interview held on the same day, that is, February 24, 2009? The worker, who bore the burden of proof, simply did not satisfy me that there was no relationship of subordination between him and the payer. Accordingly, I find that the worker was employed under a contract of service.

[7] The second question I will have to answer is this: does the Minister's decision still seem reasonable given the appellant's evidence? It should be recalled that the Minister was required to determine whether it was reasonable to conclude that the worker would have entered into a substantially similar contract of employment with the payer if they had been dealing with each other at arm's length. There was no question of determining whether working conditions necessarily reflected market conditions although, generally, this can be a relevant matter worth considering. In my view, in regard to the issue of whether, for the purposes of paragraph 5(3)(*b*), the payer and the worker would have entered into a substantially similar contract of employment, it must be taken into account that the worker was not only a manager of the payer but also one of its owners. There is no indication in paragraph 5(3)(*b*) of the Act that the worker's financial interests in the business must be disregarded. Consequently, it is possible to construct an abstract case involving a worker holding 25% of the share capital in the payer with which he is dealing at arm's length, in addition to being one of the four directors of the payer and its manager. The question that had to be decided by the Minister could then be reworded as follows: if the worker held a quarter of the shares in the payer, was a director and the only manager of the payer, and was dealing with the payer at arm's length, would he have entered into a substantially similar contract?

[8] The Court can take judicial notice that the worker who is both a paid employee of an employer and (as a shareholder) an owner of that employer would act differently from a mere paid employee. In fact, the salary of someone who is a paid employee and shareholder may take into account the fact that salaries not paid will be retained earnings that could be reported as dividends at a future date. Workers who are also shareholders must often keep the company's financial needs in mind, especially if the company is experiencing cash-flow problems. This probably explains why the worker agreed not to receive his salary for one month in 2007.

[9] Does the Minister's decision still seem reasonable? Was it reasonable for the Minister to conclude that the worker who was also a shareholder would have entered into a substantially similar contract of employment if he were dealing with the payer at arm's length? In my opinion, the worker did not succeed in demonstrating that the Minister's decision seemed unreasonable. This is not a case where the Court should intervene to substitute its opinion for that of the Minister. It is true that some of the Minister's assumptions were disproved at the hearing. However, there remained sufficient evidence to justify the Minister's decision. Had the worker not had a financial interest in the payer, he would probably not have been available at all hours of the day to respond to emergencies and he would probably not have agreed to grant

such advantageous loans to the payer. The evidence did not show that the payer constrained the worker to do these things. This, too, is the normal behaviour of a worker who is also a shareholder in his employer, regardless of whether or not he is dealing with it at arm's length. An employee who is a shareholder in the employer, whether or not the relationship is at arm's length, is generally more dedicated to the employer than a mere worker would be, as it is more in that person's interest to be. It bears repeating that there is nothing unusual about this.

[10] Moreover, it is perfectly normal for a senior manager (and even more so where he is also a shareholder in the employer) to have considerable autonomy in the performance of his duties. In this respect, the worker did not satisfy me at all that he could do as he pleased within the business and make any decisions he deemed appropriate. It is true that the evidence showed that the worker enjoyed a great deal of autonomy in performing his duties, but he had to consult informally with the other shareholders and directors before making any major decisions concerning the payer and its subsidiary, essentially to obtain their consent.

[11] If the worker had worked only ten hours per week all year long and received such pay, I would have rendered a different decision. In fact, the worker did not demonstrate that another worker who was also a shareholder in the payer would have received or agreed to very different pay from that received by the worker, in light of all the circumstances. In fact, the worker did not even allege that an arm’s-length person would not have accepted such pay in light of all the circumstances.

[12] In my view, any worker who held 25% of the share capital of the payer would have entered into a substantially similar contract with the payer, even if they were not dealing with each other at arm's length. Furthermore, did the worker not tell Mr. Côté during the first telephone interview on February 24, 2009, that, had he been working for an arm's length person, he would have accepted the same conditions of employment (see Exhibit I-2, page 7)?

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

Signed at Ottawa, Canada, this 19th day of April 2010.

"Paul Bédard"

Bédard J.

Translation certified true
on this 20th day of June 2010

François Brunet, Revisor

CITATION:	2010 TCC 207
COURT FILE NO.:	2009-3401(EI)
STYLE OF CAUSE:	FABIEN MÉNARD AND M.N.R.
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	March 15, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	April 19, 2010

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