Docket: 2009-2088(EI)

BETWEEN:

ABSOLUTE LEADERSHIP DEVELOPMENT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 27, 2010, at Hamilton, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Agent for the Appellant:	Christopher Wignall
Counsel for the Respondent:	Samantha Hurst

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Toronto, Canada, this 2nd day of June 2010.

"N. Weisman"

Weisman D.J.

Citation: 2010 TCC 282
Date: June , 2010
Docket: 2009-2088(EI)

BETWEEN:

ABSOLUTE LEADERSHIP DEVELOPMENT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Weisman, D.J.

[1] The Appellant, Absolute Leadership Development Inc. ("Absolute") is a registered non-profit organization with charitable objects and unusual employment practices. It has two operating divisions: "Think Day" and "Hero Holiday". The former consists of employee and volunteer travellers who form road teams that visit participating schools to give motivational youth empowerment seminars to assembled students. Topics include self-worth, bullying, and making a difference in the world. The schools pay for these seminars, and such payments constitute a large part of Absolute's modest income. "Hero Holiday" is a humanitarian program whereby student volunteers travel to developing countries to help build homes and schools, after raising the cost of travel themselves.

[2] Michelle Wood ("Michelle") was a Road Team Leader, a role she performed on a voluntary basis from September 2004 to June of 2007. Her husband Ryan, who was previously a pastor in Saskatchewan, worked on the road with her, driving buses and speaking in schools. He, however, was an employee of Absolute's, earning $40,000.00 per annum, payable in $1,538.46 bi-weekly instalments.

[3] In June of 2007, Michelle, being three months pregnant, started to find road travel too arduous. She and Ryan therefore met with Vaden Earle, the Appellant's Chief Executive Officer, and a non-voting member of the Board, at its Hamilton, Ontario head office. Together they agreed upon the following solution: Michelle would be promoted to the newly-created position of Bookings Manager of the "Think Day" program, and employed at $40,000.00 per annum, payable in $1,538.46 bi-weekly instalments, while Ryan would join Vaden Earle in senior management. Together they controlled the day-to-day operations of the Appellant and made all the major decisions, including hiring and firing workers. Because the organization could not afford to pay both Michelle and Ryan, his remuneration became a bookkeeping entry only, whereby for accounting purposes, it was shown as a loan from him to Absolute, which loan, minus deductions for Canada Pension Plan contributions and Employment Insurance premiums, was repaid by cheque at year's end. Ryan duly cashed the cheque, and gave the proceeds to his parents on the understanding that they would donate the full amount back to the Appellant. In this manner, Michelle ostensibly became eligible under the *Employment Insurance Act*[1] ("the *Act*") for maternity benefits in the amount of $21,750.00; Ryan could claim employment insurance benefits under the same Act, and his parents could deduct a large charitable donation from their taxable income.

[4] Ryan testified that Absolute often put volunteers on the payroll, or varied their remuneration, depending on their personal financial situation. For example, Charles Roberts, who managed the "Hero Holiday" program, was given a pay increase to $50,000.00 per annum because he had three young boys to raise and debts to pay. It was alleged that his remuneration was close to, but still less than, fair market value for his position; that this was the sum required for him to survive, and for the Appellant to retain an "invaluable person".

[5] So far as Michelle is concerned, Ryan advised that her job was very demanding; she was now not only a booking agent, but she had to learn how to plan and co-ordinate travel schedules, organize school assemblies, send out contracts and receive payments, communicate with road team leaders and schools, supervise the booking department and oversee the other booking agents. Thanks to her diligence and prior experience as a Road Team Leader, school bookings increased dramatically from June of 2007, when she started, to December 21, 2007, when she left to have her baby. According to Ryan, her $40,000.00 per annum was fair market value. Prior to Michelle assuming this position, no-one managed the operational side of the

[1] S.C. 1996, c. 23 as am.

program. When she left, she was not replaced, and school bookings dropped dramatically. The persons that preceded and succeeded her received $18,000.00 and $27,675.44 annually, though both were booking agents only, and unlike Michelle, neither was responsible for the onerous operational side of the program.

[6] Both Michelle and Ryan were open and candid in their testimony. For example, when asked why Michelle received his pay while he essentially worked without remuneration, Ryan volunteered: "We didn't need more money, we needed maternity benefits", to which Michelle added that she knew the new arrangement was for the purpose of her qualifying for maternity benefits. Ryan also explained that the loan repayment / charitable donation scheme was devised to create a "paper trail" for the benefit of the Labour Board in the event they queried his apparent shift in status from employee to volunteer.

[7] In this context, the Minister decided that Michelle was not in insurable employment because she and Absolute were not dealing with each other at arm's length within the meaning of paragraphs 5(2)(i) and 5(3)(a) of the *Act* which provide as follows:

> *Excluded Employment*
>
> 5. (2) Insurable employment does not include
>
> …
>
> (i) employment if the employer and employee are not dealing with each other at arm's length.
>
> …
>
> *Arm's Length Dealing*
>
> 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 …

[8] Paragraph 251(1)(c) of the *Income Tax Act* [2] says:

> *Arm's Length*

[2] R.S.C. 1985 (5th Supp.) as amended.

> 251. (1) For the purposes of this Act,
>
> …
>
> 251. (1)(c) … it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length.

[9] Accordingly, the determining factor in these situations is whether or not parties who are not related to each other are dealing with each other at arm's length. They can be in a non-arm's length relationship yet deal with each other at arm's length, and conversely, they can be in an arm's length relationship yet not deal with each other at arm's length.[3]

[10] In seeking guidance from the jurisprudence as to the just determination of this matter, I have been referred to the case of *Canada (Attorney General) v. Rousselle*[4] which deals with a similar fact situation. The Court says:

> Clearly the Rousselle brothers were unemployed, and for them to be eligible for unemployment insurance benefits they needed ten weeks of insurable employment in the cases of Placide and Ludger and seven weeks in Jean-Claude's case.
>
> Mr. Didier Chiasson, a timber-cutting contractor, agreed to hire these three individuals so that they could qualify for unemployment insurance benefits. He had no immediate need for wood, he was not even in any hurry to get wood …..
>
> I do not think it is an exaggeration to say, in light of these facts, that if the respondents did hold employment this was clearly "convenience" employment, the sole purpose of which was to enable them to qualify for unemployment insurance benefits. These circumstances do not necessarily prevent the employment from being insurable, but they imposed on the Tax Court of Canada a duty to look at the contracts in question with particular care; it is apparent that the motivation of the respondents was the desire to take advantage of the provisions of social legislation rather than to participate in the ordinary operations of the economic forces of the market place.

[11] Since the Court found the three workers in question to be independent contractors, it did not determine when a contract of convenience will prevent employment from being insurable. *Rousselle* was followed in *Charbonneau v. M.N.R.*[5], in which the respondent Charbonneau was also found to be an independent

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[3] Petrucci v. M.N.R. (1998), T.C.J. No.492 at para.13 (T.C.C.)
[4] [1990] F.C.J. No. 990 (F.C.A.)
[5] [1996] F.C.J. No. 1337 (F.C.A.) at para. 14

contractor. Unfortunately the Court's position on contracts of convenience remains unclear:

> The observations we have made had already been made by this Court, with variations, in Rousselle. While that case involved a contract of convenience, the Court could not have decided it based on that aspect alone and was required to examine the relations between the parties in detail, which it did. The respondent has not satisfied us that it was open to it, in the instant case, to disregard the conclusions of this Court in Rousselle.

[12] The matter before me involves a contract of convenience between parties who are in an arm's length relationship. There is no common mind directing the bargaining for both Absolute and Michelle[6]; the parties to the contract of employment were not acting in concert without separate interests[7]; and neither of the parties to the transaction had *de facto* control of the other.[8]

[13] As directed by the Court in *Rousselle*, I have looked at the contract in question with particular care, and while I have no doubt that Michelle performed services for her remuneration, as did the loggers in *Rousselle*, I find that the motivation of the parties was the desire to take advantage of the provisions of social legislation rather than to participate in the ordinary operation of the economic forces of the marketplace. I am brought to this conclusion by the clear admissions in this regard by both Michelle and Ryan, and by the fact that no one occupied Michelle's supposedly important managerial position either before or after she did.

[14] In these matters, the burden is upon the Appellant to refute or demolish the assumptions set out in paragraph 8 of the Minister's Reply to its Notice of Appeal. I note that the evidence established that (c) and (u) were true only after November of 2007, when Ryan joined Vaden Earle in management; that (v) wrongly identifies Michelle as the Appellant, and assumes that her starting base salary was $32,000 annually, when the evidence established that this sum was an approximation only, based on a theoretical pay scale; (x) was established, though qualified by the evidence that Michelle's $40,000.00 annual remuneration was fair market value; and (z) was refuted since Ryan's pay was not reduced to zero, but was ultimately received by him and made its way back to Absolute by the loan / charitable donation scheme as aforesaid. The remaining assumptions are more than sufficient to support the Minister's determination.[9]

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[6] M.N.R. v. Estate of Thomas Rodman Merritt, 69 D.T.C. 5159 (Ex. Ct.)
[7] Swiss Bank Corporation et al v. M.N.R., 71 D.T.C. 5235 (Ex. Ct.)
[8] Robson Leather Co. Ltd. v. M.N.R., 77 D.T.C. 5106 (F.C.A.)
[9] Jencan Ltd. v. M.N.R., [1997] F.C.J. No. 876 (F.C.A.)

[15] I have investigated all the facts with the parties and the witnesses called on behalf of the Appellant to testify under oath for the first time, and while new facts were found, such as Michelle and Ryan's admissions that this was a contract of convenience, they supported the Minister's decision. In addition, there was nothing to indicate that the facts inferred or relied upon by the Minister were unreal or incorrectly assessed or misunderstood, having regard to the context in which they occurred. The Minister's conclusion is objectively reasonable. Absolute and Michelle were not dealing with each other at arm's length during the period under review.

[16] In the result, the determination of the Minister will be confirmed and the appeal dismissed.

Signed at Toronto, Canada, this 2nd day of June 2010.

"N. Weisman"

Weisman D.J.

CITATION:	2010 TCC 282
COURT FILE NO.:	2009-2088(EI)
STYLE OF CAUSE:	Absolute Leadership Development Inc. and The Minister of National Revenue
PLACE OF HEARING:	Hamilton, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable N. Weisman, Deputy Judge
DATE OF JUDGMENT:	June 2, 2010

APPEARANCES:

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Counsel for the Respondent:	Samantha Hurst

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