Docket: 2010-334(EI)

BETWEEN:

MARCEL LAVOIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LES SERVICES VCN LTÉE,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Les Services VCN Ltée (2010-526(EI))
on June 28, 2010, at Sept-Îles, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the appellant:	Daniel Jouis
Counsel for the respondent:	Antonia Paraherakis
Agent for the intervener:	Mario Paquin

JUDGMENT

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

Signed at Ottawa, Canada, this 9th day of November 2010.

"Paul Bédard"

Bédard J.

Translation certified true
on this 30th day of December 2010
Johanna Kratz, Translator

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Citation: 2010 TCC 580
Date: 20101109
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Docket: 2010-526(EI)

BETWEEN:

LES SERVICES VCN LTÉE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MARCEL LAVOIE,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] These are appeals heard on common evidence. The appellants are appealing from the decision rendered by the Minister of National Revenue (the Minister) under the *Employment Insurance Act* (the Act). The Minister determined that appellant

Lavoie did not hold insurable employment while he worked for appellant Services VCN, finding that his employment was excluded because he and appellant Services VCN would not have entered into a similar contract of employment if they had been dealing with each other at arm's length. The relevant periods were February 28, 2005, to December 9, 2005, and January 30, 2006, to November 3, 2006.

[2] In rendering his decisions, the Minister relied on the following assumptions of fact, set out in paragraph 6.1 of the amended Reply to the Notice of Appeal in each case.

[TRANSLATION]

i. the payer was incorporated on June 14, 2000;

ii. the payer's activities involve operating a welding and vulcanization workshop;

iii. appellant Lavoie was hired by the payer as a manager;

iv. appellant Lavoie had a great deal of experience in this type of work, having carried out similar duties from July 30, 1975, to December 31, 2004, for Brémo inc., of which appellant Lavoie, Marc André Allard and André Morin were shareholders, in the case of Mr. Allard and Mr. Morin through their respective corporations;

v. in 2004, following internal and union problems, all the shareholders decided to transfer appellant Lavoie's position and all the operations he was responsible for from Brémo inc. to the payer;

vi. when he was laid off in December 2004 because his position had been abolished, appellant Lavoie received severance pay of $53,279, disqualifying him from receiving employment insurance benefits from January 2, 2005, to November 13, 2005;

vii. in July 2004, appellant Lavoie's spouse, Ghislaine Lavoie, acquired 20.2% of the shares issued by the payer;

viii. 9152-2334 Québec inc. was incorporated on February 9, 2005, its sole shareholder being appellant Lavoie;

ix. in February 2005, through his company 9152-2334 Québec inc., appellant Lavoie acquired 19% of the payer's issued shares;

x. since May 1, 2007, appellant Lavoie has owned 100% of the payer's shares;

xi. the minutes of the June 10, 2000, meeting, include a confirmation of Laurent Lapierre's being employed as welding foreman;

xii. on May 22, 2005, Mr. Lapierre received a $1,000 bonus for his five years of service for the payer;

xiii. appellant Lavoie's primary duties made him responsible for preparing bids, making expense and purchasing reports, managing and running errands, making purchases, hiring staff, supervising and training employees, meeting with clients and checking materials; in short, every decision had to go through him;

xiv. appellant Lavoie worked from the payer's place of business and his home and on vulcanization work sites;

xv. appellant Lavoie decided which jobs he would bid for and how much money he would ask for; he also decided on which material and workers to use and when jobs would be carried out;

xvi. it was possible for him to accumulate tasks and to do them when they were ready;

xvii. appellant Lavoie did not charge for all the hours he worked; he himself decided which hours he would bill the payer for, especially during the second period of work, during which he would bill for four to seven hours a week;

xviii. the documents on file show that in May 2006, appellant Lavoie went on holiday to California for the whole month and billed for 87 hours of work, while during the rest of the year, he would bill for between 4 and 35 hours a month, except for the last month, where he billed for 119 hours;

xix. in the first period of employment, the employment contract stipulated that appellant Lavoie had to work 40 hours a week, which is what he billed the payer;

xx. all the other employees had to complete a time sheet;

xxi. in July 2005, after four months' work, appellant Lavoie received a $10,000 bonus, whereas Mr. Lapierre received only $1,000 after five years of service;

xxii. appellant Lavoie used his own laptop computer to carry out his duties; however, the payer provided him with a cellular telephone, a computer facsimile machine, a vehicle, and credit cards for the purchase of materials and gasoline and meal expenses;

xxiii. an analysis of the documents on file revealed that appellant Lavoie covered the same distance in 2006 as he did in 2005, even though he worked full time in 2005;

xxiv. appellant Lavoie stated in his statutory declaration dated May 16, 2008, that when he was able to draw employment insurance benefits, he no longer billed for 40 hours, but only the hours that would not prevent him from being eligible for employment insurance;

xxv. in his declaration to Human Resources and Skills Development Canada (HRSDC) on May 6, 2008, Mario Paquin stated that when the partied signed the employment contract, he and appellant Lavoie agreed that this job was to help appellant Lavoie out while he was waiting to qualify for employment insurance benefits;

xxvi. the payer's hiring of appellant Lavoie was not based on the payer's needs but on the weeks for which appellant Lavoie could not be paid employment insurance benefits;

xxvii. appellant Lavoie set his own employment conditions, and he did so in his sole discretion;

xxviii. appellant Lavoie was the only person with experience in this type of work;

xxix. appellant Lavoie himself determined his periods of employment and his vacation; he was not replaced;

xxx. according to Mr. Paquin's and appellant Lavoie's declarations and the documents on file, it has been established that appellant Lavoie's duration of employment was based on appellant Lavoie's employment insurance benefit periods and not the payer's needs;

xxxi. appellant Lavoie and the payer therefore acted in concert without separate interests;

xxxii. in July 2005, the payer paid appellant Lavoie $14,000, that is a salary of $4,000 and a bonus of $10,000, after only four months of work;

xxxiii. in 2006, it was appellant Lavoie who decided his salary by billing only the maximum number of hours necessary to not negatively affect the total of his employment insurance benefits;

xxxiv. appellant Lavoie's earnings do not correspond to what a person dealing at arm's length would have received;

xxxv. the number of hours billed is less than the work carried out in 2006;

[3] The evidence shows, among other things, that

a. appellant Lavoie was appellant Services VCN's key employee during the relevant periods;

b. in December 2005, appellant Services VCN laid off appellant Lavoie, its key employee, because of a shortage of work. It should be noted that appellant Lavoie was the only employee laid off by appellant Services VCN because of a shortage of work;

c. in 2005 and 2006, appellant Services VCN's sales, the salary paid to appellant Lavoie, appellant Lavoie's hours of employment appearing in appellant Services VCN's payroll record and appellant Lavoie's mileage during his employment were as follows:

Month	Sales		Salary Paid to Marcel Lavoie	Hours of Employment	Mileage for Business
	Welding	Vulcanization			
January 2005	$38,118	$88,241	None	None	Not provided
February	$53,880	$40,635	$1,000	40	Not provided
March	$31,707	$27,436	$4,000	160	467
April	$38,065	$23,717	$4,000	160	1,552
May	$31,387	$20,318	$5,000	200	591
June	$21,068	$20,825	$4,000	160	627
July	$26,982	$7,676	$14,000	160	441
August	$54,775	$33,587	$5,000	200	2,167
September	$22,754	$33,726	$4,000	160	794
October	$29,097	$22,816	$5,000	200	1,189
November	$58,920	$13,871	$4,000	160	617
December	$28,882	$4,877	$6,121	40	1,264
Total			**$56,121**	**1,640**	**9,709**
Continuation of monthly sales:					
January 2006	$32,469	$814	$100	4	Not provided
February	$18,053	$1,585	$650	26	1,098
March	$17,441	$1,588	$700	28	1,065
April	$6,365	None	$1,062	45.5	1,281
May	$19,510	$34,106	$2,175	87	686
June	$27,081	None	$700	28	514
July	$33,733	None	$875	35	410
August	$27,059	$12,639	$700	28	633
September	$33,640	$871	$700	28	627
October	$34,080	$18,038	$2,975	119	937
Total			**$10,637**	**428.5**	**7,251**

d. throughout 2006, appellant Lavoie received employment insurance benefits;

e. in May 2006, while appellant Lavoie was on vacation in California, appellant Services VCN's payroll record indicated that appellant Lavoie worked 87 hours;

f. in his statutory declaration (see Exhibit I-1, Tab 7, page 3), appellant Lavoie stated, among other things, as follows:

> [TRANSLATION]
> Then, while I was on unemployment, I simply had to report less than 40 hours a week to continue to receive unemployment.

g. moreover, in his statutory declaration (see Exhibit I-1, Tab 8, page 2), Mr. Paquin, an officer of appellant Services VCN, stated as follows:

> [TRANSLATION]
> When I signed the two terminations of employment, it was kind of a work shortage, but I understand that it was planned when the work would reduce and based on when Mr. Lavoie was planning to go on vacation. (Emphasis added.)

The law

[4] Paragraph 5(2)(*i*) of the Act provides that insurable employment does not include employment if the employer and employee are not dealing with each other at arm's length unless it is established that non-related persons would have entered into a substantially similar contract of employment (see paragraph 5(3)(*b*) of the Act). The question of whether or not persons are dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act* (the ITA) (see paragraph 5(3)(*a*) of the Act).

[5] Paragraph 251(1)(*c*) of the ITA provides that persons not related to each other may not be dealing with other at arm's length at a particular time if particular facts demonstrate such a relationship. The essence of *Parrill v. Canada (Minister of National Revenue - M.N.R.)*, [1996] T.C.J. No. 1680 (QL), is that "[p]arties will not be dealing with each other at arm's length if there is the existence of a common mind which directs the bargaining for both parties to a transaction or that the parties to a transaction are acting in concert without separate interests or that either party to a transaction did or had the power to influence or exert control over the other and that the dealings of the parties are not consistent with the object and spirit of the provisions of the law and they do not demonstrate a fair participation in the ordinary operation of the economic forces of the market place".

Analysis and conclusion

[6] It should be recalled that the respondent has determined that this employment was not insurable under paragraph 5(2)(*i*) and subsection 5(3) of the Act because he was satisfied that it was not reasonable to conclude, having regard to all the

circumstances, that appellant Lavoie 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.

[7] The Federal Court of Appeal has repeatedly defined the role conferred on Tax Court of Canada judges by the Act. That role does not permit the judge to substitute his or her discretion for the Minister's, but does involve an obligation to "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, . . . 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).

[8] In other words, before deciding whether the Minister's conclusion still seems reasonable to me, I must verify, in light of the evidence before me, whether the Minister's allegations are in fact correct, having regard to the factors set out in paragraph 5(3)(*b*) of the Act. At issue, then, is whether appellant Lavoie 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.

[9] Appellant Lavoie had the burden of proving that the Minister did not exercise his discretion in accordance with the principles that apply in this regard, essentially, that the Minister did not examine all of the relevant facts or failed to have regard to all of the facts that were relevant.

[10] In this case, appellant Services VCN's payroll records indicate that appellant Lavoie worked 428.5 hours in 2006. In my opinion, the number of hours worked by appellant Lavoie in 2006 is much higher than that indicated in appellant Services VCN's payroll records. In fact, presuming that appellant Lavoie drove an average 100 kilometres an hour in his vehicle, his travel in 2006 would have required 725 hours alone (7,250 kilometres ÷ 100). To these 725 hours spent on travel, one must add the hours spent on meetings with the clients to whom he travelled and the time he spent on the other tasks he was responsible for, namely, taking inventory, supervising other employees and preparing bids. In that respect, I note that the evidence clearly establishes that appellant Lavoie was appellant Services VCN's key employee during the relevant periods. In other words, I am satisfied that appellant Lavoie simply continued working full-time for appellant Services VCN in 2006 and that the reason given by appellant Services VCN to lay off appellant Lavoie in December 2006 (namely, a work shortage) was false. These factors indicate that the two appellants acted in concert to falsify appellant Lavoie's length of employment.

Appellant Lavoie and appellant Services VCN (of which appellant Lavoie and his spouse were shareholders during the relevant periods) simply cooked up an arrangement the goal of which was to have the government pay part of appellant Lavoie's salary. In other words, I am satisfied that appellant Lavoie and appellant Services VCN cheated by colluding to have the employment insurance program bear the cost of the services performed by appellant Lavoie for appellant Services VCN at no charge.

[11] In my opinion, there is no need to analyze the other evidence submitted since the evidence that I have analyzed easily supports my finding that appellant Lavoie and appellant Services VCN were related persons under paragraph 251(1)(*c*) of the ITA, in that they acted in concert without separate interests.

[12] Further, in my view, no person unrelated to appellant Services VCN would have agreed to have worked so many hours unpaid. On that basis alone, the respondent's decision seems reasonable.

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

Signed at Ottawa, Canada, this 9th day of November 2010.

"Paul Bédard"

Bédard J.

Translation certified true
on this 30th day of December 2010
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COURT FILE NOS.:	2010-334(EI); 2010-526(EI)
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REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	November 9, 2010

APPEARANCES:

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Counsel for the intervener:	
Counsel for the respondent:	Antonia Paraherakis
Agent for the intervener:	Mario Paquin
Agent for the appellant:	

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