Docket: 2010-2093(EI)

BETWEEN:

2868-3977 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of Jacques Cossette (2010-2162(EI)) on April 7, 2011, at Roberval, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Jean-François Frigon
Counsel for the respondent:	Simon Vincent

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is dismissed and the decision of the Minister of National Revenue made under the *Employment Insurance Act* is confirmed.

Signed at Ottawa, Ontario, this 10th day of February 2012.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 23rd day of May 2012
Margarita Gorbounova, Translator

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Citation: 2012 TCC 47
Date: 20120210
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REASONS FOR JUDGMENT

Jorré J.

[1] The appeals of 2868-3977 Québec inc. (payer) and Jacques Cossette (worker) from the decision of the Minister of National Revenue were heard on common evidence.

[2] The worker electronically filed a claim for employment insurance benefits on December 14, 2009.[1]

[3] This claim indicates that the employer was the La Jeannoise residence, that is, the company 2868-3977 Québec inc., that the first and the last days of work were December 9, 2008, and November 26, 2009, respectively, and that the residence belonged to the worker's common-law partner, Françoise Richer.

[4] The Minister made the first determination on March 4, 2010, and concluded that the worker had not held insurable employment from December 9, 2008, to November 26, 2009.

[1] Exhibit I-1, tab C.

[5] The worker appealed that decision, and the appeal was mailed on March 31, 2010. The Canada Revenue Agency confirmed the decision in a letter dated June 4, 2010, and the two appellants appealed that decision to this Court.

[6] The relevant provisions of the *Employment Insurance Act* are the following subsections of section 5:

> (2) Insurable employment does not include
>
> . . .
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> (3) For the purposes of paragraph (2)(*i*),
>
> . . .
>
> (*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.

[7] The respondent does not dispute the existence of a contract of employment within the meaning of the *Civil Code of Québec*.

[8] However, the respondent claims that the employment was not "insurable employment" because paragraph 5(2)(*i*) of the *Employment Insurance Act* applies, while the exception in paragraph 5(3)(*b*) does not.

[9] The appellants concede that they are not dealing with each other at arm's length within the meaning of paragraph 5(2)(*i*), but claim that the exception at paragraph 5(3)(*b*) applies.

[10] These are essentially questions of fact.

[11] In *Lavoie v. M.N.R.*,[2] Bédard J. summarized the role of the Court as follows at paragraphs 7 to 9:

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[2] 2010 TCC 580.

> 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.

[12] Having heard all of the evidence, I must therefore decide whether the Minister's conclusion that the payer and an arm's length person would not have entered into a substantially similar contract of employment seems reasonable to me.

[13] In rendering his decision, the Minister relied on the following assumptions of fact:[3]

> [TRANSLATION]
> 5. . . .
>
> (a) The appellant was incorporated on November 4, 1991;
> (b) The appellant's sole shareholder was Françoise Richer;
> (c) The appellant operated a residence containing 30 apartments for independent seniors and those who were losing some of their independence;
> (d) Each apartment consisted of a bedroom, a living room and a full bathroom;
> (e) Meals were served in a common dining room;
> (f) The residence was sold on December 1, 2009;
> (g) The worker lived on site;
> (h) The worker was hired by the appellant as a full-time maintenance worker;

[3] See paragraphs 5 to 7 of the Reply to the Notice of Appeal concerning 2868-3977 Québec inc. The assumptions of fact in the Reply to the Notice of Appeal concerning Jacques Cossette are substantially the same.

(i) The worker's duties were to do all maintenance and repair work for the building, insulate around window frames, cut the grass, shovel 35 porches and paint rooms;
(j) Before hiring the worker, the appellant had not employed anyone to do this type of work;
(k) Until this fact was presented to them, neither the worker nor the appellant recalled that the worker had already worked for the appellant from November 6, 2006, to November 15, 2007, that he had stopped working to undergo surgery and that his medical leave had continued until March 18, 2008.
(l) The parties agree that, before the worker was hired in 2006, when work accumulated, the shareholder would do it with the help of her five children and the worker on a voluntary basis.
(m) Between the worker's two periods of employment, the appellant did not replace him;
(n) The appellant stated that the worker had worked 30 to 35 hours over 4 days per week, while the worker stated that he had worked 40 hours over 4 to 5 days per week.
(o) Other employees of the appellant are paid for 30 hours per week, except for cooks, who work 40 hours per week;
(p) The appellant told the worker what work to do;
(q) All tools needed by the worker to do the work were provided by the appellant;
(r) The appellant paid the worker $15 per hour;
(s) The worker was paid by cheque every week;
(t) The worker was entered in the appellant's payroll journal starting only on March 9, 2009, for 3 or 4 days, that is, 31 or 40 hours per week, though he is supposed to have been employed full time since December 9, 2008;.

6. . . .

(a) The appellant's sole shareholder was Françoise Richer;
(b) Françoise Richer is the worker's common-law partner.

7. . . .

(a) During the first 16 years of operation, the appellant did not hire anyone to do the worker's work;
(b) The worker was employed the first time from November 6, 2006, to November 15, 2007, and the second time during the period at issue, namely, from December 8, 2008, to November 26, 2009;
(c) Between the two periods of employment, the appellant did not replace the worker, who was on medical leave until March 18, 2008;
(d) The worker returned to work only on December 8, 2008, and was entered in the appellant's payroll journal only in March 2009 for six days of work;

[14] Ms. Richer and the worker testified, as did Lyne Courcy, appeals officer at the Canada Revenue Agency.

[15] The worker operated a small transportation business, which provided transportation for Abitibi-Consolidated. This business ceased its operations after the truck burned out, and it was only after that incident that the worker became an employee of the payer.

[16] The first time, the worker was employed by the payer from November 6, 2006, to November 15, 2007.

[17] This first period ended when the worker had to undergo surgery. He was on medical leave until March 18, 2008. Eventually, he started a second period of work with the payer.[4]

[18] After 2007, it became mandatory for the payer to have employees trained in first aid and CPR.

[19] In 2008, after the first period of work for the payer and before the second period of work, the worker took first-aid and CPR classes.[5]

[20] In their testimony, the worker and Ms. Richer seemed very uncertain of the date when the second period of work began.[6]

[21] Later, in cross-examination, the worker seemed to agree that he had started working in December 2008, and he stated that when he was working, he was paid.[7]

[22] A little while later, in redirect, in response to a leading question, the worker contradicted himself and stated that he had not been paid for his work in December 2008 and January and February 2009.

[23] However, the claim for benefits indicates very clearly that the work started on December 9, 2008.[8]

[24] The worker's statutory declaration also claims that December 9 is the first day of work.[9]

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[4] In his statutory declaration (Exhibit I-1, tab A), the worker stated the following, among other things, [TRANSLATION] "On March 18, 2008, my medical leave ended, but there was no work to do, so I started only 3 weeks after the end of my benefits, from December 9, 2008, to November 26, 2009."
[5] Transcript, page 7, line 8, to page 8, line 2; page 10, line 15, to page 11, line 5.
[6] Transcript, question 180.
[7] Transcript, questions 185 to 187.
[8] Exhibit I-1, tab C.

[25] The record of employment dated December 14, 2009, indicates December 29, 2009, as the first day of work. Given the date of the document and the fact that the work had finished on November 26, 2009, there must be a typo with regard to 2009 as the year during which the first day of work occurred. It must be 2008.[10]

[26] I do not hesitate in concluding that the second period of work began on December 9, 2008.[11]

[27] The worker reported no employment income in 2008.[12] The employee payroll journal shows that the worker was not paid until the week of March 8, 2009.[13]

[28] I also find that the worker was not paid for the work he did in December 2008 and January and February 2009.

[29] The worker's duties were about the same during the first period of work and the one at issue.[14]

[30] Based on the evidence, the worker

(a) was always paid for 31 or 40 hours per week;[15]
(b) did not have set work hours, and his work hours could vary considerably from day to day and from week to week; some days, he only had a little bit of work to do, but there were also exceptionally busy weeks, during which he worked a very large number of unpaid hours;
(c) worked for more hours than he was paid for;
(d) had to be able to respond to emergencies at any time.[16]

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[9] Exhibit I-1, tab A.
[10] Exhibit I-1, tab C-RDE.
[11] At the hearing, the worker and Ms. Richer were very uncertain of dates. They did not satisfy me that it should have been concluded that the work had started in March 2009, and that the Minister was wrong to rely on (i) the record of employment prepared by or for the payer, (ii) the claim for benefits made by the worker, and (iii) the worker's statutory declaration, all of which are documents that were prepared well in advance of the hearing.
[12] Exhibit I-1, tab E.
[13] Exhibit I-1, tab H.
[14] Transcript, questions 95 and 96.
[15] Exhibit I-1, tab H.
[16] See especially transcript, question 137, where the worker replies:

> [TRANSLATION]
> Well, of course, if I * logged + my hours all the time, I worked five minutes here, a half-hour there, I could've been doing a hundred (100) hours a week. It's not hard. So I had no hours, no set schedule to work. It could happen at night, it could happen during the day. When there was a problem, I was there. Then, like we talked about thirty (30) to forty (40) hours a week. For sure, I did thirty (30), forty (40) hours a week. I definitely did. I

[31] Ms. Richer testified that employees did not record their hours of work and received a fixed salary, even though they could leave early if the work was finished. However, if an employee came in early, he or she was not paid extra. She gave the example of cooks, who received a fixed weekly salary, even though they alternated between three- and four-day weeks.

[32] I do not believe that the duties of other employees such as cooks or cleaners can be compared to those of the worker.

[33] The other employees' work hours could vary slightly, but the degree of variation was not at all comparable to that of the worker's hours. Although the time the cooks needed to prepare meals could vary slightly, it was still relatively stable, just as the time needed to clean rooms could vary but was relatively stable.[17]

[34] In contrast, emergency repairs and snowstorms are very unpredictable thus making the worker's work hours much more variable than those of other employees.

[35] In addition, because he lived on site, the worker was available around the clock.

[36] Between the two periods of work, the worker worked for several hours each week. During his convalescence, his duties were very limited.

[37] However, once he returned to work in December 2008, a little more than a year after he had stopped working on November 15, 2007, I am not convinced that he limited himself to a few hours of work like he did during his convalescence after the surgery.

> even did more. But we had an agreement that I, that she would pay me for thirty (30) to forty (40) hours per week.

(the symbols "*" and "+" appeared in the transcript.)

Although the question was asked with regard to the period that began at the end of 2006, and, given that the words [TRANSLATION] "like we talked about thirty (30) to forty (40) hours a week" are referring to the preceding testimony of Ms. Richer, who spoke about periods of 31 or 40 hours (Exhibit I-1, tab 1) in response to questions asked, I conclude that the answer applies to the period at issue. Ms. Richer also testified that the worker's duties were about the same during the first period of work and the one at issue (Transcript, question 95).

See also transcript, questions 44 and 45, with regard to the worker's availability at any time and questions 47 to 49 and 80 to 86 with regard to the variability of the worker's hours.

[17] With regard to the cooks, the fact that they were paid the same amount every week even though their work hours alternated between a three-day week and a four-day week does not actually represent a great deal of variability because this happened regularly and the weekly pay corresponded in reality to an average of three and a half days of work.

[38] Overall, the evidence does not show a difference between the period from December 2008 to February 2009 and the period of work that followed. At one point, the worker testified that he had not worked or worked very little during the period from December 2008 to February 2009, but I do not accept this answer.[18]

[39] Consequently, I am satisfied that the worker did basically the same work throughout the entire period at issue.

[40] An arm's length employee and the payer would not have entered into a substantially similar contract of employment. I have made this finding for two reasons.

[41] First, given the extreme variability of the worker's work hours, it is doubtful that the payer and the worker would have entered into a contract where the worker was always paid for 31 or 40 hours.[19]

[42] Second, it is clear that, if they were dealing with each other at arm's length, the payer and the employee would not have entered into a contract of employment in which the worker would not be paid for the first two or three months out of 11 or 12 months, even though the employee had to perform basically the same tasks throughout the entire period.

[43] The worker stated that the unpaid period of work from December 2008 to February 2009 should not be taken into account and referred to the Federal Court of Appeal decision in *Théberge v. Canada*.[20]

[44] *Théberge* does not apply to the circumstances of this case.

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[18] See transcript, question 187. The worker gave this answer to a leading question in redirect, while, in his main testimony, he had been very confused when he had been asked about the date on which he had started work and while he had just said in cross-examination that he had been paid during that period. Given the worker's claim for benefits, his statutory declaration and the time that had elapsed between these documents and the hearing, I am satisfied that the worker was mistaken.

I further note the following:

(a) Although Ms. Richer's children helped out after the worker's first period of work and before the worker started working during the period at issue, the work to be done accumulated (transcript, questions 28 to 31, 91 and 92).
(b) Ms. Richer's children were tired of helping do the work.
(c) The worker was available in December 2008.

[19] The variability of work hours in this case is quite different in nature from that found in *Paré v. M.N.R.*, 2004 TCC 540. In *Paré*, the number of hours worked did not seem to vary much; however, the time when the work was performed varied (normally, during the day, but when no babysitter was available, in the evening). In the case at bar, not only did the work schedule vary, the number of hours the worker worked also varied a great deal; in addition, the worker was available around the clock.

[20] 2002 FCA 123.

[45] First, *Théberge* is in a specific context of agriculture, and its application should not be over-generalized.[21]

[46] Second, in *Théberge*, the volunteer work done by the worker consisted of 10 to 15 hours per week, while that same worker worked 40 to 80 hours per week during the paid period. The amount of work was different during the two periods, and the nature of the work was also very different during the two periods.[22]

[47] In this case, the period that is similar to the unpaid period in *Théberge* is the period from mid-November 2007 to the beginning of December 2008; during this period, the worker did some work as he was able, for example, answering the telephone. Starting in December 2008, the worker did the same work as that which he did from March to the end of November 2009.[23]

[48] Considering my finding that an arm's length employee and the payer would not have entered into a substantially similar contract of employment, the Minister's decision seems reasonable to me and I must dismiss the appeals.

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[21] See the Federal Court of Appeal decision in *Dumais v. Canada*, 2008 FCA 301, at paragraph 26.

[22] See paragraphs 4, 14 and 15 of *Théberge*. In *Paré*, there is also a very significant difference between the amount and the nature of the volunteer work and the paid work. It must also be noted that, at a certain point, if there is a sufficient amount of volunteer work, it must be taken into account depending on the circumstances. See, for example, *Bourgouin v. M.N.R.*, 2008 TCC 59

[23] The worker also cited *Campbell v. M.N.R.*, 2008 TCC 170. I have no doubt that the work was real in this case, but, as stated by Justice Boyle at paragraph 41, the test I must apply is to compare the conditions of employment where the employer is not dealing with the employee at arm's length to the conditions of employment at arm's length.

Signed at Ottawa, Ontario, this 10th day of February 2012.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 23rd day of May 2012
Margarita Gorbounova, Translator

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COURT FILE NOS.:	2010-2093(EI) 2010-2162(EI)
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PLACE OF HEARING:	Roberval, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF REASONS FOR JUDGMENT:	February 10, 2012
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