A-831-95

MONTRÉAL, QUEBEC, THIS 20th DAY OF SEPTEMBER 1996

CORAM: **THE HONOURABLE MR. JUSTICE MARCEAU**
THE HONOURABLE MR. JUSTICE DÉCARY
THE HONOURABLE DEPUTY JUSTICE CHEVALIER

BETWEEN: ATTORNEY GENERAL OF CANADA,

Applicant,

AND:

NORMAND CHARBONNEAU,

Respondent.

J U D G M E N T

The application is allowed, the decision *a quo* is set aside and the matter is referred back to the Tax Court of Canada to be redetermined on the basis that the respondent was not engaged in insurable employment under the *Unemployment Insurance Act*.

signed: Louis Marceau
J.A.

Certified true translation

C. Delon, LL.L.

A-832-95

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J.A.

Certified true translation

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CORAM: **MARCEAU J.A.**
DÉCARY J.A.
CHEVALIER D.J.

BETWEEN: ATTORNEY GENERAL OF CANADA,

Applicant,

AND:

NORMAND CHARBONNEAU,

Respondent.

A-832-95

BETWEEN: ATTORNEY GENERAL OF CANADA,

Applicant,

AND:

NORMAND CHARBONNEAU,

Respondent.

Hearings held at Montréal
on September 19 and 20, 1996

Judgment delivered at Montreal
on Friday, September 20, 1996

REASONS FOR JUDGMENT OF THE COURT BY: **DÉCARY J.A.**

A-831-95

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A-832-95

BETWEEN: ATTORNEY GENERAL OF CANADA,

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Montréal
on Friday, September 20, 1996.)

DÉCARY J.A.

Contract of employment or contract of enterprise? This, once again, is the question that arises in this case, the issue in which is whether the respondent, the owner and operator of a skidder, was engaged in insurable employment for the purposes of the application of paragraph 3(1)(*a*) of the *Unemployment Insurance Act*.

Two preliminary observations must be made.

The tests laid down by this Court in *Wiebe Door Services Ltd. v. M.N.R.*[1] — on the one hand, the degree of control, the ownership of the tools of work, the chance of profit and risk of loss, and on the other, integration — are not the ingredients of a magic formula. They are guidelines which it will generally be useful to consider, but not to the point of jeopardizing the ultimate objective of the exercise, which is to determine the overall relationship between the parties. The issue is always, once it has been determined that there is a genuine contract, whether there is a relationship of subordination between the parties such that there is a contract of employment (art. 2085 of the *Civil Code of Québec*) or, whether there is not, rather, such a degree of autonomy that there is a contract of enterprise or for services (art. 2098 of the Code). In other words, we must not pay so much attention to the trees that we lose sight of the forest — a particularly apt image in this case. The parts must give way to the whole.

Moreover, while the determination of the legal nature of the contractual relationship will turn on the facts of each case, nonetheless in cases that are substantially the same on the facts the corresponding judgments should be substantially the same in law. As well, when this Court has already ruled as to the nature of a certain type of contract, there is no need thereafter to repeat the exercise in its entirety: unless there are genuinely significant differences in the facts, the Minister and the Tax Court of Canada should not disregard the solution adopted by this Court.

In our view, when the judge of the Tax Court of Canada allowed the respondent's appeals in this case and found that the contract was a contract of employment, he felt into the trap of doing a too mathematical analysis of the tests in *Wiebe Door*,

[1] [1986] 3 F.C. 553 (C.A.)

and as a result he wrongly disregarded the solution adopted by this Court in *Attorney General of Canada v. Rousselle et al.*[2] and upheld in *Attorney General of Canada v. Vaillancourt*[3].

Here, the payer was a forestry business. It assigned the work of felling and hauling the wood to crews of two persons — a feller, who cut the trees, and a skidder operator, who picked them up and transported them to the edge of a forest road. The respondent was the owner of the skidder, a piece of heavy machinery valued at about $15,000, and he was responsible for the cost of maintaining and repairing it. He had himself recruited the feller, with whom he made up a crew. He and the feller were paid by volume, based on the number of cubic metres of wood cut down, and the contract did not specify any volume; the volume was measured every two weeks by a "measurer" employed by the payer.

At the time the contract was signed, the respondent was given [TRANSLATION] "a list and terms of holidays" which, according to the evidence, was based on provincial employment standards. He was also given a document containing [TRANSLATION] "internal regulations for workers in forests" which, according to the testimony of a representative of the payer, reflected the requirements of the Quebec ministère des Ressources naturelles. Appended to that document were [TRANSLATION] "general rules", that is, a list of technical details relating to cutting down trees, as well as the [TRANSLATION] "minimum standards for protecting forests against fire" laid down by the Société de conservation de l'Outaouais.

The respondent worked about thirty-two hours per week and his daily work period was generally, but not necessarily, within the period proposed in the internal regulations, that is, between 7:30 a.m. and 4:00 p.m. A foreman employed by the payer checked every second day to ensure that the respondent's crew was in fact cutting the trees that had previously been identified by the payer. The method of payment was as follows: one quarter of the amount owing to the crew was paid to the respondent, one quarter was paid to the feller, and half was paid to the respondent for the use of the skidder. Thus three cheques were issued by the payer every two weeks. The cost of transporting the skidder at the beginning and end of the season was borne by the respondent; in the event that there was a change of location during the season, it was borne by the payer.

When we look at the overall picture, it is quite apparent that this was, *prima facie*, a contract of enterprise. The ownership of the skidder, the choice of the other crew member, payment based on an undefined volume and the autonomy of the crew are determining factors which, in the context, can only be associated with a contract of enterprise.

[2] (1990), 124 N.R. 339 (F.C.A.)

[3] unreported, A-639-91, May 14, 1992 (F.C.A.)

Supervision of the work every second day and measuring the volume every two weeks do not, in this case, create a relationship of subordination, and are entirely consistent with the requirements of a contract of enterprise. It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker.

The same is true of the standards imposed in respect of hours and days of work, holidays, operating method and safety. The standards are common to all workers in public forests whose activities are "governed" by the ministère des Ressources naturelles. They apply regardless of whether the worker is a mere employee or a contractor.

One factor on which the judge relied, and which led him to conclude that [TRANSLATION] "there could be no chance of profit and risk of loss" during the contract, was the fact that the respondent was paid a wage, at the rate of $2.50 per hour. This is a major factual error. In fact, the respondent was paid based on his volume of production, and the mere fact that his skidder had broken down would be sufficient for him to find himself with nothing.

Counsel for the respondent advanced a hypothesis which the judge seems to have accepted: in this case, two distinct contracts were made, one a contract of employment and the other a contract for the lease of the skidder, so that the fact that the respondent was the owner of the skidder and bore the cost of maintaining and repairing it should not be taken into consideration in analysing the contract of employment, properly speaking. If in fact the hypothesis that there was a dual contract has the legal effects reckoned on by the respondent, it is not based on any evidence in this case and could most certainly not have been considered, and *a fortiori* adopted, by the judge.

The observations we have made had already been made by this Court, with slight 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 conclusion of this Court in *Rousselle*.

The application for judicial review will be allowed, the decision of the Tax Court of Canada will be set aside and the matter will be referred back to it to be redetermined on the basis that the respondent was not engaged in insurable employment.

signed: Robert Décary
J.A.

Certified true translation

C. Delon, LL.L.

Federal Court of Canada

Court file No. A-831-95

BETWEEN

ATTORNEY GENERAL
OF CANADA,

Applicant,

— and —

NORMAND CHARBONNEAU,

Respondent.

REASONS FOR JUDGMENT

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REASONS FOR JUDGMENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO:	A-831-95
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA **AND:** NORMAND CHARBONNEAU
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 19 and 20, 1996

REASONS FOR JUDGMENT OF THE COURT (MARCEAU AND DÉCARY JJ.A. AND CHEVALIER D.J.)

DELIVERED FROM THE BENCH BY: The Honourable Mr. Justice Décary

Dated: September 20, 1996

APPEARANCES:

Claude Provencher	for the applicant
Diane Rainville	for the respondent

SOLICITORS OF RECORD:

George Thomson Deputy Attorney General of Canada Montréal, Quebec	for the applicant
CAMPEAU, OUELLET & ASSOCIÉS Montréal, Quebec	for the respondent

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