Docket: 2005-3536(EI)

BETWEEN :

GROUPE FINANCIER BOSCO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 28, 2006, at Montréal, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Agent of the Appellant: Franck Barbusci

Counsel for the Respondent: Mounes Ayadi

JUDGMENT

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

Signed at Grand Barachois, New Brunswick, this 12th day of April 2006.

"S.J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 29th day of February 2008.

Brian McCordick, Translator

Citation: 2006TCC213
Date: 20060412
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BETWEEN:

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Appellant,

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REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] This appeal was heard in Montréal, Quebec, on February 28, 2006.

[2] The issue is whether Anie Belmadi, the worker, was employed in insurable employment from April 1, 2003, to February 15, 2004, while working for the Appellant.

[3] On September 16, 2005, the Minister of National Revenue ("the Minister") notified the Appellant of his decision that the worker was employed in insurable employment.

[4] In making his decision, the Minister relied on the following assumptions of fact:

> [TRANSLATION]
>
> 5 (a) The Appellant incorporated on May 1, 2003.
>
> (b) Christiane Soulard was the Appellant's sole shareholder, and Franck Barbusci was its president.

(c) The Appellant's headquarters and offices are at 8129 St-Denis Street in Montréal.

(d) The Appellant's fields are business administration and management as well as vehicle insurance sales.

(e) The Appellant sells its insurance through dealerships, which offer its insurance products to their customers.

(f) Upon being hired, the worker signed an employment contract with the Appellant.

(g) The worker claims that her primary intention upon signing her contract with the Appellant was to provide services to the Appellant in exchange for reasonable remuneration.

(h) The worker rendered services to the Appellant as a regional director for the Abitibi region.

(i) The worker promoted the Appellant's products on a continuous basis and provided training sessions to dealership employees who sold the Appellant's products.

(j) At the beginning of her period of employment with the Appellant, and regularly thereafter, the worker received training at the Appellant's expense.

(k) The worker went to the Appellant's office in Montréal every two weeks to do her work and receive additional training.

(l) The worker's principal duty was to meet auto dealers in the area to offer them the opportunity to sell the Appellant's insurance products to their customers.

(m) The Appellant provided the worker with a list of dealers to visit, and the worker was to try to add other dealers to that list.

(n) The Appellant prepared her work from home, and most work was done in the field, that is to say, on the road and at dealerships.

(o) Out of necessity, the worker did her work during normal business hours.

(p) The worker believes that she worked an average of 50 hours per week.

(q) In addition, the worker had to remain in contact with the Appellant daily by telephone, fax or e-mail.

(r) The worker had to prepare written and oral reports for the Appellant on a regular basis.

(s) The worker had to perform her services personally, and exclusively, for the Appellant.

(t) The worker had to meet the Appellant's work quality and sales volume standards.

(u) The Appellant provided the worker with a laptop computer, a printer, a fax machine and a laminator.

(v) The Appellant was to receive either a $500 base salary or an 8% commission on her sales, whichever was higher.

(w) The worker was to be reimbursed by the Appellant for her cell phone account and for the mileage driven on her car.

(x) During the period in issue, the worker always received the base salary of $500 per week.

[5] The Appellant admitted to the Minister's factual assumptions set out in subparagraphs 5(a), (c), (f), (g), (i), (l) through (o), (r), (t) and (u); it admitted to the assumptions set out in subparagraph 5(b) subject to amplification; it denied the assumptions in subparagraphs (d), (e), (h), (j), (k), (q), (s) and (v) through (x); and it claimed to have no knowledge of the assumption set out in subparagraph (p).

[6] The evidence disclosed that Christiane Soulard was not the Appellant's sole shareholder during the period in issue, but is its sole shareholder now.

[7] It was established at the hearing that the Appellant did not sell auto insurance. Rather, it sold insurance on vehicle purchase financing. This credit insurance guarantees that the customer's auto payments are made in the event of death or disability.

[8] The Appellant clarified subparagraph 5(e) at the hearing: in order to sell its insurance, the Appellant works through dealership representatives who offer the Appellant's insurance product to their customers. The Appellant administered the credit insurance program and sold its product to the dealerships.

[9] Based on the evidence adduced, the worker was a regional director for the Appellant, first in Trois-Rivières, and later in the Abitibi region.

[10] The worker began working for the Appellant after a job with Toyota as a sales manager. She had already received training, and could give training courses herself; this was among her duties with the Appellant. Upon beginning her job with the Appellant, the worker received training on its products, on how to approach customers, and on sales techniques.

[11] At the hearing, the Appellant's president stated that the Appellant did not require the worker to come to the office regularly. Specifically, the Appellant stated that the worker visited the Montréal office occasionally, but the worker contradicted this, saying that she went to the Appellant's office twice a month for meetings and training courses. She also said that she phoned in to the office three to four times a day.

[12] The Court heard the testimony of Franck Barbusci (the Appellant's president) and the worker. They are contradictory in several respects. For example, Mr. Barbusci said that if the worker phoned the office frequently, it was to request money, in which case she was asked for details regarding sales prospects in order to justify advances on her commissions.

[13] The Appellant claims that the worker was under no obligation to provide it with services on an exclusive basis. In addition, the Appellant asserts that Ms. Belmadi is self-employed, which is why she works 60 hours per week. Under such conditions, one can legitimately doubt that the worker could offer her services to another employer.

[14] The Appellant denied that the worker's pay was the higher of a $500 base salary or an 8% commission on her sales: according to Mr. Barbusci, her sole remuneration was an 8% commission on her sales. Mr. Barbusci explained that the worker received advances, and that this is what accounted for the $500 per week. He added that these advances were repayable to the Appellant out of future commissions. In addition, the Appellant denied the allegation that it had to reimburse the worker for her cell phone bills and car expenses. On the contrary, the Appellant claimed that because the worker was penniless, she was advanced funds so that she could keep her cell phone and pay for her fuel. It was established that the Appellant paid the costs that the worker incurred to move from Trois-Rivières to the Abitibi region.

[15] The Appellant consistently claimed that it paid the worker no salary, but merely advances on sales commissions. At the hearing, the Appellant claimed that since the worker made practically no sales, she owed the Appellant $25,000.

[16] The evidence discloses that the parties signed a contract when the worker began her job with the Appellant. The Appellant claims that the contract it signed with the worker supports its position that the worker was hired as an independent contractor and that there was no employer-employee relationship between them. However, the contract was not produced at the hearing, and the Appellant never provided it to the appeals officer who requested it. In addition, it was shown that the contract signed by the parties was prepared by the Appellant and that the worker could not alter it.

[17] The worker's job ended when the Appellant stopped paying her. The Appellant then requested that the advances be repaid, but it abandoned its efforts, purportedly because the worker did not have the means to repay. It is claimed that the same thing happened with the equipment and materials that belonged to the Appellant but were kept by the worker.

[18] The evidence adduced with respect to the parties' intentions is contradictory. The worker claims that she was a salaried employee, as she demanded from the moment she was hired. Further, she says that she was also supposed to receive a commission on the Appellant's products that she sold. In contrast, the Appellant submits that the worker was an independent contractor because it retained her services on that basis. The Appellant relies on a contract which was signed with the worker, but which was not produced at the hearing. Given the circumstances, this Court will not take that contract into account. Thus, we will need to analyze the evidence adduced before the Court in order to ascertain the parties' intentions.

[19] It was established that the worker performed work for the Appellant. She worked for the Appellant in Trois-Rivières and the Abitibi region. She presented herself as the Appellant's regional director on a business card that she handed out to new customers.

[20] The evidence discloses that the worker received training from the Appellant upon being hired and regularly thereafter. Upon being hired, the Appellant promised to help her with customers, and such help was given on certain occasions when Mr. Barbusci visited the worker in the Abitibi region. She also received training on sales techniques, including the way to approach customers and present the Appellant's products.

[21] The Appellant gave the worker a manual on its various products, a laptop computer, a fax machine and a cell phone. The Appellant paid the worker's expenses, including her telephone, stationery and other miscellaneous expenses, and gave her $150 per month to cover these expenses.

[22] The evidence discloses that the worker provided services to the Appellant on an exclusive basis. Mr. Barbusci denied this at the hearing, but he did state that the worker worked 60 hours per week for the company.

[23] The worker had to notify the Appellant of her absences. She gave written reports to the Appellant on a regular basis after obtaining all the information from the dealerships about the sales of the Appellant's products. The appeals officer confirmed at the hearing that Mr. Barbusci had told him that the worker regularly submitted reports to the Appellant and that this was mandatory.

[24] The evidence discloses that the worker described herself as an employee on her income tax return.

[25] Thus, the issue for determination is the relationship between the parties, namely the Appellant and the worker. Specifically, was there an employment contract between them, or, to use the wording contained in the *Employment Insurance Act*, was the worker employed in insurable employment?

[26] In Quebec, a province governed by civil law principles, the employment contract is defined in article 2085 of the *Civil Code of Québec*, S.Q. 1991, c. 64, which states that "[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."

[27] An employment contract differs from a contract of enterprise or for services (article 2098) ". . . by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay." Article 2099 provides that "[t]he contractor or provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance."

[28] Thus, subordination, or the exercise of a power of control, is a more important, if not determinative, factor in Quebec law. The *Employment Insurance Act*, which applies to the present dispute, is a federal statute. As of June 1, 2001, if concepts of private law are involved, section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, has required the application of the private law of the province in which the dispute arose:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

[29] Dussault J. of this Court wrote as follows in *Lévesque v. Canada (M.N.R.)*, [2005] T.C.J. No. 183:

> [23] In Sauvageau Pontiac Buick GMC Ltée v. Canada, T.C.C., No. 95-1642(UI), October 25, 1996, [1996] T.C.J. No. 1383 (QL), Archambault T.C.J., citing the Supreme Court of Canada's decision in Quebec Asbestos Corp. v. Couture, [1929] S.C.R. 166, considered these definitions and held that the determinative element was whether or not a relationship of subordination existed. He also accepted Pratte J.A.'s definition of this term in Gallant, supra. At paragraph 12 of his decision, Judge Archambault stated:
>
> > 12 It is clear from these provisions of the C.C.Q. that the relationship of subordination is the primary distinction between a contract of enterprise (or of services) and a contract of employment. As to this concept of a relationship of subordination, I feel that the comments of Pratte J.A. in Gallant are still applicable:
> >
> > > The distinguishing feature of a contract of service is not the control actually exercised by the employer over his employee but the power the employer has to control the way the employee performs his duties.

[30] Furthermore, in *D & J Driveway Inc. v. Canada (M.N.R.)*, [2003] F.C.J. No. 1784 (QL), Létourneau J.A. of the Federal Court of Appeal stated that an employer-employee relationship does not necessarily exist simply because a person who gives out work can control its result. He put the matter as follows at paragraph 9 of the judgment:

> 9 A contract of employment requires the existence of a relationship of subordination between the payer and the employees. The concept of control is the key test used in measuring the extent of the relationship. However, as our brother Décary J.A. said in Charbonneau v. Canada (Minister of National Revenue - M.N.R.), [1996] F.C.J. No. 1337, [1996] 207 N.R. 299, followed in Jaillet v. Canada (Minister of National Revenue - M.N.R.), 2002 FCA 394, control of the result and control of the worker should not be confused. At paragraph 10 of the decision, he wrote:
>
> > 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.

[31] Several indicia can be taken into consideration in order to determine whether or not a relationship of subordination exists. In *Seitz v. Entraide populaire de Lanaudière inc.*, Court of Québec (Civil Division), No. 705-22-002935-003, November 16, 2001, [2001] Q.J. No. 7635 (QL), Judge Monique Fradette provided a series of indicia that can help determine whether or not subordination exists. She discussed this as follows at paragraphs 60-62 of the judgment:

> [60] In order for there to be an employment contract, the jurisprudence requires the existence of a right of supervision and immediate direction. The mere fact that a person provides general instructions about the way in which the work is performed, or reserves the right to supervise or inspect the work, is not sufficient to convert the agreement into an employment contract.

> [61] A series of indicia developed by the jurisprudence enables courts to determine whether there is a relationship of subordination between the parties.
>
> [62] The indicia of control include:
>
> – mandatory presence at a workplace
> – compliance with work schedule
> – control over employee's vacations
> – submission of activity reports
> – control over the quantity and quality of work
> – imposition of the means of performing the work
> – power of sanction with respect to the employee's performance
> – source deductions
> – fringe benefits
> – employee status on income tax returns
> – exclusivity of services for employer

[32] However, it should be specified that the fact that some indicia point to a relationship of subordination does not warrant an end to the analysis. The process consists in determining the overall relationship between the parties based on the distinction drawn in the *Civil Code of Québec*. Thus, the extent to which the indicia of subordination predominate in relation to the others must be established.

[33] Let us examine the evidence in light of the indicia established by Judge Fradette in order to ascertain the overall relationship between the parties and determine whether or not a relationship of subordination exists.

[34] Mandatory presence at a workplace: the worker's task was to represent the Appellant in her dealings with the dealerships in the designated territories, first in the Trois-Rivières area, and later in the Abitibi region. She worked at the various dealerships or from home. The evidence showed that she also went assiduously to the Appellant's office in Montréal. It must be acknowledged that the nature of the worker's job did not require her to be in a single place. In my opinion, when the evidence with respect to this indicia is examined, it tends to favour the existence of a relationship of subordination.

[35] Compliance with work schedule: No evidence was truly adduced with respect to the worker's schedule. However, Mr. Barbusci acknowledged that the worker put in 60 hours per week. Given the type of work, and the number of hours that she devoted to it, the worker had to comply with some kind of schedule, even

though it was not fixed by the Appellant. In my view, when the evidence with respect to this indicia is examined, it tends to favour the existence of a relationship of subordination.

[36] Control over employee's vacations: It has been shown that the worker had to notify the Appellant of her absences, but this obligation was more onerous because of the distance between her work in outlying areas and the Appellant's place of business.

[37] Here again, I am of the opinion that the evidence favours the existence of a relationship of subordination.

[38] Submission of activity reports: There is abundant evidence documenting the fact that the worker was required to provide, and did provide, written and oral reports to the Appellant. This leads me to the conclusion that the evidence concerning this indicia warrants a determination that a relationship of subordination exists.

[39] Control over the quantity and quality of work: Based on my analysis of the evidence on this point, that evidence is neutral.

[40] Imposition of the means of performing work: The evidence shows that the worker received a manual from the Appellant in order to guide her work; she also received a product list as well as training on sales techniques, and she benefited from Mr. Barbusci's presence on site in Abitibi to help her with her work. The evidence regarding this point supports the existence of a relationship of subordination.

[41] The evidence concerning source deductions, fringe benefits, and the power of sanction with respect to the employee's performance, points to the absence of a relationship of subordination.

[42] It has been established that the worker declared that she was paid as an employee on her income tax return. The evidence obtained on this question suggests the existence of a relationship of subordination.

[43] Exclusivity of services for employer: There is a divergence between the worker's evidence and the Appellant's evidence on this point. However, Mr. Barbusci acknowledged that the worker worked 60 hours per week. It is difficult to reconcile this fact with the notion that she worked elsewhere or

could have done so. Thus, in my opinion, the evidence regarding this aspect also favours the existence of a relationship of subordination.

[44] In light of the indicia listed above, I must conclude that the degree of control in the relationship between the Appellant and the worker was such that there was, indeed, a sufficient relationship of subordination to determine that a contract of employment, not a contract of enterprise, existed.

[45] The examination of the facts in light of the *Civil Code of Québec* and of the new jurisprudence on insurability, and, in particular, the concept of an employment contract, did not support the Appellant's argument that a contract of enterprise existed.

[46] Consequently, this Court must find that the worker was employed by the Appellant in insurable employment under a contract of service within the meaning of paragraph 5(1)(*a*) of the Act, and that she therefore held insurable employment during the period in issue.

[47] In addition, the evidence pertaining to the relationship between the Appellant and the worker supports the finding that they had a contract of employment under the provisions of the *Civil Code of Québec*.

[48] Consequently, the appeal is dismissed and the decision of the Minister is confirmed.

Signed at Grand Barachois, New Brunswick, this 12th day of April 2006.

"S.J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 29th day of February 2008.

Brian McCordick, Translator

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APPEARANCES:

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