Docket: 2005-3133(EI)

BETWEEN:

ROGER MEUNIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 27, 2006, at Montréal, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Christina Ham

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 4th day of December 2006
Monica F. Chamberlain, Translator

Citation: 2006TCC203
Date: 20060412
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BETWEEN:

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Appellant,

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Respondent.

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REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] This appeal was heard in Montréal, Quebec, on February 27, 2006.

[2] The issue is the insurability of the Appellant's employment with payer EP Canada Inc., from July 23, 2003, to July 10, 2004.

[3] On May 25, 2005, the Minister of National Revenue ("the Minister") notified the Appellant of his decision that he was not employed in insurable employment.

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

> 7. (a) The payer provides payroll services to U.S. or Canadian companies that produce films in Canada.
>
> (b) The payer's offices are located at 130 Bloor Street in Toronto.

(c) The payer does not hire staff or extras, does not direct, does not supervise, has no control over the extras or workers' schedules and does not provide them training.

(d) In 2003, the Appellant was an extra in several productions, mostly American, that were filmed in Montréal.

(e) The Appellant would obtain his contracts either by registering online or through a casting agency, specifically, either Julie Breton or Cast of Thousands in Montréal.

(f) During the period in issue, the Appellant worked as an extra in the film *The Terminal*, which was filmed in Mirabel, and the film *The Aviator*, which was filmed in Montréal.

(g) The Appellant also did a few extra appearances in the films *Taking Lives, The Reagans, I Do But I Don't, Ma vie en Cinémascope* and in the program *Les Bougons*.

(h) When he was chosen, the Appellant had to report at the place and time of filming determined by the film's producer.

(i) When he worked as an extra, the Appellant had no dialogue, did not wear make-up and, with one exception, wore his own clothes.

(j) The only direction that he was given was from the production manager, who told him what to do (i.e. walk or simply stand) when the camera began to roll.

(k) At the end of his workday, the Appellant filled out an invoice (Background Voucher) stating his hours of work and had it signed by the production manager

(l) The production company faxed the sheet prepared by the Appellant to the payer, who issued the cheques on behalf of the Appellant.

(m) The Appellant received his cheque from the payer 6-8 weeks later.

(n) The Appellant's worked in accordance with a schedule that met the payer’s client's needs.

(o) The Appellant rendered services for several producers and had no expenses to incur in the performance of his duties.

[5] The Appellant admitted to the Minister's factual assumptions set out in subparagraphs 7(b) through (d), (f) through (h) and (k) through (n); he denied the assumptions set out in subparagraphs 7(a), (e), (i), (j) and (o).

[6] In his testimony, the Appellant expressed the view that the payer was the movie production company, not EP Canada Inc. In a document that forms part of his Notice of Appeal, which was produced at the hearing as Exhibit A-1, the Appellant added [TRANSLATION]: "On the T4 and TP4 slips that it sent me for the years 2003 and 2004, EP Canada Inc. stated — mistakenly, by omission or intentionally — that it was the employer."

[7] It should however be specified that this Court's mandate is to determine the insurability of the Appellant's employment with the payer, as the Appellant asked the Minister to do on March 1, 2005.

[8] The Appellant felt it important to note that he undertook other efforts to obtain contracts, such as reading newspapers and doing auditions.

[9] The Appellant submits that the Minister is mistaken when he states, at subparagraph (i), that the Appellant had no dialogue as an extra. He specified that his role sometimes required him to make background conversation and that he sometimes had to scream or sing. He also said that he needed make-up for his roles.

[10] In addition, the Appellant said that he had to wear a costume, notably in the production of *The Aviator*. In the movie *The Reagans*, he sometimes had to wear a tuxedo, and in *The Terminal*, he had to wear an Arab tunic for a scene in which he disembarked from a plane.

[11] The Appellant thought it important to add that he had learned to be a barman and a dancer for his roles as an extra.

[12] At the hearing, the Appellant said that he incurred certain work-related travel expenses. However, these expenses were only reimbursed by the payer if the shoot extended late into the evening.

[13] It was established that build or look were the only hiring criterion, but, depending on the production, the casting agency specified the requisite skill as the hiring criterion.

[14] The Appellant's testimony established that the casting agency chose extras for the production company. That company had no contact with the extras.

[15] The evidence discloses that the Appellant's hours of work were never regular. They varied greatly.

[16] If an extra was sick, he was not paid. Absences due to illness could result in the extra not getting any future assignments. [TRANSLATION] "If you are absent, they don't call you back," he said. Moreover, if the extra had to leave the set, he was not paid.

[17] The Appellant's work did not come with any fringe benefits. He had no job security and no source deductions were done.

[18] The supervision was done by the assistant production manager. He was the person to notify in the event of an absence or illness. The quality of the work done by extras was evaluated by the director.

[19] It was established that

- the payer considered the Appellant self-employed
- the payer EP Canada Inc. is only a payroll service, and is located at 130 Bloor Street in Toronto
- EP Canada Inc. provides payroll services to several film production companies
- EP Canada Inc. did not hire staff or extras, does not direct or supervise, and does not control the workers' or extras' schedules or train them
- the production company provided make-up and certain costumes to the Appellant and he also provided his own sometimes
- he was paid an hourly rate
- he recorded his hours on a "Background Voucher" time sheet which was authorized by a representative of the producer
- the production company faxed the voucher to EP Canada Inc., which issued the cheques
- shoots could last two or three days and roughly 16 hours per week
- when the worker was chosen, he was told where to go for the shoot and what time to report
- for the movie *The Terminal*, the producer organized the Appellant's trip from Montréal to Mirabel

- in most of the productions, the Appellant wore no make-up and wore his own clothing
- the Appellant sometimes waited for hours because certain scenes had to be done over several times
- the Appellant was paid $8-10 per hour for his appearances as an extra. The U.S. productions paid more than the Quebec productions.
- the Appellant's meals were sometimes provided, but this was not the case for all the productions
- the Appellant received his cheque six to eight weeks after the end of filming
- when the Appellant used the services of a casting agent, he received his paycheque, which was sent to him care of the agency, and he had to pay the agency a 15% commission
- the payer has no knowledge of the workers and has no control over what they do

[20] It should be emphasized that the evidence disclosed that no one — not the payer, and not the production company — was entitled to the Appellant's exclusive services.

[21] Appeals Officer Jacques Rousseau testified that he came to the same conclusion, that is to say, that the Appellant's employment was not insurable, even if the production company had been his employer.

[22] Thus, the issue here is the relationship between the parties, that is to say, the Appellant and the payer. Specifically, it is whether there is a contract of employment between the parties, or, to use the wording of the *Employment Insurance Act*, whether the Appellant was employed in insurable employment.

[23] It is appropriate to begin with the approach that our Court will follow in deciding this issue. The decision of the Federal Court of Appeal in *9041-6868 Québec Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2005] F.C.J. No. 1720, 2005 FCA 334, will guide me in this process. In this recent decision, Décary J.A. stated as follows:

> When the *Civil Code of Québec* came into force in 1994, followed by the enactment of the *Federal Law - Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4 by the Parliament of Canada and the addition of section 8.1 to the *Interpretation Act*, R.S.C., c. I-21 by that Act, it restored the civil law of Quebec to its rightful place in federal law, a place that the courts had sometimes had a tendency to ignore. On this point, we need only read the decision of this

> Court in *St-Hilaire v. Canada*, [2004] 4 FC 289 (FCA) and the article by Mr. Justice Pierre Archambault of the Tax Court of Canada entitled "Why Wiebe Door Services Ltd. Does Not Apply in Quebec and What Should Replace It", recently published in the *Second Collection of Studies in Tax Law (2005)* in the collection entitled *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, to see that the concept of "contract of service" in paragraph 5(1)(*a*) of the *Employment Insurance Act* must be analyzed from the perspective of the civil law of Quebec.

[24] Here is a relevant excerpt from the articles of the *Civil Code of Québec* and the sections of the *Federal Law – Civil Law Harmonization Act, No. 1* and *Interpretation Act* to which Décary J.A. referred:

Civil Code of Québec

> 1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.
>
> 1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> 1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
>
> 2085. 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.
>
> 2098. A contract of enterprise or for services is a contract 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.
>
> 2099. The contractor and the 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.

Preamble of the *Federal Law – Civil Law Harmonization Act, No. 1*

. . .

WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;

. . . .

WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;

Interpretation Act
Property and Civil Rights

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.

[25] It is also helpful to reproduce Décary J.A.'s understanding of the meaning and scope of section 8.1 of the *Interpretation Act*, as articulated in paragraph 5 of the decision cited above:

> Section 8.1 of the *Interpretation Act* came into force on June 1, 2001. It codified the principle that the private law of a province and a federal statute are complementary, which had been recognized . . . but had not always been put into practice. When that section came into force, the immediate effect was to restore the role of the civil law in matters under the jurisdiction of this Court, to bring to light how the common law might have been borrowed from, over the years, in cases where Quebec civil law applied or should have applied, and to caution us against any such borrowing in future.

[26] In carrying out the mandate that this Court has been given, we must, in the future, follow a new process, a different methodology, under a new name. In this regard, Décary J.A. stated as follows in the decision cited above:

> The expression "contract of service", which has been used in the *Employment Insurance Act* since its origin and which was the same as the expression used in article 1667 of the *Civil Code of Lower Canada*, is outdated. The *Civil Code of Québec* in fact now uses the expression "contract of employment", in article 2085, which it distinguishes from the "contract of enterprise or for services" provided for in article 2098.

[27] Quebec employment law consists of three elements: a prestation of work, remuneration, and a relationship of subordination. The element that has given rise to the most disputes is clearly the relationship of subordination.

[28] Here is how the scholar Robert P. Gagnon defines this relationship in his treatise *Le droit du travail du Québec*, 5th ed. (Yvon Blais, 2003) at pages 66-67:

> [TRANSLATION]
> 90. -- *A distinguishing factor* -- The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 *et seq*. C.C.Q. Thus, while article 2099 C.C.Q provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> 91 -- *Factual assessment* -- Subordination must ascertained from the facts. In this regard, the jurisprudence has always refused to accept the characterization of the contract by the parties . . .
>
> 92 – *Concept* -- Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his

> duties (article 1054 C.C.L.C. and article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in relation to the nature of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and set the conditions of the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way.

[29] The Appellant is asking this Court to reverse the Minister's decision and find that his employment was insurable. As is often the case, the parties have not expressed their common intention in a contract. We must therefore glean this and many other aspects of their dealings from the evidence adduced in this Court. This is the approach that we must take with the evidence that goes to the presence or absence of a relationship of subordination.

[30] 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), Fradette J. supplied a series of indicia that can assist in determining whether or not subordination is present. Here is what she wrote on this point at paragraphs 60 to 62 of her judgment:

> [TRANSLATION]
> [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 the work schedule
> - control over the employee's absences on vacations
> - submission of activity reports
> - control over the quantity and quality of work
> - imposition of the methods for performing the work
> - power to sanction the employee's performance
> - source deductions
> - benefits
> - employee status on income tax returns
> - exclusivity of services for employer

[31] Training courses can be added to this list. The payer provided no such courses. By contrast, the Appellant took bartending and dancing lessons without any contribution from the payer.

[32] Dussault J., of this Court, considered an issue similar to the issue in the instant case in *Lévesque v. Canada*, [2005] T.C.J. No. 183, and, after listing the indicia recognized by Fradette J. in *Seitz*, *supra*, he stated the following:

> [26] However, I do not consider that our analysis must stop simply because there are a number of factors that support the conclusion that a relationship of subordination exists. The exercise consists, according to the distinction established in the C.C.Q., of identifying the overall relationship between the parties. The object is thus to establish the proportion in which the factors that support the conclusion that a relationship of subordination exists predominate over the others.

[33] Upon examining the overall relationship between the parties in light of the indicia of control set out above, it is difficult to imagine that the Appellant and the payer had an employer-employee relationship. It is settled that the payer considered the Appellant, and all other extras, self-employed.

[34] No evidence was tendered before this Court on the employee status in his income tax returns.

[35] As for all the other indicia of control, they do not support the Appellant's position. In fact, the Appellant admitted that if the notion of control was present at all, it was not exercised by the payer, but by the production company's managers.

[36] The burden was on the Appellant to prove that the Minister's presumptions of fact were wrong. As far as most of those presumptions are concerned, he did not succeed.

[37] An examination of the facts in light of the *Civil Code of Québec* and the new cases concerning insurability, and, more specifically, the concept of contract of employment, did not support the Appellant's submission that the employment was insurable or that there was an contract of employment with the payer.

[38] Consequently, this Court must find that the Appellant was not employed in insurable employment with the payer under the terms of a contract of service within the meaning of paragraph 5(1)(*a*) of the Act and that he therefore did not hold insurable employment during the period in issue.

[39] In addition, the evidence going to the relationship between the Appellant and the payer does not support a finding that a contract of employment existed between them based on the provisions of the *Civil Code of Québec*.

[40] Accordingly, the appeal is dismissed and the Minister's decision 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 4th day of December 2006
Monica F. Chamberlain, Translator

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APPEARANCES:

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For the Respondent:	Christina Ham

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