Citation: 2005TCC703
Date: 20051104
Docket: 2005-816(EI)

BETWEEN:

DONALD DOYON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

(Decision rendered orally from the bench on August 29, 2005 at Québec, Quebec, and revised on November 4, 2005 at Ottawa, Ontario.)

Dussault J.

[1] This is an appeal by the Respondent for a decision by which Mr. Donald Doyon was engaged in insurable employment for Fonderie St-Romuald Inc. ("Fonderie") during the period from Janurary 1 to December 31, 2003.

[2] I shall attempt to summarize the most important elements. I will start by telling you that I decided to allow the appeal, mainly for the reasons highlighted by Mr. Poulin, counsel for the Appellant. I shall give you the most important elements that I retained, although I am in complete agreement with his arguments.

[3] We are dealing with a very particular situation in which the Appellant, Mr. Doyon, has been a consultant for the client, Fonderie, for several years. His testimony indicates that his business relationship was longstanding. A business relationship which he had decided to establish with Fonderie in the capacity of consultant.

[4] The situation gets complicated when we get into decisions made within Fonderie due to the fact that Mr. Doyon is also a 40% shareholder, thus an important shareholder. Moreover, he is also one of the two directors of this company.

[5] It is acknowledged that Mr. Doyon was a consultant in business turnaround and development for the company and that his relations with Fonderie are longstanding and that the agreement dates from the year 2000 – which is uncontested, in this respect, according to his testimony – when it was agreed that he would bill on an hourly basis, but within certain parameters, i.e. up to a maximum of $8,000 per month and $90,000 yearly. The billing included taxes and was done through his own company.

[6] The evidence established that he had a free work schedule. That he could work at the client's establishment, i.e. at Fonderie, at home or in the field. And that he also had other clients for whom he could work on site or at home.

[7] What is striking is that the relationship is acknowledged by the Respondent up until 2002, and that a sudden change is observed in 2003.

[8] Mr. Doyon has testified that he had had use of a car up until that point. That his clients reimbursed his expenses, whether it be Fonderie or his other clients. But specifically with regard to Fonderie, he had use of a car and a corporate credit card. This could be for a number of reasons, and, in my opinion, the issuance of a T-4 concerning a benefit in 2003 is not a determining factor with regard to his status. In other words, it cannot be deduced, simply from that, that he is automatically an employee.

[9] Moreover, it is known that Mr. Doyon receives no benefits, unlike the other employees, at least the office employees, concerning which documentation has been presented as evidence.

[10] In 2003, particular circumstances arise, to wit, the illness and departure of the production manager. Mr. Doyon says (and I have no reason to doubt his testimony) that he accepted to devote more time to his business – without being compensated for this work in any special or specific way – which he indeed indicated as being solely that of planning and production. The Appellant says that he acted as shareholder, since the company was in a difficult financial situation. He did it as a shareholder, but also as a consultant, since he did not want to lose this

client. As he says himself, he also did it for reasons of credibility, vis-à-vis his other clients of course.

[11] I would like to refer to a certain number of decisions to which I have previously referred regarding certain elements that appear to be important. For example, in *Pellerin v. Canada*, [2005] T.C.J. No. 281 (QL), which presented particular circumstances, I said at paragraph 28, page 6 after having cited articles 2085, 2098 and 2099 of the *Civil Code of Québec*:

> ¶ 28 As may be seen, the decisive element of a contract of employment or of service is a relationship of subordination, which is non-existent in the case of a contract of enterprise or for services. The Federal Court of Appeal recalled in *Gallant v. M.N.R.*, F.C.A., No. A-1421-84, May 22, 1986, [1986] F.C.J. No. 330 (Q.L.), that "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."

[12] What follows also seems important, since the business relationship between Mr. Doyon and Fonderie has existed for several years. At paragraph 29, I said:

> ¶ 29 The importance that should be attached to the parties' intentions must also be emphasized. In *Wolf v. Canada*, [2002] 4 F.C. 396, [2002] F.C.J. No. 375 (Q.L.), Décary J.A. wrote as follows at paragraphs 119 and 120 of his decision:
>
> [119] Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. …
>
> [120] ¶ 120 In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.

[13] I continue at paragraph 30 of the same decision in, *Pellerin*:

> ¶ 30 However, in *D & J Driveway Inc. v. Canada*, F.C.A., No. A-512-02, November 27, 2003, 322 N.R. 381, [2003] F.C.J. No. 1784 (Q.L.), Létourneau J.A. of the Federal Court of Appeal held that it is not because a work provider can monitor the result of the work that there necessarily exists an employer-employee relationship. On this point, he wrote as follows at paragraph 9 of the judgment:
>
> 9 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.

[14] I find that in this case, there is no serious indication that there was a control on the worker. That there was a control on the result in the case of Mr. Doyon, who has been consultant for the company for years, I have no doubts. This control was exercised by the board of directors on which he sits.

[15] As far as I am concerned, it all stops there, and this most important criterion is absent, in my opinion. Mr. Doyon was not controlled in the performance of his duties, which was the mandate that he had given himself for the company.

[16] The Respondent acknowledges that for the previous years, it was a relationship based on a contract of enterprise or for services. I see no significant difference arising in 2003, whereby the relationship is alleged to have been modified to become one of employer-employee.

[17] That is, broadly speaking, the way I see things. One could cite other decisions as did Mr. Poulin, in *Vulcain Alarme Inc. v. Minister of National Revenue*, [2000] 1 C.T.C. 48, among others. I believe, however that I’ve given you my essential thoughts. In my opinion, the situation is straightforward.

[18] The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed and the decision of December 10, 2004 by the Minister of National Revenue is vacated.

Signed at Ottawa, Canada, this 4th day of November 2005.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 16th day of August 2006.
Gibson Boyd, Translator

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