Docket: 2006-1441(EI)

BETWEEN:

ROGER TURCOTTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

RÉNOVATIONS MÉTROPOLITAINES (QUÉBEC) LTÉE,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 22, 2006, at Montréal, Quebec
Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Chantal Roberge
Counsel for the Intervener:	Camille Bolté

JUDGMENT

The appeal is allowed and the Minister's decision is vacated in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 14th day of December 2006.

"S.J. Savoie"

Savoie D.J

Translation certified true
on this 20th day of July 2007.

Brian McCordick, Translator

Citation: 2006TCC637
Date: 20061214
Docket: 2006-1441(EI)

BETWEEN:

ROGER TURCOTTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

RÉNOVATIONS MÉTROPOLITAINES (QUÉBEC) LTÉE,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Savoie D.J.

[1] This appeal was heard at Montréal, Quebec, on September 22, 2006.

[2] The issue is the insurability of the employment of Roger Turcotte ("the Appellant") while he was working for Rénovations Métropolitaines (Québec) Ltée ("the Payor") from September 15, 2003, to February 14, 2004 ("the period in issue").

[3] On February 28, 2006, the Minister of National Revenue ("the Minister") notified the Appellant of his decision that the Appellant was not employed in insurable employment.

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

[TRANSLATION]

(a) The Payor, which incorporated on August 16, 1979, operated a building cleaning and renovation business. (no knowledge)

(b) The Payor's sole shareholder was Nagui Labbad. (no knowledge)

(c) The Appellant was hired to sell the Payor's renovation products and services. (admitted)

(d) The Appellant provided services to the Payor under an oral agreement. (denied)

(e) The Appellant had to meet the Payor's customers and try to get them to sign an agreement covering materials and labour or simply labour. (admitted)

(f) Upon being hired, the Appellant received 10 days of training for which he was not paid. (admitted)

(g) The Appellant went to see the customers designated by the Payor but had all the desired freedom to find new customers in the region served by the Payor. (no knowledge)

(h) The Appellant could be replaced in the performance of his services for the Payor. (denied)

(i) The Payor did not monitor the times at which the Appellant arrived at work and left work. (admitted with additional details)

(j) The Appellant was free to set his work schedule and deal with customers as he saw fit. (admitted with additional details)

(k) The Appellant used his car for his work and had to pay all the related expenses. (admitted with additional details)

(l) On March 4, 2004, the Payor issued a Record of Employment to the Appellant stating that his first day of work was October 27, 2003, and that his last day of work was January 23, 2004. (admitted)

(m) The Payor made source deductions on the Appellant's behalf. (admitted)

(n) On February 3, 2004, the Appellant confirmed to the Payor, in writing, that he agreed that he was self-employed. (admitted)

[5] The Appellant proved that he could not be replaced while he was working for the Payor. His testimony in this regard was confirmed by Jean-Guy O'Connor and Céline Rouleau, who were also workers.

[6] The Appellant, who was seeking employment at the time, said that he applied for a job in response to a newspaper advertisement. The Payor was looking for a representative in the construction field. The Payor invited the Appellant to join a group of salespeople to take a training course. The training, which lasted two weeks, began on September 15, 2003, and was offered by the Payor. The purpose of the training was to tell the new candidates about the philosophy of the business and teach them sales techniques. Despite what the Appellant says was a difficult period, the Payor hired him to sell its products.

[7] This situation lasted until January 2004. At that time, the situation changed. The Appellant has shown that the Payor did everything possible to persuade him to carry out his sales duties as a self-employed worker from then onward. The Appellant initially resisted this request. According to the Appellant, the Payor later became insistent, and the Appellant gave in to the request, as confirmed in Exhibit A-9, a letter dated February 3, 2004.

[8] The evidence adduced by the Appellant discloses that his working conditions did not change at all after February 3, 2004: he was treated as an employee and was subject to the same rules imposed by the Payor.

[9] During his training, the Appellant received a document which, in his view, summarizes the instruction that he received with regard to the work method that was to be followed in order to make a sale. The document is entitled [TRANSLATION] "The 25 Rules of Engagement". Intended for salespeople, the document seeks to describe the different steps involved in presenting a product to a customer. The guide was distributed to the Appellant and to the Payor's other workers. It explains the steps that a salesperson must go through with the customer in order to make a sale. The document was produced as Exhibit A-6. It also describes a salesperson's typical day with the Payor and the procedure to follow after making a sale.

[10] The salespersons did not have permission to make appointments with customers. It was the Payor who looked after that. The evidence discloses that the Appellant and the other workers were strictly forbidden from offering their services to other employers.

[11] The Appellant showed that the salespersons had to attend training groups regularly. Attendance was checked. The salespersons could not contact customers to change appointments. The Payor's office looked after that.

[12] The Appellant worked under the close supervision of Elias Lazarikis, a co-owner of the business. Immediately after a meeting with a designated customer, the salespersons had to report to the supervisor regardless of the time of day and whether or not a sale was made.

[13] It has been shown that the Appellant and the other salespersons received training in "pressure sales" tactics. This sales method is described in the documents tendered at the hearing as Exhibits A-5 and A-6.

[14] Based on the workers' testimony, the training sessions, led by Mr. Lazarikis, taught the workers how to sell a product under pressure. The workers were blamed if no sale was made. The evidence disclosed that the training sessions were structured and intense, and that the tension was palpable. The workers described Mr. Lazarikis as a merciless supervisor who was so domineering that some participants cried.

[15] The issue in the instant case is whether the Appellant held insurable employment for the purposes of the *Employment Insurance Act* (the "Act"). The relevant provision is paragraph 5(1)(*a*) of the Act, which states as follows:

> 5. (1) Subject to subsection (2), insurable employment is
>
> (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> [Emphasis added.]

[16] The section quoted above defines the term "insurable employment". That term means employment under a contract of service, i.e. a contract of employment. However, the Act does not define what constitutes such a contract.

[17] A contract of service is a civil law concept found in the *Civil Code of Québec*. The nature of the contract in issue must be ascertained by reference to the relevant provisions of the Code.

[18] In a publication entitled [TRANSLATION] "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It", published in the fourth quarter of 2005 by the Association de planification fiscale et financière (APFF) and the Department of Justice Canada in the *Second Collection of Studies in Tax Law* as part of a series called *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Justice Pierre Archambault of this Court, referring to all periods subsequent to May 30, 2001, describes the steps that courts must go through, since the coming into force on June 1, 2001, of section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended, when confronted with a dispute such as the one before us. Here is what Parliament declared in this provision:

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.
>
> [Emphasis added.]

[19] It is useful to reproduce the relevant provisions of the *Civil Code*, which will serve to determine whether an employment contract, as distinguished from a contract of enterprise, exists:

> Contract of employment
>
> **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.
>
> **2086.** A contract of employment is for a fixed term or an indeterminate term.
>
> . . .

> Contract of enterprise or for services
>
> **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 or 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.
>
> [Emphasis added.]

[20] The provisions of the *Civil Code of Québec* reproduced above establish three essential conditions for the existence of an employment contract:

> (1) the worker's prestation in the form of work; (2) remuneration by the employer for this work; and (3) a relationship of subordination. The significant distinction between a contract for service and a contract of employment is the existence of a relationship of subordination, meaning that the employer has the power of direction or control over the worker.

[21] Legal scholars have reflected on the concept of "power of direction or control" and, from the reverse perspective, a relationship of subordination. Here is what Robert P. Gagnon wrote in *Le droit du travail du Québec*, 5th ed. (Cowansville, Qc.: Yvon Blais, 2003):

> [TRANSLATION]
>
> (c) Subordination
>
> > 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
>
> . . .
>
> 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.; 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 terms 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 monitor 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.
>
> [Emphasis added.]

[22] It must be specified that what characterizes a contract of employment is not the fact that the employer actually exercised direction or control, but the fact that the employer had the power to do so. In *Gallant v. M.N.R.*, A-1421-84, May 22, 1986, [1986] F.C.J. No. 330 (Q.L.), Pratte J. of the Federal Court of Appeal stated:

> . . . 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.
>
> . . .

[23] This Court's task, as it determines the type of contract, under Quebec law, which applies to the parties, is to consider and follow the approach adopted by Justice Archambault of this Court in the above cited publication, whose theme he referred to in *Vaillancourt v. Minister of National Revenue)*, No. 2003-4188(EI), June 27, 2005, 2005 TCC 328, [2005] T.C.J. No. 685, where he wrote as follows:

> 15 In my opinion, the rules governing the contract of employment in Quebec law are not identical to those in common law and as a result, it is not appropriate to apply common law decisions such as *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (F.C.A.) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59. In Quebec, a court has no other choice but to decide whether a relationship of subordination exists or not to decide whether a contract is a contract of employment or a contract for service.
>
> 16 The approach to take is the one adopted by, among others, Létourneau J. of the Federal Court of Appeal, who, in *D & J Driveway Inc. v. Canada*, (2003), 322 N.R. 381, 2003 FCA 453, found that there was no contract of employment by using the provisions of the Civil Code as a basis and, in particular, by noting the absence of a relationship of subordination, a relationship that "is the essential feature of the contract of employment."

[24] In the case at bar, is there a relationship of subordination between the Payor and the Appellant that would enable us to conclude that a contract of employment exists? In carrying out the mandate given to this Court, I have found the reasoning of this Court's Justice Dussault in *Lévesque v. Minister of National Revenue*, No. 2004-4444(EI), April 18, 2005, 2005 TCC 248, [2005] T.C.J. No. 183, helpful:

> 24 Furthermore, in *D & J Driveway Inc. v. Canada*, F.C.A., No. A-512-02, November 27, 2003 N.R. 381, [2003] F.C.J. No. 1784 (Q.L.), Létourneau J. of the Federal Court of Appeal stated that an employer/employee relationship is not necessarily present just because a payer can control the result of the work. Létourneau J. formulated his reasons as follows at paragraph 9 of the decision:
>
> > 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.

25 . . . Several factors can be considered in order to detect the presence or absence of a relationship of subordination. In her decision in *Seitz v. Entraide populaire de Lanaudière inc.*, Court of Quebec (Civil Chamber), No. 705-22-002935-003, November 16, 2001, [2001] J.Q. No. 7635 (Q.L.), Monique Fradette J. of the Court of Québec set out a series of factors on the basis of which it could be determined whether a relationship of subordination existed or not. She expressed herself on this point in paragraphs 60 to 62 of the decision:

> 60 The caselaw requires, in order for there to be a contract of service, the existence of a right of supervision and immediate direction. The mere fact that a person gives general instructions about the way in which the work is to be performed, or that he reserves the right to inspect and supervise the work, is not sufficient to convert the agreement into a contract of employment.
>
> 61 A series of factors developed by the caselaw allows the Court to determine whether or not a relationship of subordination exists between the parties.
>
> 62 The indicators of control [include]:
>
> - obligatory presence at a place of work
> - compliance with the work schedule
> - control of the absences of the employee for vacations
> - the submission of activity reports
> - control of the quantity and quality of work
> - the imposition of ways in which the work is to be performed
> - the power of sanction over the employee's performance
> - source deductions
> - benefits
> - [employee status on income tax returns]
> - the exclusive nature of services for the employer

[25] Most of the indicia of control listed above can be found in the case at bar. It should be specified, however, that the Appellant did not have vacations or benefits beyond what was ensured by the source deductions made by the Payor.

[26] At the hearing, the Intervener testified in support of the Minister's position on the relationship between the Intervener and the Appellant. The witnesses claimed that the Appellant and the other workers had no schedule to comply with, that they were free to attend the training sessions, and that they could offer their services to other employers — in short, that they were self-employed. However, the preponderance of the evidence supports the Appellant's submission that they were in an employer-employee relationship with the Payor.

[27] It is helpful to list a few of the facts established by the evidence of the Appellant and his witnesses. The following facts, in particular, should be noted:

1. There was mandatory training for salespersons.
2. Attendance was taken at training sessions.
3. Attendance by salespersons at the additional afternoon training and motivation meetings was mandatory.
4. Salespersons were required to submit sales reports.
5. Reports had to be prepared in accordance with the Payor's 25 rules.
6. It was absolutely forbidden to work for other payors.
7. The Payor chose which customer would be met and when.
8. Customers chosen by the Payor had to be accepted.
9. Salespersons were forbidden from selecting a replacement.
10. The Payor had absolute control over the way the commissions were paid as well as the amount allocated to the sale and the time at which they were payable.

[28] In his testimony for the Appellant, Jean-Guy O'Connor sought to show how much control the Payor had over the workers. He said that the Payor penalized him because he was absent from work in order to visit his son in the hospital.

[29] The Court noted that the Intervener, in presenting its evidence in support of the Minister, tried to denigrate the Appellant and cast doubt on his oral evidence and on the detailed reports that he prepared. Despite these efforts, the Payor's evidence was contradictory and implausible in many respects. In particular, Mr. Lazarikis's testimony contributed nothing to the debate that was capable of supporting the Intervener and Respondent's cause. His testimony was vague, confused, nebulous, contradictory, and consequently disputable and dubious. It validated the Appellant's assertion that he was disdainful toward the workers and that they were not self-employed. Mr. Lazarakis even said as much at the hearing.

By contrast, the Appellant's evidence was clear and precise and was well presented and written. In my opinion, it is genuine and credible.

[30] The evidence also disclosed that the Appellant worked under the control and direction of the Payor, who managed his workers at every step of their jobs. This control was exercised over the result of the work, but could also be seen in the method that the Appellant used and in the performance of his duties. The Appellant's remuneration was fixed by the Payor and was not negotiable.

[31] The Appellant proved that the Payor enjoyed his services on an exclusive basis and gave him a list of customers that he was required to solicit.

[32] It is important to note that despite the Appellant's experience in the sales field, he received two weeks of training. The Payor gave the Appellant and the other salespersons regular training sessions.

[33] The fact that a salesperson is remunerated by means of a commission on sales does not prevent the work from being done under a contract of service contemplated in paragraph 5(1)(*a*) of the Act. Thus, if the Appellant's job meets the requirements of article 2085 of the *Civil Code of Québec*, it will be considered to have been done under a contract of employment, regardless of the method of remuneration.

[34] The Court is of the opinion that the evidence heard at the hearing, and the documents adduced, unequivocally establish the relationship of subordination between the Appellant and the Payor. The training given by the Payor, and the instructions and guidelines in the various documents tendered as Exhibits A-3, A-4, A-5 and A-6, are sufficient proof of this.

[35] In addition, the Appellant's T4 forms for the years 2003 and 2004, which were produced at the hearing as Exhibit A-7, confirm the Payor's acknowledgement that the Appellant was his employee during the period in issue. It should be specified that the arguments made by the Payor with a view to reducing the significance and relevance of the forms were unpersuasive. The Court is of the same view with respect to the significance and relevance of Exhibit A-10, the Record of Employment which the Payor issued to the Appellant.

[36] It is also important to note that the following documents, which were tendered at the hearing, also support the Appellant's submissions:

1. Exhibits A-3 and A-4 are forms prepared by the Payor for the use of workers, who entered the customer information and the terms and conditions of the sale.

2. Exhibit A-5 is a form provided to the Appellant and the other workers. The forms were to be used to write their sales reports in accordance with the 25 rules of engagement.

3. Exhibit A-6, described above, lists the 25 rules of engagement, sets out a typical salesperson's day, and discusses the procedure to be followed after every sale.

4. Exhibit A-7 discloses the nature of the Appellant's working relationship with the Payor. It is the T4 form which the Payor remitted to the Appellant, Revenue Canada and Revenu Québec for the years 2003 and 2004.

5. Exhibit A-10 is the Appellant's Record of Employment, prepared by the Payor for the period in issue. The document also shows the employer-employee relationship between the Payor and the Appellant.

The onus was on the Appellant to prove that the Minister's assumptions of fact were wrong, and in my opinion, he has discharged this duty.

[37] The facts obtained at the hearing clearly established the three essential conditions of the existence of a contract of employment: the prestation of work by the employee, remuneration for this work by the employer, and a relationship of subordination.

[38] The Federal Court of Appeal articulated the principles that must be applied in resolving the problem before the Court in *Légaré v. Minister of National Revenue*, A-392-98, May 28, 1999, [1999] F.C.J. No. 878. The following is an excerpt from that case:

> The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister

> and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must 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, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[39] Given the evidence that has been obtained, the Court must conclude that the facts inferred or relied on by the Minister are not real and were not correctly assessed having regard to the context in which they occurred. Based on the evidence adduced at the hearing, the conclusion with which the Minister was "satisfied" no longer seems reasonable.

[40] Consequently, the appeal is allowed and the Minister's decision is vacated.

Signed at Grand-Barachois, New Brunswick, this 14th day of December 2006.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 20th day of July 2007.

Brian McCordick, Translator

CITATION:	2006TCC637
COURT FILE NO.:	2006-1441(EI)
STYLE OF CAUSE:	ROGER TURCOTTE AND M.N.R. AND RÉNOVATIONS MÉTROPOLITAINES (QUÉBEC) LTÉE
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 22, 2006
REASONS FOR JUDGMENT BY:	The Honourable Deputy Judge S.J. Savoie
DATE OF JUDGMENT:	December 14, 2006

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Chantal Roberge
Counsel for the Intervener:	Camille Bolté

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada