Docket: 2004-4356(EI)

BETWEEN:

JEAN-CLAUDE LANDRY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Raoul Lévesque (2004-4359(EI))
on March 24, 2005, at Bathurst, New Brunswick

Before: The Honourable Justice François Angers

Appearances:

Agent for the Appellant:	Roland Couturier
Counsel for the Respondent:	Stéphanie Côté

JUDGMENT

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

Signed at Ottawa, Canada, this 18th day of May 2005.

"François Angers"

Angers J.

Translation certified true
on this 11th day of March 2009.

Brian McCordick, Translator

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Citation: 2005TCC347
Date: 20050518
Dockets: 2004-4356(EI)
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BETWEEN:

JEAN-CLAUDE LANDRY,
RAOUL LÉVESQUE,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] These two appeals, heard on common evidence, are from a determination made by the Minister of National Revenue ("the Minister") on October 19, 2004 in the case of Jean-Claude Landry and on October 1, 2004 in the case of Raoul Lévesque. The Minister determined that they did not hold insurable employment within the meaning of the *Employment Insurance Act* ("the *Act*") during the period from August 25, 2003 to March 12, 2004 in the case of the Appellant Jean-Claude Landry, and from August 25 to November 7, 2003 in the case of the Appellant Raoul Lévesque. Both were associated with Yves Lévesque ("the Payor"), who carried on business under the name "Les Entreprises Yves Lévesque".

[2] The work performed by the Appellants was not the same except that both were forestry workers who owned logging machinery and equipment which they leased to the Payor in addition to providing their services. The Payor operates a forestry business which does logging on his own lands and on Crown lands and sells the wood to sawmills in the region.

Jean-Claude Landry

[3] The Appellant Jean-Claude Landry purchased a truck with a trailer on August 1, 2003, at a total cost of $89,700. He purchased this truck from the Payor for the purpose of transporting logs from the logging sites to the sawmills. After making this purchase, he leased this truck to the Payor on August 25, 2003 for the duration of the period in issue. In this contract of lease, the mode of payment was described as being weekly according to tonnage. In addition to the truck, the contract of lease covered tools, a welding machine and a compressor as well as office space in the Appellant's personal residence. The Appellant was also responsible for maintaining the truck and keeping it in good working order.

[4] Also under this contract, the Appellant was to provide liability insurance and put his machinery at the disposal of the Payor. The contract stipulated that the employer had to ensure that the operators were covered by the Commission de la santé et de la sécurité du travail (CSST), but did not identify the employer. The contract also contained a description of the terms and conditions found in the insurance policy Coverage Bulletin No. 97-1 for owner-operators of forestry machinery, but provided no particulars.

[5] On that date as well, the Appellant Jean-Claude Landry signed a contract of employment with the Payor for the duration of the period in issue. He was hired as a truck driver at a gross salary of $750 per week. The contract stipulated that in case of mechanical breakdown the Appellant was to do other work if the Payor had some to be done while the vehicle was being repaired. The terms and conditions set out in the above-mentioned Coverage Bulletin were reproduced in the contract, but without further particulars.

[6] The Appellant thus used his truck to carry logs from the logging sites to the sawmills. He paid all expenses related to this work. He was paid at a rate per ton according to the distance travelled, the species of trees to be transported and the schedule established by the Payor. The amount owed the Appellant each week was divided between two cheques. One represented his pay of $750 less an employee's payroll deductions. The second represented a net amount after deduction by the Payor of the Appellant's salary, the cost of fuel supplied to the Appellant, the Payor's share for employment insurance and Canada Pension Plan contributions and the amount of any other expense incurred by the Payor on the Appellant's account.

[7] The Appellant's remuneration, as entered in the payroll register and on the record of employment prepared by the Payor, was calculated on the basis of 50 hours per week without counting the number of hours actually worked. In fact, the Appellant's work was closely linked to the use of his truck.

[8] The truck was insured by the Appellant and he was the designated driver for that purpose. If another driver had driven his truck, he would have had to inform the insurer. Furthermore, the other driver's wages would have been paid out of the receipts derived from the operation of the truck.

[9] The invoicing prepared by the Appellant was based on the information supplied by the Payor. It can be noted therein that all of the expenses related to the Appellant's salary, the costs of operating the truck and the employer's share of the employment insurance and Canada Pension Plan contributions were deducted. Furthermore, the Appellant's income tax return for the period in question and, in particular, the Statement of Business Activities, indicates clearly that this was a business in which the expenses associated with such operation, and not simply the leasing income, were reported.

Raoul Lévesque

[10] The Appellant Raoul Lévesque is the owner of a skidder worth approximately $7,000. He was hired by the Payor as a driver. The agreement provided that the Appellant was to supply the skidder and pay all of the operating expenses himself, including the costs of transporting the skidder to the place where the work was being done. The Appellant worked as a team with a logger and he was the one who took the steps to find one. The Appellant himself repaired the skidder, and when it was not working he was not paid by the Payor.

[11] The Appellant was given instructions by the Payor as to where he was to cut. A foreman visited him three or four times a week to check his work. He received $1,200 per week for the use of the skidder, or $250 per day from Monday to Thursday and $200 on Friday. He also received a weekly salary of $750 to drive the skidder, calculated on the basis of 50 hours of work per week. During the period in issue, he was the only one who used the skidder.

[12] These agreements were all oral and it was only after the period in question that the Appellant and the Payor signed written contracts of lease and employment. The written contracts filed by the Appellant are identical to those signed by the Appellant Jean-Claude Landry except that neither the cost of the lease nor the Appellant's salary are indicated. Moreover, the Payor leased a truck, an automobile, a garage and office space in the Appellant's personal residence. The Appellant also filed in evidence a document identified as a mechanical equipment (i.e. skidder) lease signed on August 25, 2003 by the Appellant and the Payor for a duration of one day and renewable

automatically from day to day failing notice to the contrary by one of the parties. No explanation was provided at the hearing on the reason for this lease in relation to the oral and written agreements entered into after the period in question.

The law

[13] The issue in both cases is whether the Appellants held insurable employment with the Payor within the meaning of paragraph 5(1)(*a*) of the *Act* during the periods in question. In *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553, the Federal Court of Appeal provided a useful guide for distinguishing a contract of service from a contract for services. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada approved this guide and summarized the state of the law as follows:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[14] In *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (Q.L.), Marceau J.A. of the Federal Court of Appeal reminds us that the factors in question are guidelines which it is generally 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.

[15] In a recent decision, the Federal Court of Appeal explained once more the legal principles governing the issue of insurability of employment. In *Livreur Plus*

Inc. v. Canada, [2004] F.C.J. No. 267, Létourneau J.A. summarized these principles as follows at paragraphs 18 and 19 of his judgment:

> In these circumstances, the tests mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025, namely the degree of control, ownership of the work tools, the chance of profit and risk of loss, and finally integration, are only points of reference: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)* (1996), 207 N.R. 299, paragraph 3. Where a real contract exists, the Court must determine whether there is between the parties a relationship of subordination which is characteristic of a contract of employment, or whether there is instead a degree of independence which indicates a contract of enterprise: ibid.
>
> Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D & J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, *supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394 (CanLII), 2002 FCA 394, "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."

[16] Recently, Létourneau J.A. went over all these principles again in *Tremblay v. Canada*, [2004] F.C.J. 802, in which he had to address issues similar to those in the case at bar, and in particular the application of Coverage Bulletin 97-1. He gives the following very clear summary of the bulletin's purpose:

> The purpose of that Bulletin is to clarify Revenue Canada's policy on workers in the forestry industry who, in addition to providing services to a contractor, lease their heavy machinery to the same contractor. The purpose is to facilitate determining the insurability of the employment and lessen the requests for rulings on insurability sent to Revenue Canada with regard to such workers.
>
> 17 In a word, the Bulletin, which I set out below, enables an operator-owner of heavy machinery to conclude two separate contracts with a contractor: a contract to rent the machinery and a contract of employment, which the Bulletin calls a contract of service. In principle, the separate agreements must be in writing

> although verbal agreements are also accepted, but applications based on verbal agreements are subject to special review by Revenue Canada: see also the addendum to Coverage Bulletin No. 97-1 on insurance policy, which confirms this. The rental contract and the employment contract must comply with strict conditions, otherwise the employment insurability application will be denied:

[17] And he adds, later:

> 19 In rental contracts the Coverage Bulletin properly requires that certain clauses in the contract should indicate that lessee takes control of the machinery for the duration of the agreement. The contract of employment must be separate from the rental contract. Additionally, the services of the operator-owner must not be directly and exclusively linked to the operation of the machinery and the employer must be responsible for damages or injuries caused by the operator as part of his or her duties.

[18] Clearly, the appellant and the payor, by their way of doing things, agreed to sign these contracts for the purpose of fulfilling the requisite conditions to enable the appellant to qualify for employment insurance benefits in accordance with Coverage Bulletin 97-1. The purpose of this bulletin is to facilitate the determination of the insurability of an employment and, as Létourneau J.A. says in *Tremblay*, *supra*, it is relevant in analysing the parties' intentions as to their contractual and business relationships.

Analysis

[19] In the case of the Appellant Jean-Claude Landry, we find two contracts: a contract of lease and a contract of employment. It is clear from the evidence adduced, however, that these are not two distinct contracts. The contract of employment depended entirely on the contract of lease in the sense that, if the truck was not working, there was no income to pay the Appellant's salary. In fact, not only did the Appellant's salary depend on it, but so also did all the employment-related expenses for which the employer is normally responsible. The lease revenues were used to pay for everything, so we are far from the norm that is found in a contract of service, in which the employee's compensation depends on the employer's revenues.

[20] The evidence also discloses that the Appellant's time was not accounted for by him or by the Payor. Although the contract provided for a work week of 50 hours, the Appellant was paid according to the tonnage rate, provided there was wood to transport to the sawmills.

[21] The terms and conditions of the contract of lease provide that the Appellant was responsible for all expenses related to his truck, so he assumed the possible risks of loss. The Appellant was responsible for the maintenance, repair and operating costs of the truck and for the liability insurance. In the insurance contract, the Appellant is designated as the driver. To enable another driver to drive the truck, the Appellant would have had to inform the insurer, just as he had to inform the insurer that the truck was leased, so that the Payor's liability would be covered as well. In this case the Appellant remained in control of his truck, therefore, and was the only one responsible as the driver. In my opinion, this is a contract consistent with that of a contractor who supplies his labour and the tools needed to perform the work and who assumes the risks of loss and the chances of profit in return for a tonnage rate, less all the operating costs, including those of the Payor. So it is neither a genuine contract of lease nor a genuine contract of service.

[22] Why did the Payor have to lease office space in the Appellant's residence? I am unable to conclude from the evidence as a whole that there exists a true contract of service here. Even if under Coverage Bulletin 97 an owner-operator of forestry machinery may hold insurable employment, the Appellant still has to prove that he meets the conditions set out in this Bulletin. In the instant case it is clear that the Appellant's duties were performed in the context of operating his own business and that his income was directly related to the use of his truck. In my opinion, there was no contract of service between the Appellant and the Payor during the period in question. The appeal is therefore dismissed.

[23] In the case of the Appellant Raoul Lévesque, he tried to define his agreements with the Payor by producing contracts drawn up and signed after the period in issue. It is therefore necessary to disregard these contracts and rely solely on the facts establishing their relationship according to the evidence heard. The Payor is the one who told the Appellant where he was to perform his work. The Appellant was visited by a foreman three or four times a week to verify his work, so this had more to do with control over the result and quality of the work than control of its performance, using the test laid down in *Jaillet v. Canada*, [2002] F.C.J. No. 1454. Because the contracts were signed after the period in question, the evidence did not disclose the existence of a lease agreement for the skidder and, even if there was a valid contract of lease, the Appellant was the only one authorized to drive and operate the machine.

[24] The Appellant owned his skidder. He paid his transportation costs and was responsible for all expenses. This situation is clearly more consistent with a contract for services. In fact, he assumed the chances of profit and the risks of loss associated

with the operation of the skidder. Furthermore, the Appellant reported a business loss of $7,128 in 2003. This proves that the Appellant is a self-employed worker.

[25] The Appellant's duties were performed in the context of his business since these duties and his income are directly tied to the operation of his skidder. In this case, therefore, there was no contract of service during the period in question. For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 18th day of May 2005.

"François Angers"

Angers J.

Translation certified true
on this 11th day of March 2009.

Brian McCordick, Translator

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APPEARANCES:

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