Docket: 2001-3288(EI)

BETWEEN:

JEAN-RENÉ LANDRY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 30, 2003, at Québec, Quebec

Before: The Honourable Deputy Judge J.F. Somers

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

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

Signed at Ottawa, Canada, this 10th day of June 2003.

"J.F. Somers"

D.J.T.C.C.

Translation certified true
on this 3rd day of February 2004.

John March, Translator

Citation: 2003TCC178
Date: 20030610
Docket: 2001-3288(EI)

BETWEEN:

JEAN-RENÉ LANDRY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] This appeal was heard at Québec, Quebec, on January 30, 2003.

[2] On March 16, 2001, the appellant applied to the Minister of National Revenue (the "Minister") for a ruling on the question as to whether he had held insurable employment within the meaning of the *Employment Insurance Act* (the "*Act*") when in the service of the payer, Les Entreprises Forestières Etchemin Ltée, during the periods in issue, from September 28 to November 27, 1998, and from May 8 to October 20, 2000.

[3] On June 29, 2001, the Minister informed the appellant of his decision that his actual employer had been Forestiers Jean-René Landry Inc., the employer, and that the employment was not insurable because he had held more than 40 percent of the voting shares of the employer during the periods in issue.

[4] Subsection 5(1) of the *Act* reads in part as follows:

> (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;
>
> [...]

[5] Subsection 5(2) of the *Act* reads in part as follows:

> *(b)* the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
>
> [...]

[6] The burden of proof is on the appellant. He has to show on a preponderance of proof that the Minister's decision is ill-founded in fact and in law. Each case stands on its own merits.

[7] In making his decision, the Minister relied on the following assumptions of fact, which the appellant admitted, denied or knew nothing of:

[TRANSLATION]

(a) The payer, which was incorporated on December 13, 1974, operates a logging business. (knew nothing)

(b) The employer, which was incorporated on February 24, 1995, also operates a logging business. (denied)

(c) During the periods in issue, the appellant was the sole shareholder of the employer. (denied)

(d) The employer owned a John Deere grapple skidder and a Tanguay feller. (denied)

(e) In 2000, the equipment had a book value of $71,185, with accumulated depreciation of $47,079, and the rolling stock had a book value of $21,527 with accumulated depreciation of $10,606. (admitted)

(f) In 1999 and 2000, the payer retained the services of the employer to fell and yard wood. (denied)

(g) The payer paid the employer on the basis of the volume of wood cut or transported. (denied)

(h) During the periods in issue, the appellant operated the feller. (admitted)

(i) The feller operated 24 hours a day. (admitted)

(j) Three workers, including the appellant, operated the feller. (admitted)

(k) The payer paid the appellant and the other operators their wages directly. (admitted)

(l) The payer deducted from the remuneration paid to the employer the remuneration paid to the operators and the employer's contributions to the various social programs, including the employer's unemployment insurance contributions. (denied)

(m) The employer assumed responsibility for the wages of the operators of its equipment. (denied)

(n) The employer assumed responsibility for all the expenses related to its logging equipment, that is for diesel fuel and various repairs, as well as the room and board of the appellant and its operators. (denied)

(o) The employer assumed responsibility for the cost of insurance on its machinery and equipment and was to have $1,000,000 in liability insurance to cover any potential legal action. (denied)

(p) The employer was responsible for redoing, at its expense, any work that did not meet industry requirements. (denied)

(q) During the periods in issue, the appellant rendered services to the employer, not to the payer. (denied)

[8] The payer, Les Entreprises Forestières Etchemin Ltée, is a corporation that operates a logging business.

[9] During the periods in issue, the appellant was the sole shareholder of his business, Forestiers Jean-René Landry Inc.

[10] On May 8, 2000, a rental contract was entered into by the payer, Les Entreprises Forestières Etchemin Ltée, and Forestiers Jean-René Landry Inc. (Exhibit A-2) under which the latter rented a Tanguay feller to the payer for the period from May 8 to November 17, 2000.

[11] A clause in that contract entitled "Inspection of Leased Equipment and Maintenance in Proper Working Order" reads in part as follows:

> [TRANSLATION]
>
> The Lessor [Forestiers Jean-René Landry Inc.] undertakes to deliver the equipment in a sound state of repair, to guarantee the Lessee [Les Entreprises Forestières Etchemin Ltée] that it can serve the purpose for which it is leased and to proceed with the necessary maintenance and repairs to ensure the preservation and use of the equipment, subject to the lessee's right to attend to the minor maintenance of the equipment and to urgent repairs required to keep it in operation.

[12] The clause entitled "Liability Insurance and Exclusions" provides, *inter alia*, that Forestiers Jean-René Landry Inc. shall provide and keep in effect, at its own expense during the term of the lease, an insurance policy with a limit of $1,000,000 protecting the parties to the contract from and against any legal liability. Furthermore, again according to the contract, Les Entreprises Forestières Etchemin Ltée undertakes "to pay rent of $8.50 per cubic metre of timber for the use of the equipment".

[13] On June 5, 2000, the same parties entered into another contract for the rental of a "John Deere grapple skidder" for the period from June 5 to November 17, 2000 (Exhibit A-2). Under the heading "Term of Contract and Rent", Les Entreprises Forestières Etchemin Ltée undertakes "to pay rent of $5.90 per solid cubic meter".

[14] The clauses stipulated in the two rental contracts, that is for the feller and the skidder, are the same.

[15] The same companies entered into another equipment rental contract bearing no date (Exhibit A-3) for the period from May 11 to December 18, 1998. That contract does not specify the type of equipment rented; only the model and serial number of the equipment are stated therein. That contract sets out the conditions for the rental, that is the inspection of the leased equipment and its maintenance

and proper working order, and states the responsibilities of each party to the contract. The contract further states that Forestiers Jean-René Landry Inc. admits that "the equipment operators shall be regular members of Les Entreprises Forestières Etchemin Ltée".

[16] The appellant admitted that the book value of the equipment and rolling stock in 2000 was respectively $71,185 and $21,527, with accumulated depreciation of $47,079 and $10,606 respectively.

[17] The appellant stated that he had worked as a heavy equipment operator for Entreprises Forestières Serge Bureau Inc. from May 25 to September 25, 1998, as witnessed by the record of employment filed as Exhibit A-1.

[18] A contract of employment (Exhibit A-4) was signed on May 8, 2000, under which Les Entreprises Forestières Etchemin Ltée retained the appellant's services as a feller operator for the period from May 8 to November 17, 2000. The obligations of the employee, that is the appellant, described in that contract stipulate that:

> [TRANSLATION]
>
> The employee shall perform his duties in the place and in accordance with the work schedule that the employer [Les Entreprises Forestières Etchemin Ltée] may from time to time indicate to him, in accordance with the needs of the business.
>
> The employee undertakes to comply with all the regulations of the employer.
>
> The employee undertakes to comply with all the federal and provincial acts and regulations to which he is subject by reason of his employment and his presence in the forest.
>
> The employee consents to the employer [Les Entreprises Forestières Etchemin Ltée] deducting from his wages all legally payable amounts and those due to the employer.
>
> This contract constitutes the full and final agreement between the parties on the matters stated and takes precedence over any previous contract, agreement or undertaking.

[19] The appellant was the feller operator and his brother the skidder operator; those two pieces of equipment were the property of Forestiers Jean-René Landry Inc.

[20] The appellant stated that he had received fixed wages from the payer paid by cheque every week. He added that he had worked from Monday to Friday at noon. According to his submission, the payer's foreman supervised the heavy equipment operators, gave them instructions in the morning and told them where they were to cut wood; the hours of work were from 5:00 a.m. to 5:00 p.m., Monday to Thursday, and from 5:00 a.m. until noon on Friday. The appellant said that he had had to give the payer an explanation when he was absent and added that he had previously been required to redo work at the payer's expense. He further stated that those conditions were the same as those of his employment in 1998.

[21] In cross-examination, the appellant admitted that he had had to meet the work standards set by the payer's foreman; if the work was not up to standard, it had to be redone. Equipment breakdown, fuel and insurance expenses were the responsibility of the appellant's business. According to the contract of employment entered into by Les Entreprises Forestières Etchemin Ltée and the appellant, the latter's wages were fixed on the basis of the applicable hourly rate (Exhibit A-4).

[22] According to the financial statements of the appellant's business (Exhibit I-1), the turnover was $334,422 for the taxation year concerned, that is from March 1, 1998, to February 29, 1999. In his testimony, the appellant explained certain amounts entered in the financial statements to February 29, 1999, (Exhibit I-1) including that under the heading "Debtors", at page 7, saying that it referred to taxes on fuels receivable. The appellant also provided explanations concerning the amount of $73,792, representing maintenance and repairs to logging equipment and concerning the amount of $41,850 for wages and payroll taxes related to certain contracts that he had obtained in Ontario in 1998.

[23] According to the financial statements to February 29, 2000, (Exhibit I-2) the turnover of the appellant's business was $365,546. That amount, according to the appellant's submission, represents income generated by renting the feller and skidder under contracts entered into with Les Entreprises Forestières Etchemin Ltée. As to the amount of $40,500 entered for debtors at page 5 of that document under the heading "Assets", the appellant explained that it referred to income from work performed in Ontario. However, he could not explain the amount of $21,423 on page 7 under the heading "Debtors - Accounts Receivable". According to the

appellant, the overhead shown at page 11 represented heavy equipment operating costs.

[24] The appellant stated that the income entered in his returns of income for 1998 and 2000 did not include the individual wages earned in the service of the payer, Les Entreprises Forestières Etchemin Ltée.

[25] The appellant reiterated that he had had to follow the instructions of the payer's foreman, failing which he was dismissed, and added that, as a jobber, he was aware of government standards.

[26] Yvon Roy, the respondent's witness, stated that he was the payer's accounting clerk and that his responsibility was to compile the amount of wood cut. According to his submission, the appellant's wages were determined in accordance with practice in the region, that is a lump sum amount of $8.50 per cubic meter of wood cut, and, from that wage, the payer deducted fuel, meal and housing costs. The payer also made source deductions from the operator's wages for salary benefits, taxes and unemployment/employment insurance.

[27] The witness explained that the operator was not paid when his equipment was out of order as a result of a breakdown or under repairs. He added that, if the operator sold his equipment during the term of the contract, he was laid off. According to the witness, the foreman supervised the work every day.

[28] Revenue Canada issued a communiqué dated July 30, 1998, (Exhibit I-6) to clarify the policy on workers in the logging industry who, in addition to rendering services to a contractor, leased their heavy equipment to that same contractor. That communiqué does not have force of law, but is a guide that owner-operators can use to determine the nature of their contractual relations with the other contracting party. Paragraphs 6 and 7 of that communiqué read as follows:

> [TRANSLATION]
>
> **Contract of Employment**
>
> 6. Although an owner-operator may be hired under a contract of service, each case is generally considered in accordance with the circumstances surrounding it. However, it may be concluded that, where the contract of employment of an owner-operator meets the conditions stated in paragraph 7, that employment is considered as being held pursuant to a contract of service.

> 7. For there to be a contract of service, the parties concerned (employer and employee) must meet the following conditions:
>
> > (a) the employment contract must be separate from the equipment rental contract;
> >
> > (b) the remuneration method must be stated in the contract (rate by the hour, by the day, by the piece, etc.);
> >
> > (c) the employer must have the right to control the manner in which the work is performed (this control is generally exercised by a foreman on the site);
> >
> > (d) the employer tells the worker where he will render the services and the duration of those services (place, schedule, duration, etc.);
> >
> > (e) the employer has the right to decide what work the operator will perform;
> >
> > (f) the services of the owner-operator must not be directly related to the operations of his equipment. For example, in case of a major breakdown, the employer may assign the operator to other duties for which he will be remunerated accordingly; and
> >
> > (g) the employer is responsible for any injury or damage caused by the operator in the performance of his duties, including injuries suffered by the latter.

[29] Notwithstanding the employment conditions stated in the written contracts, the whole of the evidence and the circumstances of the appellant's employment must be examined.

[30] In *M.N.R. and Emily Standing* (A-0857-90), Stone J.A. of the Federal Court of Appeal wrote as follows:

> There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the *Wiebe Door* test.

[31] In *Duplin v. Canada (Minister of National Revenue - M.N.R.)*, [2001] T.C.J. No. 136, Judge Tardif of this Court wrote as follows at paragraph 30 of his decision:

> In other words, the intention of the parties to a work agreement is in no way conclusive for the purpose of characterizing that agreement as a contract of service. It is basically one factor among many.

[32] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61, the Supreme Court of Canada held that the degree of control exercised over the worker is an essential element to consider in deciding whether the worker is an employee or an independent contractor.

[33] The Supreme Court of Canada stated the following principle at page 2 of that judgment:

> There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. 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.

[34] In the case under consideration, the only witnesses heard on the degree of control were the appellant and Yvon Roy, the respondent's witness and the payer's accounting clerk.

[35] The appellant stated that the payer's foreman supervised the equipment operators, gave them his instructions in the morning and told them where they were to cut wood. The appellant added that he had to redo work if it was not to the foreman's satisfaction.

[36] Yvon Roy stated in his testimony that the foreman had supervised the work every day. However, that witness was not on site to assess the degree of control over the workers.

[37] The burden of proof was on the appellant, and he was the only witness who explained the degree of control: an instruction to watch out for fences or brooks

does not constitute control over the worker. It is well-settled case law that control of premises or measuring is not control of the worker, but control of the result. The Court cannot find on the degree of control exercised over the appellant's activities that there was a contract of service.

[38] In addition to the degree of control, other factors for distinguishing a contract of service from a contract for services are stated in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553: ownership of the tools, chance of profit or risk of loss and the integration of the employee's work into the employer's business.

[39] In the case at bar, the tools were the skidder and the feller, and they belonged to Forestiers Jean-René Landry Inc., in which the appellant owned 100 percent of the voting shares.

[40] Forestiers Jean-René Landry Inc. assumed responsibility for all the expenses related to the equipment, that is for diesel fuel and the various repairs. Although that business and the appellant are two separate entities, the appellant had control over it. The Court may conclude on the basis of this factor that the contract was a contract for services.

[41] As to the chance of profit or risk of loss, the situation regarding Forestiers Jean-René Landry Inc., which was controlled by the appellant, is such that the appellant assumed responsibility for losses when he had to redo work which was not up to standard or to the payer's satisfaction. The appellant's income was based more on production. Certain invoices entered in evidence as Exhibit I-4 show amounts of money under the headings "wages" and "advances", whereas no amounts appear under those headings on others.

[42] As to the integration test, the appellant was integrated into the operations of Forestiers Jean-René Landry Inc. That business was operated in the logging field and had contracts with the payer, Les Entreprises Forestières Etchemin Ltée, and with other companies located in Ontario and Quebec. The corporations' returns of income filed in evidence (Exhibit I-1) clearly show that the appellant, through his company, had contracts with other logging companies.

[43] The appellant's business hired two operators, including the appellant's brother, who worked with its equipment during the periods in issue, which is a factor on which it may be concluded that the contract was more a contract for services than a contract of service.

[44] The appellant's work was closely related to the operation of his company's equipment; if the equipment broke down, the appellant was not assigned to other duties, but was laid off.

[45] The evidence as adduced describes the conditions of employment during the period from May 8 to October 20, 2000. As to the period from September 28 to November 27, 1998, the appellant simply stated that he had worked for the payer on the same conditions as during the period in 2000.

[46] Having regard to the whole of the evidence and the circumstances of the appellant's employment, the appellant was employed by Forestiers Jean-René Landry Inc. Accordingly, the employment held by the appellant with the employer, Forestiers Jean-René Landry Inc., during the periods in issue is excluded from insurable employment because the appellant controlled more than 40 percent of the voting shares of that business within the meaning of paragraph 5(2)(*b*) of the *Act*.

[47] The appeal is dismissed and the decision rendered by the Minister is confirmed.

Signed at Ottawa, Canada, this 10th day of June 2003.

"J.F. Somers"

D.J.T.C.C.

Translation certified true
on this 3rd day of February 2004.

John March, Translator