Docket: 2006-605(EI)

BETWEEN:

RENÉ CÔTÉ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 18, 2007, at Roberval, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Jean Girard

Counsel for the Respondent: Dany Leduc

JUDGMENT

The appeal from the decision of the Minister of National Revenue that René Côté was not employed in insurable employment under a contract of service within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*, and that he did not hold insurable employment for the period from November 1, 1999, to October 27, 2000 when he was working for Les Entreprises en soudure Ungava Inc., is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of December 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 25th day of January 2008.

Brian McCordick, Translator

Citation: 2007TCC707
Date: 20071205
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Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a decision rendered by the Minister of National Revenue ("the Minister") on January 12, 2005, in relation to the insurability of René Côté's employment with Les Entreprises en soudure Ungava Inc. ("the Payor") from November 1, 1999, to October 27, 2000 ("the period in issue").

[2] Specifically, the Minister determined that Mr. Côté was not an employee of the Payor because the requirements of a contract of service, within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*, S.C. 1996, c. 23, as amended ("the Act") were not met, and, consequently, that there was no employer-employee relationship.

Facts

[3] The Appellant was the sole shareholder and director of Les Entreprises R.C. d'Ungava Inc., which incorporated on August 3, 1978, and which specialized in Linatex cold-process rubber lining for mining parts when it sold its business to the Payor on October 29, 1999. The selling price stated in the contract was $40,000, allocated as follows: $35,000 for equipment, accessories and furniture, $5,000 for merchandise, and $0 for goodwill. The sale did not include accounts receivable, bank accounts, the business name, the automobile, or the building in which the company's workshop was located.

[4] The aforementioned contract of sale specified that the exclusivity agreement with Linatex was part of the assets sold and included a 10-year non-competition clause for the entire sector covered by the exclusivity agreement with Linatex. This non-competition clause was also binding on the Appellant.

[5] On October 29, 1999, the day that the business was sold, the Appellant and the Payor entered into a contract of employment under which the Payor hired the Appellant as an expert consultant for a term of one year, commencing November 1, 1999, for annual remuneration in the amount of $30,000, in order to enable the Payor to acquire all the skill and knowledge required for the operation of its rubber lining installation and sales business. As noted in the employment contract, the Appellant is the only person with the requisite knowledge of rubber lining placement and installation.

[6] Under the terms of the employment contract, the Appellant agreed to work personally with the Payor for the first six months, but was not required to be present every day, except if there were contracts with the mining companies, or other customers of the business, that needed to be fulfilled. In the event of illness, the Appellant agreed to provide the Payor with an experienced person, under the same terms and conditions, and to the Payor's satisfaction.

[7] After these first six months, the Appellant would be free to manage his work schedule as he saw fit for the remainder of the term, as the Payor would have acquired the necessary knowledge and skill by then.

[8] On November 13, 2000, the Payor issued a Record of Employment to the Appellant, which stated that he accumulated 2080 hours of insurable employment and earned a total of $30,004 during the period in issue.

[9] After receiving a complaint, Human Resources Development Canada conducted an investigation of the Payor's practices, following which the Payor admitted that it was guilty of 35 counts of producing false Records of Employment, including the Appellant's, and was fined $550 on each of these counts.

[10] The Appellant faced 27 counts, under the Act, of knowingly providing false or misleading information, on job cards, with respect to the holding of insurable employment and the accumulation of 2080 insurable hours therein. In a decision rendered on June 9, 2006 by Judge Jean-Yves Tremblay of the Court of Québec, the Appellant was acquitted of the charges against him. It should be specified here that the parties limited the debate to the determination of the number of hours that the Appellant worked for the Payor.

[11] In addition to the Appellant and the Human Resources Development Canada investigator, four people testified and five statutory declarations were produced.

[12] The first witness, Alain Gagnon, was a shareholder and director of the Payor and is the person who negotiated the purchase of the Appellant's business. He explained that the Appellant's business complemented the Payor's activities. The rubber lining that the Appellant installed significantly increased the lifespan of machinery parts used by the mining industry. During the period in issue, the Payor had 10 to 15 employees but no expertise with respect to the installation of rubber lining; thus, that activity could only be carried out if the Appellant's services were used. Mr. Gagnon explained that, following the acquisition of the Appellant's business, the Payor's revenues increased more quickly than expected, so the Payor had to rent the Appellant's workshop for $400 per month. He specified that the Payor's office was in his home and that the Payor's employees (except its administrative staff) worked exclusively away at the mining sites. The Appellant, for his part, spent roughly 30% of his work time at the workshop and 70% at mining sites. He confirmed that he was the Appellant's supervisor and that the Appellant filled out his own time sheets. He admitted that he did not know the exact number of hours that the Appellant worked each week, but that he had a good idea because he saw the work done and the orders filled. He testified that the Appellant worked more than the 2080 hours reported in the Record of Employment during the period in issue, that the Appellant did not work while he was receiving employment insurance benefits, and that the Appellant's hours of work were not paid in gasoline supplied by the Payor. He acknowledged that the Payor had a practice of banking hours in order to avoid paying overtime at time and a half, and that the overtime worked by the Appellant was billed by the Appellant's company at a rate of $20 per hour plus applicable taxes. He acknowledged that the Appellant's Record of Employment was signed by his spouse Francine Gagnon, who, along with Nancy Dion, was responsible for the secretarial work and the bookkeeping. He specified that the same two people were responsible for tabulating the number of hours accumulated.

[13] In the statutory declaration that Mr. Gagnon signed on April 1, 2004, he answered question 11 as follows:

> [TRANSLATION]
>
> After September 3, 1999, with which members of the management did the employees make their arrangements for the accumulated hours?
>
> A. With their bosses, Clément Gaudreault and Roland Bédard.

[14] The Appellant was the second person to testify. He explained that his age and lung disease prompted him to decide to sell his business. He said that, during the period in issue, he did a lot of work at Inmet's Troilus division mine, as shown by the work orders produced in a bundle as Exhibit A-5. The mine was located more than 200 km from Chibougamau, and he was given food and lodging on site and had a workshop at his disposal. He acknowledged that he accumulated many overtime hours with the Payor in connection with his travel to the mine and the training of Roland Bédard, and that he billed those hours through his company. He also acknowledged that he was sometimes paid in gasoline. He submitted his gasoline bills and had them paid by the Payor, and then the office staff reduced the number of hours in the Appellant's bank by an amount equal to the total of the bills divided by $20. He explained that Roland Bédard took many hours to train and that it took a long time to complete his training because he was only available on weekends and there was a very wide range of parts to line.

[15] In the statutory declaration signed by the Appellant on March 23, 2004, the Appellant answered Question 9, at page 2, as follows:

> [TRANSLATION]
>
> Is it possible that you were paid $30,004 for 2080 hours as stated in the Record of Employment from Soudure Ungava, considering that the time cards say that you only worked for 103 hours?
>
> A. I certainly did not do all the hours, but I was there if needed. I could show the employees.

Page 3 of the declaration contains the following questions and answers:

[TRANSLATION]

Q. 11. How much did you actually sell your business for?

A. Forty plus thirty. You know how to read between the lines. They put me in an impasse, and I wouldn't want to have to tell my wife that I'm going to have to repay all of it.

Q. 12. Do you acknowledge all the 94 hours entered under your name on Soudure Ungava Inc. time sheets for the period from 2000-01-11 to September 13, 2000?

A. Yes, they were accepted and entered by the foremen.

Q. 13. Do you acknowledge all the hours entered under your name from 2000-11-06 to July 12, 2001, while you were receiving employment insurance benefits without declaring these hours?

A. You've got the evidence right there . . . those are hours that I worked.

It is important to specify that the top left of this third page of the declaration was initialled by the Appellant but was not signed by him because it was too incriminating.

At page 4 of the declaration, the following answer was given to Question 17:

[TRANSLATION]

Q. Who made the proposal to bank hours and get paid later for them?

R. Well, I was the one who wanted to keep my company and get paid later.

[16] During the Appellant's cross-examination, counsel for the Respondent produced work orders issued by the Payor and bearing the Appellant's name. These work orders report a total 103 hours of work during the period in issue, and 247 hours subsequent thereto. Counsel for the Respondent also produced a series of invoices that were issued by the Appellant's company to the Payor, and that bear dates subsequent to the period in issue — specifically, while employment insurance benefits were being paid, and subsequent to that time.

[17] The third witness, Clément Gaudreault, was a director of the Payor and a shareholder of 9081-0037 Québec Inc. who held 80% of the Payor's shares. He lost

his memory during his testimony. He did not recall whether the Appellant had banked hours, even though he gave the following answer to Question 11 of the statutory declaration that he signed on May 2, 2004:

> [TRANSLATION]
>
> Q. Are you aware of the fact that the 350.5 hours accumulated during the period covered by the Record of Employment and while he was on unemployment were paid to him through invoices of his own company, Les Entreprises R.C. d'Ungava Inc.?
>
> A. Yes, Mr. Côté made the arrangement with the three of us (Roland, Alain and me).

He neither confirmed nor denied his answer to Question 14 of his statutory declaration:

> [TRANSLATION]
>
> A. Do you acknowledge that Record of Employment #A67743337 issued to René Côté is false insofar as the number of hours that he worked from 1999-11-01 to 2000-10-27 is concerned?
>
> R. Yes, I acknowledge that. He never worked those hours. They correspond to the $30,000 that we owed him on the selling price of the business that we purchased from him.

His answer with respect to the purchase price of the Appellant's business was not as clear as his answer to Question 6 of his statutory declaration:

> [TRANSLATION]
>
> Q. Could you tell me what price you paid for René Côté's business, Les Entreprises R.C. Ungava Inc.?
>
> A. Seventy thousand ($70,000). I've always said we paid too much for it.

[18] The fourth witness was Nancy Dion, who worked for the Payor part-time as a secretary. During her testimony, she confirmed that the time banking system was a limited internal practice, and that the banked hours were recorded in a specific book. She said that the Appellant brought his time sheets to the office and submitted them to Mr. Gagnon or Mr. Gagnon's spouse. She said that the Appellant had control over his hours.

[19] In the statutory declaration that she signed on March 23, 2004, she answered Questions 5 through 10 as follows:

> [TRANSLATION]
>
> Q. 5. Do you recognize your writing on two 8½" x 11" sheets containing the details of René Côté's hours worked and paid?
>
> A. Yes, all the handwriting on both sheets is mine.
>
> Q. 6. Can you explain to me what is written on these two sheets bearing the name René Côté?
>
> A. The first page, covering January 11, 2000 to November 23, 2001, records all the hours that he worked and banked — a total of 350.5 hours. He submitted work slips (time sheets) to us for these hours worked.
>
> Q. 7. How do you account for the fact that the Record of Employment issued to him on 2000-11-13 (#A 67743337) says that he worked for 2080 insurable hours, when, according to these two sheets, he worked for only 103 hours in all during this period, and, when, moreover, those hours were banked in order to be paid later on?
>
> A. Based on what I knew from the work sheets that he brought me at the office, he worked for 103 hours.
>
> Q. 8. Is it possible that he banked hours when he was on unemployment from October 29, 2000, to October 27, 2001?
>
> A. Yes, based on the two sheets that record the banked hours, and on his time sheets, he worked a few times during this period.
>
> Q. 9 . At whose request did you keep these hours banked until they totalled 350.5 hours?
>
> A. At Mr. Côté's. He probably made this arrangement with the four shareholders at the time: Alain and Francine Gagnon, Clément Gaudreault, and Roland Bédard.
>
> Q. 10. Can you explain to me how the 350.5 banked hours were paid to René Côté?

> A. They were deducted from the bills for the gas that he bought from Shell to fill up his personal vehicle. I divided the amount of the bill by his $20 hourly wage, and reduced his banked hours by an equal amount. In addition, he submitted false invoices from his company, Les Entreprises R.C. d'Ungava Inc., bearing a number of hours (15 to 30 hours per invoice) that I computed at $20 per hour plus taxes, and I issued cheques to his company and reduced the banked hours by the number of hours that he stated on his invoices.

[20] The fifth person to testify was Roland Bédard, a director of the Payor and an equal shareholder, along with Clément Gaudreault, of 9081-0037 Québec Inc. During his testimony, he confirmed his answers to Questions 7 and 8 of the statutory declaration that he signed on March 25, 2004. Here are some excerpts:

> [TRANSLATION]
>
> Q. 7. What was the selling price of that business (R.C. d'Ungava Inc.)?
>
> A. Roughly $70,000.00, I think, and he came a few times to demonstrate the work.
>
> Q. 8. Is it possible that René Côté worked a total of 2080 hours, as stated in Record of Employment # A67743337 (from 1999-11-11 to 2000-10-27)?
>
> A. Absolutely not, Mr. Lévesque. He came a few times, that's for sure, but not that often. I am telling you this honestly between me and you.

During his testimony, Mr. Bédard also confirmed that the work orders produced as Exhibit I-6, which are for work done by Mr. Côté while he was receiving benefits, could not have belonged to anyone else.

Analysis and conclusion

[21] The determination of whether a person is an employer or independent contractor is a question of fact and law because it involves the application of a legal rule to a factual situation.

[22] The definition of insurable employment is set out in paragraph 5(1)(*a*) of the Act, which reads 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;

[23] The concept of a "contract of service" in paragraph 5(1)(*a*) of the Act must be analysed in light of Quebec civil law when the applicable provincial law is Quebec law. The *Civil Code of Québec* determines the rules applicable to a contract entered into in Quebec.

[24] The relevant articles of the *Civil Code of Québec*, S.Q. 1991, c. 64, are articles 2085, 2098 and 2099, and I shall reproduce them:

> 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 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.

[25] The purpose of the following remarks is to apply these legal rules to the facts of this case.

[26] The Record of Employment issued by the Payor to the Appellant refers to 2080 insurable hours and $30,004 in remuneration in respect of a 12-month period. The 2080 insurable hours represent 40 hours a week for 52 weeks. This is a heavy workload for the Appellant, who sold his business because he was suffering from lung disease. The Appellant himself acknowledged in his statutory declaration that he did not do all the 2080 hours, but he specified that he was available if needed and to provide training to the Payor's employees. Alain Gagnon, the Appellant's supervisor, admitted that he did not know exactly how many hours the Appellant worked every week, and that the Appellant filled out his own time sheets. Clément Gaudreault acknowledged in his statutory declarations that the Appellant did not do the 2080 insurable hours and that this amount corresponded to the number of hours needed to arrive at the $30,000 that the Appellant was owed on the selling price of his business. Roland Bédard, the very person that the Appellant trained, confirmed that the Appellant never worked those 2080 hours. Lastly, it is rather implausible that the Appellant worked 1040 hours during the last six months of the period in issue, considering that his employment contract did not even require him to report to work and he was free to manage his time at work as he saw fit.

[27] In fact, the Payor acknowledged that it was guilty of 35 counts of producing false Records of Employment, including the Appellant's, and was ordered to pay $550 in respect of each count.

[28] The $30,000 that the Payor paid the Appellant during the period in issue seems more like the balance of a selling price to me than remuneration for services rendered. It seems unlikely to me that no portion of the selling price was attributed to goodwill, the exclusivity agreement with Linatex, or the 10-year non-competition clause. Both parties obtained a substantial advantage by structuring the transaction as they did. The Payor purchased the Appellant's business by spreading out the payment of a portion of the selling price over one year's time, while the Appellant's company could reduce the tax consequences of the asset sale and the Appellant could draw employment insurance benefits one year after the sale.

[29] Based on the elements brought before me, the Appellant was arguably not even an employee of the Payor during the period in issue because there was no employer-employee relationship between them. In any event, I will continue my analysis so that I can address each aspect of the matter.

[30] The evidence discloses that

(a) the Payor had no expertise in the installation of rubber lining on mining machine parts, and thus, the Appellant's services were essential for this activity to be carried on;

(b) none of the members of the Payor's management know exactly how many hours the Appellant worked each week;

(c) the Appellant filled out his own time sheets and submitted them to the Payor's accounting department weekly;

(d) the Appellant spent approximately 30% of his work time at the workshop that his company leased to the Payor for $400 a month, and the remainder of that time at mining sites, primarily the Inmet mining company's Troilus division mine, where the mining company made a workshop available to him; and

(e) the Appellant provided training to Roland Bédard mainly on weekends, because Mr. Bédard was not available during the week; during the week, he had to work on the mining sites.

[31] Based on the facts set out in the preceding paragraph, and the following comments, I find that the work contract between the Appellant and the Payor is more consistent with a contract of enterprise or for services than a contract of employment. Under the contract, the Appellant had an obligation to provide a service, i.e. a transfer of knowledge, in exchange for $30,004 in remuneration, paid over a 12-month period. The contract did not require the Appellant to work a predetermined number of hours, he did not have to report to the Payor's establishment in order to carry out his work, and he did not have to follow a set work schedule. In addition, the Appellant was free to choose the means for performing the contract, because he was the only one who had the knowledge needed to install rubber lining. None of the Payor's people had this expertise, so nobody could dictate how the Appellant was to perform the work, or control the quality or quantity of work done by the Appellant.

[32] What distinguishes a contract of enterprise or for services from a contract of employment is the absence of a relationship of subordination insofar as the performance of the obligation set out in the contract is concerned. The word "subordination" means the employer's ability to determine what work is to be performed and to supervise and control the work. In the case at bar, I do not believe that there was a relationship of subordination between the Payor and the Appellant. Nothing in the evidence enables me to conclude that the Payor could control the quantity and quality of the work done by the Appellant or impose means of performing the work. On the contrary, the characteristics of an employment contract, namely a right of immediate supervision and direction, and the performance of the agreed-upon work by the employee personally, under the direction of the employer, and within the framework established by the employer, do not exist in the case at bar. In fact, the work contract specifically provided that, in the event that the Appellant fell ill, he was to provide the Payor with an experienced person under the same terms and conditions and to the Payor's satisfaction. This obligation imposed on the Appellant to find a replacement in the event of an illness is a good illustration of the fact that there was a contract for services between the Payor and the Appellant.

[33] Applying the tests articulated by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N*.R., [1986] 3 F.C. 553, namely control, ownership of work tools, chances of profit, risks of loss, and integration, tests that were accepted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the evidence shows that the Appellant did not own the work tools because he sold them to the Payor, he did not have chances of profit because his pay, as specified in the work contract, was determined in advance for the duration of the contract, and there was no provision for overtime. On the other hand, the obligation imposed on the Appellant to provide the services of a replacement in the event of an illness created a risk of financial losses for the Appellant, or, at least, a shortfall. As far as integration is concerned, I do not believe that the Appellant's activities were integrated into the Payor's activities. The Appellant rendered services in his workshop and in the workshop that the Inmet mining company made available to him. He determined his own work schedule. He controlled the quality and quantity of his work and the means of performing the work to be done. He held no position in the Payor's hierarchy. The Payor did not and could not exercise his power of direction of control to ensure that the work entrusted to the Appellant was performed properly.

[34] As for the parties' intention at the time that the contract was signed, it is my opinion that the parties intended to enter into an employment contract in order to give the Appellant access to employment insurance benefits after the transitional year elapsed. Unfortunately for them, the context did not lend itself well to such a contract. The contract was concurrent with a contract for the sale of business assets, and it is clear to me that the parties tried to convert what should have been the balance of a selling price into employment income. The contract in question is deficient in many respects, and does not contain the customary employment contract clauses, such as fringe benefit eligibility, vacation time, overtime, work schedule, place of work, etc. The intention factor cannot be given as much importance here as the case law normally ascribes to it. The parties' conduct in the case at bar is very telling. It is important to bear in mind that the business in issue pleaded guilty to charges of issuing false Records of Employment, and had a system in which hours were banked. In addition, we are dealing with an Appellant who made false statements in order to obtain employment insurance benefits, who worked while receiving such benefits and did not declare the hours that he worked, who participated in the Payor's system of banking hours, and who arranged to get paid for banked hours in gasoline and through invoices of his own company.

[35] For all these reasons, René Côté's appeal is dismissed, and I find that his work with the Payor during the period in issue did not constitute insurable employment within the meaning of subsection 5(1) of the Act.

Signed at Ottawa, Canada, this 5th day of December 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 25th day of January 2008.

Brian McCordick, Translator

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