

Docket: 2006-1594(EI)

BETWEEN:

RICHARD LABONTÉ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Mathieu Lebel*
(2006-2357(EI)), on February 9, 2007, at Québec, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Notary for the Appellant: Guy Labonté

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

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

Signed at Grand-Barachois, New Brunswick, this 4th day of May 2007.

"S.J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 5th day of October 2007.

Brian McCordick, Translator

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Citation: 2007TCC211
Date: 20070504
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AND:

Docket: 2006-2357(EI)

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Appellant,

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Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENTS

Deputy Judge Savoie

[1] These appeals were heard on common evidence at Québec, Quebec, on February 9, 2007.

[2] The issue in these appeals is the insurability of the employment of Mathieu Lebel ("the Worker"), who was working for Payor-Appellant Richard Labonté from March 25 to June 9, 2005, the period in issue ("the period"). On May 17, 2006, the Minister of National Revenue ("the Minister") notified the

Appellant of his decision that the Worker was employed in insurable employment during the period.

[3] In making his decision, the Minister determined that the worker was employed under a contract of service, or contract of employment, based on the following assumptions of fact:

[TRANSLATION]

- (a) The Payor operated a dairy farm with 70 heads of livestock (including 30 lactating cows) and a sugar bush. (admitted)
- (b) Each year, the Payor had to hire help during the period in which he looked after his sugar bush full-time. (denied)
- (c) In March 2005, the Appellant hired the Worker as a cowhand under an oral contract. (denied)
- (d) The Worker had just finished a vocational diploma programme in dairy production at Centre de Formation de St-Anselme, and he had experience in the field, having grown up on the family farm. (admitted)
- (e) Upon hiring the Worker, the Appellant clearly told him that he was being hired as an independent contractor. (admitted with clarifications)
- (f) The Worker does not deny this fact, but explains that he did not understand the difference between a contract of employment and a contract of enterprise because this was his first job. (denied)
- (g) The Worker's main duty was to milk the cows in the morning and the evening. (admitted)
- (h) The Worker also took care of feeding the cows, cleaning (clearing out) and small repairs (leaking trough). (admitted)
- (i) Upon hiring the Worker, the Payor spent a day with him to explain the daily work duties to him. (admitted with clarifications)
- (j) The Worker lived roughly 2 kilometres from the Appellant's farm and travelled there in his car. (admitted)
- (k) The Worker worked alone, but the Appellant's father went to the farm every day to bring in the bales of hay. (admitted with clarifications)

- (l) At the beginning of the period, the Appellant came to the farm every day and walked around. During the busy maple season, he slept in the shack. (admitted with clarifications)
- (m) During the busy maple season, the Worker worked seven days a week and then took time off based on a cycle consisting of ten days of work followed by four days off. (admitted with clarifications)
- (n) All the materials and equipment that the Worker used to do his work belonged to the Appellant. (admitted with clarifications)
- (o) The only things that the Worker had to supply were his clothing and work boots. (admitted)
- (p) The Worker received fixed pay of \$90.00 for each work day, and his work days were 7 or 8 hours long. (admitted)
- (q) The Worker had to submit an invoice setting out his hours of work. (admitted)
- (r) The Appellant asked the Worker to fill out time-based invoices and showed him how to do so. (admitted with clarifications)
- (s) Given the nature of his work, the Worker had some flexibility with respect to his work method, but received instructions from the Appellant in person or over the phone. (denied)
- (t) During the period in issue, the Worker never had himself replaced and did not ask for help in completing his work. (admitted)
- (u) If he had, he would have had to obtain the Appellant's permission, because the Appellant paid the CSST [workers' compensation board] costs for him. (denied)
- (v) The Worker rendered services to the Appellant on the days that the Appellant chose and in accordance with the Appellant's recommendations. (denied)
- (w) The Worker had no expenses to incur and rendered services to the farm operator, and not under his personal name. (denied)

[4] At the hearing, the Payor testified that he was the one who determined the Worker's days off. However, he wanted to specify that one does not impose a schedule on a self-employed worker. The Payor added that the Worker had to accept the conditions that he imposed on him.

[5] The evidence also disclosed that the Worker was supervised by the Appellant, and by the Appellant's father, who visited the site each day and was responsible for ensuring that the Worker did not work more than eight hours per day. The Payor also testified that the Worker was covered by workers' compensation and was not required to provide his equipment.

[6] The Minister has proven that the Worker was hired on March 17, 2005, while the Appellant was visiting the Worker's parents. During this visit, the Appellant offered the Worker independent contracting work as a cowhand, but specified that if the Worker wanted employment insurance benefits, an arrangement could be made. The Worker had a vocational diploma and had already acquired some experience on his father's farm. The evidence showed that the Appellant gave the Worker a general explanation about what an independent contractor was. The Worker testified that he did not really understand the explanation given by the Appellant, who was trying to emphasize the advantages of self-employed status.

[7] The Worker began working for the Appellant on March 18, 2005. His hours of work were usually 5:30 a.m. to 8:00 or 8:30 p.m. It appears from the evidence that the Appellant provided the Worker with a short training period. On the first day of work, he followed the Worker around in order to tell him what he would need to do; however, the Worker did not require lengthy training because he was already familiar with farm work. It has also been established that the Appellant went to the farm once in the morning and once in the evening during the first weeks in order to check on the work. The Worker could reach the Appellant at any time at his sugar shack. The Appellant could give the Worker instructions by phoning him. In addition, the Appellant's father exercised some supervision over the Worker because he went to the farm every day to do work.

[8] Based on the evidence that has been adduced, the Appellant required the Worker to prepare invoices for the time that he worked, and to submit those invoices to him periodically. There was never any question of employment insurance at any time during the Worker's employment.

[9] Gilles Lebel, the Worker's father, also testified at the hearing. He confirmed that he was present during the Appellant's visit which resulted in his son being hired. He confirmed that the Appellant offered the Worker work as a self-employed cowhand, while specifying that if he wished to participate in the employment insurance system, he could accommodate him in the sense that he would help him obtain benefits.

[10] The Appellant submits that the parties' intention was clearly expressed when the Worker was hired on March 17, 2005. However, the accounts obtained from the Worker and his father appear to cast doubt on such a common intention. The Minister and the Worker submit that while the Appellant highlighted the benefits of self-employed status, he did not explain the difference between a self-employed worker and a salaried worker who has employee status. As for the Worker, he testified that he did not really understand the Appellant's explanation about self-employed status. The evidence obtained at the hearing confirmed the assumptions on which the Minister relied in determining that the terms and conditions of the Worker's employment met the requirements of a contract of employment, that is to say, the prestation of work by the Worker, the payment of remuneration for the Worker, and a relationship of subordination between the Appellant and the Worker.

[11] In my opinion, the facts established at the hearing betray the Appellant's testimony that the Worker was hired as an independent contractor on March 17, 2005. The evidence, on the whole, points to a contrary finding. It has been shown that the Worker did not understand the independent contractor concept as explained by the Appellant. It can be stated that the explanation that the Appellant gave the Worker was ambiguous to say the least.

[12] The instructions given by the Federal Court of Appeal in *9041-6868 Québec Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2005] F.C.J. No. 1720, have proven helpful in analyses of this type. In that decision, Décaré J.A. held as follows:

8. We must keep in mind that the role of the Tax Court of Canada judge is to determine, from the facts, whether the allegations relied on by the Minister are correct, and if so, whether the true nature of the contractual arrangement between the parties can be characterized, in law, as employment. The proceedings before the Tax Court of Canada are not, properly speaking, a contractual dispute between the two parties to a contract. They are administrative proceedings between a third party, the Minister of National Revenue, and one of the parties, even if one of those parties may ultimately wish to adopt the Minister's position.

9. The contract on which the Minister relies, or which a party seeks to set up against the Minister, is indeed a juridical fact that the Minister may not ignore, even if the contract does not affect the Minister (art. 1440 C.C.Q.; Baudouin and Jobin, *Les obligations*, Éditions Yvon Blais 1998, 5th edition, p. 377). However, this does not mean that the Minister may not argue that, on the facts, the contract is not what it seems to be, was not performed as provided by its terms or does not reflect the true relationship created between the parties. The Minister, and the Tax Court of Canada

in turn, may, as provided by articles 1425 and 1426 of the *Civil Code of Québec*, look for that true relationship in the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage. . .

[13] Thus, the issue pertains to the relationship between the parties, that is to say, the Appellant and the Worker. Specifically, it is whether there was a contract of employment between the parties, or, to use the wording of the Act, whether the Worker was employed in insurable employment.

[14] In Quebec, a province governed by civil law principles, the contract of employment is defined in article 2085 of the *Civil Code of Québec*, which states:

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.

[15] A contract of employment is different from a contract of enterprise or for services, which 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. (article 2098)

Article 2099 C.C.Q. provides:

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.

[16] Hence, subordination, or the exercise of a power of control, constitutes a more important factor, even a determinative one, under Quebec law. The *Employment Insurance Act*, which applies to the case at bar, is a federal statute. And, since June 1, 2001, section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, has stated that the private law of the province of the dispute must be applied where concepts of private law are in play. That provision is reproduced below:

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.

[17] In *Lévesque v. Canada (Minister of National Revenue – M.N.R.)*, [2005] T.C.J. No. 183, Dussault J. of this Court wrote:

23 In *Sauvageau Pontiac Buick GMC Ltée v. Canada*, T.C.C., No. 95-1642(UI), October 25, 1996, [1996] T.C.J. No. 1383 (Q.L.), Archambault J., in referring to the decision of the Supreme Court of Canada in *Quebec Asbestos Corp. v. Couture*, [1929] S.C.R. 166, concluded, with regard to these definitions, that the distinguishing feature was the presence or otherwise of a relationship of subordination. Furthermore, it retained the definition of this expression formulated by Pratte J.A. in *Gallant*. At paragraph 12 of his decision, Archambault J. explained his reasoning as follows:

12. It is clear from these provisions of the C.C.Q. that the relationship of subordination is the primary distinction between a contract of enterprise (or of services) and a contract of employment. As to this concept of a relationship of subordination, I feel that the comments of Pratte J.A. in *Gallant* are still applicable.

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.

[18] A series of indicia developed by the jurisprudence enables the Court to determine whether or not there is a relationship of subordination between the parties. The following pronouncements on the subject can be found at paragraphs 60-62 of the decision of Judge Monique Fradette of the Court of Québec in *Seitz c. Entraide populaire de Lanaudière inc.*, Court of Québec (Civil Division), No. 705-22-002935-003, November 16, 2001, [2001] Q.J. No. 7635 (QL):

[TRANSLATION]

The indicia of control include:

- mandatory presence at a workplace
- compliance with the work schedule
- control over the employee's absences on vacations
- submission of activity reports
- control over the quantity and quality of work
- imposition of the methods for performing the work
- power to sanction the employee's performance
- source deductions
- benefits
- employee status on income tax returns
- exclusivity of services for employer

[19] However, it should be specified that the analysis should not end where some indicia support the conclusion that a relationship of subordination exists. One must continue with the exercise, which serves to determine the overall relationship between the parties. In the case at bar, the relationship of subordination between the Appellant and the Worker undoubtedly finds support in the following elements: mandatory presence at a workplace, compliance with the work schedule, control over the employee's absences, submission of activity reports, control over the quantity and quality of the work, imposition of the methods for performing the work, and exclusivity of services for the employer. With respect to benefits, the evidence discloses that the cooperative provided coverage and billed the farmer, who, in this instance, was the Appellant. On the other hand, the indicia that appear to support the existence of a contract of enterprise pertain to the power to sanction the Worker's performance, and to source deductions. However, the Court has no knowledge of the status indicated on the Worker's income tax returns because those returns were not tendered in evidence.

[20] Having completed this analysis, I believe that one can say that the facts support a finding that there was a relationship of subordination between the parties within the definition of a contract of employment set out in article 2085 C.C.Q.

[21] Having regard to the indicia referred to above, my finding must be that the degree of control in the relationship between the Appellant and the Worker establishes that there was, indeed, a sufficient amount of subordination to infer that a contract of employment, not a contract of enterprise, existed.

[22] The examination of the facts in light of the *Civil Code of Québec* and the recent jurisprudence concerning insurability, and, in particular, the concept of a

contract of employment, did not support the Appellant's submission that a contract of enterprise existed.

[23] Consequently, the Court must conclude that the Worker was employed by the Appellant in insurable employment under a contract of service within the meaning of paragraph 5(1)(a) of the Act and, thus, that he held insurable employment during the period in issue.

[24] In addition, the evidence pertaining to the relationship between the Appellant and the Worker supports the conclusion that there was a contract of employment between the parties according to the provisions of the *Civil Code of Québec*.

[25] Consequently, the appeals are dismissed and the decisions made by the Minister are confirmed.

Signed at Grand-Barachois, New Brunswick, this 4th day of May 2007.

"S.J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 5th day of October 2007.

Brian McCordick, Translator

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STYLES OF CAUSE: RICHARD LABONTÉ AND M.N.R. AND
MATHIEU LEBEL AND M.N.R.

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: February 9, 2007

REASONS FOR JUDGMENT BY: The Honourable Deputy Judge S.J. Savoie

DATE OF JUDGMENT: May 4, 2007

APPEARANCES:

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