Docket: 2006-2054(EI)

BETWEEN:

JEAN-YVES LEVESQUE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Jean-Yves Levesque* (2006-2055(CPP)), on June 12, 2007, at Beresford, New Brunswick).

Before: The Honourable Deputy Justice S.J. Savoie

Appearances:

Agent for the Appellant:	Alain Pitre
Counsel for the Respondent:	Stéphanie Côté

JUDGMENT

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

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

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 16th day of November 2007.
Daniela Possamai, Translator

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Citation: 2007TCC426
Date: 20070904
Dockets: 2006-2054(EI)
2006-2055(CPP)

BETWEEN:

JEAN-YVES LEVESQUE,

Appellant,

and

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REASONS FOR JUDGMENT

Savoie D.J.

[1] These appeals were heard on common evidence at Beresford, New Brunswick, on June 12, 2007.

[2] This is an appeal from the decision of the Minister of National Revenue (the "Minister") dated November 1, 2005. The period at issue begins on January 3, 2005, and ends on September 3, 2005. At the centre of the debate is the work performed by the Appellant on behalf of 610771 NB Inc. (the "payor"), considering that the Minister determined that, during the period at issue, the Appellant was employed in insurable employment in accordance with subsection 2(1), paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "Act") and subsection 2(1) of the *Insurable Earnings and Collection of Premiums Regulations* (the "Regulations"). The Minister also determined that the Appellant was engaged in pensionable employment with the payor within the meaning of subsection 2(1) and paragraph 6(1)(*a*) of the Canada Pension Plan (the "CPP") and subsection 3(1) of the *Canada Pension Plan Regulations*.

[3] In rendering his decision, the Minister relied on the following assumptions of fact:

[TRANSLATION]

(a) the payor was incorporated on February 4, 2004; (admitted)

(b) the payor has been operating a business under the name "Grange à tapis / Carpet Ranch" (the "business") since September 23, 2004; (admitted)

(c) the business was open year-round and its business activities consisted of selling floor covering products and services, interior decorating services as well as retailing home decorations; (admitted)

(d) the payor's shareholders were as follows: the Appellant, Réjean Bernard ("Mr. Bernard"), Denis LeBlanc ("Mr. LeBlanc") and Joey Legacé [*sic*] ("Mr. Legacé" [*sic*]) and each shareholder held 25% of the common voting shares in the payor; (admitted)

(e) the shareholders were not related persons; (admitted)

(f) each shareholder invested $15,000 and all the shareholders signed loans for the payor; (admitted)

(g) there was no unanimous shareholder agreement; (admitted)

(h) the Appellant, Mr. Bernard and Mr. LeBlanc (the "trio") controlled the payor's daily activities and made major decisions for the payor; (admitted)

(i) the trio rendered services to the payor and participated in the payor's daily business activities; (admitted)

(j) M. Bernard was the president and M. Legacé [*sic*] was the treasurer and together, they had signing authority on the payor's bank account; (admitted)

(k) from September 23, 2004, to January 1, 2005 (the "previous period"), each member of the trio received a gross salary of $600 per week, which gave each member of the trio a net salary of about $472.93 per week; (admitted)

(l) as of January 3, 2005, and for the remainder of the period at issue, the payor paid each member of the trio $475 per week, allegedly as taxable dividends (the "payments"); (admitted)

(m) the Appellant was laid off on September 3, 2005, and as of that date, the payor stopped paying him the payments; (denied)

(n) during the period at issue, the Appellant's duties included selling merchandise, cleaning and organizing shelves at the payor's business premises, ordering merchandise and all other duties required for the successful operation of the business; (admitted)

(o) the payor provided the Appellant with all the tools required for the performance of his duties; (admitted)

(p) the Appellant performed his duties at the payor's business premises; (admitted)

(q) the payor had the right to monitor the Appellant's activities; (denied)

(r) the Appellant did not have the right to hire an assistant or replacement at will; (admitted)

(s) the Appellant was engaged under a contract of service; (denied)

(t) the Appellant's duties did not change between the previous period and the period at issue; (admitted)

(u) after the period at issue, Mr. Bernard and Mr. LeBlanc continued to render services to the payor and to receive payments of $475 per week; (admitted)

(v) during the period at issue, the fourth shareholder, Mr. Legacé [*sic*], worked elsewhere, did not render services to the payor, did not participate in the payor's daily business activities, and did not receive either a salary or payments; (admitted)

(w) during the period at issue, the only shareholders who received payments were those who rendered services to the payor; (denied)

(x) the payments were not paid to the Appellant for his role as shareholder; and (denied)

(y) the payments were the Appellant's remuneration, for the services he rendered to the payor, during the period at issue. (denied)

[4] It is important to note that the Minister's assumptions of fact, set out in paragraphs (m), (q) and (w), although denied by the Appellant, were proven, based on the evidence adduced at the hearing. All of the other facts assumed by the Minister were admitted by the Appellant, except for those set out in paragraphs (s),

(w), (x) and (y), but they provide the Minister's findings in the case on which this Court has to rule.

[5] The issue also involves the Minister's determination that the Appellant received remuneration from the payor as salary and not as dividends as submitted by the Appellant.

[6] The dividend payment was not paid to all shareholders, only to those who performed duties for the company.

[7] The dividend was paid each week to providers of services as salary.

[8] The Appellant received his dividend payments until he was laid off on September 3, 2005.

[9] As for the fourth shareholder, Mr. Lagacé, who was employed elsewhere, he did not receive any dividend payments even though he held the same common voting shares in the company as the Appellant and the payor's other shareholders and employees.

[10] The Minister rightly submits that the decision to pay a dividend to shareholders is not that of only one shareholder, but that which must be made at a duly constituted shareholder meeting where decisions are rendered by the shareholders in a resolution that is part of the company's minutes, duly voted on by the board of directors, in accordance with section 64 of By-law No. 1 of 610771 NB Inc., that is to say, the payor, which stipulates as follows:

[TRANSLATION]

> 64. The board of directors may on occasion declare the payment of dividends to shareholders in accordance with their respective rights and interests in the Corporation. A dividend payable in cash shall be paid by cheque drawn on the Corporation's banks or one of them, to the order of each registered holder of shares of the class in respect of which it has been declared. The cheque is mailed by prepaid ordinary mail to such registered holder at his or her latest address as shown on the records of the Corporation. In the case of joint holders, the cheque shall, unless such joint holders otherwise direct, be made payable to the order of all of such joint holders, and if more than one address appears on the records of the Corporation in respect of such joint holding, the cheque is sent to the first of the addresses. The mailing of such cheques, unless the same is not paid on due presentation, shall satisfy and discharge the liability for the dividend to the extent of the sum represented thereby. In the event of non-receipt of any dividend cheque by

> the person to whom it is sent, the Corporation shall issue to such person a replacement cheque for a like amount on such terms as evidence of non-receipt and satisfactory security.

[11] It was established at the hearing that no resolution consistent with what is provided for in section 64, above, has been produced to date by the Appellant.

[12] Occasionally the compensation of an employee shareholder by way of salary or dividends results in confusion for some. Some have even argued that the performance of work was required to justify the payment by the payer corporation of a dividend to the provider of services. However, in *Neuman* v. *Canada (Minister of National Revenue – M.N.R.)*, [1998] S.C.J. No. 37, *per* Iacobucci J., the Supreme Court of Canada clearly rejected that interpretation when he wrote as follows:

> 57. . . . a dividend is a payment which is related by way of entitlement to one's capital or share interest in the corporation and not to any other consideration. Thus, the quantum of one's contribution to a company, and any dividends received from that corporation, are mutually independent of one another. La Forest J. made the same observation in his dissenting reasons in *McClurg* (at p. 1073):
>
> > With respect, this fact is irrelevant to the issue before us. To relate dividend receipts to the amount of effort expended by the recipient on behalf of the payor corporation is to misconstrue the nature of a dividend. As discussed earlier, a dividend is received by virtue of ownership of the capital stock of a corporation. It is a fundamental principle of corporate law that a dividend is a return on capital which attaches to a share, and is in no way dependent on the conduct of a particular shareholder. [Emphasis added.]
>
> . . .
>
> 60. . . . I am not aware of any principle of corporate law that requires in addition that a so-called "legitimate contribution" be made by a shareholder to entitle him or her to dividend income and it is well accepted that tax law embraces corporate law principles unless such principles are specifically set aside by the taxing statute.

[13] The words of Iacobucci J., above, were also quoted by Archambault J. of this Court in *Pauzé* v. *Canada*, [1998] T.C.J. No. 560 where he stated as follows:

> 10. As my colleague Judge Dussault said in *Gosselin v. R.*, 1996 CanRepNat 2472 (TaxPartner, Carswell CD-ROM), at paragraph 16, a company which pays dividends does not receive any consideration from its shareholders.

. . .

> . . . The right to a dividend is a right to share in a company's profits. With respect for those who hold the contrary view, that right arises from only one source: the ownership of shares that carry the right, and nothing else. The dividend is income from "property" and is not pay or compensation for services rendered. The fact that dividends are given favourable tax treatment when they are received by individuals, under the gross-up and tax credit provisions, is because they represent the result of this very division of a company's profits, profits which have already, in theory at least, been taxed at this initial stage, and on which the purpose is to limit or reduce the impact of double taxation when they are received by individuals. This scheme clearly does not apply to payment for services rendered . . . .
> [Emphasis added.]

. . .

> 12. I would also add that when an employer pays money in consideration of services rendered by an employee it is salary. . . .

[14] The evidence revealed that the Minister determined that the Appellant held insurable employment in 2004. Those circumstances, according to the evidence, did not change in 2005.

[15] Moreover, it was established that the amount of the dividend was paid to the Appellant as salary. However, not all of the payor's shareholders received the dividend, only those who performed duties for the payor.

[16] In September 2005, the Appellant was laid off. Since then, he has requested that the status as to the insurability of his employment be assessed. Although he stopped receiving dividend payments at that point, other employee shareholders continued to receive them.

[17] At the hearing, the Appellant stated as follows [translation]: "I was paid as a shareholder." When counsel for the Respondent asked him why, in the same circumstances as 2004, he should not consider his employment as insurable, he replied as follows [translation]: "In 2004, an error was made, we paid ourselves in salary."

[18] In his testimony at the hearing, the accountant Alain Pitre stated that the payor's shareholders decided to pay themselves a dividend of $24,700.00 in January 2005, with the exception, however, of the shareholder Joey Lagacé. He

added that in September 2005 the Appellant decided to stop his dividend payments so that he could qualify for employment insurance benefits. The accountant stated that, at the end of 2005, he should have made corrections to accommodate the Appellant's situation.

[19] The analysis of these facts, in light of the foregoing case law, leads to the conclusion reached by the Minister that the weekly payments of $475.00 were made to the Appellant in remuneration for the services he performed and not for his role as shareholder. In other words, the Minister was right to conclude that the weekly payments of $475.00 made to the Appellant were his salary.

[20] The second part of the issue to be dealt with is the insurability of the Appellant's employment. In other words, the issue here is whether the Appellant was employed in insurable employment under a contract of service, in accordance with the Act, or under a contract of employment in accordance with the *Civil Code of Québec*.

[21] With respect to the insurability of the employment in accordance with the *Employment Insurance Act*, the relevant provision is set out in paragraph 5(1)(*a*) of the Act 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.]

[22] A contract for services is a civil law concept found in the *Civil Code of Québec* (the "*Civil Code*"). Consequently, the nature of the contract must be determined in accordance with the relevant provisions of that Code.

[23] In a publication entitled, "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It," published by the *Association de planification fiscale et financière* (APFF) and the federal Department of Justice in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law*, Justice Pierre Archambault of this Court explains the steps that courts are to take for any period of employment subsequent to May 30, 2001, since the coming into force, on June 1, 2001, of section 8.1 of the amended *Interpretation Act*, R.S.C. 1985, c. I-21, when faced with a case such as the one at bar. Here is what Parliament has stated 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.]

[24] It will be helpful to reproduce the relevant provisions of the *Civil Code*, which will serve to determine whether a contract of employment exists in Quebec and will distinguish such a contract from a contract of enterprise:

> 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 entreprise 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.]

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

(1) the employee's performance of work;
(2) remuneration by the employer for that work; and
(3) a relationship of subordination. The significant distinction between a contract of service and a contract of employment is the existence of a relationship of subordination-the fact that the employer has a power of direction or control over the worker.

[26] This Court must therefore conclude that the first two elements of the definition set out in article 2085 were established, the work performed by the Appellant was proven, while this Court concluded that the weekly amounts paid to the Appellant were his salary for his performance of work.

[27] As for the relationship of subordination, the third element of this definition, the following facts are relevant.

[28] It was established that the "trio" controlled the payor's daily activities. The trio was formed by the Appellant, Réjean Bernard and Denis LeBlanc. Together, the three shareholders held 75 per cent of the common voting shares in the payor.

The Appellant was laid off on September 3, 2005. This undoubtedly supports the notion of a relationship of subordination.

[29] The evidence revealed that the payor provided the Appellant with all the tools required for the performance of his duties, which were carried out at the payor's business premises.

[30] The trio, which in some respects constituted the board of directors with 75 per cent of the payor's voting shares, had the right to monitor the Appellant's activities and the Appellant did not have the right to hire an assistant or replacement at will.

[31] It was established that the trio decided on the work schedule, which, although flexible, required the Appellant to be present at the payor's business premises.

[32] In his testimony, the Appellant admitted that if he jeopardized the company's financial health or rendered poor services to the company, the "others" could intervene. This situation, described by the Appellant, is a prime example of how the power to exercise control over the company resided with the board of directors. Furthermore, it was never shown that the board of directors waived its power to exercise control over the company. In fact, it is clear that the Appellant played two roles in the company, some would say that he "wore two hats," as he performed specific duties as an employee and held 25 per cent of the payor's voting shares. Thus, he held a voting seat on the board of directors. He was both a director and an employee.

[33] Tardif J. of this Court had to rule on a similar case in *Industries J.S.P. Inc.* v. *Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 423. He stated as follows:

> When a person occupies a strategic, executive position in a business, it is customary and normal for the job description to be very difficult to define. A partner or an individual taking part in the management of a business can hardly hope for a clearly defined, specific, limited job description.
>
> Contributing to and being a partner in the management, administration or development of a business, particularly a small business, means that a person's job description is strongly marked by responsibilities characteristic of those often fulfilled by actual business owners or persons holding more than 40 per cent of the voting shares in the company employing them. In other words, in assessing

> remuneration, at this level of responsibility, caution must be exercised when a comparison is made with the salaries of third parties; often there are advantages that offset the lower salaries.
>
> In this case, the work performed by Marie-Claude Perreault and her brothers was in many respects comparable to the work performed by business owners. That fact alone is not decisive or sufficient to exclude their work from insurable employment, particularly since the company employing them never waived its power to exercise control over their work.
>
> . . .
>
> In this case, the evidence has established that the appellant company never waived its power to exercise control over the work performed by the Perreault family members. . . .

[34] Furthermore, another decision by Tardif J., *Roxboro Excavation Inc.* v. *Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 32, on appeal, was upheld by the Federal Court of Appeal. The following paragraphs are particularly relevant in this case:

> . . .
>
> The key issue in this case is basically whether there was in 1996 a relationship of subordination between the company paying the remuneration and the interveners. In other words, did the company have the power to control and influence the work done by the Théorêt brothers?
>
> In this regard, I consider it important to point out that the courts have often said that it is not mandatory or necessary that the power to control actually be exercised; in other words, the fact that an employer does not exercise its right to control does not mean that it loses that power, which is absolutely essential to the existence of a contract of service.
>
> The power to control or the right to influence the performance of work is the main component of the relationship of subordination that lies behind a genuine contract of service.
>
> Assessing whether or not a relationship of subordination exists is difficult when the individuals who hold authority by virtue of their status as shareholders and/or directors are the same individuals who are subject to a power to control or to the exercise of authority in respect of specific work. Put differently, it is difficult to draw a clear line when a person is an employee and in part an employer all at the same time.

> . . .
>
> The evidence showed that each of the Théorêt brothers had authority and independence and even had carte blanche in performing the work for which he was responsible. The evidence also showed that decisions were made informally, collegially and by consensus.
>
> . . .
>
> In the case at bar, the fact that authority did not seem to be exercisable against the Théorêt brothers and that decisions concerning the company were made by consensus and collegially does not mean that the company was deprived of its authority over the work done by the interveners. The evidence did not show that the company had waived its power to influence their work or that its right to do so was reduced, limited or revoked.

[35] After analyzing the facts and in light of the case law, this Court is of the opinion that the relationship of subordination was established.

[36] Therefore, this Court finds that there was a contract of service within the meaning of paragraph 5(1)(*a*) of the Act and a contract of employment in accordance with the *Civil Code of Québec*.

[37] Furthermore, this Court determines that the Appellant was employed in insurable employment with the payor within the meaning of paragraph 5(1)(*a*) of the Act as well as a contract of employment in accordance with article 2085 of the *Civil Code of Québec*.

[38] Moreover, this Court determines that the payments made to the Appellant by the payor were not taxable dividends but remuneration paid to him for services rendered to the payor.

[39] Finally, the amounts paid by the payor to the Appellant represented his contributory salary and wages within the meaning of paragraph 2(1) of the CPP and his ordinary remuneration from pensionable employment within the meaning of subsection 3(1) of the *Canada Pension Plan Regulations*.

[40] Accordingly, the appeals are dismissed and the Minister's decisions are confirmed.

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

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 16th day of November 2007.
Daniela Possamai, Translator

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DATE OF JUDGMENT:	September 4, 2007

APPEARANCES:

Agent for the Appellant:	Alain Pitre
Counsel for the Respondent:	Stéphanie Côté

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