Docket: 2007-1256(EI)

BETWEEN:

2640-6496 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 21, 2008, at Montréal, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Respondent: Serge Fournier

Counsel for the Respondent: Simon Petit

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* ("the Act") is allowed on the basis that the work done for the Appellant by Huguette Chénard, Louise Chagnon, Jocelyne Durand, Gaston Audet and Luc Cloutier from January 1, 2005, to February 28, 2006, constituted self-employment and was therefore not insurable under the terms of the Act.

Signed at Ottawa, Canada, this 26th day of September 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 12th day of November 2008.

Brian McCordick, Translator

Citation: 2008 TCC 490
Date: 20080926
Docket: 2007-1256(EI)

BETWEEN:

2640-6496 QUÉBEC INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision concerning the insurability of the work done by Huguette Chénard, Louise Chagnon, Jocelyne Durand, Gaston Audet and Luc Cloutier for the Appellant, which operated, and continues to operate, under the name "Services S.L.", during the period from January 1, 2005, to February 28, 2006.

[2] Some of the numerous facts on which the insurability decision was based are consistent with the evidence adduced by the parties. They include the following:

[TRANSLATION]

(a) The Appellant was incorporated on March 17, 1989.

(b) The Appellant carried on business under the name "Services S.L."

(c) The Appellant prepared advertising flyers by inserting coupons, folding circulars and gluing coupons as required and instructed by the Appellant's customers.

> (d) The Appellant received advertising flyers from the Québecor and Transcontinental printing companies and prepared them for distribution by Publisac. It did not do any of the distribution itself.
>
> (e) In 2005 and 2006, the Appellant had sales in excess of $1 million a year.
>
> (f) The Appellant had a workshop that was located in St-Jean-sur-Richelieu and was open Monday to Sunday from 7 a.m. to 10 p.m.
>
> (g) The Appellant hired salaried employees: clerks, forklift operators, inserter machine operators and supervisors.
>
> . . .
>
> (i) The five Workers in the instant dispute were "inserters".
>
> (j) The Workers had to fill out the Appellant's employment application forms before starting to work.
>
> . . .
>
> (m) The Appellant imposed no regular schedule on the Workers.

[3] As for the other facts, the evidence has established that they were inaccurate or incomplete, or that they resulted from interpretation rather than from plain observation.

[4] Five witnesses testified. The first ones, namely Normand Tremblay, the Appellant's CEO, and Diane Tremblay, its owner, represented the Appellant. On the Respondent's side, three of the five individuals concerned by the appeal were witnesses: Gaston Audet, Luc Cloutier and Louise Chagnon.

[5] Mr. Tremblay mainly described the premises or buildings where the business operated. He also described its nature. The business owns a very large parcel of land on which several buildings stand. Its main customers are Québecor and Transcontinental.

[6] Essentially, the business prepared or assembled, in different ways, materials for the wide range of advertising initiatives carried out by various retail chains. The materials were generally delivered to one of the buildings on the Appellant's site, and they came mostly from the printers.

[7] Once the materials were delivered, the company carried out the work in accordance with the various specifications. In some cases, the work was essentially done mechanically. That kind of work was done using the company's mechanical equipment and a competent staff of just over 30 people who were generally paid at an hourly rate.

[8] The business also offered a service for which the work had to be done manually (assembly, gluing, etc.). Given the many unusual features involved, the nature of the work varied, as did its amount and duration.

[9] In explaining and describing the nature of the disputed work, the Tremblay couple explained that the business had a list of roughly 300 individuals' names and contact information for use in connection with the performance of this essentially manual labour.

[10] When the business got a contract, it phoned the people on the list in an attempt to secure the cooperation of those who were available and interested in doing the work involved.

[11] That is how the company got the labour necessary to perform a contract. When people were called, they were told about the type of work and the possible duration of the contract. The people who were solicited by phone could accept or decline the offer.

[12] If a person accepted, the person had to go to the premises set up for that purpose and work there, and would remain free to stay on for the anticipated duration of the work or to leave if the work was not to his or her liking.

[13] Occasionally, the person would go there on his or her own, or with an assistant. The pay was based on the price determined in advance; each completed bundle was accounted for by stamping a sheet bearing a single name, and payment was based on the agreed-upon price and the quantity of packages prepared.

[14] Sometimes the price that was offered was too low for the work involved. Some people, including Mr. Cloutier and Ms. Chagnon, stated that they would then seek an increase, which they sometimes obtained, and sometimes did not. They were free to leave without reprisals or consequences if the increase that they sought was not granted.

[15] The testimony of the Respondent's three witnesses, namely Gaston Audet, Luc Cloutier and Louise Chagnon, essentially confirmed Mr. and Ms. Tremblay's testimony.

[16] It is true that some situations were described differently; for example, the Tremblays said that a person would sometimes get one or two helpers even though the work was allotted to a single person. In this regard, one witness said that he always did his work unassisted, whereas Ms. Chagnon said that, on rare occasions, her husband helped her at the end of a day so that she could leave earlier.

[17] Mr. Cloutier and Ms. Chagnon testified very precisely about particular aspects which, in my opinion, are connected in a very important fashion with decisive factors in this appeal.

[18] First of all, Luc Cloutier did the disputed work to a very significant degree over a lengthy period, which began in 1997 and ended in June 2006. A young and articulate man, he gave clear and specific answers to the questions that he was asked. He explained that there was no doubt in his mind that he could refuse to work, or leave at any time if the work or price did not suit him.

[19] However, he said that he felt stressed at the idea of not working on certain occasions when there was work to be done, because he feared that he would no longer be called back, a situation that clearly never arose, given how long he worked for the Appellant.

[20] He also stated that working elsewhere would not have been a problem. He explained that he sometimes asked for an increase of the initially agreed price, and that he obtained it on some occasions, but was rebuffed on others.

[21] Whatever price increases were granted were extended to everyone. Mr. Cloutier also explained that there were very wide variables in the unit prices, which ranged from the equivalent of an hourly rate below minimum wage all the way up to the equivalent of $13 per hour, which is considerably above minimum wage.

[22] Assuming that Mr. Cloutier was a very serious and efficient person, it can be concluded that a worker with no experience or skill would earn something between ridiculously low pay and reasonable pay.

[23] As for Ms. Chagnon, she, too, worked for a long time. In testimony consistent with that of the Tremblays, who said that they had considered entrusting all the subcontracting to her, Ms. Chagnon explained that, in addition to doing the work in issue, she did telephone recruiting work.

[24] Ms. Chagnon explained that, depending on the contract, she had to call one to several dozen people from the list of nearly 300.

[25] She explained that some people accepted the offer but did not show up, and that others flatly rejected the offer made over the phone.

[26] In either case, there were no consequences or reprisals, because, even if the people refused or did not show up, their names were not removed from the list, and the same people could be phoned later. It should be noted that Ms. Chagnon earned an hourly wage for her work on the phone.

Analysis

[27] The instant case is a very good case in which to deal with the issue involved, because the evidence is clear and consistent. Indeed, it is unnecessary to engage in extrapolation, speculation or interpretation, or even to assess credibility in order to carry out the analysis; the many facts are not only clear, but telling.

[28] I believe that I can state from the outset that the work in dispute was clearly very varied, special, sporadic and frequently one-time, and that it was not very attractive, or not at all attractive, from a financial point of view. It was therefore difficult, if not impossible, to recruit reliable, competent people in such a context.

[29] In order to remedy the situation, the business set up the process abundantly described by the consistent evidence adduced by both parties. In support of their respective submissions, each party referred to two available approaches: the civil law and the common law.

[30] Firstly, reference was made to the criteria set out in the leading cases: ownership of tools; chance of profit and risk of loss; power to control; and integration. Then, reference was made to the approach codified by the *Civil Code of Québec*, in which the legislator enacted the following provisions concerning the matter:

> **Art. 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.
>
> **Art. 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.

[31] The common law approach is different, in that the distinctions between the two contracts are made on the basis of the criteria determined by the case law.

[32] The two approaches converge when it comes to deciding the most determinative aspect, that is to say, whether or not there is a relationship of subordination between the person who does the work and the person who assigns it.

[33] Indeed, reference has been made to the power to control; the chance of profit and risk of loss; integration; and the ownership of tools. And these different criteria are very interesting and particularly helpful in ultimately answering the fundamental question: is there or not a relationship of subordination?

[34] If the answer is yes and if there is also the performance of work and remuneration, the contract is a contract of employment; but if, on the other hand, there is no relationship of subordination, it is a contract of enterprise. Taking both approaches into consideration is, in fact, perfectly in keeping with the Rules of Construction – Property and Civil Rights (see Respondent's Book of Authorities, tab 2):

> **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.

[35] A contract of employment is, of course, very different from a contract of enterprise, but each contract has many repercussions; indeed, there are important differences from a tax liability perspective, but also in terms of the application of the *Employment Insurance Act*, in terms of administrative management, and so forth.

[36] In addition, the parties often have a special interest, because a contract of enterprise is less demanding than a contract of employment for a payor. Conversely, for the person doing the work, there can be a benefit in that the expenses incurred to earn income are deductible under a contract of enterprise, but not under a contract of employment.

[37] However, a contract of enterprise is not subject to coverage under the *Employment Insurance Act*. Consequently, in some situations, workers may have an interest in exploiting both statuses: the status of salaried employees when they are out of work and want to have access to employment insurance benefits, and the status of independent contractors when they are working and want to deduct the expenses they incur to earn income.

[38] The payor benefits as much as the independent contractor, firstly from a management perspective, but also, and more importantly, from great contractual freedom in terms of layoff notices, causes and grounds, and, in many cases, labour relations.

[39] In the employment sphere, there are many laws that make management more burdensome, such as contributions or premiums payable to associations, the QPP or CPP, EI, group insurance, workers' compensation or pension funds; statutory holidays and vacations; notices and notice periods in the event of a production slowdown or stoppage; bargaining, etc.

[40] Under such circumstances, it is obvious that parties might wish to describe a work relationship in a manner that is not based on the way in which the work is performed, but, rather, on the advantages or drawbacks that one contract, or the other, presents.

[41] Once this reality is understood, it becomes much easier to comprehend why it is essential, in assessing whether a contract is an employment contract or a contract of enterprise, to take all the available and relevant facts and evidence inherent to the performance of the work into account, as opposed to simply considering the wishes and intention of the parties, especially since such wishes or intention can differ, and can often stem from ignorance or from one party's authority over the other.

[42] In the case at bar, it was obviously in the clear interest of the business that the people who did the disputed work be independent contractors. By way of illustration, it is sufficient to recall that this was sporadic work which varied in duration and which had to be done within short and precise time frames in a fiercely competitive context.

[43] Generally, the rates that were offered meant that the pay was modest, the hours were variable and the vast majority of the people in question earned less than $5,000 per year. Thus, those people unquestionably had to earn more income by working elsewhere.

[44] The evidence has established, on a balance of probabilities, that the Appellant waived the fundamental rights that an employer would have in terms of authority; the Workers' independence and freedom has been shown by the Appellant, but also, and primarily, by the three people who did the work in issue over a period of several years. As a result of this waiver, the Appellant was obliged to have a very long list of names and make numerous telephone calls, and the Appellant did not count on the exclusive availability of the people whose names were on the call list.

[45] The genuine ability to turn down the work that was offered, to leave the premises, and to negotiate the prices that were offered has been established clearly; first of all, the person responsible for making calls clearly stated that there was no penalty for such refusals, that is to say, that the people who did not report even though they had said they would be present, and the people who immediately turned down offers, were not penalized, and their names remained on the call list.

[46] In addition, the work that was available involved several variables, notably financial ones; some work was much more attractive than other work; and the people whose names were on the call list were free to accept or decline.

[47] The work certainly had to be done well, and it had to be redone if it did not meet the specifications, since a single unit price was paid. This was an obligation of result, not an obligation of means.

[48] Although the "independent contractor" arrangement is beneficial to the Appellant in managing its business, it is my opinion that the company structured and organized its activities based on such an arrangement, and that it did so in compliance with the applicable rules of the game.

[49] Indeed, in order to meet workers' compensation requirements, the Appellant had to pay premiums for employees who earned more than $5,000. Such a constraint might have resulted in no one earning more than $5,000, but this is not what happened, because some people did earn more than $5,000.

[50] In addition, the Appellant had roughly 30 employees who were paid an hourly wage. Moreover, certain people on the call list were offered more stable and regular work with hourly remuneration.

[51] Lastly, the number of people on the call list was roughly 300, a number which I consider to be a determinative factor in and of itself, and which shows very clearly that the expectations were realistic having regard to the potential refusals and the reduced availability. Moreover, the business was aware that there was no exclusivity, and realized that the people had to be available to, and accept work from, other companies because the Appellant could only offer modest income that was insufficient for a decent living.

[52] In the case at bar, the parties knew and accepted the consequences of their choice and the nature of the contract between them. As for the various elements related to the relationship of subordination, the evidence showed that the Appellant waived them and agreed to treat the Workers as equals in managing the business relationship with them.

[53] For all these reasons, I find that the work done by Huguette Chénard, Louise Chagnon, Jocelyne Durand, Gaston Audet and Luc Cloutier for the Appellant from January 1, 2005, to February 28, 2006, constituted self-employment, and was therefore not insurable under the Act.

Signed at Ottawa, Canada, this 26th day of September 2008.

"Alain Tardif"

Tardif J.

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on this 12th day of November 2008.

Brian McCordick, Translator

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APPEARANCES:

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