Docket: 2008-2052(EI)

BETWEEN:

SIMON BEAUCAIRE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ÉRIC LAVOIE,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard February 18, 2009, at Montréal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Marie-Claude Landry
	Roberto Ledoux (articling student)
For the intervenor:	The intervenor himself

JUDGMENT

The appeal of the Minister of National Revenue's decision is dismissed and the decision is affirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of May 2009.

Pierre Archambault

Archambault J.

Translation certified true
on this 3rd day of July 2009.

Elizabeth Tan, Translator

Citation: 2009 TCC 142
Date: 20090521
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REASONS FOR JUDGMENT

Archambault J.

[1] Simon Beaucaire is appealing from a decision by the Minister of National Revenue (Minister) regarding the admissibility of his work as insurable employment for the purposes of the *Employment Insurance Act* (Act). The Minister determined that Mr. Beaucaire did not hold insurable employment with Éric Lavoie (payor or Mr. Lavoie) from March 1, 2007, to September 30, 2007 (relevant period). According to the Minister, Mr. Beaucaire was bound to Mr. Lavoie through a contract for services, whereas Mr. Beaucaire claims it was a contract of employment.

[2] When rendering his decision, the Minister relied on the following presumptions of fact:

> [TRANSLATION]
> 5. …

(a) as of 2002, the payor was the sole owner of a company that created development plans for commercial stores mainly[1] for the Aldo shoe company; (admitted)

(b) the appellant was hired to prepare store plans using the AutoCad computer software program; (admitted)

(c) in the beginning, the two parties agreed that the appellant was an independent worker;[2] (denied)

(d) later, the appellant and the payor did not agree on the appellant's status as independent employee or employee; (admitted)

(e) the appellant's duties were split into two steps: the first was to visit the stores, take measurements, hand-draw a first plan, verify the placement of sprinklers, the ventilation system, electrical outlets, electricity panel and existing shelves; the second was to draw up the store plans on the computer; (admitted)

(f) the first step was done mainly in different cities in the US, and the second, at the appellant's home in Montreal; (admitted)

(g) the appellant was to give the payor the plans prepared by computer, on the Wednesday of the week following the visits; [3] (denied)

(h) the appellant and the payor had agreed upon a rate of $275 per store plan; (admitted)

(i) the appellant billed the payor for his work; [4] (denied)

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1 At the beginning of the hearing, Mr. Beaucaire admitted subparagraph 5(a) except for the word "mainly". During the hearing, he stated that he thought the word "mainly" applied to him and not the company. As a result, he admitted that the payor's services were mainly for Aldo.

2 Although at the beginning of the hearing, Mr. Beaucaire denied this paragraph, he did admit, during his testimony, that he and the payor agreed that he had been hired as a self-employed worker and he had accepted this situation until Mr. Lavoie ended their contract at the beginning of October 2007 (see Exhibit A-1). With no income and having to support his small family, and after seeking advice from some friends, he challenged his self-employed status. He addressed the Commission des normes du travail du Québec. The first time Mr. Lavoie learned that Mr. Beaucaire no longer accepted his self-employed worker status was when he received notice in November 2007.

3 Although Mr. Beaucaire denied this paragraph, the evidence generally confirms that he was to deliver the plans prepared by computer on the Wednesday of the following week.

4 The evidence showed that Mr. Beaucaire billed the payor for his services, as shown in Exhibit I-1. No GST or QST appears on the invoices. Mr. Beaucaire inquired with tax

(j) the payor paid the appellant by cheque according to the invoice presented; (admitted)

(k) the payor organized the store visits, reserved the plane tickets and hotels (admitted) after verifying the appellant's availability; [5](denied)

(l) the payor was reimbursed for the plane tickets and hotel costs by Aldo; [6](no knowledge)

(m) the number of visits was generally two or three stores per week; (admitted)

(n) the appellant had no instructions to follow from the payor in carrying out his work; (denied)

(o) the appellant did not have a work schedule to follow for the payor; (denied)

(p) for the work at home, the appellant worked according to his availability; (denied)

(q) the appellant received no social benefits, vacation or sick leave from the payor; (admitted)

(r) there was no relationship of subordination between the payor and the appellant. (denied)

Factual background

[3] Mr. Lavoie worked for many years as a self-employed worker for Mr. Mathieu Quiviger, an architect who created development plans for stores, mainly for Aldo.

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authorities and learned that it was not necessary to be registered when total sales figures were less that $30,000. According to the evidence, Mr. Beaucaire expected to earn around $27,500 for a year of services.

5 The evidence showed that Mr. Beaucaire worked at a bar Sunday evenings and was generally not available Monday mornings. According to Mr. Beaucaire, if Mr. Lavoie needed him on a Monday morning, he would nake himself available. During his testimony, the payor indicated that he considered Mr. Beaucaire's availability when planning his business trips. In fact, the payor would contact Mr. Beaucaire the week before a planned visit to the US and ask for his availability.

6 The evidence showed that Aldo reimbursed Mr Lavoie for all the travel fees.

The work consisted of going to shopping centres in Canada and the US where Aldo planned on opening a store, and to prepare an architectural plan indicating the mechanical data, particularly regarding the location of sprinklers, ventilation systems, electrical outlets, etc. (mechanical data). So as not to disrupt operations at the existing stores at Aldo's intended locations, he had to work quickly. It was more efficient to have two people working to collect the relevant data. Mr. Quiviger drew the architectural plan of the location and Mr. Lavoie collected the mechanical data on a design sketch that he would later transfer to the architectural plan.

[4] This relationship lasted around six years, until Mr. Quiviger told Mr. Lavoie that he wanted to reduce the number of trips to the US the work for Aldo involved. Notably, Aldo had begun implementing a strong network of shoe stores in the US in 2006. Over a hundred contracts were completed. Mr. Quiviger therefore offered Mr. Lavoie a portion of the territories served by Aldo. He would keep the Canadian territory and Mr. Lavoie would take care of the US territory.

[5] To help with this work in the US, Mr. Lavoie decided to hire a friend, with whom it would be pleasant to travel. His plan was to proceed in the same way he and Mr. Quiviger had worked, namely he would sub-contract part of his duties to a third party. At the time of the negotiations between Mr. Lavoie and Mr. Beaucaire, Mr. Beaucaire worked for Rogers Communications and earned around $45,000. According to Mr. Lavoie, Mr. Beaucaire was not entirely satisfied with his job. Mr. Beaucaire confirmed in his testimony that he wanted to spend more time with his family.

[6] During their negotiations, Mr. Lavoie told Mr. Beaucaire he would be hired as a self-employed worker, and this was accepted. He would be paid $275 per plan. If there was more work to be done than usual, more compensation would be paid. Mr. Beaucaire admitted that he understood that, as a self-employed worker, he had no right to vacation time or social benefits.

[7] Mr. Beaucaire's work was done in two steps. The first was done on site, in the future Aldo locations in the US, where the relevant data was collected. The second was done once he was back in Montreal, in his residence, where he could transcribe the relevant data onto the basic plans created by Mr. Lavoie.

[8] In general, Aldo gave mandates to Mr. Lavoie following a verification of his availability. Aldo made all the necessary provisions for Mr. Lavoie's visits to the US along with the help he had hired. The plane tickets were reserved through Aldo's travel agency and the fees were billed directly to Aldo. As for the other travel

expenses such as hotels, meals and rental car, fees were generally covered by Mr. Lavoie. Occasionally, Mr. Beaucaire would pay certain costs, and Mr. Lavoie would reimburse him in full. Later, Aldo would reimburse Mr. Lavoie for these expenses, as well as those covered by Mr. Lavoie himself. If they travelled by car rather than by plane to get to a city, for example, Boston, Mr. Beaucaire would receive a $50 allowance.

[9] In general, at least two stores were visited per week, in geographically close locations. For example, Boston and New York or Los Angeles and San Francisco. A trip usually lasted two to three days. The agreement between Mr. Lavoie and Aldo included delivery of the plans the following week, generally on the Wednesday.

[10] Mr. Lavoie's job was the same as Mr. Quiviger's, taking the measurements required to prepare an architectural plan of the site Aldo was to occupy. Mr. Beaucaire completed the task Mr. Lavoie carried out, collecting the mechanical data. Mr. Beaucaire would normally wait for Mr. Lavoie to draw the plans of the space to add the mechanical data. According to Mr. Lavoie, they each did their data collection work on site. When Mr. Beaucaire had completed his job, he could leave the site of the future Aldo store without waiting for Mr. Lavoie to complete his work.

[11] To carry out his work, Mr. Beaucaire used certain tools that Mr. Lavoie provided for him, in particular a computer, which cost $850 and was equipped with the AutoCad software program. Although Mr. Lavoie had two laptop computers to start the data transcription work using AutoCad on site, in the US, in fact, Mr. Beaucaire could not transcribe his data until Mr. Lavoie had completed the basic plans. As a result, the computer he had been given was used more for entertainment purposes than for work. Another tool was a $350 laser to take measurements, and a digital camera worth $250. According to Mr. Lavoie, Mr. Beaucaire was not required to use the laser for his work. He could just have easily used a tape measure; but because he had two, he provided Mr. Beaucaire with one. If I understand correctly, both workers, Mr. Lavoie and Mr. Beaucaire, could have used the digital camera.

[12] Once back at his residence in Montreal, Mr. Beaucaire would transfer[7] the mechanical data onto the plans Mr. Lavoie generated using AutoCad. The software had been installed on the computer that belonged to Mr. Beaucaire. In fact, he found

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[7] Mr. Beaucaire confirmed that he worked four or five times in Mr. Lavoie's office. Mr. Lavoie responded that he never saw him working in his office, because there was no room for Mr. Beaucaire in the office. Mr. Beaucaire then stated that he only did so when Mr. Lavoie was not there.

it easier to work on a desktop computer than a laptop. Moreover, Mr. Beaucaire had some problems working AutoCad on the laptop. Mr. Lavoie had provided the installation diskette for this software, which belonged to Aldo. Mr. Beaucaire could carry out his work at his convenience. The only constraint was to deliver the plans by Wednesday the following week, as required by Aldo. During his testimony, Mr. Beaucaire admitted that the deadlines he had to meet were due to requirements imposed by the client, Aldo. However, it is important to note that there is no contractual relationship between Mr. Beaucaire and Aldo. Moreover, Mr. Beaucaire never met Aldo's representatives.

[13] Mr. Beaucaire had no training as an architectural or engineering technician. He had a bachelor's degree in environmental geography. However, as the Court itself could see, Mr. Beaucaire was an intelligent person, "quick minded" as Mr. Lavoie put it. Clearly, Mr. Lavoie had to give Mr. Beaucaire some basic training in the beginning. According to Mr. Lavoie, he did this as a friend. Obviously, it was in his best interest for Mr. Beaucaire to be competent at work. They spent two unpaid afternoons visiting two Aldo stores in Quebec to simulate the work Mr. Beaucaire would have to perform in the US. Mr. Lavoie also gave basic training on AutoCad. He was available to answer any questions Mr. Beaucaire might have regarding the completion of his work. Mr. Beaucaire indicated that in the beginning, it might take three and a half to four hours to finish his plans, whereas at the end, it might only take an hour and a half.

[14] Mr. Lavoie admitted that he verified the work Mr. Beaucaire provided, particularly in the beginning. He would verify, for example, whether he respected the established practice when selecting colours on the plans generated by AutoCad, depending on the type of data. However, he stated he could not verify the accuracy of Mr. Beaucaire's mechanical data as shown on the plans because he did not have the data required to do so. He therefore relied on the work Mr. Beaucaire had done.

[15] According to the analysis of the invoices from Mr. Beaucaire to Mr. Lavoie (Exhibit I-1), there were many periods of two or three weeks during which Mr. Beaucaire's services were not required. During these weeks, Mr. Beaucaire did not earn any pay.

[16] During his testimony, Mr. Beaucaire denied that he refused a contract that Mr. Lavoie had offered him. During cross-examination, however, he did admit that he refused a job to be done in Alberta. He justified this refusal by stating that he had a personal commitment, made after verification with Mr. Lavoie. On cross-examination, Mr. Lavoie indicated that he had also offered Mr. Beaucaire a contract

in New Jersey, which was refused. Mr. Lavoie also offered Mr. Beaucaire the names of people to contact for other contracts but Mr. Beaucaire also refused these.

Analysis

[17] The issue is whether Mr. Beaucaire held insurable employment for the purposes of the Act. The relevant provision is paragraph 5(1)(*a*) of the Act, which states:

> 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.]

[18] This provision defines insurable employment as employment under a contract of service (or, to use a more modern term, a contract of employment). However, the Act does not define this type of contract. The following is found at section 8.1 of the *Interpretation Act*, regarding such a situation:

> *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.]

[19] The most relevant provisions for determining whether there is a contract of employment in Quebec and for distinguishing it from a contract for services are found at articles 2085, 2086, 2098 and 2099 of the *Civil Code of Québec* (**Civil Code** or **C.C.Q**.):

> 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 enterprise 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.]

[20] When these Civil Code provisions are analyzed, it is clear that there are three essential conditions for a contract of employment to exist: (i) performance of work by the employee; (ii) remuneration for that work paid by the employer; (iii) a relationship of subordination. The clear distinction between a contract of employment and a contract for services is the relationship of subordination, or the employer's power of direction or control over the worker.

[21] In scholarly literature, authors have considered the concept of a right of "direction or control" and its flip side, the "relationship of subordination". Robert P. Gagnon wrote the following:[8]

> [TRANSLATION]
>
> (c) Subordination
>
> 90 - A distinguishing factor - The most significant characteristic of an employment contract is the employee's subordination to the person for whom he

[8] Robert P. Gagnon, *Le droit du travail du Québec,* 5th Ed., Cowansville, Quebec, Les Éditions Yvon Blais Inc., 2003.

> or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g., a contract of enterprise or for services governed by articles 2098 et seq. C.C.Q. Thus, while article 2099 C.C.Q. provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> . . .
>
> 92 - Concept - Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in terms of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and monitor the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way.
>
> [Emphasis added.]

[22] Note that the distinguishing feature of a contract of employment is not the employer's actual exercise of direction or control (the strict or classical concept) but the employer's right to do so (broad concept). In *Gallant v. M.N.R.*, [1986] F.C.J. No. 330 (QL), Pratte J.A. of the Federal Court of Appeal stated:

> …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…
>
> [Emphasis added.]

[23] Mention should also be made of the commentary of Quebec's Minister of Justice on article 2085 C.C.Q. accompanying the draft Civil Code, which I quoted at page 2:26 of an article I wrote (my article) entitled "Contract of Employment: Why Wiebe Door Services Ltd. Does Not Apply in Quebec and What Should Replace It."[9]

> [TRANSLATION]
>
> This article restates the rule enacted by article 1665(a) C.C.L.C. The definition contained in the new article establishes more clearly the difference between a contract of employment and a contract for services or contract of enterprise. The sometimes fine line between the two kinds of contracts has caused difficulties both in the scholarly literature and in the case law.
>
> The definition indicates the essentially temporary nature of a contract of employment, thus enshrining the first paragraph of article 1667 C.C.L.C., and highlights the chief attribute of such a contract: the relationship of subordination characterized by the employer's power of control, other than economic control, over the employee with respect to both the purpose and the means employed. It does not matter whether such control is in fact exercised by the person holding the power; it also is unimportant whether the work is material or intellectual in nature
>
> [Emphasis added.]

[24] In Québec, unlike in the common law, the main issue is whether there is a relationship of subordination, or a power of control or direction. To determine whether a contract is a contract of employment or a contract for services, a court has no choice but to determine whether there is a relationship of subordination. This was the approach taken by Létourneau J.A. of the Federal Court of Appeal in D & J Driveway, [10] in which he found that there was no contract of employment

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9 Second Collection of Studies in Tax Law (2005) in the collection entitled *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Montréal, Association de planification fiscale et financière and the Department of Justice Canada.

10 *D & J Driveway Inc. v. Canada (M.N.R.),* [2003] F.C.J. No. 1784 (QL), 2003 FCA 453. See also *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (QL) (F.C.A.); *Sauvé* v. *Canada (M.N.R.),* [1995] F.C.J. No. 1378 (QL) (F.C.A.); *Lagacé v. Canada* (*M.N.R.*), [1994]

based on the provisions of the Civil Code and, in particular, on his finding that there was no relationship of subordination, which he described as "the essential feature of the contract of employment."[11]

[25] In addition to D & J Driveway, I would note the decision of the Federal Court of Appeal in *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, [2005] F.C.J. No. 1720 (QL) 2005 FCA 334 (Tambeau). Décary J.A. wrote the following at paragraphs 2 and 3:[12]

> 2 With respect to the nature of the contract, the judge's answer was correct, but, in my humble opinion, he arrived at it incorrectly. He did not say anything about the provisions of the Civil Code of Québec, and merely referred, at the end of his analysis of the evidence, to the common law rules stated in Wiebe Door Services Ltd. v. Canada (Minister of National Revenue), [1986] 3 FC 533 (FCA) and 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983. I would hasten to point out that this mistake is nothing new and can be explained by the vacillations in the case law, to which it is now time to put an end.
>
> 3 When the *Civil Code of Québec* came into force in 1994, followed by the enactment of the Federal Law - *Civil Law Harmonization Act, No. 1*, SC 2001, c. 4 by the Parliament of Canada and the addition of section 8.1 to the *Interpretation Act*, R.S.C., c. I-21 by that Act, it restored the civil law of Quebec to its rightful place in federal law, a place that the courts had sometimes had a tendency to ignore. On this point, we need only read the decision of this Court in *St-Hilaire v. Canada*, [2004] 4 FC 289 (FCA) and the article by Mr. Justice

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F.C.J. No. 885 (QL) (F.C.A.), affirming [1991] T.C.J. No. 945 (QL). It must be mentioned that in *D & J Driveway* and *Charbonneau*, the Court of Appeal did not specifically exclude the application of *Wiebe Door*, but found that a contract for services existed, based on the absence of a relationship of subordination, thus following the Civil Code rules.

11 Para. 16 of the decision.

12 It must be noted that Pelletier and Létourneau JJ. indicated they agreed with Décary J.'s decision. However, in a subsequent decision, *Combined Insurance Company of America v. M.N.R. and Mélanie Drapeau*, 2007 FCA 60, per Nadon J., accepeted by Pelletier and Létourneau JJ., reference is again made to *Wiebe Door*. However, there is no reference in *Combined Insurance* to *Tambeau* nor is there any mention that the interpretation adopted by Décary J. was no longer legally binding in Québec. The application for leave to appeal *Combined Insurance* at the Supreme Court of Canada was dismissed on October 25, 2007. Létourneau J. had the opportunity to re-address this issue in a recent case, *Grimard v. Her Majesty the Queen*, 2009 FCA 47. At paragraph 37, he stated: "…in Quebec civil law, the notion of control is more than a mere criterion as it is in common law. It is an essential characteristic of a contract of employment…" He then cited *Tambeau* in support of his statement.

> Pierre Archambault of the Tax Court of Canada entitled "Why Wiebe Door Services Ltd. Does Not Apply in Quebec and What Should Replace It", recently published in the Second Collection of Studies in Tax Law (2005) in the collection entitled *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, to see that the concept of "contract of service" in paragraph 5(1)(a) of the *Employment Insurance Act* must be analyzed from the perspective of the civil law of Quebec when the applicable provincial law is the law of Quebec
>
> [Emphasis added.]

[26] As mentioned above, there may be a fine line between a contract of employment and a contract for services. It is important that as a starting point, we consider how the parties themselves defined the nature of their contractual relationship. Here, evidence of the parties' intention is clear. It shows that the parties wanted to enter into a contract for services. In fact, when Mr. Lavoie stated to Mr. Beaucaire that he would be a "self-employed worker", he was indicating his intention to create a relationship in which the services provided by Mr. Beaucaire would be carried out "completely independently" and that he would have the freedom to choose his methods of execution. Even if Mr. Beaucaire stated that he did not fully understand the concept of a self-employed worker, he did acknowledge that it included the concept of independence. The courts have recognized the importance of the parties' intentions regarding their contractual relationship. For example, in *Livreur Plus Inc. v. Canada (M.N.R.)*, [2004] F.C.J. No. 267 (QL), Létourneau J. stated, at paragraph 17:

> **17** What the parties stipulate as to the nature of their contractual relations is not necessarily conclusive, and the Court may arrive at a different conclusion based on the evidence before it: D & J Driveway Inc. v. The Minister of National Revenue, 2003 FCA 453. However, if there is no unambiguous evidence to the contrary, the Court should duly take the parties' stated intention into account: Mayne Nickless Transport Inc. v. The Minister of National Revenue, 97-1416-UI, February 26, 1999 (T.C.C.). Essentially, the question is as to the true nature of the relations between the parties. Thus, their sincerely expressed intention is still an important point to consider in determining the actual overall relationship the parties have had between themselves in a constantly changing working world: see Wolf v. Canada, 2002 FCA 96, [2002] 4 F.C. 396 (F.C.A.); Attorney General of Canada v. Les Productions Bibi et Zoé Inc., 2004 FCA 54.
>
> [Emphasis added.]

[27] The question now is whether there is unequivocal evidence to the contrary that would lead the Court to find that the parties were mistaken about the true nature of

their contractual relationship. As I wrote in *Banque Financière Inc. v. The Minister of National Revenue and Carlo Massicolli*, 2008 TCC 624, at paragraph 59:

> …
> It is the function of this Court to ensure that the conduct of parties in the performance of the contract was consistent with the intent that they expressed when they agreed to form the contract.[13] Among other things, the Court must ensure that all conditions essential to the existence of an employment contract were fulfilled. In the case at bar, the condition that might pose a problem is the existence of a relationship of subordination. As counsel for NBF noted in his oral argument, citing the Civil Code, cases and scholarly writing in support, in Quebec the criterion that distinguishes between a contract of employment and a contract of enterprise or for services is the existence of a relationship of subordination

[28] In my opinion, other important citations from *Livreur Plus Inc*. also apply in this case:

> **19** Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D & J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, *supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.*), 2002 FCA 394, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker".
>
> **20** I agree with the applicant's arguments. A subcontractor is not a person who is free from all restraint, working as he likes, doing as he pleases, without the slightest concern for his fellow contractors and third parties. He is not a dilettante with a cavalier, or even disrespectful, whimsical or irresponsible, attitude. He works within a defined framework but does so independently and outside of the business of the general contractor. The subcontract often assumes a rigid stance dictated by the general contractor's obligations: a person has to take it or leave it. However, its nature is not thereby altered, and the general contractor does not lose his right of monitoring the results and the quality of the work, since he is wholly and solely responsible to his customers.
>
> …

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[13] For a discussion of this process, see my article, at pages 2:63 *et seq*.

> **24** Counsel for the respondent mentioned a number of facts in support of her argument that the applicant exercised such control over its two workers that the only conclusion could be that a relationship of subordination existed between the parties. To begin with, she strongly emphasized the fact that the delivery persons were subject to obligatory hours of availability, each worked in a defined territory and they could not alter the work schedule without the applicant's authorization.
>
> **25** With respect, I do not think that these three first points are conclusive in determining the nature of the overall relationship between the parties or suffice to change the nature of what they stated in the contract. The reason is quite simple. Under its contract of enterprise, the applicant assumed specific obligations of time and space toward its customers, the pharmacies. As appears from the contract governing their relations, specific times and places for collecting and delivering medication were agreed on between the applicant and the pharmacies. These obligations are contained in part in the subcontract with the delivery persons. The specific nature of the duties and availability to carry them out are not the characteristic features of a contract of employment. A contractor who hires the services of subcontractors to perform all or part of the duties it has undertaken to perform for its customers in accordance with a schedule will identify and define what they have to do and ensure that they are available to do it: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.), supra*; *Vulcain Alarme Inc. v. The Minister of National Revenue, supra*, at paragraph 4. Otherwise, on this basis, one would have to conclude that the applicant itself was an employee of the pharmacies, since it had to be available to serve them at the agreed times and on the agreed schedule.
>
> [Emphasis added.]

[29] In my opinion, there was a contract for services between Aldo and Mr. Lavoie. He had specific obligations towards this client in terms of time limits and the work to be accomplished. He had to go to certain places in the US where Aldo planned to set up stores, and he had to produce plans describing the space, including mechanical data. There was a time limit for producing these plans. To carry out part of this contract for services, Mr. Lavoie hired Mr. Beaucaire as a sub-contractor. His part was to collect the mechanical data and reproduce them on the plans drawn using the AutoCad software program. In my opinion, Mr. Lavoie did not have the right of control or direction over the work Mr. Beaucaire performed. The evidence did not show that Mr. Lavoie exercised such a right. The control exercised was on the result and the quality of the work Mr. Beaucaire submitted.

[30] It is true that in the beginning, Mr. Beaucaire did not have the knowledge or experience required to carry out the mandate he was given. It is normal that Mr. Lavoie would provide his guidance to help him acquire this knowledge and

experience. It is also normal that Mr. Lavoie would verify the work Mr. Beaucaire submitted to ensure its quality. This verification mainly addressed aesthetic issues, such as the colour of the data reproduced using AutoCad. As was the case of the delivery persons in *Livreur Plus Inc.*, if Mr. Beaucaire did not wish to accept a mandate, he was perfectly free to refuse it. This was, in fact, what he did on at least two occasions.

[31] The following comments by Letourneau J. in *Livreur Plus Inc.*, at paragraph 41, are also relevant in this case:

> **41** The delivery persons had no offices or premises at the applicant's location. They did not have to go to the applicant's location to do their delivery work: *ibid*., page 81. Together with the right to refuse or decline offers of services, these are factors which this Court has regarded as indicating a contract of enterprise or for services rather than one of employment: see *D & J Driveway Inc. v. The Minister of National Revenue, supra*, paragraph 11.

[32] In *Sauvageau Pontiac Buick GMC Ltée v. Canada (Minister of National Revenue)*, [1996] T.C.J. No. 1383 (QL), I adopted a similar viewpoint, cited in *D & J Driveway*:

> **16** The Court does not consider that, in the instant case, any relationship of subordination between Mr. Bédard and Sauvageau Pontiac existed during the relevant period. To begin with, Mr. Bédard was not required to be available at the Sauvageau Pontiac place of business. Then, he was completely free to accept or to refuse the delivery of a car. Sauvageau Pontiac could not exercise any control over Mr. Bédard's activities. If he refused a delivery offer for any reason, all that Sauvageau Pontiac could do was contact another of its driver-agents. The task specified in the contract between Mr. Bédard and Sauvageau Pontiac was very specific and limited in scope. His work involved either driving a car from Sauvageau Pontiac's place of business to the customer's residence or taking delivery of it at the client's and drive it back to Sauvageau Pontiac's place of business. The service provided by Mr. Bédard was very similar to that provided by companies delivering packages, except that here the package was the car.
>
> [Emphasis added.]

[33] As in *D & J Driveway*, *Livreur Plus* and *Sauvageau Pontiac Buick GMC Ltée*, the work Mr. Beaucaire was to provide was fairly simple and specific: collect the mechanical data and reproduce it on the plan generated by a software program. The ability to refuse or accept "offers of service" is a factor that the case law has relied on to indicate a contract for services rather than a contract of employment.

[34] That Mr. Beaucaire could leave the stores after he finished his work, without staying to help Mr. Lavoie in his duties is another important indicator of the absence of a relationship of subordination. The purpose of the contract was to carry out a specific task and once it was completed, Mr. Beaucaire was free to do what he wanted. If he had been hired as an employee, Mr. Lavoie would certainly have asked him to help him finish his own work.

[35] In my opinion, another indicator that a contract for services exists rather than a contract of employment is the fact Mr. Beaucaire did not work unless he received a specific contract. When he did not have work, he had no services to render, and, obviously, he was not paid. In such a context, it is plausible that Mr. Lavoie had no right of control or direction over Mr. Beaucaire's work. As a result, with no evidence showing that the parties' behaviour was not in accordance with their intent, the only conclusion here is that Mr. Beaucaire provided his services under a contract for services and not a contract of employment. As a result, Mr. Beaucaire did not hold insurable employment during the relevant period.

[36] For all these reasons, Mr. Beaucaire's appeal is dismissed.

Signed at Ottawa, Canada, this 21st day of May 2009.

Pierre Archambault

Archambault J.

Translation certified true
on this 3rd day of July 2009.

Elizabeth Tan, Translator

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