Docket: 2009-3652(EI)

BETWEEN:

ALAIN BERNIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MICHAEL GOUGEON,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 10, 2010 at Québec, Quebec.

Before: The Honourable Justice François Angers

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Marjolaine Breton
For the intervener:	The intervener himself

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed, and the Minister's decision is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of June 2010.

"François Angers"

Angers J.

Translation certified true
on this 14th day of July 2010

Margarita Gorbounova, Translator

Citation: 2010 TCC 280
Date: 20100614
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REASONS FOR JUDGMENT

Angers J.

[1] The appellant is appealing the decision of the Minister of National Revenue (the Minister) dated September 10, 2009, stating that the employment of Michel Bokwala-Ngilima and Michael Gougeon with Alain Bernier (Entretien Ménager ADM enr.) during the period between January 1, 2007, and December 31, 2008, was insurable within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the Act). Michael Gougeon is the only intervener in this appeal.

[2] It is thus up to the appellant to demonstrate on the preponderance of the evidence that the Minister's decision is unfounded in fact and in law.

[3] The appellant is the sole proprietor of a business, which he operates under the name Entretien Ménager ADM enr. (the payer). The business has been in operation since 1999. It provides cleaning services to restaurants and bars in the Québec area. According to the payer, it established the negotiated rate with its clients based on its own assessment of the work to be done. The price was not negotiated based on the size of the establishment or the amount of work to be done but rather based on [TRANSLATION] "eyeballing", to use the payer's expression.

[4] The payer was paid monthly by its clients, and it provided mops, vacuum cleaners, stepladders and all cleaning products.

[5] In order to perform the work, the payer employed workers including the two workers involved in this appeal. The worker Bokwala-Ngilima worked full time for the appellant for 5 or 6 years and was assigned mainly to three establishments. His task was to clean those three establishments, including the bathrooms, and to vacuum. He worked Tuesday to Sunday from midnight to 7 or 8 a.m. and during the

holiday season. Sometimes he had to travel from one establishment to another during his work shift. He was paid between $11 and $12 per hour.

[6] The same work conditions apply to the worker Michael Gougeon, who is the intervener in this appeal. He was in the appellant's service part time for 3 or 4 years and worked from midnight to 7 or 8 a.m. on Saturday and Sunday. He was paid $13.50 per hour.

[7] All workers had to mark down their time of arrival and departure for each establishment they went to on timesheets provided by the payer for that purpose. They were paid every two weeks by cheque issued by the payer. It was admitted that they all used tools and products provided by the payer to perform their tasks and that none of them incurred expenses in carrying out their tasks in the payer's service. The clients' complaints could be addressed to the workers, but the payer assumed responsibility for them.

[8] In its testimony, the payer stated that it had signed more cleaning contracts than it was able to fulfill. It stated that it therefore sub-contracted the two workers to do the remainder of the work. According to the payer, the two workers were in charge of their schedules and could have had others do their work. They were also

free to work the hours that suited them provided that the work was done before the establishments in question opened. It maintains that it exercised no control over the way they performed their work and that there were no consequences or reprisals if they did not come to work.

[9] In cross-examination, the payer acknowledged that it established the rate of pay and that it gave instructions concerning the work to be done. It was also on the premises with the workers to do its part of the work.

[10] The only other witness was the intervener, Michael Gougeon. He maintains that he had negotiated his pay of $13.50 per hour, that he worked the number of hours he wanted and that it was to supplement his income. He does not consider that he was under contract with the payer given that he did not pay employment insurance premiums.

[11] Sylvie Munger is a complex case and technical review officer at the Ministère de Revenu. She was assigned to analyze this case. She interviewed the payer and the two workers, and the questionnaires used were filed in evidence. Among the answers, she retained the fact that the payer provided training to the workers and that they were paid for the time that it took up. It was the payer who assigned tasks and set

standards respecting quality, quantity and timelines that had to be followed. The workers also answered that Mr. Bernier supervised the work and made important decisions. The workers could not decide not to come to work without first informing the payer and it was the payer who found a replacement. The two workers and the payer answered yes to the question of whether the payer was able to dismiss a worker.

[12] The following statutory provisions are relevant to the resolution of the instant appeal:

> ***Interpretation Act***
>
> 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.

Civil Code of Québec

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

1426. In interpreting a contract, 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, are all taken into account.

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.

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.

[13] In a recent decision of the Federal Court of Appeal, *NCJ Educational Services Ltd. v. Canada*, [2009] F.C.J. No. 507, Justice Desjardins wrote about the background to the concept of subordination found in the *Civil Code of Québec* by referring to the author Robert Gagnon (*Le droit du travail du Québec*, 6th edition), and to the fact that, in the latest edition of his work, certain indicia are added that make it possible to conduct an analysis similar to that which applies in common law. The relevant passage reads as follows:

> [TRANSLATION]
>
> 92 - Concept - Historically, the civil law first developed a so-called strict or classical concept of legal subordination that was used as a test for the application of the principle of the civil liability of a principal for injury caused by the fault of his agents and servants in the performance of their duties (art. 1054 C.C.L.C.; art. 1463 C.C.Q.). This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the concept of legal subordination in a broad sense. The diversification and specialization of occupations and work techniques often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work. Thus, subordination has come to be equated with the power given a person, accordingly recognized as the employer, of determining the work to be done,

> overseeing its performance and controlling it. From the opposite perspective, an employee is a person who agrees to be integrated into the operating environment of a business so that it may receive benefit of his or her work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over the quantity or quality of the work done, ownership of tools, chance of profit, risk of loss and so on. Work in the home does not preclude this sort of integration into the business.

[14] Justice Létourneau of the Federal Court of Appeal cited the same passage in *Grimard v. Canada*, [2009] F.C.J. No. 167, as Justice Décary did in *Wolf v. The Queen*, [2002] 4 F.C. 396, and added the following at paragraphs 37 to 43:

> This excerpt mentions the notion of control over the performance of work, which is also part of the common law criteria. The difference is that, 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: see *D&J Driveway*, *supra*, at paragraph 16; and *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334.
>
> However, we may also note in the excerpt from Mr. Gagnon that, in order to reach the conclusion that the legal concept of subordination or control is present in any

work relationship, there must be what the author calls [TRANSLATION] "indicia of supervision", which have been called "points of reference" by our Court in *Le Livreur Plus Inc. v. MNR*, 2004 FCA 68 at paragraph 18; and *Charbonneau v. Canada (Minister of National Revenue – M.N.R.)*, (1996), 207 N.R. 299, at paragraph 3.

For example, under Quebec civil law, integration of a worker within a business is an indicator of supervision that is important or useful to find in order to determine whether legal subordination exists. Is that not also a criterion or a factor that is used in common law to define the legal nature of an existing employment contract?

Likewise, as a general rule, it is the employer and not the employee who makes the profits and incurs the losses of the business. In addition, the employer is liable for the employee's actions. Are these not practical indicators of supervision, indicating the existence of legal subordination in Quebec civil law as well as in common law?

Finally, is the criterion of the ownership of work tools that is used by the common law not also an indicator of supervision that would be useful to examine? Depending on the circumstances, it may reveal the degree of an employee’s integration into the business or his or her subordination to or dependence on it. It may help to establish the existence of legal subordination. In a contract of employment, more often than not, the employer supplies the employee with the tools required to perform the work. However, it seems to me to be much more difficult to conclude that there is

integration into a business when the person performing the work owns his or her own truck with his or her name advertised on the side and containing some $200,000 worth of tools to perform the tasks that he or she does and markets.

It goes without saying, in both Quebec civil law and common law, that, when examined in isolation, these indicia of supervision (criteria or points of reference) are not necessarily determinative. For example, in *Vulcain Alarme Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 749, (1999), 249 N.R. 1, the fact that the contractor had to use expensive special detection equipment supplied by the client to check and gauge toxic substance detectors was not considered to be sufficient in itself to transform what was a contract for services into a contract of employment.

In short, in my opinion there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.

[15] This being said, it must thus be determined whether the facts of the case will make it possible for me to find that the two workers did work for remuneration according to the instructions and under the direction or control of the appellant, thus performing insurable employment within the meaning of the Act under a contract of employment.

[16] In this case, there was work performed by the two workers for which they were paid. In regard to the claim that there was no relationship of subordination, or direction or control of the two workers, neither the evidence heard nor the answers obtained during meetings support the appellant's claim.

[17] The workers first underwent training provided and paid for by the payer; their work schedule met the payer's needs; and most of the time, they worked together in the same location, at the same time and at the same client's establishment. In my opinion, this is far from a contract for services. The workers also had to keep track of their time using forms provided by the payer for that purpose. Work hours were established, and each worker had to be at work during the hours required to do his work. Based on the questionnaires, they were hired by the payer, and it assigned them their tasks and supervised them. The important decisions were made by the payer.

[18] The evidence showed that the payer provided the workers with all tools and products necessary to carry out their work. The two workers did not assume any financial responsibility, and therefore, they had no chance of profit or risk of loss.

[19] In light of all of the evidence, I find that in this case contracts of employment within the meaning of the Act existed between the payer and Mr. Bokwala-Ngilima and Michael Gougeon during the period from January 1, 2007, to December 31, 2008.

[20] Accordingly, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 14th day of June 2010.

"François Angers"

Angers J.

Translation certified true
on this 14th day of July 2010
Margarita Gorbounova, Translator

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APPEARANCES:

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