Dockets: 2010-946(EI),
2010-947(CPP)

BETWEEN:

DONALD BERNIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence with the appeal of Alain Bernier
(Entretien ménager ADM enr.) (2010-1090(EI)),
on December 10, 2010, at Québec, Quebec

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Marie-France Dompierre

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue dated February 4, 2010, is confirmed, in accordance with the attached Reasons for Judgment.

The appeal under the *Canada Pension Plan* is dismissed since the Minister of National Revenue did not make a decision on that matter.

Signed at Ottawa, Canada, this 10th day of March 2011.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 20th day of April 2011
Margarita Gorbounova, Translator

Docket: 2010-1090(EI)

BETWEEN:

ALAIN BERNIER
(ENTRETIEN MÉNAGER ADM ENR.),

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Citation: 2011 TCC 156
Date: 20110310
Dockets: 2010-946(EI), 2010-947(CPP)

BETWEEN:

DONALD BERNIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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AND BETWEEN:

Docket: 2010-1090(EI)

ALAIN BERNIER
(ENTRETIEN MÉNAGER ADM ENR.),

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Hogan, J.

Introduction

[1] The appellant Alain Bernier (Entretien ménager ADM enr.) (the payer) is appealing from the decision of the Minister of National Revenue (the Minister) dated February 4, 2010, according to which Donald Bernier, Denis Hamel, Francis Blouin and Marc Thibodeau (the workers) held insurable employment within the meaning of the *Employment Insurance Act* (the Act) from January 1, 2008, to June 30, 2009.

[2] Donald Bernier, the payer's brother, appealed from the Minister's decision regarding him under the Act. Donald Bernier's Notice of Appeal indicated that he was also objecting to the fact that his employment with the payer entitled him to a pension under the *Canada Pension Plan*. Since the evidence shows that the respondent did not make a decision concerning the *Canada Pension Plan*, Donald Bernier's appeal under docket number 2010-947(CPP) is dismissed without further reasons.

[3] Accordingly, the rest of the reasons will deal only with the appeals of Donald Bernier, 2010-946(EI), and Alain Bernier (Entretien ménager ADM enr.), 2010-1090(EI), from the Minister's decisions under the Act.

[4] The appeals were heard on common evidence.

Factual background

[5] On November 17, 2009, the appellant Alain Bernier asked the Minister to decide whether Donald Bernier, who is his brother, as well as Denis Hamel, Francis Blouin and Marc Thibodeau (the workers) had held insurable employment when they worked for him from January 1, 2008, to June 30, 2009.

[6] On February 4, 2010, the Minister confirmed that the workers had held insurable employment during the period at issue. The appellant Alain Bernier decided to appeal that decision.

[7] Only the Bernier brothers testified for the appellants. Roger Dufresne, the appeals officer for the Canada Revenue Agency (CRA) was the only witness for the Minister.

[8] The appellant Alain Bernier is the sole proprietor of a business, which he operates under the name Entretien Ménager ADM enr. It cleans restaurants and bars in the Québec area. The appellant negotiates prices with his clients based on the time he estimates it would take to complete the cleaning.

[9] During the period at issue, the business billed its clients every month and was paid within 15 days. The evidence shows that the appellant provided mops, vacuum cleaners, stepladders and cleaning products most of the time. The workers did not need to supply anything. To do the work, the business retained the workers' services.

[10] Before the Court, the payer clearly stated that there were no notable differences in the workers' work. Every worker had similar work conditions. In

addition, the payer stated in cross-examination that one of the workers, Denis Hamel, performed exactly the same tasks as Mr. Bokwala. Mr. Bokwala's status was examined by the Tax Court of Canada in *Bernier v. Canada*, 2010 TCC 280.

[11] The payer stated that he set its workers' pay rates. In order to get paid, the workers prepared invoices that they submitted to the payer. None of the workers billed the payer for GST.

[12] The payer stated that he instructed the workers about their work and indicated where they should work. According to the payer, the workers had flexible schedules, but the work absolutely had to be done before the establishments in question opened. The payer stated that he had no control over the way the workers did their work because he was not always present. he stated that, if there were complaints, they were mostly directed to the payer because he was in charge of the contracts, but that, if the work had been poorly done, the clients could ask the worker about it directly. However, the payer assumed full responsibility for the work.

[13] In the case of Donald Bernier, Alain Bernier's brother, the facts are substantially the same with a few differences. Donald Bernier worked part time for the payer. He did cleaning with his brother at a bar and by himself in hair salons and at one office in the area. Donald maintained that, when he worked alone, he used his own vacuum cleaner. However, just like in the case of the other workers, it was his brother who told him which client he had to do the cleaning for. To get paid, Donald submitted invoices, which indicated his time of arrival and departure. He stated that, when he worked with his brother at the bar, he was paid $12.50 per hour, and, when he did the cleaning for a business, he earned a fixed amount of $125 for about 10 hours of work. In addition, he stated that he was paid regularly, every two weeks, and that the businesses were not his clients.

[14] The Minister's only witness was Roger Dufresne, appeals officer for over 12 years. It was he who had analyzed the appellants' file. He stated that he had spoken with Alain Bernier several times, but that Alain Bernier had never followed up on the letters he had sent. In the course of their conversations, he asked him whether there were any differences from the Bokwala case. The payer told him that the conditions of employment were identical. He assigned tasks and set standards to follow with respect to the places where cleaning had to be done, quality of work and timelines. The workers were paid per hour and, in order to get paid, they marked down their hours of work on a document that they submitted to the payer.

[15] As for Donald Bernier, the appellant's brother, Mr. Dufresne maintained that he had quickly verified the significance of the non-arm's-length relationship. Based

on the evidence he had before him, he determined that his conditions of employment were similar to those of the other workers.

Analysis

[16] The relevant statutory provisions of the *Employment Insurance Act*, S.C. 1996, c. 23, read as follows:

> Types of insurable employment
>
> **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;
>
> (*b*) employment in Canada as described in paragraph (*a*) by Her Majesty in right of Canada;
>
> (*c*) service in the Canadian Forces or in a police force;
>
> (*d*) employment included by regulations made under subsection (4) or (5); and
>
> (*e*) employment in Canada of an individual as the sponsor or co-ordinator of an employment benefits project.
>
> Excluded employment
>
> **(2)** Insurable employment does not include
>
> (*a*) employment of a casual nature other than for the purpose of the employer's trade or business;
>
> (*b*) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
>
> (*c*) employment in Canada by Her Majesty in right of a province;
>
> (*d*) employment in Canada by the government of a country other than Canada or of any political subdivision of the other country;
>
> (*e*) employment in Canada by an international organization;
>
> (*f*) employment in Canada under an exchange program if the employment is not remunerated by an employer that is resident in Canada;

(*g*) employment that constitutes an exchange of work or services;

(*h*) employment excluded by regulations made under subsection (6); and

(*i*) employment if the employer and employee are not dealing with each other at arm's length.

Arm's length dealing

(3) For the purposes of paragraph (2)(*i*),

(*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and

(*b*) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

***Interpretation Act*, R.S.C. 1985, c. I-21:**

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*, S.Q. 1991, c. 64:**

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.

[17] The issue of whether an employment is insurable or not has been the subject of numerous decisions. To start, it is important to note that the burden of proof is on the appellant. He must demonstrate that the Minister made an error when making his decision. He must do so on the balance of probabilities. Each case is different and must be assessed based on the evidence presented at the hearing.

[18] Case law has established four criteria to distinguish a contract of enterprise from a contract of service: (a) the degree or absence of control exercised by the employer, (b) ownership of tools, (c) chance of profit and risk of loss and (d) integration of the employee's work into the employer's business. Those criteria were established in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553. The purpose of the criteria is to analyze the relationship between the payer and the worker in its entirety. The courts must try to determine the parties' common intention in light of the evidence. As stated in the Supreme Court Decision in *671122 Ontario Ltd. v. Sagaz industries Canada Inc.*, [2001] 2 S.C.R. 983,

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[Emphasis added]

[19] These factors were established and have been evolving under common law. The question that must be considered now is how important they are under civil law. Since section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. 1-21, was enacted, it has been clear that the criteria from the *Civil Code of Québec* must be used to determine whether a contract of employment exists. Thus, are the common law criteria still relevant?

[20] The Federal Court of Appeal clearly explained how to apply those criteria in light of the Civil Code in two recent decisions: *Grimard v. Canada*, [2009] 4 F.C.R. 592, 2009 FCA 47, and *NCJ Educational Services Ltd. v. Canada*, 2009 FCA 131. The Court stated that, under the Civil Code, the contract of employment must be read in light of the relevant provisions.[1] According to the exhaustive analysis performed by the Federal Court of Appeal in the two decisions, direction and control over the work are a determinative factor in a contract of employment, but the other criteria established by the common law are also relevant because they provide indicia of subordination or supervision. In *Grimard*, after analyzing the common law criteria, Justice Létourneau stated the following:

> 42 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.
>
> 43 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.
>
> [Emphasis added]

[21] The criteria enable the Court to make a factual assessment of the relationship between the parties. Thus, it will consider the reality – the parties' behaviour – not just their claims. Subordination and control must be examined keeping in mind the issue of whether the payer has the power to determine the work to be done, and to

[1] They are articles 1425, 1426, 2085, 2098 and 2099 of the *Civil Code of Québec*.

supervise and control the employee. As for the worker, his or her integration will be determined based on the profit that the business makes from his or her work.

[22] In the case of Donald Bernier, the payer's brother, it is paragraph 5(3)(*b*), in particular, that interests us. That paragraph provides that, if individuals are not dealing with each other at arm's length, employment is not insurable unless the Minister is satisfied of the contrary, having regard to the circumstances. When the Court is dealing with an appeal concerning the Minister's decision, it must show deference and cannot replace the Minister's decision with its own if there are no new facts at the hearing.[2] However, the judge is obliged to verify whether the facts used by the Minister are real and were correctly assessed having regard to the context.[3] That procedure has been confirmed by the federal courts in several decisions.[4] In *Le Livreur Plus Inc. v. Canada*, 2004 FCA 68, Justice Létourneau eloquently summarized the role of the judge when he or she is faced with this type of appeal. He wrote the following:

> 12 As already mentioned, the Minister assumed in support of his decision the existence of a number of facts obtained by inquiry from workers and the business he considered to be the employer. Those facts are taken as proven. It is for the person objecting to the Minister's decision to refute them.
>
> 13 The function of a Tax Court of Canada judge hearing an appeal from the Minister's decision is to verify the existence and accuracy of those facts and the assessment of them by the Minister or his officials, and after doing so, to decide in light of that whether the Minister's decision still seems to be reasonable: *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 878; *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310; *Massignani v. Canada (Minister of National Revenue - M.N.R.)*, 2003 FCA 172; *Bélanger v. Canada (Minister of National Revenue - M.N.R.)*, 2003 FCA 455. In fact, certain material facts relied on by the Minister may be refuted, or the view taken of them may not stand up to judicial review, so that because of their importance the apparent reasonableness of the Minister's decision will be completely destroyed or seriously undermined.
>
> 14 In exercising this function the judge must accord the Minister a certain measure of deference, as to the initial assessment, and cannot simply substitute his own opinion for that of the Minister unless there are new facts or evidence that the known facts were misunderstood or wrongly assessed: *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, *supra*, paragraph 15.

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[2] *Pérusse v. Canada*, [2000] F.C.J. No. 310.
[3] *Bélanger v. Canada*, 2003 FCA 455.
[4] *Légaré v. Canada*, [1999] F.C.J. No. 878, *Valente v. Canada*, 2003 FCA 132, and *Massignani v. Canada*, 2003 FCA 172.

> 15 The judge must make a legal analysis of the facts alleged by the Minister to determine whether they support the conclusion drawn by the latter from them. By this I mean that he must indicate how and why these facts establish, or tend to establish, the existence of a contract of employment rather than a contract of enterprise between the parties.

[23] In a recent decision of this Court, Justice Bédard discussed the judge's role in analyzing the Minister's decision.[5] His comments are similar to those made in *Le Livreur Plus Inc.* He added that the burden of proof is on the appellant. The appellant must demonstrate, on the balance of probabilities, that the Minister did not verify all of the relevant facts.[6] Let us now apply the law to the facts of this case.

[24] Although the facts are strangely similar to those in Justice Angers' decision in *Bernier v. Canada, supra*, it is important to note that every case is examined in light of the specific facts of that case. First, let us analyze the issue of whether the worker's employment was insurable. Was it a contract of service or a contract of enterprise?

[25] Both the payer and the payer's brother testified before the Court. Their testimony revealed several similar facts. Both appellants confirmed that the workers were paid regularly, that they noted down their hours of work on sheets and submitted them to the payer in order to receive their wages and that their work was assigned by the payer. The payer maintained that he provided the tools and products needed to do the work, with the exception of Donald, who used his own vacuum cleaner, but not his own cleaning products. In addition, Donald Bernier maintained that he did not bill the payer for GST.

[26] The workers assumed no financial responsibility. They could not have any chance of profit or risk of loss. Moreover, they did not contact the clients; the payer did. Alain and Donald Bernier often pointed out that the payer exercised no control over the workers' work. In response to their argument, I believe it would be relevant to take into account Justice Desjardins' comments in *NCJ Educational Services Ltd. v. Canada*, *supra*, where she summarizes the evolution of subordination in labour law under the Civil Code, based on the book by Robert Gagnon.

> 59 In the most recent edition of the book of Robert Gagnon (6e édition, mis à jour par Langlois Kronström Desjardins, sous la direction de Yann Bernard, Audré Sasseville et Bernard Cliche), the indicia (underlined below) have been added to those found in the earlier 5th edition. Those added indicia are the same as those developed in the *Montreal Locomotive Works* case and applied by this Court in *Wiebe Door*.

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[5] *Lavoie v. Canada*, 2010 TCC 580.
[6] Ibid. at paragraphs 7 to 9.

> 92 - Notion – Historiquement, le droit civil a d'abord élaboré une notion de subordination juridique dite stricte ou classique qui a servi de critère d'application du principe de la responsabilité civile du commettant pour le dommage causé par son préposé dans l'exécution de ses fonctions (art. 1054 C.c.B.-C. ; art. 1463 C.c.Q.). Cette subordination juridique classique était caractérisée par le contrôle immédiat exercé par l'employeur sur l'exécution du travail de l'employé quant à sa nature et à ses modalités. Elle s'est progressivement assouplie pour donner naissance à la notion de subordination juridique au sens large. La diversification et la spécialisation des occupations et des techniques de travail ont, en effet, rendu souvent irréaliste que l'employeur soit en mesure de dicter ou même de surveiller de façon immédiate l'exécution du travail. On en est ainsi venu à assimiler la subordination à la faculté, laissée à celui qu'on reconnaîtra alors comme l'employeur, de déterminer le travail à exécuter, d'encadrer cette exécution et de la contrôler. En renversant la perspective, le salarié sera celui qui accepte de s'intégrer dans le cadre de fonctionnement d'une entreprise pour la faire bénéficier de son travail. En pratique, on recherchera la présence d'un certain nombre d'indices d'encadrement, d'ailleurs susceptibles de varier selon les contextes : présence obligatoire à un lieu de travail, assignation plus ou moins régulière du travail, imposition de règles de conduite ou de comportement, exigence de rapports d'activité, contrôle de la quantité ou de la qualité de la prestation, propriété des outils, possibilité de profits, risque de pertes, etc. Le travail à domicile n'exclut pas une telle intégration à l'entreprise.
>
> [Emphasis added.]

[27] In this case, the payer told the workers what work needed to be done. He managed the workers' activities.

[28] The appellants filed with the Court the decision in *Ouellet v. Canada*, 2004 TCC 357, claiming that the situation in this case was similar. In that matter, the Minister had determined that the appellant held non-insurable employment because she was not employed under a contract of service. She did the cleaning in the offices of a business. Having analyzed the Minister's assumptions of fact, Deputy Justice Savoie focused on the criterion of control. Having analyzed the evidence, he inferred that the payer had no control over the appellant's work and that the result was what was important to him. The appeal was dismissed and the Minister's decision was confirmed. The appellants are claiming that the same should apply to their situation. However, that decision can be distinguished from the case at bar.

[29] First, in *Ouellet*, the appellant did not appear at the hearing. The Court therefore based itself on written documents provided by the appellant to Human Resources Development Canada (HRDC). In addition, in those documents the appellant stated that she had given erroneous information to HRDC. For that reason, the Court seemed to have made a negative inference from them. In this case, the appellants appeared in Court and had the opportunity to testify. Secondly, unlike in

Ouellet, the payer in this case provided cleaning products and supervised its employees' work. Finally, the appellant in *Ouellet* was paid a fixed amount regardless of the number of hours she worked. In this case, the workers were paid per hour. For the contract that Donald had with a business, the wages received corresponded to the hourly rate he received when he worked elsewhere.

[30] As far as Donald Bernier's appeal is concerned, the fact that he and the payer are related is not disputed. The question to ask is whether the Minister had properly evaluated the relationship between the appellant and the payer within the meaning of paragraph 5(3)(*b*) of the Act. It is now established that when an issue of that type is before the Court, it must ask itself whether the Minister's finding of fact is reasonable in light of the evidence he had before him. Several decisions have dealt with this issue.[7]

[31] It has long been established that the role of the Court is to examine from a legal perspective the facts that the Minister relied on to make his decision. The factors stated in paragraph 5(3)(*b*) include remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed. It is essential to specify that the burden of proof is on the appellant. He must demonstrate that the Minister made an error or did not take into account all of the relevant facts.

[32] Donald Bernier was not really able to demonstrate that his conditions of employment were different from those of the other employees. In light of the evidence before him, the Minister determined that he had held insurable employment. Donald Bernier performed similar tasks, had to fill out "invoices" for his brother, received the payer's orders and did not receive preferential treatment. He did no volunteer work or receive any preferential treatment. The fact that Alain Bernier stated that he was not making any money from a cleaning contract that Donald had with a business does not change the fact that the Minister's determination having regard to all of the evidence was not unreasonable.

[33] In light of that analysis, it seems to me that the appellants have not fulfilled their obligation to prove to the Court, on the balance of probabilities, that the decision was unreasonable under the circumstances. To start, the evidence indicates that the relationship between the payer and the workers was that of employer and employees. It seems to me that each worker was well integrated into Alain Bernier's business. It is important to be very careful not to confuse "flexibility" with "control". As seen from the case law, the concepts of control and subordination have changed with the times.

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[7] *Birkland v. Canada (Minister of National Revenue)*, 2005 TCC 291; *Lenover v. Canada*, 2007 TCC 594.

[34] For all of these reasons, the appeals are dismissed, without costs.

Signed at Ottawa, Canada, this 10th day of March 2011.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 20th day of April 2011
Margarita Gorbounova, Translator

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STYLE OF CAUSE:	DONALD BERNIER v. M.N.R. and ALAIN BERNIER (ENTRETIEN MÉNAGER ADM ENR.) v. M.N.R.
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