Docket: 2010-578(EI)

BETWEEN:

LAVIN ASSOCIÉS INC,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 10, 2011, at Sherbrooke, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the appellant:	Érica Gosselin
Counsel for the respondent:	Simon Vincent

JUDGMENT

The appeal is allowed and the decision rendered by the Minister of National Revenue is set aside in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 23rd day of March 2012.

"Paul Bédard"

Bédard J.

Translation certified true
on this 3rd day of May 2012.
Elizabeth Tan, Translator

Citation: 2012 TCC 87
Date: 20120323
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REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal from a decision by the Minister of National Revenue (the Minister) dated November 23, 2009, rendered pursuant to the *Employment Insurance Act* (the Act), according to which Thomas Lavin, Dominique Lavin and Érica Gosselin held insurable employment when they worked for Lavin Associés Inc. (the payor) during the following periods: March 1 to April 30, 2009, for Thomas Lavin and Dominique Lavin and April 6 to April 30, 2009, for Érica Gosselin.

[2] In the case of Thomas Lavin and Dominique Lavin, the Minister determined that they were employees of the payor during the relevant periods under a contract of service and that their employment was not excluded as insurable employment because he was convinced they would have entered into a substantially similar contract had they been dealing with the payor at arm's length. In the case of Érica Gosselin, the Minister decided that she was an employee of the payor during the relevant period under a contract of service and she was dealing with the payor at arm's length, meaning her employment was not excluded as insurable employment.

[3] The respondent's decision was based on the following facts, stated at paragraphs 18, 19 and 20 of the Amended Reply to Notice of Appeal:

> [TRANSLATION]
> (18) In making his decision, the Minister determined that the workers held employment under a contract of service, based on the following presumptions of fact:
>
> (a) the appellant was incorporated on July 26, 2007; **(admitted)**
>
> (b) the appellant operated a professional business, specifically a law firm; **(admitted)**
>
> (c) the appellant's three main shareholders are the three workers involved in this case, who hold equal parts of the appellant's voting shares; **(admitted)**
>
> (d) a shareholder agreement exists, but does not restrict the voting rights of any of the shareholders; **(admitted)**
>
> (e) the shareholder agreement also states that all business conduct decisions must be approved unanimously; **(denied)**
>
> (f) prior to the appellant's incorporation, the three shareholder workers operated a law firm as an informal cost-sharing company; **(admitted)**
>
> (g) at that time, the three workers had the status of self-employed workers; **(admitted)**
>
> (h) the appellant acquired the building and equipment for its head office in December 2008; **(admitted)**
>
> (i) half of the building and the basement are used by the appellant and the other half has two rented dwellings; **(admitted)**
>
> (j) the appellant's facilities provides an office for each worker and a secretary, and has a reception area; **(denied)**
>
> (k) Thomas A. Lavin and Érica Gosselin each have a secretary; **(admitted)**
>
> (l) Érica Gosselin's secretary has a desk at the reception, Thomas A. Lavin and Dominique Lavin each pay one third of 20% of this secretary's salary, and the same is true for Thomas A. Lavin's secretary who spends one day per week on bookkeeping; **(admitted)**

(m) the purpose of incorporating was to reduce paperwork and have only one accounting process; **(admitted)**

(n) the facts show there are the so-called common expenses related to the building and stationery, and the expenses associated with each lawyer's mandate are accounted for by lawyer; **(denied)**

(o) the appellant's business hours are from Monday to Friday, 8:30 a.m. to 5:00 p.m., but sometimes the lawyers bring work home with them; **(denied)**

(p) generally, Érica Gosselin and Dominique Lavin work five days, whereas Thomas A. Lavin works four days; **(denied)**

(q) the appellant's clients mandate the appellant; **(admitted)**

(r) clients are billed on behalf of the appellant; **(denied)**

(s) the appellant receives all the income, which is accounted for in the appellant's books under the name of the worker who generated this income; **(admitted)**

(t) the appellant's cheques require the signature of two or three worker shareholders; **(admitted)**

(u) each of the shareholders has the use of a vehicle provided by the appellant; **(admitted)**

(v) the workers try to plan their schedules so the office is not empty during vacation periods; **(admitted)**

(w) from the incorporation date to February 28, 2009, no salary was paid to the shareholder workers because they took advances according to their respective needs and at the end of the year, the accountant converted the advances into dividends; **(denied)**

(x) in January 2009, the worker shareholders verbally agreed to pay themselves a salary, starting March 1, 2009; **(admitted)**

(y) since March 1, 2009, Thomas A. Lavin and Dominique Lavin have been receiving a salary; **(admitted)**

(z) although the salaries were paid annually, they differed from worker to worker; Dominique Lavin received an annual salary of $32,000, Thomas A. Lavin, $10,000 and Érica Gosselin, $42,000; **(admitted)**

(aa) the amount of the salaries changed many times and then settled on an equal salary based on the maximum earnings of the Québec Pension Plan; **(denied)**

(bb) Érica Gosselin was on maternity leave from June 28, 2008, to April 5, 2009; **(admitted)**

(cc) she started to receive a salary from the appellant upon her return, April 6, 2009; **(admitted)**

(dd) only one of the three shareholder workers, Érica Gosselin, chose to buy wage-loss insurance, which she paid for herself; **(denied)**

(ee) the appellant is the owner of insurance policies and pays the fees; **(denied)**

(19) The appellant and two of the workers are related within the meaning of the *Income Tax Act* because:

(a) the appellant's shareholders were, in equal parts, Thomas A. Lavin, Dominique Lavin and Érica Gosselin; **(admitted)**

(b) Thomas A. Lavin is Dominique Lavin's father; **(admitted)**

(c) there is an arm's length relationship between Thomas A. Lavin, Dominique Lavin and Érica Gosselin; **(denied)**

(d) the appellant admits that the three shareholder workers form a related group for the purposes of the *Income Tax Act*. **(admitted)**

(20) The minister found that the appellant and the workers were deemed to have an arm's length relationship in the context of these jobs because he was convinced it was reasonable to find that the appellant and the workers would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, considering the following:

(a) the three shareholder workers, including the related workers, carried out the same lawyer's duties; **(admitted)**

(b) the working conditions were the same for the related shareholder workers and for Érica Gosselin; **(denied)**

(c) the three workers, including the related shareholder workers, experienced the same salary fluctuation, the same terms of remuneration and the same wage determination; **(denied)**

(d) the tasks carried out by the shareholder workers correspond to the needs and expectations of the appellant and are essential to the appellant; **(denied)**

[4] I note that each of the workers testified in support of the payor's position and only Lyne Courcy, appeals officer (who reviewed the decision of the insurability officer who had determined that the workers held insurable employment when working for the payor during the relevant periods) testified in support of the respondent's decision.

[5] The workers' testimony, which I felt was very credible, can be summarized as follows:

(1) After the payor was incorporated, each of them continued to manage his or her legal practice in the same manner as when they were in a nominal partnership. On this, they stated that:

(i) the payor did not supervise their work. They each determined their own work schedule and could modify these hours as they wished. Each could be absent when they wanted, based on family and personal needs. Each could determine the dates and length of their vacations;

(ii) each had the choice to accept or refuse a mandate;

(iii) each received from the payor (as salary, bonus or dividend, their choice) the net earnings they generated for the payor, the net earnings being essentially the result obtained by subtracting from the hours billed the sum of the following two amounts:

(a) his or her share of the common expenses (such as those related to the building); and

(b) inherent expenses of his or her law practice (such as bailiff fees, court fees, stenographer fees, expert fees, secretary's wages, expenses related to the rental car the payor made available to each worker, and his or her disability insurance premiums;

(iv) each could also require the payor to lease a vehicle for their use, or that the payor hire a secretary or a lawyer as an employee available

exclusively for that worker, and the expenses so incurred by the payor would be accounted for as that worker's expenses in the calculation of the net earnings generated by his or her practice;

(v) the workers worked almost exclusively on the cases of clients they had recruited.

(2) At the time the payor was incorporated, the workers had agreed that it would not give them any instructions and would not supervise their practice in any way. They explained that they were subject to only two rules: workers must not receive an amount greater than the net earnings generated by their law practice and workers must compensate the payor when the fees generated by their law practice are less than the sum of their share of the common expenses and the expenses related to each worker's law practice.

(3) The workers were not bound to each other or to the payor by any type of non-competition clause. The workers explained that they had agreed each worker would remain the owner of the clients they recruited and they could retain them if they decided to practice law elsewhere than for the payor.

[6] The evidence also showed that:

(i) Thomas A. Lavin and Dominique Lavin are not related to Érica Gosselin.

(ii) Dominique Lavin, Érica Gosselin and Thomas A. Lavin hold 400 class A-1 shares, 400 class A-2 shares and 400 class A-3 shares, respectively. The three share classes in question are ordinary types that carry voting rights. These shares in distinct classes allow the payor to, for example, pay a dividend to the class A-1 shareholder without being required to pay one to the shareholders in other classes. This is why, in 2009, the workers received unequal dividends. That year, Érica Gosselin, Thomas A. Lavin and Dominique Lavin received dividends of $32,000, $10,000 and $19,000, respectively. It should also be noted that the information slips for 2009, established by the payor indicate employment income of $32,000, $61,964 and $60,372 for Érica Gosselin, Thomas Lavin and Dominique Lavin, respectively.

(iii) The payor's board of directors is composed of two people. During the relevant periods, Dominique Lavin and Érica Gosselin were the payor's two directors. It should be noted that under the terms of the shareholders agreement, signed by the workers (Exhibit I-1, Tab 6), the workers are required to take the measures required and use the voting rights attached to their shares to elect a board of directors for the payor and to keep "at least" Dominique Lavin and Érica Gosselin or their representatives in place. I also note that under this agreement, any decision regarding compensation for the workers and the declaration of dividends must be approved by a unanimous vote of the payor's shareholders. I also note, however, that the Minister's statement at paragraph 18(e) of the Reply is inaccurate because only the decisions regarding the subjects described at paragraph 9.1 of the shareholder agreement were to be approved by a unanimous shareholder vote.

(iv) Dominique Lavin and Ms. Gosselin were guarantors for the payor's $35,000 line of credit.

(v) The three workers were guarantors for the hypothecary loan taken out by the payor.

Analysis and conclusion

[7] The first question to answer in this case is: Were the workers employed by the payor during the relevant periods, under contracts for services?

[8] When the courts must define concepts from Quebec's private law for the purpose of applying federal legislation such as the *Employment Insurance Act*, they must follow the rule of interpretation at section 8.1 of the *Interpretation Act*. To determine the nature of a Quebec employment contract and distinguish it from a contract for services, at least since June 1, 2001, the relevant provisions of the *Civil Code of Québec* (the Civil Code) must be applied. These rules are not consistent with the rules stated in decisions such as *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 and *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553. Unlike in common law provinces, in Quebec the constituent elements of a contract of employment have been codified and since the coming into force of articles 2085 and 2099 of the Civil Code on January 1, 1994, the courts no longer have the same latitude as the common law courts to define what constitutes a contract of employment. If it is necessary to rely on previous court decisions to

determine whether there was a contract of employment, decisions with an approach that conforms to civil law principles must be used.

[9] The *Civil Code* contains specific chapters governing the "contract of employment" (articles 2085 to 2097) and on the "contract of enterprise or for services" (articles 2098 to 2129).

[10] Article 2085 states that the 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 control of another person, the employer.
>
> (emphasis added)

[11] Article 2098 states that the contract of enterprise:

> ...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.

[12] Article 2099 follows, and states:

> 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] It can be said that the fundamental distinction between a contract for services and a contract of employment is the absence, in the former, of a relationship of subordination between the service provider and the client, and in the latter, the presence of the right of the employer to direct and control the employee. Therefore, in the present case, it must be determined whether there was a relationship of subordination between the payor and the workers.

[14] The payor has the burden of proving, on a balance of probabilities, the facts in issue that establish its right to have the Minister's decision set aside. It must prove the contract entered into by the parties and establish their common intent regarding the nature of this contract. If there is no direct evidence of this intent, the payor may turn to indicia in accordance with the contract entered into and the Civil Code provisions that governed it. In this case, the payor must prove there was no relationship of subordination if it wishes to show that there was no contract of

employment; to do so, it may, if necessary, use indicia of independence such as those stated in W*iebe Door*, *supra*, namely the ownership of tools and the risk of loss and possibility of profit. However, in my opinion, I feel that unlike the common law approach, once a judge is able to find there is no relationship of subordination, the analysis ends there when determining whether there is a contract for services. It is not necessary to consider the relevance of the ownership of the tools and the risk of loss or possibility of profit because under the Civil Code, the absence of a relationship of subordination is the only essential element of a contract for services that distinguishes it from the contract of employment. Elements such as the ownership of tools and risk of loss or possibility of profit are not essential elements of a contract for services. However, the absence of a relationship of subordination is an essential element. For both types of contract, it must be determined whether there is a relationship of subordination. Clearly, the fact a worker behaved like a contractor could be an indication that there was no relationship of subordination.

[15] In this case, the evidence clearly established that the workers carried out their profession with the payor, as they saw fit. In other words, the evidence clearly established that the workers did not work under the control or direction of the payor during the relevant periods.

[16] Since the evidence showed that the payor did not, in this case, exercise control over the workers during the relevant periods, the next question to answer is: did the payor have the power to control the way the workers did their work? This is what the Federal Court of Appeal asks us to do in such a situation. In this regard, I will reproduce the statements by Noël J.A. in *Canada (Minister of National Revenue – M.N.R.) v. Groupe Desmarais Pinsonneault & Avard Inc.*, 2002 FCA 144, [2002] F.C.J. No. 572, at para. 5:

> **5** The question the trial judge should have asked was whether the company had the power to control the way the workers did their work, not whether the company actually exercised such control. The fact that the company did not exercise this control or that the workers did not feel subject to it in doing their work does not have the effect of removing, reducing or limiting the power the company had to intervene through its board of directors.

[17] In my opinion, the question to ask now is the following: did the payor waive its power of direction or control, or was this right reduced, limited or even revoked? Under the *Companies Act* (see sections 123.91 to 123.93*)* shareholders may, if all of them consent and make a written agreement to that effect, restrict the powers of the directors. In this case, the payor did not prove that a unanimous shareholder

agreement restricting or revoking the power of its board of directors in regard to the workers work existed during the relevant periods. Throughout the case, the evidence showed that during the relevant periods, there was an oral agreement between the workers under which the payor did not control or direct their work in any way. However, the Supreme Court of Canada, in *Duha Printers (Western) Ltd. v. Canada*, [1998] S.C.J. No. 41, [1998] 1 S.C.R. 795 indicates that such an oral agreement cannot result in a restriction or revocation of the directors' power over the workers' work. The workers' credible testimony indicates that they had come to an oral agreement, not only amongst themselves but with the payor, that the payor, through the board of directors, would not exercise its right of direction or control over their work or regarding the practice of their profession. In particular, I note the testimony of Dominique Lavin (who had suggested the payor be incorporated) according to which the two other workers had in a sense agreed to work in their profession with the payor on condition that the complete freedom to exercise their profession they had enjoyed with the nominal partnership would be maintained with the payor. I note that Thomas A. Lavin essentially gave similar testimony (see typed transcript, page 4, paragraphs 15 to 25 and page 5, paragraphs 1 to 16).

[18] Since under the terms of the oral contract between the workers and the payor, the payor agreed (a commitment, it must be remembered, that was respected) to not direct or control the workers' work, I must find that the contract is a contract for services within the meaning of article 2098 of the Civil Code and not a contract of employment within the meaning of article 2085 of the Civil Code. Again, the fundamental distinction between a contract for services and a contract of employment is the absence, in the first case, of a relationship of subordination between the service provider and the client and the presence, in the second case, of the right of the employer to direct and control the employee.

[19] According to the provisions of the Civil Code, regarding the contract for services:

> (i) the employer's obligations pursuant to article 2087 of the Civil Code are to: (1) provide work, (2) remunerate the employee, (3) protect the health, safety and dignity of the employee.
>
> (ii) moreover, pursuant to article 2088, the employee is bound, among other things, to personally carry out the work agreed to, as provided by the employer.

[20] In this case, the evidence clearly showed that the payor did not provide any work to the workers. Since the payor did not provide work to the workers, the conclusion must be that they had no obligation to perform work for the payor and that the workers were dealing with the payor at arm's length under a contract for employment pursuant to article 2085 of the Civil Code. In fact, the evidence showed that the workers did not actually work for the payor. The method of remunerating the workers very clearly shows that they worked solely for the purpose of ensuring the success of their own practice.

[21] Considering my conclusion that the workers were not the payor's employees during the relevant periods under a contract of service, it does not seem necessary to review the other issues that led to the Minister's decision.

[22] For all these reasons, the appeal is allowed.

Signed at Montréal, Quebec, this 23rd day of March 2012.

"Paul Bédard"

Bédard J.

Translation certified true
on this 3rd day of May 2012.
Elizabeth Tan, Translator

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APPEARANCES:

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