Dockets: 2009-1951(EI)
2009-2146(EI)
2009-2147(CPP)

BETWEEN:

GUY LANGLOIS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence on October 8 and 10, 2013,
at New Carlisle, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellant:	Andrée Rioux
Counsel for the respondent:	Stéphanie Côté

JUDGMENT

The appeals under paragraph 5(1)(*a*) of the *Employment Insurance Act* and paragraph 6(1)(*a*) of the *Canada Pension Plan* are dismissed and the decisions of the Minister of National Revenue are confirmed.

Signed at Ottawa, Canada, this 25th day of August 2014.

"Alain Tardif"

Tardif J.

Translation certified true
on this 3rd day of March 2016
Daniela Guglietta, Translator

Citation: 2014 TCC 257
Date: 20140825
Dockets: 2009-1951(EI)
2009-2146(EI)
2009-2147(CPP)

BETWEEN:

GUY LANGLOIS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] The appellant appeals from two determinations whereby the work performed by him was ruled not to be insurable employment. The work in issue was performed on behalf of and for the benefit of two different employers, R. Bossé & Fils Inc. and 6302629 Canada Inc.

[2] The periods in question are, first, from September 20, 2004, to November 20, 2004, for docket 2009-1951(EI), and, second, from July 4, 2005, to October 15, 2005, for docket 2009-2146(EI) within the meaning of the *Employment Insurance Act* (EIA) and docket 2009-2147(CPP) within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan* (CPP).

[3] The appellant also appeals from a decision with respect to his pension entitlement under section 2 and paragraph 6(1)(*a*) of the CPP. Since it is a matter that may or may not be directly related to the insurability of the work in issue, the parties have agreed to consolidate this appeal with the two cases specifically involving the insurability of the work in question. Thus, the outcome of the appeal in docket 2009-2147(CPP) rests on the decision in dockets 2009-1951(EI) and 2009-2146(EI).

[4] In such a context, the parties agreed to proceed on common evidence for all three dockets.

[5] The appellant explained and described his forestry skills and abilities and his forestry technician diploma.

[6] He explained and described the type of work he had performed on behalf of the two employers who prepared the Records of Employment for the periods of work in issue.

[7] Highly qualified in forestry both in theory and practice, the appellant was fully qualified to assess the value of woodlots. He had the expertise and experience to monitor selective logging, including the planning required for cutting, collecting and hauling wood.

[8] In other words, the appellant had sufficient and adequate forestry expertise to monitor and supervise the performance of said work, the environmental requirements of which are numerous and strict. He also had the knowledge and experience to address serious shortcomings, and even the irresponsibility of companies who retained his services and issued the Records of Employment in issue.

[9] The appellant explained that the companies who issued the Records of Employment in issue had a number of issues with regional county municipalities (RMCs) responsible for environmental protection regulations.

[10] The appellant also explained that the executives of these same companies had very limited knowledge of forestry. He indicated that work involving the cutting and hauling of selective wood was generally performed by subcontractors who had and used their own equipment to perform the work.

[11] First, the appellant's work mainly consisted in meeting and holding discussions with woodlot owners; he walked through woodlots and assessed the value of the woodlot that could be selectively logged based on quality and quantity.

[12] He also assessed the nature of potential issues, determined constraints such as the bearing quality of wet or dry soil and access; he took into account proximity to streams, wetlands, ground elevations, etc.

[13] Following site visits, the assessment of the woodlot, conditions and constraints for hauling the cut wood, he submitted a report to the company who made an offer to the owner and/or manager of the woodlot.

[14] The appellant was not party to the negotiations and did not know the nature of the offer between the owners and/or managers of the woodlots and the companies

who issued the Records of Employment. He was essentially informed of the outcome.

[15] Second, if a transaction was completed, he was notified, and he would then go to the sites to ensure that the work was performed according to standards while complying with environmental regulations.

[16] To confirm and validate his claims, the appellant called two witnesses, one as the owner, and the other as duly appointed manager, who testified that they had indeed seen the appellant, on a number of occasions, on the lands that were selectively logged. In addition, the appellant filed, with the consent of the respondent, affidavits in support of his evidence.

[17] The appellant focused almost all of his efforts and energies on demonstrating that he had worked as if it was all that was required to succeed.

[18] There is no doubt that the appellant did perform work for companies he described as his employers. However, is the relationship between him and these alleged employers the one he would like the Court to accept?

[19] As for the periods of work where work hours were allegedly performed, the evidence is rather circumstantial; this evidence consists mainly of the testimonies of Messrs. Lajule and Horth, along with the content of the affidavits. These two witnesses essentially reported having seen the appellant occasionally at the site located on the lands they were responsible for. These testimonies simply validate the obviousness of the occasional performance of the work performed by the appellant.

[20] In Jacques Francoeur's affidavit, he states that he saw the appellant every day from July 4, 2005, to October 15, 2005. However, the rest is vague, if not a bit confusing.

[21] In this case, precision rather discredits the reliability of the information; indeed, the most important element, i.e., the duration of the work, is very precise and unequivocal; everything else is vague and uncertain.

[22] Regarding the evidence of the appellant's presence on the sites, the content of the affidavit signed by Danny Hudon is somewhat telling about the total lack of credibility of the appellant's testimony regarding his continuous presence on the sites. I refer in particular to the work schedule of Mr. Hudon, who states in his affidavit that he worked seven consecutive days per week every two weeks.

[23] In response to a specific question from the Court, as to whether Mr. Hudon, the affiant, was continuously present on the worksite, the appellant replied that Mr. Hudon was indeed always there except weekends.

[24] The affiant states as follows at paragraph 11:

> [TRANSLATION]
> I worked with another team, we shared the work so I was on the site for seven days and then on leave for the same length of time as I was replaced by another team, and so forth.

[25] If Mr. Hudon had been as present as he says, there is no doubt that he would have developed, maybe not a friendship, but most certainly a relationship with the appellant that would have allowed the appellant to know and remember that Mr. Hudon's work schedule was very different from what he stated. This is a very important factor when assessing credibility.

[26] This factor was further supplemented by the appellant's responses during the various interrogations conducted by investigators and the responses given, from his home, to questionnaires that he himself filled out, more specifically with respect to the various places where he worked.

[27] The appellant's incomplete evidence does not make it possible to conclude that the work in question was performed under a contract of service. Indeed, the appellant's explanations are that remuneration negotiations were conducted as among equals. Moreover, the parties to the contract needed each other: the forestry businesses to continue their activities, and the appellant to qualify for employment insurance benefits.

[28] In light of the facts relied upon to explain and justify the determinations, namely, that the work was not insurable employment, the appellant certainly had to emphasize the work component.

[29] The appellant's evidence described at length the work performed, all of which undoubtedly stems from paragraph (r) in all three dockets 2009-2146(EI), 2009-1951(EI) and 2009-2147(CPP) of the Replies to the Notices of Appeal, which states as follows [TRANSLATION]: "during the period at issue, the appellant did not perform any services for the payer."

[30] Indeed, upon reading the allegations in the Replies to the Notices of Appeal, clearly written in the context of a huge fraud involving fictitious Records of Employment, it is apparent that the appellant had to emphasize the [TRANSLATION] "work performed" component given that, in a large number of cases, they were essentially convenience Records of Employment.

[31] To prevent the appellant from being deprived or penalized by the very general content of the allegations in the Notices of Appeal, I often intervened to ensure the debate was limited to the following fundamental question: was it insurable employment?

[32] Despite the reminders, the appellant did not provide any evidence of any relationship of subordination. Remuneration paid as salary, the performance of work and the occasional presence on the site are very important elements in an employment relationship.

[33] However, they are not sufficient to conclude that a contract of service existed; these are equally essential characteristics in a contract of enterprise.

[34] The distinction between the two contracts is the existence of a relationship of subordination where one party has authority over the other, the power of control and the ability to monitor, intervene and sanction the work performed by the other party.

[35] In contrast, the contract of enterprise assumes that the parties to the contract negotiated make transactions and communicate as equals and the work is rather assessed in terms of expectations and results.

[36] In the case at bar, the work was performed, but I am satisfied that it was performed at the appellant's convenience and availability. One thing is for sure, the evidence is totally insufficient to conclude that the work was performed as described in the Records of Employment in issue.

[37] It is difficult to demonstrate the existence of a relationship of subordination without the presence of both parties to the contract. However, the appellant's explanations for the absence of his alleged employers and/or co-workers are not persuasive.

[38] Indeed, he stated that he preferred to stay away from potentially dangerous persons, even though, based on his language and certain observations, he seemed to have had rather friendly relations with these persons.

[39] In such circumstances, I think instead that their absence was motivated by the very real fear that the persons in question would validate the respondent's hypothesis through their explanations about their relationship with the appellant.

[40] In the case at bar, there is no relationship of subordination between the two parties. The appellant's mandate was one of result. To achieve this result, the appellant had complete latitude and freedom and was not subject to any authority. In other words, the evidence submitted does not make it possible to conclude that a contract of service existed.

[41] Of course, this is an interpretation based on the evidence presented. However, it is an interpretation validated by a number of elements that make it probative.

[42] I refer in particular to the following elements:

- absence of representatives from both companies,
- the nature of the work,
- circumstance surrounding the setting of remuneration,
- presence on the work site,
- the appellant himself had a business,
- incomplete but telling explanations of the content of Mr. Hudon's affidavit,
- the absolute necessity for the companies to retain the appellant's services.

[43] The appellant's work was performed on behalf and for the benefit of two companies with apparently no regard for or knowledge of environmental regulation.

[44] The companies in question were known as offenders, having no concern for the requirements regarding the respect for and protection of the environment.

[45] The companies in question were so irresponsible that they would have clearly had to leave the area had it not been for the arrival of the appellant, who, through his knowledge, qualifications and reputation, essentially accredited the companies in question with the authorities, including the RMCs.

[46] The appellant explained that he sought remuneration that corresponded to the maximum insurable amount, which he was granted. At first, he stated that he walked through woodlots likely to be cut to assess the quality and quantity of the wood. He also estimated possible constraints for hauling wood from the forest. In that regard,

he delineated appropriate locations for a road to allow wood to always be hauled in accordance with environmental statutes and regulations.

[47] All of the appellant's explanations were very general and unclear except for the locations, which were also validated and confirmed by two individuals who owned and/or were responsible for the sites where logging was carried out.

[48] A description of the work performed and the actual days on which the work was performed was provided in very general terms, a bit confusing and unclear about the work. One thing is for sure, on the balance of probabilities, one cannot conclude that the appellant worked the number of hours and during the periods mentioned in the Records of Employment, the fundamental object of the two insurability cases.

[49] The appellant referred to "Pierre" when speaking about Pierre Bossé during his testimony, demonstrating that he knew him very well. He stated that Mr. Bossé had little or no knowledge of the forestry industry and had acquired a very bad reputation to the point where authorities had to initiate legal proceedings to end the forest massacre.

[50] He therefore needed the appellant who assessed and estimated the inventories of wood that could be harvested. He delineated territories targeted by cutting and described the quality of the wood, soil, thereby making it possible to anticipate constraints and requirements in terms of equipment and machinery to haul the wood to be cut on the various sites.

[51] The appellant's evidence revealed one important element likely to validate his claims; it is his bank statement showing that the payroll deposits were consistent with the Records of Employment. While it is clearly a relevant element, it is certainly not determinative in proving the existence of a relationship of subordination; this was no doubt a mere agreement on the terms of payment.

[52] The employer and/or author of the Records of Employment did not testify.

[53] For his part, the respondent noted that the two employers in question had been the subject of a major investigation which unequivocally revealed, *inter alia*, the facts described in paragraphs 8(d) and (e) in docket 2009-1951(EI) and 7(k) and (l) in dockets 2009-2146(EI) and 2009-2147(CPP) of the Replies to the Notices of Appeal:

> (d)/(k) the payer was part of a group of corporations that was the subject of a major investigation by the Employment Insurance Commission;

> (e)/(l) the major investigation showed that these corporations, including the payer, were involved in schemes, with individuals such as the appellant, designed to provide the individuals with false Records of Employment so that they could qualify for Employment Insurance benefits to which they were not entitled;

[54] The burden of proof is on the appellant. He chose not to involve the two employers, one of whom he knew particularly well as, during his testimony, he constantly referred to "Pierre" when speaking about Mr. Bossé. It would have been important for Mr. Bossé to come validate, confirm and corroborate the various facts recounted by the appellant. The appellant's evidence is essentially circumstantial.

[55] There is no doubt that the appellant did perform work for R. Bossé & Fils Inc. and 6302629 Canada Inc.

[56] However, although the evidence established the performance of work by the appellant, does this mean that the work was performed under a contract of service?
[57] The answer is obviously no because the work was clearly performed under a contract of enterprise for an amount reflecting the payments established in such a way as to create a presumption of sorts that it was a contract of service; the appellant was rather an entrepreneur or self-employed person.

[58] This is a case in which the contract of enterprise was disguised as a contract of service. For employment insurance purposes, form is certainly important, but substance is equally important and must be aligned with form.

[59] During the preparation of his case, the appellant knew and was clearly aware of the facts and circumstances behind the decision that is the subject of his three appeals.

[60] Despite this reality, the appellant chose to submit fairly general and unclear evidence regarding essential elements. He mentioned that the salary claimed was based on the maximum insurable amount for the period of time required to qualify for employment insurance benefits and the CPP.

[61] The appellant also chose not to have the two employers in question testify, knowing full well they were unscrupulous in providing, selling or falsifying a number of Records of Employment. This reality should have ensured that he neither overlook nor omit certain evidence.

[62] In light of the evidence submitted, by both parties, the mainly circumstantial evidence of the appellant does not make it possible to conclude by a preponderance of the evidence that the agreement on the work that was indeed performed was under a contract of service.

[63] For these reasons, the appellant's appeals under the EIA and the CPP are dismissed.

Signed at Ottawa, Canada, this 25th day of August 2014.

"Alain Tardif"

Tardif J.

Translation certified true
on this 3rd day of March 2016
Daniela Guglietta, Translator

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APPEARANCES:

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Counsel for the respondent:	Stéphanie Côté

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