Docket: 2003-1476(EI)

BETWEEN:

9098-5326 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CHRISTIAN ROY, DANIEL VACHON, DANY LESSARD, DANY ROY, FRÉDÉRIC ROY, GASTON ROY, JEAN-CLAUDE PERREAULT, YVAN GRONDIN, ÉRIC SHINK, JEAN-NOËL LESSARD, PAUL-ÉMILE BISSON, DONALD CHAMPAGNE, MAURICE CHOUINARD, FRÉDÉRIC COUTURE, STÉPHANE DOSTIE, GILLES FONTAINE,

Interveners.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 6, 2004, at Sherbrooke, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Agents for the Appellant:	Mélanie Shink Richard Shink
Counsel for the Respondent:	Yannick Landry
For the Interveners:	The Interveners themselves

JUDGMENT

The appeal is allowed and the decision of the Minister is varied to take into account the fact that the amounts representing the taxes (GST and QST) collected by some Workers are excluded from their insurable employment for the purposes of calculating the employer's assessment, in accordance with the attached Reasons for Judgment.

Signed at Montréal, Quebec, this 1st day of June 2004.

"Paul Bédard"

Bédard J.

Translation certified true
on this 27th day of September 2004.

Shulamit Day, Translator

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Date: 20040601
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REASONS FOR JUDGMENT

Bédard J.

[1] The issue in this case is relatively simple. The Minister of National Revenue (the "Minister") is of the opinion that the Workers are employees of the Appellant whereas the Appellant asserts that they are self-employed. The Workers appeared as Interveners in this case.

[2] The years at issue are 2000, 2001 and 2002. On May 22, 2002, the Minister assessed the Appellant's employee and employer premiums for unpaid employment insurance premiums for 42 different Workers, as well as the related penalties and interest.

[3] Following a request by the Appellant, the Minister modified the assessments as it appears in his letter dated January 20, 2003. The assessments were reduced by excluding the costs reimbursed to the 41 Workers by the Appellant, such as meal allowances, gas expenses, lodging and other reimbursed costs; the assessment for Robert Dubreuil for 2000 was vacated because he had not worked for the Appellant.

[4] The assessments were therefore reduced, for 2000, to a total of $27.61 for two Workers; for 2001, to a total of $9,426.93 for 41 Workers; and for 2002, to a total of $1,878.62 for ten Workers.

[5] The facts upon which the Respondent relied in making his decision are described at paragraph 7 of the Reply to the Notice of Appeal as follows:

> [TRANSLATION]
>
> (a) The Appellant was incorporated on December 1, 2000;
>
> (b) The Appellant conducted business as "T.S. Consultants";
>
> (c) The Appellant operated a shelf installation and assembly business for large warehouse clients located in Quebec, Ontario and the United States;
>
> (d) The Appellant had a list of Workers' names and, on Sundays, the number of Workers required to perform the week's contracts were contacted;
>
> (e) The Workers were hired by the Appellant as assemblers;
>
> (f) The Workers could refuse a contract and remain on the Appellant's call list;
>
> (g) The clients were the Appellant's;
>
> (h) Workers who accepted a contract could not have another Worker replace them. Only the Appellant hired Workers;
>
> (i) The Workers' tasks involved installing and disassembling shelves (95% of the time) and unloading trucks (5% of the time);
>
> (j) The Workers worked at the premises of the Appellant's clients;

(k) The Workers worked in teams of two because the shelves are heavy;

(l) The Appellant provided transportation to the Workers in his vehicles in order to reach clients who were at a distance;

(m) Either a shareholder of the Appellant or an experienced Worker gave instructions to the Workers in order to comply with the client's plans and specifications;

(n) The Workers followed a Monday-to-Friday work schedule of approximately 40 to 42 hours per week, which was set by the Appellant;

(o) The Workers were paid between $12.50 and $14.50 per hour;

(p) Each week, the Workers billed the Appellant according to an hourly rate for the number of hours actually worked as well as the reimbursable costs incurred;

(q) The Workers received their pay from the Appellant by cheque each week;

(r) The Appellant reimbursed Workers' meal, lodging and gas expenses;

(s) The Workers provided their own toolboxes, which included small tools, such as a small sledgehammer, a hammer and a ratchet wrench;

(t) The Appellant or the Appellant's clients provided the Workers with large tools;

(u) The Workers had no risk of financial loss or gain;

(v) The Workers' tasks were integrated into the Appellant's activities.

[6] It should be noted that the Appellant admitted all the facts outlined in paragraph 7 of the Reply, with the exception of those in paragraphs (h), (n), (u) and (v).

Analysis

The law

[7] It is appropriate to emphasize that the contractual relationship between the Appellant and the Workers must be interpreted in a manner consistent with the laws of the province of Quebec.

[8] In the *Civil Code of Québec*, different chapters deal with the "contract of employment" (articles 2085 to 2097) and the "contract of enterprise or for services" (articles 2098 to 2129).

[9] Article 2085 addresses 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 direction or control of another person, the employer.

[10] Article 2098 addresses the 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.

[11] Article 2099 follows, and is written in the following terms:

> 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.

[12] It can be said that the fundamental factor that distinguishes a contract for services from an employment contract is, in the first case, the absence of a relationship of subordination between the individual providing the services and the client, and the presence, in the second case, of the employer's right to direct and control the employee. Justice Pratte of the Federal Court of Appeal made the following decision in *Gallant v. M.N.R.*:[1]

> . . . The distinguishing feature of a contract of service is <u>not the control actually exercised by the employer</u> over his employee <u>but the power</u> the employer has to control the way the employee performs his duties. [My emphasis.]

[1] [1986] F.C.J. No. 330 (Q.L.)

It must therefore first be determined whether there is or is not a relationship of subordination between the Appellant and the Workers.

[13] In *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, Justice MacGuigan of the Federal Court of Appeal made a statement on the control test and recognized that the right to give orders and instructions to the employee regarding the manner in which to carry out the work is an essential criterion for the exercise of control over an employee's work. In *Vulcain Alarme Inc. v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 749, Justice Létourneau of the Federal Court of Appeal also stated that the basis of control is the giving of orders and instructions with respect to the way the employee's work is to be done. In this case, it must therefore be determined, in light of the evidence, whether the Appellant gave or could give Workers instructions with respect to the manner in which their work should be accomplished. That being said, control of the results or the quality of the work must not be confused with control over the manner in which the Worker performs the work for which he is responsible. In fact, it is the rare company that contracts out work without ensuring that it is performed in compliance with its requirements.

[14] However, when the evidence does not allow a clear determination as to the existence of a relationship of subordination, I am of the opinion that the contractual relationship must therefore be examined in light of other factors outlined by the Federal Court of Appeal in *Wiebe Door*, *supra*, and revisited by the Supreme Court in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983: integration, ownership of the tools required to carry out the work, chances of profit and risk of loss. These factors can indicate the existence of a contract of service.

[15] A review of the facts in light of these tests will usually confirm the existence or lack of a relationship of subordination; in other words, when there is doubt, a more holistic approach must be used.

[16] Finally, I should add that when the issue is unclear, in other words, when the relevant factors indicate both conclusions are possible, it may be helpful to find out the parties' intentions when the contract was drawn up. I believe that the way the parties viewed their agreement must prevail, except if they are mistaken with respect to the real nature of their relationship. Certainly, the Court will not consider the parties' provisions with respect to the nature of their contractual relationship if it must find to the contrary based on the evidence submitted to it. Nonetheless, in the absence of unequivocal evidence or evidence to the contrary, the Court must certainly take the stated intentions of the parties into account.

Relationship of subordination

[17] Are the Workers carrying out their work under the Appellant's direction or control? Did or could the Appellant give orders to the Workers?

[18] It is once again appropriate to recall that the contractual relationship between the Appellant and the Workers must be interpreted in a manner consistent with the laws of the province of Quebec. From articles 2085, 2098 and 2099 of the *Civil Code of Québec*, it is clear that the fundamental distinction between a contract for services and a contract of employment is, in the first case, the lack of a relationship of subordination between the individual providing the services and the client, and the presence, in the second case, of the employer's right to direct and control the employee. In other words, did or could the Appellant give instructions to the Workers with respect to the manner in which they should carry out their work? That being said, control of the results or the quality of the work must not be confused with control over the manner in which the Worker performs the work for which he or she is responsible.

[19] In this case, the Appellant admitted during the hearing that the Minister's statement was correct at paragraph 7 of the Reply to the Notice of Appeal that a shareholder of the Appellant or an experienced Worker gave instructions to the Workers to ensure compliance with the client's plans and specifications.

[20] Mélanie Shink, Agent for the Appellant, and the Interveners who testified, with the exception of Mr. Bisson, gave similar testimony. The testimony of Mr. Croteau, who worked at the Appeals Division of the Canada Customs and Revenue Agency, and who conducted the investigation in this case, and the report he submitted as Exhibit I-2, reveal that Alain Tardif, a substantial shareholder of the Appellant, or Yvan Grondin, an experienced Worker, directed the work teams. The Appellant's client submitted the plans and specifications to the two individuals, who gave instructions to these Workers so that these plans and specifications were respected and their requirements were met.

[21] The evidence therefore demonstrated clearly that there was a relationship of subordination between the Workers and the Appellant, which is the very essence of a contract of employment. The fact that the evidence also revealed that a Worker was not permitted to have another Worker replace him only confirms, in my opinion, that the Workers were employees of the Appellant.

Ownership of tools, chances of profit and risk of loss

[22] We will now examine the contractual relationships between the parties in light of the tests outlined in *Wiebe Door*, *supra*, such as ownership of tools, chances of profit and risk of loss. As previously mentioned, these tests can indicate the existence of a contract for services.

(i) The Workers provided their own toolbox, which included small tools such as a small sledgehammer, a hammer and a ratchet wrench, worth less than $100. The Appellant's clients provided the large tools, such as a lift truck. The Appellant transported the Workers in his vehicles when the clients were at a distance.

(ii) The Workers' pay varied between $12.50 and $14.50 per hour. Each week the Workers billed the Appellant according to the agreed hourly rate for the number of hours they had actually worked, in addition to the reimbursable expenses they had incurred. The Appellant paid the Workers by cheque each week and he reimbursed their meal, lodging and gas expenses. The evidence revealed very clearly that the Workers did not have any risk of loss or chances of profit.

[23] Although a great deal of weight may not be given to these two factors, given the nature of the services rendered, the needs which had to be met and the few work tools used, on the other hand, I cannot help but conclude that they do not indicate the existence of a contract for services.

Intention of the parties

[24] As I mentioned previously, the manner in which the parties may have viewed their agreement must prevail, unless they were mistaken as to the true nature of their agreement. Certainly, the Appellant and the Interveners who testified emphasized that their contractual relationships were in the nature of a contract for services. However, the evidence submitted in this case leads me to conclude that the parties were mistaken with respect to the true nature of their relationships.

[25] For these reasons, I find that the employment was insurable for the years at issue. However, since the Minister has admitted he erred in his interpretation of the *Act* and its *Regulations*, that the taxes collected (GST and QST) by certain Workers must be included in their insurable employment for the purposes of calculating the employer's assessment, I therefore conclude that the said amounts are excluded from their insurable earnings.

Signed at Montréal, Quebec, this 1st day of June 2004.

"Paul Bédard"

Bédard J.

Translation certified true
on this 27th day of September 2004.

Shulamit Day, Translator