Docket: 2004-3937(EI)

BETWEEN:

LÉO DUFOUR,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 28, 2005, at Québec, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Julie David

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 4th day of October 2005.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 18th day of October 2005.

Aveta Graham, Translator

Citation: 2005TCC609
Date: 20051004
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REASONS FOR JUDGMENT

Savoie D.J.

[1] This appeal was heard in Québec, Quebec, on July 28, 2005.

[2] The issue in this appeal is the insurability of the Appellant's employment with the Payor, Les Entreprises Besson Inc., from May 19 to November 16, 2002.

[3] On September 16, 2004, the Minister of National Revenue ("the Minister") notified the Appellant of his decision that he did not hold insurable employment and did not accumulate any insurable hours.

[4] In rendering his decision, the Minister relied on the following assumptions of fact, which the Appellant either admitted or denied:

[TRANSLATION]

(a) The Payor was incorporated on October 27, 2000. (admitted)

(b) The Payor operated a weeping tile excavation and installation business. (admitted)

(c) The Payor had five shovel excavators and four carriers. (admitted)

(d) The Appellant wanted to purchase the Payor's business. (denied)

(e) The Payor went bankrupt on February 12, 2004. (admitted)

(f) During the period in issue, the Appellant allegedly worked by transporting machinery and shopping around for pipes and drains. (admitted)

(g) During the period in issue, the Appellant, who claims to have been paid $750 a week for 40 hours, was actually not paid at all. (denied)

(h) On February 4, 2003, the Appellant and the Payor signed an acknowledgement of the Payor's indebtedness to the Appellant for 26 weeks' worth of pay, which amounts to $19,500. (admitted)

(i) According to the acknowledgement of debt signed on February 4, 2003, the Payor's debt to the Appellant totalled $56,047.18. (admitted)

(j) On June 30, 2004, the Appellant told a representative of the Respondent that, on our about November 20, 2004, the Payor's secretary Nadia Larivière gave him his termination of employment and had him endorse 26 paycheques. (admitted)

(k) On or about November 20, 2002, the Payor gave the Appellant a Record of Employment that stated that the first day of work was May 19, 2002, and the last day of work was November 16, 2002, and indicated that there were 1,040 insurable hours and $19,500 in insurable earnings. (admitted)

(l) The Appellant's Record of Employment does not reflect the true number of hours worked or the true insurable earnings. (denied)

(m) The Appellant and the Payor made an arrangement to qualify the Appellant for unemployment benefits. (denied)

(n) The Appellant never received any remuneration from the Payor. (denied)

(o) The Appellant never filed a complaint for unpaid wages with a government authority or with the Payor's trustee in bankruptcy. (denied)

[5] During his testimony, the Appellant admitted that he had taken steps to purchase the Payor's business. However, the financial statements that he was requesting were not forthcoming and the plan was aborted.

[6] At the hearing, the Appellant produced a document (Exhibit A-2) which purports to be a compilation of the hours that he worked for the Payor during the period in issue. He said he prepared the document himself, but he apparently did not show it to anyone beforehand. In addition, the number of hours set out in the document contradicts the number stated in the Record of Employment (Exhibit A-1). He said that he made his calculations based on a 50-hour work week.

[7] The Appellant testified that his work was supervised by Sylvain Ouellette, the Payor's general director, but the only evidence he provided on the subject was his testimony that Mr. Ouellette called him on his cell phone for updates.

[8] The Appellant also testified that the Payor was having liquidity problems and that Mr. Ouellette therefore borrowed money from him. The Appellant claimed that he lent the Payor's business $15,000 so that it could pay him for upcoming contracts. In addition, the Appellant said that Sylvain Ouellette was insolvent and needed him. The Appellant acknowledged that he was not paid for his work during the period in issue.

[9] The evidence revealed that the Appellant received $13,701 from the Payor on July 13, 2003. He claims to have applied this amount to the salary he was owed, and not to the $56,047.18 debt that the company incurred toward him, the details of which are set out in the document entitled [TRANSLATION] "Demand Loan," produced at the hearing as Exhibit A-5. It has been established that the Appellant filed no complaint for non-payment of remuneration with any federal or provincial labour authority. The Appellant claims to have filed a claim in this regard with the Payor company's trustee in bankruptcy, but he admits that he is not listed as one of its creditors.

[10] Richard Powers, an investigator for Human Resources Development Canada, visited the Payor's company to audit its books. At the hearing, he said that he discovered that hours had been banked there. He added that the manual labourers were paid regularly, whereas the employees on the administrative side received cheques in series bearing consecutive numbers. He discovered only five cheques payable to the Appellant, and the Appellant had endorsed these cheques and re-deposited them into the company's account.

[11] Mr. Powers said that he did not find a single hour of the Appellant's work recorded in the company's payroll journal. In fact, he said he did not find any payroll journal at all. He also claimed that the Payor's company accountant did not talk to him about documentary evidence. Mr. Powers testified that he uncovered other anomalies, including the fact that the Appellant was purportedly paid a higher salary than the company's general director.

[12] Based on the evidence, the Appellant was financing the Payor's company. This is confirmed by the document entitled [TRANSLATION] "Demand Loan" (Exhibit A-5). The document shows that, apart from the hours worked by the Appellant, the Payor acknowledges the investments made by the Appellant, including, for example, an amount of $20,695.72, which represents the invoices paid by the Appellant; an amount of $1,200 for office furniture; an amount of $15,000, representing a loan to the Payor's company; and an amount of $4,000, representing another loan to that company.

[13] Faced with this situation, it is reasonable to ask how it can be reconciled with the concept of a relationship of subordination — an essential element of an employment contract. Is the subordination not reversed in this case?

[14] The issue in this case is whether the Appellant held insurable employment for the purposes of the *Employment Insurance Act* ("the Act"). The relevant provision is paragraph 5(1)(*a*) of the Act, which provides:

> 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;

. . .

[Emphasis added.]

[15] The section quoted above contains the definition of insurable employment. One holds insurable employment under a contract of service, i.e. a contract of employment. However, the Act does not define what constitutes such a contract. There is no written contract in the case at bar, but testimony was offered at the hearing with regard to the intent that the parties showed during the period in issue. By analysing the facts presented at the hearing, this Court will be able to establish the type of contract that is binding on the parties in the case at bar.

[16] A contract of service is a civil law concept that is found in the *Civil Code of Québec*. The nature of the contract in issue must therefore be ascertained by reference to the relevant provisions of the Code.

[17] It is useful to reproduce the relevant provisions of the *Civil Code of Québec*, which will serve to determine whether an employment contract, as distinguished from a contract of enterprise, exists.

Contract of employment

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.

Contract of enterprise or for services

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. [Emphasis added.]

[18] The provisions of the *Civil Code of Québec* reproduced above establish three essential conditions for the existence of an employment contract: (1) the employee's prestation in the form of work; (2) remuneration by the employer for that work; and (3) a relationship of subordination. The significant distinction between a contract of service and a contract of employment is the existence of a relationship of subordination — the fact that the employer has a power of direction or control over the worker.

[19] Scholarly writers have reflected on the concept of "power of direction or control" and its flip side, subordination. Here is what Robert P. Gagnon wrote in *Le droit du travail du Québec*, 5th ed. (Cowansville: Yvon Blais, 2003):

> [TRANSLATION]
>
> (c) Subordination
>
> 90 – *A distinguishing factor* – The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 et seq. C.C.Q. Thus, while article 2099 C.C.Q provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> . . .
>
> 92 – *Concept* – Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in relation to the nature of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and set the conditions of the performance. Viewed from

> the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way. [Emphasis added.]

[20] It must be specified that what characterizes an employment contract is not the actual exercise of direction or control by the employer, but the fact that the employer has the power to exercise that direction and control. That is what the Federal Court of Appeal held in *Gallant v. Canada (Minister of National Revenue – M.N.R.)*, [1986] F.C.J. No. 330 (QL).

[21] This Court's task is to determine the type of Quebec contract to which the parties are bound. In carrying out this task, it is its duty to consider and follow the relevant provisions of the *Civil Code of Québec* and the jurisprudence that has applied them.

[22] In the case at bar, was there a relationship of subordination between the Appellant and the Payor that would enable us to conclude that an employment contract existed? Several indicia can be taken into consideration in our mandate to determine whether or not a relationship of subordination exists. The jurisprudence has developed a number of these indicia of supervision. Here are the indicia that emerge from a reading of this jurisprudence:

(1) mandatory presence at a workplace;
(2) compliance with the work schedule;
(3) control over employee's absences on vacations;
(4) submission of activity reports;
(5) control over quantity and quality of work;
(6) imposition of methods for performing the work;
(7) power to sanction employee's performance;
(8) source deductions;
(9) benefits;
(10) employee status on income tax returns; and
(11) exclusivity of services to employer.

[23] However, a word of caution is necessary: the analysis cannot stop merely because certain indicia support a conclusion that a relationship of subordination exists. The exercise, which is based on the distinction drawn in the *Civil Code of Québec*, is to determine the overall relationship between the parties. Thus, one must establish the extent to which the indicia pointing to a relationship of subordination predominate over the other indicia.

[24] Based on his analysis, the Minister determined that the Payor and the Appellant had entered into an arrangement to qualify the Appellant for unemployment benefits.

[25] A situation of this kind came before our Court in *Thibeault v. Canada (Minister of National Revenue – M.N.R.)*, [1998] T.C.J. No. 690, where Tardif J. wrote:

> 26 The unemployment insurance scheme is a social program whose aim is to support those who lose a real job. It is definitely not a scheme under which it suffices to pay premiums for a certain period of the year in order to have automatic entitlement to benefits.
>
> 27 It is an insurance scheme under which all the known conditions defined by the Act and its regulations must be respected or else the person who has paid the premiums cannot claim automatic entitlement to the payment of benefits.
>
> 28 Generally, the entitlement to benefits under an insurance contract must be based on facts over which the potential beneficiary has no control.
>
> 29 Of course, it is neither illegal nor reprehensible to organize one's affairs so as to profit from the social program that is the unemployment insurance scheme, subject to the express condition that nothing be misrepresented, disguised or contrived and that the payment of benefits occur as a result of events over which the beneficiary has no control. Where the size of the salary bears no relation to the economic value of the services rendered, where the beginning and end of work periods coincide with the end and the beginning of the payment period and where the length of the work period also coincides with the number of weeks required to requalify, very serious doubts arise as to the legitimacy of the employment contract. Where the coincidences are numerous and improbable, there is a risk of giving rise to an inference that the parties agreed to an artificial arrangement to enable them to profit from the benefits.
>
> 30 In this case, not only are the coincidences great and very numerous, the size of the salary has never been justified in a proper and reasonable manner.

[26] The Payor's debts to the Appellant are undeniable. They consist of amounts other than unpaid salary.

[27] In the case at bar, the Appellant contends that the $13,701 that he received from the Payor on July 13, 2003, is part of the insurable earnings paid to him. But aside from this assertion by the Appellant, the facts presented to this Court do not support such a finding.

[28] The Minister based his decision on paragraph 5(1)(*a*) of the Act, section 9.1 of the *Employment Insurance Regulations* and section 2 of the *Insurable Earnings and Collection of Premiums Regulations*. It is useful to reproduce these relevant provisions below:

> 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;
>
> . . .
>
> [Emphasis added.]
>
> 9.1 Where a person's earnings are paid on an hourly basis, the person is considered to have worked in insurable employment for the number of hours that the person actually worked and for which the person was remunerated.
>
> *Earnings from insurable employment*
>
> 2. (1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is
>
> > (*a*) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, and
> >
> > . . .
>
> (2) For the purposes of this Part, the total amount of earnings that an insured person has from insurable employment includes the portion of any amount of such earnings that remains unpaid because of the employer's bankruptcy, receivership,

> impending receivership or non-payment of remuneration for which the person has filed a complaint with the federal or provincial labour authorities, except for any unpaid amount that is in respect of overtime or that would have been paid by reason of termination of the employment.

[29] The evidence in the case at bar does not establish that the Appellant has discharged his obligation under section 2 of the Regulations, *supra*, to prove that his unpaid remuneration was the subject of a complaint to the federal or provincial labour authorities.

[30] The burden was on the Appellant to prove that the Minister's assumptions of fact were false, and he has not done so.

[31] Moreover, the Appellant has not succeeded in showing that he held insurable employment with the Payor. In addition, he was unable to answer relevant questions that he was asked about documents that he himself produced late without notifying the Minister. However, in view of his incomplete and evasive answers, the surprise that the production of these documents created at the hearing placed his credibility in question.

[32] In light of the foregoing, this Court can only conclude, as did the Minister, that the Payor and the Appellant entered into an arrangement to qualify him for unemployment benefits.

[33] The following articles of the *Civil Code of Québec* are worth reproducing:

> IV – Cause of contracts
>
> 1410. The cause of a contract is the reason that determines each of the parties to enter into the contract.
>
> The cause need not be expressed.
>
> 1411. A contract whose cause is prohibited by law or contrary to public order is null.

[34] Consequently, this Court sees no basis to intervene in the Minister's decision.

[35] The appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois, New Brunswick, this 4th day of October 2005.

"S.J. Savoie"

Savoie D.J.

Translation certified true
on this 18th day of October 2005.

Aveta Graham, Translator

CITATION:	2003TCC609
COURT FILE NO.:	2002-3937(EI)
STYLE OF CAUSE:	Léo Dufour v. M.N.R.
PLACE OF HEARING:	Québec, Quebec
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APPEARANCES:

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For the Respondent:	Julie David

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