Docket: 2006-1252(EI)

BETWEEN:

BERTRAND CÔTÉ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 12, 2007, at Montréal, Quebec.

Before: The Honourable Deputy Justice S. J. Savoie

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Mounes Ayadi

JUDGMENT

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

Signed at Grand-Barachois, New Brunswick, this 4th day of May 2007.

"S. J. Savoie"

Savoie D.J.

Translation certified true
on this 29th day of August 2007
Gibson Boyd, Translator

Citation: 2007TCC212
Date: 20070504
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BERTRAND CÔTÉ,

Appellant,

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REASONS FOR JUDGMENT

Savoie D.J.

[1] This appeal was heard at Montréal, Quebec, on March 12, 2007.

[2] This is an appeal from the decision by the Minister of National Revenue (the "Minister") dated February 28, 2006. The period at issue (the "period") started on November 26, 2001, and ended March 8, 2002. The dispute centres on the work executed by the Appellant for Stratège Soft inc., (the "Payor"). The Minister determined that the Appellant exercised insurable employment during the period in question.

[3] In rendering his decision, the Minister relied on the following presumptions of fact:

(a) the Payor operated a retail software business; (denied)

(b) the sole shareholder of the Payor was 9098-2760 Québec inc.; (neither admitted nor denied)

(c) the sole shareholder of 9098-2760 Québec inc. was Michel Rathé; (denied)

(d) during the period at issue, the Appellant provided services to the Payor as business development manager; (denied)

(e) the Payor hired the Appellant as a salaried employee, while the Appellant claims to have worked as an independent consultant; (denied)

(f) the Appellant provided services to the Payor according to a work schedule from Monday to Friday; (denied)

(g) the Appellant met with Mr. Rathé two or three times a week to discuss his work; (denied)

(h) the Appellant had to provide the Payor with sales reports; (denied)

(i) the Appellant provided services to the Payor on the road and at home; (denied)

(j) the Appellant used his automobile for his work and was provided with an expense account by the Payor; (denied)

(k) the Appellant received a fixed salary of $1,192.40 per week for 40 hours of work; (denied)

(l) the Appellant claimed that the amounts he received from the Payor in December 2001 (4 weeks) and during 2002 were for work done, on contract, in June and July 2001; (admitted)

(m) the Payor asserts that the Appellant started his work in November 2001; (denied)

(n) On March 8, 2003, the Payor issued a record of employment in the name of the Appellant indicating November 26, 2001, as the first day of work and March 8, 2002, as the last day paid, 600 insurable hours and insurable earnings totalling $ 17,886 (15 weeks at $1,192,40); (admitted)

(o) For 2001, the Payor issued a T4 in the Appellant's name indicating $4,769 that the Appellant included in his income tax return in 2001; (admitted)

(p) the Payor made his deductions at the source on the amounts paid out in accordance with the amounts appearing on the record of employment and the T4; (admitted)

(q) the facts and documents support the Payor's claims to the effect that the Appellant provided services to the Payor under an employment contract during the period at issue. (denied)

[4] The evidence presented at the hearing revealed that the Appellant had been looking for an accounts and business development manager position. His services were retained by the Payor following a process undertaken by a head-hunter consulted by the Payor.

[5] In an exchange of e-mails between the Appellant and the Payor, the employment conditions were established. The Payor confirmed the hiring of the Appellant on November 13, 2001, as evidenced by Exhibit I-5 at page 7.

> [TRANSLATION]
>
> From: Michel [mrathe@videotron.ca]
> Sent: November 13, 2001 08:54
> To: 'Bertrand Cote'
>
> Hello Bertrand,
>
> I am pleased to inform you that I have selected your application for this position.
> I believe we will work well together.
> I am eager to get this all started.
>
> We'll call each other this morning about lunch (unless your condition prevents it).
>
> Goodbye.
>
> Michel Rathé

The Appellant confirmed his availability starting November 21. His employment started on November 26, 2001. Previously, the Appellant had specified to the Payor his requirements concerning employment conditions in an e-mail dated November 7, 2001, of which here are the main elements:

> [TRANSLATION]
>
> From: Bertrand Cote [cotebertrand@videotron.ca]
> Sent: November 7, 2001 13:32
>
> . . .
>
> As discussed yesterday, here are my requirements for a position of manager . . .
>
> Annual base remuneration: 62k / annum

Yearly vacation 4 weeks
. . .

Transportation costs….
Representation costs
Expenses
Parking
Mobile phone and long distance

. . .

Date of availability – November 21, 2001

[6] The Appellant's schedule, while being fairly flexible, had to meet the Payor's needs. The Appellant therefore had to work from Monday to Friday, from his office or on the road, depending on the Payor's requirements.

[7] It was established that the Appellant met with Mr. Rathé, the Payor, every week and prepared reports that the Payor would consult. The evidence also revealed that the Appellant used his vehicle for work. Under the agreement reached with the Payor, it was the Payor who paid the expenses.

[8] As for the Appellant's salary, the records of employment prepared by the Payor were filed at the hearing and support the Minister's claim as to the Appellant's period of employment and his remuneration.

[9] The Appellant asserted that he made an error when he admitted in his Notice of Appeal of April 24, 2006, that he had held insurable employment with the company D.I.A. (Décision et Intelligence d'affaires), from January 13 to August 22, 2002. In other words, in his testimony, the Appellant contradicted the contents of his Notice of Appeal. His testimony to this effect is not trustworthy when all of the evidence, oral and documentary, is taken into consideration. It suffices to consider the Payor's testimony, the records of employment, Exhibit I-2 and the letter of Daniel Lalonde, CPP/EI eligibility officer, dated February 19, 2003, Exhibit I-4, informing the Appellant of his decision to the effect that he considered the Appellant's employment insurable for period in question solely based on the information provided by the Appellant. Yet, the Appellant testified that he was employed by D.I.A. from January 14, 2002. However, the Appellant could not explain convincingly why he had received a salary payment from this company on December 14, 2001. He claimed in cross-examination that it was his salary for the work he had done for the Payor in the summer of 2001.

[10] This assertion was denied in a convincing manner by the Payor, who was not cross-examined on this important aspect of his testimony. Moreover, the T4 prepared by the Payor supports its position and also refutes the Appellant's claim that he had worked for the Payor in the summer of 2001. It has moreover been proved that Mr. Rathé did not even know the Appellant at that time, only having met him in the autumn of 2001.

[11] The evidence revealed that, during the period in question, the Appellant's salary was paid by Stratège Soft inc. or by a pay service provided by société Desjardins on behalf of the Payor, since the new company D.I.A. had not yet been formed and structured so as to provide the service.

[12] The Appellant had the burden of proof. The onus was on him to prove the falseness of the Minister's claims. He did not do so. Indeed, the evidence that he presented supports the Minister's presumptions and conclusion with regard to the insurability of his employment. At the hearing, the debate dealt with the period of employment rather than its insurability.

[13] The Appellant denied having worked from November 26, 2001, to January 14, 2002. He admitted having worked for the rest of the period. It must be noted however, that the Appellant admitted having applied for employment insurance benefits on July 5, 2001. This is Exhibit I-3. The Appellant also admitted having received employment insurance benefits until mid-January 2002. This perhaps explains why he denied having been employed by the Payor during this period. With respect to this, the Court must conclude that the Appellant lacked candour and sincerity. On this point, he was contradicted by the rest of the oral and documentary evidence. Due to the foregoing, it became evident at the hearing that the subject of debate was the Appellant's period of employment rather than insurability.

[14] The period of employment was proved by the Payor in its evidence, but also in part by the Appellant himself, as indicated above. The period of employment was also established in the e-mails exchanged by the parties. Moreover, the Appellant's assertion that he was employed during the summer of 2001 was refuted by abundant evidence. This has already been referred to by the Court. This also had the effect of casting doubt on the Appellant's credibility.

[15] The Court must now determine whether the Appellant held insurable employment for the purposes of the *Employment Insurance Act* (the "Act"). The relevant provision is set out at paragraph 5(1)(*a*) of the Act and reads as follows:

> 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]

[16] The paragraph quoted above defines the term "insurable employment". It is employment under a contract of service, i.e. a contract or employment. However, the Act does not define what constitutes such a contract. In the case at bar, there is a written contract. It has been reproduced above. The intention of the parties is expressed in this contract.

[17] The contract of employment is a civil law notion found in the *Civil Code of Québec*. The nature of this contract therefore must be determined under the relevant provisions of the Civil Code.

[18] In a publication entitled "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It." (*The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law*. Montreal: APFF, 2005), Justice Pierre Archambault of this Court describes, with regard to any period of employment after May 30, 2001, the method to be used by the courts since the coming into force, on June 1, 2001, of section 8.1 of the *Interpretation Act*, S.R.C. (1985), c. 1-21, amended, when dealing with a dispute like this one. Here is what was set forth by Parliament in this section:

> *Property and Civil Rights*
>
> **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.
>
> [Emphasis added.]

[19] It is appropriate to cite the relevant provisions of the Civil Code, which will be used to determine the existence of a contract of employment in Quebec, to distinguish it from a contract for services:

> 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.]

[20] The provisions of the Civil Code cited above establish three conditions essential to the existence of a contract of employment:

> (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.

[21] As pointed out at the hearing by counsel for the Respondent, Mr. Ayadi, the evidence presented supports the Minister’s conclusion that the Appellant held

insurable employment with the Payor. Indeed, this fact is admitted by the Appellant except for the period from November 26, 2001 to January 14, 2002. However, the weight of the evidence establishes the contrary, including Exhibit A-1 filed at the hearing and that the Appellant was unable to explain in a credible manner.

> A series of indicia developed by the case law enables the Court to determine whether there is a relationship of subordination between the parties.
>
> The indicia of supervision include:
>
> - mandatory presence at a workplace
> - compliance with work schedule
> - control over the employee's absences on vacations
> - submission of activity reports
> - control over quantity and the quality of the work
> - imposition of the methods for performing the work
> - power to sanction the employee's performance
> - source deductions
> - benefits
> - employee status on income tax returns
> - exclusivity of services for employer

[22] It should be specified, however that the presence of indicia supporting one conclusion or another, i.e. whether there is a relationship of subordination or not, does not put an end to the analysis. The exercise consists, according to the distinction established in the *Civil Code of Québec*, in determining the overall relationship between the parties. It is a matter of establishing in what proportion the indicia potentially leading to the conclusion that there is a relationship of subordination are predominant compared to the others.

[23] Most of the above-mentioned indicia are present in this case, specifically the source deductions, benefits, employee status in income tax returns and exclusivity of services to the employer.

[24] The testimonial and documentary evidence also supports the existence of a relationship of subordination when the facts presented are examined in light of the indicia concerning the respect of a work schedule, the control of the employee's vacation absences and submission of activity reports. However, the Appellant was not required to be present at a designated workplace. The parties had agreed that, due to the nature of the work, the Appellant could perform his duties on the road or

at home. It must be acknowledged that this indicium is rather neutral in the analysis of its bearing on the determination of a relationship of subordination.

[25] Based on this analysis, the Court must find that the evidence describing the relationship between the Appellant and the Payor supports the conclusion that there was a contract of employment between them according to the provisions of the *Civil Code of Québec* and, as a result, according to paragraph 5(1)(*a*) of the Act.

[26] Accordingly, the Minister's decision on the duration of the period of employment in question, i.e. from November 26, 2001, to March 8, 2002, and on the insurability of this employment is confirmed.

[27] The appeal is therefore dismissed.

Signed at Grand-Barachois, New Brunswick, this 4th day of May 2007.

"S. J. Savoie"

Savoie D.J.

Translation certified true
on this 29th day of August 2007
Gibson Boyd, Translator

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Mounes Ayadi

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada