Docket: 2007-1601(EI)

BETWEEN:

ARKADILY LISOVENKO,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 1, 2007, at Montréal, Quebec

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Stéphanie Archambault

Counsel for the Respondent: Christina Ham

JUDGMENT

The appeal under paragraph 5(1)(*a*) of the *Employment Insurance Act* is allowed and the decision made by the Minister of National Revenue is vacated in accordance with the attached Reasons for Judgment in that, for the 2005 taxation year, the Appellant, Arkadily Lisovenko, was employed in insurable employment when he was working for 9088-4453 Québec Inc.

Signed at Ottawa, Canada, this 22nd day of January 2008.

"François Angers"

Angers J.

Translation certified true
on this 21st day of April 2008.
Brian McCordick, Translator

Citation: 2008TCC6
Date: 20080122
Docket: 2007-1601(EI)

BETWEEN:

ARKADILY LISOVENKO,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] The Appellant is appealing from a decision of the Minister of National Revenue ("the Minister") that he was not employed in insurable employment in 2005 when he was rendering services to 9088-4453 Québec Inc. because the employment did not meet the requirements of a contract of service within the meaning of the *Employment Insurance Act* ("the Act").

[2] 9088-4453 Québec Inc. was incorporated on March 8, 2000, and operates a forestry business in Quebec that is primarily engaged in brush cutting and reforestation. The business is known as Florexpert.

[3] In 2005, 75% of Florexpert's workers were considered employees, and 25% of them were considered independent contractors. The distinction that the appeals officer drew between the employees and the independent contractors was that the employees were new employees, trained by Florexpert, who planted new trees in addition to cutting brush. They were paid on an hourly basis, their work tools were supplied to them, and they were transported by Florexpert to the work sites. As for the independent contractors, they were experienced, and were paid to clear parcels of land in accordance with a five-tier fee scale that is based on the parcel of land to be cleared. In order to get paid what they were due, the independent contractors had to do their work to Florexpert's satisfaction. They also had to use their own tools. All the workers got their room and board from Florexpert, but this expense was deducted from their pay.

[4] The Appellant worked for Florexpert from August 6 to late October 2005 as a brush cutter. This was not his first experience in this field, because he had already worked as a brush cutter for another company named Reboitech in May and June 2005.

[5] The Appellant was hired by Reboitech as an employee. In order to do the work, he had to live in camps set up by his employer in the woods. The employer deducted from his salary the costs associated with his camp, including meals and lodging. He also purchased the tools necessary to do his work, as well as the fuel for those tools and the parts to repair them, from the employer. All of these amounts were withheld from his pay. He got to the camp on his own or used the transportation made available by the employer.

[6] A forestry pay statement for a week's work with Reboitech states that the Appellant cleared roughly one and a half hectares of land at a rate of $350 per hectare. After certain adjustments, including 4% vacation pay, Reboitech made the customary source deductions and then deducted the costs associated with the camp and with equipment purchases. The remaining balance was deposited into his account. The gross taxable income was converted into 45 hours of insurable employment for the week.

[7] Reboitech suspended its forestry operations because of forest fires. Therefore, Reboitech offered the Appellant a job which was similar, but in which he would be doing work for Florexpert. Consequently, the Appellant went to the work site, which was located near the Gouin dam. The Appellant filled out a job application, and he claims that he was hired under the same terms and conditions that Reboitech had offered. He says that there was no discussion of the fact that there were two categories of employees.

[8] He started work the next day and was told what land to clear. The land was marked out with flags, and if the work was not done well, he had to redo it. Thus, there was a supervisor who checked his work. He understood that he needed to make $700 a week in order to get employment insurance benefits. Meals and lodging were provided by Florexpert, but his expenses were deducted from his pay. There were roughly 15 to 20 occupants in each camp, and everyone had the same schedule. According to the Appellant, no one at his camp was paid on an hourly basis. There was a set time for the meal break. He worked 10 to 12 hours a day, starting very early in the morning, and ending at approximately 4 p.m.

[9] The land was owned by Florexpert, which determined what would be paid for each parcel of land based on the category to which it belonged. Florexpert chose the land that the Appellant would have to clear, and told him which trees not to cut. When Florexpert determined that the terrain was very rugged and that he should not work alone, it required hum to work with someone else. However, the Appellant could choose who that co-worker would be. Workers were prohibited from working more than fifteen days in a row; if they did, they risked being penalized. The Florexpert supervisor carried replacement parts and fuel for the Appellant's tools. All purchases made by the Appellant were deducted from his income.

[10] Despite the requests that he made while working for Florexpert, the Appellant received no pay stub, explanations or other information, except at the very end, when everything was deposited into his account. Exhibit A-4 shows that, for the year 2005, Florexpert deducted tool, fuel and lodging costs from the Appellant's income. It is also interesting to note that the Appellant is identified in the [TRANSLATION] "Detailed Report of Purchases from Suppliers" as an employee on the first page, but that the second page refers to the Appellant, the amount of land cleared, and the fee per parcel of land. The Appellant, for his part, says that he does not know if he was paid properly. However, he knew the fee per parcel, and knew that, if he worked quickly, he could increase his income. According to the Appellant, all of Florexpert's workers used their own tools and no one at his camp was paid by the hour. The planting of new trees was done by students, not by brush cutters.

[11] The Appellant obtained a T4 from Reboitech, but Florexpert did not give him one. He did not get vacation pay from Florexpert. He retained the servies of a professional to prepare his income tax return, and deducted his expenses from his income. His return was later changed when the Canada Revenue Agency prepared a T4 concerning his job with Florexpert, but everything was put on hold pending this decision.

[12] The issue for determination, then, is whether the services that the Appellant rendered to Florexpert were services under a contract of employment, or under a contract of enterprise or for services. In *9041-6868 Québec Inc. v. Canada*, [2005] F.C.J. No. 1720, Décary J.A. of the Federal Court of Appeal determined the parameters of the analysis that must be applied in cases such as this:

> In other words, it is the *Civil Code of Québec* that determines what rules apply to a contract entered into in Quebec. Those rules are found in, *inter alia*, the provisions of the Code dealing with contracts in general (arts. 1377 C.C.Q. *et seq.*) and the provisions dealing with the "contract of employment" (arts. 2085 to 2097 C.C.Q.) and the "contract of enterprise or for services" (arts. 2098 to 2129 C.C.Q.). Articles 1378, 1425, 1426, 2085, 2098 and 2099 C.C.Q. are of most relevance for the purposes of this case:
>
> 1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.
>
> 1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

1440. A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.

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.

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 and 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.

He continues by defining the role of the Tax Court of Canada, and notes the three constituent elements of a contract of employment.

8 We must keep in mind that the role of the Tax Court of Canada judge is to determine, from the facts, whether the allegations relied on by the Minister are correct, and if so, whether the true nature of the contractual arrangement between the parties can be characterized, in law, as employment. The proceedings before the Tax Court of Canada are not, properly speaking, a contractual dispute between the two parties to a contract. They are administrative proceedings between a third party, the Minister of National Revenue, and one of the parties, even if one of those parties may ultimately wish to adopt the Minister's position. .

9 The contract on which the Minister relies, or which a party seeks to set up against the Minister, is indeed a juridical fact that the Minister may not ignore, even if the contract does not affect the Minister (art. 1440 C.C.Q.; Baudouin and Jobin, *Les Obligations*, Éditions Yvon Blais 1998, 5th edition, p. 377). However, this does not mean that the Minister may not argue that, on the facts, the contract is not what it seems to be, was not performed as provided by its terms or does not reflect the true relationship created between the parties. The Minister, and the Tax Court of Canada in turn, may, as provided by articles 1425 and 1426 of the *Civil Code of Québec*, look for that true relationship in the nature of the contract, the circumstances in

which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage. The circumstances in which the contract was formed include the legitimate stated intention of the parties, an important factor that has been cited by this Court in numerous decisions (see *Wolf v. Canada* (C.A.), [2002] 4 FC 396, paras. 119 and 122; *A.G. Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54; *Le Livreur Plus Inc. v. M.N.R.*, 2004 FCA 68; *Poulin v. Canada (M.N.R.)*, 2003 FCA 50; *Tremblay v. Canada (M.N.R.)*, 2004 FCA 175).

10 The expression "contract of service", which has been used in the *Employment Insurance Act* since its origin and which was the same as the expression used in article 1667 of the *Civil Code of Lower Canada*, is outdated. The *Civil Code of Québec* in fact now uses the expression "contract of employment", in article 2085, which it distinguishes from the "contract of enterprise or for services" provided for in article 2098.

11 There are three characteristic constituent elements of a "contract of employment" in Quebec law: the performance of work, remuneration and a relationship of subordination. That last element is the source of the most litigation. For a comprehensive definition of it, I would refer to what was said by Robert P. Gagnon in *Le droit du travail du Québec*, Éditions Yvon Blais, 2003, 5th edition, at pages 66 and 67:

> 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.
>
> 91 - *Factual assessment* - Subordination is ascertained from the facts. In this respect, the courts have always refused to accept the characterization of the contract by the parties. . . .

> 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 terms 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 monitor 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.

> 12 It is worth noting that in Quebec civil law, the definition of a contract of employment itself stresses "direction or control" (art. 2085 C.C.Q.), which makes control the actual purpose of the exercise and therefore much more than a mere indicator of organization, as Mr. Justice Archambault observed at page 2:72 of the article cited *supra*.

[13] As we have seen, the distinction drawn by the appeals officer between the two groups of workers was that the employee group consisted of new workers that Florexpert had to train. These workers did brush cutting and planting, were paid on an hourly basis, and were provided with tools for their work. As for the independent contractors, including the Appellant, they were paid a rate that depended on the category of land to be cleared, and they had to do the work to Florexpert's satisfaction and supply their own work tools.

[14] The Appellant submits that all the workers owned their work tools, whether they were paid by the hour or based on the set fee for land to be cleared. The Appellant further submits that only the students planted small trees, and that the workers who stayed at his camp were not paid by the hour.

[15] The documentation that Florexpert tendered in evidence refers to the Appellant as an employee on the first page and a supplier from which Florexpert makes purchases on the second page.

[16] The Appellant claims that he was hired by Florexpert under the same terms and conditions under which Reboitech employed him. Under his contract with Reboitech, he was paid by parcel or hectare of land cleared, not based on the hours that he worked. He had purchased his work tools from Reboitech, along with the parts to repair them. He lived in a camp that belonged to Reboitech, and his lodging costs and source deductions were deducted from his income. His income was converted into insurable hours. He believed, at least until his job ended, that he was a Florexpert employee governed by the same terms and conditions that had applied at Reboitech. In fact, everything except the source deductions was done the same way.

[17] What was the true relationship between the Appelant and Florexpert in the case at bar? Was there a prestation of work, remuneration, and a relationship of subordination between them? The Minister relied on the information obtained during his investigation to prepare the Reply to the Notice of Appeal, which was worded as follows:

> [TRANSLATION]
>
> 1. The brush cutters, including the Appellant, had to travel to the work sites, supply their own equipment, and feed and house themselves.
>
> 2. They did not have a precise work schedule to comply with.
>
> 3. They received no training.
>
> 4. The payor assigned them a site, on which they generally worked alone and unsupervised by the payor.
>
> 5. They were remunerated based on the number of hectares of woods cleared.
>
> 6. They had to supply their own work tools and fuel and look after the maintenance of their own equipment.

7. Their hours of work were not counted, because the payor was only interested in the results.

8. They got no fringe benefits from the payor, not even the 4% vacation pay.

9. They had no quotas to meet and were remunerated solely based on the amount of work done.

[18] The Appellant admitted to paragraphs 5, 6, 8 and 9. In my opinion, he provided credible, sincere testimony which, on several points, contradicts the assumptions on which the Minister relied in making his decision.

[19] The Appellant claims that he had to go to Florexpert's camp, but that, once there, he was transported by Florexpert to the work sites at the times that corresponded to the camp's activities, particularly mealtimes. He got his room and board from Florexpert, but reimbursed Florexpert for these services. It is true that the Appellant did not have a precise schedule to keep, but he had to comply with the schedule that Florexpert had established for the purposes of its forest camp. The Appellant was required to comply with Florexpert's camp schedule at the very least.

[20] With respect to the training, it is true that the Appellant knew what he had to do. However, he testified that, based on the type of land that he had to clear, he received instructions on how to perform the work in order to protect certain types of trees and to comply with Florexpert's requirements. This suggests to me that, in the instant case, Florexpert had some measure of control and power over the performance of the work by the Appellant.

[21] The Appellant did not have the power to choose the type of land that he would work on. The parcel of land was assigned by Florexpert, and the rate varied depending on the land involved. In addition, if Florexpert determined that the terrain was too rugged, it required the Appellant to be accompanied by another worker, whom it paid. The only thing that the Appellant could choose was who that other worker would be. This, in my opinion, is an indicia that Florexpert had a power of direction and control over the worker, which supports the argument that a relationship of subordination existed.

[22] It is true that the Appellant had to supply his own tools. However, he depended on Florexpert to obtain the fuel and parts necessary for his tools to function properly. Florexpert provided this service through its supervisor, who went from site to site with the fuel and replacement parts that he sold to the workers. Any delay in this distribution was detrimental to the workers, not Florexpert. In my opinion, an independent contractor would have made sure that he was not short of anything so that he would not have to wait for the supervisor and depend on the supervisor's comings and goings.

[23] However, there are indicia that favour the argument that the Appellant was self-employed. The fact that the hours of work were not recorded, and that the Appellant was paid solely based on the number of parcels of land that he cleared, suggests that Florexpert was only interested in the result and the quality of the work that was done. It is also true that he had no quota to meet because he was paid based on the quantity of work done. The fact that the Appellant supplied his work tools, and that he purchased fuel and parts sold by Florexpert, are also indicia that the Appellant was self-employed.

[24] However, I believe that, on a balance of probabilities, the Appellant has succeeded in showing that he had rather little decision-making power and was therefore integrated into Florexpert's forestry operations. Moreover, Florexpert exercised a power of direction or control over the Appellant that was sufficient for me to find that a relationship of subordination existed. The Appellant received specific instructions regarding the places that he had to clear; he was assigned a parcel of land, a determination was made concerning the rate and how he would have to perform his work based on the type of terrain. This amounts mainly to saying that Florexpert chose the land based on the Appellant's ability to do the work. He was assigned a co-worker when Florexpert determined that the terrain was too rugged. He was forbidden from working more than 15 days in a row, failing which he was penalized. He had to comply with the schedule of the camp where he was lodged, and the circumstances required him to live at the camp. For all practical purposes, he had to purchase his fuel and parts from Florexpert, and, as a result, his power to control the cost of his expenses was reduced. In my opinion, all of this creates a relationship of subordination and leads me to the conclusion that the services that the Appelant rendered to Florexpert were rendered under a contract of employment, and therefore constituted insurable employment within the meaning of the Act.

[25] The appeal is allowed and the decision rendered by the Minister of National Revenue is vacated in that the Appellant, Arkadily Lisovenko, was employed in insurable employment.

Signed at Ottawa, Canada, this 22nd day of January 2008.

"François Angers"

Angers J.

Translation certified true
on this 21st day of April 2008.

Brian McCordick, Translator

CITATION:	2008TCC6
COURT FILE NO.:	2007-1601(EI)
STYLE OF CAUSE:	Arkadily Lisovenko and M.N.R.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 1, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice François Angers
DATE OF JUDGMENT:	January 22, 2008

APPEARANCES:

Counsel for the Appellant:	Stéphanie Archambault
Counsel for the Respondent:	Christina Ham

COUNSEL OF RECORD:

For the Appellant:

Name:	Stéphanie Archambault
Firm:	Blackburn & Associés, Avocats
City:	Montréal, Quebec

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