

Citation: 2005TCC328
Date: 20050627
Dossier: 2003-4188(EI)

BETWEEN:

JEAN-YVES VAILLANCOURT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

FONDATION QUÉBÉCOISE DE LA
DÉFICIENCE INTELLECTUELLE,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

(Delivered orally from the bench on September 1, 2004,
at Montréal, Quebec and amended for clarification and precision.)

Archambault J.

[1] Jean-Yves Vaillancourt is appealing from a decision by the Minister of National Revenue (**Minister**) regarding the insurability of his employment with the Fondation québécoise de la déficience intellectuelle (**Foundation**) for the period of May 27 to December 31, 2002 (**relevant period**). Mr. Vaillancourt is contesting the Minister's decision that, during this period, he was not engaged in insurable employment under the *Employment Insurance Act*, S.C. 1996, c. 23 (**Act**) because, in his opinion, he was hired under a contract of employment. The Minister feels that Mr. Vaillancourt's services were rendered under a contract for service, as a "self-employed worker," the term commonly used.

Facts

[2] The evidence showed the following. First, at the beginning of the hearing, Mr. Vaillancourt admitted all the facts stated in paragraph 7 of the Minister's Reply to the Notice of Appeal, except for those in subparagraphs 7(f) and 7(l). I will reproduce the subparagraphs here:

- (a) The Payer had been operating a used-article collection company since August 17, 1988;
- (b) the Payer had a place of business in Montréal and another one in Gatineau, and hired around 110 people;
- (c) the Payer wanted to develop a new project with collection boxes for clothing and various articles at grocery stores, convenience stores and drug stores;
- (d) on May 27, 2002, it hired the Appellant as project manager for this new project;
- (e) a one-year agreement was signed between the parties to this effect;
- (f) the signed agreement stated that the Appellant was hired as a self-employed worker and his duties were to:
 - Develop a new project to install collection boxes for clothes.
 - Prepare a flyer.
 - Go to various businesses.
 - Sign agreements with business people to install 80 collection boxes in Montréal and 16 in the Outaouais.
 - Provide services to the Payer for more or less 40 hours per week;
- (g) during the first two months of the agreement, the Appellant worked in the Payer's office and then he worked mainly on the road;
- (h) the Appellant could use an office and any equipment needed for his work, provided by the Payer;
- (i) the Payer provided a cell phone and business cards for the Appellant;
- (j) all the costs incurred by the Appellant, including vehicle expenses, were reimbursed by the Payer;

- (k) the Appellant received a set pay of \$1,346.15 every two weeks, upon presentation of an invoice, required by the Payer;
- (l) starting January 1, 2003, the parties amended their agreement and the Appellant became the Payer's employee;
- (m) on January 21, 2003, the Payer issued a record of employment in the Appellant's name indicating the first day of work as January 1, 2003, the last paid day as January 20, 2003, 91 insurable hours and a total insurable pay of \$1,750.

[3] As for subparagraph 7(f), the only part that caused a problem for Mr. Vaillancourt was the mention of a "flyer". However, the evidence showed that, although not strictly speaking a flyer, a promotional document was, in fact, created and produced. As for subparagraph (l), I agree with Mr. Vaillancourt that the evidence shows the parties did not amend their May 27, 2002, agreement. It shows that they undertook negotiations towards the end of December 2002 and in January 2003 to replace it with a contract of employment, but one of the essential elements of a contract of employment—the power of direction and control that the Foundation could exercise over Mr. Vaillancourt's work—caused a problem. In fact, Mr. Vaillancourt never accepted the Foundation's intention to exercise strict control over his work.¹

[4] I agree with Mr. Vaillancourt that the degree of control Mr. Boily wanted to exercise seems quite strict, if not extreme, but this is not the issue. Whether justified or not is irrelevant. That issue stems from the contractual freedom of the parties. In fact, Mr. Vaillancourt could have refused to have such a control exercised over him and this is what he did. That is why there was never an agreement to replace the original agreement. As a result, it is incorrect to claim, in subparagraph 7(l) of the Reply to the Notice of Appeal, that Mr. Vaillancourt became an employee as of January 1, 2003. The fact that the terms of payment changed, in particular the fact that source deductions had begun, is not a decisive element for the existence of a contract of employment. It is merely an indication that the Foundation believed in the existence of a contract for employment starting in January 2003.

¹ A contract of employment project was even drafted in definitive form (Exhibit A-1, Collection IV, Tab 5), but this contract was not signed.

[5] Since there was no agreement to amend the original agreement, I think the existing contractual relationship of May 27, 2002, continued after December 31, 2002. However, this is all theoretical since the relevant period ended December 31, 2002. What must be determined is the actual nature of the relationship between Mr. Vaillancourt and the Foundation during the relevant period. Was it a relationship between client and service provider (self-employed worker) or a relationship between employer and employee? In other words, was there a contract of employment or a contract for services?

[6] At the hearing, Mr. Vaillancourt produced extensive documentary evidence that was exceptionally well presented. His many documents are distributed in four collections. In the fourth, one of the things at Tab 2, is the May 27, 2002, agreement that describes the terms of the Foundation's hiring of Mr. Vaillancourt and in which Mr. Vaillancourt is described as the Project Leader. I will reproduce some of the more important parts of this agreement:

[TRANSLATION]

PREAMBLE

WHEREAS the Project Leader presented the Foundation with an offer of services on May 13, 2002, regarding the development of the Foundation's business;

...

THE PARTIES AGREE AS FOLLOWS:

1 PURPOSE

The Foundation retains the services of the Project Leader as a subcontractor in charge of business development.

2 Term

- (a) This agreement, for a maximum term of one year, takes effect on May 27, 2002, and will end on May 26, 2003 at the latest.

- (b) The Foundation can end this agreement at any time by sending a written notice to this effect, in which case the agreement is terminated upon reception of the notice by the Project Leader.

3 REPRESENTATIONS BY THE PROJECT LEADER

- (a) The Project Leader guarantees the Foundation that he has the experience, knowledge and resources required to ensure the services rendered to the Foundation.
- (b) The Project Leader guarantees the Foundation that he has read this agreement, is satisfied with and will respect it.

4 CONSIDERATION

- (a) For the services rendered by the Project Leader under this agreement, the Foundation will pay him a fee of \$1,346.15 (excluding applicable taxes — GST and QST) every two weeks, for more or less 40 hours/week based on a flexible schedule.
- (b) The fees will be paid to the Project Leader upon presentation of an invoice every two weeks addressed to the Foundation (c/o the Director General) to the above address that presents a brief summary of the duties accomplished, the time allotted to them, the amount of the fees due for the period in question[,], the calculation of applicable taxes and the Project Leader's GST and QST numbers.
- (c) The Project Leader will be reimbursed for travel expenses in accordance with the rate established by the board of directors.

The Project Leader will be reimbursed for actual expenses preauthorized by the Director General, upon presentation of supporting documents.

The Project Leader will present a monthly claim for the amounts mentioned in the preceding paragraphs.

5 RELATIONSHIP BETWEEN THE PARTIES

- (a) The Project Leader will act as an independent contractor at all times and there is no employment relationship between the Foundation and the Project Leader.

...

- (c) The Project Leader is the sole person responsible for any act carried out or omission that may arise when carrying out his obligations under this agreement and for any damages, of any type, that may arise for the Foundation or third parties, except where this act or omission is fully imputable to the Foundation.

- (d) The Project Leader indemnifies the Foundation, and any employees, agents or insurers of the Foundation, of any claim, penalty or prosecution resulting from an act or omission for which he is responsible that is committed or which arises under this agreement or is related to it in any way.

6 VARIA

...

- (c) This agreement is governed by the legislation of the Province of Quebec.

[Emphasis added.]

[7] In accordance with the May 27, 2002, agreement, every two weeks Mr. Vaillancourt presented an invoice addressed to the Foundation with a brief summary of the duties accomplished. As an example, I will reproduce the first invoice, covering the period of May 27 to June 7, 2002, and the last, covering the period of December 23 to December 31, 2002:

[TRANSLATION]

Invoice No.: 20001

June 10, 2002

Jean-Yves Vaillancourt
300 rue Saint-Georges, apartment 600
Saint-Lambert, Que J4P 3P9

<p>Fee: May 27 to May 31, 2002, and June 3 to June 7, 2002 GST number: 144526142</p> <p style="text-align: right;">7%</p> <p>QST number: 1087758334TQ0001</p> <p style="text-align: right;">7.5%</p> <p>Services rendered to:</p>	<p>\$1 346.15</p> <p style="text-align: right;"><u>\$94.23</u></p> <p>\$1 440.38</p> <p style="text-align: right;"><u>\$108.03</u></p> <p>\$1 548.41</p>
<p><u>FQDI</u> La Fondation québécoise de la déficience intellectuelle 3958 rue Dandurand Montréal, Que H1X 1P7 Jacques Boily – Director General</p>	
<p><u>Brief description of services rendered:</u></p> <ol style="list-style-type: none"> 1. Preparation of a draft portfolio 2. Partial market and competition analysis 3. Draft partnership agreement 4. Support and introduction to storage 5. Introduction to collection <p style="text-align: right;">Total fees: \$1 346.15 Total GST and QST: \$202.26 Total fees including GST and QST: <u>\$1 548.41</u></p>	

Amount payable immediately upon receipt of this invoice

Invoice No.: 20016

December 31, 2002

<table border="1" style="margin: auto;"> <tr> <td style="text-align: center;"> <p>Jean-Yves Vaillancourt 300 rue Saint-Georges, apartment 600 Saint-Lambert, Que J4P 3P9</p> </td> </tr> </table>	<p>Jean-Yves Vaillancourt 300 rue Saint-Georges, apartment 600 Saint-Lambert, Que J4P 3P9</p>
<p>Jean-Yves Vaillancourt 300 rue Saint-Georges, apartment 600 Saint-Lambert, Que J4P 3P9</p>	

otherwise;

pièces, soit de toute autre manière;

[Emphasis added.]

[10] This paragraph defines insurable employment as employment under a contract of service (which is a synonym for contract of employment²). However, the Act does not define such a contract. As Mr. Vaillancourt's May 27, 2002, contract is governed "by the legislation of Quebec"³ and the contract for services is a civil law concept found in the *Civil Code of Quebec (Civil Code)*, it is under the relevant provisions of the Civil Code that the nature of this contract must be determined. For any employment period post May 30, 2001, this is the procedure courts must follow since the coming into force on June 1, 2001, of section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, amended. This section states⁴:

² See Hubert REID, *Dictionnaire de droit québécois et canadien*, 3rd ed., Montréal: Wilson & Lafleur, 2004, p. 361.

³ Subparagraph 6(c) of the agreement (reproduced at para. 6 of these Reasons).

⁴ For a more thorough discussion of the application conditions of this section, see the article, "Contrat de travail : Pourquoi *Wiebe Door Services Ltd.* ne s'applique pas au Québec et par quoi on doit le remplacer" (**article on *Wiebe Door***) that I wrote and that will be published during the fourth quarter of 2005 by the Fiscal and Financial Planning Association and the federal Department of Justice in the second collection of studies in tax law in the series of publications on Canadian bijuralism.

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.

Propriété et droits civils

8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

[Emphasis added.]

[11] The most relevant provisions for determining whether a contract of employment exists in Quebec, to distinguish it from a contract for services are articles 2085, 2086, 2098 and 2099 of the Civil Code:

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.]

[12] Upon analysis of these provisions from the Civil Code, it is clear that there are three essential conditions for a contract of employment to exist: (i) provision in the form or work provided by the worker; (ii) remuneration for this work by the employer; and (iii) a relationship of subordination. A significant distinction between a contract for service and a contract of employment is the existence of a relationship of subordination, meaning the employer has the power of direction or control over the worker.

[13] In academic literature, authors have considered the concept of "power of direction or control" and its flip side, the relationship of subordination. Robert P. Gagnon states⁵ :

[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

⁵ Robert P. GAGNON, *Le droit du travail du Québec*, 5th ed., Cowansville: Les Éditions Yvon Blais Inc., 2003.

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 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.

[14] It must be noted that the characteristic of a contract of employment is not the fact that the employer does exercise direction or control, but the fact that the employer had the power to do so. In *Gallant v. M.N.R.*, [1986] F.C.J. No. 330 (Q.L.), Pratte J. of the Federal Court of Appeal stated:

...The distinguishing feature of a contract of service is not the control actually exercised by the employer over his employee but the power the employer has to control the way the employee performs his duties...

[Emphasis added.]

[15] In my opinion, the rules governing the contract of employment in Quebec law are not identical to those in common law and as a result, it is not appropriate to apply common law decisions such as *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (F.C.A.) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59.⁶ In Quebec, a court has no other choice but to decide whether a relationship of subordination exists or not to decide whether a contract is a contract of employment or a contract for service.

[16] The approach to take is the one adopted by, among others, Létourneau J. of the Federal Court of Appeal⁷, who, in *D & J Driveway Inc. v. Canada*, (2003), 322 N.R. 381, 2003 FCA 453, found that there was no contract of employment by using the provisions of the Civil Code as a basis and, in particular, by noting the absence of a relationship of subordination, a relationship that "is the essential feature of the contract of employment."⁸

[17] We shall apply these rules to the appeal at bar. First, it must be noted that the written agreement clearly describes the nature of the contract, it is a contract for service, and not a contract of employment. The intention of the parties is clear: Mr. Vaillancourt was to provide his services as an "independent contractor and there is no employment relationship between the Foundation and the Project Leader" (subparagraph 5(a) of the agreement). According to the content of the written agreement, it is clear that the Foundation had no power of direction and control since Mr. Vaillancourt was to carry out his work "as an independent contractor."

[18] However, the courts have refused to rely solely on the qualification or distinction the parties give to their agreements. The agreement's conformity with

⁶ For a thorough summary of the reasons justifying this conclusion, see the article on *Wiebe Door*, *supra*.

⁷ See also *Sauvé v. Canada*, [1995] F.C.J. No. 1378 (Q.L.), *Lagacé v. Canada*, [1994] F.C.J. No. 885 (Q.L.) (F.C.A.), confirming a Tax Court of Canada decision, [1991] T.C.J. No. 945 (Q.L.) and *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (Q.L.). It must be noted that the Federal Court of Appeal, in *D & J Driveway* and *Charbonneau* did not specifically dismiss the application of *Wiebe Door*.

⁸ Para. 16 of the decision.

the provisions of the Civil Code must be verified by carefully reviewing the way in which the contract was performed. Létourneau J., in *D & J Driveway*, stated:

2 It should be noted at the outset that the parties' stipulation as to the nature of their contractual relations is not necessarily conclusive and the Court which has to consider this matter may arrive at a contrary conclusion based on the evidence presented to it: *Dynamex Canada Inc. v. Canada*, [2003] [305 N.R. 295](#) (F.C.A.). However, that stipulation or an examination of the parties on the point may prove to be a helpful tool in interpreting the nature of the contract concluded between the participants.

[Emphasis added.]

[19] In *Wolf v. Canada*, [2002] 4 F.C. 396, 2002 DTC 6853, [2002] 3 C.T.C. 3, 2002 CFA 96, Décarý J. expanded on this and stated⁹:

119 Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search...

[Emphasis added.]

[20] As a result, the deciding issue in Mr. Vaillancourt's appeal is whether the contract for service was performed as such. It must be determined that there was no relationship of subordination between Mr. Vaillancourt and the Foundation regarding the performance of the contract, meaning Mr. Vaillancourt did not carry out his work under the direction or control of the Foundation.

[21] I have listened attentively to all the testimony presented, in particular by Mr. Vaillancourt and Mr. Boily, who was the Foundation's Director General, and I find that the Foundation did not exercise control over Mr. Vaillancourt in the performance of his duties.

⁹ It is important to note the underlying premise of Décarý J.'s statement: the contract must have been "performed as such."

[22] Mr. Boily, a CGA, is an experienced person. He seemed well aware of the distinction between a contract of employment and a contract for service. For there to be a contract for service—as opposed to a contract of employment—he could not exercise control over Mr. Vaillancourt and this is what he did. He left Mr. Vaillancourt the freedom to choose the means to carry out the contract and did not try to exercise control over its performance.

[23] Mr. Boily's testimony on this subject was supported by Mr. Vaillancourt's own testimony. He admitted that he agreed to be hired as a self-employed worker. He also admitted that he had absolute independence. He determined his own hours of work and the businesses he would approach in carrying out his contract. Being a conscientious man, Mr. Vaillancourt spent the 40 hours per week for which he was paid working, in accordance with his contract. He did all he needed to to develop new business and perform the contract he was offered. He even stated that he was the one who decided to undertake negotiations with owners of convenience stores because there was an interesting potential for developing new business there.

[24] However, when he became aware of the tax consequences of his contractual relationship with the Foundation, namely that he would have to make higher social contributions (in particular to the Québec Pension Plan), which would not be the case if he were merely a paid worker, Mr. Vaillancourt pushed Mr. Boily to grant him a contract of employment rather than a contract for service, from that time on. Since the contract for service had just recently been signed, Mr. Boily did not want to go before his board of directors again to modify the agreement with Mr. Vaillancourt. He informed Mr. Vaillancourt that he would have to prove himself first and, in a way, earn the change in contract.

[25] Very satisfied with Mr. Vaillancourt's services, toward the end of 2002, Mr. Boily proposed a contract of employment to Mr. Vaillancourt with conditions that seemed to Mr. Vaillancourt to be completely unacceptable. The Foundation wanted to exercise very strict control over his activities, in particular, he would have to produce weekly detailed reports indicating the times of the visits, their duration, and the content of discussions between Mr. Vaillancourt and the Foundation's potential partners, among other things. For Mr. Vaillancourt, this requirement for control was equivalent to a flagrant lack of confidence in his integrity. To him, it was unreasonable and he therefore refused the contract of employment project.

[26] When he signed the May 27, 2002, agreement, Mr. Vaillancourt knew very well that he had not been hired as an employee. Therefore, I could only have

intervened and concluded that a contract of employment existed if, as I mentioned during the oral argument, I had been convinced that the parties did not act in accordance with the terms of the contract they had signed. However, the evidence does not show that the Foundation exercised sufficient direction or control over Mr. Vaillancourt for the contract to no longer reflect reality. I have no other choice but to find that there was no contract of employment between Mr. Vaillancourt and the Foundation during the relevant period. For these reasons, Mr. Vaillancourt's appeal is dismissed.

Signed at Magog, Quebec, this 27th day of June 2005.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 28th day of October 2005.

Elizabeth Tan, Translator

CITATION: 2005TCC328

COURT FILE NO.: 2004-4188(EI)

STYLE OF CAUSE: Jean-Yves Vaillancourt and M.N.R.

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: August 31 and September 1, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice Pierre Archambault

DATE OF JUDGMENT: September 15, 2004

DECISION RENDERED ORALLY: September 1, 2004

REASONS FOR JUDGMENT: June 27, 2005

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Agathe Cavanagh

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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