

Docket: 2002-326(EI)

BETWEEN:

RÉSIDENCES PLACE DE L'ÉTOILE  
SUR LE LAC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on January 22, 2003, at Sherbrooke, Quebec

Before: The Honourable Judge Alain Tardif

Appearances:

Agent for the Appellant: Marc Guillemette

Counsel for the Respondent: Claude Lamoureux

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### JUDGMENT

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

Signed at Ottawa, Canada, this 24th day of February 2003.

“Alain Tardif”

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J.T.C.C.

Translation certified true  
on this 20th day of April 2004.

Stephen Balogh, Revisor

Citation: 2003TCC28  
Date: 20030224  
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**REASONS FOR JUDGMENT**

**Alain Tardif, J.T.C.C.**

[1] This is an appeal from a determination dated November 22, 2001, in which the respondent concluded that the work performed by Richard Ouellet between June 11, 2000, and August 4, 2001, was done under a contract of service.

[2] During the periods at issue, the appellant held a mandate to market and sell condominium units built by Construction Longer Inc. The condominiums were built in two phases.

[3] For sales, the appellant used various methods, one of which was to engage the services of salespersons who were not real estate agents. One of the salespersons, the one to whom the appeal relates, was Richard Ouellet.

[4] According to Marc Guillemette, C.G.A., the appellant's agent, the work performed by Richard Ouellet in sales was not insurable employment under the *Employment Insurance Act*. He focussed in particular on facts relating to the sale of the Phase I condominiums.

[5] Mr. Guillemette also maintained that the commissions were paid to Mr. Ouellet not by the appellant, but by the notary, Mr. Gu  rin, who prepared the notarial deeds that made the sales by the salespersons, including Richard Ouellet, legal.

[6] Mr. Guillemette stated that Richard Ouellet had total discretion in performing his work as a salesperson in that he could work from home, his schedule was based on his availability, and no controls were exercised or constraints placed on him by the payer who, it should be remembered, was according to the appellant's agent not the appellant, but the notary who prepared the notarial contracts.

[7] According to Richard Ouellet, his work as a salesperson had on the whole been performed in substantially the same way in both Phase I and Phase II.

[8] For Phase II, a number of documents were available to assess and characterize the legal relationship between Mr. Ouellet and the appellant. They included a contract entitled [TRANSLATION] "Basis for payment of Richard Ouellet" (Exhibit I-1) and some bundles of invoices and cheques (Exhibit I-2). It should be noted that the amounts of the cheques matched the invoices.

[9] Mr. Ouellet explained that a number of condominium units had been sold when he started working as a salesperson. As Phase I had been completed, he was able to close the sales and deliver the condominiums within a very short period, and this enabled him to receive the agreed-upon commission quite quickly.

[10] As for Phase II, sales were based on plans, since no condominiums had been built yet; this meant lengthy delays before the formal sales took place, and payment of the related commissions was delayed accordingly.

[11] An agreement was then reached whereby the salesperson, Mr. Ouellet, would receive advances based on the hours he spent in the sales office set up at the appellant's place of business. The documentary evidence is conclusive in this respect (Exhibits I-1 and I-2).

[12] This very important agreement was signed in September 2000. I feel it is important to reproduce the contents of the agreement (Exhibit I-1).

[TRANSLATION]

LE LITTORAL/SALE OF CONDOS/SALE OF ROOMS  
BASIS FOR PAYMENT OF RICHARD OUELLET

A- COMMISSIONS

The commissions for the sale of condos and hotel rooms to be built in Phase 2 are:

- \$3,000 per condo
- \$1,000 per room

B- METHOD OF PAYMENT

The commissions are paid as follows:

- 1/3 when the work begins
- 1/3 4 months after the work begins
- the other 1/3 on delivery of the condos and rooms to the clients.

RESTRICTIONS

Commissions shall be payable only if the construction of Phase 2 of the project begins, or in other words, if 16 of the 26 condos and 15 hotel rooms are sold.

PROGRESSIVE ADVANCES

Progressive advances may be made at the rate of \$120 a week if the seller is present at least 12 hours a week, i.e., 6 hours on Saturday and 6 hours on Sunday.

The advances will be deducted from the commissions to be paid at each of the above-mentioned stages.

If the construction of Phase 2 cannot be started before February 15, 2001, the advances paid may be kept by the salesperson as wages for the work accomplished and no further commission will be paid.

(Emphasis added.)

[13] The part entitled “PROGRESSIVE ADVANCES” is particularly interesting and relevant to the characterization of the nature of the legal relationship between the appellant and its salesperson, Mr. Ouellet. This is especially true of the last paragraph relating to delays in construction of the condominiums.

[14] Did Richard Ouellet perform this work under a genuine contract of service? To answer this question, I must analyse the facts in light of the tests developed by the courts.

#### Control and relationship of subordination

[15] The courts have long held the control test on which the relationship of subordination is based to be essential to finding that a contract of service exists. However, it is not necessary for the employer to have exercised or to be exercising the power of control; it is enough for the employer to have the right to do so.

[16] In the case at bar, not only did the appellant employer have this power during the periods at issue, it exercised the power in planning minimum work schedules and in requiring that the salesperson be in the sales office, on weekends, for a minimum of six hours a day. In addition, Mr. Ouellet had to report on his work, notify the appellant when he would be absent and explain his absences.

### Ownership of tools

[17] Richard Ouellet did his work primarily from the office set up for sales. In performing his work as a salesperson, he used advertising material provided and paid for by the employer.

### Risk of loss and chance of profit

[18] Richard Ouellet had no risk of loss and his income was based on the sales he closed. The amount of the commissions had been determined beforehand. He received fixed commissions that were paid to him during Phase II in the form of advances based on the hours he worked in the sales office. If he did not make any sales, he quite simply had no income; he had nothing to spend on advertising, rent, travel, etc. For Phase II, the salesperson would have kept the advances if the project had not seen the light of day.

### Integration

[19] The appellant had a specific mandate to sell condominiums that had been built and others that were to be built. Mr. Ouellet's work was performed under the appellant's mandate.

[20] Where insurability is in issue, the burden of proof lies on the person who appeals the determination; the Court must dispose of the appeal based on a preponderance of evidence.

[21] In the case at bar, the presentation by the appellant's agent of the facts and circumstances relating to the performance of the work in Phase I was questionable.

[22] He maintained, *inter alia*, that the notary was the payer and not the appellant. However, it is clear from the evidence that the appellant was in fact the debtor for the commission. The fact that the notary was the one who handed over the cheque for the commission is neither sufficient nor conclusive to make the notary the employer of Mr. Ouellet. The appellant's claims that the notary was the one who paid the commission and that the notary was therefore Mr. Ouellet's employer are completely unfounded. This conclusion also makes it possible to understand why Mr. Guillemette said that the payer of the commission had no control or authority over Mr. Ouellet's acts and deeds.

[23] According to the salesperson, Mr. Ouellet, the terms and conditions of his work were the same in Phase II as in Phase I except that he had to wait longer to be paid his commission. However, the documentary evidence relating to Phase II enables us to draw some interesting conclusions as to the issue of the existence of an employment contract that, moreover, are consistent with the respondent's determination that led to this appeal. The facts showed that, on a preponderance of evidence, the work had been performed under a genuine contract of service.

[24] For these reasons, the appeal is dismissed on the basis that the work performed by Richard Ouellet was done under an insurable contract of service for all of the periods at issue.

Signed at Ottawa, Canada, this 24th day of February 2003.

“Alain Tardif”

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J.T.C.C.

Translation certified true  
on this 20th day of April 2004.

Stephen Balogh, Revisor