

Dockets: 2005-3107(EI)
2005-3108(EI)

BETWEEN:

ASSOCIATION CHASSE ET PÊCHE DE LA DÉSSERT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on March 15, 2006, at Ottawa, Ontario

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Jean Faullem
Counsel for the Respondent:	Justine Malone

JUDGMENT

The appeals under subsection 103(1) of the *Employment Insurance Act* are dismissed and the decisions rendered by the Minister of National Revenue dated May 25, 2005, are confirmed in that there was a contract for services between the Appellant and Alain Prud'homme and his spouse Angèle Constantineau for the period from May 10, 2004, to November 14, 2004.

Signed at Ottawa, Canada, this 20th day of March 2006.

"Lucie Lamarre"»

Lamarre J.

Translation certified true
on this 23rd day of June 2006.

Elizabeth Tan, Translator

Citation: 2006TCC182
Date: 20060320
Dockets: 2005-3107(EI)
2005-3108(EI)

BETWEEN:

ASSOCIATION CHASSE ET PÊCHE DE LA DÉSSERT INC.,
Appellant,

and

THE MINISTER OF NATIONAL REVENUE,
Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] The issue before the Court is whether Alain Prud'homme and his spouse Angèle Constantineau (the "Workers") held insurable employment within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act* ("EIA"), while working for the Appellant during the period of May 10 to November 14, 2004.

[2] The Appellant claims that the Workers did not hold insurable employment during this period.

[3] The Appellant is a non-profit corporation that operates a zone d'exploitation contrôlée ("ZEC") [controlled harvesting zone] in the La Vérendrye Wildlife Refuge in the province of Quebec. It is managed by volunteers. Each person who enters the ZEC must register at one of the two welcome stations, one of which is at the north of the ZEC (La Tortue post) and the other at the south (Tomassine post).

[4] When registering, users indicate the duration of their stay and the type of activity they will engage in (fishing, hunting, camping or swimming), and pay an entry fee according to the type of activity chosen and the duration of the stay. It is possible to become a member of the ZEC at the beginning of the season, which runs from May to November. When the season opens, people can purchase their membership card. At that time of the year, the Appellant can collect between \$20,000 and \$30,000 in membership fees.

[5] The Appellant hires attendants for the two welcome stations. In the case at bar, the Workers were hired for the Tomassine welcome station during the 2004 season. During the 20 preceding seasons, the Appellant had hired a couple, the Comtois, to take care of this welcome station. They lived in a trailer they owned, and were hired as the Appellant's employees. Since the Comtois were retiring, the Appellant's board of directors decided to issue a call for tenders and hire newcomers on a contractual basis. For one, the board members felt it was too expensive to have employees, and for another, they were all busy with their own work, and did not have much time to spend managing employees. It must be noted, however, that the person hired at the "La Tortue" post was still considered an employee.

[6] Further to the call for tenders in the regional paper, the Appellant received five submissions. The Appellant chose Mr. Prud'homme, who offered \$31,500 for his services from May 10, 2004, to November 14, 2004 (Exhibit A-4). It must be noted that Mr. Prud'homme knew the Comtois—who had worked at the position for 20 years—very well.

[7] Following an interview that was held in March 2004, with Mr. Prud'homme, his spouse Ms. Constantineau, and Jocelyne Lyrette, the Appellant's representative, a contract was signed on May 10, 2004 (Exhibit A-6). The evidence shows that since the contract was signed on the first day of work and there were many people on site, with the big crowd, only Mr. Prud'homme signed the contract. An amendment was signed, however, on July 9, 2004, to include Ms. Constantineau in the contract (Exhibit A-7). Since only Mr. Prud'homme was paid before the contract was amended, the Appellant proceeded to rectify the situation by only paying Ms. Constantineau for a period equal to that which had passed before the amendment, and then paid the Workers equally. At the hearing, the question was raised as to whether the Appellant was tied by contract to Ms. Constantineau during the entire period. Given the facts mentioned above, I consider that the Appellant agreed to sign a contract with both Workers for the entire period in question.

[8] In this contract, the Workers agreed to live in the furnished building the Appellant rented from the Société des Établissements de Plein Air du Québec ("SEPAQ"), located at the Tomssine entrance. The Workers did not pay anything to stay there, the Appellant paid all the related costs including general liability insurance in the amount of \$2,000,000.

[9] The workers agreed to keep the welcome station open from 7:00 a.m. to 10:00 p.m., seven days a week. They were also to be available if someone arrived at night. On those occasions, they could charge an extra \$3 in addition to the basic price. The Workers kept this \$3 for themselves. Their duties were to greet guests, fill in the forms required by the Government of Quebec that were provided by the Appellant, collect the entrance fees, give information on the 500 lakes and 110 campgrounds that were in the refuge, which has a surface area of 1,205 km². They were to respond at all times on the FM telecommunications post ("FM post") that was installed in their dwelling and that was used by the refuge's game wardens or by the wildlife officer hired by the Appellant. The Workers also weighed the fish and registered the results on the appropriate sheet, which they gave to the Appellant. They also entered data on hunting and fishing on a computer provided by the Société de la faune et des parcs du Québec (FAPAQ).

[10] The Workers received a four-day training from the Comtois at the beginning of the season. The also said that the Comtois came to help them during the following two weekends. During the four-day training, it was admitted that the Appellant paid the Comtois. During the two other weekends, the Workers say the Appellant paid them whereas the Appellant says it did not pay them. It was admitted that when the Workers took a weekend off, they asked the Comtois to replace them and they organized the Comtois' compensation amongst themselves. Mr. Prud'homme said he gave them \$50 for their travel and provided them with food.

[11] According to the contract, replacements were to be approved by the Appellant. In fact, the Comtois understood the operations at the welcome station very well and the Appellant did not object to their replacing the Workers.

[12] The Appellant was insured against theft up to \$5,000 for the money in the cash register. (In the amendment to the contract (Exhibit A-7), clause 12.0 of the initial contract (Exhibit A-6) that required the Workers themselves to take out theft insurance was removed). The Workers could not keep more than \$200 in the cash register till, and no more than \$5,000 in the safe provided by the Appellant. Mr. Prud'homme was to go to the Appellant's office once a week to hand in the forms or registration booklets filled in by the clients, and the money collected during the week. The Appellant's secretary verified whether the registration fees on the forms corresponded to the money Mr. Prud'homme handed in. Mr. Prud'homme and his spouse were responsible for the difference between the money registered on the forms and actual amount given, if there were any discrepancies.

[13] The wildlife protection officer who worked for the Appellant went to the welcome station at least two or three times a week, at any time, without necessarily any warning. This wildlife protection officer's duties included monitoring that each visitor to the ZEC was registered properly. He could communicate with the Workers at any time using the FM post to advise them of any problems in the zone. The FM post was to be on and the Workers were to respond at all times between 7:00 a.m. and 10:00 p.m. Moreover, Jocelyne Lyrette herself went by the Tomassine welcome station every weekend, to take advantage of the outdoor activities in the ZEC.

[14] The Workers also operated a small convenience store where they sold various products (such as soft drinks, snacks, bait) to the visitors. They got the Appellant's approval to operate this small store and the meagre profits went to the Workers.

[15] Moreover, the Workers housed two of the Appellant's employees during the period in question. The representatives of the Appellant, Jocelyne and Victor Lyrette, both said they learned of this only later. The Workers said that they housed these two employees at Mr. Lyrette's request. One of them was already there when they arrived. They collected \$5 a day from each of these two boarders, and the Workers kept the money for themselves.

[16] The issue in this case is whether the Workers were the Appellant's employees or independent workers. As Décary J. stated in *9041-6868 Québec Inc. v. Canada*, [2005] F.C.J. No. 1720 (QL), there are three characteristic constituent elements of a "contract of employment" in Quebec law: the performance of work, remuneration and a relationship of subordination. At paragraph 12 of this decision, Décary J. stated:

¶ 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.

[17] In paragraph 11 of the decision, Décary J. referred to what Robert P. Gagnon stated in *Le droit du travail du Québec*, Éditions Yvon Blais, 2003, 5th edition, at pages 66 and 67, where the relationship of subordination concept is explained at paragraph 92:

... 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.

[18] In this case, the relationship of subordination carried out by the Appellant on the Workers genuinely exists. The two Workers were to ensure a continuous presence at the welcome station, which was monitored sporadically but regularly by either the wildlife protection agent who could appear on site at any time, or the Appellant's representatives, Jocelyne and Victor Lyrette, who went regularly to go camping and could therefore ensure the Workers' presence during working hours. Ms. Lyrette even assisted the Workers during the opening at the beginning of the season, considering the large amounts of money coming in at that time. Moreover, another type of control existed with the FM post, which the Workers were to answer at all times. The FM post allows for communications inside the ZEC between employees or the Appellant's representatives and the Workers.

[19] In addition, paragraph 14.0 of the contract (Exhibit A-6) states:

[TRANSLATION]

Monitoring

A representative of the Association's board [the Appellant] shall go to the site of the welcome station every two weeks for the duration of operations, for the purpose of verifying the logbooks, inventories and amounts of money kept by the operator for the Association.

[20] Moreover, the work assigned to the Workers required them to meticulously follow certain strict rules. Each visitor was to complete a prescribed form provided by the Appellant, which the Workers had in their possession. The Workers collected the entry fees set by the Appellant and handed in the amounts collected to the Appellant's office once a week. These amounts were verified by the Appellant's secretary with the forms completed by each visitor. Additionally, if the Workers wanted to be replaced, clause 9.0 of the employment contract (Exhibit A-6) clearly states that the Workers must advise the Appellant's management of the name of their replacement and the duration of their absence. This absence was to be justified, limited and of short duration. In the case at bar, it was the Comtois, who

had worked for the Appellant for 20 years, who replaced the Workers. It appears that this was approved by the Appellant. Moreover, on one occasion, the Workers had to be replaced when the Comtois were apparently not available, when Mr. Prud'homme's brother passed away, and it was the Appellant that found and paid the replacements for the day of the funeral service.

[21] Finally, the Appellant provided the building and all the work instruments. The Appellant paid for the telephone, electricity and heating and provided accommodations free of charge. The Appellant also had civil liability insurance on this building. It also had theft insurance for up to \$5,000. The Workers were to ensure that the money was brought to the Appellant's office before this limit was reached. I agree with counsel for the Respondent that the nature of the work required by the Workers required some type of control. In fact, it is hard to imagine workers, keeping large amounts of money for the person who hired them, would not be subject to that person's control.

[22] In my opinion, although the Appellant proceeded through a call for tenders, it is clear that the Workers did the same work and were treated in the same way as all the other employees who had held this position before, and those who worked at the ZEC's other welcome station (La Tortue). Considering the degree of control and direction exercised by the Appellant on the Workers, I consider that the Appellant exercised a significant relationship of subordination over the two Workers, who had almost no latitude or flexibility in their work. Other than the \$50 and food the Workers provided for the Comtois when they replaced them, and the fact that they were responsible for paying any discrepancies between the amounts collected and the amounts given to the Appellant, the Appellant could be considered completely in charge of the Workers. The fact that the Workers arranged for the Comtois to replace them themselves (there were a few contradictions in the evidence as to who had paid the Comtois during the first two weekends in May) and that they could be required to reimburse any missing amounts (something that never actually occurred) does not, in my opinion, change the nature of the employment contract that, in reality, was concluded between the parties. In fact, the evidence showed that the Workers did not apply as contract workers to fill a position they knew only very little about. From their testimony, it appears they were seeking employment and this was why they responded to the call for tenders.

[23] I therefore find that the Workers were governed by a contract for employment and that their employment was insurable.

[24] The appeals are dismissed.

Signed at Ottawa, Canada, this 20th day of March 2006.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 23rd day of June 2006.

Elizabeth Tan, Translator

CITATION: 2006TCC182

COURT FILE NO.: 2005-3107(EI) and 2005-3108(EI)

STYLE OF CAUSE: ASSOCIATION CHASSE ET PÊCHE DE
LA DÉSSERT INC. v. M.N.R.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: March 15, 2006

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: March 20, 2006

APPEARANCES:

Counsel for the Appellant:	Jean Faullem
Counsel for the Respondent:	Justine Malone

COUNSEL OF RECORD:

For the Appellant:

Name:	Jean Faullem
Firm:	Noël & Associés

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada