Docket: 2003-4033(EI)

BETWEEN:

ISADORE CAPLAN PARIFSKY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 25, 2004 at Montréal, Quebec

Before: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant: Ed Robert

Counsel for the Respondent: Emmanuelle Faulkner

JUDGMENT

The appeal is allowed and the Minister of National Revenue's decision is vacated, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of January 2005.

"C.H. McArthur"

McArthur, J.

Citation: 2005TCC84
Date: 20050125
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REASONS FOR JUDGMENT

McArthur, J.

[1] The Appellant, Isadore Caplan Parifsky, has appealed a decision rendered on February 26, 2003, by Canada Customs and Revenue Agency (now "CRA") which established that Elizabeta Vrdoljak held insurable employment for the purposes of the *Employment Insurance Act*[1] ("*Act*") from June 4, 2001, to August 29, 2002.

[2] This appeal therefore consists of determining the legal nature of the relationship between Isadore Caplan Parifsky and Elizabeta Vrdoljak.

[3] The facts leading to this appeal are somewhat unsettling. The Appellant's wife, Rose Caplan Parifsky, is now deceased. She suffered terrible pain for many years, preventing her from taking care of herself. More recently, Mrs. Parifsky fractured a hip. Unable to walk because of her precarious state of health, she was hospitalized for a number of months at Montreal's Jewish General Hospital for treatment to help with her rehabilitation. She was later transferred to the Griffith-McConnell Residence. Moreover, it should be mentioned that Mrs. Parifsky suffered from impaired memory, which greatly affected her independence.

[1] R.S.C. (1996) c. 23.

[4] Mrs. Parifsky's husband, the Appellant, is now 85 years old. His state of health is fragile to say the least. He suffers from kidney problems and is currently hospitalized at Elizabeth Bruyère in Ottawa. Needless to say, this appeal is in itself an additional element that could be detrimental to the Appellant's state of health. Under the circumstances, the Court has permitted the Appellant to give evidence by affidavit.

[5] Given that he was unable to perform the tasks related to his wife's medical conditions, the Appellant had to use the services of Elizabeta Vrdoljak, who was referred to him by Ms. Vrdoljak's mother, Victoria Bergeron, who had worked as a caregiver for Mrs. Parifsky in the past.

[6] Ms. Vrdoljak's main duties were to provide personal care and companionship to Mrs. Parifsky. As such, Ms. Vrdoljak could primarily be called on to change Mrs. Parifsky's bed linen, help her eat, take her outside the hospital for fresh air, and look after her well-being in general. Ms. Vrdoljak worked at the Jewish General Hospital and the Griffith-McConnell Residence under the supervision of the employees at these institutions and it was always understood that only Ms. Vrdoljak could act as Mrs. Parifsky's caregiver because of the nature of personal care to be provided.

[7] Uncertain as to whether or not she held insurable employment, Ms. Vrdoljak requested a decision from the Minister under the form prescribed for this purpose. It was after this request was made that the Minister found that the Appellant was Ms. Vrdoljak's employer from June 4, 2001, to August 29, 2002. Consequently, under paragraph 5(1)(*a*) of the *Act*, Ms. Vrdoljak's work constituted "insurable employment."

[8] In his letter of February 26, 2003, addressed to the Appellant, the Minister cited control as a decisive factor in determining insurable employment. He inferred this control from the fact that:

(a) the Appellant established the hours of work;
(b) Ms. Vrdoljak had to provide the services personally;
(c) Ms. Vrdoljak had to follow instructions as to the work to be performed and the method to be used; and
(d) Ms. Vrdoljak could not hire other people to replace her.

[9] I respectfully disagree with the Minister's claims. I believe that the legal nature of the relationship between Mr. Parifsky and Ms. Vrdoljak was misunderstood.

[10] To support my reasoning, I would like to cite the Federal Court of Appeal's decision in *Poulin* v. *Canada*[2] where Létourneau J.A. had to rule on a similar issue. At paragraph 12 of the decision, Létourneau J. states that attention must be given to the intention of the parties when determining the overall relationship they have to each other:

> [12] …This misunderstanding stems from a misapplication of some of the tests in the *Wiebe Door Services Ltd.* case, *supra*, and a failure to pay sufficient attention to the intention of the parties in the determination of the overall relationship they have to each other: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, at paragraphs 46 and 47. I will begin my remarks with the test of control and the subordinate relationship cited by the Tax Court of Canada.

[11] I therefore have to follow the Federal Court of Appeal's analysis, and to do this, I would first like to analyze the test of control and the relationship of subordination.

(a) existence of control and a relationship of subordination

[12] Article 2085 of the *Civil Code of Québec* ("*C.c.Q.*") determines the applicable law in this case because the contract must be interpreted according to the laws of the province of Quebec. This article sets out the following:

> **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.

[13] The opposite of the contract of employment is the contract for services or of enterprise. The latter does not involve any relationship of subordination with respect to its performance, and leaves the provider of services free to choose the means of performing the contract. Articles 2098 and 2099 of the *C.c.Q.* read as follows:

> **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

[2] [2003] F.C.J. No. 141 (Q.L.).

> 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.

[14] In spite of all the importance that must be given to the notion of control, it is not always conclusive in itself. Létourneau J.A. expressed the following in this regard at paragraph 15 in *Poulin*:

> [15] What must be retained from these definitions of the two contracts is that the notion of control is important to the legal determination of the nature of the relationship between the parties. However, this notion of control is not always conclusive in itself, notwithstanding the importance it must be given. As our colleague, Madam Justice Desjardins, said in *Wolf, supra*, at paragraph 76, "While the control test is the traditional civil law criterion of employment, it is often inadequate because of the increased specialization of the workforce": see also *Wiebe Door Services Ltd., supra*, at pages 558-59, where our colleague, Mr. Justice MacGuigan, states that the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.

[15] In this case, Ms. Vrdoljak provided care to Mrs. Parifsky with no real control by the Appellant in this regard. Ms. Vrdoljak's hours were established based on Mrs. Parifsky's needs. Therefore, her work schedule could vary as a result. Ms. Vrdoljak's services were normally required between noon and 8 p.m., that is until the time that Mrs. Parifsky had to go to bed, for a total of approximately 32 hours a week at $9/hour. The total hours of service could thus vary considerably from week to week because it depended on Mrs. Parifsky's needs. However, as Létourneau J.A. mentioned in *Poulin* at paragraph 19, the fact that the duties were performed according to a schedule and with payment by the hour does not necessarily lead to the existence of a relationship of subordination between the parties:

> [19] Finally, the fact that the duties performed were performed according to a schedule and with payment by the hour does not necessarily lead, as the Tax Court of Canada apparently thought, to the existence of a relationship of subordination between the parties. It

> is not uncommon for contractors, for example in plumbing, heating or electricity, to work and invoice according to established hourly rates, and, as in the case of employees, increased rates on holidays. Likewise, it is not uncommon for a client to determine the times at which the services are to be provided by the contractor he has hired.

[16] In addition, Ms. Vrdoljak was enrolled in a full-time nursing program at that time. She was therefore free to choose how she spent her time and able to plan her own schedule based on her availability.

[17] It is clear that Ms. Vrdoljak was able to decide what kind of care had to be given to Mrs. Parifsky. She was in a position where she had a significant amount of freedom over the services to be provided to Mrs. Parifsky. The Appellant, also with a precarious state of health, was in no position to give Ms. Vrdoljak instructions on how to provide care. The Appellant was only able to play a passive role in all of these events, only able to ask Ms. Vrdoljak about his wife's state of health on a daily basis.

[18] The fact that Ms. Vrdoljak provided services personally and that she could not delegate her work does not automatically make her the Appellant's employee. In *Poulin*, Létourneau J.A. refers to what Desjardins J.A. said in *Wolf*[3] as follows in paragraphs 20 and 21 of the decision:

> [20] The respondent also made much of the fact that the workers had to render the services personally. I agree with Madam Justice Desjardins that the fact that a person cannot delegate his labour to someone does not necessarily mean that this person is an employee: *Wolf v. Her Majesty the Queen*, *supra*, at paragraph 80 . . . .
>
> [21] It is not hard to understand why, in this case, the applicant was insistent that the highly intimate and personalized medical care necessitated by his state of health be provided by the nurse with whom he had contracted and in whom he had confidence. The same comment applies to many of the services rendered by the care attendants and the visiting homemaker as a result of the applicant's neurological difficulties. The record discloses that these two workers attended to the applicant's person and his residential premises: see Applicant's Record, transcript of testimony, pages 52 and 108-09. The difficult physical condition in which the applicant found himself did not deprive him of his rights to human dignity and privacy and to his expectations in that regard.

[3] [2002] F.C.J. No. 375 (Q.L.).

[19] Létourneau J.A.'s comments make complete sense in this case. It is perfectly normal that the Appellant insisted that only Ms. Vrdoljak could provide the contracted services, given the personal care required by Mrs. Parifsky's state of health.

[20] Consequently, I believe that the notions of control and the relationship of subordination indicate that this agreement between the parties is a contract for services.

(b) ownership of the tools needed for the performance of the work

[21] This test is in no way useful in clarifying the nature of the legal agreement between the parties. The evidence revealed that most of the time, Ms. Vrdoljak used the equipment belonging to the Jewish General Hospital or Griffith-McConnell Residence. I therefore believe that little weight should be given to this factor.

(c) chances of profit and risks of loss

[22] This test is of no use in this case. It has been shown that if Ms. Vrdoljak had to be absent from her duties for part of the week, she only received an amount of pay for the services she actually rendered. However, this in itself is not very useful in clarifying the legal nature of the agreement between the parties.

[23] In my opinion, even if two of the tests developed by the courts to differentiate a contract of employment from a contract for services are not determining factors, the fact remains that the first of these tests, that is, the existence of control and a relationship of subordination, clearly indicates that the legal nature of the relationship between the Appellant and Ms. Vrdoljak was of a contract for services.

[24] In addition, the intention of the parties in this case leaves little room for interpretation. In the hypothesis where the test of control and of a relationship of subordination would not have made it possible to come to a definitive conclusion, I believe that it would not have changed this Court's conclusion that the legal nature of the relationship of the parties is one of a contract for services. I agree with Létourneau J.'s comments in *Poulin* at paragraph 30. Even if there was no written agreement, I do not believe that it would be reasonable to infer that the Appellant intended to sign a contract of employment with Ms. Vrdoljak making him her employer, given the Appellant's and Mrs. Parifsky's physical conditions and the

consequences that result from having an employer's status. The Appellant is clear that he has always considered Ms. Vrdoljak to be self-employed. I therefore accept the Appellant's version.

[25] Consequently, the appeal is allowed, the Minister's decision is vacated and Ms. Vrdoljak's employment is declared uninsurable employment.

Signed at Ottawa, Canada, this 25th day of January, 2005.

"C.H. McArthur"

McArthur, J.

CITATION:	2005TCC84
COURT FILE NO.:	2003-4033(EI)
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APPEARANCES:

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