Docket: 2004-4444(EI)

BETWEEN:

JACQUES LÉVESQUE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

NICOLE ST-JULES,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 30, 2005, at Montreal, Quebec.
Before: The Honourable Justice Pierre R. Dussault

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Nathalie Labbé
For the Intervener:	The Intervener herself

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed on the grounds that the worker, Nicole St-Jules, did not hold insurable employment with the Appellant, Jacques Lévesque, during the period from September 4, 2000 to May 14, 2004, and the decision of the Minister of National Revenue is set aside.

Signed at Ottawa, Canada, this 18th day of April, 2005.

"P. R. Dussault"

Dussault J.

Certified true translation
On this 1st day of February, 2006.
Garth M^{c}Leod, Translator

Citation: 2005TCC248
Date: 20050418
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JACQUES LÉVESQUE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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NICOLE ST-JULES,

Intervener.

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REASONS FOR JUDGMENT

Dussault J.

[1] This is an appeal against a decision of the Minister of National Revenue (the "Minister") according to which Nicole St-Jules held insurable employment in the service of the Appellant from September 4, 2000 to May 14, 2004.

[2] In determining that the worker was employed by the Appellant under a contract of service, the Minister based his decision on the hypotheses set out at paragraphs (a) to (r) of paragraph 5 of the Response to Notice of Appeal. These paragraphs read:

> (a) the Appellant was a bus driver for the Montreal Transportation Commission;
>
> (b) the wife of the Appellant died in 1999;
>
> (c) the Appellant has two young children, Josiane, born in 1991 and Laurence, born in 1995;
>
> (d) the worker was hired as a caregiver for the children;

(e) during the period at issue, the worker performed her services at the home of the Appellant;

(f) the duties of the worker consisted of looking after the children, taking care of them on their return from school, preparing the meal and housekeeping;

(g) the worker performed the services for the Appellant 4 to 5 days a week;

(h) the worker generally worked from Monday to Thursday, but the days on which she worked could vary depending on the days worked by the Appellant;

(i) the hours of work of the worker were from 10.30-11.00 am to 5.00-5.30 pm;

(j) the worker performed her services for the Appellant for approximately 32 hours a week;

(k) the worker was paid $40 for each day's work;

(l) the worker was paid by cheque every week;

(m) the worker was required to notify the Appellant in the event of absence;

(n) in the event of her absence, the worker was not responsible for finding a replacement;

(o) in performing her duties, the worker used property and equipment belonging to the Appellant;

(p) the worker incurred no expenses in the performance of her duties;

(q) there was no possibility that the worker would incur a financial loss;

(r) the duties of the worker corresponded to the needs of the Appellant.

[3] Subparagraphs (f), (h), (i), (j) and (r) are denied. The Appellant provided explanations regarding subparagraphs (g), (m) and (p).

[4] The Appellant and Nicole St-Jules testified.

[5] The Appellant stated that he never regarded himself as an employer and Ms. St-Jules presented herself as a self-employed person. The Appellant explained that, after the death of his wife, he had to find a caregiver for his children. Since he trusted Ms. St-Jules, he hired her essentially to look after the children, supervise their homework and lessons, prepare meals and see that the children ate. The Appellant mentioned that his mother was also frequently at the house at mealtimes.

[6] Since Ms. St-Jules was not always available, because she was initially working elsewhere every other Friday, the Appellant explained that he, on those occasions, used the school day-care facilities or his mother. He also stated that he had changed his own work schedule one year in order to adjust to the availability and schedules of Ms. St-Jules.

[7] The Appellant confirmed that he paid Ms. St-Jules a set amount of $40 a day, but that she had to pay for her own bus transportation.

[8] Exhibit A-1 is a document showing the amounts paid to Ms. St-Jules for each week of the period at issue. Since the agreed remuneration was $40 a day, it is easy to calculate the number of days worked each week. This number generally varies from two to five days, but is more frequently three to five days a week. However, the Appellant explained that Ms. St-Jules had not worked from mid-June to mid-August 2001 or from mid-December 2001 to the beginning of January 2002. These periods of absence notwithstanding, the Appellant indicated that Ms. St-Jules had worked 56 days in 2000 (from September 4 to December 31), 146 days in 2001, 271 days in 2002, 187 days in 2003 and 75 days in 2004 (from January 1 to May 14).

[9] During cross-examination, the Appellant stated that Ms. St-Jules was supposed to look after the children at his home, that she was not able to look after other children, that she informed or notified him if she anticipated activities outside the home with the children and that she gave him a report after each day's work.

[10] In her testimony, Ms. St-Jules stated that her schedule was flexible and that she generally arrived at the home of the Appellant around 10.30 or 11.00 am and left around 5.30 or 6.00 pm. She said that initially, when the Appellant was working evenings, she finished around 8 pm. Ms. St-Jules also explained that she had not always been available, either because of health problems, because of appointments with the doctor or to undergo medical tests.

[11] With regard to her duties, Ms. St-Jules stated that she fetched the younger of the two children from school, that she looked after them and showed them how to do their lessons. She also said that she could go out with the children and take them to the park. She stated that she reported to the Appellant like any good caregiver.

[12] Ms. St-Jules confirmed that she could not look after other children or find a replacement for herself.

[13] The Appellant maintains that Ms. St-Jules was a self-employed worker, that she introduced herself as such, that she could have other activities and work elsewhere. When she was not available, Ms. St-Jules simply notified him and he would make other arrangements for childcare. According to him, she did not have permission to ask him about this, and he was the one who had to adjust to Ms. St-Jules' availability.

[14] The Appellant acknowledged that he asked Ms. St-Jules for a report, and that she gave him one, like any good caregiver, but that she was otherwise free when she was looking after the children.

[15] Counsel for the Respondent maintained that Ms. St-Jules was performing her duties at the home of the Appellant under a contract of service. She emphasized specifically the power of control and the control exercised by the Appellant with regard to the performance of her duties. Counsel for the Respondent also noted that Ms. St-Jules could not arrange for her own replacement, that she was required to inform the Appellant if she was not available and that she had to report to him what she had done.

[16] She recalled that Ms. St-Jules looked after the children on a regular basis at the home of the Appellant, without being required to provide anything, for a set salary of $40 a day and with no other expenses than her transportation costs.

[17] Counsel for the Respondent cited the decisions in *Mohr v. Canada (Minister of National Revenue – M.N.R.)*, T.C.C., No. 97-481(UI), October 24, 1997, [1997] T.C.J. No. 1252 (Q.L.), *Mayer v. Canada (Minister of National Revenue – M.N.R.)*, T.C.C., No. 2004-286(EI), January 21, 2005, [2005] T.C.J. No. 34 (Q.L.), and *Wells v. Canada (Minister of National Revenue – M.N.R.)*, T.C.C., No. 86-607(UI), June 10, 1987, [1987] T.C.J. No. 640 (Q.L.), to conclude that Ms. St-Jules performed her duties under a contract of service. In these three decisions, the power of control actually exercised by the employer, specifically through the children clearly appears to have been a decisive factor.

[18] Counsel for the Respondent also referred to several decisions which held that child care services were not performed under a contract of service. These are the decisions in *Ferme Gendroline Enr. v. M.N.R.*, T.C.C., No. 87-169(UI), October 27, 1987, [1987] T.C.J. No. 910 (Q.L.), *Hastie v. M.R.N.*, T.C.C., No. 1999-3173(EI), December 9, 1999, [1999] T.C.J. No. 864 (Q.L.), *Blouin-Poirier v. Canada (Minister of National Revenue – M.N.R.)*, T.C.C., No. 98-850(UI), September 13, 1999, [1999] T.C.J. No. 596 (Q.L.), *Randa v. Canada (Minister of National Revenue – M.N.R.)*, T.C.C., No. 97-1196(UI), October 16, 1998, [1998] T.C.J. No. 940 (Q.L.) et *Thériault v. Canada (Minister of National Revenue – M.N.R.)*, T.C.C., No. 97-442(UI), March 13, 1998, [1998] T.C.J. No. 193 (Q.L.). The absence of control by the payor and the wide margin of latitude left to the caregiver in the performance of her duties are elements that are found in the majority of these decisions.

[19] Counsel for the Respondent also referred to the decision of the Federal Court of Appeal in *Gallant v. M.N.R.*, No. A-1421-84, May 22, 1986, [1986] F.C.J. 330 (Q.L.), to emphasize that, in a contract of service, the decisive factor is not the exercise of control by the employer, but "rather the power the employer has to control the way in which the employee performs their duties."

Analysis

[20] To say the least, the decisions to which Counsel for the Respondent referred illustrate the inherent difficulty in distinguishing precisely between a contract of service or employment and a contract for services in situations where services are performed in the home which have no relationship to the activities of the payor. The exercise becomes even more difficult when the payor is not even on the premises, as is the case with childcare.

[21] It is important to mention that, since June 1, 2001, the legislator has specifically provided in subsection 8.1 of the *Interpretation Act*[1] for a referral to the private law of the province where the litigation originates when it is necessary to go back to concepts that fall within the purview of the civil law of the province. The wording of section 8.1 is as follows:

> 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.

[22] A contract of employment is defined at article 2085 of the *Civil Code of Quebec* (C.C.Q.) and the contract for services or contract of service is defined in articles 2098 and 2099 of the C.C.Q. These articles read as follows:

> 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. 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,

[1] R.S. 1985, ch. I-21

> 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.

[23] In *Sauvageau Pontiac Buick GMC ltée v. Canada*, T.C.C., No. 95-1642(UI), October 25, 1996, [1996] T.C.J. No. 1383 (Q.L.), Archambault J., in referring to the decision of the Supreme Court of Canada in *Quebec Asbestos Corp. v. Couture*, [1929] S.C.R. 166, concluded, with regard to these definitions, that the distinguishing feature was the presence or otherwise of a relationship of subordination. Furthermore, it retained the definition of this expression formulated by Pratte J. A. in *Gallant.* At paragraph 12 of his decision, Archambault J. explained his reasoning as follows:

> 12 It is clear from these provisions of the C.C.Q. that the relationship of subordination is the primary distinction between a contract of enterprise (or of services) and a contract of employment. [See Note 2 below] As to this concept of a relationship of subordination, I feel that the comments of Pratte J.A. in *Gallant* are still applicable:
>
> > 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.

[24] Furthermore, in *D & J Driveway Inc. v. Canada*, F.C.A., No. A-512-02, November 27, 2003 N.R. 381, [2003] F.C.J. No. 1784 (Q.L.), Létourneau J. of the Federal Court of Appeal stated that an employer/employee relationship is not necessarily present just because a payer can control the result of the work. Létourneau J. formulated his reasons as follows at paragraph 9 of the decision:

> 9 A contract of employment requires the existence of a relationship of subordination between the payer and the employees. The concept of control is the key test used in measuring the extent of the relationship. However, as our brother Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, [1996] F.C.J. No. 1337, [1996] 207 N.R. 299, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, control of the result and control of the worker should not be confused. At paragraph 10 of the decision, he wrote:
>
> > It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his

> or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker.

[25] In the instant case, did a relationship of subordination exist between Ms. St-Jules and Mr. Lévesque, on the basis of which we can conclude that a contract of employment existed? Several factors can be considered in order to detect the presence or absence of a relationship of subordination. In her decision in *Seitz v. Entraide populaire de Lanaudière inc.*, Court of Quebec (Civil Chamber), No. 705-22-002935-003, November 16, 2001, [2001] J.Q. No. 7635 (Q.L.), Monique Fradette J. of the Court of Quebec set out a series of factors on the basis of which it could be determined whether a relationship of subordination existed or not. She expressed herself on this point in paragraphs 60 to 62 of the decision:

> 60 The caselaw requires, in order for there to be a contract of service, the existance of a right of supervision and immediate direction. The mere fact that a person gives general instructions about the way in which the work is to be performed, or that he reserves the right to inspect and supervise the work, is not sufficient to convert the agreement into a contract of employment.
>
> 61 A series of factors developed by the caselaw allows the Court to determine whether or not a relationship of subordination exists between the parties.
>
> 62 The indicators of control are:
>
> - obligatory presence at a place of work
> - compliance with the work schedule
> - control of the absences of the employee for vacations
> - the submission of activity reports
> - control of the quantity and quality of work
> - the imposition of ways in which the work is to be performed
> - the power of sanction over the employee's performance
> - source deductions
> - benefits
> - the status of the employee in their declaration of earnings
> - the exclusive nature of services for the employer

[26] However, I do not consider that our analysis must stop simply because there are a number of factors that support the conclusion that a relationship of subordination exists. The exercise consists, according to the distinction established in the C.C.Q., of identifying the overall relationship between the parties. The

object is thus to establish the proportion in which the factors that support the conclusion that a relationship of subordination exists predominate over the others. The relationship of subordination between the Appellant and Ms. St-Jules could, in my view, be established by the following factors: the fact that it was clearly established that Ms. St-Jules was required to go to the residence of the Appellant to perform her duties, the fact that Ms. St-Jules could not arrange for her own replacement and the fact that she looked after the children, without being required to provide anything, for a set salary of $40 a day.

[27] On the other hand, in my view, some facts are not determinative. They are as follows: the fact that Ms. St-Jules was required to submit a report after each day's work and the fact that she notified Mr. Lévesque when she anticipated going outside the house. Anyone who has ever looked after their children will say that it is entirely normal and customary to ask a caregiver for a report at the end of the evening or the day, just as it is normal to ask to be notified when the caregiver anticipates going outside the house with the children. Not to do so would reflect a degree of negligence on the part of the parents. The fact that Mr. Lévesque asks for a report at the end of the day is merely a neutral indicator that cannot be used to establish a relationship of subordination between the Appellant and Ms. St-Jules. The Appellant was merely exercising a degree of supervisory authority in view of the nature of the services provided by Ms. St-Jules, namely services which directly affected the welfare of his own children. Even in daycare centres, the staff report to the parents.

[28] In examining the overall relationship between the parties, we can also identify factors that would indicate the absence of a relationship of subordination. Thus, Ms. St-Jules was free to choose the ways in which she performed her duties when she was looking after the children. The Appellant did not require her to perform her duties in any specific way and does not seem to have been in a position to control how she did so, other than by the results. Furthermore, her schedule was flexible, and it even happened that she was not available on some days or during more extensive periods because of health problems or for other reasons. Ms. St-Jules could also have other activities and work elsewhere. When she was not available, Ms. St-Jules notified the Appellant, who would make other arrangements to look after his children. Ms. St-Jules did not have to ask him for permission to do this. Paradoxically, it would appear that it was the Appellant himself who was dependent on Ms. St-Jules. In fact, on several occasions, the Appellant had to adjust his own plans based on the availability of Ms. St-Jules.

[29] Furthermore, I note that the Appellant had no way of controlling the absences of Ms. St-Jules, did not withhold any source deductions and required no exclusivity on her part, since she could work.

[30] I believe it is also appropriate to attach a degree of importance to the intentions of the parties. This is apparent in this case. The Appellant stated that he never regarded himself as an employer and that Ms. St-Jules had presented herself as self-employed. In *Wolf v. Canada*, [2002] ¸4 F.C. 396, [2002] F.C.J. No. 375 (Q.L.), Décary J. had this to say at paragraphs 119 and 120 of his decision:

> [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. [...]
>
> [120] In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterized as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.
>
> [My emphasis.]

[31] In the instant case, there is no written contract. There was a very simple verbal agreement based on trust in respect of a service that can be very demanding for a reliable person whose primary concern is the welfare of the children. For Mr. Lévesque, whose wife had recently died, his primary concern was to have the children looked after, to find someone trustworthy who would look after them when he could not do so himself because he was at work, in accordance with the availability of that individual. I would add that the fact that a contract is written or oral does not fundamentally change the nature of the contract. Thus, I feel that, although they were formulated in a different context, the words of Décary J. retain all their relevance in an analysis of the overall relationship between the parties, when the aim is to determine the nature of a contract in respect of services.

[32] Lastly, in *St. John's Ambulance v. Canada*, F.C.A., No. A-685-02, October 13, 2004, [2004] F.C.J. No. 1680 (Q.L.), Létourneau J. also stated that great importance should be given to the intent of the parties:

> [3] Although the stated intent of the parties or their mutual understanding are not necessarily determinative of the nature of their relationship, they are, however, entitled to considerable weight in the absence of evidence to the contrary, such as a behaviour which betrays or contradicts the said intent or understanding. Where the parties "have freely elected to come together in separate business arrangements rather than one side arbitrarily and artificially imposing that upon the other, so that in fact it is a sham, parties should be left to their choice and that choice should be respected by the authorities". We agree with this statement of Porter D.T. C.J. in *Krakiwsky v. Canada (Minister of National Revenue - M.N.R.)*, 2003 T.C.J. No. 364.

[33] In light of the foregoing, I believe that there are more factors or elements that support the absence of a relationship of subordination. My conclusion is thus that the Appellant and Ms. St-Jules were not bound by a contract of employment, but rather by a service contract during the period at issue. As a result, the appeal is allowed and the decision of the Minister is set aside.

Signed at Ottawa, Canada, this 18th day of April, 2005.

" R. Dussault"

Dussault J.

Certified true translation
On this 1st day of February, 2006.
Garth M^{c}Leod, Translator

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APPEARANCES:

For the Appellant:	The Appellant himself
For the Respondent:	Nathalie Labbé
For the Intervener:	The Intervener herself

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