Docket: 2001-4481(EI)

BETWEEN:

DONALD PLOURDE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 20, 2003, at Jonquière, Quebec.

Before: The Honourable Deputy Judge J. F. Somers

Appearances:

Agent for the Appellant: Lyne Poirier

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

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

Signed at Ottawa, Canada, this 11th day of September 2003.

"J. F. Somers"

Somers, D.J.T.C.C.

Translation certified true
on this 22td day of March 2004.

Shulamit Day-Savage, Translator

Citation: 2003TCC585
Date: 20030911
Docket: 2001-4481(EI)

BETWEEN:

DONALD PLOURDE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Somers, D.J.

[1] This appeal was heard at Jonquière, Quebec, on June 20, 2003.

[2] By letter dated October 26, 2001, the Minister of National Revenue (the "Minister") informed the Appellant of his decision that his employment with the Payor, Coopérative forestière Manicouagan-Outardes, during the period at issue, from May 10, 1999, to March 30, 2000, was not insurable because it did not meet the requirements of a contract of service and as a result there was not an employer-employee relationship between the Payor and the Appellant. In addition, the Minister advised the Appellant that it had been determined the Appellant's actual employer was 1863-2265 Québec Inc. and that his employment was not insurable because he had control over more than 40% of the voting shares in the company.

[3] The burden of proof is on the Appellant. The Appellant must show, on a balance of evidence, that the Minister's decision is unfounded in fact and in law. Each case stands on its own merits.

[4] In making his decision, the Minister relied on the following assumptions of fact which were admitted or denied by the Appellant:

[TRANSLATION]

(a) The Payor was incorporated on July 1, 1980; (admitted)

(b) The Payor operated a business specializing in wood harvesting; (admitted)

(c) The Payor's managing director is Daniel Fournier; (admitted)

(d) The executive director of the Payor is Marie-Laure Bouchard; (admitted)

(e) The company 1863-2265 Québec Inc. was incorporated on November 15, 1982; (admitted)

(f) The Appellant is the sole shareholder in 1863-2265 Québec Inc.; (admitted)

(g) The principal office of 1863-2265 Québec Inc. is located at the Appellant's residence, 378 Montaigne, Chicoutimi; (admitted)

(h) 1863-2265 Québec Inc. owns a tree-feller with a multifunctional head worth approximately $450,000; (denied)

(i) During the period at issue, the Payor had a contractual arrangement with 1863-2265 Québec Inc. for timber felling; (admitted)

(j) The Payor paid remuneration to the Appellant; (admitted)

(k) 1863-2265 Québec Inc. was required to have liability insurance for the tree-feller; (admitted)

(l) 1863-2265 Québec Inc. was responsible for costs related to the maintenance, repair and use of the feller; (admitted)

(m) Costs for transporting the feller to the wood-cutting area were divided between the Payor and 1863-2265 Québec Inc.; (admitted)

(n) the Payor had a foreman at the wood-cutting area who was responsible for marking off the wood-cutting area, and for ensuring

that government and work quality standards were met; (admitted, subject to amplification)

(o) The Payor paid 1863-2265 Québec Inc. $18 per cubic metre of cut wood; (denied)

(p) From the amount paid to 1863-2265 Québec Inc., the Payor deducted all of the goods and services acquired from the cooperative, such as gas, room and board, telephone, etc.; (admitted)

(q) In addition, from the amount due to 1863-2265 Québec Inc., the Payor deducted the amount of the Appellant's salary plus an additional 27.5% for benefits such as worker's compensation employment insurance premiums (employee and employer), premiums paid to the Régie des rentes du Québec, etc.; (admitted)

(r) 1863-2265 Québec Inc. was entirely responsible for the Appellant's salary; (denied)

(s) During the period at issue, the Appellant operated tree-timber feller belonging to 1863-2265 Québec Inc.; (denied)

(t) No production volume was required of the Appellant. (admitted)

[5] The company 1863-2265 Québec Inc. was incorporated on November 15, 1982, and the Appellant is the sole shareholder. The principal office of this company is located at the Appellant's residence.

[6] During the period at issue, the Payor had a contractual agreement with 1863-2265 Québec Inc. to cut wood. A contract of employment (Exhibit A-1) was reached between the Payor and the Appellant on May 10, 1999, stipulating, among other things, that the Appellant was hired as a mechanic at an hourly rate of $16.36. The conditions of employment outlined in the contract are as follows:

[TRANSLATION]

The employee is hereby bound to work faithfully for the Coopérative forestière Manicouagan-Outardes and agrees to comply with all forestry regulations of the province and of the cooperative.

A) PROVINCIAL: Specifically, the laws relating to the environment and to workplace safety.

B) COOPERATIVE: All regulations presented in your working agreement and/or any regulations set out by the Cooperative's representative.

C) I hereby authorize the doctor designated by THE COOPERATIVE to obtain a complete copy of my medical files if he deems it relevant.

IMPORTANT: All workers must confirm the number of hours worked, either verbally or in writing, to the Cooperative's representative. Workers have 24 hours from the end of the working day to comply with this requirement.

The employee shall be considered an employee of the Cooperative only when present at his usual work site. He is not considered to be at work when travelling to and from the work site.

[7] At the beginning of the work, the Payor and the Appellant signed a document entitled [TRANSLATION] "Information Required to Hire New Group 04 Equipment" (Exhibit A-2). The equipment mentioned in this document is a saw feller worth approximately $500,000. The Payor set a lump sum rental price.

[8] The Appellant's company had liability insurance for the tree-feller. This company was responsible for maintenance costs, as well as costs associated with the repair and use of the tree-feller. Costs for transporting the tree-feller to the cutting area were divided between the Payor and the Appellant's company. The Payor deducted from the amount paid to 1863-2265 Québec Inc. all the goods and services acquired from the cooperative, such as gas, room and board, telephone, etc. In addition, from the amount due to 1863-2265 Québec Inc., the Payor deducted the Appellant's salary plus a 27.5% charge for benefits such as worker's compensation, employee-employer employment insurance premiums, premiums paid to the Régie des rentes du Québec, etc.

[9] According to the Appellant, he worked for the Payor for the first time during the period at issue. When he was hired, the Appellant received a document entitled "Coopérative forestière Manicouagan-Outardes – Member's Guide" (Exhibit A-3),

outlining employment conditions. According to this guide, [TRANSLATION] "all workers must acknowledge that membership in the Cooperative is a pre-condition to hiring" and the policy with respect to paid hours is as follows (pages 12 and 13 of the guide):

> [TRANSLATION]
>
> **Guiding Principle**
>
> The principle of time worked equals time paid shall apply. This is to ensure equity among all members of the Cooperative.
>
> **Work Schedules**
>
> Work schedules are set by Cooperative management, after discussion with the worker/operators and equipment owners.
>
> **Pay and Coverage**
>
> The Cooperative shall pay and cover (C.S.S.T.) workers within the time period they are scheduled to be present on the work site (wood-cutting area, road and landing construction and maintenance, loading and transportation, office, camps, kitchen, etc.) or while involved in work ordered by a manager of the Cooperative. Workers are therefore employees of the Cooperative.
>
> 1. When the worker/operator conducts <u>production work</u>, the Cooperative is responsible for him and he must be paid in accordance with the rates established by the Cooperative for this purpose.
>
> 2. When the worker/operator conducts <u>maintenance and repairs</u> during the work periods scheduled, the policy of compensatory work time applies. . .
>
> 3. When the worker/operator conducts <u>production work</u> outside of the established work schedule, the worker must obtain prior authorization from the Cooperative and will therefore be paid by and under the responsibility of the Cooperative, only when the Cooperative has been so notified.
>
> 4. When the worker/operator conducts <u>maintenance and repair work</u> for the owner, outside of the established work

schedule, he is therefore paid by and under the responsibility of the equipment owner who must notify the Cooperative when this work is conducted in the area of operation.

The owner is paid and covered by the Cooperative according to the same principles which govern the worker/operators. He is paid and covered by the Cooperative when he is on the work site during the established work schedule.

Compensatory Work Time

Upon mechanical breakdown or any other production stoppage of less than two hours, the worker/operator's time may be paid on condition that he does not refuse compensatory work that he an perform.

Upon mechanical breakdown or production stoppage of more than two hours, the worker/operator's time may be paid, on condition that the Cooperative has work, for which he is qualified, to offer him.

Walking Time

Walking and travel time between the camp and the usual work site is not considered work time.

This walking and travel time may be covered only if the transportation from the camp to the work site is supervised by a manager of the Cooperative.

Authorization for Hours Paid

The time paid by the Cooperative must be authorized by the employee's immediate supervisor.

When his time is not authorized by his immediate supervisor, an owner, or an owner/operator is deemed to be employed by the owner when conducting the work necessary for proper operation of the owner's equipment and the owner must provide the Cooperative with his C.S.S.T. number to demonstrate he is properly covered.

[10] The Appellant explained that he was required to return to the foreman a schedule establishing his working hours, which was provided to him by the foreman. According to the Appellant, he met the foreman twice per day. The foreman did not testify at this hearing to corroborate the Appellant's statements.

[11] The Appellant worked as a mechanic; Jean-Marc Pouliot and Daniel Bouchard were equipment operators—one worked days and the other worked nights. The Appellant considered these operators to be [TRANSLATION] "his men". The names of these operators and that of the Appellant appear on the payroll submitted as Exhibit A-4.

[12] The Appellant explained that the operators helped with his duties as a mechanic when there was a heavy equipment breakdown and that they were paid for this time. When there was a major breakdown, the worker/operator could be offered compensatory work, on condition that the Payor had such as to offer him (see page 13 of the member's guide, Exhibit A-3); therefore the worker/operator was not paid if the Payor did not have any work to offer him.

[13] The Appellant produced as evidence the payroll, Exhibit A-4, in which appeared the names of the Appellant and the two operators, Daniel Bouchard and Jean-Marc Pouliot, the hours worked, the earnings, the benefits, the amounts of GST and TVQ to be deducted, etc. This payroll also indicated, under the [TRANSLATION] "Earning Summary" heading, the volume of wood cut, the hourly rate, etc., as well as the details of purchases, such as fuel, telephone, etc.

[14] According to the earnings summary, $6,058.25 was deducted from an amount of $10,821.24. These deductions represented the salaries of the Appellants and the two operators, leaving an income of $4,762.99.

[15] The labourer's wage and the machine wage were paid every two weeks by bank transfer.

[16] On cross-examination, the Appellant explained that the heavy equipment included a [TRANSLATION] "tree-feller with a saw head" worth between $450,000 and $500,000. The two operators of this equipment were labourers with the Appellant's company: Jean-Marc Pouliot was a regular employee of the Appellant and Daniel Bouchard was assigned by the Payor to work on the tree-feller.

[17] The financial statements of 1863-2265 Québec Inc. (Exhibit I-1) demonstrate, among others, the following expenses for 1999, under the heading

[TRANSLATION] "Operating Costs": salaries and payroll taxes, $117,231; Machinery maintenance, $54,461; Fuel and oil, $37,508; Insurance, $15,273; Travel and meals, $1,345.

[18] The Appellant explained that the total for salaries and fringe benefits represented the salary and fringe benefits for him and for the two operators. He also explained that the payroll taxes were amounts paid to the C.S.S.T., employment insurance premiums and premiums paid to the Régie des rentes du Québec. Equipment transportation fees were the responsibility of the Appellant and the Payor: transportation costs to the work site were the responsibility of the Appellant's company and costs for returning it to the Appellant’s residence were the Payor's responsibility.

[19] The Appellant recognized that he had replied to question 28 in the negative in his application for unemployment benefits, "Are you self-employed or engage in the operation of a business (other than farming)?" His explanation for his answer was that he was not self-employed and he did not operate a business.

[20] The Appellant was the only witness to be heard in support of his appeal.

[21] Marie-Laure Bouchard, executive director for the Payor and witness for the Minister, stated that she was responsible for the Payor's finances. She explained that usually the heavy equipment operator brought his operators to work at wood-cutting. Daniel Bouchard and Jean-Marc Pouliot, whose names appeared on the payroll (Exhibit A-4) are the operators of the heavy equipment owned by the Appellant.

[22] According to the witness, the Appellant was the mechanic who was responsible for machinery maintenance and who supervised the operators' work. She added that 1863-2265 Québec Inc., the sole shareholder in which was the owner, paid the maintenance costs for the machinery.

[23] Ms. Bouchard explained that the GST and TVQ appearing in the payroll (Exhibit A-4) were billed to the Appellant's company but that the Payor did him a favour by doing all the calculations. With respect to the payroll, this witness gave the following explanations with respect to the earnings column:

> [TRANSLATION]
>
> . . . you have a column "volume measured" and one "volume advanced". Volume measured is when it is weighed; the volume advanced is the wood that was cut in the forest, our measurer went by and he counted the trunks and he gave a certain volume to be advanced. . .

[24] This witness stated that the Appellant, through his company, had two pieces of heavy equipment involved in this contract, a tree-feller with a saw head and a Target. This last piece of equipment trims and sections the cut trees. She added that the heavy equipment owners choose their operators and they discuss this with the Payor's general management. She also added that the machinery owner is responsible for keeping it in good working order, for the cost of its use and repair.

[25] According to this witness, it is the foreman's responsibility to mark the cutting area, to ensure safety and accident prevention, to respect the environment, to apply quality standards and to ensure compliance with all the rules and regulations of the Ministère des Ressources naturelles. In addition, she stated that the heavy equipment owner, along with the supervisor, approves overtime for employees.

[26] Ms. Bouchard acknowledged that the document entitled [TRANSLATION] "contract of service: multifunctional mechanical felling of short wood" (Exhibit I-3) is a standard agreement. Clause 1.4 of this standard agreement reads as follows:

> [TRANSLATION]
>
> "THE COOPÉRATIVE" shall manage the salaries of its employees and the "THE OPERATOR" shall be responsible for salaries paid under the contract. An additional amount equivalent to 27.5% shall also be paid in order to compensate for payroll taxes such as the Régime de rentes du Québec, the commission de la santé et de sécurité au travail du Québec, unemployment insurance, health insurance, vacation, holidays and others as applicable. The rate charged to the artisans can be readjusted by the Cooperative if

> modifications have been made to one or another of these benefit rates.

[27] She stated that the operator is the owner of the machine. In this case, 1863-2265 Québec Inc., of which the Appellant is the sole shareholder, is the operator. She added that in the event that the machinery belonging to the Appellant is sold, the operators, as members of the cooperative, would be returned to the call-back list.

[28] On cross-examination, Ms. Bouchard stated that the contract of service (Exhibit I-3) did not exist when the Appellant was hired but that there was a verbal agreement with the Appellant and his company that the conditions outlined in the contract also applied to the verbal agreement.

[29] This witness explained that the foreman, in addition to the responsibilities listed above, was also required to ensure that the operators conducted their work in the proper manner, in other words, that the wood was cut to the desired length. She added that she did not know how often the foreman visited the work site.

[30] Finally, Ms. Bouchard said she agreed with the following interpretation by Counsel for the Respondent with respect to compensatory work:

> [TRANSLATION]
>
> Upon mechanical breakdown or any other production stoppage—so the machine is no longer operating—the worker or operator may be paid for his time—in other words, he will continue to receive his salary—on condition that he does not refuse to work the hours for which he was advanced money at another time.

[31] In *M.N.R. and Emily Standing* (No. A-857-90), Stone J. of the Federal Court of Appeal said:

> . . . There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the *Wiebe Door* test.

[32] In *Duplin v. Canada (Minister of National Revenue - M.N.R.)*, [2001] T.C.J. No. 136, Tardif J. of this Court said the following at paragraph 30 of his decision:

> In other words, the intention of the parties to a work agreement is in no way conclusive for the purpose of characterizing that agreement as a contract of service. It is basically one factor among many.

[33] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61, the Supreme Court of Canada retained that the degree of control exercised over the worker is an essential element that must be considered in order to decide whether the latter is an employee or a self-employed entrepreneur.

[34] The Supreme Court of Canada outlined the following principle at page 2 of this judgment:

> There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor.

[35] In the case under review, only two witnesses were heard: the Appellant and the Payor's executive director.

[36] The degree of control exercised by the Payor over the work of the Appellant and his operators was mentioned. The Appellant explained that the Payor's foreman set the hours of work, designated the work site and visited them twice per day to verify compliance with the directives that had been given.

[37] The Court must limit itself to the evidence presented. The degree of control is an essential test. The foreman, who is the individual responsible for exercising the control, did not testify at the hearing of this appeal. The Appellant testified that he supervised the work of his operators when he was not busy with his duties as a mechanic. He added that during his free time, he drove around in his truck, which is owned by his company, to check on the work of his operators.

[38] In *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, [1996] F.C.J. No. 1337, the Federal Court of Appeal said the following:

> When we look at the overall picture, it is quite apparent that this was, *prima facie*, a contract of enterprise. The ownership of the skidder, the choice of the other crew member, payment based on an undefined volume and the autonomy of the crew are determining factors which, in the context, can only be associated with a contract of enterprise.
>
> Supervision of the work every second day and measuring the volume every two weeks do not, in this case, create a relationship of subordination, and are entirely consistent with the requirements of a contract of enterprise. 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.
>
> The same is true of the standards imposed in respect of hours and days of work, holidays, operating method and safety. The standards are common to all workers in public forests whose activities are "governed" by the Ministère des Ressources naturelles. They apply regardless of whether the worker is a mere employee or a contractor.

[39] It is normal for the foreman to check the quality of the machinery operators' work. The Payor had an interest in the result; in addition, the Appellant stated in his testimony that the Payor did not set a quota.

[40] According to the payroll (Exhibit A-4), the Appellant assumed all expenses related to the operation of the heavy equipment, paid the operators' salaries—and his own—as well as the fringe benefits mentioned above. The Payor provided a service to the Appellant and/or his company by making certain calculations, and in exchange for this, the Payor charged the Appellant GST and TVQ.

[41] The 1999 financial statements for the Appellant's company (Exhibit I-1) corroborate the data entered on the payroll. All of the operating costs for 1863-2265 Québec Inc., of which the Appellant is the sole shareholder, the payroll taxes, etc., are indicated in these financial statements.

[42] The Appellant affirmed to the Court that he did not have any contracts in 1999 other than that with the Payor. Therefore the Appellant, through his company, provided services to the Payor under a contract for services.

[43] The selection of fellow team members, worker supervision, payment as a function of an undefined volume and the independence of the team are all determining factors which, in this context, can only be associated with a contract for services.

[44] The Appellant stated to the Court that Jean-Marc Pouliot had been the regular operator of his heavy equipment for several years, therefore he brought him to perform work for the Payor. The other operator, Daniel Bouchard, was a worker who was suggested by the Payor, and the Appellant, before agreeing to hire him, reassured himself of his competence. This worker was therefore under the Appellant's supervision.

[45] Ms. Bouchard testified that the Appellant owned two pieces of heavy equipment, a tree-feller and a Target (delimber). The Appellant stated that his company also owned a service truck whereas the equipment contract (Exhibit A-2) mentions only a saw feller. Ms. Bouchard also stated that the heavy equipment owner was responsible for the costs of operator overtime.

[46] In order to distinguish a contract of service from a contract for services, the Court must examine the tests outlined in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, which are the degree of control, ownership of tools, chances of profit and risks of loss, and integration of the employee in the employer's business.

[47] With respect to the degree of control, the fact that the foreman marked the area to be cut, ensured compliance with the quality standards pursuant to the laws and regulations of the Ministère des Ressources naturelles, etc. is not sufficient control to conclude that the Appellant was an employee of the Payor. In addition, the Appellant stated, during his testimony, that he supervised his fellow team members.

[48] The tools that were the property of 1863-2265 Québec Inc., owned by the Appellant.

[49] The chances of profit and risks of loss were assumed by the Appellant's company, as is shown in the financial statements submitted as Exhibit I-1.

[50] 1863-2265 Québec Inc. was the Appellant's business and the latter was integrated into its operations.

[51] In *Michel Simard and M.N.R.*, [2002] T.C.J. No. 468, Savoie D.J. of this Court said the following:

> 2425-9483 Québec Inc. was the worker's business. Thus, the worker and his company, 2425-9483 Québec Inc., became integrated with the appellant at the beginning of the project in order to carry out the agreed work. However, one must recognize that the meaning and scope of a contract is determined not by the title the contract is given, but rather by the relationships between the parties and by the parties' conduct. That is what determines the true nature of the resulting contract.

[52] The facts related in this case are analogous to those in the case under review. Savoie D.J. concluded that the Appellant's employment was not insurable because it did not meet the requirements for a contract of service. Therefore there was no employer-employee relationship. At paragraph of his judgment, Savoie D.J. said the following:

> In addition, the appellant's actual employer was 2425-9483 Québec Inc. However, his employment with that employer is not insurable because the appellant controlled more than 40% of the voting shares of that corporation.

[53] In light of the circumstances and of the evidence presented, the Court concludes that the Appellant was in the service of 1863-2265 Québec Inc. and not in the service of Coopérative forestière Manicouagan-Outardes. In addition, the Appellant's employment during the period at issue was not insurable since he controlled more than 40% of the voting shares in 1863-2265 Québec Inc.

[54] As a result, the appeal is dismissed and the decision of the Minister is confirmed.

Signed at Ottawa, Canada, this 11th day of September 2003.

"J. F. Somers"

Somers, D.J.T.C.C.

Translation certified true
on this 22td day of March 2004.

Shulamit Day-Savage, Translator