Docket: 2006-1397(EI)

BETWEEN:

SOCIÉTÉ EN COMMANDITE LE DAUPHIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 19, 2006, at Montréal, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Agents of the Appellant:	Danielle Hervieux Marcel Lalonde
Counsel for the Respondent:	Christina Ham

JUDGMENT

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

Signed at Grand-Barachois, New Brunswick, this 14th day of December 2006.

"S.J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 27th day of February 2008.

Brian McCordick, Translator

Citation: 2006TCC653
Date: 20061214
Docket: 2006-1397(EI)

BETWEEN:

SOCIÉTÉ EN COMMANDITE LE DAUPHIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] This appeal is about the insurability of the worker André Lefebvre's employment when he was working for the Appellant, and about his hours of work and insurable earnings during the period in issue, that is to say, from June 27, 2004, to July 8, 2005.

[2] On February 21, 2006, the Minister of National Revenue ("the Minister") notified the Appellant of his decision that the worker was employed in insurable employment. He also determined that the worker worked for 1512 insurable hours and had $6,430.88 in insurable earnings.

[3] In rendering his decision, the Minister relied on the following assumptions of fact:

[TRANSLATION]

(a) The Appellant operated Le Dauphin, a 48-unit apartment building which had three floors and a basement. (admitted)

(b) The Appellant rented out the units without appliances, and the cost of electricity, heat and other utilities was borne by the tenants. (admitted subject to clarifications)

(c) Starting in 2001, the worker worked as a building superintendent (janitor) for the Appellant. (admitted)

(d) The work contract, which was signed by the parties, specified that the worker was responsible for:

- renting the units
- collecting the rent
- maintaining the premises
- maintaining peace and good order so that each tenant could fully enjoy his or her apartment (admitted)

(e) In this regard, the worker had to perform the following work:

- prepare the vacant units with a view to renting them
- perform designated maintenance work in the units
- keep the common areas (corridors, entrance, etc.) very acceptably clean
- maintain the building exteriors
- maintain the land around the buildings
- perform any other job-related duties called for under the circumstances
- prepare any reports that the work required
  (denied)

(f) In addition to his janitorial duties, the worker was entitled to perform certain work specified in the contract in his capacity as a subcontractor. (denied)

(g) The worker alleges that he had to be available 24 hours a day, seven days a week, to perform his work. (denied)

(h) All of the worker's equipment and work tools were provided by the Appellant. (denied)

(i) The worker could not get himself replaced without the Appellant's authorization. (denied)

(j) Except in emergencies, the worker needed the Appellant's approval before undertaking repairs. (denied)

(k) The worker's hours were not compiled by the Appellant or by the worker. (admitted)

(l) Neither the written contract nor any oral agreement provided even approximately for the number of hours that would be required in order for the worker to perform his regular maintenance and upkeep work. (admitted)

(m) The worker alleges that he worked at least 30 hours a week in his capacity as a janitor, whereas the Appellant claims that he devoted only 16 hours per week to such duties. (denied)

(n) On July 4, 2005, the Appellant issued a Record of Employment (ROE) to the worker which stated that the first day of work was July 1, 2001, and that the last day worked was July 8, 2005, and which reported 621 insurable hours and $11,137 in insurable earnings. (denied)

(o) The Appellant made source deductions from the worker's salary. (admitted)

(p) During the period in issue, the worker was paid fixed gross remuneration of $412.50 per week every two weeks. (admitted)

(q) The Respondent has shown that during his last 14 pay periods, the worker received $6,430.88 in insurable earnings (14 periods at $412.50 and $655.88 in vacation pay). (admitted)

(r) The Respondent has shown that during the period in issue (54 weeks), the worker accumulated 1512 hours of insurable employment, that is to say, 54 weeks at 28 hours per week. (admitted)

[4] At the hearing, the Minister produced Exhibit I-4, the contract between Société en commandite Le Dauphin and André Lefebvre. The contract, which is binding on the parties, describes, among other things, the [TRANSLATION] "purpose" of the agreement, the [TRANSLATION] "services concerned", the [TRANSLATION] "activities and responsibilities" and the [TRANSLATION] "remuneration". Appendix 1 contains the list of duties. It is generally similar to the list set out in the Minister's assumptions of fact in the Reply to the Notice of Appeal.

[5] It was shown at the hearing that the Appellant made source withholdings in respect of the Québec Pension Plan, federal and provincial income tax and employment insurance.

[6] In support of her argument that the worker was governed by a contract of employment, counsel for the Minister relied on the decision in *Commission des normes du travail c. 9002-8515 Québec inc.*, No. 500-05-020995-963, April 6, 2000 (Que. S.C.) where Justice Claudette Picard wrote as follows:

> [TRANSLATION]
>
> [5] The Court must decide the following issues.
>
> 1. Is Mr. Vaillancourt an employee of Québec within the meaning of the Act?
>
> . . .
>
> [7] In order to determine whether Mr. Vaillancourt is an employee within the meaning of the Act, three elements must be considered: the prestation of work; remuneration; and a relationship of subordination.
>
> . . .
>
> [10] The courts have relaxed the concept of a relationship of subordination. They have done so because workers are increasingly autonomous in their work and enjoy freedom in the performance of their duties even through they are still subordinate to their employers. What of Mr. Vaillancourt's situation?
>
> [11] The Agreement contains indicia of supervision and subordination, as well as indicia of autonomy.
>
> [12] The indicia of supervision and subordination are as follows. Québec is designated as the "builder" and Mr. Vaillancourt is designated as the "advisor" and/or "sales director" and:
>
> 1. The Québec units must be sold during the period, for the prices and subject to the considerations and conditions stipulated in writing by the builder.
>
> 2. The advisor must perform the duties entrusted to him, including the duties described in great detail in paragraph 19 of the Agreement.
>
> 3. The compensation for the work is clearly stated; the Agreement refers to a percentage of the value of the real estate transaction, not including tax. The evidence shows that there were various agreements which changed the terms of payment of the commission. In roughly half the cases, the agreements executed concurrently with the offers of purchase or after the acceptance of those offers did not include tax.
>
> 4. Paragraph 4.4 of the Agreement refers to source deductions.
>
> 5. The mandate given to the advisor is personal and exclusive.

> 6. Paragraph 13 of the Agreement refers to termination of employment.
>
> . . .
>
> [15] In order for a contract of enterprise to exist, there must be no relationship of subordination, and the Agreement contains several elements demonstrating such a relationship. In the case at bar, there are sufficient indicia of a relationship of authority.

[7] The issue for determination is whether the worker was employed in insurable employment for the purposes of the *Employment Insurance Act* ("the Act"). The relevant provision is paragraph 5(1)(*a*) of the Act, which states:

> 5. (1) Subject to subsection (2), insurable employment is
>
> (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[8] The section quoted above defines the term "insurable employment". The term means employment under a contract of service, i.e. a contract of employment. However, the Act does not define what constitutes such a contract. In the case at bar, there is a written agreement. It is reproduced below and it expresses the parties' intent.

[9] A contract of service is a civil law concept found in the *Civil Code of Québec*. The nature of the contract in issue must therefore be ascertained by reference to the relevant provisions of the Code.

[10] In a publication entitled [TRANSLATION] "Contract of Employment: Why Wiebe Door Services Ltd. Does Not Apply in Quebec and What Should Replace It", published in the fourth quarter of 2005 by the Association de planification fiscale et financière (APFF) and the Department of Justice Canada in the Second Collection of Studies in Tax Law as part of a series called *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Justice Pierre Archambault of this Court, referring to all periods subsequent to May 30, 2001, describes the steps that courts must go through, since the coming into force on June 1, 2001, of section 8.1 of the *Interpretation Act*,

R.S.C. 1985, c. I-21, as amended, when confronted with a dispute such as the one before us. Here is what Parliament declared in this provision:

Property and Civil Rights

> **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.
>
> [Emphasis added.]

[11] It is useful to reproduce the relevant provisions of the Civil Code, which will serve to determine whether an employment contract, as distinguished from a contract of enterprise, exists:

> Contract of employment
>
> **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.
>
> **2086.** A contract of employment is for a fixed term or an indeterminate term.
>
> . . .
>
> Contract of enterprise or for services
>
> **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.** 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.
>
> [Emphasis added.]

[12] The provisions of the *Civil Code of Québec* reproduced above establish three essential conditions for the existence of an employment contract:

> (1) the worker's prestation in the form of work; (2) remuneration by the employer for this work; and (3) a relationship of subordination. The significant distinction between a contract for service and a contract of employment is the existence of a relationship of subordination, meaning the employer has the power of direction or control over the worker.

[13] Legal scholars have reflected on the concept of "power of direction or control" and, from the reverse perspective, a relationship of subordination. Here is what Robert P. Gagnon wrote in *Le droit du travail du Québec*, 5th ed. (Cowansville, Que.: Yvon Blais, 2003):

> (c) Subordination
>
> > 90 – *A distinguishing factor* – The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 *et seq*. C.C.Q. Thus, while article 2099 C.C.Q provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> [Emphasis added.]

[14] A series of indicia developed by the jurisprudence enables courts to determine whether there is a relationship of subordination between the parties.

> The indicia of control include:
>
> 1- mandatory presence at a workplace
> 2- compliance with the work schedule
> 3- control over the employee's absences on vacations
> 4- submission of activity reports
> 5- control over the quality and quantity of work

6- imposition of the methods for performing the work
7- power to sanction the employee's performance
8- source deductions
9- benefits
10- employee status on income tax returns
11- exclusivity of services for the employer

[15] I conclude, as did Picard J. in *Commission des normes du travail c. 9002-8515 Québec Inc.*, *supra*, that there are sufficient indicia that the worker carried out his duties under a contract of employment.

[16] In the case at bar, the relationship of subordination between the Appellant and the worker can, in my opinion, be established by indicia 1, 2, 5, 6, 8, 10 and 11. Further support for this conclusion can be found in the work contract, written and signed by the parties, in which the worker agrees to carry out his duties as described by the Appellant. The agreement that was performed provides that the worker is to provide his services personally and describes how each party can terminate the employment.

[17] In addition, the Court has analysed the overall relationship between the parties and finds that the worker was employed in insurable employment within the meaning of paragraph 5(1)(*a*) of the Act and under a contract of employment within the meaning of article 2085 of the *Civil Code of Québec*.

[18] Having determined that the worker's employment was insurable, the Minister proceeded, in the absence of precise data, to determine the hours of work and insurable earnings of the worker based on the Record of Employment issued by the Appellant and in accordance with subsections 10(4) and 10(5) of the Employment Insurance Regulations and paragraph 2(3)(*a*) of the Insurable Earnings and Collection of Premiums Regulations. I shall reproduce below the excerpts in question.

> 10. (4) Except where subsection (1) and section 9.1 apply, where a person's actual hours of insurable employment in the period of employment are not known or ascertainable by the employer, the person, subject to subsection (5), is deemed to have worked, during the period of employment, the number of hours in insurable employment obtained by dividing the total earnings for the period of employment by the minimum wage applicable, on January 1 of the year in which the earnings were payable, in the province where the work was performed.

> (5) In the absence of evidence indicating that overtime or excess hours were worked, the maximum number of hours of insurable employment which a person is deemed to have worked where the number of hours is calculated in accordance with subsection (4) is seven hours per day up to an overall maximum of 35 hours per week.
>
> 2. (3) For the purposes of subsections (1) and (2), "earnings" does not include
>
> (*a*) any non-cash benefit, other than the value of either or both of any board or lodging enjoyed by a person in a pay period in respect of their employment if cash remuneration is paid to the person by their employer in respect of the pay period;
> . . .

[19] After completing the calculations specified by Parliament in the provisions reproduced above, the Minister deemed that during the 54-week period in issue, the worker was employed in insurable employment for the Appellant for 1512 hours in accordance with subsections 10(4) and 10(5) of the Employment Insurance Regulations. In addition, he found that the worker's insurable earnings for the last fourteen pay periods within the period in issue amounted to $6,430.88 according to section 2 of the Insurable Earnings and Collection of Premiums Regulations.

[20] The onus was on the Appellant to prove that the Minister's allegations were false. The Appellant did not discharge this onus. Under these circumstances, the Court does not believe that its intervention is warranted because it must be found that the Minister properly carried out the mandate given to him by Parliament.

[21] Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois, New Brunswick, this 14th day of December 2006.

"J.S. Savoie"

Deputy Judge Savoie

Translation certified true
on this 27th day of February 2008.

Brian McCordick, Translator

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APPEARANCES:

Agent of the Appellant:	Danielle Hervieux
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