Docket: 2005-282(EI)

BETWEEN:

LES ENTREPRISES B. SMITH INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on July 12, 2007, at Sept-Îles, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

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| Counsel for the Appellant: | Daniel Jouis |
| Counsel for the Respondent: | Benoit Mandeville |

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**JUDGMENT**

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue is confirmed on the ground that the work performed by Yvan Gagnon, for Les Entreprises B. Smith Inc., during the period from February 5 to April 22, 2003, was under a true contract of service within the meaning of paragraph 5(1)(*a*), in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 27th day of September 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 19th day of October 2007.
Daniela Possamai, Translator

Citation: 2007TCCI456
Date: 20070907
Docket: 2005-282(EI)

BETWEEN:

LES ENTREPRISES B. SMITH INC.,

Appellant,

and

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## REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision concerning the insurability of the work performed by Yvan Gagnon for Les Entreprises B. Smith Inc., during the period from February 5 to April 22, 2003.

[2] The decision under appeal is that the work was performed under a contract of service. The Appellant alleges that Mr. Gagnon performed the work in question as a self-employed person.

[3] In order to justify the decision under appeal, the Minister of National Revenue (the Minister) relied on the following assumptions of fact:

[TRANSLATION]

(a) the Appellant, incorporated on October 28, 2002, operates a deforestation business;

(b) Bruno Smith was the Appellant's sole shareholder;

(c) in 2003, the Appellant obtained a deforestation contract from Hydro-Québec in an area situated 110 kilometres from Baie Comeau;

(d) to fulfill the contract, the Appellant hired twenty or so loggers, including the worker;

(e) from February 5 to April 22, 2003, the worker rendered services to the Appellant as a logger;

(f) on May 8, 2003, the Appellant issued a Record of Employment in the name of the worker indicating March 17, 2003, as the first day of work and April 11, 2003, as the last day of work;

(g) the Appellant does not challenge the insurability of the worker's employment for the period from March 17 to April 11, 2003;

(h) the Appellant claims that from February 5 to March 16, 2003, and from April 11 to April 22, 2003, the worker rendered services to it as a self-employed person;

(i) when he first started working, on February 5, the Appellant provided the worker with the chainsaw and, at an undetermined date at the beginning of the period of employment, the worker purchased the Appellant's chainsaw;

(j) except for the fact that the worker used the Appellant's chainsaw and then his, there was no change in his working conditions at the Appellant during the period in issue;

(k) when he was in the forest, the worker's lodging and meals were provided by the Appellant;

(l) the worker, like all the other workers of the Appellant, worked five consecutive days and left the logging camp every weekend;

(m) the worker usually worked 10 hours per day, that is 50 hours per week;

(n) Hydro-Québec kept a record of the comings and goings of the logging camp workers;

(o) the worker was supervised either by the logging camp foreman or by Mr. Smith;

(p) the worker provided his chainsaw and incurred its maintenance costs;

(q) the worker received remuneration based on the volume of wood cut: initially, he received $250 per acre cut and then, he received $200 per acre cut;

(r) the payor issued T4 slips for 2003 to over 45 employees including the worker's with source deductions;

(s) during the period in issue, the worker worked 424 hours;

(t) during the period in issue, the worker received $9,431.50 from the Appellant.

[4] The Appellant indicated that it admitted paragraphs (a), (b), (c), (e), (f), (h), (i), (j), (m), (n), (p), (r) and (t).

The facts

[5] Bruno Smith, logging contractor, is the sole shareholder of the payor company. The payor obtained a contract from a company which also obtained a larger contract from Hydro-Québec. The work was divided among twenty or so companies. The objective was to prepare the land to be filled for the construction of a dam.

[6] In other words, all the trees on the surface to be used as a water retention pond had to be cut down.

[7] Hydro-Québec was responsible for providing lodging and meals to all persons working on the logging camp, regardless of who they worked for.

[8] Hydro-Québec also monitored comings and goings by means of a swipe card providing access to the site. The card in question made it possible to know the exact time of entry and exit of each person.

[9] As for the Appellant, it obtained a subcontract under which it had to clear, to the satisfaction of Hydro-Québec, the site specified in the contract. To that end, the Appellant hired some loggers.

[10] The hiring of loggers required to perform the work was done through two types of contracts, either a contract of service or a business contract. In either case, the contract in question consisted in felling all the trees in an area that was not accessible to heavy machinery.

[11] Regardless of the type of contract chosen, the work had to be performed in the same way, the only difference being how the work was paid. If the logger was hired under a "business contract," he or she was paid $250 per acre cut. In the case of a "contract of service," the same work was paid at a rate of $200 per acre cut, a difference of $50, which in terms of percentages represented a 20% difference.

[12] The agent for the Appellant indicated that the work was performed in exactly the same way; he explained that the 20% difference covered not only administrative expenses incurred by the employer, certain deductions, but also expenses inherent to such a contract, inter alia, the Employment Insurance program.

[13] The agent for the Appellant explained that it had no other choice but to accept the loggers' demands as to the nature of the contract.

[14] During the hearing, I got the sense that the Respondent questioned that version of the facts and rather believed that the Appellant issued false records or dummy records.

[15] I indicated, at the hearing, that I did not share that interpretation, especially for the following reason: when the Appellant accepted to be hired under a contract of service with all the financial consequences and administrative expenses that it entailed, it became easy and routine to allocate remuneration for all the work periods, which seems to me to be sufficient to exclude or reject the theory of dummy records.

[16] Generally speaking, loggers are an important group of workers in the category of seasonal workers. The are paid in a very particular way and the way they perform their work is equally unique. In general, they own their tools and, in principle, they are responsible for maintaining their tools and for the costs associated with their use.

[17] It is a category of workers that are covered by the financial assistance program provided by the *Employment Insurance Act* (the Act), in spite of the classic criteria (ownership of the tools, chance of profit or risk of loss, integration) set out in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025 and recently applied for their pertinence by the Federal Court of Appeal in *Combined Insurance Company of America*, decision rendered by Nadon, Létourneau and Pelletier JJ. on January 30, 2007, on appeal from the decision of McArthur J. of this Court, dated September 6, 2005.

[18] In fact, the work performed by loggers is very unique. Generally, loggers are paid according to various formulae where the quantity of wood cut is the main component of the remuneration obtained; they own their work tools and assume responsibility for the costs associated with their use and maintenance. They are also independent with respect to the way in which they cut wood. In other words, they apply their own felling technique.

[18] All these distinctive features make it even more difficult to determine the nature of the contract of employment, notably with respect to whether there exists a true power of control by the person who pays remuneration.

[19] The presence of this power of control by the employer is revealed by his or her presence or absence on the logging camp, by his or her right of intervention not only in terms of safety measures in the performance of work, but also in terms of the reliability and safety of the tools and clothing used.

[20] There is no single or magic formula for defining the nature of a contract of employment. Recently, my colleague, the Honourable Pierre Archambault, stated in an exhaustive analysis that the only possible approach to dealing with the issue of the central nature of the work, in the province de Quebec, was the application of the provisions of the *Civil Code of Québec.*

[21] At first, such an approach seems to simplify the process of determining the nature of the contract of employment; but when it comes down to the facts, it is quite a different matter as one of the three essential factors, that is the relationship of subordination, requires an analysis of all the facts where the famous criteria set out in *Weibe Door*, *supra*, always prove to be very useful and relevant in determining the nature of the contract in issue.

[22] To be eligible for employment insurance benefits, loggers must meet certain requirements, including working a sufficient number of hours to be worked under a contract of service.

[23] Those conditions are essential and absolutely fundamental, even more so since employment insurance benefits constitute vital financial assistance. Considering that all work performed as a self-employed person is excluded from the calculation of hours required to be eligible for the benefits, it is easy to understand why loggers want to perform work under a contract of service.

[24] Therefore, the search for insurable employment is a major concern for the vast majority of workers and particularly for those who fall into the category of "seasonal workers."

[25] Once the number of insurable hours is reached, additional working hours are obviously not of equal importance, especially since it undoubtedly becomes more profitable at that point to work as a self-employed person because it is then possible to deduct employment-related expenses.

[26] In the case at bar, first, the worker undoubtedly wanted to have it both ways, that is accumulate sufficient hours of insurable employment to become eligible for employment insurance benefits. Second, as for the additional hours he did not need to become eligible, he wanted to be considered a contractor, which would allow him to earn more as he would not be subject to deductions, which, furthermore, would undoubtedly be more lucrative for him. In fact, the status of contractor or self-employed person allowed him to deduct those expenses, which could prove to be of great benefit.

[27] The Appellant explained that it had to comply with the requirements of some loggers as to the type of contract; if it failed to meet the requirements of the loggers, whose services were essential, it simply would not have had the workforce necessary for the performance of its subcontract.

[28] Moreover, it is easy to understand why the loggers' have a great interest in a hybrid formula. First, the hybrid formula allows the worker to accumulate the number of hours of insurable employment required to become eligible for employment insurance benefits; second, the worker performs the same work as a self-employed person, which makes him or her eligible to deduct all his or her expenses and perhaps, and I mean perhaps, allows him or her to work as a self-employed person during the period in which he or she receives Employment Insurance benefits. Obviously, this hypothesis is simply pure speculation because this type of situation must undoubtedly be very rare.

[29] In the case at bar, I venture to think that the worker Yvan Gagnon applied for Employment Insurance benefits and was told that he did not have the required number of hours to be eligible. He therefore decided to retroactively and unilaterally change the nature of the work he performed, that is to say that he claimed that the worked performed as a self-employed person was nothing less than salaried employment or, in other words, work performed under a contract of service.

[30] However, the same work performed in the same way cannot at the same time be work performed under a contract of service and a business contract for different periods.

[31] For this to be so, it would be necessary for the parties' intentions, as to the nature of the contract, to be the essential and determinative element in characterizing the contract. However, the case law has indicated on numerous occasions that the parties' intentions is but one element among many, an element not determinative and above all not sufficient in itself.

[32] Although the parties' intentions could prove to be of some importance, the characterization of the contract of employment is neither sufficient nor determinative in itself, as the performance of the work must be consistent with and comply with the type of contract involved.

[33] In the case of controversy or inconsistency, the facts relate to the performance of the work and the circumstances under which the work is performed trump the parties' intentions. It is from those facts and circumstances that one must draw the elements leading to a conclusion as to the nature of the contract.

[34] In the case at bar, this task is made more difficult by the fact that the nature of the work is very unique.

[35] I must first point out that, in the instant case, there could not be two types of contracts between the same parties for performing the same work in the same way.

[36] In the case of the hybrid formula, the parties' intentions should be the only criterion required to characterize the contract; such an approach is neither consistent with the Act nor with the criteria established by the case law.

[37] What about the facts and terms and conditions as to the performance of the work in the case at bar?

[38] The agent for the Appellant stated that he regularly toured the logging camp to make sure the work was performed in accordance with the requirements of Hydro-Québec, failing which the Appellant itself would not get paid. He also stated that he had to provide Yvan Gagnon with good quality tools which the Appellant clearly controlled to ensure the quality and safety of the equipment used by the loggers it remunerated.

[39] He also explained that the persons he remunerated consulted with each other as to the periods of employment. They could work several days in a row and then take a few days off. The swipe card they all had allowed the Appellant to monitor their presence on the logging camp. The system implemented and managed by Hydro-Québec allowed the Appellant to know the exact time of entry into and exit from the logging camp.

[40] Each logger entered into an agreement with the Appellant. Instructions were given to the logger as to the place where the work was to be carried out.

[41] Although it was up to the logger to decide how to perform the work, the felling work had to be performed in a manner acceptable to the Appellant. The work was supervised and, even though the Appellant rarely intervened, it had at all times the right to intervene and power of control not only over the work performed, but also over the overall conduct of the worker, especially to ensure that the work was carried out in accordance with safety requirements.

[42] Each logger entered into an individual agreement. The Appellant was also responsible for the worker's conduct and quality of his or her work.

[43] Such control or supervision was exercised by maintaining an almost constant presence on the premises where the work was carried out. The Appellant clearly had power of intervention. Concrete instances of the use of such power of control were few, except that the loggers were not left alone to work. The evidence did not establish that the Appellant did not expressly or tacitly waive its power.

[44] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 27th day of September 2007.

"Alain Tardif"

Tardif J.

Translation certified true

on this 19th day of October 2007.

Daniela Possamai, Translator

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APPEARANCES:

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| Counsel for the Respondent: | Benoit Mandeville |

COUNSEL OF RECORD:

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