Docket: 2006-2831(EI)

BETWEEN:

LIVAIN COMEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 5, 2007, at Bathurst, New Brunswick

Before: The Honourable Justice François Angers

Appearances:

Counsel for the appellant:	Basile Chiasson
Counsel for the respondent:	Stéphanie Côté

JUDGMENT

The appeal from the decision of the Minister of National Revenue to the effect that the appellant did not hold insurable employment within the meaning of paragraphs 5(1)(*a*), 5(2)(*i*) and 5(3)(*b*) of the *Employment Insurance Act* with Stéphane Comeau from May 30 to September 3, 2005, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of October 2007.

"François Angers"

Angers J.

Translation certified true
on this 1st day of February 2008
Michael Palles, Reviser

Citation: 2007TCC595
Date: 20071025
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BETWEEN:

LIVAIN COMEAU,

Appellant,

and

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OFFICIAL ENGLISH TRANSLATION

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from a decision of the Minister of National Revenue (the "Minister") dated July 18, 2006, according to which employment held by the appellant with his son Stéphane Comeau from May 30 to September 3, 2005, was not insurable because it was not held under a contract of service within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "Act"). In the alternative, the Minister submits that even if this was a contract of service, the appellant still did not hold insurable employment within the meaning of paragraphs 5(2)(*i*) and 5(3)(*b*) of the Act because the appellant and his son were not dealing at arm's length; having regard to all the circumstances, it was reasonable for the Minister to determine that the appellant and his son would not have entered into a substantially similar contract of employment if they had been dealing at arm's length.

[2] Stéphane Comeau operated a business under the name of "JLR Hunting". Its main activity was to offer the services of a guide for bear and moose hunting. He has been operating this business since March 16, 2005. The appellant admitted almost all assumptions of fact on which the Minister relied in rendering his decision, except for the assumption that his son (the "payer") did not pay any rental fees to the appellant for the use of the appellant's camp by his business, and the assumption that the payer

allegedly saved approximately $10,000 in accommodation costs after the appellant allowed him to use his camp to lodge his hunters during the 2005 hunting season.

[3] Only the appellant testified. He has hunted since the age of 16 and has held a guide permit since 2001. This permit is required to guide non-residents who come to New Brunswick to hunt. Although he is from a family of hunters, he acknowledges that his son Stéphane only hunts occasionally because he does not enjoy it. Stéphane held full-time employment in a lending institution, Wells Fargo Financial, during the period in question.

[4] Before becoming a hunting guide, the appellant was a new and used car dealer from 1997 to 2002–2003. He operated an automobile export business which employed five to six employees. He set the work schedule for his employees, and his spouse mainly took care of office tasks and the computer system. In 2004, he worked as a hunting guide for Jacques Roy, the former owner of JLR Hunting.

[5] According to the appellant's testimony, his son purchased JLR Hunting in early 2005. This was essentially a take-over of Jacques Roy's activities by Stéphane Comeau, as no monetary consideration was paid. Clients, most of whom are American, are solicited by Internet. Clients give a deposit, and time is allotted to them based on the bear hunting season. In 2005, the bear hunting season was divided into three periods, namely, from April 18 to June 25, from September 12 to 24 (strictly for bow hunting) and from October 1 to November 5.

[6] Therefore, the appellant was hired as a hunting guide. For the 2005 season, the payer also hired his uncle, the appellant's brother, as a guide as well as hiring a cook. Accordingly, the appellant's tasks consisted in guiding hunters, doing taxidermy, building permanent platforms, installing temporary platforms, preparing bait for bears and preparing hunting areas. He was paid an hourly rate of $16 for 47 hours of work per week. He received a cheque every week. The other workers were paid the same hourly rate as the appellant. However, the appellant did not receive vacation pay or paid holidays. It is also admitted that the appellant did not have the right to hire other workers and that the payer had the right to supervise the appellant's daily tasks and activities, although the appellant worked without being supervised. There were no means of communication at the hunting camp. The appellant saw the payer in the morning or in the evening, as he did not always sleep at the camp.

[7] The appellant's spouse took care of the payer's accounting. She personally applied for a grant on the payer's behalf to help him pay the salaries of his employees.

[8] The appellant began to work for the payer only at the end of the month of May, for health reasons. The payer did not hire extra help during the appellant's absence, and his work was performed by the other workers. They were laid off on July 23, 2005, while the appellant continued to work until September 3.

[9] According to the appellant, the work of a guide is not easy. A truck is required to perform this work, and he purchased one in 2004 at a price of $10,350 in order to work for Jacques Roy. He therefore used it during the period in question. The truck maintenance fees were not reimbursed to him, but the payer paid for gasoline using a credit or debit card. Work would begin a few weeks before the beginning of the hunting season to identify hunting areas and to get the bears used to coming to take the bait. The appellant obtained bait in various restaurants and would prepare it. The appellant paid for his $5 guide permit himself and supplied all the tools required to perform his work.

[10] During the 2005 hunting season and the period in question, the appellant made his hunting camp available to the payer so he could lodge his clients. This camp was located on land leased from the Crown. He acquired it in the fall of 2004, but ownership was transferred to him only once the purchase price had been completely paid. This explains why the rental fees for the land in 2005 were billed to the former owner but paid by the appellant. It is admitted that the appellant had purchased the camp for his own personal use, and in the fall of 2005 and spring of 2005, he made renovations costing approximately $10,000.

[11] A lease concluded between the payer and the appellant, dated April 1, 2005, was submitted in evidence. This was a five-year lease under the terms of which the first year was free, with a rent of $3,000 a year thereafter. The lease excluded the cost of firewood, stove oil and diesel for the generator. According to the appellant, the payer paid these expenses in 2005. The camp could not be used after 2005, because it was not in compliance with commercial requirements and the Canada Select program. Although the respondent had previously asked the appellant to disclose his evidence, it was only at the hearing that this lease was mentioned for the first time.

[12] Thirteen non-resident bear hunting permits were issued to the payer in 2005, seven of which were issued on May 23 and six of which were issued on May 29,

2005. According to the black bear registration reports filed by the payer with the New Brunswick Department of Natural Resources and Energy, 12 black bears were killed from May 23 to June 2, 2005. There are no other reports or permits in the payer's name in 2005.

[13] The only known version of events given by the payer followed a telephone conversation between him and the respondent's investigator. The payer allegedly told the investigator that the appellant had been hired to work as a guide and promote the business during the season, and that it was the payer who took care of the business after the hunting season was over.

[14] The appeals officer filed in evidence the deed of sale of the appellant's camp and testified that his investigation showed that it cost the owner of JLR approximately $10,000 to lodge his clients in 2004. Thus, the payer saved this amount in rental fees in 2005.

[15] The first issue is to determine whether there was a contract of service between the payer and the appellant from May 30 to September 3, 2005. In *Wiebe Door Services Ltd v. Minister of National Revenue* [1986] 3 F.C. 553, the Federal Court of Appeal gave some useful tests for answering this question. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada endorsed these tests criteria and summed up the state of the law as follows at paragraphs 47 and 48:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. 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. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[16] In *Charbonneau v. Canada* [1996] F.C.J. No. 1337 (Q.L.), Marceau J.A. noted that the factors in question are reference points which are generally useful to consider, but not to the point of jeopardizing the ultimate goal of the exercise, which is to determine the overall relationship between the parties.

[17] In a recent judgment, the Federal Court of Appeal once again explained the legal principles which govern the issue of insurability of employment. In *Livreur Plus Inc. v. Canada,* [2004] F.C.J. No. 267, Létourneau J.A. summarized these principles as follows at paragraphs 18 and 19 of his judgment:

> In these circumstances, the tests mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025, namely the degree of control, ownership of the work tools, the chance of profit and risk of loss, and finally integration, are only points of reference: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)* (1996), 207 N.R. 299, paragraph 3. Where a real contract exists, the Court must determine whether there is between the parties a relationship of subordination which is characteristic of a contract of employment, or whether there is instead a degree of independence which indicates a contract of enterprise: *ibid.*
>
> Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D&J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, *supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, "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".

[18] That being said, the facts in this case show that the appellant's services were required as a guide and that he had to promote the business, that is to say, to find clients. There is no doubt that he was the one who had the knowledge and skills required to operate the business and act as a guide. His experience as a businessman allowed him to ensure proper management, and his experience as a hunter and guide allowed him to give good customer service. His talents were used to serve the clients, not the payer. In my opinion, in such circumstances, it was very difficult for the payer to ensure that the service complied with the applicable legislation and standards. Not only was the payer not present where the services were rendered, but it was also impossible for him to contact the appellant during the day. Even if the appellant could contact the payer in the evening, it was highly improbable that the

payer could give any instructions, as he had no knowledge of guiding or of the clients' needs.

[19] The appellant testified that to be able to act as a guide, he needed a truck, and he purchased one for the price of $10,350. The only expense paid by the payer was gasoline, which the appellant purchased with the payer's credit or debit card. The fact that the reimbursement of other expenses by the payer was minimal is an important detail. This is a situation which does not support the argument that there was a contract of service, especially when the travelling distances to the hunting camp are considered, as well as collection of the bait before the hunting season.

[20] Transportation of clients to the hunting camp involved risks which only the appellant seems to have assumed in this case. Therefore, the appellant had a risk of loss. I should note that the payer did not testify in this case. It would have been interesting to learn about the operation of his business, for example, who purchased food for the clients and ammunition for the guides, whether the guides used their own firearms and who paid the invoices.

[21] As far as integration is concerned, there is no doubt that the appellant's work was necessary for the proper operation of the payer's business. In fact, on the basis of all the evidence, I conclude that, in this case, the payer's business could not have operated without the appellant. At first sight, it seems that such a conclusion is consistent with a contract of service, but in my opinion, it is consistent with the conclusion that the business in question really belongs to the appellant and only appears to belong to the payer. The appellant used his knowledge, truck, hunting camp, guide permit and his experience, while the payer rarely went hunting or even in the woods and worked on a full-time basis for a finance company.

[22] In this case, there are insufficient indicators of supervision by the payer in terms of instructions given to the appellant or of performance and control of the quantity or quality of the work performed.

[23] In my opinion, the evidence submitted is insufficient to allow me to conclude on a balance of probabilities that there was a contract of service between the appellant and the payer in this case.

[24] Having reached this conclusion, I do not need to deal with the alternative question. However, if I had reached a different conclusion, suffice it to say that in this case, according to the law, the evidence overall allows me to conclude that the decision of the Minister appears to me to be reasonable, that is to say, that the

appellant and the payer would not have entered into a substantially similar contract of employment if they had been dealing at arm's length.

[25] The appeal is dismissed.

Signed at Ottawa, Canada, this 25th day of October 2007.

"François Angers"

Angers J.

Translation certified true
on this 1st day of February 2008
Michael Palles, Reviser

CITATION:	2007TCC595
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APPEARANCES:

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