Docket: 2003-2412(EI)

BETWEEN:

CAMIL OUELLET,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 20, 2004, at Baie-Comeau, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Lise Bibeau

Counsel for the Respondent: Julie David

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 in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 14th day of May 2004.

"Alain Tardif"

Tardif J.

Translation certified true
on this 10th day of September 2004.

Shulamit Day, Translator

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Date: 20040514
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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal of a decision dated April 15, 2003. The decision held that the Appellant's work during the period from June 23 to September 28, 2002, for Société 9104-5658 Québec Inc., was not insurable because there was not a genuine contract of service.

[2] To explain and justify the decision under appeal, the Respondent relied upon the following assumptions of fact:

> [TRANSLATION]
>
> (a) The Payor, established on May 18, 2001, specializes in the purchase and sale of small fruits;
>
> (b) The Payor's sole shareholder is Daniel Racine;
>
> (c) The Payor's activities are seasonal and take place from summer to fall;
>
> (d) The Payor primarily buys blueberries on the north shore of the St. Lawrence River and sells them to Montréal retailers;
>
> (e) The Appellant was hired by the Payor under a verbal agreement;

(f) The Appellant's duties included buying blueberries from blueberry growers or independent pickers, checking their quality, weighing and pouring them into wood baskets and then storing them in his garage;

(g) An equal amount of blueberries was bought from both blueberry growers and independent pickers;

(h) Blueberry pickers came to the Appellant's home and he organized his own work schedule;

(i) The Appellant was responsible for the cost of the advertising identifying him to blueberry pickers as the buyer;

(j) There was no specific agreement between the Payor and the blueberry sellers;

(k) The Payor set the price of the blueberries purchased by the Appellant;

(l) The Appellant assumed a loss of income when he had to resell, at a lower price, lower quality blueberries that the Payor had turned down;

(m) The Appellant, who used his garage as a warehouse, had to pay for the purchase of a ceiling fan;

(n) The Appellant used an office in his personal residence in order to compile his purchases;

(o) The Appellant had taken out public liability insurance;

(p) The Payor did not exercise any control over the Appellant's work. He came to the Appellant's home every two days in order to collect the blueberries and to return empty baskets at the same time;

(q) The harvest began during the first week of August and ended on September 28, 2002;

(r) From June 23 to the beginning of August 2002, the Appellant only repaired some broken baskets supplied by the Payor and put together cardboard boxes containing small berries;

(s) The Appellant was responsible for hiring staff to replace him when he was absent;

(t) During the period at issue, he occasionally used the services of his daughter;

(u) The Appellant received a weekly gross pay of $700, which was paid in cash to him every two weeks.

[3] Several facts that had been denied were proven to be true; I refer specifically to paragraphs (a), (b), (h), (m), (n), (o), (q) and (t). The facts admitted are those in paragraphs (c), (d), (e), (f), (i), (j), (k) and (u).

[4] During his testimony, the Appellant minimized the importance of several of the assumptions of fact. Specifically, he admitted having spent money on advertising, but he added that this was a very minimal amount.

[5] He admits that he experienced losses following the purchase of low-quality blueberries, but he added that there were only a few baskets weighing 14½ pounds each.

[6] He admitted having paid for the fan, adding that he installed it himself and that he spent approximately $35 to buy it.

[7] The same minimization occurred for the painting and use of his garage, the use of an office in his home, the cost of telephone calls – which according to the Appellant were rare – and for the use of the safe which he owned at the beginning of the period at issue.

[8] He acknowledged that he had taken out an insurance policy at the beginning of the 2000s when he had tried the blueberry business. The premiums for this coverage were not large, so he decided to renew the contract each year, which is why the policy was still in effect during the period at issue.

[9] His daughter helped him, essentially on an occasional basis, when he had to go to the bank to get the cash he needed for his operations.

[10] With respect to the work carried out prior to the blueberry harvest at the end of July or the beginning of August, things were very different; he therefore stated that the Respondent had minimized the amount of work. According to the Appellant, he had in fact performed very significant work, repairing and preparing a great many containers that were to be filled with blueberries.

[11] From the beginning of the 1990s, the Appellant operated his own carpet cleaning business, and a "Rambo" brand vacuum cleaner retail, maintenance and repair business. He indicated that he had totally stopped the commercial activities of his business during the period at issue, from June 23 to September 28, 2002.

[12] The Appellant was available at his home very early in the morning until late every day, especially during the busy season of the blueberry harvest, from the beginning of July to the end of September, when pickers came to sell their product to him.

[13] Depending upon the size of the daily purchase, Mr. Racine, described by the Appellant as his employer, came to take possession of the berries; he most often gave him the money in cash, so that he could continue purchasing blueberries.

[14] The Appellant indicated that he was responsible for the accounts; in other words, if the accounts did not balance, he had to assume the loss.

[15] Since there were surprising facts, at least in some respects, for someone who did not consider himself an employee or a worker, it would have been very important to have the Payor testify in order to obtain a more complete and substantive version of the facts, so that the court could have more complete and more transparent evidence.

[16] Although the Court accepted the version of the facts submitted by the Appellant as entirely true, several elements pointed to a conclusion that the Appellant was operating his own business during the period at issue.

[17] The amounts invested in advertising, equipment purchase (painting and fan), long distance calls, electricity and use of the space (garage, safe and office) were not significant expenses, but they were nonetheless elements that are not part of a contract of service.

[18] Although the tools used already belonged to the Appellant prior to the beginning of the period at issue, this had no effect on the nature of the work.

[19] Although the losses were not substantial, the Appellant referred to three baskets of 14½ pounds each; however, he admitted that he was responsible for unclean or poor quality blueberries. He also indicated that if the cash did not balance, he was responsible. There is reason to assume that he was responsible for

the consequences of theft of the cash, or a loss of inventory, in whole or in part, due to spoilage, fire, theft, or other incident.

[20] The test of whether a given job was carried out under a contract for services or a contract of service does not necessarily require that there be factual situations supporting one or the other of the possibilities. It is sufficient to be able to answer hypothetical questions raised by the presence or absence of distinguishing criteria.

[21] For example, if an individual must cover advertising costs, own the work tools and assume all risk related to the activities at issue, the chance that there is a contract for services is very high, even if no money has been spent and there have been no losses.

[22] The same principle applies to control; the Federal Court of Appeal has often recalled that the existence of a contract of service does not require evidence of actual control, but rather evidence for the existence of power of control. In other words, the control does not need to be or have been exercised. It is sufficient for the right of control to exist for there to be a contract of service.

[23] The sample principle exists with respect to the "chance of profit and risks of loss" criteria. It is not essential to provide evidence of substantial profit or loss to qualify a job. It is sufficient to check or analyze whether the individual who performed the work at issue did or did not have the chance of profit or risks of loss when performing the work.

[24] Some explanations and various facts reported by the Appellant raised very real doubts as to truthfulness, therefore it would have been desirable to have more complete evidence.

[25] I am referring specifically to the absence of the Payor, Racine, the fact that remuneration was paid in cash, the fact that the work at issue corresponded to the exact number hours required to qualify for employment insurance and, finally, the fact that the remuneration was such that it enabled the Appellant to qualify for the maximum amount of employment insurance benefits. The Appellant also maintained that he totally interrupted the activities of the business he had been operating since the beginning of the 1990s, which is more than surprising.

[26] Since the 1990s, the Appellant had been operating a carpet washing and cleaning business, while selling, servicing and repairing "Rambo" brand

equipment. How can we imagine a person suspending all activities for three months in order to devote oneself to another job?

[27] In 2000, he had tried his luck in the blueberry business. In 2003, he returned to this activity, but as a contractor who sold his product to several buyers. In 2002, he claims to have been simply an employee working under the orders and guidance of a certain Mr. Racine in exchange for a weekly gross salary of $700. These facts should have been the subject of more complete evidence.

[28] The burden of proof was on the Appellant. His testimony was ambiguous with respect to certain elements that were nonetheless very important for a full analysis. However, he did raise several elements that strongly supported the conclusion that the work was performed as part of his own business.

[29] In support of this conclusion, I recall that the Appellant was responsible for the risks of loss, and that he owned several of the work tools, the most significant being his garage, his fan, his telephone and his office. Finally, both before and after the period at issue, he operated his own business.

[30] With respect to the presence or absence of actual control, it would have been useful, and in fact essential, for the person claiming to have this right, a certain Mr. Racine, to appear before the court to demonstrate that fact.

[31] The Appellant stated that he has been paid in cash. He allegedly received wages that enabled him to collect the maximum amount of benefits. The alleged period of insurable work corresponded to the exact number of hours needed to qualify for employment insurance benefits. Finally, the individual who would have been able to provide fundamentally important clarification with respect to the presence or absence of any type of power of control, the alleged Payor, did not testify.

[32] These are the facts which, together, largely support the decision which resulted from the Respondent's analysis of the file, that is, that the Appellant's work was not under a contract of service but as a contractor. Since the Appellant did not meet the burden of proof upon him by presenting deficient and incomplete evidence, his appeal must be dismissed.

Signed at Ottawa, Canada, this 14th day of May 2004.

"Alain Tardif"

Tardif J.

Translation certified true
on this 10th day of September 2004.

Shulamit Day, Translator