

Docket: 2008-310(EI)

BETWEEN:

9113-7307 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 10, 2008, at Sherbrooke, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the Appellant: André Parent

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* ("the Act") is dismissed on the ground that Chantale Martel's employment with the Appellant from September 27, 2006, to April 30, 2007, constituted insurable employment within the meaning of the Act.

Signed at Ottawa, Canada, this 12th day of August 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 22nd day of September 2008.
Susan Deichert, Reviser

Citation: 2008 TCC 419

Date: 20080812

Docket: 2008-310(EI)

BETWEEN:

9113-7307 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal concerning the insurability of work done by Chantale Martel for 9113-7304 Québec Inc. ("the Corporation") from September 27, 2006, to April 30, 2007.

[2] The Appellant is the Corporation. It was represented by André Parent.

[3] After taking an oath, Mr. Parent acknowledged the truth of several assumptions of fact on which the Minister had relied in determining that the employment was insurable and which are set out in the Reply to the Notice of Appeal:

[TRANSLATION]

(a) The Appellant was incorporated on February 20, 2002.

(b) The Appellant specializes in building inspection, generally for pre-purchase, estimates and damage assessments (fire, water, vandalism, etc.).

- (c) The Appellant operates its business year-round.
- (d) During the period in issue, the Appellant's equal shareholders were André Parent and his son Pascal Parent.
- (e) The Appellant employed five people, including the two shareholders.
- (f) The Appellant's sales varied from \$350,000 to \$400,000 per year.
- (g) The Appellant was open Monday to Friday from 8:30 a.m. to 4 p.m.; however, the inspectors and appraisers could work on evenings and weekends.
- ...
- (i) The Worker began working for the Appellant on September 27, 2006, as a building inspector.
- ...
- (k) Generally, the Worker inspected houses for people who were considering a purchase. She checked most components of the house, took photographs, and was then required to write an inspection report.
- (l) The Worker always did her inspections with André Parent, who was also a building inspector (and/or Pascal).
- (m) The Worker generally met Mr. Parent at a meeting point, or went to his house and travelled with him to see the client.
- ...
- (o) The Worker did not work evenings and weekends because she had three children at home.
- ...
- (q) The Worker received 25% of the total amount billed to the client; she generally received \$100 for each inspection carried out.
- (r) She was remunerated by cheque issued weekly by the Appellant, after she submitted her invoices to the Appellant.

[4] Mr. Parent testified in a direct, spontaneous and forthright manner. He did not in any way attempt to dodge the questions or hide certain facts. He explained the facts surrounding Ms. Martel's hiring, and the contact that resulted from an advertisement that the business had published with a view to recruiting someone.

[5] Ms. Martel, who had recently graduated from studies in the field of appraisal, reported to the Corporation's office. She had no experience. The business saw the opportunity to train someone who might be able to round out the team made up of Mr. Parent and his son.

[6] Mr. Parent described Ms. Martel in a very respectful manner, stating, among other things, that she did her work meticulously. He also said that she had no experience and that she lacked the reflexes that can only be developed with experience in the field. In addition, he explained that she owned a few small tools for her work, but that the ladder, stepladder, computer, office and transportation were supplied by the Corporation.

[7] Ms. Martel usually worked three days a week due to her family obligations, and she went with Mr. Parent or his son on her visits. When she was at the sites, she observed, listened, and took notes and photographs.

[8] She then prepared the reports using the computer and software supplied by the Corporation. Mr. Parent explained that she took roughly four hours to prepare reports, which was double the time that a more experienced person would take. He also explained how the Corporation determined that it would pay her \$100 per report.

[9] According to Mr. Parent, municipalities or regional county municipalities often hire young graduates as municipal inspectors. They are generally paid a salary of \$14 or \$15 per hour. Mr. Parent explained that a report generally required a visit that averaged an hour and a half in duration, plus one-half hour to get to the premises and four hours to draft the report. This adds up to roughly six hours, which accounts for the amount of \$100 per report, or \$16.66 per hour.

[10] Mr. Parent explained that Ms. Martel was in no way autonomous; she was generally introduced as an intern. He explained that in order for a person to become competent and obtain certification from the professional association, the person must have written 400 to 500 reports.

[11] Only certified inspectors can work on their own in this field, notably because it would otherwise be impossible to get professional liability insurance.

[12] According to Mr. Parent's testimony, the Corporation that he and his son headed clearly believed that the way in which they remunerated Ms. Martel caused her to be self-employed. However, several details disclosed by the evidence establish very clearly that the relationship between Ms. Martel and the business was a true contract of service.

[13] I find, among other things, that Ms. Martel did not have the skill, experience, or professional status as a certified inspector in order to work on her own or simply go into business on her own in the field of building inspection. She needed the benefit of very close supervision. Indeed, Mr. Parent explained that Ms. Martel never went to the premises alone; she was always accompanied by Mr. Parent or his son.

[14] Mr. Parent explained several times that Ms. Martel was an intern or trainee. In other words, he was enabling her to learn this very specialized trade so that she could round out the team of inspectors in the future.

[15] Although this situation is sufficient in itself to warrant a finding that a contract of service existed, the finding is confirmed by other evidence. Specifically, Ms. Martel signed no minutes, took no part in billing, had no clients of her own, was not at all involved in file follow-up, did not bear the costs of transportation to her work sites, and, lastly, had no expectation of profit or risk of loss. Moreover, the main tools apparently belonged to the business.

[16] In fact, only two factors might have favoured a finding that Ms. Martel did her work as an independent contractor. The lump-sum amount of \$100 per file was explained very reasonably, leaving no doubt as to the reasonableness of the compensation, which essentially corresponded to the hours worked. The evidence also disclosed that Ms. Martel had a great deal of freedom in the performance of the work for which she was paid.

[17] In this regard, Mr. Parent explained that, in view of her family responsibilities, it was mutually agreed from the outset that she would enjoy considerable freedom. Thus, when she wanted, she notified the secretary that she would be unable to work a certain day, and Mr. Parent and his son accepted this limited availability.

[18] For all these reasons, the decision that the work done by Chantale Martel for the Appellant from September 27, 2006, to April 30, 2007, was insurable employment within the meaning of the Act is confirmed.

Signed at Ottawa, Canada, this 12th day of August 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 22nd day of September 2008.
Susan Deichert, Reviser

CITATION: 2008 TCC 419
COURT FILE NO.: 2008-310(EI)
STYLE OF CAUSE: 9113-7307 QUÉBEC INC. and M.N.R.
PLACE OF HEARING: Sherbrooke, Quebec
DATE OF HEARING: July 10, 2008
REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif
DATE OF JUDGMENT: August 12, 2008

APPEARANCES:

Agent for the Appellant: André Parent
Counsel for the Respondent: Marie-Claude Landry

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada