

Docket: 2008-1294(EI)

BETWEEN:

DOMINIQUE SAVOIE AND LINDA LÉTOURNEAU,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on December 1, 2008, at Montréal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellants:	The Appellants themselves
Counsel for the Respondent:	Sarom Bahk

JUDGMENT

The appeal from the determination made under the *Employment Insurance Act* is dismissed and the Minister's determination is confirmed.

Signed at Montréal, Quebec, this 3rd day of December 2008.

“Lucie Lamarre”

Lamarre J.

Translation certified true
on this 22nd day of January 2009.
Bella Lewkowicz, Translator

Citation: 2008 TCC 660

Date: 20081203

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BETWEEN:

DOMINIQUE SAVOIE AND LINDA LÉTOURNEAU,

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REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from the decision made by the Minister of National Revenue (the “Minister”) that Mr. Benoit Gauvreau had insurable employment pursuant to paragraph 5(1)(a) of the *Employment Insurance Act* (the “Act”) while working for the Appellants from September 15, 2006, to September 15, 2007.

[2] In December 2005, the Appellants bought a building with 69 residential housing units in Brossard, Quebec, with an occupancy rate of approximately 90 percent.

[3] At the time of purchase, there was an agreement between the Vendor and Mr. Gauvreau for maintenance and superintendent services, signed July 15, 2005 (Exhibit A-1). According to the Appellants, they verbally agreed to retain this agreement, offering Mr. Gauvreau a higher fixed salary: \$550 net biweekly (instead of \$400 biweekly, plus a \$10 bonus per new rental and \$5 per annual renewal), in addition to free housing, including electricity and phone. He also got two weeks paid vacation.

[4] According to paragraph 2 of this agreement, Mr. Gauvreau was employed as the superintendent and had to provide the following services:

[TRANSLATION]

- 2) The owner would like to retain the services of the superintendent, who agrees to do the following:
 - Clean the premises and common areas;
 - Clean the units;
 - Perform general maintenance of the building and its grounds;
 - Rent available units;
 - Collect rent;
 - Make repairs when needed, as well as kitchen counters and washrooms;
 - Ensure the building is clean at all times;
 - Cut the grass and maintain grass edges;
 - Rid grounds and parking lot of all papers and litter, etc.

[5] Paragraphs 7-15 of this agreement outline the obligations of the superintendent as follows:

[TRANSLATION]

OBLIGATIONS OF THE SUPERINTENDENT

- 7) The superintendent will clean the hallways, stairs, laundry room, building entrances and exits, the windows at the entrance and mailboxes if needed, and will prepare and take out the garbage twice a week.
- 8) With each move, the superintendent will see to the preparation of a clean apartment available to the new tenant (appliances and the apartment).
- 9) The superintendent will see to general building maintenance: carry out minor plumbing, locksmith work, carpentry and other work.
- 10) The superintendent will remove snow from entrances and sidewalks.
- 11) The superintendent will be responsible for renting apartments according to the terms and conditions established by the owner. Once a tenant has given notice, the superintendent will do what is necessary to rent the vacant apartment as quickly as possible. The superintendent will collect information about the person(s) who “present an interest and check them out”.

- 12) The superintendent will collect rent each month; rent is due on the FIRST DAY OF EACH MONTH.
- 13) The superintendent will put tenants' names on the mailboxes and will change them when required. The superintendent will monitor the circulation of keys and where they are stored, when necessary.
- 14) The superintendent will immediately notify the owner of all work to be done around the building whether it is his responsibility or not. And without limiting the generality of the foregoing, the superintendent will ensure the well being of tenants.
- 15) The superintendent must ensure the building and the grounds, including the parking lot, are clean at all times.

[6] In paragraph 16, the working conditions are as follows:

[TRANSLATION]

WORKING CONDITION

- 16) In principle, the superintendent is always on duty in order to respond to emergencies. If he has to be away, the superintendent will, where possible, tell the owner and a reliable tenant where he can be reached by phone.

[7] The agreement also specifies the following:

According to the following specifications:

- 3) The owner hereby retains the superintendent's services as an independent general contractor and designates him as his nominee for cleaning, maintenance, rental, and rent collection purposes for the above-mentioned building on behalf of the owner for the period of time designated hereafter and pursuant to the conditions provided for herein.
- 4) This service agreement will remain in effect until one of the parties hereto terminates it in the manner described below. The current agreement is effective:
August 1, 2005.
- 5) The parties agree that either party may terminate this agreement by means of a written notice 30 days prior to the scheduled date of termination.

[8] The Appellants said that from the moment they became owners, they did not ask that Mr. Gauvreau be available evenings and weekends. Mr. Gauvreau testified otherwise.

[9] The Appellants also said that Mr. Gauvreau was very good with electrical work and computers. While Mr. Gauvreau apparently installed a whole security camera system in the building, the Appellant paid for just the materials; they did not pay any surplus (just a few hundred dollars and other favours) to Mr. Gauvreau for his installation services. The Appellants said that Mr. Gauvreau also provided electrical services to others. Mr. Gauvreau explained that he had done some work in the neighbouring building before the Appellants became the new owners, as the former owner for whom he worked owned both buildings. Another time, he helped the superintendent of that building, who is a friend, during an emergency. Otherwise, Mr. Gauvreau said he did not work for anyone but the Appellants.

[10] With respect to the work schedule, the Appellants stated that it was hard to say how many hours Mr. Gauvreau worked. He could work 20 hours as easily as 40 in a given week. If Mr. Gauvreau wished to be away, he notified the Appellants. Mr. Gauvreau said he worked Monday through Friday, 8:00 a.m. to 5:00 p.m. He carried out the tasks assigned by one of the Appellants, Mr. Savoie, who was always on site. Mr. Gauvreau said he did not have the time for other clients. He was also available for repairs at tenants' units during evenings or weekends if tenants could not be there during weekdays.

[11] The last part of this testimony contradicts Mr. Savoie's. Mr. Savoie insists that Mr. Gauvreau never worked evenings or weekends. Mr. Savoie also said that he provided computer services to tenants for money. He also said that Mr. Gauvreau could have called on other people if he needed assistance. For example, he could have hired another person to paint the apartments. Mr. Gauvreau denied this. He said that only his wife helped him. He would never have hired another person and paid them from his own pocket. The Appeals Officer, Elio Palladini, confirmed that Mr. Savoie told him over the phone that he did not authorize Mr. Gauvreau to hire or pay people to help him without obtaining formal permission, which confirms this version.

[12] With respect to work tools, this time everyone said the same thing. Mr. Gauvreau had a small toolbox; the Appellants provided the bigger tools. Mr. Gauvreau rarely had to buy anything for the Appellants. He never had any expenses.

[13] On December 1, 2006, Mr. Savoie informed Mr. Gauvreau that he would not renew his contract of employment as of January 1, 2007. However, it seems that Mr. Gauvreau continued to be in the Appellants' employ for a longer period of time. Another letter dated August 18, 2007, again advised Mr. Gauvreau of a cessation of employment and told him to vacate his apartment as of September 18, 2007. In another letter on September 10, 2007, Mr. Savoie confirmed the end of Mr. Gauvreau's employment as of September 15, 2007 (Exhibit I-1).

Analysis

[14] Even though Mr. Gauvreau signed a contract as a self-employed person with the former owner (Exhibit A-1), which according to the Appellants was verbally renewed, Mr. Gauvreau claims he was an employee. The Minister accepted Mr. Gauvreau's position. Even though the terms of the contract as accepted by both parties cannot be ignored, this does not in any way prevent the Minister from alleging that, on the facts the contract is not what it seems to be, was not performed as provided by its terms or does not reflect the true relationship created between the parties. This is what the Federal Court of Appeal said in *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, [2005] F.C.J. No. 1720 (QL):

9 The contract on which the Minister relies, or which a party seeks to set up against the Minister, is indeed a juridical fact that the Minister may not ignore, even if the contract does not affect the Minister (art. 1440 C.C.Q.; Baudouin and Jobin, *Les Obligations*, Éditions Yvon Blais 1998, 5th edition, p. 377). However, this does not mean that the Minister may not argue that, on the facts, the contract is not what it seems to be, was not performed as provided by its terms or does not reflect the true relationship created between the parties. The Minister, and the Tax Court of Canada in turn, may, as provided by articles 1425 and 1426 of the *Civil Code of Québec*, look for that true relationship in the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage. The circumstances in which the contract was formed include the legitimate stated intention of the parties, an important factor that has been cited by this Court in numerous decisions (see *Wolf v. Canada* (C.A.), 2002 FCA 96 (CanLII), [2002] 4 FC 396, paras. 119 and 122; *A.G. Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54 (CanLII), 2004 FCA 54; *Le Livreur Plus Inc. v. M.N.R.*, 2004 FCA 68 (CanLII), 2004 FCA 68; *Poulin v. Canada (M.N.R.)*, 2003 FCA 50 (CanLII), 2003 FCA 50; *Tremblay v. Canada (M.N.R.)*, 2004 FCA 175 (CanLII), 2004 FCA 175).

10 The expression "contract of service", which has been used in the *Employment Insurance Act* since its origin and which was the same as the expression used in article 1667 of the *Civil Code of Lower Canada*, is outdated. The *Civil Code of Québec* in fact now uses the expression "contract of employment", in article 2085,

which it distinguishes from the "contract of enterprise or for services" provided for in article 2098.

11 There are three characteristic constituent elements of a "contract of employment" in Quebec law: the performance of work, remuneration and a relationship of subordination. That last element is the source of the most litigation. For a comprehensive definition of it, I would refer to what was said by Robert P. Gagnon in *Le droit du travail du Québec*, Éditions Yvon Blais, 2003, 5th edition, at pages 66 and 67:

[TRANSLATION]

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.

91 - Factual assessment - Subordination is ascertained from the facts. In this respect, the courts have always refused to accept the characterization of the contract by the parties. . . .

92 - Concept - Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in terms of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and

monitor the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way. (Emphasis added.)

[15] In the present case, the evidence shows that despite the contractions there, Mr. Gauvreau did not have much latitude and had to carry out his tasks under Mr. Savoie's control and supervision. Mr. Savoie was always on the premises and, according to his testimony, he paid particular attention to everything being done in his building. He did not let Mr. Gauvreau carry out tasks he was less competent in. He showed him how to do certain things and trusted him to some extent in the tasks he was better at. Both Mr. Palladini, who noted Mr. Savoie's statements as taken over the phone, and Mr. Gauvreau mentioned that Mr. Gauvreau was not authorized to hire or pay anyone without Mr. Savoie's formal approval. Even if Mr. Gauvreau was not busy all the time, he still had to be available in the event there was work to be done. Mr. Gauvreau said Mr. Savoie met with him daily and assigned him various tasks. Mr. Savoie did a lot himself, which shows to what point he was meticulous about the maintenance of his building. That is to his credit. But it is questionable to say that he did not control Mr. Gauvreau's work. The dismissal letters sent also indicate that Mr. Savoie considered Mr. Gauvreau an employee (Exhibit I-1). The fact raised by Mr. Savoie, that Mr. Gauvreau's income was not high enough for employee contributions, does not change the true legal relationship between the parties.

[16] From the evidence, I find that Mr. Gauvreau was an employee of the Appellants in that Mr. Savoie controlled the work carried out and required his presence on the premises unless his absence was justifiable. He did as he was told to do as superintendent. Moreover, as outlined in the case law cited, it is not because the contract states that Mr. Gauvreau was a self-employed individual that he was indeed such. It is the true relationship between the parties that must be analyzed. According to the evidence, in this relationship, Mr. Gauvreau did the work assigned by Mr. Savoie and was sufficiently supervised in doing so as to be considered an employee.

[17] For these reasons, I would dismiss the appeal and confirm the Minister's decision.

Signed at Montréal, Quebec, this 3rd day of December 2008.

“Lucie Lamarre”

Lamarre J.

Translation certified true
on this 22nd day of January 2009.
Bella Lewkowicz, Translator

CITATION: 2008 TCC 660

COURT FILE NO.: 2008-3554(EI)

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LÉTOURNEAU v. M.N.R.

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REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

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APPEARANCES:

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