Docket: 2004-4390(EI)

BETWEEN

RÉAL BUJOLD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on March 24, 2005, at Bathurst, New Brunswick

Before: The Honourable Justice François Angers

Appearances:

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| Agent of the Appellant: | Roland Couturier |
| Counsel for the Respondent: | Stéphanie Côté |

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**JUDGMENT**

The appeal is dismissed and the decision made by the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 17th day of May 2005.

"François Angers"

Angers J.

Translation certified true
On this 30th day of March 2009
Monica Chamberlain, Translator

Citation: 2005TCC299
Date: 20050517
Docket: 2004-4390(EI)

BETWEEN

RÉAL BUJOLD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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## REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from the determination by the Minister of National Revenue (the Minister) dated September 20, 2004, that the Appellant was not engaged in insurable employment within the meaning of the *Employment Insurance Act* (the Act) during the period from July 14, 2003, to March 8, 2004, (the period in issue) while he was associated with North American Forest Products Ltd. (the payor).

[2] The payor operates a forestry business that cuts timber, transports logs and sells the logs to sawmills, and saws timber in its own plants. The Appellant was employed by the payor to transport logs from the payor's woodlot sites to various destinations. To do that, he had to load and unload the logs himself. In order to do that work, the Appellant had to have access to a truck. During the period in issue, he owned a truck for transporting timber that was equipped with a loader, the value of which was approximately $75,000.

[3] At the hearing, the Appellant produced a contract of employment between himself and the payor, signed on January 24, 2003. The term of the agreement is not clear, in that all that appears under that heading is [TRANSLATION] "From to 2003". The contract states that the Appellant would be paid by the week, based on

an amount determined jointly with the employer each week. The one-page contract also contains the following provision regarding control of the work:

> [TRANSLATION]
> It is agreed that the employer will control the manner in which the work is performed on the ground. Control will be exercised by a foreperson and/or the management. The employer will instruct the operator-owner as to the location, nature and duration of the work to be performed by him.

[4] The Appellant testified that he also had to have a rental contract. He produced a contract for the period from June 1, 2004, to March 31, 2005, a period after the period in issue. For the period in issue there could therefore have been only an oral agreement for the rental of his truck, as the evidence indicated.

[5] The payor paid the Appellant based on weight, distance traveled and type of timber transported. Whether the truck was equipped with its own loader had an effect on payment. The timber was transported on a timetable established by the payor. Each week, the amount owing to the appellant, based on the timetable, was paid by two cheques. The Appellant received a paycheque in the amount of $721.20 plus four percent vacation pay, for driving the truck for one week. The usual deductions from an employee's earnings were made from that amount. The second cheque issued to the Appellant represented the amount owing to him based on the timetable. The payer deducted from that his $721.20 salary, the four percent vacation pay in the amount of $28.85, the cost of the gas supplied to the Appellant by the payor, the employer's share of the Canada Pension Plan and employment insurance premiums, and any other expenses incurred by the payor on the Appellant's behalf. In fact, the payor did not assume any expenses in connection with the services provided by the Appellant and his truck. Its role amounted solely to paying him the agreed amount per kilo for transporting timber.

[6] The Appellant's salary was based on a 60-hour work week, without regard to the actual number of hours worked. No record of hours worked was kept by the parties, and they relied on the documents produced by the sawmills to calculate the hours worked by the Appellant.

[7] The Appellant also assumed the costs of insurance, maintenance and repairs during the term of the agreement. He was responsible for any damage he caused in the course of the work. He repaired his truck himself, unless there were major repairs. He stated that he received his pay even when the truck had not been used very much, because the income generated meant that the payor was able to pay

him. In my opinion, the Appellant's work was closely tied to the use of his truck. Notwithstanding the Appellant's claim that there was a rental contract for his truck, it is obvious that the payor exercised no control over the truck during the period in issue.

[8] The invoices submitted in evidence confirm that the Appellant's salary was deducted from the revenue from his truck and that he assumed all the expenses, and so the payor paid only the rate per kilo to which they had agreed. In the Appellant's income tax returns, everything is treated as if the Appellant was operating his own business. In his testimony, he also referred to being self-employed.

[9] The payor's foreperson stated in his testimony that he supervised the construction of roads and the transport of timber. He met with the Appellant to assign work to him. The payor ensured that the Appellant and the other workers received safety training once a year. A representative of the payor met with the Appellant every day and filled out a series of documents. The hours worked by the Appellant were not recorded, but he knew what to do and he communicated by radio to say where he was with the work. The witness said nothing about a rental contract for the truck for the period in issue. The question is therefore whether the Appellant was engaged in insurable employment with the payor within the meaning of paragraph 5(1)(*a*) of the Act during the period in issue. In *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553, the Federal Court of Appeal provided a useful guide for distinguishing a contract of service from a contract for services. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada approved that guide, and summarized the law as follows:

> 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.

[10] In *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (Q.L.), Mr. Justice Marceau of the Federal Court of Appeal 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.

[11] In a recent judgment, the Federal Court of Appeal once again explained the legal principles that govern the issue of the insurability of employment. In *Livreur Plus Inc. v. Canada*, [2004] F.C.J. No. 267, Mr. Justice Létourneau summarized those 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*, F.C.J. No. 749, 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 F.C.J. No. 1454, 2002 FCA 294, "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".

[12] Recently, Létourneau J.A. reiterated all these principles, in *Tremblay v. Canada*, [2004] F.C.J. No. 802, in which he had to dispose of issues similar to the issues in this case, and in particular the application of Coverage Bulletin 97-1. He summarized the purpose of that bulletin very clearly, as follows:

> The purpose of that Bulletin is to clarify Revenue Canada's policy on workers in the forestry industry who, in addition to providing services to a contractor, lease their heavy machinery to the same contractor. The purpose is to facilitate determining the insurability of the employment and lessen the requests for rulings on insurability sent to Revenue Canada with regard to such workers.
>
> 17 In a word, the Bulletin, which I set out below, enables an operator-owner of heavy machinery to conclude two separate contracts with a contractor: a contract to rent the machinery and a contract of employment, which the Bulletin calls a contract of service. In principle, the separate agreements must be in writing although verbal agreements are also accepted, but applications based on verbal agreements are subject to special review by Revenue Canada: see also the addendum to Coverage Bulletin No. 97-1 on insurance policy, which confirms this. The rental contract and the employment contract must comply with strict conditions, otherwise the employment insurability application will be denied: …

[13] He went on to add:

> 19 In rental contracts the Coverage Bulletin properly requires that certain clauses in the contract should indicate that lessee takes control of the machinery for the duration of the agreement. The contract of employment must be separate from the rental contract. Additionally, the services of the operator-owner must not be directly and exclusively linked to the operation of the machinery and the employer must be responsible for damages or injuries caused by the operator as part of his or her duties.

[14] The Appellant contends that the facts in this case meet the requirements set out in Coverage Bulletin 97-1, which operator-owners of machinery must meet in order to be entitled to employment insurance benefits. The Bulletin provides that in order for there to be a contract of service, the parties concerned must meet the following requirements:

(a) the employment and machinery rental contracts must be separate;
(b) the method of remuneration must be indicated in the contract (hourly, daily, piece rate, etc.);
(c) the employer must have the right to control the way the work will be done. Generally, this control is exercised by a foreperson on the worksite;

(d) the employer tells the worker where and for how long he/she will render the services (location or site-timetable or schedule, duration of the employment);

(e) the employer has the right to decide what type of work the operator will do;

(f) the services of the operator-owner must not be directly linked to the production of his/her machinery. In case of major breakdown, the operator may be required by the employer to carry out other duties for which he/she will be paid accordingly;

(g) the employer is responsible for damages or injuries caused or suffered by the operator as part of his/her duties.

[15] Although at first blush there seems to be a written contract of employment and an oral rental contract in this case, the particular terms and conditions of those contracts, and specifically the term and remuneration, are not specified, and so the contracts completely fail to contain the essential elements of a valid contract. If there is a valid contract, it is impossible to separate the two contracts, since the Appellant's remuneration under the contract of employment is tied directly to the operation of his truck under the rental contract.

[16] The Appellant assumed liability for injury caused to third parties as a result of his use of his truck and for expenses associated with the operation of the truck. In my opinion, this is not remotely like a genuine rental contract. Rather, this is apparently a case of an entrepreneur operating his own business. Although the facts of the case seem, at first blush, to establish that the payor had some control over the Appellant's performance of the work, what it was, rather, was control over the quality and results of the work. The Appellant only had to comply with a safety code and environmental standards. For everything else, the Appellant was on his own. That situation leaves little room for a relationship of subordination to be established.

[17] The Appellant owned his own truck and was responsible for all expenses, including gas. Accordingly, he assumed the chance of profit and risk of loss. The duties he performed were a good fit with his business, since his remuneration was tied directly to the operation of his truck. The hours he worked were not recorded, and his record of employment does not reflect the reality.

[18] For these reasons, I conclude that in this case there was no genuine contract of service between the payor and the Appellant during the period in issue. The appeal is dismissed.

Signed at Ottawa, Canada, this 17th day of May 2005.

"François Angers"

Angers J.

Translation certified true
On this 30th day of March 2009
Monica Chamberlain, Translator

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| DATE OF JUDGMENT: | May 17, 2005 |

APPEARANCES:

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| Agent of the Appellant: | Roland Couturier |
| Counsel for the Respondent: | Stéphanie Côté |

COUNSEL OF RECORD:

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| For the Appellant: | |
| Name: | |
| Firm: | |
| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Ontario |