Docket: 2011-3663(EI)

BETWEEN:

GUY CHARBONNEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DIDIER GIRARD,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 7, 2013, at Montréal, Quebec.

Before: The Honourable Jean-Louis Batiot, Deputy Judge

Appearances:

Counsel for the appellant:	France Charbonneau
Counsel for the respondent:	Marie-France Camiré
For the intervener:	The intervener himself

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (the Act) is dismissed and the decision made by the Minister of National Revenue under section 91 of the Act, dated September 9, 2011, is confirmed on the basis that the appellant did not hold insurable employment during the period from January 1 to August 18, 2010, under paragraph 5(1)(*a*) of the Act.

Signed at Annapolis Royal, Nova Scotia, this 21st day of February 2013.

"J.-L. Batiot"

Batiot D.J.

Translation certified true
on this 12th day of April 2013
Margarita Gorbounova, Translator

Citation: 2013 TCC 55
Date: 20130221
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REASONS FOR JUDGMENT

Batiot D.J.

[1] The appellant, Guy Charbonneau, is appealing from a decision of the Canada Revenue Agency (CRA). The respondent set aside its decision after considering all the relevant facts including the submissions of Didier Girard, the payer and intervener. The appellant claims that he was eligible for employment insurance when he worked with the payer; the respondent declared him ineligible.

THE CONTRACT

[2] Having known him for a few years, the appellant approached the payer, a cabinetmaker by trade, and they discussed the possibility of working together. The appellant had had some experience in the trade 20 years ago. They agreed on the following points:

- The appellant would work in the payer's workshop and would use the tools found there.
- The appellant would submit his invoices for the work performed;
- The appellant would keep his independence and work on his own schedule;
- The payer would show him the work to be done and pay the invoices that were submitted to him.

LEGAL CONTEXT

[3] Were the appellant and the payer engaged in a contract of service (employee) or a contract for services (self-employed worker)?

[4] In Quebec, this issue must be resolved by taking into consideration the *Civil Code of Quebec*, L.R.Q., c. C-1991 (C.C.Q.) (see *Garneau v. M.N.R.*, 2006 TCC 160), which is supplemental to the common law in this area (*Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025; *Grimard v. Canada*, 2009 FCA 47). The following articles of the C.C.Q. are relevant:

> **1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> **1426.** In interpreting a contract, 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, are all taken into account.
>
> **2085.** A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> **2086.** A contract of employment is for a fixed term or an indeterminate term.
>
> **2098.** A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.
>
> **2099.** The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

THE PRACTICE

[5] This arrangement was put into practice. The payer, who specializes in building solid-wood staircases for his own clients, showed the appellant how he prepared the wood for parts of the project (such as treads and risers), but the appellant was free to do it his own way. The important part was the end result, which had to satisfy both the payer and his clients' requirements. As far as the payer could remember, the appellant did not meet this quality criterion only once or twice and redid the work himself. At all other times, the finished products were satisfactory.

[6] For each project, the payer gave the appellant the exact dimensions required for the parts. Each project was unique it seems and, of course, had to meet building code standards.

[7] The appellant said that the work hours were from 7:30 a.m. to 4:30 or 5 p.m., five days per week, that he chose the wood for the project, cut it, prepared it and assembled it as required, in the payer's workshop, using the payer's tools. He had only a few of his own tools on hand.

[8] The appellant submitted his invoices, which the payer paid by cheque or direct deposit right away without discussion. There were 37 invoices between January 4 and August 24, 2010. The appellant was not certain of the dates, but his counsel reminded him of them. All but four are for different amounts. It appears that the appellant needed money urgently sometimes, it seems, after one, two or three days of work (Exhibits A-1: $144.38 on 16/04/10, $330 on 07/05/10, $269 on 12/05/10, $231 on 14/05/1, $363 on 27/05/10, etc.). His pay increased from $15 to $16.50 per hour the week of August 15, 2010. The invoice dated August 24 is signed by the appellant like the others, with thanks and the words: [TRANSLATION] "It has been a pleasure working with you".

[9] This last invoice is a submission form that the appellant had used since June 29. Some have been corrected, all state the working hours, an amount, the appellant's SIN and the method of payment (direct or by cheque). Those are in fact invoices.

[10] The appellant admitted that he had been a self-employed worker, which gave him the independence he cherished, and received the full amount of his invoices, without any deductions. In the spring, he thought, given his repeated absences, that the arrangement was going to be over and declined the payer's second job offer with the benefits that such status entailed. He ended his association with the payer on

August 24, 2010, and went to the office of Emploi et solidarité sociale, which, upon learning that he had earned an income, referred him to employment insurance. Unfortunately, he had no insurable hours.

[11] After some back and forth between those two organizations about his submissions, the appellant received employment insurance benefits, which were then terminated, when more evidence was provided, including that of the payer. The appellant therefore received a request to repay some $19,000; he was ineligible. Hence, this appeal.

[12] The payer, Didier Girard, wanted to help the appellant, which was why he had accepted the agreement and the work hours of the appellant, who had acknowledged his absences and his money problems, attributable to his addiction problem, which he has been fighting and continues to fight.

[13] The payer was satisfied with the work completed. His workshop is open from 8 a.m. to 5 p.m., five days a week, but he let the appellant use it on one or two evenings. The payer thought that the appellant had his own clients.

[14] The payer is a member of the Confrérie du Bois in France. Every year, the Confrérie uses a Franco-Canadian organization to offer professional internships to a member who must be an employee. Thus, he has the organizational skills and accounting knowledge needed to have an employee, in the appellant's opinion on this subject. The appellant decided not to be one despite two job offers.

[15] The payer lent him a book called [TRANSLATION] *Cabinetwork from A to Z*. The appellant cited it as evidence that he had received some training from the payer. I note that the appellant had asked for this book and that the payer lent it to him voluntarily for his own technical building. It is likely that these two "wood workers" discussed their work from time to time; they were in the same workshop, knew each other and shared a common interest. But the payer provided no professional training to the appellant, because he was not a member of the Confrérie.

[16] The payer described his working relationship with the appellant, which reflected the above-mentioned agreement. He exercised no control over the appellant's conduct or over his absences; the appellant could work in his workshop during working hours on the payer's projects in order to make individual parts in accordance with established standards. He submitted invoices within his own timelines (37 in less than eight months, some for only a few hours of work), which were paid immediately. If the appellant [TRANSLATION] "complied with Didier's [the

payer's] requests" regarding invoices, it was because the payer needed to know the amounts to be paid, which was an arrangement they had had from the start, and to keep the invoices for his own accounting, which is a business and tax obligation.

[17] Indeed, when I consider the evidence in its entirety, it is remarkable to note that the appellant was free from all control on the payer's part, except regarding the quality of the finished product (which is not necessarily an indicator of a relationship of subordination, see *Combined Insurance Company of America v. M.N.R.*, 2007 FCA 60, paragraph 70). He was not subject to any subordination: he had no *obligation*, required by article 2085 C.C.Q. (contract of employment), towards the payer; he could work or not work, during the hours he preferred, for one or several days; it was his choice entirely, which he exercised without explanations. It is true that he used the payer's tools in his workshop, but it was the most convenient solution for him to do the work. The only obligation was that of the payer to pay the appellant, required by article 2098 C.C.Q. (contract of enterprise), for the work that the appellant did, when he was available, during the workshop's hours of operation, where he was "free to choose the means of performing the contract" (art. 2099 C.C.Q.).

[18] It is exactly the nature of a contract of enterprise or for services described in articles 2098 and 2099 C.C.Q. without the appellant's undertaking to carry it out. He was therefore a self-employed worker.

[19] The appeal is dismissed.

Signed at Annapolis Royal, Nova Scotia, this 21st day of February 2013.

"J.-L. Batiot"

Batiot D.J.

Translation certified true
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PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 7, 2013
REASONS FOR JUDGMENT BY:	The Honourable Jean-Louis Batiot, Deputy Judge
DATE OF JUDGMENT:	February 21, 2013

APPEARANCES:

Counsel for the appellant:	France Charbonneau
Counsel for the respondent:	Marie-France Camiré
For the intervener:	The intervener himself

COUNSEL OF RECORD:

For the appellant:

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For the respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada