Date: 20090219

Docket: A-39-08

Citation: 2009 FCA 47

CORAM: **LÉTOURNEAU J.A.**
BLAIS J.A.
TRUDEL J.A.

BETWEEN:

MICHEL GRIMARD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on February 4, 2009.

Judgment delivered at Ottawa, Ontario, on February 19, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: BLAIS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This appeal involves three issues:

1. Did the appellant supply his professional services under a contract for services or a contract of employment?

2. If this was a contract for services, were the expenses claimed by the appellant deductible from his income as business expenses?

3. Was there in this case any bias or appearance of bias on the part of the judge of the Tax Court of Canada (judge) who rendered the judgment under appeal?

[2] The first issue, which is important and recurring, provides an opportunity to clarify matters on the one hand about the supposed opposition on this point between Quebec civil law and common law, and on the other hand about what the authors M. P. Allard and C. Jacquier called [TRANSLATION] "The Federal Court of Appeal's pussyfooting in the application of federal legislation in Quebec", in an article published in the *Revue de planification fiscale et successorale*, Vol. 28, No. 1, 2007-2008, in which they concluded at page 58 that the result was uncertainty for Quebec litigants.

[3] I am including for reference purposes a table of contents of the points dealt with:

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The facts on which this litigation is based and the ensuing procedures

[4] The appellant, Mr. Grimard, is representing himself. He is a medical specialist. He resides in Sherbrooke. He offers services as a consultant in environmental health matters and in occupational medicine.

[5] From 1995 to 1998, the years to which this litigation pertains, the appellant worked as a medical assessor with the administrative tribunal initially known as the Commission d'appel en matière d'accidents de travail et des maladies professionnelles. This tribunal was created by the Gouvernement du Québec under the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001 (AIAOD).

[6] This tribunal was replaced and continued in 1998 by the Commission des lésions professionnelles (CLP) as a result of a reform of administrative tribunals. I will use the abbreviation

CLP to refer to either one of these two tribunals because the change of name of the organization has no impact on the analysis to be made of the work relationship involving the appellant.

[7] The CLP had offices in Montréal. Accordingly, the appellant had to report there regularly for his work. The work performed by the CLP involved hearing and ruling on litigation concerning health matters under the AIAOD and the *Act respecting occupational health and safety*, R.S.Q., c. S-2.1 (AOHS).

[8] Although the appellant had rented an apartment in Montréal that he also used as an office, he maintained his principal residence in Sherbrooke. For the taxation years at issue, that is to say, 1995 to 1998, he reported his CLP income as professional income. He deducted expenses incurred for rent, office expenses and travel between Sherbrooke and Montréal on weekends. As office expenses in Montréal, the appellant included telephone, computer and stationery costs.

[9] Following an audit by the Ministère du Revenu du Québec, it was determined that the assessors at the CLP had the status of employees. On March 31, 1998, the CLP was advised of this so that it could henceforth withhold source deductions of income tax and other payroll taxes that are the responsibility of employers (e.g., health insurance, employment insurance, pension plans, etc.).

[10] This determination of the status of assessors resulted in an adjustment of the appellant's income tax returns and some of the deductions he had claimed for his expenses were disallowed. The Canada Revenue Agency issued reassessments for the years in question, 1995 to 1998.

[11] The appellant appealed from the decision of the Ministère du Revenu du Québec to the Court of Québec. It was not until July 9, 2003, that the Court rendered its judgment by which it upheld the decision of the Ministère, and therefore the appellant's status as an employee, based on the criteria of control, ownership of the tools, chance of profit, risk of loss, and integration into the business: C.Q. No. 500-02-087518-002.

[12] The judgment of the Court of Québec was appealed. On March 23, 2005, the Quebec Court of Appeal upheld the judgment of the Court of Québec: *Grimard v. Québec (Deputy Minister of Revenue)*, 2005 QCCA 346. It also found that the appellant could not deduct from his taxable income his travel expenses and expenses for the apartment in Montréal even if he were a self-employed worker under a contract for services. As far as the Court of Appeal was concerned, this was a secondary residence and the travel and personal expenses had not been incurred in order to gain or produce income.

[13] The appellant objected to the notices of reassessment issued by the Minister of National Revenue (Minister) for the period at issue. His appeals were heard on October 12, 2007, and a decision was rendered on December 20 of the same year. This decision and the issues it raised are the subject of the appeal before us.

Judgment of the Tax Court of Canada

[14] So as to avoid laborious repetitions, I will simply summarize the findings made by the judge. In reviewing the first ground of appeal, I will have the opportunity to explain and analyze the judge's reasoning.

[15] On the basis of the *Civil Code of Quebec* (Code), and more specifically articles 2085, 2086, 2098 and 2099, as well as the contract signed by the parties, the judge found, like the Court of Québec and the Quebec Court of Appeal, that the work relationship between the appellant and the CLP was that of an employer/employee governed under a contract of employment.

[16] In addition, at paragraph 45 of his reasons for decision, the judge approved the finding of the Quebec Court of Appeal that the appellant's travel expenses between Sherbrooke and Montréal and the expenses related to the rented apartment were personal expenses that could not be deducted from either employment income or business income.

[17] Accordingly, the judge dismissed the appeals and upheld the assessments made by the Minister under the *Income Tax Act*.

Analysis of the grounds of appeal and the judgment

(a) Relevant legislative provisions

[18] I will reproduce the provisions relevant for the comprehension and disposition of this appeal:

Interpretation Act

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	**8.1** Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

Civil Code of Québec

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	**1425.** Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés. **1426.** On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages. **2085.** Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant

for remuneration, according to the instructions and under the direction or control of another person, the employer.	rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre personne, l'employeur.
2086. A contract of employment is for a fixed term or an indeterminate term.	**2086.** Le contrat de travail est à durée déterminée ou indéterminée.
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.	**2098.** Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.
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.	**2099.** L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et il n'existe entre lui et le client aucun lien de subordination quant à son exécution.

[19] Before examining the first ground of appeal, it is appropriate to determine the supplementary law applicable in this case. On this point, the appellant argued that the judge made an error of law. He took issue with the judge for [TRANSLATION] "having systematically and deliberately set aside and disregarded the case law concerning the criteria developed in customary law to distinguish between an employee and a self-employed worker": appellant's memorandum of fact and law at paragraphs 1, 19, 25 and 35. We will subsequently see how this was dealt with in the decision when analyzing the first ground of appeal.

b) Supplementary law applicable in this case

[20] In the article entitled [TRANSLATION] "The Federal Court of Appeal's pussyfooting in the application of federal legislation in Quebec", *supra*, the authors concluded that our Court was pussyfooting around the issue of how Quebec private law supplements federal law. It is perhaps of some use to underline the fact that the source of this pussyfooting was the federal Department of Justice, of which one of the two authors was a part.

[21] In fact, in *Construction Bérou Inc. v. The Queen*, 99 D.T.C. 5841, heard on May 13, 1999, the Department strenuously argued that Quebec civil law had to be applied as supplementary law so as to prevent Quebec taxpayers from making deductions that other Canadian taxpayers everywhere else in Canada could make.

[22] However, one month later, on June 16, and still in an attempt to prevent Quebec taxpayers from making certain deductions, this same Department argued in *Her Majesty the Queen v. Mont-Sutton Inc.*, A-764-95, June 29, 1999 (F.C.A.), that the *Income Tax Act* had to be uniformly applied to all Canadians, no matter what provincial law stated. This is what our Court wrote at paragraph 24 of the reasons for judgment in *Construction Bérou Inc.*, a judgment handed down after the *Mont-Sutton Inc.*:

> I should mention in passing that it is interesting to see that in the appeal case *Her Majesty the Queen and Mont-Sutton Inc.*, which was heard by this Court on June 16, 1999, the appellant admitted that the concept of a licence at common law does not exist in Quebec civil law. In order to deny a deduction to a taxpayer, the respondent argued that it was necessary to [TRANSLATION] "ensure a fair and equitable application of the Act

> throughout Canada" and that even if the concept of a licence was not part of Quebec civil law, "the provisions of the Act should be applied uniformly to everyone so far as possible whatever the legal system". It is a matter for surprise that in the appeal at bar the respondent is using the special nature of Quebec civil law as a reason for denying the appellant a deduction which is granted to taxpayers and businessmen operating under the common law system.
>
> [Emphasis added.]

[23] It is obvious that our Court did not appreciate the fact that, in the public interest, the executive branch argued one thing and then the contrary on the same issue within the space of one month, with the decided intent of winning in both cases.

[24] Parliament decided to take a stance two years later. By enacting section 8.1 of the *Interpretation Act*, R.S.C. (1985), c. I-21, using the *Federal Law-Civil Law Harmonization Act. No. 1*, S.C. 2001, c. 4, it acknowledged the principle of complementarity of Quebec civil law to federal law when the conditions in section 8.1 are met. In so doing, it allowed for differences in the treatment of Canadian litigants under federal legislation.

[25] Our Court gave effect to section 8.1 in *Canada v. St-Hilaire*, [2001] 4 F.C. 289, and, as we will see farther on when analyzing the appellant's work relationship with the CLP, I do not believe that the subsequent judgments of our Court have challenged the principle laid down in *St-Hilaire*.

[26] In this case, the judge was correct to rely on the Code in assessing the legal nature of the work relationship in question.

(c) Antinomy between civil law and common law

[27] However, it would be wrong to believe that there is antinomy between the principles of Quebec civil law on this point and what has been referred to as common law criteria, that is to say, control, ownership of the tools, chance of profit, risk of loss, and integration of the worker into the business.

[28] I acknowledge from the outset, and this is often the case, that there is a difference in conceptualization between common law and civil law that gives rise to another difference, this time in the approach taken to characterize the nature of the contract of employment and the contract for services. The civil law approach is Cartesian and synthetic, while the common law approach is analytical.

[29] Accordingly, Quebec civil law defines the elements required for a contract of employment or for services to exist. On the other hand, common law enumerates factors or criteria which, if present, are used to determine whether such contracts exist.

[30] Among other things, article 2085 of the Code states that, for a contract of employment to exist, the work must be under the direction or control of an employer. Its equivalent for the contract for services, article 2099, requires the lack of any subordination between the contractor and the client in respect of the performance of the contract.

[31] According to the *Le Petit Robert* and the *Le Petit Larousse Illustré* dictionaries, subordination of a person involves his or her dependence on another person or his or her submission to that person's control. Therefore, a contract for services is characterized by a lack of control over the performance of the work. This control must not be confused with the control over quality and result. The Quebec legislator also added as part of the definition the free choice by the contractor of the means of performing the contract.

[32] A contract is concluded by the exchange of the consent of the parties to the contract. Therefore, when a contract is interpreted, articles 1425 and 1426 of the Code require that the mutual intention of the parties be determined and that a certain number of factors be considered, such as the circumstances in which it was formed.

[33] As important as it may be, the intention of the parties is not the only determining factor in characterizing a contract: see *D&J Driveway Inc. v. Canada (M.R.N.)*, 2003 FCA 453; *Dynamex Canada Inc. v. Canada*, 2003 FCA 248. In fact, the behaviour of the parties in performing the contract must concretely reflect this mutual intention or else the contract will be characterized on the basis of actual facts and not on what the parties claim.

[34] In addition, as the judge justly noted, third parties such as the State may have an interest in ensuring that laws establishing payroll taxes for employers and employees are complied with, whereas one or both of the parties to the contract may find it very tempting to avoid them or to benefit from tax benefits available to contractors but not to employees.

[35] By contrast, as I have already mentioned, common law has developed criteria for analyzing the relationship between the parties. However, it must not be thought that these common law criteria are of no use (or that their use should be prohibited or that such use would be heresy) in characterizing a contract of employment under Quebec civil law.

[36] In *Wolf v. The Queen*, [2002] 4 F.C. 396, our colleague Mr. Justice Décary cited the following excerpt written by the late Robert P. Gagnon in his book entitled *Le droit du travail au Québec*, 5th ed.(Cowansville: Les Éditions Yvon Blais, 2003), page 67, and clarifying the content of the notion of subordination in Quebec civil law:

> [TRANSLATION]
>
> Historically, the civil law first developed a so-called strict or classical concept of legal subordination that was used as a test for the application of the principle of the civil liability of a principal for injury caused by the fault of his agents and servants in the performance of their duties (art. 1054 C.C.L.C.; art. 1463 C.C.Q.). This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the concept of legal subordination in a broad sense. The diversification and specialization of occupations and work techniques often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work. Thus, subordination has come to be equated with the power given a person, accordingly recognized as the employer, of determining the work to be done, overseeing its performance and controlling it. From the opposite perspective, an employee is a person who agrees to be integrated into the operating environment of a business so that it may receive benefit of his work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over the quantity or quality of the work done, and so on. Work in the home does not preclude this sort of integration into the business.
>
> [Emphasis added.]

[37] This excerpt mentions the notion of control over the performance of work, which is also part of the common law criteria. The difference is that, in Quebec civil law, the notion of control is more than a mere criterion as it is in common law. It is an essential characteristic of a contract of employment: see *D&J Driveway*, *supra*, at paragraph 16; and *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334.

[38] However, we may also note in the excerpt from Mr. Gagnon that, in order to reach the conclusion that the legal concept of subordination or control is present in any work relationship, there must be what the author calls [TRANSLATION] "indicia of supervision", which have been called "points of reference" by our Court in *Le Livreur Plus Inc. v. MNR*, 2004 FCA 68 at paragraph 18; and *Charbonneau v. Canada (Minister of National Revenue – M.N.R.)* (1996), 207 N.R. 299, at paragraph 3.

[39] For example, under Quebec civil law, integration of a worker within a business is an indicator of supervision that is important or useful to find in order to determine whether legal subordination exists. Is that not also a criterion or a factor that is used in common law to define the legal nature of an existing employment contract?

[40] Likewise, as a general rule, it is the employer and not the employee who makes the profits and incurs the losses of the business. In addition, the employer is liable for the employee's actions. Are these not practical indicators of supervision, indicating the existence of legal subordination in Quebec civil law as well as in common law?

[41] Finally, is the criterion of the ownership of work tools that is used by the common law not also an indicator of supervision that would be useful to examine? Depending on the circumstances, it may reveal the degree of an employee's integration into the business or his or her subordination to or dependence on it. It may help to establish the existence of legal subordination. In a contract of employment, more often than not, the employer supplies the employee with the tools required to perform the work. However, it seems to me to be much more difficult to conclude that there is integration into a business when the person performing the work owns his or her own truck with his or her name advertised on the side and containing some $200,000 worth of tools to perform the tasks that he or she does and markets.

[42] It goes without saying, in both Quebec civil law and common law, that, when examined in isolation, these indicia of supervision (criteria or points of reference) are not necessarily determinative. For example, in *Vulcain Alarme Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 749, (1999), 249 N.R. 1, the fact that the contractor had to use expensive special detection equipment supplied by the client to check and gauge toxic substance detectors was not considered to be sufficient in itself to transform what was a contract for services into a contract of employment.

[43] In short, in my opinion there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is

required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.

[44] Let us now examine the reasoning followed and the principles applied by the judge to arrive at the conclusion that the parties in question were governed by a contract of employment.

(d) The role and jurisdiction of our Court in this appeal

[45] Before examining the grounds of appeal, I must determine the standard of review applicable in this case and thereby define the role and jurisdiction of our Court in connection with the judge's decision.

[46] The role and jurisdiction of our Court in this appeal are established and governed by the standard of review developed by the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. Questions of law are subject to the standard of correctness. Questions of fact or of mixed fact and law may only be reviewed by us if they contain a palpable and overriding error.

(e) Did the appellant supply his professional services under a contract for services or a contract of employment?

[47] It should be recalled that, contrary to the appellant's submission that this was a contract for services, the judge considered that the contract concluded between the parties was a contract of employment. As already mentioned, in order to do so he applied the principles of civil law to the legal characterization of the appellant's work relationship. He also cited and analyzed the case law of our Court on this point. He also considered Parliament's intention.

[48] As far as the intention of the parties was concerned, he reviewed the clauses of the contract and assessed the testimony given by the appellant as well as that given by the representatives of the CLP. He noted that the contract was silent as to its true legal nature: see paragraph 28 of his reasons for judgment. He identified the clauses of the contract that had indicia of supervision as well as clauses that had indicia of autonomous performance without any subordination: *ibid*, paragraphs 28 to 30.

[49] On the basis of the documentary and testimonial evidence the judge concluded that the CLP did not question the legal nature of the contract. As far as it was concerned, it was essential to do away with some of the administrative constraints connected with recruitment and staffing in the public service: *ibid* at paragraph 32. In addition, what was important for the CLP was for the assessor to have status as a term contract worker and not as a permanent employee having job security. According to the judge, this explained why the CLP did not determine the legal nature of the contract it offered and its tax consequences: *ibid*, at paragraphs 33 and 34 of the decision.

[50] The judge reached the following conclusion at paragraphs 35 and 36 of his decision:

> [35] In my opinion, little weight should be given here to the way the two parties may have understood the nature of their contract at the time they entered into it. They never specifically contemplated whether Mr. Grimard was to be free to choose the means of performing his contract or whether he was to work without direction or control by the board.
>
> [36] In any event, as the courts have stated many times, the fact that the parties characterize their contract as a contract for services does not necessarily mean that it is one. It is necessary to look at their conduct to determine the true nature of their contractual relationship. In France, this is referred to as the application of the "reality principle". Here, I have no hesitation in concluding that the parties' interpretation is not in keeping with reality, as indeed the Court of Quebec and the Quebec Court of Appeal both concluded: by its true nature, the contract in question is a contract of employment rather than a contract for services. The board had a right of direction or control over Mr. Grimard, and he provided his services under the board's direction or control. There was thus a relationship of subordination between him and the board.

[51] Paragraphs 37 to 46 show that the judge looked for and analyzed indicia of either supervision or unsupervised performance of the work. Contrary to what the appellant alleged, it is interesting to note that, in this regard, the judge examined the common law criteria.

[52] For example, at paragraph 39, the judge noted that the CLP gave the appellant "an office equipped with all the tools he needed to do his work". In other words, he inquired into the ownership of the work tools.

[53] At paragraphs 42 and 43 the judge examined the appellant's integration into the business. He noted that the board's organization chart showed that "the assessors' work is an integral part of the board's machinery". He also linked this factor to the length of service (8 years), the fact that the appellant worked full time and on a continuous basis, the compensation conditions, the fact that the services were rendered to the CLP at its office and that all tools required to perform the work were

supplied by the CLP. If the judge's reference to the organization chart of the CLP may lead to the impression that he examined integration into the business from the point of view of the payor rather than from that of the employee, the other factors he noted correct that impression.

[54] Finally, the judge examined the risk of loss to conclude that the appellant did not have any if he took a vacation (he was entitled to four weeks of paid vacation annually), if he did not work on statutory holidays (he was paid), if he had to travel in the performance of his work (his expenses were reimbursed), if he made a mistake in good faith in the performance of his work (he was covered by immunity from prosecution).

[55] The appellant was surprised by the fact that it was possible to conclude that he was an employee of the CLP even before his status as a public service employee was granted on the day after the reevaluation of his status by the Ministère du Revenu du Québec. According to him, if he subsequently became an employee, it is because he was not one before.

[56] However, this situation, which seems contradictory from a factual point of view, is not so from a legal point of view. It is not unlikely, as the concept of employee is legally defined and interpreted on the basis of the context and for the purpose for which it is used.

[57] For example, the *Canada Labour Code* has a very broad and far-reaching definition of the term "employee" for the purpose of determining the composition of bargaining and certification

units. However, the definition is more restrictive for the purpose of staffing and membership in the public service.

[58] In this case, the purpose was the following: characterize the legal nature of the contractual work relationship existing between the appellant and the CLP. To do so, the definitions of contract of employment and contract for services provided for in the Code had to be applied.

[59] The determination of the legal system applicable to the issue raised in this case, that is to say, the nature of the work relationship between the parties, is a question of law. On this point, the judge did not make any error that requires or warrants our intervention. He used Quebec civil law as a supplement to federal law, as required under section 8.1 of the *Interpretation Act*.

[60] The application of the principles of Quebec civil law to the facts of the case raises questions of mixed fact and law.

[61] The judge attempted to determine if there was any subordination between the appellant and the CLP. In order to do so, he analyzed the contract, reviewed the intention of the parties and examined their actual behaviour. As we have seen, he took numerous indicia into consideration, including those used in common law provinces, which could enable him to determine the legal nature of the relationship of the parties.

[62] As is often the case in such matters, the judge was confronted with sometimes contradictory indicia. He weighed them to finally reach the conclusion that the work relationship between the appellant and the CLP was governed under a contract of employment within the meaning of the Code.

[63] The appellant has raised many criticisms about the judge's analysis of the legal situation, especially concerning the concept of integration into the business, the worker’s control as opposed to control over the result of the work, and the fact that he was paid during absences due to illness.

[64] The appellant added that, in looking for the relationship of subordination, the judge mistakenly took into consideration the fact that he was subject to a Code of Ethics. Likewise, the judge allegedly put too much emphasis on the fact that the appellant performed his work under the authority of a commissioner within the decision-making process of the CLP.

[65] It is not clear that the judge erred with respect to the payment of remuneration during an absence due to illness because, according to the judge, the appellant had admitted that he could be paid even if he missed a day of work on account of illness: see paragraph 29 and footnote 21 of the reasons for decision. In any event, if there was a mistake, it is not in itself sufficient to invalidate the judge's findings about the legal nature of the work relationship, which were based on the many other indicia of supervision.

[66] The application of a Code of Ethics by the CLP and the fact that the appellant performed his duties under the authority of a commissioner remain relevant indicia of supervision that the judge could take into consideration. However, he also weighed these indicia by acknowledging the fact that the appellant ". . .had considerable autonomy in performing his work, that is, in using his medical expertise to answer the questions submitted to him by the board": see paragraph 38 of the reasons for decision.

[67] The judge had to determine the legal nature of the overall relationship between the parties in a constantly changing working world: *Le Livreur Plus Inc. v. The Minister of National Revenue and Laganière*, 2004 FCA 68, at paragraph 17; *Wolf v. Canada*, [2002] 4 F.C. 396 (F.C.A); and *Attorney General of Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54. This is what he did. It is possible that, were a microscopic examination of the judge's analysis of some of the indicia to be conducted, it would be necessary to make some distinctions and clarifications. However, I cannot find that there is such a palpable and overriding error in this analysis, to paraphrase the standard of the Supreme Court, that requires and warrants our intervention.

(f) <u>If this was a contract for services, were the expenses claimed by the appellant deductible from his income as business expenses?</u>

[68] In view of the conclusion I have reached and section 8 of the *Income Tax Act*, the judge did not commit any error in finding that the expenses claimed by the appellant were not deductible.

(g) <u>Was there in this case any bias or appearance of bias on the part of the judge of the Tax Court of Canada (judge) who rendered the judgment under appeal?</u>

[69] The appellant submitted that the judge should have [TRANSLATION] "recused himself to avoid being accused of bias": see the appellant's memorandum of fact and law at paragraphs 3 and 29. According to him, the judge was biased and the issue was already prejudged: *ibid* at paragraphs 19, 24, 27, 34 and 36. As proof of this, he mentioned the fact that the judge referred to an article that he himself wrote, entitled “Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law* (2005), Montréal, APFF, 2005, which he cited three times in support of his reasoning and conclusions. This is an article the judge wrote while serving as a judge and the appellant discovered its existence only on reading the reasons for judgment.

[70] It is always difficult and even perilous for a serving judge to publish in an article his or her opinions on a subject or issue on which he or she may eventually be called upon to rule. This may give rise to a perception on the part of a litigant, especially a self-represented citizen, that the judge has already made up his or her mind and that the judge is not in any way willing to set aside a firm stance that he or she has previously taken and stated. In this area, perception is often and unfortunately just as or even more important than reality. Obviously this problem does not arise when the judge's opinions are given in a decision that he or she has rendered. Because a judge must apply the law consistently, he or she may, without any subsequent difficulty, cite as precedents the judgments he or she has previously rendered and which have become *res judicata*.

[71] I attentively and meticulously examined the reasons for the judge's decision to determine if they could objectively give rise to a conclusion or a perception that he was biased. For the following reasons, I am satisfied that a person who is informed as to the facts and the circumstances, viewing the matter realistically and practically and having thought the matter through, could not reach this conclusion: see the test developed by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at paragraph 40.

[72] The judge first referred to the article he wrote at paragraph 20 of his reasons. However, he simply did so to reproduce the comments of the Minister of Justice of Quebec concerning article 2085 of the Code, which comments were included in this article. In fact, he reproduced the Minister's opinion on this point. The reference to his article was only for ease of consultation.

[73] This reference to the Minister's opinion was given in the detailed and serious analysis he made of the case law of our Court, of the Supreme Court of Canada and of Quebec authors. No reasonable apprehension of bias may be inferred from the analysis he made of the applicable law.

[74] The second reference the judge made to his article was of the same nature as the first: see paragraph 26 of his reasons for decision. He repeated a quotation he had used of a relevant excerpt from a decision of the Superior Court of Quebec about the interpretation of a contract for services.

[75] Finally, the last reference was made in paragraph 27 of his reasons for decision. In his article, the judge discussed the state of the case law of our Court on the scope to be given to the

intention of the parties in relation to the reality of how services are delivered. This was the case law he correctly applied to the facts of this case.

[76] For these reasons, I cannot allow the third ground of appeal raised by the appellant.

Request for an equitable remedy

[77] The appellant complained of the harm he sustained because he was reassessed for the years 1995, 1996, 1997 and 1998. The reassessments were issued following a new legal characterization of his work relationship with the CLP. More than ten (10) years have gone by since the reassessments were issued and, according to the appellant, the interest accrued during this period exceeds the initial amount of the contested assessments.

[78] There is no doubt that both the appellant and the CLP acted in good faith in defining their work relationship and the legal characterization they gave it. A letter dated July 8, 1996, sent by the CLP to Ms. S. Beauvais, certification agent, mentioned that the conciliation assessors (a status of assessor similar to that of the appellant), hired by contract (like the appellant), to deliver conciliation services, were, according to the CLP, bound by a contract for services and not a contract of employment: see Appeal Record, Volume II, at tab 11. It is obvious, and this is also shown in this matter, that the CLP considered that the contracts it awarded were contracts for services.

[79] The appellant complained of the fact that part of the harm he sustained was caused by the lengthy period of time taken by the Canada Customs and Excise Agency to respond to the notices of objection he had filed several years previously. For these reasons, he requested that this Court award a remedy in equity.

[80] The *Income Tax Act* establishes the tax liability of a taxpayer. Our Court cannot exempt a taxpayer from its application or relieve a taxpayer from this responsibility.

[81] Likewise, we do not have the authority to intervene with the payment of interest. In *Gilbert v. Canada*, [2000] F.C.J. No. 550 (QL), our Court wrote the following:

> [5] In his conclusions the appellant asked to be relieved from the payment of interest on the amount owed. In the circumstances, this is not a negligible amount since the notice of assessment dates back to 1984, for the 1981 taxation year.
> [6] We do not have jurisdiction to grant this request. The power to remit interest is a discretionary one and the Minister of National Revenue has been made responsible for exercising it by s. 220(3.1) of the *Income Tax Act*.

[82] In this regard, the Minister has the discretion necessary to relieve the taxpayer's burden. If considered appropriate and on request, the Minister may award the remedy he considers applicable in the circumstances.

Conclusion

[83] For these reasons, I would dismiss this appeal without costs.

"Gilles Létourneau"

J.A.

"I concur.
Pierre Blais, J.A."

"I concur.
Johanne Trudel, J.A."

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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