Dockets: 2015-5465(EI),
2015-5466(EI)

BETWEEN:

LES PRODUCTIONS DU GRAND BAMBOU INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence on May 11 and 12, 2017, at
Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Andréa Gattuso
Counsel for the Respondent:	Alain Gareau

JUDGMENT

These appeals from the Minister of National Revenue's decisions dated September 17, 2015, to the effect that (1) workers François Blouin, Mathieu Breton, Xavier Berthiaume, Michel Bacon, and Benoit Bellehumeur held insurable employment with the appellant for the period from January 1, 2014, to June 18, 2015, and that (2) worker Auguste Peterson held insurable employment with the appellant for the period from May 23 to August 31, 2014, are dismissed. Accordingly, the employment of the workers referred to above is employment included in insurable employment during the respective periods at issue under

paragraph 6(*g*) of the *Employment Insurance Regulations*, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of August, 2017.

"Réal Favreau"

Favreau J.

Citation: 2017TCC161
Date: 20170829
Dockets: 2015-5465(EI),
2015-5466(EI)

BETWEEN:

LES PRODUCTIONS DU GRAND BAMBOU INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] These are two appeals heard on common evidence, from the decisions dated September 17, 2015, by the Minister of National Revenue (Minister) that (1) workers François Blouin, Mathieu Breton, Xavier Berthiaume, Michel Bacon, and Benoit Bellehumeur held insurable employment with the appellant for the period from January 1, 2014, to June 18, 2015, and that (2) worker Auguste Peterson held insurable employment with the appellant for the period from May 23 to August 31, 2014. Workers François Blouin, Mathieu Breton, Xavier Berthiaume, Michel Bacon, Benoit Bellehumeur, and Auguste Peterson, are collectively referred to as the "workers", and the periods from January 1, 2014, to June 18, 2015, and from 23 to August 31, 2014, are collectively referred to as the "period at issue".

[2] The respondent submits that the workers' employment was employment included in insurable employment under paragraph 6(*g*) of the *Employment Insurance Regulations*, SOR/96-332 (*Regulations*) because the appellant was then acting as a placement agency and the workers were called to provide services to that placement agency's clients, under the direction and control of the appellant's clients, while being paid by the appellant.

[3] The appellant submits that the workers provided their services as independent contractors.

File histories

[4] Worker Auguste Peterson filed a claim for employment insurance benefits with Service Canada. Service Canada then asked the Canada Revenue Agency (CRA) to determine whether the worker had held insurable employment with the appellant during the period from May 23 to August 31, 2014.

[5] In letters dated February 16, 2015, the CRA advised Service Canada, the worker, and the appellant of its decision that the worker's employment with the appellant was insurable during the period at issue, pursuant to paragraph 5(1)(*d*) of the *Employment Insurance Act*, L.C. 1996, c. 23, as amended (*Act*), because the conditions of paragraph 6(*g*) of the *Regulations* were met.

[6] The appellant appealed the CRA decision to the respondent, who confirmed the CRA's decision in letters dated September 17, 2015.

[7] Workers François Blouin, Mathieu Breton, Xavier Berthiaume, Michel Bacon, and Benoit Bellehumeur were selected in the process of an examination by the CRA's Trust Accounts Examination Section, which asked the CPP/EI Rulings Division to decide whether these workers held insurable employment with the appellant during the period from January 1, 2014, to June 18, 2015.

[8] In letters dated June 19, 2015, the CRA advised Service Canada, the workers, and the appellant of its decisions that the workers' employment with the appellant was insurable during the period at issue, pursuant to 5(1)(*d*) of the *Act*, because the conditions of paragraph 6(*g*) of the *Regulations* were met.

[9] The appellant appealed the CRA's decision to the respondent, who confirmed the CRA's decisions in letters dated September 17, 2015.

The presumptions of fact

[10] The respondent assumed the following presumptions of fact in the record of workers François Blouin, Mathieu Breton, Xavier Berthiaume, Michel Bacon, and Benoit Bellehumeur:

[TRANSLATION]

(a) the appellant is an incorporated entity;
(b) the appellant is also known as Les Éditions Bavard;
(c) the appellant's sole shareholder is Mr. Yves Savard;
(d) the appellant operates a performance agency and artists' agency;
(e) the workers were hired by the appellant under agreements concluded in the province of Quebec;
(f) the workers were hired as technicians;
(g) the workers were hired as technicians; the appellant's role was to provide technical workers, such as stage, audio, light, and video technicians, to its clients ("**clients**");
(h) the appellant invoiced its clients for the workers' services, namely:
    (i) a lump sum; or,
    (ii) an hourly rate between $21 and $24 for the hours worked in 2014;
    (iii) an hourly rate between $22.50 and $28.50 for the hours worked in 2015;
(i) the appellant paid the workers for the services that they provided to clients in a lump sum or at an hourly rate between $16 and $18;
(j) the appellant determined the lump sum and the workers' hourly rate;
(k) during the period at issue, the appellant provided qualified technicians, including the workers, to its clients;
(l) the workers' services were offered to support the services of the clients' technical teams;
(m) the workers performed the services according to the clients' needs;
(n) the workers worked under the clients' supervision through supervisors, technical directors, managers, or show producers;
(o) the clients assigned the work location and the task lists to the workers;
(p) with the exception of tools normally provided by employees in the industry, the material and equipment were provided by the clients;
(q) the workers had to perform the tasks themselves and could not sub-contract their work;
(r) the appellant paid the workers for their services by cheque; and,
(s) the appellant paid the workers on a weekly basis.

[11] The presumptions of fact in the record of worker Auguste Peterson that were assumed by the respondent are the same presumptions of fact as those set out above except for paragraphs (f), (h), (i), and (j), which read as follows:

[TRANSLATION]

(f) the worker was hired as a sound technician;
(h) the appellant invoiced its clients for the services provided by the worker, namely:
  (i) a lump sum; or,
  (ii) an hourly rate of between $12 and $24 for the hours worked;
(i) the appellant paid the worker a rate of $17 per hour for the services he provided to the clients;
(j) the appellant determined the worker's hourly rate;

The issue

[12] The issue is not whether the workers were employees or independent workers, but rather to determine whether the appellant was a placement agency during the period at issue and whether the appellant had the obligation to withhold source deductions from the workers' remuneration.

The testimony

[13] Mr. Yves Savard, President and owner of 100% of the appellant's voting shares, testified at the hearing. He explained that the appellant has operated since 1979 and that it offers services for the production of shows and events, by providing stage, audio, lighting, and video technicians, rigging personnel, etc. The appellant also provides the technical direction for L'Équipe Spectra Inc.

[14] The appellant has two employees, Mr. Savard and an administrative assistant. The appellant keeps a database of stage technicians' names, which it uses when clients need workers.

[15] Technicians are recruited based on word-of-mouth. The candidates submit their résumés to Mr. Savard, who then schedules interviews with the candidates to verify each one's skills and achievements. A service agreement is concluded with the technicians in a very large majority of the cases. The appellant does not guarantee the number of work hours.

[16] For example, Mr. Savard introduced into evidence the service agreement dated June 11, 2015, concluded with François Blouin, who declared that he was an independent contractor. The services offered by the technician are not exclusive and the agreement's term is indefinite. The remuneration for the technician's services is a predetermined hourly rate or a lump sum determined by the appellant.

The hourly rate is not stated in the agreement because it varies according to the venue's rates. The technician undertakes to submit an invoice for the services provided to the appellant, services which are taxable supplies for the purposes of the Goods and Services Tax and the Quebec Sales Tax. The appellant can terminate the agreement at any time without cause, in which case the technician is only entitled to claim the payment due for services provided before that termination.

[17] The list of available technicians is updated daily by the appellant after the technicians call, around 11:00, to provide their availability for the next day. If the appellant has requests for the technicians' services, it calls them to ensure their availability and to tell them when and where to report. The technicians are then also advised of the hourly rate. In 2014, the hourly rate was between $16 and $18 an hour.

[18] When the technicians arrived at the time and place indicated by the appellant, the technicians received a technical data sheet from the presenter indicating the layout of the venue, the placement of the musical instruments, the scenes and rigging arrangement, the exact placement of the lights, sound consoles, and speakers. According to Mr. Savard, the part of the technical sheet that involves the lighting is sometimes given to the lighting technicians the day before the general installation of the equipment.

[19] Mr. Savard is not present at the work location, but he submits the list of the names of technicians who must be present at the work location. If a technician does not report to work at the agreed time, the presenter's representative calls Mr. Savard to resolve the problem or to find another technician. It is the responsibility of the presenter's representative to ensure that all the equipment is functioning properly. If a problem arises, the technicians must resolve it. Mr. Savard gives the appropriate lighting instructions to the technicians sent by the appellant to provide the services, but the appellant or Mr. Savard do not supervise the work performed by the technicians and do not assess the quality of the technicians' work. However, it sometimes happens that a presenter requests that certain technicians be excluded or replaced at the work location. The appellant does not guarantee the quality of work performed by the technicians sent by it to provide the services.

[20] The presenter gives the technicians their work schedule when they arrive at the work location. A minimum of four hours of work per call is the industry standard but is not a regulatory requirement. The technicians provide their own small tools that may be required to install the equipment that they operate. In the

event that a technician breaks equipment, the technician is responsible for the cost of the repair. The technicians do not have to wear a uniform except to wear black clothes on stage.

[21] Once the work was done, the technicians submitted their respective invoices to the appellant, indicating the date and number of the invoice, the name of the client for whom services were provided, the dates worked, the nature of the work performed, the nature of the services provided, the number of hours worked per day, the hourly rate, the fees per day worked, the fees and taxes, if applicable, as well as the tax numbers. According to Mr. Savard, the fees earned by the appellant for the services provided by the technicians represent more than 50% of the appellant's total revenues.

[22] The appellant pays the fees by cheque once a week, on Thursdays. The cheques are sent to the Astral box office or are mailed. The cheques are prepared by the appellant's administrative assistant and are signed by Mr. Savard or his spouse, without source deductions for taxes, contributions to the Quebec Pension Plan, or Canada Employment Insurance.

[23] At the end of the year, the appellant issues T4As to all technicians who were paid by the appellant over the year.

[24] During his testimony, Mr. Savard also explained that, on top of the work placement activities, the appellant acted as a consultant for the technical management of events and shows. This activity can include the preparing a budgetary estimate for an event, determining the equipment necessary to put on the event, which can be rented by the appellant or by the presenter, and determining how many technicians will be required to hold the event.

[25] The appellant's main client for consultation services are provided by Mr. Savard himself, who has more than 35 years of experience in planning events and shows.

[26] The appellant's main clients for the consultation services are L'équipe Spectra Inc. and the Groupe Evenko. Mr. Savard introduced into evidence the detailed report of the appellant's invoices paid by L'équipe Spectra Inc. from April 15, 2008, to March 17, 2017, 2017, which amounted to $446,087.54, excluding taxes. The payments to L'équipe Spectra Inc. were made on retainer, generally every three months, and included the cost of Mr. Savard's services and an amount for the fees paid for the technicians' services. For the Groupe Evenko, the

appellant issues one invoice per event according to a budgetary estimate, with adjustments for contingencies.

[27] Mr. Savard also adduced into evidence an invoice dated January 9, 2017, from Solotech Inc., for equipment rental and a purchase order for Loto Québec's Corporate Procurement division dated July 25, 2014, to provide technical services and stage management for the Casino de Montréal for the period from September 1, 2014, to August 31, 2016.

[28] On cross-examination, Mr. Savard explained that one of the technicians sent to a work location had a list of technicians who were supposed to be on site and took the technicians' attendance. The appellant could also verify with the producer the hours worked by the technicians.

[29] Two workers, Michel Bacon, a rigger, and Xavier Berthiaume, an audio technician and soundman, testified at the hearing.

[30] Mr. Bacon described the work of a rigger, namely to install equipment on the rigs and control the rigs during the show. He submitted an example of a production sheet for the installation of 32 rigs for a show at Théâtre St-Denis. He also filed the service agreement that he concluded with the appellant in 2015, an example of an invoice to the appellant, dated April 17, 2017 (fees + taxes), and all his tax slips, employment income, and various income for the 2014 and 2015 tax years, which were attached to his Quebec income tax returns. Mr. Bacon explained that he provided services to many companies and that he was also considered to be an independent worker when he worked with the appellant. He admitted, however, that sometimes he worked as a rigger as an employee with other organizations. Finally, he explained that if he had to leave a work location, he had to find a replacement. When this situation occurred, he still invoiced the appellant for his services and paid his replacement. He claimed a deduction for the fees paid to his replacement in the calculation of his income.

[31] Mr. Berthiaume also filed his service agreement with the appellant for 2013 and he filed a statement of his income and expenses for 2014 that shows that he acted as an employee when he worked for theatres or performance halls, and as an independent worker when he worked for the appellant. He also explained that if he could not carry out a mandate from the appellant, he had to then find a replacement that he would pay himself, unless that replacement came from the appellant's list of technicians, in which case the replacement was paid directly by the appellant.

[32] Mr. Michaël Frascadore of the L'équipe Spectra Inc. testified at the hearing at the appellant's request. He is currently vice-president of production. L'équipe Spectra Inc. organizes the Festival International de Jazz de Montréal, the FrancoFolies de Montréal, and Montréal en Lumière, which represents 600 shows per year. L'équipe Spectra Inc. offers consultation services (preparing stage design, production schedules, and equipment lists, production management, technical management services, and stage technician supplies). He has done business with the appellant for about eight years.

[33] Mr. Frascadore explained that L'équipe Spectra Inc. has a verbal agreement with the appellant, which is not exclusive. The appellant's main competitors are Les Productions Pros-Spec, Cubix, and Jardin à Cour. In his opinion, the appellant is specialized in subcontracting and he calls on the appellant primarily to supplement the basic teams because the Festival International de Jazz de Montréal, the FrancoFolies de Montréal, and Montréal en Lumière have their own teams and their own employees.

[34] When he wants to call on the appellant's services, he asks the appellant to submit a bid. The bid is then reviewed; the parties agree on the services to be provided and the parties negotiate the cost of the services. When an agreement is reached, it is verbal and there is no signed contract. After the appellant provides the services, it invoices L'équipe Spectra Inc. by budget item. Examples of invoices dated during the period at issue were filed into evidence as exhibit I-1 and the principal budget item of these invoices is for technical workers.

[35] Mr. Frescadore also explained that the appellant always had a representative at the work location who had to ensure that the technicians were on site and to record the hours worked by those technicians.

[36] Mr. Martin Perreault of Solotech Inc. testified at the hearing at the request of the respondent. Solotech Inc.'s main activity is the sale and rental of equipment for shows, including workers for the assembly, disassembly, and operation of stage equipment. It is a turnkey service.

[37] Mr. Perreault indicated that Solotech Inc. is not a competitor of the appellant because the services offered by the two companies are different. In 2014 and 2015, Solotech Inc. called on the appellant's services for occasional workers. For Solotech Inc., the appellant only supplies workers.

[38] In 2014, Solotech Inc. had 450 employees, of which fifty or so were stage technicians. Solotech Inc. gives priority to its employees before calling on freelance. Solotech Inc. does not guarantee a number of hours to its technicians but does ensure ongoing training and a higher qualification level, which improves the quality of their work and ensures greater mobility in their assignments outside Quebec and even outside Canada.

[39] Mr. Perreault explained that, at the technicians' work locations, there was always a team leader or project manager to connect the producer and the technicians, to ensure that the technical plan was followed to the letter. The team leader is usually a representative of Solotech Inc. or the technician whom Solotech Inc. finds most trustworthy.

[40] The last person to testify was Mr. Arona Mbaye, a CRA Appeals Officer. His Appeal Report was filed into evidence. Mr. Mbaye explained that he had conducted telephone interviews with Mr. Yves Savard, the workers with the exception of Benoit Bellehumeur, two representatives of L'équipe Spectra Inc., and a representative of Solotech Inc., and that he had consulted the following documents:

(a) the report of the Rulings Officer;
(b) the information drawn from the CRA systems:
  (i) information about the payor; and
  (ii) information about the worker Peterson;
(c) information from the enterprise registrar;
(d) the documents received from the Rulings Division about the worker Peterson and the other workers connected with the case;
(e) the documents received from the Trust Accounts section, namely:
  (i) an unsigned copy of a sample service agreement; and
  (ii) Yves Savard's answers to the Rulings Officer's questionnaire;
(f) the five service agreements received from the payor that were signed with the workers, except the one with the worker Peterson;
(g) the documents received from L'équipe Spectra Inc., namely:
  (i) the payor's invoices;
  (ii) the technicians' time sheets; and
  (iii) two occupancy permits granted to the payor for commercial vehicle parking; and
(h) and invoices from Solotech Inc. for the months of June, July, August, and October 2014, for the number of hours worked by the technicians referred by the appellant.

[41] Mr. Mbaye's Appeal Report and testimony indicates that:

(a) many workers have dual tax status, namely that of independent worker and of employee, all depending on the entity that they are performing services for;
(b) the appellant issued, in 2014, four T4 slips and 249 T4A slips. For 2014 and 2015, about 300 workers received T4A slips from the appellant;
(c) the workers contacted by the CRA (Mr. Benoit Bellehumeur was interviewed not by Mr. Mbaye but rather by another CRA officer) are a representative sampling of the 300 workers affected by the CRA decisions;
(d) the six workers declared that they intended to be independent workers in the performance of their duties for the appellant's clients;
(e) the appellant's two main clients, L'équipe Spectra Inc. and Solotech Inc., gave essentially the same answers and described the same operating procedures in their relations with the appellant;
(f) the Appeals Officer found that the appellant acted as a placement agency given the tripartite nature of the relations between the three parties in this case: the appellant, the clients, and the workers. The workers were called by the appellant to provide services to the appellant's clients, under the direction and control of those clients, but all the while being paid by the appellant;
(g) Mr. Mbaye did not consider in his review the consultation services provided by the appellant to certain clients.

Legislative and regulatory provisions

[42] The provisions of the *Act* and of the *Regulations* that are relevant in this case are paragraphs 5(1)(*d*) and 5(4)(*c*) of the *Act* and paragraph 6(*g*) of the *Regulations*. These provisions read as follows:

> 5(1) Subject to subsection (2), insurable employment is
>
> …
>
> (*d*) employment included by regulations made under subsection (4) or (5); and
>
> …
>
> (4) The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment:

…

(*c*) employment that is not employment under a contract of service if it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, persons employed in that employment are similar to the terms and conditions of service of, and the nature of the work performed by, persons employed under a contract of service;

6 Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:

…

…..(*g*) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.

[43] Paragraph 6(*g*) of the *Regulations* is promulgated under paragraphs 5(1)(*d*) and 5(4)(*c*) of the *Act*. The effect of paragraph 6(*g*) of the *Regulations* is to include employment that would not otherwise be considered insurable employment because it is not governed by a contract of service, as in the case of independent workers.

[44] The term "employment" used in paragraph 6(g) of the *Regulation*s includes a business, trade, or occupation, and is not used solely to designate a master and servant relationship (see the decision *Sheridan v. Canada*, [1985] F.C.J. No. 230 (QL) delivered by Heald, Urie and Stone JJ.) and the following cases of the Supreme Court of Canada: *The Queen v. Scheer Ltd.*, [1974] S.C.R. 1046 and *Martin Service Station Ltd. v. M.N.R.*, [1977] 2 S.C.R. 996).

[45] The term "placement agency", used in paragraph 6(*g*) of the *Regulations*, is not defined in the *Act* or in the *Regulations*. However, the *Canada Pension Plan Regulations*, C.R.C. c. 385 provides the following definition of the term "placement agency":

34(1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the

> remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual.
>
> (2) For the purposes of subsection (1), placement or employment agency includes any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

[46] Given the similarity of the context that exists between section 34 of the *Canada Pension Plan Regulations* and paragraph 6(*g*) of the *Regulations*, some judges of the Tax Court of Canada applied the definition set out above to paragraph 6(*g*) of the *Regulations* (see the decisions of Weisman D.J. in *Carver PA Corporation v. M.N.R.*, 2013 TCC 125, *OLTCPI Inc. v. M.N.R.*, 2008 TCC 470, and *Pro-Pharma Contract Selling Services Inc. v. M.R.N.*, 2012 TCC 60).

[47] The Federal Court of Appeal has not definitively ruled, to date, on the definition to give to the expression "placement agency", as used in paragraph 6(*g*) of the *Regulations*. However, the Federal Court of Appeal agreed, in *OLTCPI Inc. v. Canada*, [2010] F.C.J. No. 379 (QL), to analyze the status of the appellant for the purposes of the *Act* and for the purposes of the *Canada Pension Plan*, based on the definition in subsection 34(2) of the *Canada Pension Plan Regulations.* The Federal Court of Appeal found that, to determine whether a person is a placement agency within the meaning of subsection 34(2), the question is whether the person concerned is merely supplying workers or is doing so in the course of providing a distinct service.

[48] The Federal Court of Appeal's decision is inspired by the words of Porter D.J. of the Tax Court of Canada in Supreme Tractor Services Ltd. V. M.N.R., [2001] T.C.J. No. 580 (QL), which explained in more detail the distinction between merely supplying workers and providing a distinct service.

[49] The analysis of the legislation in the above case essentially reiterates the words of my colleague, Hogan J., in. *Diane Barbeau v. M.N.R.*, 2015 TCC 131.

Analysis

[50] The first issue to decide in this case is a question of mixed fact and law, namely whether the appellant was acting as a placement agency during the period at issue in relation to workers. If not, the issue ends there. If so, it should be

considered whether the workers were called to provide services to the appellant's clients under the direction and control of those clients, and whether the workers were paid by the appellant.

[51] First, it should be noted that the expression "placement agency" is defined in the *Canada Pension Plan Regulations* to include certain situations and is therefore not exhaustive. Further, that definition does not require that the person who supplies the workers' services, which is the situation in this case, do so on an exclusive basis or any other basis.

[52] Accordingly, as soon as a person supplies the services of persons receiving a fee or other form of remuneration, that person is acting as a placement agency.

[53] The appellant's position is that supplying specialized workers is part of a larger service offered to the appellant's clients. The service offered by the appellant includes technical management, production management, supplying specialized workers, rental, repair, and purchase of equipment.

[54] The appellant looks after the production management and technical management of shows and events. This means that the show producer sends a technical data sheet to the appellant and, following the analysis of that document, the appellant ensures that the technical equipment necessary for lighting and audio (sound, lighting, stage management and material) are available and usable during the time required for the show.

[55] The technical data sheet given to the appellant included information related to the show (length of the show, number of persons on stage, instruments, stage design, available equipment, data sheet for the room).

[56] The appellant enters into agreements with businesses in order to rent material and it negotiates and buys material for certain clients. The appellant also plans the technical costs for the material rental and technical personnel in order to respect the budgetary estimate for the show. In doing so, it undertakes to its clients that the required material will be available and operational before the beginning of the show. Also, based on the services offered, the appellant determines the number of specialized technicians required to assemble and disassemble the stages. The technical personnel on site during a show vary considerably according to the importance, the activity, and the infrastructure of the location.

[57] Supplying specialized workers is part of a service offered to the appellant's clients. Therefore, when the clients chose to do business with the appellant, these clients expect the appellant to determine the technicians required to perform the that service and expect those technicians be on site during the show. Also, the appellant's clients expect equipment to be adequately assembled and disassembled by the technicians, so that the show meets the artistic demands of the artist.

[58] It was also demonstrated that the appellant offered a variety of services to its clients, for example, for the shows of Nick Cave & The Bad Seeds, Diana Krall, and the annual Gala ADISQ. The appellant coordinates the production with the show producer; i.e. plans the schedule and responds to certain needs:

- coordinates the start of the assembly according to the arrival of the trucks belonging to the artist;
- coordinates the disassembly of the show with the time of the end of the show; and
- obtains the parking permits from the cities or the municipality so that the trucks transporting the material necessary for the show can park legally.

[59] The appellant offers its service as a production manager for the annual Gala ADISQ. The appellant's representative, Mr. Yves Savard, attends meetings in order to coordinate the show's production. Therefore, with a team of twelve people, he plans the equipment rental, the schedule of the event, and the supply of technical personnel. Mr. Savard also offers his expertise based on his thirty-five years of experience in the field.

[60] This description of the services offered by appellant indicates that the clients call on its services to plan, coordinate, and manage shows and that supplying workers is part of the services offered by the appellant to its clients.

[61] Based on the evidence in the record, there is no doubt that the appellant offers a range of services, sometimes including turnkey solutions with many services and other times a single service, such as supplying specialized workers. Each case where a client calls on the appellant for an event or a show is a specific case.

[62] The respondent filed en liasse as exhibit I-1, a series of the appellant's invoices dated within the period at issue and addressed to different organisations like the FrancoFolies de Montréal, the Festival International du Jazz de Montréal, the FIJM company for a Diana Krall show at the Salle Wilfrid-Pelletier, Montréal

en Lumière, and the Metropolis for different shows, which cover only the supply of technical workers. With respect to these invoices, the appellant did not adduce any document, contract, or purchase order that shows that the supply of technical workers was part of a group of services offered by the appellant to each client.

[63] Indeed, Mr. Savard recognized that the appellant did not have a contract with the clients that it supplied with technical workers. The only document dated within the period at issue indicating that the appellant supplied technical and stage management services is the purchase order for the Casino de Montréal and that purchase order does not refer to the supply of technical workers.

[64] Accordingly, as there is not any evidence, I cannot accept the appellant's proposition that for each event where the appellant supplied the workers' services during the period at issue, the supply of workers was part of a group of services that were in fact supplied by the appellant to its clients.

[65] With regard to providing workers' services during the period at issue, the appellant therefore acted as a placement agency. It is not the availability of services that is relevant, but rather the actual services provided for each event.

[66] The second test for the application of paragraph 6(*g*) of the *Regulations*, namely that the person must be called by this agency to perform services for a client, is not disputed by the appellant. It is admitted that the appellant communicates with technicians so that they can perform their services for the appellant's clients.

[67] The third test for the application of paragraph 6(*g*) of the *Regulations* is that the person must be under the direction and control of the client.

[68] The appellant's position is that the technicians are not under the direction and control of the clients. The clients do not tell the technicians how they should do their work. The clients expect good cooperation from the technicians to achieve the expected result. Monitoring the results through performance control, productivity control, and quality control, does not mean that the technicians are subordinate or under the client's control and direction. The time or location constraints are not criteria for establishing a relationship of subordination.

[69] For the respondent, the technicians do not work in a vacuum. They are part of the production team coordinated by the production manager, who is a representative of the client and they have to integrate into the clients' business.

The productions are equivalent to a list of tasks to perform and are the team's game plan. The concept of direction and control must be interpreted according to the modern meaning of the words and includes the power to control whether that power is exercised or not.

[70] In light of the facts presented, I must find that the workers were under the direction and control of the clients they served.

[71] The services performed by the workers are the same as those performed by salaried technicians of other organizations. Indeed, some workers sometimes act as salaried workers and sometimes as independent workers while performing the same services.

[72] The client's exercise of the power of direction and control is especially reflected by the clients' right to exclude from the workplace a technician who is under the influence of drugs or alcohol, to require the replacement of a technician who arrives late to work, or to exclude certain technicians with whom they had problems in the past. In these situations, it is not control of the result, but rather control of the worker.

[73] From an operational point of view, the control and direction over the workers is more tenuous because the workers are technicians. The workers know how to assemble, disassemble, and operate the equipment that they are responsible for. However, the technical specifications prepared by presenter or the producer tell the workers everything that they have to do on the stage. They do not have any discretion in this regard. Everything is determined in advance: the type of equipment to be installed, the amount, and their placement on the stage. All the workers report to the production manager who ensures the coordination and running of the event. The workers cannot leave the workplace at their discretion and they cannot take breaks when they want to, because they must often work as a team. In my opinion, the management of the workers at their work location is significant enough for these workers to be considered to be under the direction and control of the producer or presenter.

[74] The fourth and final test for the application of paragraph 6(*g*) is that the person must be remunerated by the agency. In my opinion, this requirement is also met in this case. I do not think that the appellant acts as an intermediary between its clients and the workers because it invoices its clients with an increase on the workers' hourly rate and it gives the workers only part of what it bills its clients. According to the evidence, the workers are not paid if they do not invoice the

appellant. This approach indeed demonstrates that the appellant does not act merely as an intermediary.

[75] Because all the conditions for the application of paragraph 6(*g*) of the *Regulations* have been met, the appeals are dismissed. Accordingly, the appellant is deemed to be the workers' employer and had to make the source deductions with respect to the remuneration paid to the workers in accordance with section 7 of the *Insurable Earnings and Collection of Premiums Regulations*, SOR/97-33 and subsection 82(1) of the *Act*.

Signed at Ottawa, Canada, this 29th day of August 2017.

"Réal Favreau"

Favreau J.

CITATION:	2017TCC161
COURT FILE NOS.:	2015-5465(EI) 2015-5466(EI)
STYLES OF CAUSE:	Les Productions du Grand Bambou Inc. and M.N.R.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 11 and 12, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	August 29, 2017

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