

Dockets: 2003-9(EI)  
2003-1838(EI)  
2003-1841(EI)

BETWEEN:

LYSON LAVOIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on February 25, 2004, at Québec, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Pierre-Paul Trottier

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### JUDGMENT

The appeals, submitted on May 5 and 6, 2003, under subsection 103(1) of the *Employment Insurance Act*, of the decisions of the Minister of National Revenue dated December 2, 2002, are dismissed, and the decisions are upheld in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 13<sup>th</sup> day of April 2004.

"Alain Tardif"

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Tardif J.

Translation certified true  
on this 26<sup>th</sup> day of August 2004.

Shulamit Day, Translator

Dockets: 2003-1839(CPP)  
2003-1840(CPP)

BETWEEN:

LYSON LAVOIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on February 25, 2004, at Québec, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Pierre-Paul Trottier

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### JUDGMENT

The appeals, heard on May 5 and 6, 2003, under paragraph 6(1)(a) of the *Canada Pension Plan*, of the decisions of the Minister of National Revenue, are dismissed, and the decisions are upheld in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 13<sup>th</sup> day of April 2004.

"Alain Tardif"

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Tardif J.

Translation certified true  
on this 26<sup>th</sup> day of August 2004.

Shulamit Day, Translator

Dockets: 2003-1309(EI)  
2003-1310(EI)

BETWEEN:

SYLVAIN LAVOIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard on February 25, 2004, at Québec, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Pierre-Paul Trottier

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### JUDGMENT

The appeals, under subsection 103(1) of the *Employment Insurance Act*, of the decisions of the Minister of National Revenue dated February 14, 2003, are dismissed and the decisions are upheld in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 13<sup>th</sup> day of April 2004.

"Alain Tardif"

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Tardif J.

Translation certified true  
on this 26<sup>th</sup> day of August 2004.

Shulamit Day, Translator

Citation: 2004TCC219

Date: 20040413

Dockets: 2003-9(EI), 2003-1838(EI), 2003-1841(EI)  
2003-1839(CPP), 2003-1840(CPP)

BETWEEN:

LYSON LAVOIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND BETWEEN:

Dockets: 2003-1309(EI), 2003-1310(EI)

SYLVAIN LAVOIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

### **REASONS FOR JUDGMENT**

**Tardif J.**

[1] These are several appeals which, at the request of the parties, were subject to common evidence for all the dockets, which I list: *Lyson Lavoie*, [2003-9(EI), 2003-1838(EI), 2003-1839(CPP), 2003-1840(CPP), 2003-1841(EI)] and *Sylvain Lavoie* [2003-1309(EI), 2003-1310(EI)].

[2] The periods at issue for each of the appeals are as follows:

Docket number	Period at issue	Payor's name
<b>Lyson Lavoie</b>		
2003-9(EI)	June 25 to November 17, 2001	L. C. Rioux & Son Ltd
2003-1838(EI)	August 7, 2000 to January 12, 2001	Fletcher's Forestry Enterprises Ltd
2003-1839(CPP)	August 7, 2000 to January 12, 2001	Fletcher's Forestry Enterprises Ltd
2003-1840(CPP)	June 19 to July 21, 2000	Jean-René Boucher Ltée
2003-1841(EI)	June 19 to November 17, 2000	Jean-René Boucher Ltée
<b>Sylvain Lavoie</b>		
2003-1309(EI)	July 2 to November 24, 2001	L. C. Rioux & Son Ltd
2003-1310(EI)	October 33, 2000 to January 12, 2001	Fletcher's Forestry Enterprises Ltd

[3] Several facts were admitted; they are with respect to both Appellants. They were reduced to writing. It is appropriate to reproduce them (see the letter dated February 24, 2004, addressed to Jérôme Carrier):

[TRANSLATION]

1. The Payors operated a forest-cutting business;
2. There was no written and signed contract between the Appellants and their respective Payors;
3. The Appellants' duties (with their employee) were to cut and transport wood;
4. The Payors did not choose the employee, in other words, the lumberjack, for each Appellant;
5. The Payors did not impose on the Appellants a quota of wood to be cut;
6. The wood cut by the Appellants was measured at the sawmill;
7. The Payors paid the Appellants according to the quantity of wood cut and measured by the sawmill; in other words, the total remuneration paid to the Appellants and their employees should correspond to the quantity of wood cut and measured by the mill;
8. The Payors were not owners of the skidders used by the Appellants;



9. The Payors did not rent the Appellants' skidders;
10. The Payors could not assign another operator to the Appellants' skidders;
11. The costs of operating the skidders (gas, oil, insurance, maintenance) were the responsibility of the Appellants and not of the Payors;
12. If the skidders were to break, the Payors did not give other duties to the Appellants;
13. The Payors did not keep track of the hours worked by the Appellants;
14. The Appellants provided the other work tools involved in this matters, such as mechanical saws, and assumed the maintenance and operating costs;

[4] With respect to the dockets of Appellant Lyson Lavoie; in addition to the facts admitted and recorded, Counsel for the Appellant made a certain number of admissions among the presumptions of fact, to explain and justify the determinations he is appealing. These facts were recorded in docket 2003-9(EI) and read as follows:

[TRANSLATION]

- (a) The Payor, L. C. Rioux & Son Ltd, operates a forestry business;
- (b) The Appellant owned a skidder, the initial cost of which was approximately \$15,000;
- (c) During the period at issue, the Appellant provided services to the Payor as a skidder operator;
- (d) There was no written contract between the Appellant and the Payor;
- (e) The Appellant worked cutting wood in a team with a lumberjack that he had chosen himself;
- (f) The Appellant worked between 40 and 50 hours per week;

...

- (i) The Appellant assumed all the costs related to the operation of his skidder;
- (j) If the skidder broke down, the Appellant was responsible for repairing it and covering the costs. The Payor did not assign him any other duties;
- (k) The Payor could not assign another operator to the Appellant's skidder;
- (l) The Appellant was paid as a function of the quantity of wood cut;
- (m) When the Appellant was hired, he and the Payor agreed that a weekly amount of \$750 would be paid to each member of the team as an advance;
- (n) The Payor issued separate cheques for the weekly advance;

...

- (q) On December 4, 2001, the Payor issued a record of employment to the Appellant indicating the first day of work as June 25, 2001, and the last day paid as November 17, 2001, and indicating that the Appellant had been paid for only 16 of the 21 weeks in this period, for a total remuneration of \$12,280.66;

...

[5] The other presumptions of fact were denied. They are as follows:

[TRANSLATION]

- (g) The Payor indicated the work area to the Appellant, as well as the length of wood to cut, but he did not control how the work was to be conducted;
- (h) The Appellant was free to be absent without requesting authorization from the Payor;

...

- (o) Since the Appellant's team had not cut enough wood to cover the advances already paid during the period at issue, the Appellant had to provide services to the Payor without pay for a period of five weeks;
- (p) The Appellant was responsible for the lumberjack's salary. The Payor subtracted all the advances paid from the amounts due to the Appellant, including the amounts paid to the lumberjack;
- ...
- (r) The record did not reflect reality with respect to the number of weeks or the amount of remuneration.
- (s) During the period at issue, the Appellant operated his own business.

[6] Appellant Sylvain Lavoie stated that he would give the same answers as Appellant Lyson Lavoie, his father, if the same questions were asked of him. Appellant Lyson Lavoie explained that the travel costs for his skidder were the Payor's responsibility. The Payor came to the site several times per week. He would have certain requirements, such as, specifically, cutting a particular tree with a diameter greater than that determined by the instructions given when the site was opened.

[7] With respect to pay, the evidence demonstrated that it was essentially a function of the wood cut and the price obtained at delivery to the buyer. The alleged weekly pay was essentially an advance disguised as remuneration and presented as if it were a salary for a 40-hour workweek. In reality, the remuneration paid was established exclusively as a function of the wood cut, delivered and sold.

[8] The way in which the hours were counted and, in particular, the manner of recording them, was in reality a scheme to give the impression that this was employment in the usual sense, work carried out following a fixed schedule. Furthermore, it is interesting to note in the records of employment that, each week, the Appellant always accumulated the same number of hours although on he did not work some days because of rain or extreme heat, which made the site dangerous.

[9] Even though this appeared to be regular employment allowing the Appellant to receive a weekly salary, it is very easy to imagine situations in which the work might not have been paid: mechanical breakdown is the most obvious. The size of the income depended essentially on mechanics, weather, soil quality, the type of woodland, etc. All these vagaries were the exclusive responsibility of the Appellant. At the end of the contract, the parties settled their accounts, and the Appellant might have found himself in a situation in which he had to reimburse overpayments. Forestry and the economic activity it generates involve true specialists for whom there are no secrets. It is very easy for them to predict income in advance and to disguise a contract for services as a contract of service. The risks are many, the weather is uncertain and forest workers want to maximize the profit from their work.

[10] In this case, the test most likely to justify the possible existence of a contract of service is the control or the power of control. All the others (ownership of work tools, integration, chance of profit and risk of loss) lead us to conclude that the Appellant operated his own business.

[11] With respect to control, the facts likely to lead to the conclusion that the work was controlled by the Payor or subject to the Payor's power of control are not determinative. These are normal, legitimate and common facts and actions of an individual who gives a contract for services and who wants to ensure that the result complies with his expectations. The woodlot owner explained at the outset what he wanted with respect to the type of cutting (selective or clear) and the skidder owner, in cooperation with the lumberjack he hired, made provisions for performing the work as quickly as possible before going to another lot. This is a similar, if not identical docket, to others that have been decided by the Federal Court of Appeal.

[12] I will not go further with the analysis, since this type of work, the manner of execution and the way in which the income was established were addressed in several decisions, specifically *Charbonneau v. Canada (Minister of National Revenue – M.N.R.)*, [1996] F.C.J. No. 1337 (Q.L.), in which Décary, J.A. of the Federal Court of Appeal stated:

4. Moreover, while the determination of the legal nature of the contractual relationship will turn on the facts of each case, nonetheless in cases that are substantially the same on the facts the corresponding judgments should be substantially the same in law.

As well, when this Court has already ruled as to the nature of a certain type of contract, there is no need thereafter to repeat the exercise in its entirety: unless there are genuinely significant differences in the facts, the Minister and the Tax Court of Canada should not disregard the solution adopted by this Court.

...

10. Supervision of the work every second day and measuring the volume every two weeks do not, in this case, create a relationship of subordination, and are entirely consistent with the requirements of a contract of enterprise. 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.
11. The same is true of the standards imposed in respect of hours and days of work, holidays, operating method and safety. The standards are common to all workers in public forests whose activities are "governed" by the ministère des Ressources naturelles. They apply regardless of whether the worker is a mere employee or a contractor.

...

[13] In this case, the Appellants were each skidder owner-operators. They worked in cooperation with a lumberjack they themselves chose. They carried out their work on a site determined by the owner of the cutting rights, and received certain instructions from the latter with respect to the desired results.

[14] Many factors had an influence on their income, and at the end of the site, the parties settled their accounts and assumed the financial consequences. If the wood sold brought less than the advances paid, the forest worker had to repay the difference. Conversely, if the wood sold represented more than the advances, days or even weeks were added as a function of the amounts.

[15] The fact that it was all presented as a contract of service is not relevant to the legal qualification of the verbal agreement at the source of these appeals. These are dockets similar to that of *Charbonneau (supra)*. There is no reason to handle them differently. I therefore conclude that the work carried out by the Appellant was not carried out under a contract of service but under a contract for services.

[16] With respect to Appellant Sylvain Lavoie [2003-1309(EI), 2003-1310(EI)], he did not mention any specific fact or element; he stated that he would have given the same answers as his father, Lyson Lavoie, if the same questions were asked of him, all of which has the effect of shortening his testimony considerably. Consequently, all the facts and reasons for judgment in the Lyson Lavoie dockets, [2003-9(EI), 2003-1838(EI), 2003-1839(CPP), 2003-1840(CPP), 2003-1841(EI)], are reproduced for the Sylvain Lavoie dockets [2003-1309(EI) and 2003-1310(EI)].

[17] For these reasons, the appeals are therefore dismissed.

Signed at Ottawa, Canada, this 13<sup>th</sup> day of April 2004.

"Alain Tardif"

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Tardif J.

Translation certified true  
on this 26<sup>th</sup> day of August 2004.

Shulamit Day, Translator