Docket: 2003-663(EI)

BETWEEN:

LOUIS LEHOUX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

and

3935833 CANADA INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 29, 2003 at Sherbrooke, Quebec

Before: The Honourable Deputy Judge Somers

Appearances:

Counsel for the Appellant:	The Appellant himself
Counsel for the Respondent:	Emmanuelle Faulkner
Counsel for the Intervener:	Philippe Lafleur

JUDGMENT

The appeal is allowed and the Minister's decision is vacated in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 7th day of October, 2003.

"J. F. Somers"

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Sharon Moren, Translator

Citation: 2003TCC663
Date: 20031007
Docket: 2003-663(EI)

BETWEEN:

LOUIS LEHOUX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

3935833 CANADA INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Somers, D.J.

[1] This appeal was heard at Sherbrooke, Quebec, on July 29, 2003.

[2] The Appellant is appealing the decision of the Minister of National Revenue (the "Minister") finding that the employment performed over the period at issue, from January 3 to June 27, 2002 for 3935833 Canada Inc., the Payor, was not insurable for the reason that it was not employment under a contract of service in accordance with Paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "Act").

[3] The burden of proof is on the Appellant, who must establish in accordance with the preponderance of evidence that the Minister's decision is wrong in fact and in law. Each case must be examined on its own merit.

[4] In making his ruling the Minister drew upon the following facts, which were either admitted or denied by the Appellant:

(a) The Payor has been operating since the month of August 2001. (no knowledge)

(b) The Payor does commercial building maintenance. (admitted)

(c) The Payor makes bids to obtain contracts for commercial building maintenance (the "clients"), and consequently hires sub-contractors to perform a portion of the duties that the Payor cannot perform himself. (denied).

(d) The Appellant's duties were to dust, vacuum and clean the bathrooms for two restaurants. (admitted)

(e) The Appellant was remunerated $46.00 per day upon submission of invoices to the Payor. (admitted)

(f) The Appellant bore the costs of the *Commission de la santé et de la sécurité du travail* ("CSST") contributions. (admitted)

(g) The Appellant bore the expenses for travel, supplies and accessories necessary to perform his duties. (denied)

(h) The Appellant could complete his duties according to a timetable that suited him. (denied)

i) The Appellant's only constraint required by the client who requested that the housekeeping maintenance be done while the establishment was closed. (admitted)

[5] The Payor, in operation since the month of August 2001, did commercial building maintenance.

[6] According to the Appellant, the Payor made bids in order to obtain contracts. According to him, the Payor posted a sign at the Human Resource Centre of Canada asking for a person who was interested in doing housekeeping maintenance work and he then approached Marcel Lortie, the Payor's managing director, for this job and they entered into an agreement.

[7] The Appellant stated that Marcel Lortie described to him the duties to be done. He added that Marcel Lortie drove him from his home to the work place, a distance of about 20 kilometres, and took him back to his home after work.

[8] The Appellant stated that he was paid $46.00 per day for cleaning a restaurant and later on, $96.00 since he was looking after a second restaurant for two months. The Appellant calculated that he was paid $11.50 per hour.

[9] The Appellant stated that he was working for two hours per day at the first restaurant but that he was remunerated for four hours and that he submitted invoices to the Payor (Exhibit I-1). The Payor, for his part, deducted form these invoices, the price of gas and an amount for the contributions to the *Commission de la santé et de la sécurité du travail*. The invoices were paid by the Payor once per month.

[10] The Appellant's duties were to dust, vacuum and clean the bathrooms of the two restaurants.

[11] According to the Appellant, all the tools necessary for the work were provided by himself or by the restaurateur. He added that the Payor set the hours of work.

[12] The Appellant recognized that on the invoices (Exhibit I-1) he wrote [TRANSLATION] "self-employed person for housekeeping maintenance".

[13] The Appellant stated that he did not always receive $46.00 or $96.00 per day and that the invoice amounts varied depending on the number of hours worked.

[14] According to this witness, Marcel Lortie was on the premises during the hours of work except when he had to be away. The Appellant explained that [TRANSLATION] "a good evening of work was about 5 ½ hours" and that occasionally Mr. Lortie asked him to go work elsewhere.

[15] Marcel Lortie, who has been proprietor of the business for 20 years, stated that he always hired self-employed workers to perform this housekeeping maintenance work. He stated that he had posted a sign at the Human Resource Centre of Canada for the purpose of recruiting individuals for this type of work.

[16] This witness stated that the Appellant contacted him and that they had entered into an agreement. According to this agreement, the Appellant would be expected to do the housekeeping maintenance at the restaurant *La Cage aux Sports*, work that took him from 1 to 1 ½ hours for remuneration of $46.00 per day.

[17] According to Marcel Lortie, when the agreement was made, the Appellant asked him how to make out the invoices and he told him to write [TRANSLATION] "self-employed person" on them. It should be noted that no deduction at source was made on the invoices submitted by the Appellant (Exhibit I-1).

[18] The Payor, for his part, deducted from the total amount of the invoice the CSST contribution, as appears on the invoices filed as Exhibit I-1, as well as an amount for gasoline since he drove the Appellant to his job and took him back to his home after the work was completed.

[19] Marcel Lortie stated that he drove the Appellant from his home to his work place. He added that the work was ordinarily finished at 5:00 in the morning since the restaurants opened at this time. He moreover stated that he was not on site while the Appellant performed his work.

[20] According to Marcel Lortie, he replaced the Appellant on occasion when the latter was absent, but the Appellant was responsible for finding a replacement. He added that the restaurateurs supplied the work tools.

[21] In order to correctly distinguish the contract of service from the contract for service, it is necessary to examine all the various components of the relationship between the parties, including the parties' intentions.

[22] Jurisprudence has recognized that the parties' intention is one component, among others, which enable determination of whether [a contract] is a contract of service or a contract for service, but not necessarily a deciding factor.

[23] It is well established that there are four basic components for distinguishing a contract of service from a contract for service: a) the degree or absence of control exercised by the employer; b) ownership of the tools; c) the opportunity for profit and risk of loss; and d) the degree of integration of the employee's work in the employer's business (see *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553).

a) Control

[24] The Payor was looking for an individual to do housekeeping maintenance in commercial buildings where he had obtained a contract. The Payor posted a sign at the Human Resource Centre of Canada for the purpose of recruiting a self-employed person. The fact that he posted a sign indicated that he was merely

looking for a worker and not an independent businessperson (self-employed person), but the Court can only rely on this single indicator.

[25] The Appellant answered this advertisement and contacted the Payor. Marcel Lortie, proprietor of the Payor, stated that he had offered $46.00 per day to the Appellant to do housekeeping maintenance in a restaurant and that later this amount had been increased to $96.00 since the Appellant had to work in a second restaurant. Marcel Lortie stated that he has proceeded in this fashion for 20 years.

[26] The Appellant accepted the Payor's offer. There is no evidence showing that the Appellant was a self-employed businessperson or that he had employees or that he had previously performed this type of work. The Appellant, who was unemployed at the time, accepted the Payor's offer without negotiating the terms and conditions; it must be acknowledged that the Payor was in a position of power.

[27] According to Marcel Lortie, the Appellant asked him how to write his invoices, to which he answered to indicate [TRANSLATION] "self-employed person" on them; this fact shows a certain control of the Payor over the Appellant.

[28] Marcel Lortie drove the Appellant from his home to work every evening, after the restaurants closed, and drove him back home at the end of his work; he even replaced the Appellant at his job when the latter was absent.

[29] The facts noted above demonstrate that there was a degree of control over the Appellant and support the conclusion that a contract of service existed.

b) Ownership of tools

[30] The work tools belonged to the restaurateur and not the Appellant; the clientele was the Payor's and not the Appellant's. From this component, the Court can conclude that a contract of service existed.

c) Chance for profit and risk of loss

[31] The Appellant was paid a fixed amount, set by the Payor, regardless of the number of hours of work. This component could cast doubt on the nature of the contract but considering the evidence as a whole, one can only conclude that a contract of service existed.

d) Degree of integration

[32] The business belonged to the Payor and not the Appellant. The Appellant did not have employees; he was at the service of the Payor's business. According to this component, a contract of service existed.

[33] The whole of the above components, of which the degree of control of the Payor over the Appellant is an essential factor for making the distinction between the two types of contracts, supports the conclusion that a contract of service existed.

[34] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, Major J. of the Supreme Court of Canada stated:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[35] On the basis of this decision, it is reasonable to conclude that a contract of service existed.

[36] Counsel for the Respondent relied on the decision of the Federal Court of Appeal in *Wolf v. Canada*, [2002] F.C.A. No. 96 in support of her submissions. Noël J.A. (Concurring in result only) stated as follows at Paragraph 122:

> I too would allow the appeal. In my view, this is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force,

> the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.

[37] This Federal Court of Appeal judgment placed a great deal of importance on the parties' intentions but acknowledged that the manner in which the parties decide to describe their relationship is not usually determinative.

[38] In the case at bar, it is the Payor who offered work to the Appellant at a set salary. The Appellant, having no choice since he was unemployed, accepted the Payor's offer without negotiating the terms. The Payor even gave instructions to the Appellant, upon his request, with regard to the manner in which to write his invoices, namely, to write [TRANSLATION] "self-employed worker" on them.

[39] Taking into account the whole of the evidence, the Court finds that a contract of service existed. Consequently, the Appellant's work for the Payor, during the period at issue, is insurable under Paragraph 5(1)(*a*) of the Act.

[40] The appeal is allowed and the decision of the Minister is vacated.

Signed at Ottawa, Canada, this 7th day of October, 2003.

"J. F. Somers"

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Sharon Moren, Translator