Docket: 2009-984(EI)

BETWEEN:

LYNE GAGNÉ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

PATRICK BÉLAND

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
L'Express Marchandiseur Inc., 2009-985(EI),
on October 7, 2009, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Agent for the appellant:	Michel Normandin, Accountant
Counsel for the respondent:	Mounes Ayadi
Counsel for the intervener:	Patrick Brunelle

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed, and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of December 2009
Margarita Gorbounova, Translator

Docket: 2009-985(EI)

BETWEEN:

L'EXPRESS MARCHANDISEUR INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

FRÉDÉRIC POULIN,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Lyne Gagné, 2009-984(EI),
on October 7, 2009, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Agent for the appellant:	Michel Normandin, Accountant
Counsel for the respondent:	Mounes Ayadi
Counsel for the intervener:	Patrick Brunelle

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed, and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of December 2009
Margarita Gorbounova, Translator

Citation: 2009 TCC 549
Date: 20091026
Dockets: 2009-984(EI)
2009-985(EI)

BETWEEN:

LYNE GAGNÉ and L'EXPRESS MARCHANDISEUR INC.,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE

Respondent,

and

PATRICK BÉLAND and FRÉDÉRIC POULIN,

Interveners.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] The appellants are appealing from the decisions of the Minister of National Revenue (the Minister) made under the *Employment Insurance Act* (the Act). In file No. 2009-984(EI), the Minister decided that, for the period from October 31, 2006, to December 2, 2007, Patrick Béland was employed under a contract of service and that accordingly he held insurable employment within the meaning of paragraph 5(1)(*a*) of the Act when he was working for SOS Garnisseurs, a business operated by Lyne Gagné. In file No. 2009-985(EI), the Minister decided that, for the period from January 1, 2007, to January 5, 2008, Frédéric Poulin was employed under a contract of service and that accordingly he held insurable employment within the meaning of paragraph 5(1)(*a*) of the Act, when he worked for L'Express Marchandiseur Inc. (L'Express).

[2] In making his decision in file No. 2009-984(EI), the Minister relied on the following assumptions of fact:

[TRANSLATION]

(a) The appellant registered a sole proprietorship on February 24, 2006. (**admitted**)

(b) The appellant registered a trade name of "SOS Garnisseurs". (**admitted**)

(c) The appellant operated a business specializing in setting up displays and stocking shelves with bread in supermarkets. (**admitted**)

(d) The appellant's clients were Maxi and Loblaws for the bread supplier Weston and Super C, Métro and IGA for the bread supplier Multimarques. (**admitted**)

(e) The appellant employed between 10 and 20 people depending on the time of year. (**admitted**)

(f) The worker was hired as a shelf stocker by the appellant. (**admitted**)

(g) The worker’s tasks consisted of stocking the shelves with bread, rotating the bread, checking the bread-tag codes and taking inventory. (**admitted**)

(h) The parties do not agree on whether the worker provided services as a salaried worker or a self-employed worker. (**admitted**)

(i) According to the appellant, the worker had signed a self-employment contract; according to the worker, there was no written contract between the parties. (**admitted**)

(j) The worker had three days of unpaid training for Weston and seven days for Multimarques. (**admitted**)

(k) The worker had no experience as a display artist or shelf stocker before working for the appellant. (**admitted**)

(l) After his training, the appellant assigned the worker to a sector close to his home. (**admitted**)

(m) The work schedule was determined by the appellant. (**denied**)

(n) The work hours were mainly from 2 a.m. to 7 a.m. as well as at stocking time in the afternoon on the busy days, namely, from Thursday to Sunday. (**admitted**)

(o) The worker's schedule was always the same from one week to the next. (**denied**)

(p) If the worker was absent, he informed the appellant, and she had to find a replacement. (**admitted**)

(q) For bread made by Weston, the appellant paid her workers 7 to 8 cents per loaf. (**admitted**)

(r) For bread made by Multimarques, the appellant paid the worker $12.00 per hour. (**admitted**)

(s) The worker had to cover his own transportation costs for getting to the supermarkets, but, as he travelled by bicycle, he had almost no expenses in carrying out his functions. (**admitted**)

(t) The appellant gave the worker instructions by telephone or e-mail. (**admitted**)

(u) The appellant sometimes visited the work sites to check the quality of the workers' stocking. (**admitted**)

(v) The worker had to follow the instructions of the appellant and her clients in carrying out his tasks. (**admitted**)

(w) Complaints from the clients and supermarket managers were addressed to the appellant, who took action accordingly. (**admitted**)

(x) The clients were clients of the appellant and not of the worker. (**admitted**)

[3] In making his decision in file No. 2009-985(EI), the Minister relied on the following assumptions of fact:

[TRANSLATION]

(a) The appellant incorporated on August 31, 2006. (**admitted**)

(b) Lyne Gagné was the appellant's sole shareholder. (**admitted**)

(c) The appellant operated a business specializing in setting up displays and stocking shelves with bread in supermarkets. (**admitted**)

(d) The appellant's clients were Maxi and Loblaws for the bread supplier Weston and Super C, Métro and IGA for the bread supplier Multimarques. (**admitted**)

(e) The appellant employed between 10 and 20 people depending on the time of year. (**admitted**)

(f) The worker was hired as a shelf stocker by the appellant. (**admitted**)

(g) The worker's tasks consisted of stocking the shelves with bread, rotating the bread, checking the bread-tag codes and taking inventory. (**admitted**)

(h) The parties do not agree on whether the worker provided services as a salaried worker or a self-employed worker. (**admitted**)

(i) According to the appellant, the worker had signed a self-employment contract; according to the worker, there was no written contract between the parties. (**admitted**)

(j) The worker had three days of unpaid training for Weston and seven days for Multimarques. (**denied**)

(k) The worker had no experience as a display artist or shelf stocker before working for the appellant. (**denied**)

(l) After his training, the appellant assigned the worker to a sector close to his home. (**denied**)

(m) The work schedule was determined by the appellant. (**admitted**)

(n) The work hours were mainly from 2 a.m. to 7 a.m. as well as at stocking time in the afternoon on the busy days, namely, from Thursday to Sunday. (**admitted**)

(o) The worker's schedule was always the same from one week to the next. (**denied**)

(p) If the worker was absent, he informed the appellant, and she had to find a replacement. (**admitted**)

(q) For bread made by Weston, the appellant paid her workers 7 to 8 cents per loaf. (**admitted**)

(r) For bread made by Multimarques, the appellant paid the worker $12.00 per hour. (**admitted**)

(s) The worker had to cover his own transportation costs for getting to the supermarkets, but, as he travelled by bicycle, he had almost no expenses in carrying out his functions. (**admitted**)

(t) The appellant gave the worker instructions by telephone or e-mail. (**admitted**)

(u) Lyne Gagné sometimes visited the work sites to check the quality of the workers' stocking. (**admitted**)

(v) The worker had to follow the instructions of the appellant and her clients in carrying out his tasks. (**admitted**)

(w) Complaints from the clients and supermarket managers were addressed to the appellant, who took action accordingly. (**admitted**)

(x) The clients were clients of the appellant and not of the worker. (**admitted**)

Ms. Gagné's testimony

[4] Among other things, the following is apparent from Ms. Gagné's testimony:

(i) The appellants had not signed a contract with Mr. Poulin and Mr. Bélard (the workers). However, Ms. Gagné explained that the parties had still entered freely and with full knowledge into a verbal contract for services. She added that, when the two workers had entered into the contract, it was established that the workers would receive no benefits and that they would have to pay for their transportation between supermarkets. Ms. Gagné also explained that, a little after the two workers had been hired, the appellants had put in place a policy according to which all the workers whose services they retained had to sign a contract that set out the terms and conditions of the relationship between the parties and the conditions under which the workers stocked the bread shelves. In that contract, the workers are described as independent contractors, not as employees of the appellants. In regard to that, I would immediately point out that the workers testified that the nature of the contract they had entered into with the appellants had never really been discussed with Ms. Gagné, as she basically focused on explaining to them how they would be paid.

(ii) The workers were free to stock the shelves of the appellants' clients with other products than bread, provided that doing so was not unfavourable to the appellants.

(iii) The workers could find replacements without the appellants' consent or involvement. However, Ms. Gagné explained that she had required the workers to inform her right away if they could not find a replacement and to give her their replacements' contact information in order that she could send them instructions if necessary.

(iv) The appellants did not train the workers as the workers had the experience necessary to do that type of work. I note, however, that

Ms. Gagné admitted that, generally, the workers whose services were retained attended unpaid training.

(v) The workers had a great deal of flexibility in organizing their work in that they could decide at what time they stocked the shelves in the supermarkets and the order in which the supermarkets were provisioned. However, the evidence showed that the workers had little flexibility in organizing their work because the instructions they received from the appellants (imposed on the appellants by Weston and Multimarques) clearly established the slots of time during which the shelves had to be stocked and they were usually very short.

(vi) Each worker's wages for stocking shelves were agreed on by the parties for each supermarket. Effectively, for each supermarket, the parties agreed on a maximum number of hours that it could take to stock the shelves and on the hourly rate, which was $12 during the relevant periods, so that the more experienced and thus quicker workers earned more than $12 per hour and the less experienced workers, who generally worked more slowly, earned less than $12 per hour.

[5] In addition, the evidence disclosed the following:

(i) The appellants often filled out evaluation forms concerning the workers' performance and communicated the evaluation results to the workers in writing. I note upon reading the evaluation forms filed in evidence as Exhibits A-3 and A-4 that the language used by the appellants is that of a superior addressing an employee, not that of a client addressing a subcontractor.

(ii) The appellants often phoned or e-mailed the workers to give them instructions on how to do the work.

(iii) The workers did not need any tools to carry out their work, except for hand trucks provided by Weston and Multimarques.

(iv) The workers never behaved like self-employed workers. In fact, the workers never registered their businesses with the inspecteur général des entreprises financières. They were not registered with the tax authorities for GST purposes either.

(v) Every time they came in to the supermarket, the workers had to fill out a form attesting to their work there, which had to be signed by an authorized employee of each supermarket.

Analysis

The law

[6] When the courts must define concepts from Quebec private law for the purpose of applying federal legislation such as the *Employment Insurance Act*, they must follow the rule of interpretation in section 8.1 of the *Interpretation Act*. To determine the nature of a Quebec employment contract and distinguish it from a contract for services, the relevant provisions of the *Civil Code of Québec* (the Civil Code) must be relied on, at least since June 1, 2001. Those rules are not consistent with the rules stated in decisions such as *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 and *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553. Contrary to the common law situation, the constituent elements of a contract of employment have been codified, and, since the coming into force on January 1, 1994, of articles 2085 and 2099 of the Civil Code, the courts no longer have the same latitude as the common law courts to define what constitutes an employment contract. If it is necessary to rely on previous court decisions to determine whether there was a contract of employment, one must choose decisions with an approach that conforms to civil law principles.

[7] The Civil Code contains distinct chapters governing the "contract of employment" (articles 2085 to 2097) and the "contract of enterprise or for services" (articles 2098 to 2129).

[8] Article 2085 states that a contract of employment

> . . . is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

[9] Article 2098 states that a contract of enterprise

> . . . 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.

[10] Article 2099 follows and states the following:

> 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.

[11] It can be said that the fundamental distinction between a contract for services and a contract of employment is the absence, in the former case, of a relationship of subordination between the provider of services and the client, and the presence, in the latter case, of the right of the employer to direct and control the employee. Thus, what must be determined in the case at bar is whether there was a relationship of subordination between the appellants and the workers.

[12] The appellants had the burden of proving, on a balance of probabilities, the facts at issue that establish their right to have the Minister's decisions set aside. They had to demonstrate the contract entered into by the parties and establish their common intention with respect to its nature. If they had no direct evidence of that intention, the appellants could turn to indicia as evidence of the contract that was entered into and rely on the Civil Code provisions that govern it. The appellants in this case had to demonstrate that there was no relationship of subordination in order to establish that they had not entered into a contract of employment. To do so, they could, if necessary, prove the existence of indicia of independence such as those stated in *Wiebe Door*, *supra*, namely, the ownership of tools amd the risk of loss and the chance of profit.

[13] However, in my opinion, contrary to the common law approach, once a judge is satisfied that there was no relationship of subordination, that is the end of the judge's analysis of whether a contract for services existed. It is then unnecessary to consider the relevance of the ownership of tools or the risk of loss or chance of profit, since, under the Civil Code, the absence of a relationship of subordination is the only essential element of a contract for services that distinguishes it from a contract of employment. Elements such as the ownership of

tools, the risk of loss or the chance of profit are not essential elements of a contract for services. However, the absence of a relationship of subordination is an essential element. For both types of contract, one must decide whether or not a relationship of subordination exists. Obviously, the fact that a worker behaved like a contractor could be an indication that there was no relationship of subordination.

[14] Ultimately, the Court must usually make a decision based on the facts shown by the evidence regarding the performance of the contract, even if the intention expressed by the parties suggests the contrary. If the evidence regarding the performance of the contract is not conclusive, the Court will rely on the parties' intention and their description of the contract, provided the evidence is probative with respect to these questions. If that evidence is not conclusive either, the appellants' appeal will be dismissed on the basis that there is insufficient evidence.

[15] Thus, the question is whether the workers in the case at bar worked under the appellants' control or direction, or whether the appellants could or were entitled to control or direct the workers.

[16] In this case, the evidence does not enable me to clearly determine the parties' intention. In fact, the appellants maintained that they had wanted to enter into contracts of enterprise, while the workers maintained that the nature of the contracts had never been the subject of any such discussions and that, in any case, at the time, they could not have stated their intention to that effect clearly, freely and in a fully informed manner since they would not have been able to distinguish between a contract of enterprise and a contract of employment. As a result, only a review of the facts in light of the evidence provided will make it possible in this case to determine the nature of the contractual relationship.

[17] In my opinion, the contract between the workers and the appellants was a contract of employment because there was a relationship of subordination. In fact, the evidence showed that the appellants exercised over the workers the most traditional type of control: the appellants gave the workers frequent and precise instructions on how to carry out their work. That constitutes direct control. The workers in this case were not free to choose the means of execution. At best, they had very little flexibility with regard to organizing their work. The appellants' faculty of control over the workers is also apparent in the supervision of their work. In fact, not only

did Ms. Gagné sometimes visit the workers' work sites to check the quality of their work, she also often filled out evaluation forms for the workers and sent the evaluation results to them in writing. The appellants also required the workers to fill out attendance sheets. In view of all of the evidence, it cannot be found otherwise than that there was a relationship of subordination between the workers and the appellants. It is therefore not necessary to review and weigh the other facts put in evidence that may prove or disprove the existence of relationships of subordination. Although there is no need to do so, I note that most of the other facts in evidence (for example, the fact that the workers never behaved like contractors, that the workers worked only for the appellants during the relevant period and that the clients they served were the appellants' clients) lead me to conclude that a relationship of subordination existed.

[18] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Paul Bédard"

Bédard J.

Translation certified true
on this 9th day of December 2009
Margarita Gorbounova, Translator

CITATION:	2009 TCC 549
COURT FILE NOS:	2009-984(EI), 2009-985(EI)
STYLE OF CAUSE:	LYNE GAGNÉ AND L'EXPRESS MARCHANDISEUR INC. and M.N.R. AND PATRICK BÉLAND AND FRÉDÉRIC POULIN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 7, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	October 26, 2009

APPEARANCES:

Agent for the appellants:	Michel Normandin, Accountant
Counsel for the respondent:	Mounes Ayadi
Counsel for the intervener:	Patrick Brunelle

COUNSEL OF RECORD:

For the appellants:

Name:	
Firm:	

For the respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada

For the interveners:

Name:	Patrick Brunelle
Firm:	Ratelle, Ratelle et Associés Joliette, Quebec