

Docket: 2006-331(EI)

BETWEEN:

CHRISTIAN DESJARDINS & NATHALIE ST-AMOUR
O/A CLINIQUE ST-AMOUR,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ANICK JEAN

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 6, 2007, at Québec, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Agent for the Appellant:	Christian Desjardins
Counsel for the Respondent:	Martin Gentile
Intervener:	Anick Jean

JUDGMENT

The appeal is dismissed and the decision made by the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 23rd day of April 2007.

"Sylvio Savoie"

Deputy Judge Savoie

Translation certified true
on this 4th day of October 2007.

Brian McCordick, Translator

Citation: 2007TCC244

Date: 20070423

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Intervener.

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REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] This appeal was heard in Québec, Quebec, on February 6, 2007.

[2] The issue is whether the employment of Anick Jean ("the Worker") by the Appellant, from December 16, 2003, to December 22, 2004 ("the period in issue"), was insurable employment.

[3] On September 27, 2005, the Minister of National Revenue ("the Minister") notified the Appellant of his decision that the Worker was employed in insurable employment during the period in issue because the employment was under a contract of service within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act* ("the Act").

[4] In making his decision, the Minister relied on the following factual assumptions:

[TRANSLATION]

- (a) The Appellant registered a business name on June 9, 1994. (admitted)
- (b) The Appellant's two business associates are Christian Desjardins and Nathalie St-Amour. (admitted)
- (c) During the period in issue, the Appellant operated a clinic that treated eating disorders such as anorexia and bulimia under the business name "Clinique St-Amour". (admitted)
- (d) The Appellant's clientele came to it as a result of referrals by physicians, CLSCs and community organizations, or visits to the Appellant's website. (admitted)
- (e) During the period in issue, in addition to the business associates, a receptionist, a psychologist and a social worker worked at the Appellant's clinic. (admitted)
- (f) The Worker completed her Bachelor's degree in nutrition in December 2003. (admitted)
- (g) The Appellant posted an advertisement at Université Laval seeking the services of a nutritionist. (clarification requested)
- (h) On December 16, 2003, the Appellant hired the Worker. (denied)
- (i) On the same date, the Worker signed a written agreement of indeterminate duration with the Appellant. (admitted)
- (j) The agreement provided for the Worker's supervision, her place of work, the reimbursement of her expenses, her hours, her vacations and statutory holidays, and the term for which she was being hired. (denied)
- (k) Upon signing the Agreement, the Worker did not know the difference between being an employee and being self-employed. (clarification requested)
- (l) The Worker was under the immediate supervision of Christian Desjardins. (clarification requested)
- (m) The [Worker]'s task was to hold consultations with clients, and, on occasion, to work with them as part of an intensive follow-up program. (denied)

- (n) The Worker met with the Appellant's clients at the Appellant's clinic. (denied)
- (o) The Appellant set the times at which the clients had their appointments with the Worker. (denied)
- (p) The Worker rendered services to the Appellant from Monday to Saturday, but the Worker kept one or two days off for herself. (denied)
- (q) The Worker's hours of work varied from week to week depending on the appointment schedule set by the Appellant. (denied)
- (r) The Worker wrote a consultation report for each client. (clarification requested)
- (s) The Appellant billed clients \$80 per hour and paid the Worker \$20 per hour as remuneration. (clarification requested)
- (t) In addition, the Worker received \$10 per hour from the Appellant for time spent working with clients as part of intensive follow-up programs. (admitted)
- (u) The Appellant had exclusive responsibility over accounts receivable. (denied)
- (v) The Worker did not bill the Appellant. (admitted)
- (w) The Appellant paid the Worker every Friday by cheque based on the hours that she had worked during the week. (clarification requested)
- (x) The Worker could not get another person to replace her at her job. (clarification requested)
- (y) The Worker used the Appellant's office and equipment to perform her duties. (admitted)
- (z) The Appellant reimbursed the Worker for the client-related meal and taxi expenses that she incurred. (denied)
- (aa) The Worker had no financial stake in the Appellant. (admitted)
- (bb) The Worker ran no risk of financial loss in the performance of her duties for the Appellant. (denied)

- (cc) On September 20, 2005, Christian Desjardins told a representative of the Respondent that the Worker did not have to seek clients. (clarification requested)
- (dd) The clientele belonged to the Appellant, not the [Worker]. (denied)
- (ee) The Worker's duties corresponded to the Appellant's needs. (clarification requested)
- (ff) The Worker ceased working at the Appellant's place of business by reason of a maternity leave on December 22, 2004, not December 16, 2004. (admitted)

[5] The evidence adduced by the Appellant is intended to establish that the Worker joined the clinic as a business associate ["*associé*"]. According to the Appellant, both the advertisement that it posted at Université Laval, and the contract duly signed by the parties (and produced at the hearing as Exhibit A-1), provided for this.

[6] Since the Appellant denied many of the Minister's factual assumptions, which drew their inspiration from Exhibit A-1, it is helpful to reproduce the text of that agreement for the purpose of analysing the relationship between the parties:

[TRANSLATION]

BY HAND

Lévis, 2003-12-16

Clinique St-Amour
1120 Boulevard de la Rive-Sud, Suite 200, P.O. Box 11
Lévis, QC G6W 5M6

SUBJECT: Confirmation of hiring as an associate

Dear *Anick Jean*,

We are pleased to confirm that you have been hired as an associate of our business. The terms and conditions of your hiring are as follows:

Position: You will hold the position of dietician in our business.

Main duties and responsibilities: Your main duties and responsibilities will be as follows: You will be responsible for caring for our clients' nutrition.

Immediate supervisor: You will be under the immediate supervision of Christian Desjardins, the coordinator, or such other person as we designate.

Place of work: You will work at our office in St-Romuald or any other place necessary for the efficient operation of our business.

Remuneration: You will be remunerated on a fee-for-service basis at a rate of \$20 per consultation. The remuneration will be payable each Friday by cheque.

Reimbursement of expenses: You will be reimbursed for all reasonable expenses incurred in connection with your duties upon submission of vouchers, provided those expenses were approved in advance.

Hours of work: The normal hours of work will be 9 a.m. to 6 p.m. from Monday to Friday based on a variable schedule. However, the hours of work may vary depending on the nature and scope of your tasks and the needs of our business.

Vacations: You will be entitled, on prior notice to the coordinator, to take a certain number of weeks of vacation each year by mutually satisfactory agreement with the clinic. Vacation days shall be at your expense.

Statutory holidays: In addition, you shall be entitled to the usual statutory holidays.

Confidentiality Agreement: You are required to read, understand and sign the attached document entitled "Confidentiality Agreement", which covers all information and documents disclosed to you as part of your work with our company.

Client Non-Solicitation Agreement: You are required to read, understand and sign the attached document entitled "Client Non-Solicitation Agreement".

Non-Competition Agreement: You are required to read, understand and sign the attached document entitled "Non-Competition Agreement", which will be in force for the duration of your commitment and for three (3) years thereafter.

Beginning and Duration of Commitment: Your first day of work will be December 16, 2003, and your commitment is indeterminate and may be terminated by either party upon lawful notice.

If you agree with the terms and conditions set out herein, kindly return to us a duly signed copy hereof, along with the attached Confidentiality Agreement and Non-Competition Agreement. On behalf of our business, we wish to express our pleasure that you are joining us. We are confident that you will enjoy your work and find it continually motivating. Naturally, if you have any questions, do not hesitate to contact us. In the meantime, please accept our best wishes.

Sincerely,

Christian Desjardins

I accept the terms and conditions set out above.

2003-12-16

(date)

Anick Jean

(signature of associate)

[7] Additional related documents, attached to Exhibit A-1, will shed light on the true nature of the agreement between the parties. Here are a few relevant excerpts from these documents:

[TRANSLATION]

CONFIDENTIALITY AGREEMENT

BETWEEN: Anick Jean (hereinafter "the associate")

AND: CLINIQUE ST-AMOUR (hereinafter "the company")

Ownership: The associate acknowledges that the information and documents supplied by the company (including but not limited to client lists, price lists, processes, treatments, practices, methods, contracts, agreements, software, databases and treatment-related documents) are strictly confidential and privileged and shall remain the property of the company.

...

... except in the course of her work, she shall not make or keep any copies, photocopies, drafts or other reproductions of documents or information, including, without limiting the generality of the foregoing, treatment-related information or documents.

No Grant of Licence: All information and documents are and shall remain the exclusive property of the company. The associate shall be granted no licence or other interest of any kind in the information or documents as a result of their disclosure.

CLIENT NON-SOLICITATION AGREEMENT

BETWEEN: Anick Jean (hereinafter "the associate")

AND: CLINIQUE ST-AMOUR (hereinafter "the company")

The associate acknowledges that she has obtained or will obtain privileged access to information and documents related to the company's business in the course of her work. The associate also acknowledges that the company has given or will give her the opportunity to acquire knowledge and become familiar with the practices, processes and methods used by the company in the course of its business activities, and, in particular, without limiting the generality of the foregoing, in the course of its customer relations.

...the associate agrees not to solicit the company's clients directly or indirectly, except in the performance of her duties for the benefit of the company. This non-solicitation agreement applies whether the associate solicits a client of the company, or the client solicits the associate. A client of the company means any purchaser or lessee of the services offered by the company.

[8] The Worker, for her part, submits that she never knew the difference between employee and self-employed status. She says that she only learned it at the end of her employment, when her accountant, who prepared her income tax return, explained it to her.

[9] In addition, the Worker, and the Department of Revenue, submitted that the facts are inconsistent with the status of business associate described in the contract that the Appellant had the Worker sign.

[10] The evidence disclosed that the Worker's schedule was set by the Appellant. Naturally, the Worker was consulted about her availability. However, based on the evidence, the Appellant most often determined the schedule and the intensive follow-up programs, and the Worker was consulted in between two clients and felt that she was stuck and had no choice but to accept this schedule because there were no other nutritionists. This situation became particularly difficult for the Worker because she had asked if she could stop providing intensive follow-up services due to her pregnancy.

[11] It has been shown that the Worker rendered her services to the Appellant under the direct supervision of Christian Desjardins, even though she had a certificate attesting to her training as a nutrition professional. Given her qualifications, the Appellant did not have to dictate the manner in which the Worker practiced her occupation. She was a professional. She did not have to be followed around everywhere. However, based on the evidence, she had to submit reports and follow the schedule and procedure established by the Appellant.

[12] The Worker offered her services to the Centre hospitalier de l'Université Laval (CHUL) on weekends, and was paid by the hour at that hospital. However, it was shown that she would have left her employment there if it had given rise to any conflicts.

[13] It is true that the contract describes the Worker as a business associate ("*associée*"). However, the facts in the case at bar are not consistent with that concept, because it has been shown, *inter alia*, that the Worker had no financial

stake in the Appellant's business and did not share in its profits. Moreover, she had no decision-making power in the business. The business's losses were incurred by its two real business associates, that is to say, Christian Desjardins and Nathalie St-Amour, the person for whom the business was named. The business was responsible for keeping track of accounts receivable. It was also shown that Clinique St-Amour had access to the Worker's client records.

[14] Counsel for the Minister submits that the principle laid down by the Federal Court of Appeal in *9041-6868 Québec Inc.*, where Décary J. stated the following, is applicable to the case at bar:

9 The contract on which the Minister relies, or which a party seeks to set up against the Minister, is indeed a juridical fact that the Minister may not ignore, even if the contract does not affect the Minister (art. 1440 C.C.Q.; Baudouin and Jobin, *Les obligations*, Éditions Yvon Blais 1998, 5th edition, p. 377). However, this does not mean that the Minister may not argue that, on the facts, the contract is not what it seems to be, was not performed as provided by its terms or does not reflect the true relationship created between the parties. The Minister, and the Tax Court of Canada in turn, may, as provided by articles 1425 and 1426 of the *Civil Code of Québec*, look for that true relationship in 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. The circumstances in which the contract was formed include the legitimate stated intention of the parties, an important factor that has been cited by this Court in numerous decisions (see *Wolf v. Canada (C.A.)*, [2002] 4 FC 396, paras. 119 and 122; *A.G. Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54; *Le Livreur Plus Inc. v. M.N.R.*, 2004 FCA 68; *Poulin v. Canada (M.N.R.)*, 2003 FCA 50; *Tremblay v. Canada (M.N.R.)*, 2004 FCA 175).

[15] Thus, the relationship between the parties (the Appellant and the Worker) is at the heart of this dispute, and the issue is whether there was a contract of employment between them, or, in the words of the Act, whether the Worker held insurable employment.

[16] In Quebec, a province governed by civil law principles, the contract of employment is defined in article 2085 of the *Civil Code of Québec*, which provides:

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.

[17] A contract of employment is different from a contract of enterprise or for services, which 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. (article 2098)

Article 2099 C.C.Q. provides:

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.

[18] Hence, subordination, or the exercise of a power of control, constitutes a more important factor, even a determinative one, under Quebec law. The *Employment Insurance Act*, which applies to the case at bar, is a federal statute. And section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which has been in force since June 1, 2001, states that the private law of the province of the dispute must be applied when private law concepts are in issue. That provision reads:

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.

In *Lévesque v. Canada (Minister of National Revenue – M.N.R.)*, [2005] T.C.J. No. 183, Dussault J. of our Court wrote:

23 In *Sauvageau Pontiac Buick GMC ltée v. Canada*, T.C.C., No. 95-1642(UI), October 25, 1996, [1996] T.C.J. No. 1383 (Q.L.), Archambault J., in referring to the decision of the Supreme Court of Canada in *Quebec Asbestos Corp. v. Couture*, [1929] S.C.R. 166, concluded, with regard to these definitions, that the distinguishing feature was the presence or otherwise of a relationship of subordination. Furthermore, it retained the definition of this expression formulated by Pratte J.A. in *Gallant*. At paragraph 12 of his decision, Archambault J. explained his reasoning as follows:

12. It is clear from these provisions of the C.C.Q. that the relationship of subordination is the primary distinction between a contract of enterprise (or of services) and a contract of employment.

As to this concept of a relationship of subordination, I feel that the comments of Pratte J.A. in *Gallant* are still applicable.

The distinguishing feature of a contract of service is not the control actually exercised by the employer over his employee but the power the employer has to control the way the employee performs his duties.

[19] Several factors can be considered in order to ascertain whether or not a relationship of subordination exists. In her decision in *Seitz v. Entraide populaire de Lanaudière inc.*, Court of Québec (Civil Division), No. 705-22-002935-003, November 16, 2001, [2001] J.Q. No. 7635 (QL), Judge Monique Fradette of the Court of Québec set out a series of indicia on the basis of which one can determine whether or not subordination exists. This is what she wrote about this point at paragraphs 60 to 62 of her judgment:

60 The case law requires, in order for there to be a contract of service, the existence of a right of supervision and immediate direction. The mere fact that a person gives general instructions about the way in which the work is to be performed, or that he reserves the right to inspect and supervise the work, is not sufficient to convert the agreement into a contract of employment.

61 A series of indicia developed by the case law enables the Court to determine whether or not a relationship of subordination exists between the parties.

62 The indicia of control include:

- mandatory presence at a workplace
- compliance with the work schedule
- control over the employee's absences on vacations
- submission of activity reports
- control over the quantity and quality of work
- imposition of the methods for performing the work
- power to sanction the employee's performance
- source deductions
- benefits
- employee status on income tax returns
- exclusivity of services for employer

[20] However, it must be specified that the existence a few indicia pointing to a relationship of subordination, or the absence of such a relationship, is no basis for ending the analysis. The exercise, which is based on the distinction drawn in the *Civil Code of Québec*, is to determine the overall relationship between the parties. Thus, one must establish the extent to which the indicia pointing to a relationship of subordination predominate over the other indicia.

[21] Let us examine the evidence in light of the indicia articulated by Judge Fradette in order to ascertain the overall relationship between the parties and determine whether or not there was a relationship of subordination.

Mandatory presence at a workplace

[22] The Worker's job required her to hold consultations with clients, and, on occasion, to work with them as part of an intensive follow-up. She did these things at the Appellant's clinic, or, as specified in Exhibit A-1, the contract,

[TRANSLATION]

any other place necessary for the efficient operation of our business.

[23] When the evidence is examined from the perspective of this indicia, it favours the existence of a relationship of subordination.

Compliance with work schedule

[24] Exhibit A-1 states the following in this regard:

[TRANSLATION]

Hours of Work: The normal hours of work shall be from 9 a.m. to 6 p.m. from Monday to Friday based on a variable schedule. However, the hours of work may vary depending on the nature and scope of your tasks and the needs of our business.

In addition, the Appellant set clients' appointment times with the Worker. When the evidence is examined from this perspective, it favours the existence of a relationship of subordination.

Control over the Worker's absences on vacation

[25] The Worker got no paid vacations. However, she had to ask for permission to be absent. The Appellant did not withhold such permission. After she got pregnant, the Worker took days off with the Appellant's permission and she asked the Appellant no longer to assign her intensive follow-up programs, largely without success.

[26] Here again, the evidence points to the existence of a relationship of subordination.

Submission of activity reports

[27] It has been shown that the Worker had to prepare a consultation report in respect of each client for the Appellant, and that the Appellant had access to her client records. When the facts are considered from this perspective, they support the existence of a relationship of subordination.

Control over the quantity and quality of work

[28] It has been proven that the Appellant was responsible for finding clients who would book consultations with the Worker. The Appellant did not intervene in the Worker's work; it respected her professional competency in the field of nutrition. However, the Worker carried out her duties within a framework established and directed by the Appellant. In addition, she was under the immediate direction and supervision of Mr. Desjardins. The facts showed that, from this perspective, a relationship of subordination existed.

The imposition of the methods for performing the work

[29] When the evidence is considered from this perspective, it supports the existence of a relationship of subordination, as set out in the preceding paragraph. As for the indicia related to the power to sanction the employee's performance, and to source deductions and benefits, the evidence that has been obtained tends to support the absence of a relationship of subordination more than the existence of such a relationship. The evidence did not disclose how the Worker described the status of her job in her income tax return.

Exclusivity of services for employer

[30] It has been shown that the Worker could not have someone perform her duties in her place. It is true that she worked at the hospital on weekends, but that work

was for a different clientele. In addition, the evidence showed that she would have quit her hospital job in the event of a conflict, even though that job was authorized because the Appellant apparently never argued that the Worker was violating her non-competition agreement, which she signed on the same date as her contract. In my view, the evidence, when analysed from this perspective, appears to show the existence of a relationship of subordination.

[31] Having regard to the indicia set out above, I must find that the degree of control in the relationship between the Appellant and the Worker was such that there was enough of a relationship of subordination to determine that a contract of employment, not a contract of enterprise, existed.

[32] The examination of the facts in light of the *Civil Code of Québec* and the recent jurisprudence concerning insurability, and, in particular, the concept of the contract of employment, did not support the Appellant's submission that a contract of enterprise existed. Consequently, the Court must conclude that the Worker was employed by the Appellant in insurable employment under a contract of service within the meaning of paragraph 5(1)(a) of the Act and, thus, that she held insurable employment during the period in issue. In addition, the evidence pertaining to the relationship between the Appellant and the Worker supports the conclusion that there was a contract of employment between the parties according to the provisions of the *Civil Code of Québec*.

[33] Consequently, the appeal is dismissed and the decision made by the Minister is confirmed.

Signed at Grand-Barachois, New Brunswick, this 23rd day of April 2007.

"Sylvio Savoie"

Deputy Judge Savoie

Translation certified true
on this 4th day of October 2007.

Brian McCordick, Translator

CITATION: 2007TCC244

COURT FILE NO.: 2006-331(EI)

STYLE OF CAUSE: CHRISTIAN DESJARDINS & NATHALIE
ST-AMOUR O/A CLINIQUE ST-AMOUR
AND M.N.R.

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: February 6, 2007

REASONS FOR JUDGMENT BY: The Honourable Deputy Judge S.J. Savoie

DATE OF JUDGMENT: April 23, 2007

APPEARANCES:

Agent for the Appellant: Christian Desjardins

Counsel for the Respondent: Martin Gentile

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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