Docket: 2018-3622(EI)

BETWEEN:

DÉNEIGE-TOIT SERVICE-PLUS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 11, 2019, at Quebec City, Quebec

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellant: Sébastien Gobeil

Counsel for the Respondent: Emmanuel Jilwan

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (the "Act") is dismissed and the decision of the Minister of National Revenue on August 10, 2018, according to which Mr. Larochelle held insurable employment with the Appellant within the meaning of paragraph 5(1)(a) of the Act for the period from February 13, 2018, to March 10, 2018, is confirmed in accordance with the attached Reasons for Judgment.

Signed at Montreal, Quebec, this 20th day of November, 2019.

"Dominique Lafleur"

Lafleur J.

Citation: 2019 TCC 257
Date: 20191120
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REASONS FOR JUDGMENT

Lafleur J.

I. BACKGROUND

[1] Déneige-Toit Service-Plus Inc. (the "Appellant") is appealing the Minister of National Revenue's (the "Minister") decision dated August 10, 2018, according to which François Larochelle was an employee of the Appellant and therefore held with it,for the period of February 13, 2018 to March 10, 2018 (the "period at issue"), insurable employment within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act"). The Minister's decision, according to which Mr. Larochelle did not hold insurable employment for the period of March 5, 2017 to February 12, 2018, is not disputed.

[2] For many years, and during the period at issue, the Appellant held the contract to remove snow from the immense roof at the Place Ste-Foy shopping centre in Quebec City. While it was necessary to clear snow from the roof, the Appellant retained the services provided by the workers, including Mr. Larochelle, to do the work.

[3] At the hearing, Martin Fortier, owner and president of the Appellant, testified as to how the Appellant's company's activities were carried out. The Appellant also had Maxime Racine, accounting assistant, testify. He provided services to the Appellant during the winter of 2019. Mr. Larochelle testified for the respondent.

II. ISSUE:

[4] The issue is whether Mr. Larochelle held insurable employment with the Appellant within the meaning of paragraph 5(1)(a) of the Act during the period at issue. To answer this question, what must be determined is whether the requirements for a contract of service (or contract of employment under the *Civil Code of Québec* ("C.C.Q.")) as opposed to a contract of enterprise (or contract of service), were met.

III. FACTS

Mr. Fortier's testimony

[5] The Appellant's snow removal season could last from three to eight weeks, depending on weather conditions.

[6] When the engineers in charge of monitoring the roof at Place Ste-Foy told the Appellant that snow must be cleared from that roof, the Appellant retained the services of workers to clear the snow. An announcement was posted on social media (the Appellant's Facebook page, in this case) that the snow removal site would be open on a given date from a given time to a given time, and all that anyone interested in clearing snow from the roof had to do was show up at the mall and follow the directions given by the security guards to get to the mall's roof. On the roof, a site was made available to the Appellant to receive the workers.

[7] Mr. Fortier said that one of the Appellant's representatives (a person named Philippe Arcand) who worked for it was on the rooftop site to receive the workers. Mr. Fortier was neither on the site nor anywhere else on the roof.

[8] There could have been 150 to 200 workers on the roof in one day. About 75% of the workers were students and disadvantaged individuals (or people with no fixed address).

[9] Mr. Fortier testified that before starting the work, the workers had to sign a standard agreement and that the terms of that agreement could not be amended. This agreement set out, among other things, that the worker being a self-employed person, there was no relationship of subordination between him and the Appellant, that he had to confirm his availability to the Appellant no later than 24 hours after a service request from it, that he had to provide full clothing and all equipment that he deemed necessary to carry out the service request, and that he covered all

expenses necessary to perform the work. The agreement also set out that the Appellant would pay the agreed hourly rate, including applicable taxes, and that it guaranteed no minimum of hours for a service request.

[10] The workers could not negotiate the price paid by the Appellant for the services; it had been set by the Appellant at $17 an hour throughout the period at issue. The Appellant provided no benefits or insurance of any type to the workers.

[11] After having signed the contracts, the workers provided their social insurance number so the Appellant could do a verification. A worker could be accompanied by someone else; in this case, the Appellant noted only one social insurance number and all payments were made in the name of the person who provided his or her social insurance number. Some workers submitted invoices to the Appellant. At the end of snow removal season, the Appellant provided various workers with T4A slips.

[12] A time card was filled out for each person who went onto the roof to clear snow. The times at which the worker arrived and left were noted on the cards. The time cards were necessary to determine the hours worked and for security reasons because they made it possible to do a count of how many people were on the roof at a given time.

[13] According to Mr. Fortier, some workers worked only one hour, while others worked much longer. The Appellant did not require a minimum or maximum number of hours. However, when a person sent a worker to the Appellant and when that person cleared snow for at least four hours, the person doing the referring received a $25 bonus for having sent the worker. The amounts owing to the workers were not paid at regular intervals. Sometimes, the Appellant paid the service delivery amount the next day; sometimes after a few days.

[14] The only work instrument that the Appellant provided to the workers was a shovel. The type of shovel used to clear snow from the roof was a particular requirement from Place Ste-Foy's insurance company. Some 450 shovels were stored on the roof.

[15] According to Mr. Fortier, Mr. Arcand remained on the site's roof to take attendance and he did not go out to check the work done by the workers. Mr. Fortier agreed that the representative could do a walkaround on the roof to see what was going on. However, according to Mr. Fortier, Mr. Arcand was not a foreman. None of the Appellant's representatives told the workers how to do their

jobs. Snow removal is not a complicated task; the workers had to follow one behind the other. Mr. Fortier also said that the Appellant never gave any warnings to any of the workers.

Mr. Larochelle's testimony

[16] Mr. Larochelle noticed the Appellant's advertisement on Facebook and decided to come to the shopping centre. He said that the Appellant's secretary and Mr. Arcand were in the area on the shopping centre's roof.

[17] Mr. Larochelle testified that, during the winter of 2018, he did a lot of work for the Appellant and also worked in the construction industry. He called or wrote to Mr. Arcand to find out whether the Appellant needed his services. Mr. Larochelle worked the hours that suited him, but said that he could not always come to the snow removal site at any time because he needed prior authorization from Mr. Arcand. He had informed him that he had to stay at least four hours and that he could not work more than eight hours per day, unless authorization to do so was given by the Appellant. He worked days and evenings.

[18] Mr. Larochelle said that all of the workers took their lunch break at the same time, even though they were not paid for it. However, the other breaks were paid. According to Mr. Larochelle, Mr. Arcand or another of the Appellant's representatives monitored the site to indicate, among other things, where to put the snow and where and how to spread de-icing salt, and to monitor the workers' behaviour. The workers had to follow certain rules, such as not doing drugs, not leaving things lying around, and not misbehaving. Mr. Larochelle testified that on one occasion, the Appellant's representative asked a worker to leave for not following the rules after being warned three times.

[19] Mr. Larochelle signed four contracts during the period at issue that were similar to the standard agreement described above. He signed the four contracts when he went to look for the cheques for payment of the amounts owing to him. According to Mr. Larochelle, only the time card was filled out on every work day to note when the workers who cleared snow on the roof arrived and left.

[20] Mr. Larochelle did not submit any invoices to the Appellant and was not registered in the sales tax files during the period at issue.

[21] According to Mr. Larochelle, sometimes Mr. Arcand offered to take him and some of the other workers home, in his own truck or the Appellant's, when they finished quite late at night.

[22] In his other jobs, Mr. Larochelle was always considered an employee.

Mr. Racine's testimony

[23] Mr. Racine considered himself a self-employed person for the provision of his services to the Appellant during the winter of 2019, just like the other workers he met in this job. He signed a contract similar to the standard agreement and provided his social insurance number to the Appellant. He testified that he filled out time cards. Mr. Racine said that he could take his lunch break at whatever time was convenient for him; he dressed like he wanted and the Appellant provided only the shovel. Mr. Racine also testified that Mr. Arcand showed up on the roof to count the number of workers who were there.

IV. PARTIES' POSITIONS

The Appellant

[24] During the period at issue, Mr. Larochelle was not an employee who was bound to the Appellant by a contract of employment. This was for several reasons. To begin with, the parties had signed a contract establishing a relationship in which the worker was a "self-employed person." The mutual intent of the parties to the relationship was to establish such a relationship. In addition, none of the Appellant's representatives exercised on Mr. Larochelle a control that met the relationship of subordination criterion that is essential to a contract of employment under applicable Quebec legislation. The Appellant had no rules regarding when workers had to come to and could leave the snow removal site, or regarding what they had to wear and how they were to do their work. Time cards were filled out only to allow hours worked to be compiled and to comply with safety standards as per Place Ste-Foy's requirements.

The Respondent

[25] During the period at issue, Mr. Larochelle was an employee who was bound to the Appellant by a contract of employment. Mr. Larochelle could not negotiate either the agreement or the price paid by the Appellant for services rendered. The contract between the parties is of a membership agreement nature. Mr. Larochelle

was not acting as a person who was in business when he provided his services to the Appellant and had no chance of making a profit or suffering losses during his roof snow removal activities.

[26] In addition, the relationship of subordination essential to the existence of a contract of employment was clearly demonstrated. Mr. Larochelle had the impression that he had to do a minimum of four hours of work and a maximum of eight hours of work, unless otherwise authorized by the Appellant. In addition, the Appellant made rules with respect to the organization of the work. One of the Appellant's representatives was on the roof during snow removal operations to ensure that the rules were being followed. The Appellant gave instructions for spreading de-icing salt. The Appellant provided the shovel. The Appellant gave warnings when there was misconduct on the part of certain workers.

V. THE ACT AND CASE LAW

Section 5 of the Act expressly sets out what insurable employment is by including in the definition of this expression "employment....under any express or implied contract of service or apprenticeship."

5(1) Types of insurable employment — Subject to subsection (2), insurable employment is	**5(1) Sens de *emploi assurable*** — Sous réserve du paragraphe (2), est un emploi assurable :
(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;	a) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière;
. . .	[…]

[Emphasis added]

[27] Nowhere does the Act define a "contract of service."

[28] Because the facts in this case took place in Quebec, we must review the relationship between Mr. Larochelle and the Appellant with respect to private law applicable in Quebec.

[29] Therefore, the criteria set out in the C.C.Q. must be applied to determine whether we are dealing with a contract of service (or contract of employment) or a contract of enterprise or for services. Justice Desjardins states as follows in *NCJ Educational Services Limited v. M.N.R.* [*sic*], 2009 FCA 131:

> [49] Since paragraph 5(1)(*a*) [of] the *Employment Insurance Act* does not provide the definition of a contract of services, one must refer to the principle of complementarity reflected in section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which teaches us that the criteria set out in the *Civil Code of Québec* must be applied to determine whether a specific set of facts gives rise to a contract of employment. […]

The relevant provisions of the C.C.Q. are contained in articles 2085 and 2086 as concerns a contract of employment and in articles 2098, 2099 and 2101 as concerns a contract of enterprise or for services.

2085. A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.	**2085.** Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre personne, l'employeur.
2086. A contract of employment is for a fixed term or an indeterminate term.	**2086.** Le contrat de travail est à durée déterminée ou indéterminée.
. . .	[…]
2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him.	**2098.** Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.
2099. The contractor or the provider of services is free to choose the means of performing the contract	**2099.** L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et

and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client.	il n'existe entre lui et le client aucun lien de subordination quant à son exécution.
. . .	[…]
2101. Unless a contract has been entered into in view of his personal qualities or unless the very nature of the contract prevents it, the contractor or the provider of services may obtain the assistance of a third person to perform the contract, but its performance remains under his supervision and responsibility.	**2101.** À moins que le contrat n'ait été conclu en considération de ses qualités personnelles ou que cela ne soit incompatible avec la nature même du contrat, l'entrepreneur ou le prestataire de services peut s'adjoindre un tiers pour l'exécuter; il conserve néanmoins la direction et la responsabilité de l'exécution.

[Emphasis added]

[30] Therefore, for a contract of service to exist within the meaning of the Act (or contract of employment within the meaning of the C.C.Q.), the following three constituent elements are required (*9041-6868 Québec Inc. v. M.N.R.)* [*sic*], 2005 FCA 334, paragraph 11):

i. The performance of work;

ii. Remuneration; and

iii. A relationship of subordination.

[31] The relationship of subordination (or the criterion of direction or control) is the determining factor that distinguishes a contract of employment from a contract for services under Quebec law. As Justice Archambault states, "[t]o determine whether a contract is a contract of employment or a contract for services, a court has no choice but to determine whether there is a relationship of subordination" (*Beaucaire v. M.N.R.*, 2009 TCC 142, paragraph 24).

[32] In the requisite analysis, consideration must also be given to articles 1425 and 1426 of the C.C.Q., which provide that the common intention of the parties must be sought:

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be	**1425.** Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties

sought in interpreting a contract.	plutôt que de s'arrêter au sens littéral des termes utilisés.
1426. In interpreting a contract, 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, are all taken into account.	**1426.** On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.

[33] In *Grimard v. Canada*, 2009 FCA 47, [2009] 4 F.C.R. 592 [*Grimard*], the Federal Court of Appeal states that it is not wrong to draw on the criteria established by the common law in analyzing the legal nature of a work relationship in order to determine the existence of a relationship of subordination, regardless of the fact that the ruling must be made under Quebec civil law:

> [43] In short, in my opinion there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.
>
> [Emphasis added]

[34] However, I am of the opinion that the comments made by Justice Décary in *9041-6868 Québec Inc. v. M.N.R.*, above (paragraph 12), are still relevant in that factors other than direction or control, which in Quebec law is the determining factor, will be merely indicators to be considered in determining the existence of a contract of employment.

[35] As well, as the Federal Court of Appeal stated in *Grimard* (paragraph 67), the judge that must answer the question of a worker's status must ". . . determine the legal nature of the overall relationship between the parties in a constantly changing working world . . .".

[36] In *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 (paragraphs 36, 37, 44 and 57), the Supreme Court of Canada recently indicated that for a person to have independent contractor status, that person must have assumed the business risks,

that is, he or she must be able to organize his or her business venture in order to make a profit. A contextual and fact-specific inquiry must be conducted for each case; it is important to look behind the contract binding the parties to ascertain the true nature of the relationship of the parties.

[37] In *1392644 Ontario Inc., o/a Connor Homes v. M.N.R.*, 2013 FCA 85 [*Connor Homes*] at paragraphs 39 and 40, Justice Mainville describes a two-step method to address the central question that is asked when determining whether an individual has employee or independent contractor status. That 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 (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, paragraph 47). This two-step method can also be applied in Quebec.

[38] Under the first step, the subjective intent of each party to the relationship must be ascertained. The second step is to ascertain whether an objective reality sustains the subjective intent of the parties, if applicable. It is in the second step that one can ascertain whether there is a relationship of subordination between the parties.

VI. ANALYSIS

[39] In this case, the parties do not dispute the fact that Mr. Larochelle carried out work and received compensation. These first two essential elements of a contract of employment are therefore not at issue. Rather, it is the third and last of the essential elements of a contract of employment—that is, the existence of a relationship of subordination (criterion of direction and control)—that is at issue.

[40] Using the two-step method described in *Connor Homes*, I must determine whether there was such a relationship of subordination between Mr. Larochelle and the Appellant during their relationship in the period at issue.

[41] For the reasons stated below, I find that there was such a relationship of subordination between Mr. Larochelle and the Appellant during the period at issue. Thus, Mr. Larochelle was under a contract of employment with the Appellant and therefore held insurable employment with the Appellant under paragraph 5(1)(a) of the Act during the period at issue. I find that Mr. Larochelle was not an independent contractor in the context of his relationship with the Appellant during the period at issue.

[42] In these reasons, I will use the expression “self-employed worker” or “independent contractor” interchangeably.

First step: subjective intent of the parties

[43] In the interpretation of the contract between Mr. Larochelle and the Appellant, the common intention of the parties must be sought, if applicable, and, to do so, the circumstances in which the contract was formed and usage must be taken into account. Under Quebec law, this first step is essential considering articles 1425 and 1426 of the C.C.Q. In addition, during this first step, the actual behaviour of the parties must be considered. Thus, I must verify whether Mr. Larochelle submitted invoices, whether he was registered for sales tax purposes, and whether he filed his tax return as an independent contractor.

[44] However, case law has repeatedly indicated that the characterization of the relationship between the parties is not necessarily determinative with respect to the nature of the contract between them (*D&J Driveway Inc. v. M.N.R.*, 2003 FCA 453, paragraph 2, *Grimard*, paragraph 33). Thus, for example, if the behaviour of the parties is inconsistent with the contract purporting to create an independent contractor relationship, or if the evidence demonstrates the existence of a relationship of subordination between the parties, the relationship would be an employer-employee relationship instead.

[45] In this case, upon preponderance of evidence, this first step does not establish an intention in common of the parties with respect to the characterization of their relationship. Therefore, the finding at the second step will be determinative.

[46] First, Mr. Larochelle seemed rather indifferent with respect to the characterization of the type of relationship with the Appellant. The evidence demonstrates that he was happy to work and to receive his pay. Mr. Larochelle testified that he knew that the Appellant considered him as a self-employed worker and that, for that reason, he had not requested a record of employment at the end of the snow removal season.

[47] With regard to the Appellant, the evidence demonstrated that its intention was that all workers removing snow from the roof of Place Ste-Foy, including Mr. Larochelle, be considered as self-employed workers, not as employees of the Appellant.

[48] In addition to Mr. Fortier's testimony, the Appellant filed the four contracts entered into with Mr. Larochelle to support its position. As indicated above, those contracts provided that the workers were self-employed workers who provided their services to the Appellant, that they assumed all the expenses necessary to deliver the services, and that they had to provide all the clothing and equipment that they deemed necessary. Those contracts also provided that the Appellant did not guarantee any minimum number of hours and that it agreed to pay, upon submission of a timesheet, the hourly rate agreed upon (including any applicable taxes). The last clause provided that the workers had no relationship of subordination with the Appellant. Likewise, the time cards indicating Mr. Larochelle's arrival and leave times, the cheques that the Appellant issued to Mr. Larochelle, and the other proof of payment of the amounts paid to Mr. Larochelle, were filed as evidence.

[49] Upon preponderance of evidence, the contracts between the Appellant and Mr. Larochelle were signed after he provided the services, that is, when Mr. Larochelle would take, in the week following the end of the work, the cheques that the Appellant had issued as payment for the services provided. Those contracts were not signed upon Mr. Larochelle's arrival on the roof. Therefore, they cannot demonstrate the existence of a common intention of the two parties with respect to the relationship at the time that Mr. Larochelle and the Appellant entered into an agreement to perform the snow removal work.

[50] Mr. Fortier testified that the standard-form contract—the same as the four contracts that Mr. Larochelle signed—was signed by all the workers before they started removing snow from the roof on the first day that the snow removal site opened. However, Mr. Larochelle testified that he signed the four contracts in the week following the work's completion, when he picked up the cheques for the amounts that he was owed, not the first day of the opening of the snow removal site. According to Mr. Larochelle, the time card was simply filled out every work day to note the workers' entries and exits on the roof.

[51] A fact consistent with Mr. Larochelle's testimony is that the four contracts that he signed are not dated as the first day of work indicated on the corresponding time cards. The contracts are instead dated a few days after the last day of work indicated on those time cards. This element gives credibility to Mr. Larochelle's testimony with respect to when the workers signed the contracts and, at the same time, casts doubt on the credibility of Mr. Fortier's testimony in that regard.

[52] In addition, the four contracts between Mr. Larochelle and the Appellant can in no way establish the parties' intention in common because the evidence demonstrated that Mr. Larochelle was unable to negotiate the conditions. These contracts can be referred to as contracts of adhesion. In fact, Mr. Fortier admitted that the conditions of the standard-form contract were not negotiable. Mr. Fortier also testified that the $17 hourly rate had been set by the Appellant and was not negotiable with any of the workers.

[53] Lastly, the actual behaviour of the parties does not affect this finding. In fact, the evidence demonstrated that Mr. Larochelle was not registered for sales tax purposes and that he had not issued any invoices for the services provided to the Appellant. However, there is no evidence as to whether Mr. Larochelle filed his tax return indicating that he was a self-employed worker, although he submitted the T4A slip to his father's accountant, who prepared his returns. Likewise, there were no source deductions on the amounts that the Appellant paid to Mr. Larochelle, and he did not have any health insurance or retirement plan.

Second step: Objective intention or legal subordination

[54] Because I am required to rule pursuant to Quebec civil law, I must determine whether there was a relationship of subordination between Mr. Larochelle and the Appellant within the framework of the snow removal work undertaken by Mr. Larochelle, bearing in mind that in order to find the existence of a contract of employment, the C.C.Q. requires that direction or control be exercised by a person who is the employer. For the contract of enterprise, on the contrary, there must not be any relationship of subordination with respect to performing the contract. The other criteria, namely ownership of the tools, the chance of profit, the risk of loss, and integration into the Appellant's business, will be but indicators to consider in determining whether there was such a relationship of subordination between Mr. Larochelle and the Appellant.

[55] For the reasons listed below, I find that there was such a relationship of subordination between Mr. Larochelle and the Appellant during the period at issue, because the evidence demonstrated that the Appellant exercised direction and control over the manner in which Mr. Larochelle carried out the snow removal work.

[56] Mr. Larochelle's testimony was credible and plausible. According to Mr. Larochelle, Mr. Arcand supervised the work, coordinated it and recorded the hours. Mr. Larochelle indicated, among other things, that the workers were given

instructions by a representative of the appellant (Mr. Arcand) concerning the spreading of de-icing salt and the removal of snow from the compressors. In addition, certain rules imposed by the Appellant, such as not taking drugs, not leaving things lying around, and not misbehaving, had to be respected on the roof. Mr. Larochelle also testified that he saw a worker be expelled from the roof after receiving three warnings.

[57] Mr. Larochelle testified that he communicated with Mr. Arcand to find out whether he needed him to work, that he could not arrive on the snow removal site before a certain time and that he had to work a minimum of four hours and a maximum of eight hours a day, unless authorized by the Appellant. Mr. Larochelle's time cards, which were filed as evidence, indeed show that Mr. Larochelle always worked a minimum of four hours every work day. The time cards that the workers completed are typical of a relationship resulting from a contract of employment allowing the Appellant to exercise control over the hours worked by the workers.

[58] All of these facts demonstrate that the Appellant controlled the way in which the work was carried out, not simply the quality and result of the work (*Grimard*, paragraph 31).

[59] Even if other time cards for other workers indicate fewer than four hours of work a day, that evidence is not relevant in determining Mr. Larochelle's status. Likewise, the fact that the evidence demonstrated that some workers enlisted an assistant or submitted invoices to the Appellant is not relevant with regard to the question of whether Mr. Larochelle was under a contract of employment or under a contract of enterprise with the Appellant. What I must determine is Mr. Larochelle's status with the Appellant, not the status of the other workers that the Appellant hired to remove snow from the roof of the shopping centre.

[60] I do not accept Mr. Fortier's testimony about the way in which things were done on the roof, that is, that only Mr. Arcand was on the premises on the roof to receive the workers and that Mr. Arcand did not go on the roof, except to see what was happening. First, Mr. Fortier admitted that he was not present on the premises or on the roof. However, I find it unlikely that only Mr. Arcand was present on the premises on the roof to receive all the workers when the snow removal site opened. The evidence demonstrated that the roof was huge. Mr. Fortier testified that in a typical work day, workers walked 5.5 kilometres.

[61] I also find it unlikely that the workers were sent on the roof with a shovel, without any instructions from a representative of the Appellant concerning the area to be cleared of snow and the way in which the snow was to be cleared, without having established any rules for carrying out the snow removal work. I find it unlikely that such a large group of workers on the roof of the shopping centre (sometimes 100 to 150 workers) was not subject to the direction or control of a representative of the Appellant with regard to the way in which the work was to be carried out, as Mr. Fortier claims. Because the Appellant paid the workers by the hour, it is more likely that it implemented control systems so that the workers could perform their work efficiently: It had to determine the locations where the snow had to be cleared and the locations that had to be de-iced, and establish the rules to perform the work, the rules to follow on the roof, etc.

[62] Considering the significant number of workers on the roof, I find that a representative of the Appellant had to supervise the work on the roof and the manner in which the work was performed. In addition, considering the number of workers, it is plausible that the Appellant's secretary was also on the premises on the roof, as Mr. Larochelle indicated in his testimony, in addition to Mr. Arcand, so that the latter could supervise the workers.

[63] Mr. Arcand's testimony would have been beneficial to the Court. Mr. Arcand could have explained how the Appellant's activities were performed on the premises, as well as on the roof, given Mr. Fortier's absence in those areas. Mr. Arcand could have told the Court whether he gave instructions concerning the tasks to be performed and, above all, whether he gave instructions on the manner in which those tasks were to be performed. I therefore draw a negative inference from the fact that Mr. Arcand did not testify.

[64] Upon preponderance of evidence, Mr. Larochelle was not in business during the period at issue. Mr. Larochelle did not negotiate the price that the Appellant paid for the services rendered. The amount was set at $17 an hour, and it was not possible to negotiate with the Appellant. In the course of the snow removal activities, Mr. Larochelle could not make a profit or suffer a loss as would be the case for someone who was in business. Even if the Appellant implemented a referral system, this is not enough to allow Mr. Larochelle to be considered as an independent contractor.

[65] I agree with Justice D'Auray who, in *AE Hospitality Ltd. v. Minister of National Revenue*, 2019 TCC 116, concluded that the criterion of chance of profit or of risk of loss must be interpreted in the entrepreneurial sense:

> [149] In my view, working more or less hours does not equate to a chance of profit or a risk of loss. In *6627148 Ontario Ltd. (Daily Care Health Services) v. M.N.R.,* Daily Care Health Services put forward the same argument as AE in this matter, that is, that the workers had a chance of profit if they worked more hours and a risk of loss if they worked less hours. Justice V. Miller did not accept the argument put forward by Daily Care Health Services. She stated that the term "chance of profit and risk of loss" had to be understood in the entrepreneurial sense.

[66] The other indicators of supervision, that is, the ownership of the tools (shovels provided by the Appellant) and Mr. Larochelle's degree of integration, only support my finding of the existence of a relationship of subordination.

[67] Lastly, Mr. Racine's testimony did not help the Court to determine Mr. Larochelle's status with the Appellant. Mr. Racine testified concerning, among other things, his subjective intent in his relationship with the Appellant, which is not relevant in this case. Mr. Racine also testified that Mr. Arcand would go onto the roof to count the workers who were on it. For the reasons outlined above, and given the size of the shopping centre's roof and the number of workers, I do not find it plausible that Mr. Arcand's only duty when he was on the roof was to count the workers who were on it.

VII. CONCLUSION

[68] On the balance of probabilities, during the period at issue, while working for the Appellant, Mr. Larochelle held insurable employment within the meaning of paragraph 5(1)(a) of the Act. Given the direction and control that the Appellant exercised over Mr. Larochelle's work, there was a relationship of legal subordination between them, such that the requirements of the contract of service were met.

[69] For these reasons, the appeal is dismissed and the Minister's decision is upheld.

Signed at Montreal, Quebec, this 20th day of November 2019.

"Dominique Lafleur"

Lafleur J.

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