Date: 20071122

Docket: T-810-06

Citation: 2007 FC 1224

Ottawa, Ontario, November 22, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

CAMERON WIDRIG

Applicant

and

LE REGROUPEMENT MAMIT INNUAT INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] 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. If this rule is applied to the circumstances of the case at bar, it is quite clear that the applicant was an employee and not a contractor.

(*Gallant v. Canada (Department of National Revenue)*, [1986] F.C.J. No. 330 (QL), Justice Louis Pratte, Federal Court of Appeal).)

[2] Two recent decisions emanating from the Tax Court of Canada and the Federal Court of Appeal have noted:

> [20] Scholars have considered the concept of "power of direction or control" and its flip side, the relationship of subordination.

(*3588718 Canada Inc. v. Canada (Minister of National Revenue – M.N.R.)*, 2005 TCC 628, [2005] T.C.J. No. 476 (QL).)

> [11] …
>
> > 91 -- Factual assessment -- Subordination is ascertained from the facts. In this respect, the courts have always refused to accept the characterization of the contract by the parties...

(*9041-6868 Québec Inc. v. Canada (Minister of National Revenue – M.N.R.*), 2005 FCA 334, [2005] F.C.J. No. 1720 (QL).)

[3] Justice Roger Savoie, of the Tax Court of Canada, enumerates a non-exhaustive list of indicia that can be considered when "carrying out the mandate of determining the presence or absence of a relationship of subordination…"

(1) mandatory presence at a workplace;
(2) compliance with the work schedule;
(3) control over employee's vacations;
(4) submission of activity reports;
(5) control over quantity and quality of work;
(6) imposition of methods for performing the work;
(7) power to sanction employee's performance;
(8) source deductions;
(9) benefits;
(10) employee status on income tax returns; and
(11) exclusivity of services to employer.

(*3588718 Canada*, above, para. 23.)

[4] Justice Gilles Létourneau, of the Federal Court of Appeal, stated in *D & J Driveway Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2003] FCA 453, [2003] F.C.J. No. 1784 (QL):

> [9] … The concept of control is the key test used in measuring the extent of the relationship. However, as our brother Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, [1996] F.C.J. No. 1337, [1996] 207 N.R. 299, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, control of the result and control of the worker should not be confused. At paragraph 10 of the decision, he wrote:
>
> > It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker.

NATURE OF THE JUDICIAL REVIEW

[5] This is a judicial review pursuant to section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2, of an Adjudicator's decision rendered April 7, 2006.

FACTS

[6] Mr. Cameron Widrig, the Applicant, began working for Le Regroupement Mamit Innuat Inc. (Mamit), as a technical advisor, in August 2001.

[7] His work continued on an uninterrupted and exclusive basis until August 2003, at which time he was advised that his services were no longer required.

[8] Mamit is a not-for-profit organization incorporated in 1988 under the laws of the Province of Québec. It can be best described as an umbrella organization to various Aboriginal groups on the North Shore providing its expertise to the Aboriginal tribes that constitute its members. The

organization was formed to coordinate the efforts of its members with respect to all relevant government programs, both federal and provincial, relating to Aboriginals to act as a consulting service to its members. (Adjudicator's Decision, paras. 12-13.)

[9] As a result of the Supreme Court of Canada decision in *R. v. Marshall*, [1999] 3 S.C.R. 456, the federal government moved to implement programs for the purpose of Aboriginal fishing. This created opportunities for various Aboriginal communities, provided that the proper administrative structures were in place in the community. It is for this reason that having managerial expertise, provided by Mamit, was necessary for the implementation of the programs. (Adjudicator's Decision, para. 14.)

[10] Both, Mr. Guy Berthe, the Director-General of Mamit and Mr. Yves Bernier, Director of Property and Economic Development for the Minguan Band Council, were actively involved in developing and implementing a fisheries strategy for the native communities.

[11] Mr. Widrig was presented with his first written contract from Mamit, on March 12, 2003; however, the Respondent, Mamit, submits that Mr. Widrig and Mamit entered into, what would have been, the first written agreement in 2001, although a duly signed copy could not be produced in evidence. Mr. Widrig is therein described as a self-employed worker ("travailleur autonome"). There is, however, no evidence that the contract was signed by Mr. Widrig. The contract price is for $10,000.00 covering ten weeks of service for a period commencing August 20, 2001 and terminating on October 26, 2001. The Respondent, Mamit, submits that, notwithstanding the

expiration of the above-noted contract, on October 26, 2001, the parties continued their relationship as if the terms of the contract were still in effect. (Adjudicator's Decision, para. 21.)

[12] Mr. Widrig began to work for Mamit on August 21, 2001 on the basis of a verbal contract. He was initially paid $975 per week which was later increased to $1,200 per week and eventually to $1,250 per week.

[13] On February 9, 2003, and, subsequently, on February 24, 2003, Mr. Widrig communicated to Mamit, via email, his interest in establishing a new term for his employment. The parties entered into negotiations with the expectation that they would negotiate a new term of employment. (Respondent's Binder 1 of 2, Tabs B-22 and B-23, Exhibits D-22 and D-23.)

[14] The negotiations resulted in the preparation of a contract, dated March 12, 2003. Prior to signing the contract, Mr. Widrig proposed certain amendments, which were not approved by the Respondent, Mamit. (Respondent's Binder, above, Tabs B-29-B-31, Exhibits D-29-D-31.)

[15] Mr. Widrig did not sign the contract.

[16] The Respondent, Mamit, specifies that the proposed amendment sought to add a new structure to the organization, a structure that had not been approved by the Board of Directors. (Respondent's Memorandum of Fact and Law, para. 33.)

[17] On August 14, 2003, Mamit, in a letter signed by Mr. Bernier, "Responsable des pêches marines", advised Mr. Widrig that his services as an advisor for fisheries development were thereby terminated. The letter cited budgetary restrictions as the reason why this was necessary. The termination of services was made to be effective immediately. (Adjudicator's Decision, para. 30; Respondent's document, Tab B-34, Exhibit D-34.)

[18] On September 23, 2003, Mr. Widrig filed a complaint with the Department of Labour, pursuant to section 240 of the *Canada Labour Code*, alleging that he had been unjustly dismissed from his position with Mamit.

CONTESTED DECISION

[19] The Adjudicator held that Mr. Widrig did not have a relationship of employment with the Respondent, Mamit, that he worked rather as an independent contractor, and, on these grounds, the Adjudicator dismissed Mr. Widrig's complaint as not having met the requirements of paragraph 240(1)(*a*) of the *Canada Labour Code*. (Applicant's Submissions and Reply to a Notice of Status, para. 1.)

PREVIOUS DECISIONS RENDERED IN RESPECT OF THE APPLICANT

[20] The following are previous decisions rendered in respect of Mr. Widrig:

> (i) On May 26th, 2004, Lise Côté, an official working as an Inspector for Human Resources Development Canada (section 240(1) of the *Canada Labour Code*), rendered a decision with respect to the Applicant's complaint of unjust dismissal. In this decision Mrs. Côté reached the conclusion that the Applicant was indeed an employee of the Respondent, and that the Respondent employer owed the Applicant

certain sums of money as calculated on the basis of the minimum requirements set down in Part III of the *Canada Labour Code*…

(ii) On November 13, 2003, Gilles Bélanger, a Canada Pension Plan - Employment Insurance Coverage Officer working for the Canada Customs and Revenue Agency, rendered a decision to the effect that the Applicant was an employee of the Respondent, and that his employment was insurable for the purposes of the *Employment Insurance Act*. This decision was ruled inadmissible by the Adjudicator Deschênes at the hearings held before her, on the grounds that a final judgment had not as yet been rendered in this matter…

(iii) The Respondent appealed Mr. Bélanger's decision. On June 8th, 2004, Louise Dessureault, a Canada Pension Plan – Employment Insurance Appeals Officer with the Canada Customs and Revenue Agency, rendered a detailed decision on behalf of the Minister of National Revenue. This decision confirmed Mr. Bélanger's ruling that the Applicant was indeed an employee of the Respondent, and that his employment was insurable under the *Unemployment Insurance Act*. As with Mr. Bélanger's decision, the decision rendered by Mrs. Dessureault was also ruled inadmissible in the hearings held before Adjudicator Lise Deschênes because a final judgment had not as yet been rendered…

(iv) The Respondent appealed the above decision to the Tax Court of Canada whereupon a hearing was held on October 11th, 2005 before the Honorable Mr. Justice Pierre R. Dussault. On May 17th, 2006, Mr. Justice Dussault rendered a comprehensive judgment whereby he dismissed the appeal of the Respondent in the present application, Le Regroupement Mamit Innuat Inc. He confirmed the decision of the Minister of National Revenue to the effect that the Applicant was an employee and held insurable employment with the Respondent...

…

The Honorable Justice Dussault rendered this judgment about a month after Adjudicator Lise Deschênes issued a diametrically opposed decision on these same facts. The Respondent in the present application, Le Regroupement Mamit Innuat Inc., did not appeal Mr. Justice Dussault's judgment…

(Applicant's Submissions and Reply to a Notice of Status, para. 4.)

ISSUES

[21] Although the Applicant has raised a number of issues, this Court is of the view that the core issues are:

(1) Did the Adjudicator correctly interpret paragraph 240(1)(*a*) of the *Canada Labour Code*?

(2) Did the Adjudicator identify the appropriate legal principles in her analysis of whether Mr. Widrig was an employee of the Respondent, Le Regroupement Mamit Innuat Inc., and were the principles applied to the facts in a legally sustainable manner?

(3) Alternatively, is it important for the determination of the issues to consider whether Mr. Widrig was an employee hired in virtue of a contract of employment, and, if so, was the termination of his employment justified inasmuch as it falls within the ambit of paragraph 242(3.1)(*a*) of the *Canada Labour Code*?

ANALYSIS

Standard of Review

[22] Section 240 of the *Canada Labour Code* reads as follows:

240. (1) Subject to subsections (2) and 242(3.1), any person	**240.** (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :
(*a*) who has completed twelve consecutive months of continuous employment by an employer, and	(*a*) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;

(*b*) who is not a member of a group of employees subject to a collective agreement,	(*b*) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

[23] The Court recognizes, due to a privative clause, the definitive nature of decisions in accordance with section 243 of the *Canada Labour Code* which refers to section 242 which sets aside the possibility of exceptional remedies.

[24] Case law clearly establishes that an interpretation by a tribunal of a statutory provision, which confers jurisdiction upon it or which limits the scope of its jurisdiction, is to be reviewed on a correctness standard.

[25] Former Chief Justice Julius A. Isaac, of the Federal Court of Appeal, in *Beothuk Data Systems Ltd., Seawatch Division v. Dean (C.A.)*, [1998] 1 F.C. 433, [1997] F.C.J. No. 1117 (QL), stated:

> [27] … The law is now settled that, notwithstanding the curial deference owed to tribunals protected by a privative clause, an interpretation by a tribunal of a statutory provision which confers jurisdiction upon it, or which limits the scope of its jurisdiction, is to be reviewed on a correctness standard. In relation to Part III of the [Labour] Code, the decision of this Court in Pollard, supra, makes it clear that the interpretation by an adjudicator of the statutory conditions precedent to a validly filed complaint in subsection 240(1) is subject to review on the correctness standard.

[26] In reviewing an administrative tribunal's conclusion, with respect to an erroneous interpretation of a statutory provision, this Court, will give no judicial deference. It will apply its own reasoning process to arrive at a result judged to be correct.

[27] Furthermore, the standard of review, in regard to conclusions reached by an adjudicator on the basis of factual evidence, is that of patent unreasonableness. (*Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 S.C.R. 1079.)

[28] In a matter of mixed law and fact, the standard of review is simply that of reasonableness *simpliciter*. (*Dynamex Canada Inc. v. Mamona*, 2003 FCA 248, [2003] F.C.J. No. 907 (QL).)

Issue (1) - Interpretation of subsection 240(1) of the *Canada Labour Code*

[29] Mr. Widrig submits that the Adjudicator erred in her interpretation of subsection 240(1) of the *Canada Labour Code*; however, having concluded that "Cameron Widrig falls within the normal common law definition of independent contractor as opposed to an employee and thus does not fall within the definition of employee as contained in Part III of the *Canada Labour Code*." (Adjudicator's Decision, para. 74.)

[30] The Adjudicator was not required to interpret this statute if this would have been a contract of enterprise and not a contract of employment; however, if it is a contract of employment, a requirement exists to then interpret the statute.

Canadian Bijuralism: Duality of Legal Traditions

[31] In recognizing the supremacy of the Canadian Constitution which provides not only for recognition of bijuralism (civil or common law jurisdiction – depending on the province) in delineating a division of powers between the Federal and Provincial governments. The legislative degree of autonomy and interdependence vary according to the rubric of the Constitution (e.g. sections 91 or 92 of the Constitution). Canadian federalism is thus based on principles of unity, diversity, shared responsibility and autonomy.

[32] Justice Robert Décary in *9041-6868 Québec*, above, draws reference to Justice Pierre Archambault, who specifies:

> …the enactment of the new *Civil Code* and the *Harmonization Act* has significantly transformed the state of the law in terms of the relevant sources of law to be used in characterizing, for the purposes of applying a federal enactment, the contractual relations between a person who, in Quebec, hires another person to do work for him.

("Contract of Employment: Why Wiebe Door Services Ltd. Does Not Apply in Québec and What Should Replace It" in Department of Justice Canada, *Second Collection of Studies in Tax Law (2005): The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism* (Montreal: Association de planification fiscale et financière), p. 2.5, para. 8 (Contract of Employment).)

[33] Civil Code principles are at times distinct from common law principles in their very formulation but not necessarily in respect of the conclusions reached.

[34] The *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, has distributed the legislative powers in such a way that provincial legislatures have exclusive powers regarding property and civil rights:

Exclusive Powers of Provincial Legislatures	**Pouvoirs Exclusifs des Législatures Provinciales**
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	**92.** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:
…	…
13. Property and Civil Rights in the Province.	13. La propriété et les droits civils dans la province;

[35] In 1994, the Parliament of Canada formally acknowledged the *Civil Code of Québec*, S.Q. 1991, c. 64, in enacting the *Federal Law – Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4 and adding section 8.1 to the *Interpretation Act*, R.S.C., c. I-23, s. 1.

[36] The relevant passages from the preamble of the *Harmonization Act* read as follows:

Preamble to the *Federal Law – Civil Harmonization Act, No. 1*	Préambule de la *Loi d'harmonisation no 1 du droit fédéral avec le droit civil*
…	Attendu :
	…
WHEREAS the harmonious interaction of federal legislation and provincial legislation is	qu'une interaction harmonieuse de la législation fédérale et de la législation provinciale s'impose

essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;	et passe par une interprétation de la législation fédérale qui soit compatible avec la tradition de droit civil ou de common law, selon le cas;
…	…
WHEREAS the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;	que, sauf règle de droit s'y opposant, le droit provincial en matière de propriété et de droits civils est le droit supplétif pour ce qui est de l'application de la législation fédérale dans les provinces;

Issue (2) - Applicable Legal Principles: Nature of the relationship between Mr. Widrig and Mamit

[37] As the Adjudicator noted in her decision: "… whatever terminology was used, this should not be determinative of the relationship." (Adjudicator's Decision, para. 59.)

[38] The relative weight given to the factors depend on the particular facts and circumstances of the case at bar.

[39] The Adjudicator determined in her decision: "… the historic determinants of control, ownership of tools and the profit/risk analysis are somewhat out of date with the modern phenomena of a person such as Cameron Widrig who clearly begins his business relationship as a consultant." The Adjudicator then questions whether a relationship which has been qualified as that

of a consultant can ultimately become one of employee-employer. (Adjudicator's Decision, para. 60.)

[40] The Applicant states that the Adjudicator did not identify the correct legal principles in her analysis as to whether Mr. Widrig was Mamit's employee. The Applicant, like the Adjudicator in her decision, probes the common law principle in respect of an employee-employer relationship formerly known as that of master and servant.

[41] As Justice Archambault stated in his article, Contract of Employment, above, at 2.44, para. 65, published in *Second Collection of Studies in Tax Law (2005)*: "Under the Civil Code, once the existence of a relationship of subordination has been established, there is no need to consider the other tests, such as the entrepreneur test, which involves, *inter alia*, the following three elements: ownership of tools, chance of profit and risk of loss." This leaves us with the ultimate question: Was Mr. Widrig subordinate to Mamit?

[42] For Mr. Widrig, his relationship with Mamit was one of employee-employer, formerly known as master and servant, which would, therefore, be analogous to the *Civil Code of Québec*'s contract of employment.

[43] As noted above, in the case at bar, there is no written contract that was agreed upon between the parties. This Court must, therefore, analyze the facts and determine the parties' intentions in

order to establish the type of contract to which the parties are committed. (See *3588718 Canada*, above, para. 14.)

[44] Two recent decisions emanating from the Tax Court of Canada and the Federal Court of Appeal sought to clarify the last characteristic constituting the element of a contract of employment, noting: “Scholars have considered the concept of "power of direction or control" and its flip side, the relationship of subordination. In *Le droit du travail du Québec,* 5th ed. (Cowansville: Les Éditions Yvon Blais Inc., 2003), author Robert P. Gagnon states":

> [TRANSLATION]
>
> 90-- A distinguishing factor -- The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 *et seq*. C.C.Q. Thus, while article 2099 C.C.Q. provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> 91 -- Factual assessment -- Subordination is ascertained from the facts. In this respect, the courts have always refused to accept the characterization of the contract by the parties... .
>
> 92 -- Concept -- Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in terms of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and

> specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and monitor the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way. (Emphasis added)

(*3588718 Canada*, above; *9041-6868 Québec*, above, in citing Robert P. Gagnon, *Le droit du travail du Québec*, 5th ed. (Cowansville: Les Édititions Yvon Blais Inc., 2003).)

[45] Justice Louis Pratte of the Federal Court of Appeal notes: "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. If this rule is applied to the circumstances of the case at bar, it is quite clear that the applicant was an employee and not a contractor" (*Gallant*, above).

[46] Justice Archambault equally recognized the need to clarify the meaning of subordination. He noted: "According to the usual meaning of these terms, the employee must do the work under the authority and supervision of a person who leads or conducts the performance of the work as chief or head" (Justice Archambault, Contract of Employment, above, at p. 2.25, para. 41).

[47] Some scholars have noted: "Although the employee sometimes in practice enjoys substantial leeway in carrying out the work, he is still, however, subject to the employer's control: because the employee's activity is integrated into the context established by the employer and is performed for the employer's benefit, it is only normal that there would be control on the one hand and subordination on the other." (Justice Archambault, Contract of Employment, 2:27, para 43.)

[48] Justice Savoie enumerates a non-exhaustive list of indicia that can be considered when "carrying out the mandate of determining the presence or absence of a relationship of subordination"(*3588718 Canada*, above, para. 23):

(1) mandatory presence at a workplace;
(2) compliance with the work schedule;
(3) control over employee's vacations;
(4) submission of activity reports;
(5) control over quantity and quality of work;
(6) imposition of methods for performing the work;
(7) power to sanction employee's performance;
(8) source deductions;
(9) benefits;
(10) employee status on income tax returns; and
(11) exclusivity of services to employer.

He cautiously notes, however, that the analysis must "determine the overall relationship between the parties. Thus, one must establish the extent to which the indicia pointing to a relationship of subordination predominates over the other indicia." (*3588718 Canada*, above, para. 24.)

[49] When considering the degree of control, the Adjudicator notes:

> 63. …A significant portion of Widrig's work consisted of doing studies and producing reports. In producing these, he was basically on his own. A significant portion of the work produced was produced away from the

> respondent's place of business. It would be unrealistic to expect Widrig to perform his duties without any degree of control being exercised by Mamit.

Mr. Widrig had stated, however, that he "…did not possess the freedom of an independent contractor; namely the freedom to work for others while having someone else do his work at Mamit Innuat. The fact that he was working 60 hours per week and that he was required to perform his services personally effectively extinguishes that possibility."

[50] Furthermore, Mr. Widrig "…did not work for anyone other than the respondent during the period from August, 2001 to August, 2003." (Affidavit of Cameron Widrig, para. 6.4, p. 27.)

[51] As to whether Mr. Widrig's work was exclusively for Mamit, Mr. Bernier and Mr. Berthe state that Mr. Widrig was always free to develop his own clientele and that his services were not exclusive to Mamit. (Memorandum of Fact and Law of the Respondent, para. 30.)

[52] In order to substantiate their claim, the Respondent, Mamit, refers to correspondence between Mr. Widrig and Mr. Tony Wright where Mr. Widrig was offering his services for a new project. (Respondent's Binder 1 of 2, Tab B-27.)

[53] Upon examining the said letter, one notices that it was sent February 25, 2003, the same time when Mamit and Mr. Widrig were still attempting to negotiate a new employment agreement.

[54] To further substantiate her conclusion regarding the nature of a contractor-client relationship between Mr. Widrig and Mamit, the Adjudicator notes at para. 73: "…the fact that the reports are technical in nature and … demonstrate expertise that would not be available to persons employed by Mamit."

[55] This fact is not in any way determinative of the control, or lack thereof, that Mamit exercised over Mr. Widrig. As Justice Archambault, citing Ms. Marie-France Bich, noted in his article: "The kind of control exercised in practice by the employer tends to change, however, as the level of specialization or knowledge required of the employee increases." (Contract of Employment, above, p. 2.28.)

[56] Justice Létourneau, of the Federal Court of Appeal, stated in *D & J Driveway*, above:

> [9] The concept of control is the key test used in measuring the extent of the relationship. However, as our brother Décary J.A. said in *Charbonneau v. Canada* (*Minister of National Revenue - M.N.R.*), [1996] F.C.J. No. 1337, [1996] 207 N.R. 299, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, control of the result and control of the worker should not be confused. At paragraph 10 of the decision, he wrote:
>
> > It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker.

[57] Despite the ambiguity regarding the existence of any contract of employment or contract of enterprise between Mamit and Mr. Widrig, and despite the difficulty in determining the parties intentions respecting the nature of their relationship, (on the one hand, due to the fact that Mr. Widrig had "agreed to receive gross remuneration with no source deductions for nearly two

years and never reported that remuneration as income from employment in a timely manner" or on the other hand, that Mamit "never presented Mr. Widrig with a real contract of employment", Mamit did not have the expertise required to develop and implement the fisheries strategy and, therefore, sought external expertise. Mr. Widrig was retained exclusively by Mamit as a "consultant" in order to complete certain specific assignments. (*Regroupement Mamit Innuat Inc. v. Canada (Minister of National Revenue – M.N.R.)*, 2006 TCC 125, [2006] T.C.J. No. 211 (QL), paras. 121 and 122.)

[58] Mr. Widrig was assigned the job title of "aviseur" and was provided with business cards identifying him as such. He worked exclusively for Mamit, working 60 hours per week, therefore, unable to entertain the opportunity to independently seek additional clients. All persuasive indicators that his activities were integrated into the context established by the Respondent and that these activities were performed for the benefit of Mamit.

[59] The Respondent, Mamit, provided Mr. Widrig with all the tools necessary to do his work (this included a laptop computer, telephone and vehicle). They also paid for all of Mr.Widrig's expenses, including office supplies, hotels and meals while traveling, airline tickets, gas, vehicle maintenance, as well as accommodations in Mingan and Sept-Îles, Québec – costs that an independent contractor would normally have to incur. Mamit paid for half the cost of French language training that he had taken during the months of January, February and March 2002.

[60] Mr. Widrig was provided with Mamit letterhead to be used for written correspondence and reports that he was required to prepare.

[61] Unlike a contractor, Mr. Widrig was not subjected to the potential risk of loss as he was paid the same amount every two weeks – characteristics which are an inherent feature of an employee. Furthermore, Mr. Widrig's supervisor, Mr. Bernier, prepared "invoices" in his name which were forwarded to the Respondent's accounting department every two weeks for payment.

[62] As Justice Pierre R. Dussault of the Tax Court of Canada concluded: "The fact that [Mamit] did not supervise the intervener's activities on a day-to-day basis or did not oversee daily his comings and goings, his presence or his absences, … does not imply that the duties performed by Mr. Widrig were not so performed under Mr. Bernier's supervision and immediate hierarchical control within the … organization." (*Regroupement Mamit*, above, para. 127.)

[63] Justice Dussault concluded: "…there was in fact truly a relationship of subordination between Mr. Widrig and the appellant and the appellant exercised supervision over his activities as a fisheries development adviser, and more specifically, it did so through Mr. Bernier, the fisheries director." (*Regroupement Mamit*, above, para. 131.)

[64] Mamit sought a specialized service in order to pursue the development and implementation of a fisheries strategy for the native communities. Mr. Widrig was hired by Mamit in order to prepare a strategic plan on the development of this project. Mamit was in charge of managing the

native fisheries in the communities that were members and, thus "determining the work to be done, overseeing its performance and controlling it". (Reference is made to par. 92 of the Judgment in *9041-6868 Québec*, above, par. 11.)

Issue (3) - Was Mr. Widrig's termination justified according to paragraph 242(3.1)(*a*) of the *Canada Labour Code*?

[65] Paragraph 242(3.1)(*a*) reads as follows:

Limitation on complaints	**Restriction**
242(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where	**242(3.1)** L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
(*a*) that person has been laid off because of lack of work or because of the discontinuance of a function; or	(*a*) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;
(*b*) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.	(*b*) la présente loi ou une autre loi fédérale prévoit un autre recours.

[66] Justice Marshall E. Rothstein, of the Federal Court of Appeal, notes that, in order for an employer to rely on paragraph 242(3.1)(*a*) of the *Canada Labour Code*, "…the employer must show two things: first, an economic justification for the layoff; and second, a reasonable explanation for the choice of the employees to be laid off. The onus then shifts to the employee to rebut that evidence" (*Thomas v. Enoch Cree Nation Band*, 2004 FCA 2, [2004] F.C.J. No. 3 (QL), para. 5.)

[67] The legislative framework does recognize the employers' rights to lay-off employees for economic, financial, cost-cutting reasons, provided that the decision is genuine and made in good faith. (*Assembly of First Nations v. Prud'homme*, [2002] C.L.A.D. No. 323 (QL).)

[68] Justice Francis C. Muldoon, of the Federal Court, in *Air Canada v. Davis*, [1994] F.C.J. No. 268 (QL), while interpreting the meaning and scope of "lay-off" for the purposes of paragraph 242(3.1)(*a*) of the Labour Code, stated:

> [22] This Court interprets "laid off" in the context of that division in general, and section 242 in particular, to mean the employer's temporary or permanent termination of the employee's employment for reasons of the employer's economic concerns of lack of work, or with the same concerns expressed through management re-structuring choices, the discontinuance of a function. The term "laid off" in paragraph 242(3.1)(*a*) virtually defines itself according to its context. The employer seeks to reduce overhead while revenues are reduced, by terminating the employment, and therefore, terminating for a time or forever the employer's liability to pay the employee, in order to save money. Unlike being fired, the termination of employment may be seen to be more in sorrow than in anger, not being imposed because the employee has misbehaved or is otherwise insubordinate, or too-often absent, or is found to be incompetent to do the job. The lay off may be permanent when and if the employer foresees no improvement in its bleak revenue-earning prospects; or it may be temporary, awaiting the day of an improvement in business. So, a lay-off for the purpose Division XIV of the [Labour] Code inherently imports the notion of no blame on the employee's part, just hard times or a change of the employer's business operations even when hard times might not be a factor…
>
> [23] The whole idea behind paragraph 242(3.1)(*a*) is that a blameless employee may in fact have his or her employment terminated, but without such termination constituting an unjust dismissal.

[69] Currently, the evidence before this Court is insufficient to determine if Mr. Widrig's dismissal falls within paragraph 242(3.1)(*a*); however, irrespective of this determination, the Respondent, Mamit, is required to compensate Mr. Widrig, pursuant to sections 230 and 235 of

the *Canada Labour Code*, as was previously determined by Ms. Lise Coté, Inspector for Human Resources Development Canada, in her decision rendered on May 26, 2004. (As of the date of this Court's judgment, no further determination has been issued on the matter of compensation subsequent to that of Ms. Lise Côté.)

CONCLUSION

[70] Based on the foregoing, this Court holds that Mr. Widrig was employed by Mamit according to a contract of employment, pursuant to sections 230 and 235 of the *Canada Labour Code*. The relationship governing the parties was in fact a relationship of subordination. It was an employee-employer relationship. Mamit and more specifically, Mr. Bernier, the fisheries director, exercised supervision over Mr. Widrig's activities which consisted of the latter's exercising the duties of a fisheries development adviser.

[71] The application for judicial review is allowed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed and the matter be remitted for redetermination by a different adjudicator.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Cameron Widrig	FOR THE APPLICANT
Mr. Serge Belleau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Cameron Widrig	FOR THE APPLICANT
GAGNÉ LETARTE, s.e.n.c. Québec (Québec)	FOR THE RESPONDENT