Citation: 2005TCC260
Date: 20050919
Docket: 2004-2032(EI)

BETWEEN:

JEWISH REHABILITATION HOSPITAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

FRANCE BOUCHER,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

(Delivered orally from the Bench on March 23, 2005,
at Montréal, Quebec, and amended for greater clarity and precision.)

Archambault J.

[1] The Jewish Rehabilitation Hospital (**Hospital**) is appealing from a decision made by the Minister of National Revenue (**Minister**) that the employment held by the Intervener, France Boucher, during the period from July 1, 1999 to April 21, 2003 (**relevant period**) was insurable for the purposes of the *Employment Insurance Act* (***Act***).

[2] The issue in this case is essentially the nature of the contractual relationship that bound Ms. Boucher to the Hospital during the relevant period. It is necessary to decide whether she was bound by a contract of employment or by a contract for services.

Factual context

[3] Speech therapy was included in the services that the Hospital offered to its clients during the relevant period. It is helpful to cite a speech-language pathologist's work description, provided by the Ordre des orthophonistes et audiologistes du Québec (**Order**):

> [TRANSLATION]
>
> Speech-language pathologists and audiologists are independent professionals with graduate-level university education who are members of the Ordre des Orthophonistes et Audiologistes du Québec. They have expertise in the field of human communication and related disorders.
>
> . . .
>
> Speech-language pathologists are professionals who perform the following duties:
>
> - Screening, identification, assessment, interpretation, diagnosis, rehabilitation and prevention of disorders: oral and written language, speech, voice, oropharyngeal function, as well as cognitive/linguistic communication disorders.
> - Evaluation, recommendation and development of alternative communication systems and training on their use;
> - Counselling clients, their families, health care providers, educators and other individuals with regard to all aspects of communication disorders;
> - Development and implementation of programs focusing on education, prevention of language disorders and supervision of screening programs;[1]
>
> . . .

[4] Prior to the start of the relevant period, the Hospital had among its employees a number of speech-language pathologists, two of whom worked in the traumatic brain injury department and three of whom worked in neurology. Speech

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1 Exhibit I-1, tab 2, Normes relatives à la compétence clinique de l'orthophoniste et de l'audiologiste [standards relating to the clinical competence of speech-language pathologists and audiologists], February 1995.

therapy services were not just offered to the Hospital's patients (**internal service**). There was also a demand to provide such services to patients in residential and long-term care centres (CHSLD) in Laval (**Centres** or **external service**). At that time, the Hospital had assigned another of its speech-language pathologists, an employee, to the external service.

[5] To fund this service, the Laval Regional Health and Social Services Board (**Board**) provided a budgetary allocation to the Hospital. Since, I would imagine, it did not have the necessary financial resources to establish speech therapy departments in each of the Centres (approximately 11 in the Laval area), the Board deemed it appropriate to use the Hospital's existing staff to provide this service. To that end, it provided the Hospital with a list of Centres and of the persons in charge at each of these Centres.

[6] At first, the Board exercised little control over the speech therapy program offered at the Centres. Subsequently, possibly due to a change in the Board's personnel, the Board required the Hospital to provide more data on this program; the Hospital had to provide the Board with increasingly detailed reports in the months and years that followed.

[7] Based on an organizational structure that I would describe as two-tier, the Hospital's speech-language pathologists reported to a chief of the Hospital's speech-language pathologists group as well as to the head of the department to which they were assigned, for example, the traumatic brain injury or neurology department head.

[8] For the purpose of supervising the salaried speech-language pathologists providing internal services, department heads held meetings to discuss internal administration (assignments) and problems relating to patients. In addition, the Hospital evaluated the speech-language pathologists' work. The evaluation process was such that it provided employees with the opportunity to share their expectations with the group leaders and enabled the latter to evaluate the employees' work. No evidence was submitted with regard to how the salaried speech-language pathologists who provided external services were evaluated.

[9] When the Hospital hired Ms. Boucher, she only possessed a Bachelor's Degree in Speech-Language Pathology. However, she had already started her Master's program and she had completed a practicum (internship) at the Hospital upon finishing her education, but prior to writing her Master's thesis. Furthermore, it

was due to the work she had performed during this internship that the Hospital offered her employment with the external service in late winter 1999.[2]

[10] On March 16, 1999, the Hospital and Ms. Boucher signed an agreement (**Agreement**), which I shall reproduce at this point:[3]

> [TRANSLATION]
>
> AGREEMENT
>
> BETWEEN
>
> The Jewish Rehabilitation Hospital, a legally incorporated entity having its head office at 3205 Place Alton Goldbloom, Chomedey, Laval, Quebec H7V 1R2, hereinafter referred to as the Hospital, represented by André Ibghy, its duly authorized Executive Director
>
> AND
>
> France Boucher, Speech and Language Correctionist
>
> WHEREAS the mandate of the Regional Centre for rehabilitation services assigned to the Hospital by the Laval Regional Board.
>
> WHEREAS the Memorandum of Understanding concluded between the Hospital and France Boucher.
>
> WHEREAS the Mission, the need for speech therapy services for clients staying at the Laval CHSLD.
>
> PURPOSE OF THE AGREEMENT
>
> The parties agree to assign France Boucher the responsibility of providing speech therapy services to clients staying at CHSLD.
>
> TERM OF CONTRACT
>
> Between April 1, 1999 and September 30 1999, renewable.
>
> COMMITMENT OF THE PARTIES
>
> France Boucher agrees to serve the clients staying at CHSLD in Laval, in accordance with her availability and client needs.
>
> Clients shall include patients, their families and health care staff.

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2 Ms. Boucher did in fact submit her Master's thesis in the summer of 2002, so she was able to obtain her Master's degree in late fall 2002 and to become a member of the Order in early 2003.

3 Exhibit I-1, tab 3.

> The services will be provided to patients presenting with aphasia, dysarthria, communication disorders associated with dementia, dysphagia, or other communication disorders of a neurological origin (Parkinson's disease, multiple sclerosis, etc.).
>
> DETAILS OF SERVICE
>
> The services provided shall include individual and/or group treatment and training for families and health care staff. France Boucher will be responsible for documenting follow-up care in accordance with the prerequisites of the Ordre des Orthophonistes et Audiologistes du Québec.
>
> France Boucher will be responsible for a service report.
> France Boucher will be responsible for being a member of the Ordre des Orthophonistes et Audiologistes du Québec, as well as for obtaining professional liability insurance.
>
> The reports shall be submitted to the Jewish Rehabilitation Hospital.
>
> André Ibghy designates Donna Bleier to be the contact person for this contract.
>
> The Jewish Rehabilitation Hospital agrees to pay up to $14,500 for the services.
>
> In witness whereof, the parties signed the Agreement at Laval on the 16th day of March 1999.

[Emphasis added.]

[11] It is clear that the Agreement does not characterize its nature or specify the way in which remuneration for Ms. Boucher's services will be calculated. However, Ms. Boucher believed that she was being hired as an employee and that she would receive the remuneration that is normally paid to the Hospital's speech-language pathologists. She did not know her hourly rate of pay until she received her first cheque. In order to obtain her cheque, she had to complete a document created by the Hospital. The template for the document that Ms. Boucher adduced in evidence bears the Hospital's logo and the logo of the teaching hospitals affiliated with McGill University; it reads as follows:[4]

[TRANSLATION]

JEWISH REHABILITATION HOSPITAL
HÔPITAL JUIF DE RÉADAPTATION
3205 Place Alton Goldbloom • LAVAL, QUEBEC, H7V 1R2 • (514) 688-9550 •
FAX: (514) 688-3673

Professional Fees January 18, 2002
Speech-Language Pathology Department, Laval CHSLD
For the Jewish Rehabilitation Hospital

By **France Boucher**

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4 Exhibit INT-1, second sheet.

2044 Des Seigneurs Boulevard
Terrebonne, Quebec J6X 3N9

Period from January 7 to 11, 2002

Number of hours:	24 hours	

Period from January 14 to 18, 2002

Number of hours:	24 hours	
Total:	**48 hours**	**1,158.72**

PLEASE PLACE THE COPY OF THE CALCULATION INTO AN ENVELOPE TO MAINTAIN CONFIDENTIALITY. THANK YOU[5]
Give the paycheque to Donna Bleier or Fanny Singer
Speech-Language Pathology Department
Thank you

(Signature, Donna Bleier)	January 21, 2002
Donna Bleier or Fanny Singer	Date
(Signature)	January 18, 2002
France Boucher	Date

Ms. Boucher provided the number of hours for the two weeks at issue. A Hospital representative handwrote the amount of the fees.

[12] As confirmed by Ms. Singer and Ms. Bleier, the two Hospital representatives who testified at the hearing, Ms. Boucher's remuneration essentially corresponded to the hourly rate paid to speech-language pathologists employed by the Hospital, plus 35% to account for vacation, sick leave and other benefits to which Hospital employees are entitled.

[13] Contrary to what is stipulated in the Agreement, Ms. Boucher was not required to purchase her own professional liability insurance. Since she was not a member of the Order, she was not covered under the insurance that the Order offered its members. Due to this coverage issue, her contract's start date was postponed. Indeed, she did not commence work until July 8, 1999, after the Hospital had confirmed by letter that she was covered under the insurance program for institutions in the health and social services system.[6] In this letter, the Director of Rehabilitation Programs and Services wrote: [TRANSLATION] "It will be a pleasure to have you on our team . . ."

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5 This note was added at Ms. Boucher's request.

6 Exhibit I-1, tab 8. Unfortunately, a copy of the insurance contract or certificate of insurance was not adduced in evidence.

[14] The services that Ms. Boucher provided to patients at the Centres focused on two types of problems: communication and dysphagia (difficulty swallowing). Her work was not limited to treating patients. Since she also provided training to staff at the Centres housing residential patients and to the families of these patients, she required presentation materials, which the Hospital provided to her or for which the Hospital reimbursed her.

[15] The Agreement was renewed on September 21, 1999, for the period from October 1, 1999 to March 31, 2000 (**Renewal Contract**). This contract reads as follows:[7]

[7] Exhibit I-1, tab 4.

[TRANSLATION]

JEWISH REHABILITATION HOSPITAL
HÔPITAL JUIF DE RÉADAPTATION
3205 Place Alton Goldbloom • Laval, QC, H7V 1R2 • (450) 688-9550 • FAX (450) 688-3673

RENEWAL CONTRACT

September 21, 1999

The contract for the provision of Speech Therapy to clients housed in CHSLDs is hereby renewed for a period of six months, from October 1, 1999 to March 31, 2000. The Hospital agrees to continue to insure France Boucher for this period or until such time as she is insured by the Ordre des Orthophonistes et Audiologistes du Québec. She will be paid at level two of the pay scale for Speech-Language Pathologists. She will be paid weekly. A final report on services will be required.

(Signature)
France Boucher

(Signature)
Donna Bleier, M.Sc., S-LP (C)

(Signature)
Nicole Payen, Director of Rehabilitation
Programs & Services

[Emphasis added.]

[16] Effectively, Ms. Boucher's work was interrupted from November 1999 to April 2001 due to an accident she had.

[17] The parties did not sign any other written agreement relating to the conditions for renewing Ms. Boucher's contract. Some attempts were made to enter into an agreement; however, they were not successful. According to the testimony of Ms. Singer, a speech-language pathologist who was Ms. Boucher's superior, one of the Hospital's executives suggested settling Ms. Boucher's situation so that the contract would reflect the fact that she was a Hospital employee. One of the draft contracts (**Draft 1**)[8] reads as follows:

[TRANSLATION]

CONTRACT

BETWEEN: JEWISH REHABILITATION HOSPITAL, an institution duly constituted under *An Act respecting health services and social services* R.S.Q. c. S-S [*sic*], having its head office at 3205 Place Alton Goldbloom, Chomedey, Laval District, represented by Hélène Brunette, duly

8 Exhibit I-1, tab 5. A portion of the text is printed; the remainder is handwritten.

authorized

(hereinafter referred to as [the Hospital])

AND:

(hereinafter referred to as [the Employee])

1. The Hospital retains the Employee's services to fill a position under the direction of speech therapy services to serve CHSLD clients.

2. Employment shall begin on June 5 and shall end on December 5. This Agreement will be renewed automatically upon expiration of the first term, for successive periods of six months each, under the same terms and conditions, unless one of the parties provides notice to the contrary thirty (30) days prior to the expiration of the current term.

3. For the term of the employment defined in clause 2 above, the Employee's working conditions will be governed by the standards and practices for managing employees who are not excluded from bargaining but are not unionized.

4. The Hospital may terminate this Agreement and the Employee's employment by providing thirty (30) days' notice or by paying compensation equal to one month's wages. However, for serious cause, the Hospital may terminate this Agreement and the Employee's employment at any time, without any obligation to provide any prior notice or compensation whatsoever to the Employee (the Employee and Employer must agree in order for this to apply).

5. The Employee acknowledges that she will not be entitled to any recourse of any nature against the Hospital due to the termination of her employment at the end of her term, as defined in clause 2 above.

6. The Employee shall be paid every two weeks.

SIGNED AT LAVAL ON THIS ________________________

For the Hospital

____

For France Boucher

[Emphasis added.]

[18] According to Ms. Boucher, she did not sign this draft contract because she was not informed of the exact amount of her remuneration. Ms. Singer, who was supposed to obtain this information, went on sick leave. Subsequently, it was agreed that the hourly rate would be $35; however, this rate was not specified in any written agreement. According to Ms. Boucher, this remuneration corresponded to that of a

speech-language pathologist employed by the Hospital at the seventh or eighth pay level.[9]

[19] Another draft contract (**Draft 2**) was written early in 2003. It reads as follows:[10]

> [TRANSLATION]
>
> Jewish Rehabilitation Hospital
> Hôpital juif de réadaptation
>
> **FIXED-TERM CONTRACT**
>
> NON-RENEWABLE
>
> **BETWEEN:** **JEWISH REHABILITATION HOSPITAL**, an institution duly Constituted under *An Act respecting health services and social services* R.S.Q. c. S-S [*sic*], having its head office at 3205 Place Alton Goldbloom, Chomedey, Laval District, represented by Félicia Guarna, Director [*sic*] of Programs and Services, duly authorized.
>
> (hereinafter referred to as [the Hospital])
>
> **AND:** **France Boucher**
>
> (hereinafter referred to as [the Speech-Language Pathologist])
>
> 1. The Hospital retains the contractual services of Speech-Language Pathologist France Boucher to work extra hours in different programs of the speech therapy department of the Rehabilitation Programs and Services Directorate.

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9 According to the calculations of Counsel for the Hospital, communicated during the oral argument, remuneration for levels seven, eight and nine ranged from $27 to $33. (I assume that this represents the hourly rate after the 35% increase.)

10 Exhibit I-1, tab 6.

2. Employment shall begin on May 5, 2003 and shall end on August 4, 2003.

3. During this period, Ms. Boucher will be paid the same hourly rate as in the previous contract, that is, a rate of thirty-five dollars ($35.00) per hour, for a maximum of thirty-five hours per week.

4. The Hospital may terminate this Agreement, thereby terminating the Speech-Language Pathologist's employment, by providing fifteen (15) days' notice or by paying compensation equal to fifteen (15) days' wages. However, for serious cause, the Hospital may terminate this Agreement and the Speech-Language Pathologist's employment at any time, without the obligation to provide any prior notice or compensation whatsoever to the Speech-Language Pathologist.

5. The Employee acknowledges that she will not be entitled to any recourse of any nature against the Hospital upon termination of her contract of employment, as defined in clause 2 above.

SIGNED AT LAVAL ON THIS ______________________

______________________ ______________________

Speech-Language Pathologist **Hospital by:**
(duly authorized)

[Emphasis added.]

[20] This contract was never signed, because the Hospital refused to sign it. This may be related to this letter of reprimand:[11]

[TRANSLATION]

Jewish Rehabilitation Hospital
Hôpital juif de réadaptation

May 1, 2003

Dear Ms. Boucher:

This letter is further to our meeting of April 29, 2003, the date on which we provided you with a letter citing our reasons for removing you from the regional specialized speech therapy services program in CHSLDs. In addition, we offered you the opportunity to have a contract for services[12] for a three-month term, from May 5 to

[11] Exhibit I-3.

[12] However, draft contracts refer to Ms. Boucher as an "employee." Thus, there is an inconsistency here in the characterization of the agreement. This situation clearly illustrates the principle of article 1425 of the *Civil Code of Québec* (***Civil Code***), which states that "adherence to the literal meaning of the words" is not necessary.

August 4, 2003, to work extra hours in different programs of the speech therapy department of the Rehabilitation Programs and Services Directorate.

At the same meeting, we were surprised to learn that on Tuesday, April 22, 2003, you went to the Orchidée Blanche CHSLD to continue to provide speech therapy services. On a number of occasions, Ms. Ménard, your immediate superior, instructed you to stop providing services on April 17; thus, we find that this situation is unacceptable. In addition, during our meeting, it was necessary to prohibit you from returning to the Orchidée Blanche CHSLD, because you still intended to complete your care at a future time.

During the meeting, we noted that you were not listening very carefully, which sometimes led to a lack of understanding of some of the instructions we were giving you. Consequently, we are of the opinion that if this behaviour were to persist, it could cause difficulties in the supervision of your clinical activities throughout the term of the contract.

Sincerely,

(Signature)
Félicia Guarna
Director, Rehabilitation Programs and Services

FG/aa
cc: Hélène Brunette, Head, Human Resources Services
Suzanne Ménard, Acting Department Head, Speech-Language Pathology

[Emphasis added.]

Analysis

[21] It must be determined whether Ms. Boucher held insurable employment for the purposes of the *Act*. The relevant provision is paragraph 5(1)(*a*) of the *Act*, which reads as follows:

5(1) Subject to subsection (2), insurable employment is	5. (1) 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.]

[22] This section defines insurable employment as including employment under a contract of service (or, to use a synonym, a contract of employment[13]). However, the Act does not define what constitutes such a contract. Since the Agreement was made in Quebec, and since a contract of service is a civil law concept that is found in the *Civil Code*, the nature of this contract must be determined pursuant to the relevant provisions of this *Code*.[14]

[23] The most relevant provisions for determining the existence of a contract of employment in Quebec and for distinguishing it from a contract for services are articles 2085, 2086, 2098 and 2099 of the *Civil Code*:

Contract of employment	Contract of enterprise or for services
	2098 A contract of enterprise or for services is

[13] Refer to REID, Hubert. *Dictionnaire de droit québécois et canadien.* 3rd ed. Montréal: Wilson & Lafleur, 2004, p. 361.

[14] This involves the principle of complementarity, which is regularly applied by the Courts. The term can be defined as follows: the rule by which private law concepts that are referred to in an Act of Parliament but that have not been defined therein must be interpreted based on the private law of the province in which the Act of Parliament happens to be applied. It is this principle that section 8.1 of the *Interpretation Act* has legitimized and codified on June 1, 2001. For a comprehensive analysis of this principle, as it was applied before the enactment of section 8.1, refer to *St-Hilaire v. Canada*, [2001] 4 F.C. 289; 2001 FCA 63.

Also refer to my article, "Contrat de travail — Pourquoi *Wiebe Door Services Ltd.* ne s'applique pas au Québec et par quoi on doit le remplacer" [contract of employment—why *Wiebe Door Services Ltd.* does not apply in Quebec and what should replace it] (**article on *Wiebe Door***), which will be published in the fourth quarter of 2005 by the Association de planification fiscale et financière [tax and financial planning association] and by the Ministère de la Justice (Department of Justice) in the second collection of studies in tax law in the series of publications dealing with Canadian bijuralism.

2085 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.

2086 A contract of employment is for a fixed term or an indeterminate term.

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.

2099 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.

[Emphasis added.]

[24] Upon analyzing these provisions of the *Civil Code*, it is clear that there are three essential conditions for a contract of employment to exist: i) work performed by the employee; ii) remuneration for this work, paid by the employer; and iii) a relationship of subordination. What clearly distinguishes a contract for services from a contract of employment is the existence of the relationship of subordination; that is, the fact that the employer has the power to direct or control the worker.

[25] In academic literature, authors have reflected on the concept of "power to direct or control" and its reverse, "relationship of subordination." Robert P. Gagnon[15] writes the following:

[TRANSLATION]

c) Subordination

90 —*Distinctive factor*— The most significant factor characterizing a contract of employment is the subordination of the employee to the person for whom the employee works. This factor makes it possible to distinguish a contract of employment from other contracts for value that also involve performing work for the benefit of another person, for a price, such as the contract of enterprise or for services governed by articles 2098 and following of the *Civil Code of Québec* (C.C.Q.). Thus, when the contractor or the provider of services remains, under article 2099 of the C.C.Q, "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," it is characteristic of a contract of employment, subject to its terms, that the employee personally performs the agreed-upon work under the direction of the employer and within the framework established by the employer.

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15 GAGNON, Robert P. *Le droit du travail du Québec.* 5th ed. Cowansville, QC: Les Éditions Yvon Blais Inc., 2003.

. . .

> **92** —*Notion*— Historically, civil law first developed the strict or classical notion of legal subordination, which was used as a test to apply the principle of civil liability of the principal for injury caused by his agent and servant in the performance of their duties (article 1504 *Civil Code of Lower Canada*; article 1463 C.C.Q.). This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work with respect to its nature, terms and conditions. It gradually became more flexible to give rise to the notion of legal subordination in the broad sense. The diversification and specialization of occupations and work techniques have, in effect, often rendered it unrealistic that the employer would be in a position to dictate or even to immediately supervise the performance of the work. Thus, we have begun to assimilate subordination to the right, leaving the individual recognized as the employer to determine the work to be performed, and to supervise and control the performance of the work. By reversing the perspective, the employee is the one who agrees to become integrated into the operating framework of a business, in order to perform work for the business. In practice, evidence of a number of supervision indicators will be sought, which will likely vary depending on the context: mandatory presence at a workplace, fairly regular assignment of work, imposition of rules of conduct or behaviour, activity reports requirement, control of the quantity and quality of the work, etc. Working from home does not preclude such integration into the business.

[26] I would add that the distinguishing feature of a contract of employment is not the fact that the employer actually exercised direction or control, but the fact that the employer had the power to do so. In *Gallant v. M.N.R.*, [1986] F.C.J. No. 330 (Q.L.), Pratte J., of the Federal Court of Appeal, states:

> . . . 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 . . . .
>
> [Emphasis added.]

[27] In addition, in *Groupe Dessmarais Pinsonneault & Avard Inc. v. Canada (M.N.R.)*, 2002 FCA 144, (2002) 291 N.R. 389, Noël J.A. writes:

> 5. The question the trial judge should have asked was whether the company had the power to control the way the workers did their work, not whether the company actually exercised such control. The fact that the company did not exercise the control or that the workers did not feel subject to it in doing their work did not have the effect of removing, reducing or limiting the power the company had to intervene through its board of directors.

[28] In my opinion, the rules governing the contract of employment in Quebec law are not identical to those of common law and, consequently, it is not appropriate to apply common law decisions such as *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553 (F.C.A) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59. In Quebec, a court has no choice but to determine whether or not there is a relationship of subordination in order to determine whether a contract constitutes a contract of employment or a contract for services. This is what Létourneau J.A. of the Federal Court of Appeal stated in *D & J Driveway*,[16] in which he determined that there was no contract of employment, based on the provisions of the *Civil Code* and particularly by noting that no relationship of subordination existed, which he describes as "the essential feature of the contract of employment."[17]

[29] Here are some of the reasons that I discussed in the article on *Wiebe Door* to justify my conclusion:[18]

> [TRANSLATION]
>
> [64] In comparing the rules of the *Civil Code* with those of common law, it is clear that they differ in terms of the conditions necessary in order for a contract of employment to exist. The rules set out in the *Civil Code* are statutory and "no court can change a written rule." The *Civil Code* requires the existence of a relationship of subordination: this is one of the three elements essential to the existence of a contract of employment, the two others being work and remuneration. The rules of common law, case law, are flexible and can therefore be modified by the courts as needed. This is how the control test, the only test used by the courts in the past, was abandoned, because it was deemed to have "an air of deceptive simplicity." It "has broken down completely in relation to highly skilled . . . workers, who possess skills far beyond the ability of their employers to direct." With regard to control, "analysis of the extent and degree of such control is not in itself decisive."

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16 *D & J Driveway Inc. v. Canada (M.N.R.)*, 2003 FCA 453. Also see *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (Q.L.) (FCA); *Sauvé v. Canada*, [1995] F.C.J. No. 1378 (Q.L.) (FCA); *Lagacé v. Canada* (*M.N.R.*), [1994] F.C.J. No. 885 (Q.L.) (FCA), affirming [1991] T.C.J. No. 945 (Q.L.). However, it is important to mention that in the first two cases, the Court of Appeal did not explicitly reject the application of *Wiebe Door*, but determined that there was a contract for services due to the fact that there was no relationship of subordination, thereby following the rules of the *Civil Code*.

17 Paragraph 16 of the decision.

18 Unless otherwise indicated, the footnotes have been omitted.

The "notion of control is not always conclusive in itself, notwithstanding the importance it must be given" and "there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. . . . The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account." Since courts of common law have abandoned the control test to adopt the total relationship approach, it is possible for them to determine that there is a contract of employment without making a finding of fact with regard to the existence of the right of control.

[65] And yet, in Quebec, due to the paramountcy of article 2085 C.C.Q., judges are required to determine whether there is a relationship of subordination in order to decide whether all of the conditions necessary for the existence of a contract of employment have been met. The same is true regarding the existence of a contract for services: there must be no relationship of subordination (article 2099, C.C.Q.). Under the *Civil Code*, once it has been established that there is a relationship of subordination, it is not necessary to consider the other tests, such as the business test, particularly including the following three elements: the ownership of the tools, chance of profit and risk of loss. With due respect for those who hold a contrary view, nor is it possible to conclude that the control test is neutral, that too much weight can be placed on the relationship of subordination and that, when ruling on the existence of a contract of employment governed by the *Civil Code*, this test is not a good indication of the nature of the contract between the parties. Such conclusions would be possible, however, when applying principles of common law. Aside from the work and remuneration, the relationship of subordination (the right of direction or control) is the only decisive test. I believe this is what Décary J.A. means at paragraph 114 of *Wolf*, when he writes:

> . . . I may add that I find it somehow puzzling that "control" is listed amongst the factors to be considered in an exercise the purpose of which is precisely, under the *Civil Code of Québec*, to determine whether or not there is control.

[66] Consequently, the approach adopted in *Sagaz* and *Wiebe Door* is inconsistent with the relevant provisions of the *Civil Code*. Professor Duff comes to a substantially similar conclusion:

> . . . In most tax cases, these judicial decisions rely on the general test adopted in *Wiebe Door*, which corresponds to the private law of the common law provinces but differs from the control or subordination test contained in the C.C.Q. Neither the ITA nor other federal legislation explicitly dissociates the meaning of this word from the civil law of Quebec, nor does the text of the ITA necessarily imply that the meaning of the word for tax purposes should be interpreted according to its common law definition. Here too, a general presumption that Parliament might have intended the distinction between employees and independent contractors to apply uniformly throughout Canada should not outweigh the explicit affirmation of Canadian bijuralism in new section 8.1 of the federal *Interpretation Act* and the Preamble to the *Harmonization Act*. Consequently, to the extent that tax cases in Quebec rely on *Wiebe Door* rather than the C.C.Q., or as a separate test in addition to the C.C.Q., they are incompatible with new section 8.1 of the federal *Interpretation Act*. Where a court refers to the general test in *Wiebe Door* in order to apply the control or subordination test, on the other hand, complementarity is maintained and section 8.1[19] need not apply. In practice, however, the expansive *Wiebe Door* test may be incompatible with the singular emphasis on subordination in the C.C.Q.
>
> [Emphasis added.]

[67] Both MacGuigan J. in *Wiebe Door* and Desjardins J.A. in *Wolf* believed that the rules of civil law and common law concerning contracts of employment were identical. Indeed, the latter stated the following:

> 48 In *Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent*, [1978] 1 S.C.R. 605, a case in tort, the Supreme Court of Canada was called upon to determine whether a medical doctor was an employee of the hospital where the claiming party had been

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19 The footnote appearing in the article reads as follows:

[TRANSLATION] This sentence is the only point in this passage about which I do not share Professor Duff's opinion, because he expresses a point of view that is incompatible with my conclusion concerning the impropriety of using common law decisions to interpret provisions of the *Civil Code*. That being said, it is clear that one must analyze all of the evidence in order to be able to make a determination concerning the existence or absence of a relationship of subordination. See *Charbonneau*, *supra* (note 4), par. 3 and 9.

> treated. Pigeon J., for the Court, cited with approval André Nadeau, *Traité pratique de la responsabilité civile délictuelle* (Montréal: Wilson & Lafleur, 1971), page 387, who had observed that [TRANSLATION] "the essential criterion in employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work" (page 613). Pigeon J. then cited the famous case of *Curley v. Latreille* (1920), 60 S.C.R. 131, where it was noted that the rule was identical on this point to the common law (*ibid.*, at pages 613-614).
>
> 49 Consequently, the distinction between a contract of employment and a contract for services under the *Civil Code of Québec* can be examined in light of the tests developed through the years both in the civil and in the common law.
>
> [Emphasis added.]

[68] The statement attributed to Pigeon J., who referred to *Curley*, with regard to the identity in the two legal systems of the rule for determining the existence of a contract of employment, is incorrect for two reasons. First, that is not what he said. Furthermore, as was seen previously, the rules of common law and civil law are not identical in terms of the essential elements of the contract of employment.

[69] The debate in *Curley*—as is primarily the case in *Hôpital Notre-Dame*— concerned the liability of the master for the act of another person (the servant), not the servant's legal status. Thus, it is by addressing the issue of liability for the act of another person and not the essential elements of a contract of employment that Pigeon J. affirmed, in *Hôpital Notre-Dame*, the identity of the rules of civil and common law, as the following two passages reveal:

> Turning now to the initial fault, here again the hospital's liability appears to me without legal basis. It would have to be based on the last paragraph of art. 1054 C.C.:
>
> > Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.
>
> Since *Curley v. Latreille* . . . it is settled law in Quebec that, in the French version of the Code, the words "dans l'exécution des fonctions" are to be given a literal interpretation, a literal meaning corresponding to the English version: "in the performance of the work". It was expressly noted that this meaning is also that of the

> common law rule. The broad meaning which the French courts have given the words "dans les fonctions" in art. 1384 C.N., and which results in liability being fixed for acts that are merely performed "on the occasion of work" and are connected to it only by circumstances of time, place or service, has thus been rejected.
> [p. 611]
>
> . . . In the case at bar, the medical care was given to Dame Laurent under a contract, not with the hospital, but with Dr. Théoret. Since it was noted in *Curley v. Latreille* that the Quebec rule is identical on this point to the common law, I will take the liberty of quoting the following statement of Aylesworth J.A. of the Ontario Court of Appeal, cited by Hall J. in *The Trustees of the Toronto General Hospital v. Matthews* [[1972] S.C.R. 435.], (at p. 439):
>
> > The cases under review both in this country and in England make it clear, I think, that the liability of a hospital for the negligent acts or omissions of an employee vis-à-vis a patient, depends primarily upon the particular facts of the case, that is to say, the services which the hospital undertakes to provide and the relationship of the physician and surgeon to the hospital.
>
> [pp. 613 and 614]
>
> [Emphasis added.]

[70] In addition, it is in *Curley* that Mignault J., after noting that several Court of Appeal judges had [TRANSLATION] "likened our civil law, in terms of the responsibility of masters and servants, to English law," issued his warning against the temptation [TRANSLATION] "to go outside the legal system to seek precedents in another system." Thus, both in *Hôpital Notre-Dame* and in *Curley*, the identity of the rules was only recognized for civil liability and not for the elements that are essential to the existence of a contract of employment. . . .

. . .

[72] In *Wiebe Door*, MacGuigan J. adopted the same approach as the one adopted by the Privy Council of London, England—the first court to establish the enterprise test—in *Montreal Locomotive*. Since the dispute in *Montreal Locomotive* began in Quebec, some people might have believed that the enterprise test could be applied in the Province of Quebec. Two comments are required. First, in no way did that case involve determining the nature of a contract of employment governed by Quebec law; rather, it was necessary to determine to what extent the Montreal Locomotive company was subject to municipal taxation as the "occupant" of a building. This company had sold its land to the Crown and had agreed to construct a plant and to operate it as an agent of the Crown. Therefore, it was necessary to determine in this case who the occupant was. To do this, it was necessary to establish whether Montreal Locomotive operated a business on its own

account or on behalf of the Crown. Furthermore, according to MacGuigan J. in *Wiebe Door*, to settle this issue in *Montreal Locomotive* Lord Wright apparently relied on an article written by an American lawyer. Thus, the Privy Council did not establish rules governing a contract of employment in Quebec, nor did it even use the rules of contractual civil law to settle the issue under review.

[73] In conclusion, since the coming into force of the *Civil Code* in 1994 and of section 8.1 of the *Interpretation Act* in 2001, it is no longer appropriate to apply common law decisions, such as *Sagaz* and *Wiebe Door*, to determine the essential elements of a contract of employment in Quebec. Rather, it is necessary to apply the relevant provisions of the *Civil Code*, which clearly define and specify a contract of employment. . . .

[30] Having concluded that it was inappropriate to use precedents from common law, I then proposed, in the same article, the approach that should be used when this Court must apply the provisions of the *Civil Code*. The summary I wrote reads as follows:

[TRANSLATION]

2.4. SUMMARY OF THE APPROACH

[124] In summary, the approach suggested in the second part of the article enables the Court to settle the issue with which it has been presented, that is, to determine whether or not there is a contract of employment. The individual before the court is responsible for proving disputed facts to establish his or her right to have the Minister's decision set aside or varied. Therefore, it would be appropriate to prove the contract entered into by the parties and to establish their common intention regarding the nature of this contract. If direct evidence of this intention is not available, then the individual can use **indications of intention**.

[125] He or she will then need to demonstrate that the parties performed the contract in accordance with the agreed-upon stipulations and with the legislative provisions of the *Civil Code* that govern this contract. The individual must establish that the work was performed, that remuneration was paid and that the work was carried out under the payor's direction or control, if the individual wants to establish that the parties were bound by a contract of employment. If necessary, the individual can use a variety of indications such as **indications of subordination** (indications of direction or control). If, on the other hand, the individual wants to prove that there was no contract of employment, then he or she needs to prove that there was no relationship of subordination using **indications of autonomy**, if necessary. It is in the Minister's best interest to adduce in evidence all of the factual elements that could prove that the contract was not performed in compliance with the stipulations contained therein and with the *Civil Code*.

[126] Ultimately, the Tax Court must render its decision primarily on the basis of the facts revealed by evidence of the performance of the contract even if the stated intention of the parties indicates the opposite to what is disclosed by the facts. If evidence that the contract was performed in accordance with its stipulations and with the *Civil Code* is inconclusive, then a decision may still be rendered based on the characterization of the contract by the parties and based on their stated intention at the time of the agreement, if the evidence is probative regarding these issues. If it is not, then the individual's appeal will be dismissed due to insufficient evidence.

[Emphasis added.]

[31] At this point, I would like to discuss some passages from the article to clarify this approach:[20]

[TRANSLATION]

2.1.1. Burden of proof

[76] The rule of the onus or burden of proof is used to determine who must prove before the Tax Court the relevant facts that establish, in the case at bar, the existence or absence of a contract of employment. This rule is not found in the *Employment Insurance Act* (EIA). However, subsection 104(1) of the EIA stipulates that the Court has "authority to decide any question of fact or law necessary to be decided in the course of an appeal under section . . . 103 . . ." In addition, according to subsections 18.29(1) and 18.15(4) of the *Tax Court of Canada Act*, hereinafter **TCCA**, in appeals arising under the EIA, the Court is not bound by any legal or technical rules of evidence, which means that "Parliament was, as it were, adopting the autonomy of evidence principle . . . as that principle is applied by administrative tribunals." However, even though the Court is not bound by any rule of evidence, this does not mean that it does not apply any rules. In general, the rules of evidence that it applies are based on a judicial philosophy marked by pragmatism and flexibility and based on the rules of natural justice. Under the autonomy of evidence principle, however, the Court can, by analogy, certainly apply rules of evidence that are applicable in the appeals heard by that Court under other procedural schemes, including General Procedure.

[77] Having noted the absence of a rule concerning the burden of proof in the EIA, it is appropriate to refer to the *Tax Court of Canada Rules of Procedure respecting the Employment Insurance Act* (SOR/90-690, amended, hereinafter **RPEIA**). However, the rules of evidence set out in section 25 of the RPEIA do not address the burden of proof either. However, Part I of the *Canada Evidence Act* applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction. Section 40 of this Act adopts the principle of complementarity with the laws of evidence in the province in which the proceedings are taken. This section reads as follows:

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[20] Numerous footnotes have been omitted.

40. In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.	**40.** Dans toutes les procédures qui relèvent de l'autorité législative du Parlement du Canada, les lois sur la preuve qui sont en vigueur dans la province où ces procédures sont exercées, y compris les lois relatives à la preuve de la signification d'un mandat, d'une sommation, d'une assignation ou d'une autre pièce s'appliquent à ces procédures, sauf la présente loi et les autres lois fédérales.

[Emphasis added.]

[78] If the individual's appeal is filed in Quebec, then the general rules of evidence set out in articles 2803 and following of the *Civil Code* will apply. Articles 2803 and 2804 read as follows:

> **2803.** A person wishing to assert a right shall prove the facts on which his claim is based.
>
> A person who alleges the nullity, modification or extinction of a right shall prove the facts on which he bases his allegation.
>
> **2804.** Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.
>
> [Emphasis added.]

[79] The *Civil Code* establishes rules of private law that govern the relationships between persons. And yet, this case involves relationships between citizens and the Administration, which falls under administrative law, thus under public law. In *Victoriaville* (*supra*) I concluded that the rules of evidence in the *Civil Code* are applicable in appeals heard by the Quebec Tax Court under the General Procedure, regardless of whether these appeals deal with the issue of private or public law. It is appropriate to apply article 2803 C.C.Q., adapting it to suit the context of an appeal introduced under the EIA. Whether a worker or a payor files the appeal, that party has the right before the Court to have the Minister's decision set aside or varied. According to the first paragraph of article 2803, the person wishing to assert a right shall prove the facts on which his claim is based. In administrative law, this rule is all the more justified because the individual before the Court is generally in the best position to prove the disputed facts. This involves the application of the procedural fairness principle.

[80] For the purpose of comparison, it is appropriate to emphasize that the burden of proof rule set out in article 2803 C.C.Q. corresponds to the rule of

common law applied in the provinces. Thus, in *Tignish Auto Parts Inc. v. Canada (M.N.R.)*, Desjardins J. of the Federal Court of Appeal stated that it is the "applicant, who is the party appealing the determination of the Minister [on the insurability of employment, that] has the burden of proving its case."

[81] In conclusion, although the Tax Court is not bound by any rule of evidence, it is certainly reasonable to expect that the party that brings an appeal before the Court has the burden of proving the facts warranting this appeal and that the appeal will be dismissed if the party fails to satisfy the judge that its claims are well-founded. Thus, an individual who wishes to prove the existence of a contract of employment is responsible for adducing in evidence facts that prove that the three essential elements concerning the existence of such a contract have been met. On the other hand, if the individual wants to prove that there was no contract of employment, then the individual needs to prove that at least one of the three elements of a contract of employment is absent. Most often, this involves proving that there was no relationship of subordination. Obviously, this proof can also be made by presenting evidence demonstrating that all of the elements that are essential to a contract of employment have been met. However, it is important to remember that one of these elements is the performance of the contract with no relationship of subordination (art. 2099 C.C.Q.). Here again, if the individual does not present sufficient evidence, then the appeal will be dismissed.

2.1.2. Proof by presumption of fact

[82] Article 2811 C.C.Q. stipulates that "proof of a fact or juridical act may be made by a writing, by testimony, by presumption, by admission or by the production of material things. . . . " At this point, it is not necessary to examine each of these five proofs. However, it would be appropriate to analyze proof by presumption of fact because this proof is very useful in establishing the existence of a contract of employment. As will be seen later, proof of the contract itself, of the juridical act, may be made by direct evidence, that is, by producing a document attesting as such, or if not, by testimonial evidence as to what the parties agreed upon when they entered into their agreement. Direct evidence of the work performed by the employee and of the salary paid by the employer can be made in the same manner, that is, in writing or by testimony. With regard to the relationship of subordination, that is, the reverse of the power of direction or control, direct evidence can be made if this power was exercised or if it is stipulated in the contract. In cases in which it was neither exercised nor stipulated, or was only exercised to a small degree, it is necessary to prove the existence of this "power" of direction or control, that is, to establish an unapparent or unknown fact, which requires indirect or circumstantial proof. This is what the *Civil Code* refers to as proof by presumptions of fact. Furthermore, the same approach may be necessary if the parties did not state in their agreement their intention regarding the nature of the contract.

[83] Paraphrasing the text of art. 2846 C.C.Q., Professor Ducharme describes this proof as "an intellectual process by which the existence of an

unknown fact is determined by induction from known facts." The analysis that he includes in his work reads as follows:

> **Par. I — Analysis of presumption of fact**
>
> 599. If we analyse the process by which the judge goes from known facts to an unknown fact, we see that this induction includes three separate steps. First, establishing the known facts or seeking indications; second, the intervention of a principle that is used to link known facts and the one sought and, finally, the induction term, which is the rather great certainty of the induced fact. We will briefly analyze each of these steps.
>
> **A — Seeking indications**
>
> 600. Any fact or act, provided that it is validly established before the Court, may serve as an indication. Thus, no specific rule can be developed regarding the nature of the facts likely to be used as the basis for inductive reasoning, except perhaps that the facts must be serious, precise and concordant, as confirmed by article 2849 C.C.Q., as well as by consistent case law.
>
> 601. What does this expression mean? In our opinion, it simply means that the known facts must be such that it is at least probable that the fact to be induced exists. If the known facts are just as consistent with the existence as with the absence of this fact, then they cannot be used as a basis for a presumption and it would be said that they are not sufficiently serious, precise or concordant. It is important to note that simple probability is sufficient and that it is not necessary for the presumption to be so strong as to exclude any other possibility. Later, we will study the issue of the admissibility of evidentiary processes to prove indications.
>
> **B — Intervention of a principle**
>
> 602. Indications prove nothing in and of themselves; their value rests in their interpretation, and they can be interpreted via a principle taken from the field of science, psychology, physiology, etc.
>
> 603. The principle of causality plays a major role in presumptions. According to this principle, it is known that there is no effect without a cause; thus, by starting with an effect, it is possible to determine the cause that produced it. As such, in a specific case, the Court presumed that sheep had been killed by stray dogs based on the nature of the injuries that they sustained. In other cases, the principle of causality makes it possible to determine from a certain fact the

> cause of another event, for example, to designate as the cause of a fire the pesticide vapours that had been spilled in a building some hours earlier.
>
> [Emphasis added.]

[84] Thus, by analyzing and weighing a series of factual indications, it will be possible to make a determination as to the existence or absence of unapparent or undemonstrated facts, such as the power of direction or control or the intention of the parties regarding the nature of the contract.

2.2. PROOF OF A CONTRACT OF EMPLOYMENT AND OF THE INTENTION OF THE PARTIES

[85] For reasons that will be discussed later, the proof that an individual must present in his or her appeal before the Court will relate to two very distinct issues i) the existence of the juridical act itself, namely the contract of employment and the intention of the parties as to the nature of this contract and ii) the performance of the contract. With regard to the first issue, the time to consider is the time at which the parties reached an agreement or the time at which the agreement was subsequently amended. With regard to the second issue, the entire period over which the contract was performed is taken into account, placing greater importance on the period covered by the Minister's decision that is under appeal.

[86] The fact of being an employee does not constitute a simple relationship between a payor and a worker. Rather, it involves a contractual relationship, which requires an "agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation" (art. 1378 C.C.Q.). Thus, it is important to provide proof of this agreement and of its terms and conditions pertaining to the work and remuneration, and to specify the intention of the parties regarding the nature of this agreement.

[87] It is important to remember that the contract of employment is subject to the general provisions of the *Civil Code* regarding contracts (article 1377 and following). As such, a contract of employment is subject to the conditions of formation of a contract, including the exchange of consents, cause and object (article 1385 C.C.Q. and following).

[88] Among the general provisions, those dealing with the interpretation of contracts are of clear interest. The most relevant provisions read as follows:

> **1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> **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.

1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.

. . .

1431. The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

1432. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.

[Emphasis added.]

[89] Proof of the intention of the parties when they entered into the agreement could be extremely important in an appeal if the facts pertaining to the essential elements are unclear. In *Wolf*, *supra* (note 30), Décary J.A. writes:

> [117] The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other. I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e. the intention of the parties. Article 1425 of the *Civil Code of Québec* establishes the principle that "[t]he common intention of the parties rather than the adherence to the literal meaning of the words shall be sought in interpreting a contract". Article 1426 C.C.Q. goes on to say that "[i]n 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".
>
> . . .
>
> [119] Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common

> intention of the parties is clear and that should be the end of the search. . . .
>
> [Emphasis added.]

[90] In the same case, Noël J.A. states:

> [122] . . . In my view, this is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.
>
> [Emphasis added.]

2.2.1. Intention expressed in the agreement

[91] The *Civil Code* does not prescribe any technical rule for a contract of employment. It can be written or verbal. Obviously, if there is a written contract, this makes the individual's task easier. A well-drafted contract will clearly stipulate the intention of the parties regarding the nature of their agreement. It constitutes direct evidence of one of the facts at issue. This intention can arise from the description of the contract, particularly as a "contract of employment," and from the stipulations of the contract. In particular, the contract might stipulate that the worker will perform work under the direction or control of the employer. In such a case, it would be wise to determine that the contracting parties intended to form a contract of employment. If, on the other hand, the parties characterized their contract as a "contract for services" and stipulated that the worker would render services as a "self-employed worker", an "independent contractor", or an "independent subcontractor" or that there is no employment relationship between the payor and the worker, then it can be determined that they intended to form a contract for services. Even if the written agreement does not contain such clear terms, the intention of the parties could still be revealed from all of the terms used in the agreement.

[92] If there is no written agreement, or if the document is incomplete, then testimonial evidence may be provided at the hearing regarding the intention expressed by the parties in their verbal agreement, even though this is not the best kind of evidence. The issue that arises when testimonial evidence is used is the faulty memory of the contracting parties and the risk that their memory of what had been agreed upon may differ. In the case of contradictory evidence, the judge must assess the credibility of the testimony.

2.2.2. Implied intention based on the parties' conduct (indications of intention)

[93] If the parties did not state their intention in a written or verbal contract, this intention could be established indirectly or circumstantially by providing detailed proof of their conduct. For example, if the payor includes the worker's name on the payroll, issues a pay statement to the worker, makes tax deductions at source on the worker's earnings and completes a T4 slip, contributes to certain benefit plans that the payor has established (such as a pension plan or health insurance plan) or to public plans (such as the Employment Insurance Plan and the Quebec Pension Plan), or if the payor pays the worker for vacation and sick leave, then it can be deduced that the payor intended to enter into a contract of employment.

[94] The indications of intention for a contract for services are opposite to those mentioned for a contract of employment. The absence of the elements listed in the preceding paragraph could therefore reveal the intention to enter into a contract for services.

[95] If workers record the remuneration received for their work as employment income on their tax returns or complete an application to join a private pension plan established for the payor's employees, then it can also be deduced that the workers intended to enter into a contract of employment. However, if workers report their income as business income, describe themselves as independent consultants on their business cards or introduce themselves to other merchants as a business owner, register their business with the Inspector General of Financial Institutions, register with tax authorities for the purposes of the Goods and Services Tax (GST) and the Quebec Sales Tax (QST), charge fees for their services to which they add GST/QST, if they pay business tax, agree to be liable for damages that occur in the performance of the contract, or contribute to their own pension fund or to the Quebec Pension Plan as self-employed workers, then they likely consider themselves to be providers of services (self-employed workers).

[96] In a way, any behaviour that generally corresponds to that of an employer or employee could constitute an indication as to the intention of the parties regarding the nature of their contract. For this reason, these indications can be designated as indications of intention. However, it is important to emphasize that they do not necessarily reveal that the payor had the power to direct or control the worker's work, let alone that such power was actually exercised.

2.3. PROOF OF PERFORMANCE OF THE CONTRACT OF EMPLOYMENT

[97] Even if the contracting parties specified their intention in their written or verbal contract or if such an intention can be induced from their behaviour, this does not necessarily mean that the Courts will deem this fact to be decisive. As Décary J.A. indicates in *Wolf*, *supra*, the contract must be executed in accordance with this intention. Thus, simply because the parties called their contract a "contract for services", stipulated that the work would be performed by a

"self-employed worker" and that there was no employer-employee relationship, does not necessarily render it a contract for services. The contract could be a contract of employment. As stipulated in article 1425 C.C.Q., the true common intention of the parties rather than adherence to the literal meaning of the words used in the contract shall be sought. In addition, the Courts must verify that the conduct of the parties complied with the legislative provisions pertaining to contracts. Robert P. Gagnon writes:

> **91** —*Factual assessment*— Subordination is borne out by the facts. In this regard, case law has always refused to uphold the characterization given to the contract by the parties:
>
> > In the contract, the distributor personally acknowledges that he is acting on his own account as an independent contractor. It is not necessary to go back to this point, because in reality this would not change anything; furthermore, what is claimed to be true is often not true.
>
> [Emphasis added.]

[98] In *D & J Driveway*, Létourneau J.A. of the Federal Court of Appeal writes:

> 2 It should be noted at the outset that the parties' stipulation as to the nature of their contractual relations is not necessarily conclusive and the Court which has to consider this matter may arrive at a contrary conclusion based on the evidence presented to it: *Dynamex Canada Inc. v. Canada*, [2003] 305 N.R. 295 (F.C.A.). However, that stipulation or an examination of the parties on the point may prove to be a helpful tool in interpreting the nature of the contract concluded between the participants.
>
> [Emphasis added.]

[99] Therefore, judges are able to recharacterize contracts so that their name reflects the facts. In France, recharacterization of a contract stems from the application of the principle of reality. The Cour de cassation adopts a similar approach to the one adhered to in Canada:

> Since the existence of an employment relationship does not depend on the expressed desire of the parties or on the name they attributed to their agreement, but on the conditions of fact in which the workers' activity is exercised; . . .

[100] In my opinion, this verification of compliance is necessary when interpreting contracts of employment because there may be an interest in disguising the true nature of a contractual relationship between a payor and a worker. Indeed, experience reveals that some employers, wanting to reduce their tax burden with respect to their employees, decide to treat them as self-employed workers. This decision may be made at the beginning of the contractual relationship or at a later time. Similarly, some employees may have an interest in disguising their contract of employment as a contract for services because circumstances are such that they do not feel they will require employment insurance benefits and they would like to eliminate their employee contributions to the employment insurance plan or because they want to have more freedom to deduct certain expenses for the purpose of calculating their income under the *Income Tax Act*.

[101] Since, in general, the EIA only authorizes the payment of employment insurance benefits to employees who lose their employment, the Courts must be vigilant in order to expose false self-employed workers. The Courts must also ensure that the Employment Insurance Account, from which these benefits are withdrawn, receives contributions from all those required to contribute, including from false self-employed workers and their employers.

[102] Not only is there a need to prove contract performance in cases in which the parties have expressly or implicitly stated their intention to adopt either a contract of employment or a contract for services, but also in all cases in which proof of this intention is insufficient or absent. This proof of contract performance involves the three elements that are essential to a contract of employment. Generally, it is not too difficult to prove the first two elements (work and remuneration), because this involves material facts that are relatively easy to establish. However, proving the legal relationship of subordination, including the power of direction or control that an employer exercised or could have exercised, is a very difficult task. It will be even more difficult if the employer exercised little or no direction or control.

2.3.1. Direct proof of the power of direction or control

[103] The best evidence will be direct proof of the facts establishing that the work was actually performed under the payor's direction and control. This proof can be made by documents or testimony revealing specific instructions that were issued to the worker concerning the work to be completed (the "what") and concerning the way in which it is to be completed (the "how"), the place at which it is to be completed (the "where"), and the time at which it is to be completed, as well as the time frame involved (the "when"). In addition to these facts, facts

demonstrating that the payor supervised the work, particularly by requiring the worker to regularly provide reports, by regularly completing evaluation forms concerning the work performed by the worker, by meeting with the worker to communicate the results of the evaluation and perhaps by disciplining the worker. With evidence of this sort as a whole, it would be relatively easy to determine that a relationship of subordination exists.

[104] As an example of work in which the worker receives numerous instructions on the "what," the "how," the "where" and the "when" and in which the personal performance of the work (the "who") is important, one can consider actors employed by a theatre company or film production company. In general, their work is performed under the direction and control of a director. Since the contract of employment may be for a fixed term and is "essentially temporary," nothing prevents the employment from lasting for only a few weeks (2086 C.C.Q.).

[105] Another direct proof of the exercise of the power of direction of an employer could be proof establishing that the payor trains the worker, unless the training relates only to knowledge of the products to be sold. The imposition of rules of conduct or behaviour also constitutes direct proof, unless the rules correspond to standards that are applicable regardless of the worker's status, i.e. statutory standards.

2.3.2. Circumstantial proof of the power of direction or control (indications of subordination)

[106] It is important to remember that the distinguishing feature of a contract of employment is not the fact that the employer actually exercised direction or control, but the fact that the employer had the power to do so. In circumstances in which the employer did not regularly exercise its power of direction or control, it is not easy to prove this "power." Thus, it is not surprising that to resolve this problem, common law courts have opted for tests other than the control test. However, in Quebec, the Courts do not possess this latitude. They must determine the existence or absence of a relationship of subordination to characterize an agreement as a contract of employment or as a contract for services. Therefore, it is necessary to have available proof by presumption of fact, that is, indirect or circumstantial proof.

[107] When choosing and weighing indications, one must bear in mind the provisions of the *Civil Code* that distinguish a contract of employment from a contract for services. One must ask the following question: Does a circumstantial fact make the existence of the power of direction or control probable, or on the contrary, is it probable that the worker was self-employed when performing the contract? The following constitutes a very partial list of indications, to which modifications or additions may be made. The usefulness, relevance and probative value ("serious, precise and concordant" facts) of these indications and of those that

may be added to them need to be assessed on the specific circumstances of each case.

[108] Prior to proposing or making comments concerning indications that might prove to be useful, it is appropriate to remember those described in literature, first and foremost those suggested by Robert P. Gagnon, at paragraph 92 of his work, *supra*:

> . . . In practice, the presence of a certain number of supervision indicators will be sought, which will likely vary depending on the context: mandatory presence at a workplace, fairly regular assignment of work, imposition of rules of conduct or behaviour, activity reports requirement, control of the quantity and quality of the work, etc. Working from home does not preclude such integration into the business.

[Emphasis added.]

[32] In the article on *Wiebe Door*, I describe the indications used by French doctrine (paragraph 109) and by Canadian and Quebec case law (paragraph 110 and following). Some are indicative of the power of direction or control over the what, the how, the where and the when, which I will not reproduce here. However, I believe it is helpful to reproduce the comments concerning the indication of integration:[21]

[TRANSLATION]

- **Degree of integration into the payor's business**

[111] All of the indications that we have just analyzed separately could, when examined together, reveal that the worker is highly integrated into the payor's business. This approach is slightly different from the approach described above. Indications of the exercise of the power of direction or control are not sought, but rather indications that reveal that the worker's work is integrated to a large degree into the payor's business. However, this integration could in itself constitute an indication of subordination. For this reason, it is discussed separately here.

[112] However, a preliminary remark is required. To determine whether there is integration, the issue is not whether the worker's work is essential to the payor's business. If the payor retained the worker's services, it is usually because the payor required those services. Therefore, the answer to this question is not useful. Rather, it must be asked to what degree the work is actually integrated into the payor's business. Take, for example, a dentist (similar to *Dr. Denis Paquette*) who works 35 hours per week year-round in a dental clinic, based on the clinic's normal

[21] The footnotes have been omitted.

business hours, who uses the services of an assistant and all of the equipment provided by the clinic and who charges patients fees at rates corresponding to those set by the clinic's price list. Furthermore, compare this situation to that of a plumber who is called to come and repair a faucet at this clinic. Obviously, although the work of both of these workers is essential to the clinic, the dentist is integrated into the clinic, whereas the plumber is not.

[113] In their texts, *supra*, Quebec authors Bich and Gagnon discuss the integration of the work of the employee or worker into the employer's business; Bich writes that "the employee’s activity is integrated into the employer’s business and is carried out for the employer", and second, in affirming that [TRANSLATION] "the employee agrees to become integrated into the operational framework of a business so as to perform work for the business."

i) Nature of the work

[114] The fact that the worker holds a line position in the payor's business, for example, the fact that the worker is a CEO or sales director, constitutes an indication of integration into the business and an indication of subordination.

ii) The number of hours and payors

[115] If a worker devotes 35 or 40 hours of work per week year-round to a single payor, as in the previous example involving the dentist, then one would believe that this worker is integrated into the payor's business and is subject to the payor's right of direction and control. This conclusion shall be even more evident if the payor has exclusive rights to the worker's services. However, if the worker performs work for a number of payors, which is especially true in the case of a housekeeper who cleans private residences, it will be easier to conclude that the worker is self-employed and that there is no relationship of subordination, which is essential to the existence of a contract of employment. However, the fact that the worker is able to work for other payors does not necessarily mean that there is no relationship of subordination; it is possible to have more than one job.

iii) The workplace

[116] The power to determine and control the place where the work is performed (the "where") was discussed previously. If there is no proof establishing that this power was exercised, the fact that the work was performed at the payor's place of business could indicate that the worker's work was integrated into the payor's business and, consequently, it could constitute an indication of the power of direction or control. For example, if seamstresses perform work at the payor's place of business, then this would certainly indicate the existence of a relationship of subordination, whereas work performed in the seamstresses' homes could indicate that these workers are self-employed.

[117] Obviously, certain tasks require that the work be performed outside of the payor's place of business: consider, for example, truck drivers and sales representatives. Thus, the relevance of the workplace is considerably more important in cases in which the work, which can normally be performed at the payor's place of business, is not.

iv) Supply of materials, equipment and staff and reimbursement of expenses

[118] The fact that the payor provides the worker with all of the materials, equipment and everything else that is necessary to perform the work (such as staff) or reimburses the worker for work-related expenses may constitute another factor that reveals the integration of the worker into the payor's business.

v) Scope of the worker's decision-making power

[119] This factor was also discussed previously, at paragraph 110. However, it is important to emphasize that the limited scope of the worker's decision-making power could also reveal a certain degree of integration into the payor's business.

vi) Ownership of the result of the work performed by the worker

[120] Other indications of the worker's integration into the payor's business and, consequently, of the existence of the power of direction or control include the following facts:

- The clients that the worker serves are the payor’s clients;
- The payor is responsible for collection of accounts;
- The payor owns the intellectual property resulting from the worker's research.

[33] This is the approach that I intend to follow in this appeal. Thus, first it must be determined what the agreement was between Ms. Boucher and the Hospital and what their intention was regarding the nature of this agreement.

Proof of contract and of the intention of the contracting parties

[34] The Agreement describes the work that Ms. Boucher was required to perform and the amount of the remuneration for this work, which was not to exceed $14,500 for the specified period. The method used to calculate the hourly rate does not appear in this Agreement; however, it was established by testimonial evidence: the parties to this appeal do not disagree in this respect. The Agreement is also deficient because it does not specify the intention of the parties regarding the

nature of the contract, that is, whether it was a contract of employment or a contract for services. The parties did not characterize their written agreement as a contract for services or a contract of employment; they simply referred to it as an agreement. Nor did they specify whether Ms. Boucher rendered her services as an independent or self-employed worker or whether the work was instead to be performed under the direction or control of the Hospital, as specified in clause 1 of Draft 1.

[35] As Counsel for the Respondent acknowledged, the wording of the Agreement itself is not inconsistent with the existence of a contract for services. Due to the absence of certain key words, a knowledgeable legal professional could well conclude that such a contract exists. For example, the word "employee" is not found in the Agreement, contrary to Draft 1, in which the words "employee" and "employment" are used approximately fifteen times on a single page. In addition, in all probability, using the expression "contact person" was deliberate, rather than using the terms "supervisor," "superior" or "department head," as the Hospital used in its letter of reprimand. However, the use of the word "clients" is rather neutral, because it also appears in Draft 1 (a contract of employment). The most probative factor (without necessarily being conclusive), in terms of characterizing the Agreement as a contract for services, is probably the stipulation that Ms. Boucher [TRANSLATION] "agrees to serve the clients . . . in accordance with her availability and client needs." This is an indication of self-employment. However, it can be interpreted in another way. One speech-language pathologist could not meet all of the needs of the 11 Centres on her own. Therefore, this stipulation could mean that she was required to do her best under the circumstances.

[36] In short, the Agreement does not clearly state the nature of the intention of the contracting parties. At best, it can be stated that its stipulations are not inconsistent with the existence of a contract for services. Therefore, it is necessary to verify the common intention of the parties by referring to their testimony. However, the evidence that I heard reveals a lack of common intention between the two contracting parties. Indeed, the evidence concerning the intention of the parties is contradictory.

Intention of the Hospital

[37] On one hand, according to the testimony of the two Hospital representatives, the Agreement constitutes a contract for services. The Hospital hired a professional to assist the Hospital in carrying out the mandate that it had received from the Board. Ms. Boucher's work was to be performed without supervision. As a professional, she knew what she needed to do. She determined her own schedule, which Centres she

needed to visit and which patients she needed to treat, using the list provided by the Board. In addition, the representatives did not visit the Centres, nor was any verification carried out over the telephone. Moreover, the Hospital did not have access to the files of these Centres.

[38] The supervision exercised by the Hospital amounts to financial control, such that Ms. Boucher's remuneration would not exceed the budgetary allocation that the Board granted to the Hospital for external service. It was not necessary for Ms. Boucher's reports to the Hospital to contain a detailed description of the services rendered. Of particular interest to the Hospital was the number of patients she cared for and the number of hours she spent providing her services, not the details of the clinical treatment.

[39] The fact that the Hospital did not deduct at source any taxes to be paid by Ms. Boucher is consistent with the behaviour of an individual who pays fees to a provider of services, not a salary to an employee, as is the paying of remuneration upon presentation of an invoice.[22] In addition, there is the fact that the Hospital did not complete T4 slips for Ms. Boucher.

[40] However, there are other facts that raise doubt regarding the Hospital's true intention. Contrary to what is stipulated in the contract, Ms. Boucher did not obtain her own professional liability insurance coverage; rather, the Hospital provided her with insurance through the network of hospital institutions. Normally, service providers are liable for their actions and must obtain their own insurance coverage against any financial risk that their actions may involve. However, employers are liable to their clients for the actions of their employees and it is in the best interest of such employers to obtain insurance against this risk. Moreover, that is what the Hospital did.

[41] Another fact that raises doubt is the letter in which the Hospital informs Ms. Boucher that it will be a pleasure to have her [TRANSLATION] "on our team," which implies that Ms. Boucher was part of the Hospital's staff.

[42] Although this is not decisive, Ms. Boucher's remuneration was calculated in relation to the salaries paid to employees. The fact that she was given an additional 35% to account for benefits is another indication. As Counsel for the Respondent mentioned, a client does not usually provide benefits to its suppliers.

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22 However, the fact that the invoice was printed on a sheet bearing the Hospital's letterhead and logo and that it was completed in part by the Hospital is rather curious.

[43] Another aspect of the Hospital's conduct that I feel is inconsistent with the intention of having a contract for services is not only the fact that the Hospital paid for Ms. Boucher's training courses (as it did for the other speech-language pathologists employed by the Hospital), but also that it paid her for the time during which she participated in these courses. I do not know very many clients who pay for their service providers' training. Usually, they hire people who have the necessary skills to provide the desired services.

[44] A final factor that casts doubt on the Hospital's intention is the fact that some of the Hospital's executives even felt it was appropriate to formalize Ms. Boucher's situation by deciding to offer her a contract of employment (Draft 1). It is easy to imagine that they may have been concerned about the risk that the Hospital would be penalized for its failure to withhold at source Ms. Boucher's taxes and to pay benefit taxes (including Employment Insurance contributions).

Intention of Ms. Boucher

[45] On the other hand, according to her testimony, Ms. Boucher always considered herself to be an employee hired under a contact of employment. That is what she thought she had signed. Furthermore, she was replacing a salaried speech-language pathologist who worked in the external service. This employee helped her take over his duties with the Centres' patients. In fact, this is why she had requested a T4 slip. One might be tempted to criticize her for accepting payment without deductions at source, which could lead to the belief that she was acting as a service provider. However, it is important to note that this was her first job after completing her university studies.

Proof of contract performance

• Direct proof of a relationship of subordination

[46] In light of the contradictory evidence regarding the intention of the parties, it is necessary to verify the manner in which Ms. Boucher's contract was performed. Did the Hospital exercise the power of direction or control over Ms. Boucher or, at least, did the Hospital have this power?

[47] Before answering these questions, it is helpful at this point to describe three different hypotheses concerning the types of contracts that the parties could have concluded, which could, in my opinion, explain the contradictions in the

evidence. As I mentioned during the oral arguments, it seems to me that the Agreement can be characterized in three different ways. It may be a contract of employment, which I would describe as a contract of employment for permanent employees, one that grants employees permanent status and a variety of employee benefits. In this case, an hourly wage is paid according to a scale with a number of levels, but without the 35 per cent increase.

[48] The second type of contract that may have been negotiated in this case is also a contract of employment; however, it is one that I would describe as a contract of employment for contract employees. It is a matter of judicial notice that governments and paragovernmental organizations favour this type of contract when they do not wish to provide their workers with permanent status (often those starting a new job with these organizations). The workers are offered limited-term contracts, usually for six-month terms, which can be renewed for a number of years. The remuneration paid to these contract employees is substantially similar to that of permanent employees (usually unionized); however, there is no obligation to grant the worker permanent status. I note that articles 2085 and 2086 of the *Civil Code* are devoted to the principle of the temporary nature of a contract of employment. Therefore, there is no inconsistency in the existence of six-month contracts. Under both types of contracts that I just discussed, permanent and contract employees perform their work under the direction or control of the department or paragovernmental organization.

[49] This is not the case with the third type of contract that is possible here: a contract that gives the worker the freedom to choose the means of performing the contract and that is performed with no relationship of subordination. This is a contract for services.

[50] Now, let us return to the original question. Did Ms. Boucher perform her work under the Hospital's direction and control? On a balance of probabilities, the evidence reveals that this was the case. The Agreement is indeed a contract of employment for contract employees.

[51] First of all, preliminary remarks are required with regard to the contradictory testimonies. In my opinion, Ms. Boucher's testimony appears to be more probative than the testimony provided by both Hospital representatives, because it was specific, thorough and much more detailed. I am not saying that the other two individuals lacked sincerity in their testimony. However, I observed that their memories were often quite faulty. They frequently had difficulty remembering all of the circumstances of the events that occurred throughout the relevant period. I am satisfied that this is partly due to the fact that they did not have regular contact with

Ms. Boucher during this period, either because they were on sick leave or because they were only responsible for overseeing and supervising Ms. Boucher's work for brief periods of time.

[52] The principal argument submitted by the Hospital is that Ms. Boucher was a professional who had a great deal of professional freedom, who knew what she needed to do and who could determine her own duties and schedule. First of all, as Robert P. Gagnon recognizes in his work, *supra*, a high degree of specialization is not inconsistent with the broad concept of subordination. Subordination exists as soon as the payor has the option [TRANSLATION] "to determine the work to be performed, and to supervise and control the performance of the work" (Gagnon, *supra*, at paragraph 92). For an example involving a salaried dentist who worked in a dental clinic, refer to *Commission des normes du travail c. Dr Denis Paquette*, REJB 1999-15508 (C.Q.) and for an example of a salaried anaesthesiologist, refer to the decision of the Cour de cassation published in Cass. soc., March 29, 1994, Bull. civ. 1994.V.74, No. 108.

[53] I believe that the following facts constitute direct evidence that reveals that the Hospital indeed exercised direction and control over the work that Ms. Boucher performed:

- The Hospital, through its two representatives, who were Ms. Boucher's superiors, defined the duties that she was to perform and, on a number of occasions, they gave her instructions including:
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  i) to go to the Centres, to contact the individuals in charge at the Centres and to meet the needs of the patients at these Centres;

  ii) to not attempt to do everything and to limit herself to one or two Centres per day;

  iii) to stop providing dysphagia services at the Centre that had complained to Ms. Boucher's superior and that wanted its own dieticians to provide these services;

  iv) as a result of the suggestion that Ms. Boucher made to her superior, to finish providing her communication services that she had begun with other patients in this Centre, prior to going to the other Centres;

  v) to stop her work at the Centres in order to write a report for the Board, to prepare a presentation for the Centres' directors to describe the services provided or to develop a new format that would take into account the relative significance of the number of patients in each of the

Centres, so that the speech-language pathologists' services could be shared in a more equitable manner;

vi) to stop visiting the Centres after the Hospital had decided to replace her with other speech-language pathologists (refer to the letter of reprimand reproduced at paragraph 20 of this judgment, a letter that discusses the failure to comply with this instruction and the impact on the supervision of her clinical activities);

vii) to attend meetings convened by her superiors;

viii) to prepare increasingly detailed reports relating to her professional activities.

- When Ms. Boucher encountered a difficulty or when an important decision needed to be made, she deferred the decision to her supervisor. This was particularly the case with regard to:

i) purchasing materials;

ii) stopping the dysphagia service at Ms. Boissonneault's Centre;

iii) the way in which to make her presentations.

[54] In addition to these facts, which I feel directly prove the existence of direction and control, there are also indications that, while not themselves determinative, constitute evidence that points to the Hospital having the power of direction and control, the primary indication being that of integration. The facts proving that Ms. Boucher was well-integrated into the Hospital's business are:

i) first, the welcome letter stating that the Hospital is pleased to have Ms. Boucher on its team;

ii) her participation (more regular at the beginning and at the end) in team meetings;

iii) the fact that she was on the Hospital's premises on a regular basis for official and informal meetings, to prepare her presentations or for various other activities;

iv) her full-time work for the Hospital, which was her only source of income arising from her professional activities;

v) the fact that the Hospital provided her with all of the necessary materials for her presentations (including the tool used to create them, that is, a computer), reimbursed her for her purchases and paid for her training courses (even paying her salary while she attended these courses and paying for her parking fees).

[55] For all of these reasons, the appeal of the Jewish Rehabilitation Hospital must be dismissed.

Signed at Ottawa, Canada, this 19th day of September 2005.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 9th day of January 2006.

Sharlene Cooper, Translator