Docket: 2007-3554(EI)

BETWEEN:

PATRICIA CAROLA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SERGE ROY, IN HIS CAPACITY AS
CURATOR TO ALEXANDRINE LESSARD,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 5, 2008, at Montréal, Quebec

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Gilbert Nadon
Counsel for the Respondent:	Anne Poirier
Counsel for the Intervener:	Philip Hazeltine

JUDGMENT

The appeal is allowed and the decision made by the Minister of National Revenue is varied as follows: Patricia Carola was employed in insurable employment while working for the Intervener from November 7, 2004, to July 31, 2005.

Signed at Québec, Canada, this 10th day of October 2008.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 10th day of December 2008.

Brian McCordick, Translator

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Date: 20081010
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REASONS FOR JUDGMENT

Archambault J.

[1] Patricia Carola is appealing from a decision by the Minister of National Revenue ("the Minister") that she was not employed under the terms of a contract of service from November 7, 2004, to July 31, 2005 ("the relevant period"). Serge Roy, as curator to the property of Alexandrine Lessard, intervened in Ms. Carola's appeal to support the Minister's decision, which relied on the following assumptions of fact, all of which Ms. Carola has admitted to:

[TRANSLATION]

(a) On November 7, 2004, the Appellant was hired as a [TRANSLATION] "domestic helper" by Nicole Roy, who is Alexandrine Lessard's daughter and the Payor's sister.[1]

(b) Alexandrine Lessard was suffering from Alzheimer's disease and needed constant supervision at home.[2]

(c) Nicole Roy hired the Appellant at the request of her mother, who knew her and who demanded that the Appellant be the person who looked after her.

(d) Following a disagreement with Nicole Roy, her brother, the Payor, was appointed curator to the property of Alexandrine Lessard on June 9, 2005, under a judgment of the Superior Court.[3]

(e) Ms. Roy had hired the Appellant, under an oral agreement, to look after her mother, who was incapacitated from both the medical and legal standpoints.[4]

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1 The Reply to the Notice of Appeal states that Serge Roy is the Payor. The footnotes in this statement of facts are mine.

2 However, the evidence disclosed that Ms. Lessard was left without supervision when Ms. Carola, who worked only four and a half days a week, was away.

3 It would appear, however, that the disagreement arose earlier, before Serge Roy was appointed administrator of Ms. Lessard's property under an interim order of the Superior Court dated February 8, 2005, which was not adduced. It would have been helpful to adduce it, because the parties gave contradictory and confusing testimony about when exactly the misunderstanding between Ms. Roy and her mother arose. Indeed, Ms. Carola believes that the dispute, and the transfer of Ms. Roy's power to Mr. Roy, occurred two or three months later. Ms. Roy, for her part, changed her account of the facts pertaining to this question several times. At first, she said that she believed that the transfer took place five or six months after Ms. Carola was hired. Later, on cross-examination, she spoke about seven months, and then estimated that the misunderstanding arose roughly one or two months after she was hired. According to Mr. Roy, this dispute took place one week after Ms. Carola was hired. See also paragraph 16 of these reasons.

4 However, the evidence discloses that when Ms. Roy was hired, she was acting under a notarial power of attorney by which Ms. Lessard authorized her, and her brother Mr. Roy, to represent her in the administration of her property. If she had been juridically incapable at or subsequent to the time that the power of attorney was signed, the power of attorney would not have been valid, or would no longer have been valid. (See, *inter alia*, C. Fabien, "Passage du mandat ordinaire au mandat de protection" (2001) 80 Revue du Barreau 951.) But the two children continued to make use of this power of attorney, notably when

(f) The Appellant had to look after Ms. Lessard at all times.[5] She had to care for her, administer her medication, prepare her meals, keep the house clean, help her get around inside and outside the house, and, occasionally, bring her to her secondary residence in Prévost.

(g) The Appellant is neither a nurse nor a personal care attendant, and had no medical duties in relation to Ms. Lessard, other than to administer her medication.

(h) During the period in issue, CLSC Ahunstic [*sic*] evaluated the care that would need to be provided to Ms. Lessard, and allocated 10 hours per week for such care.

(i) The Appellant received 10 hours of insurable earnings per week for the care given through the CLSC. In this regard, she received a Record of Employment (ROE) specifying a total of 390 hours and $3,090.02 in insurable earnings.[6]

(j) Since Ms. Lessard required supervision 24 hours a day,[7] the Payor hired the Appellant to look after her beyond the 10 hours subsidized by the CLSC.

(k) According to the agreement between the parties, the Appellant was to stay at Ms. Lessard's residence 4½ days a week, 24 hours a day.

(l) Nicole Roy told her what tasks she was to perform for her mother, and she continued to perform those tasks when the Payor was appointed curator to Ms. Roy's mother.

Ms. Carola was hired. However, the power of attorney was not adduced in evidence. See also the analysis of the facts, *infra*, especially at paragraphs 14-16, and 47 *et seq*.

5 See footnote 2, *supra*.

6 The ROE issued by the Desjardins Group's "Chèque emploi service" (CES) processing centre was signed by Mr. Roy in his capacity as curator to Ms. Lessard. The ROE states that Ms. Lessard is the employer and that Ms. Carola is the employee. The period specified in the ROE is November 7, 2004, to August 6, 2005. Ms. Carola's occupation is given as [TRANSLATION] "domestic services". Consequently, it would be more accurate to write [TRANSLATION] "for the care subsidized by the CLSC" instead of [TRANSLATION] "through the CLSC". See also paragraphs 10 *et seq*. of these reasons.

7 See footnote 2, *supra*.

(m) The Payor did not supervise the Appellant's work daily, but he spoke regularly with his mother for news about her health and to check whether everything was going well with the Appellant.

(n) Within the confines of her five working days, the Appellant had complete freedom over the allocation of her hours and the provision of the care required by Ms. Lessard, and she did not have to provide a detailed report concerning the hours devoted to each of her different tasks.[8]

(o) Upon hiring, the Appellant's fixed remuneration was $500 per week (raised to $600 per week in the course of the period in issue)[9] for her five days of work for Ms. Lessard.

(p) The Appellant was remunerated every two weeks by direct deposit.

(q) The Appellant received her pay without any source deductions, and had no benefits (sick leave or paid holidays) from the Payor.

(r) The Appellant used her personal automobile for outings or errands with Ms. Lessard and to travel to Ms. Lessard's secondary residence, and she received no compensation for the use of the vehicle.

[2] Alexandrine Lessard's children Serge Roy and Nicole Roy testified at the hearing, as did Ms. Carola. The evidence revealed the following additional facts. Ms. Lessard suffered from Alzheimer's disease, which was diagnosed roughly three years before Ms. Carola was hired (according to Nicole Roy's testimony).

[3] The appeals officer tried repeatedly to obtain information from Mr. Roy concerning the date on which Ms. Lessard was determined incapable. She wrote as follows at page 6 of her report:

> [TRANSLATION]
>
> **N.B.** Shortly after our telephone conversation, the Payor was asked for the date on which her physician determined that Ms. Lessard was incapable, and for the details concerning remuneration and hours worked by the Worker. Since the Payor did not respond to our telephone call, a letter requesting the above information was sent, but remained unanswered despite the fact that additional time was granted.
>
> [Emphasis added.]

---

8 The evidence discloses that Ms. Carola did not have complete freedom over the allocation of her time and the provision of her care. See the analysis further below.

9 As of March 14, 2005, according to Mr. Roy.

[4] Ms. Lessard was a real estate broker for many years. In addition, she owned several rental properties during the relevant period. Mr. Roy testified that, in July 2005, his mother owned five rental buildings and had 20 tenants. She had met Ms. Carola in the context of her brokerage work and had been the broker for the sale of her property upon her divorce.

[5] Owing to problems managing her own finances (her bills and tenants' rents), it appears that Ms. Lessard signed a notarial power of attorney in or about 2003. According to Mr. Roy, the power of attorney dates back to early 2004. It conferred on both of Ms. Lessard's children the power to look after her affairs. Given her mother's loss of independence, Ms. Roy undertook discussions with CLSC Ahuntsic to determine which resources could be placed at her disposal to provide services to her mother.

[6] The appeal report states that Mr. Sylvain Léonard of CLSC Ahuntsic's finance department provided the following information:

> [TRANSLATION]
>
> 48. The direct allowance program is a government program administered by the Ministère du Revenu. Under the program, anyone who works for seniors, regardless of the case or the number of hours that have been allocated, has the title of home care services provider and is considered an employee, and CES is required to make source deductions.
>
> 49. In the past, service recipients or their representatives were personally responsible for paying their domestic help, but there was an enormous amount of work paid under the table. This is why the CES was created.
>
> 50. A person recognized by the CLSC prepares a service plan following an assessment of the service recipient's condition. The CLSC will never pay for more than the number of hours determined based on the assessment, but may pay for fewer hours. The service recipient must fill out a time sheet in order to determine the number of hours for which the worker is to be paid.
>
> 51. If the service recipient does not know anyone, a CSLC employee will be dispatched to provide the services.
>
> 52. The CLSC does regular checks at the service recipient's residence in order to verify whether the services have been provided in accordance with the service plan prepared at the outset.
>
> [Emphasis added.]

[7] CLSC Ahuntsic conducted an assessment and determined that it could fund the presence of a domestic helper for 10 hours. Based on its financial resources, it was unable to provide more than 10 hours worth of funding. However, Ms. Lessard's children believed that more help was needed to ensure that someone would be with her longer.

[8] This is why Ms. Roy took steps to find someone to look after her mother. She said that she initially looked for someone with experience and medical knowledge. However, Ms. Lessard demanded that Ms. Carola be her home care provider. Ms. Roy offered a base salary of $250 to $300 for four days of service per week. After consulting with her loved ones, Ms. Carola turned down that offer and made a counter-offer of $500, which Ms. Roy accepted. The duties that Ms. Carola was assigned are described above.

[9] The CLSC subsidy was initially $9.44 per hour, but was increased to $10.44. Thus, the assistance that Ms. Lessard initially received was $94.40 per week, and that amount served to pay part of Ms. Carola's $500 weekly salary.

[10] Although it appears that the Minister took it for granted that the CLSC was Ms. Carola's employer, the evidence as a whole, including the testimony given by Mr. and Ms. Roy, discloses that it was not.

[11] First of all, nothing suggests that there was a contract between Ms. Carola and CLSC Ahuntsic. On the contrary, the notices of deposit prepared by CES show that CES was acting as paymaster for the purpose of managing the direct allowances under the program to assist people with decreasing abilities, and that the amount was deposited to the credit of Alexandrine Lessard (see Exhibit A-10). The deposit slip and notice of deposit both name Ms. Carola and Ms. Lessard. CES made the source deductions, including the deductions in respect of Ms. Carola's employment insurance (EI) premiums. The notice of deposit also makes reference to vacation pay: out of an amount of $110.03, there is $4.23 in vacation pay and a $2.15 EI premium. Based on this notice of deposit, CES was acting as Ms. Lessard's mandatary when it paid Ms. Carola her remuneration.

[12] In addition to the notice of deposit, there is the Record of Employment (ROE) which Mr. Roy signed in his capacity as curator on August 18, 2005, and which identifies Alexandrine Lessard as Ms. Carola's employer. This ROE covers the period from November 7, 2004, to August 6, 2005, and refers to 390 insurable hours and a total of $3,090.02 in insurable earnings.

[13] Mr. Roy testified that he felt obliged to accept this approach set up by CSLC Ahuntsic and CES in order to be able to benefit from the subsidy. In his submission, the amounts paid by Ms. Lessard through him or through Ms. Roy were remuneration for the services of a self-employed worker. I use the word "remuneration", but Mr. Roy, a lawyer trained in Quebec civil law, who was the Registrar and Clerk of the Gomery Commission during the relevant period, used the term [TRANSLATION] "salary" to describe the remuneration that Ms. Carola was paid.

[14] Ms. Carola says that she worked for Ms. Lessard only four and a half days a week, on Mondays, Tuesdays, Wednesdays, Saturdays and Sundays. No one replaced her on the other two days. According to Ms. Carola, Ms. Lessard was not completely incapable. In fact, her children allowed her to collect the rents from two of her units, specifically, the unit located at her principal residence and the unit located at her secondary residence, which provided her with about $1,200 per month. Ms. Lessard personally went to the Caisse populaire once a month to negotiate the cheques.

[15] Ms. Carola also says that she went with Ms. Lessard when she saw the doctor for an assessment of her mental capacity. Apparently, the examination was only about 15 minutes long, and Ms. Lessard was irritated with the tests performed on her. Apparently, she said: [TRANSLATION] "They take me for an imbecile."

[16] On June 9, 2005, the Superior Court delivered a decision from the bench in which it established a private curatorship to Ms. Lessard's person and property and appointed Mr. Roy as the curator. Mr. Roy was entitled to compensation of $20 per hour, up to a maximum of $500 per week, for fulfilling this duty. Ms. Roy received $2,700 for the administration work that she performed from May 2004 to February 8, 2005. Mr. Roy was awarded remuneration retroactively, effective February 8, 2005. Thus, it seems likely that the transfer of powers from Ms. Roy to Mr. Roy occurred after the judgment of February 8, 2005, was rendered. That judgment also implemented Mr. Roy's proposal to make $2,400 available to Ms. Lessard every month for her personal needs (see Exhibit INV-1).

[17] During the month of July 2005, Ms. Carola accompanied Ms. Lessard on her visit to her sister in the Beauce region. Following her arrival, Ms. Carola expressed the wish to return, but she remained in the Beauce with Ms. Lessard at Mr. Roy's insistence. Upon returning, Ms. Carola, who felt tired, took a one-week vacation at her own expense, after which she returned to Ms. Lessard's home, where Mr. Roy notified her that he was terminating her contract. It appears that several elements gave rise to frustration in the relationship between Ms. Carola and Mr. Roy. Mr. Roy says that he noticed, while his mother and Ms. Carola were away in the Beauce, that the home had not been cleaned, the pots had not been washed, and the refrigerator had been neglected.

[18] When Ms. Carola applied for employment insurance (EI) benefits, the only ROE that was prepared was the ROE for August 2005, which reported only 390 insurable hours. Since Ms. Carola had worked considerably more hours than that, she contested the Department's calculation of her insurable hours. She reminded the EI officer that she had worked 24 hours a day, five days a week (see the EI officer's file adduced as Exhibit A-3, and in particular page 9 of 24). Upon investigating, the officer determined that Mr. Roy's position was that Ms. Carola had two statuses, namely, that of a self-employed worker and that of an employee, it being clear that the employee status applied only to the work remunerated through the CLSC Ahuntsic subsidy.

Analysis

[19] In *Chantal Rhéaume v. Minister of National Revenue,* 2007 TCC 591,[10] I described as follows the rules for determining whether a contract is a "contract of service" (contract of employment) for the purposes of subsection 5(1) of *Employment Insurance Act*, or whether it is, instead, a contract for services:[11]

> [21] The issue is whether Ms. Rhéaume was employed in insurable employment for the purposes of the Act. The relevant provision is paragraph 5(1)(*a*) of the Act, which provides:
>
> > 5(1) Subject to subsection (2), insurable employment includes
> >
> > (*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.
> >
> > [Emphasis added.]
>
> [22] This provision defines insurable employment as employment under a contract of service (or, in more modern parlance, a contract of employment). However, the Act does not define the concept of a contract of employment. Section 8.1 of the *Interpretation Act* addresses circumstances such as the one in the case at bar:
>
> > *Property and Civil Rights*
> >
> > 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
> >
> > [Emphasis added.]

---

[10] See my other decisions, notably *NCJ Educational Services Limited v. M.N.R.*, 2008 TCC 300, and *Grimard v. The Queen*, 2007 TCC 755. In addition, see the decision of Justice Bédard of this Court in *9020-8653 Québec Inc. v. M.N.R.*, 2007 TCC 604.

[11] Footnotes omitted.

[23] The provisions most relevant to the task of determining whether a contract of employment exists in Quebec, and distinguishing such a contact from a contract for services, are articles 2085, 2086, 2098 and 2099 of the *Civil Code of Québec* ("Civil Code" or "C.C.Q."):

> Contract of employment
>
> **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.
>
> Contract of enterprise or for services
>
> **2098.** A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to 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 analysing these provisions of the *Civil Code*, it is clear that three essential conditions must be met in order for a contract of employment to exist: (i) prestation of work by the employee; (ii) remuneration paid by the employer for this prestation; and (iii) a relationship of subordination. The factor that clearly distinguishes a contract for services from a contract of employment is the existence of a relationship of subordination, that is to say, the employer's power of direction or control over the worker.

[25] Legal scholars have reflected on the concept of "power of direction or control", and, from the reverse perspective, the "relationship of subordination". Robert P. Gagnon writes as follows:

[TRANSLATION]

> *(c) Subordination*
>
> **90** — *A distinguishing factor* – The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 *et seq*. C.C.Q. Thus, while article 2099 C.C.Q provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> **92** — *Concept* – Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in terms of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and monitor the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work;

> the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way.
>
> [Emphasis added.]

[26] It must be noted that the characteristic of a contract of employment is not the fact that the direction or control was effectively performed by the employer (the strict or classical concept) but the fact that the employer had the power to do so (the broadened concept). In *Gallant v. M.N.R.*, [1986] F.C.J. No. 330, Pratte J.A. of the Federal Court of Appeal stated:

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

[28] The following comments by the Minister of Justice concerning article 2085 C.C.Q., which accompanied the draft Civil Code and which I quoted in my article entitled "Contract of Employment: Why *Wiebe Door Services Ltd*. Does Not Apply in Quebec and What Should Replace It" at page 2:26, should be added:

> [TRANSLATION]
>
> The article restates the rule enacted by article 1665(a) C.C.L.C. The definition contained in the new article establishes more clearly the difference between a contract of employment and a contract for services or contract of enterprise. The sometimes fine line between the two kinds of contracts has caused difficulties both in the scholarly literature and in the case law.
>
> The definition indicates the essentially temporary nature of a contract of employment, thus enshrining the first paragraph of article 1667 C.C.L.C., and highlights the chief attribute of such a contract: the relationship of subordination characterized by the employer's power of control, other than economic control, over the employee with respect to both the purpose and the means employed. It does not matter whether such control is in fact exercised by the person holding the power; it also is unimportant whether the work is material or intellectual in nature.
>
> [Emphasis added.]

[29] In my opinion, the rules governing the contract of employment in Quebec law are not identical to the common law rules, and thus, 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. At common law, "there is no universal test 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. As Major J. Held in *Sagaz*:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan, J.A. that a persuasive approach to the issue is that taken by Cooke, J. in *Market Investigations*, *supra*. 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. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker

> provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.
>
> [Emphasis added.]

[30] Consequently, at common law, it is possible to hold that a contract of employment exists without even deciding the factual question of whether a power of control or direction exists.

[31] In Quebec, unlike the common law situation, the central question is whether there is a relationship of subordination, that is to say, a power of control or direction. Courts have 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. That is the approach that Létourneau J.A. of the Federal Court of Appeal adopted in *D & J Driveway*, where he determined that there was no contract of employment based on the provisions of the *Civil Code*, and, in particular, his finding that there was no relationship of subordination, which he described as "*the essential feature of the contract of employment*."

[32] In addition to the decision in *D & J Driveway*, I would point out the decision of the Federal Court of Appeal in *9041-6868 Québec Inc. v. Canada (Minister of National Revenue*), [2005] F.C.A. No. 1720 (QL), 2005 FCA 334, where Décary J.A. writes as follows at paragraphs 2 and 3:

> 2 With respect to the nature of the contract, the judge's answer was correct, but, in my humble opinion, he arrived at it incorrectly. He did not say anything about the provisions of the *Civil Code of Québec*, and merely referred, at the end of his analysis of the evidence, to the common law rules stated in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*, [1986] 3 FC 533 (FCA) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. I would hasten to point out that this mistake is nothing new and can be explained by the vacillations in the case law, to which it is now time to put an end.
>
> 3 When the *Civil Code of Québec* came into force in 1994, followed by the enactment of the *Federal Law - Civil Law*

> *Harmonization Act, No. 1,* S.C. 2001, c. 4 by the Parliament of Canada and the addition of section 8.1 to the *Interpretation Act*, R.S.C., c. I-21 by that Act, it restored the civil law of Quebec to its rightful place in federal law, a place that the courts had sometimes had a tendency to ignore. On this point, we need only read the decision of this Court in *St-Hilaire v. Canada*, [2004] 4 FC 289 (FCA) and the article by Mr. Justice Pierre Archambault of the Tax Court of Canada entitled "Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It", recently published in the Second Collection of Studies in Tax Law (2005) in the collection entitled *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, to see that the concept of "contract of service" in paragraph 5(1)(*a*) of the *Employment Insurance Act* must be analyzed from the perspective of the civil law of Quebec when the applicable provincial law is the law of Quebec.
>
> [Emphasis added.]

> [33] Lastly, before finishing this statement of the rules that govern the determination of whether Ms. Rhéaume held insurable employment, we should recall the remarks made by Picard J. of the Quebec Superior Court in *9002-8515 Québec Inc.*, which I reproduced at paragraph 121, page 2:82 of my paper:
>
> 15 In order for there to be a contract of enterprise, there must be no relationship of subordination and the Agreement contains several elements showing a relationship of subordination. A sufficient number of indicia exists in this case of a relationship of authority.

[20] In the case at bar, the rules of the *Civil Code of Québec* ("the Civil Code") must indeed be applied in order to determine whether Ms. Carola was bound by a contract of employment or a contract for services.

The Minister's decision

[21] It is interesting to note that the EI eligibility officer, who applied common law principles (the four criteria referred to in *Wiebe Door*), determined that a contract of employment existed, whereas the appeals officer, who applied the rules in the Civil Code, determined – wrongly, in my view – that a contract for services existed.

[22] Upon reading the appeals officer's analysis (Exhibit A-4), one can see that the initial statement at page 7 of her report, that [TRANSLATION] "we must refer to the provisions of the *Civil Code of Québec*, which dictates the rules of a contract of employment and the rules of a contract of enterprise", is correct in law. She properly

refers, *inter alia*, to articles 2085, 2098 and 2099 of the Civil Code. In step 2 of her analysis, she describes the evidence regarding (a) the performance of the work, (b) the remuneration, and (c) the relationship of subordination. With respect to the last criterion, she writes:

> [TRANSLATION]
>
> (c) **Relationship of subordination**
>
> The "relationship of subordination" criterion, also referred to as the employer's control over the worker, is based on the fact that, in a contract of employment, the payor has a right of direction over the worker and a right to control every aspect of the worker's employment. The payor determines the final result, as well as the time, place and manner in which the worker carries out her duties. A contract for services is a contract in which one party agrees to perform specific work for another party. This contemplates the carrying out of a specific employment or task.
>
> In the present case, the payor, following a CLSC assessment, was allocated a total of 10 hours for the services of a domestic helper. The mandatary, Chèque Emploi Service, paid the salary directly to the worker.
>
> The worker had to stay with Ms. Lessard permanently 4½ days a week, 24 hours a day. The payor gave the worker the tasks that she was to perform. She performed them in the order of her choice during her hours of work. Although the payor told her what needed to be done, she set her priorities, as long as the requested tasks were performed. She herself chose the means by which the payor's needs were met. She held no other employment during the period in issue.
>
> The worker could not hire someone else to help or replace her. She had to perform her work personally. In fact, Ms. Lessard had specifically asked that Ms. Carola be the person who worked for her.
>
> Ms. Lessard was considered medically incapable because she had Alzheimer's disease. It was impossible to obtain the exact date on which she was declared incapable, but one can say that this occurred after the worker was hired, because the worker was with her for her doctor's visit in this regard.
>
> The CLSC did regular checks, and Serge Roy would have been informed of the situation if she had been unsatisfactory. In fact, Serge Roy called his mother and the worker 3-4 times a week to check that everything was going well.
>
> The only instruction that the worker received was to notify Ms. Roy if she wanted to be away, so that Ms. Lessard would not remain alone.
>
> Serge Roy dismissed the worker because he was not satisfied with the condition of the house and he suspected that she stole money from Ms. Lessard.

[Emphasis added.]

[23] However, she errs when she concludes:

> [TRANSLATION]
>
> **Results of analysis**
>
> Considering the type of work to be done, the elements set out in point (c) are considered by the court to be neutral elements.
>
> [Emphasis added.]

[24] As I said in *Grimard*, *supra*, at paragraphs 22-23:[12]

> [22] There are numerous common law decisions in which the courts have held that the "control" factor is neutral and therefore not conclusive. In the common law, it is thus possible to conclude that a contract of employment exists without making any finding of fact regarding the existence of a right of control or direction.
>
> [23] In Quebec, unlike in the common law, the central question is whether there is a relationship of subordination, that is, a power of control or direction. To determine that a contract is a contract of employment or a contract for services, as the case may be, a court has no choice but to make a finding as to the presence or absence of a relationship of subordination. . . .
>
> [Emphasis added.]

---

[12] Footnotes omitted.

[25] The courts in the rest of Canada apply the common law rules to determine the relative importance of each criterion established by the case law. In fact, the Supreme Court of Canada held in *Sagaz* that none of the criteria is conclusive. To better illustrate this common law approach, it is worth quoting the following remarks by Robertson J.A. in *Still v. Canada (Minister of National Revenue)*, [1997] F.C.J. No. 1622, [1998] 1 F.C. 549, at paragraph 46:

> **46** Professor Waddams suggests that where a statute prohibits the formation of a contract the courts should be free to decide the consequences (at page 372). I agree. If legislatures do not wish to spell out in detail the contractual consequences flowing from a breach of a statutory prohibition, and are content to impose only a penalty or administrative sanction, then it is entirely within a court's jurisdiction to determine, in effect, whether other sanctions should be imposed. As the doctrine of illegality is not a creature of statute, but of judicial creation, it is incumbent on the present judiciary to ensure that its premises accord with contemporary values. . . .
>
> [Emphasis added.]

[26] However, this approach is not valid in Quebec, because the constituent elements of a contract of employment and a contract for services are not defined by rules made by the courts, but rather by statutory rules enacted by the National Assembly of Québec and set out in the Civil Code. The provisions of that Code take precedence over the rules that the courts in the common law provinces have made for the purpose of distinguishing between employees and independent contractors. The Civil Code establishes the distinctive criteria of a contract of employment and those of a contract for services. A relationship of subordination cannot be considered a neutral factor, because Quebec's legislature has adopted it in the Civil Code. The courts have no choice but to apply the factor.

[27] Consequently, in Quebec, it is essential to determine whether such a relationship of subordination exists, that is to say, whether the payor has a right of direction or control over the work done by a worker. The question whether such a right exists is necessarily a question of fact in each case, and thus, previous court decisions are of limited help in determining whether a payor has the right to exercise a power of control or direction in any particular case.

[28] After comparing the result of her analysis with the parties' accounts, the appeals officer concluded as follows:

> [TRANSLATION]
>
> **Step 3**
>
> Comparing the result of the analysis with the parties' intention
>
> Since the parties' intention was not common, it cannot support the nature of the contract, and the determination as to whether there was an employment contract between the parties must be based on the result of the analysis.
>
> **Final conclusion**
>
> Courts have held that people who work as home care attendants did not hold employment under an employment contract, but, rather, under a contract for services. Based on these elements, we find that there was a contract for services, not an employment contract, between the payor and the worker.
>
> This decision is based on the cases listed below in Part VII.
>
> **(VII) PRECEDENT, LEGAL ADVICE, ETC.**
>
> **Paragraph 5(1)(*a*)**
>
> 9041-6868 Québec Inc. v. M.N.R.
> (2005) A-559-04 (FCA)
>
> Poulin v. M.N.R.
> 2003 FCA 50
>
> Vienneau v. M.N.R.
> 2004 TCC 2631
>
> Parifsdy [*sic*] v. M.N.R.
> (2005 CarswellNAT 213, 2005 TCC 84)

[29] In my opinion, the appeals officer erred in law when she found that courts have held that home care attendants are not employees. I know of no provision of the Civil Code based on which it could be asserted that certain types of activities cannot be the subject of an employment contract. The constituent elements necessary for the existence of an employment contract are clear: provision of work, direction or control by the payor, and remuneration.

[30] It is strange to assert that the work done by home care attendants, whose services closely resemble the services that were provided to payors who were once called "masters", by people who were once called "servants" or "domestics", constitutes self-employment. The economic reality of today is that only the very wealthy can afford to hire servants as was done early in the last century. Articles 1667 *et seq*. of the *Civil Code of Lower Canada* (Book Third, Title Seventh, Chapter Second) deal with "the Lease and Hire of the Personal Service of Workmen, Servants and Others ("*Du louage du service personnel des ouvriers, domestiques et autres*"). In particular, article 1668 addresses the case of a "domestic, servant, journeyman or labourer" hired by the week, the month or the year, and of the circumstances under which a contract for the lease and hire of personal service could be terminated. An analysis of the English legal treatises from the previous century discloses that the relationship created by an employment contract was called a "master-servant relationship".

[31] It would be highly surprising if the work done by domestics could now be considered self-employment, considering that it was once the archetypal example of what constituted an employment contract. To conclude, as did the appeals officer, that home care services are provided under a contract for services and not an employment contract, would be a 180-degree turnaround in the law.[13]

[32] In my opinion, the question that the appeals officer had to answer is this: Did Ms. Lessard, the true payor in the instant case, who, at the time the Appellant was hired, was represented by her attorney under a notarial power, and who later, by orders of the Superior Court, was represented by the administrator of her property (effective February 8, 2005) and by her curator (effective June 9, 2005), have the right to exercise direction and/or control over Ms. Carola's work? If she did have such a right, the appeals officer had to conclude that there was an employment contract. Otherwise, it was open to the officer to find there was a contract for services.

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13 In his commentaries on the draft *Civil Code of Québec* that he was tabling, the Minister of Justice made the following remarks with respect to Chapter VII (of Title II of Book V), which deals with the "contract of employment": [TRANSLATION] "The rules in the *Civil Code of Lower Canada* concerning the lease and hire of services included certain specific rules concerning contracts of employment. Since these rules were developed last century, it was appropriate to update them in order to provide a new definition of the contract of employment and better specify the legal principles on which it is based." Nothing in those remarks would justify a change as radical as the one implied by the appeals officer's reasoning.

The parties' intention

[33] Before that question is addressed, it would be helpful to determine what the parties intended when they negotiated the service agreement on or about November 7, 2004. Ms. Roy revealed that when she hired Ms. Carola, she did not give any thought to the true nature of the contract that she negotiated with her. It never crossed her mind ask whether Ms. Carola would be considered an employee or a self-employed worker, or, to state the question more precisely, whether Ms. Lessard, assisted by her representatives, was to have a right of direction or control over Ms. Carola's work. As for Ms. Carola, I would be surprised if she thought of this at the time that she was hired. Consequently, the parties' intention on that date is of no assistance in defining the nature of the legal relationship that was established between Ms. Roy, acting as mandatary under Ms. Lessard's notarial power of attorney, and Ms. Carola.

[34] The situation later changed. Ms. Carola testified that she was always under the impression that she was an employee of Ms. Roy (since Ms. Roy hired her). However, given that Ms. Roy was acting as Ms. Lessard's mandatary, it is clear that the contract (of employment or for services) was between Ms. Lessard and Ms. Carola. It should also be recalled that Ms. Roy was acting within her mandate, since she hired Ms. Carola at Ms. Lessard's express request.

[35] Ms. Carola's impression that she was hired as a (salaried) employee of Ms. Roy was certainly strengthened by the fact that source deductions were made from part of her pay. In addition, she says that Ms. Roy described her as her employee in conversation. It should be mentioned that Ms. Roy was retired from a position as an assistant with Shell Canada's administrative services department. The fact that Ms. Carola entered only the amounts corresponding to the CLSC subsidy in her income tax returns does not have any bearing on the nature of the amounts that Ms. Lessard paid out of her own funds.[14]

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[14] However, it does appear to confirm the remarks made by Mr. Léonard of CLSC Ahuntsic about the phenomenon of "work paid under the table" (see paragraph 6 above).

[36] As for Mr. Roy, he testified that, in telephone conversations that took place after she was hired, he told Ms. Carola that she had been hired as a self-employed worker, that no source deductions would be made, and that she should set aside 25-30% of her remuneration for the income tax that she might be required to pay.[15] Ms. Carola denies having such a conversation with Mr. Roy; on the contrary, she claims that he told her that all of this would be arranged at the end of the year. It is very likely that Mr. Roy tried to explain to Ms. Carola that she was hired as a self-employed worker, and not as an employee, but that she did not understand the scope and meaning of the particulars that he provided after she was hired. In fact, the appeals officer made the following finding at page 7 of her report:

> [TRANSLATION]
>
> . . . Serge Roy told her that everything would be okay and not to worry, but that she had to keep her gasoline receipts. I cannot believe the employer's claim that she was 100% clear about what that meant, even though this was not her first experience in the workforce. The fact that she agreed to continue the employment does not mean that she accepted the situation. Rather, she simply needed the work. . . .
>
> [Emphasis added.]

[37] Even though Mr. Roy claims that he explained very clearly to Ms. Carola the legal nature of the oral contract that she had entered into with his sister, it is interesting that he himself made reference to the "*salaire*" (salary) that Ms. Carola was paid, because, generally, the ordinary meaning of the word "salary" is the remuneration that an employer pays an employee. In fact, the Civil Code uses the word "*salarié*" to describe a person bound by an employment contract. When a "provider of services" is hired, one generally refers to "fees". I am certain that Mr. Roy bills his clients for "fees", not "salary".

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15 When I asked Mr. Roy why he felt it so important to specify Ms. Carola's self-employed status to her, he replied that he was concerned about tax considerations (source deductions and EI premiums), about the obligation to give her reasonable notice in the event that he terminated the contract, and about the impossibility of exercising effective control.

[38] Based on all these facts, intention did not play a decisive role in characterizing the legal nature of the contract between Ms. Carola and Ms. Lessard, because there is no written document setting out the terms of the agreement between the parties. Moreover, at the time that they made the agreement, the parties never turned their minds to the nature of the contract. In other words, they never asked themselves whether it was a contract of employment or a contract of service. Lastly, the parties do not have the same understanding of what their relationship was supposed to be. Consequently, in order to determine whether or not there was a contract of employment, we must rely on an analysis of the parties' conduct in carrying out their contract.

Relationship of subordination or right of direction or control

[39] The only element that poses a problem here is the existence of a relationship of subordination; the question is whether Ms. Lessard, represented by her mandatary Ms. Roy, or by her son, initially as administrator of her property (February 2005) and later as curator (commencing June 9, 2005), had a right of direction or control over Ms. Carola's work.

[40] A reading of Mr. Roy's responses to the investigating eligibility officer clearly shows that he has adopted the "classical" definition of subordination as described by legal scholar Robert P. Gagnon in his treatise *Le droit du travail du Québec*, quoted above in the excerpt from *Rhéaume*. This "strict" or "classical" concept of legal subordination is characterized by the direct control exercised by the employer over the nature of the employee's performance of the work and the terms and conditions that govern it. Mr. Roy completely disregards the broader concept of subordination, which the Minister of Justice of Quebec adopted in the commentaries that he tabled with the draft Civil Code, and which Mr. Gagnon also adopted in his treatise, owing to the fact that [TRANSLATION] "the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work."[16]

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[16] See the full excerpt in *Rhéaume*, *supra*, at paragraph 25, reproduced at paragraph 19 of these reasons.

[41] In the summary of the eligibility officer's discussion with Mr. Roy, reproduced in her notes (Exhibit A-3) at page 015 of 021, she states:

> [TRANSLATION]
>
> We discussed the file again, and Mr. Roy maintained that no one had control over the worker because there was nobody on the premises to tell her what work was to be done every day or to tell her how to do the work. I did try to explain to Mr. Roy that the jurisprudence refers to the RIGHT to control, but Mr. Roy maintained his position, claiming that, being a lawyer, he is fully aware of what a relationship of subordination means.
>
> [Emphasis added.]

[42] At page 018 of 021, she adds:

> [TRANSLATION]
>
> Details
>
> . . .
>
> - According to Serge Roy, the concept of control would have required someone to see Ms. Carola every day in order to tell her what to do, whereas Ms. Carola received only general instructions to take care of Ms. Lessard, and nothing more.
>
> [Emphasis added.]

[43] A little farther on, at page 019 of 021, she adds:

> [TRANSLATION]
>
> - As far as Mr. Roy is concerned, in order for control to exist, there would have to be someone on the premises every morning to tell the worker what to do and how to do it. Mr. Roy even said that he would have had to tell her how to make meals, e.g., how to make spaghetti sauce, and what route to take in order to get to the doctor's office. . . .
>
> [Emphasis added.]

[44] As the late Mr. Gagnon wrote, the strict concept of subordination is outmoded and no longer in line with today's reality. If Mr. Roy's theory were applied, how could salespeople who are constantly on the road promoting and selling their employers' products be considered employees, seeing that no one comes with them to tell them what to do and how to do it? How could elementary and high school English or math teachers be considered employees, given that no one checks on the performance of their teaching duties on a daily basis?[17] How could salaried associates at a large law firm, who are assigned files in respect of which they are required to achieve satisfactory results for clients without any of the partners necessarily checking every day, every week or even every month on the services that they provide, be considered employees? How could an airline pilot be an employee without the pilot's immediate superior being present while the pilot works? It was clearly not necessary for someone to be present every day to tell Ms. Carola what to do, how to make spaghetti sauce, and the like, given the nature of the work that she had to perform.

(A) Direct evidence

Supervision by Ms. Lessard

[45] In any event, the approach advocated by Mr. Roy disregards the fact that Ms. Carola's real employer was not his sister, but his mother. She had a right of direction or control over Ms. Carola every day. There was absolutely no evidence that Ms. Lessard's illness was so advanced that she was unable to exercise her power of control or direction over Ms. Carola. On the contrary, the evidence discloses that she gave Ms. Carola instructions by telling her what meals she wanted Ms. Carola to prepare for her, when she wanted to go to her secondary residence in Prévost, and when she wanted assistance with personal grooming or any other domestic tasks.

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17 See notably *Rosen v. Canada*, [1976] F.C.J. No. 515 (QL), 76 DTC 6274 (Eng.), concerning a civil servant who was also a sessional university lecturer.

[46] Ms. Carola gave the eligibility officer the same description of Ms. Lessard's mental capacity and of her right of direction or control just a few weeks after the termination of her employment, that is to say, in September 2005.[18]. Here is what the officer wrote in her report (Exhibit A-3), at page 016 of 023:

> [TRANSLATION]
>
> 5. Ms. Carola explained that, despite Ms. Roy's absence, she did what Alexandrine Lessard asked her to do, and she specified that Ms. Lessard was able to say what it was she wanted. Alexandrine Lessard is a very proud woman; she did her own grooming and had some degree of independence.
>
> [Emphasis added.]

[47] The fact that Ms. Lessard lived alone during Ms. Carola's two days off shows that she was not entirely incapable of living independently and exercising a right of control or direction over Ms. Carola's work. Mr. Roy said that he phoned regularly to get news from his mother, notably about her outings and meals. This suggests that it was possible to have coherent conversations with her. In addition, Ms. Roy said that after Ms. Carola was hired, she called her mother to find out whether everything was all right. If the answer was yes, she did not inquire further. Such conduct on the part of the children who were appointed Ms. Lessard's mandataries also suggests that Ms. Lessard was quite able to look after her affairs. The fact that the Superior Court implemented Mr. Roy's proposal to make $2,400 available to Ms. Lessard every month for her personal needs clearly shows that Ms. Lessard is not so incapacitated as to be unable to make decisions as to how she spends her money, notably on clothing, beauty products, etc.

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[18] I should note that I am attaching a great deal of importance to the factual accounts that the officer was given, because they were disclosed to her a few weeks after the termination of the employment in 2005. At that time, the main actors' memories were certainly much fresher than they were at the hearing of the appeal in March 2008.

[48] Furthermore, I draw a negative inference from the fact that Mr. Roy never provided the appeals officer, or the Court, for that matter, with the proof of his mother's incapacity.[19] Consequently, I infer that Ms. Lessard was not completely incapable or incapacitated during the relevant period (at least until June 9, 2005) and that she was able to exercise her power of control and direction over Ms. Carola's work.

[49] Several times during her testimony, Ms. Carola stated that Ms. Lessard gave her instructions concerning the meals that she wanted. She preferred hamburger steak and onions and refused to eat certain vegetables, such as broccoli, which Ms. Roy, as part of her instructions to Ms. Carola, demanded that she serve Ms. Lessard. Since Ms. Lessard refused to eat the dishes that she did not like, Ms. Carola had no choice but to follow Ms. Lessard's instructions. She also provided the following example: during the night-time, Ms. Lessard sometimes asked her to prepare some soup, because Ms. Carola slept in the same room as Ms. Lessard. Ms. Lessard sometimes told her how to prepare dishes to her liking.

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[19] In *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) the authors John Sopinka and Sidney N. Lederman describe the consequences of the failure to produce evidence under certain circumstances. They state as follows, at pages 535-36:

> In *Blatch v. Archer*, Lord Mansfield stated:
>
> > It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.
>
> The application of this maxim has led to a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.
>
> In the case of a plaintiff who has the evidentiary burden of establishing an issue, the effect of such an inference may be that the evidence led will be insufficient to discharge the burden.

I consider this rule completely justified under the present circumstances. See also *Enns v. M.N.R.*, Tax Court of Canada, APP-1992 (IT), February 17, 1987, 87 DTC 208, at page 210 (Eng.).

[50] Another good example of Ms. Lessard's exercise of direction or control occurred during the 2004 Christmas holidays, when Ms. Carola notified Mr. Roy that she would have to be away because her daughter was seriously ill (she was suffering from cancer). Mr. Roy told Ms. Carola that he insisted she remain with Ms. Lessard because he considered it totally unimaginable that she not be with her. However, Ms. Lessard authorized Ms. Carola to leave her residence in order to be with her daughter.

Supervision of Ms. Carola's work by Mr. Roy

[51] Ms. Carola also said that she received numerous instructions from Mr. Roy. She provided the same account of the facts to the eligibility officer in September 2005. Here is what the officer wrote in her report (Exhibit A-3) at page 016 of 024:

> [TRANSLATION]
>
> 6. Thereafter, she received her instructions from Serge Roy. The duties remained the same, but, unlike his sister Nicole Roy, Mr. Roy specified that his mother should not be deprived of outings. . . .
>
> [Emphasis added.]

[52] During his testimony, Mr. Roy tried to downplay his role of direction and control in respect of Ms. Carola's work. I find his testimony tendentious and frequently contradictory; for example, he said that Ms. Carola was completely free to prepare the dishes that she wanted, without having to take Ms. Lessard's wishes and instructions into account. I believe that his testimony was influenced by his desire that the Court find that Ms. Carola was self-employed. There are several other examples of this in his testimony. Here are a few of them.

[53] Mr. Roy said that he did not call regularly to control Ms. Carola's work, but that he did call regularly to get news from his mother. He considered it natural to do so. In addition, to justify what little interest he had in Ms. Carola's work, he said that he was on guard because he did not know her from Eve or Adam. And yet, the tenor of his conversations with the appeals officer was different, because he said that he had to trust Ms. Carola and that this accounts for why he did not exercise control over her work.

[54] Mr. Roy gave another unconvincing answer when he said that he told Ms. Carola that he expected his mother to spend as much time as possible at her secondary residence, where she loved spending the weekend; but, he said, it was difficult for him to impose such an activity on Ms. Carola, and he could merely suggest it to her. In her report, the eligibility officer duly noted the inconsistency in Mr. Roy's account concerning this activity (Exhibit A-4, page 006 of 021, at paragraph 6):

> [TRANSLATION]
>
> 6. With respect to outings, Mr. Roy stated that he often spoke insistently to Ms. Carola about taking his mother to the Laurentians more often, but that Ms. Carola did as she pleased. He said that he insisted often and forcefully and that this was very upsetting because Mr. Carola simply did as she pleased.
>
> Comment:
>
> By making these statements, Mr. Roy is saying that instructions were given to Ms. Carola.
>
> [Emphasis added.]

[55] In order to prove that he exercised little control when he visited his mother, Mr. Roy said that he had a quick look, but could not ask if Ms. Carola had done the laundry, and that he needed to have at least some confidence in her work. Thus, Mr. Roy acknowledges that he checked on the housekeeping when he visited, even though he underestimates the scope of those checks. And yet, not only did Mr. Roy have a duty, as a good son, to be concerned about his mother's health and comfort, he also had a duty, as her mandatary, administrator and curator, to give instructions to Ms. Carola and supervise the work that she did. I cannot believe that Mr. Roy agreed to be remunerated by his mother as her administrator or curator without fulfilling his obligations.

[56] In any event, Mr. Roy acknowledges having given instructions to Ms. Carola, including the instruction not to use her son's services because he was manic-depressive. He also clearly told Ms. Carola that her son was not to accompany Ms. Lessard. In doing these things, Mr. Roy was exercising his right of direction over Ms. Carola's work, initially as mandatary, and then as administrator and curator. He also exercised this right when he insisted that Ms. Carola stay in the Beauce region and that she not return after the first day. After a lengthy discussion with Mr. Roy, Ms. Carola complied with this instruction.

[57] In addition, Mr. Roy's position is certainly inconsistent, if not odd, because, by signing the ROE, he agreed to Ms. Carola being considered an employee for the 10 hours subsidized by the CLSC, while claiming that she was self-employed the rest of the time. As I have stated, Ms. Carola was not an employee of the CLSC. There was no contract between the CLSC and Ms. Carola. Consequently, she provided her services to Ms. Lessard. It is hard to imagine how the work subsidized by the CLSC could have been performed under the control and direction of Ms. Lessard, but not the work that Ms. Lessard paid for out of her own pocket.

[58] Of course, it could be argued that the CLSC incorrectly instructed CES to make source deductions and to consider Ms. Carola an employee of Ms. Lessard. What is quite difficult to understand, however, is that Mr. Roy agreed to sign the ROE describing Ms. Lessard as the employer and Ms. Carola as her employee.

[59] It should be noted that the appeals officer, who determined that the contract was a contract for services (not a contract of employment) noted under the heading [TRANSLATION] "Relationship of subordination" that [TRANSLATION] "[t]he only instruction that the worker received was to notify Ms. Roy if she wanted to be away . . ." (Emphasis added.) But the evidence adduced in this Court certainly disclosed that the instructions given to Ms. Carola were not solely about her notifications of absence.

[60] The direct evidence, as a whole, discloses not only that Mr. Roy gave Ms. Carola numerous instructions concerning the performance of her work, but that Ms. Lessard and Ms. Roy gave her instructions as well. The control by the children was exercised, in part, through the numerous telephone calls that they regularly made to their mother and Ms. Carola. If Ms. Lessard had been dissatisfied with Ms. Carola's work, they would have been able to take the appropriate corrective measures.

(B) Indirect or circumstantial evidence

[61] In addition to the direct evidence discussed above, there is, in my opinion, very clear circumstantial evidence from which it can be inferred that Ms. Lessard, represented by her son or daughter, had the right of direction and control with respect to Ms. Carola. Ms. Carola worked full-time for Ms. Lessard, at her residence, from November 7, 2004, to July 2005. She spent roughly 108 hours per week (4.5 x 24) there with Ms. Lessard. She slept in the same room as Ms. Lessard. It is not difficult to see this as an indicia that Ms. Lessard had the ability to exercise her right of direction and control over Ms. Carola's work, even during Ms. Carola's sleep time. As we have seen, Ms. Lessard sometimes asked her to prepare some soup or other snack in the middle of the night, in accordance with her wishes.

[62] The work that Ms. Carola was to perform needed to be performed by her, and by no one else, given the wish that Ms. Lessard expressed in that regard and given the nature of the services to be rendered, including the fact that she had to sleep in the same room as Ms. Lessard. During those 108 hours, Ms. Carola could not work for anyone else. It is unreasonable of Mr. Roy to assert that Ms. Carola was free to work elsewhere. She very much deserved her two days off after spending so many hours satisfying Ms. Lessard's domestic needs.

[63] Under these circumstances, it is reasonable to infer that a person who spends so many hours each week at a payor's residence, for nine months, is subject to a right of direction and control by the person for whom she is working. As stated above, I do not see any major difference between Ms. Carola's "domestic help" and the work performed by "servants" last century as employees of their "masters". In an article in the August 21, 2008, issue of the *Globe and Mail*, entitled "U.S. gavels pound FedEx business model", at page B9, several American lawsuits concerning the distinction between employees and independent contractors are discussed. Here is an excerpt from the article that I consider completely appropriate in the instant case:

> A California appeals court refused in August, 2007, to overturn a $5.3-million verdict that the company misclassified the workers. "If it looks like a duck, walks like a duck, swims like a duck and quacks like a duck, it is a duck," the appeals court said. The California Supreme Court refused to hear the case in November.

Furthermore, Ms. Carola did not run any business. She did not have her own establishment where she welcomed people to whom she could provide domestic care. She had no clients other than Ms. Lessard.

[64] I conclude, without hesitation, that the evidence has disclosed not only that Ms. Lessard, represented or assisted by her son or daughter, could exercise a right of control and direction over Ms. Carola's work, but that this right was abundantly exercised as well. Consequently, since there was a relationship of subordination between Ms. Carola and Ms. Lessard, a contract for services, under article 2099 of the Civil Code, cannot have existed. Ms. Carola had a contract of employment with Ms. Lessard and held insurable employment with her during the relevant period.

[65] For all these reasons, Ms. Carola's appeal is allowed. The Minister's decision is varied. Ms. Carola was employed in insurable employment during the relevant period.

Signed at Québec, Canada, this 10th day of October 2008.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 10th day of December 2008.

Brian McCordick, Translator

CITATION:	2008TCC508
COURT FILE NO.:	2007-3554(EI)
STYLE OF CAUSE:	PATRICIA CAROLA AND THE MINISTER OF NATIONAL REVENUE AND SERGE ROY IN HIS CAPACITY AS CURATOR TO ALEXANDRINE LESSARD
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 5, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	October 10, 2008

APPEARANCES:

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Counsel for the Respondent:	Anne Poirier
Counsel for the Intervener:	Philip Hazeltine

COUNSEL OF RECORD:

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