Docket: 2011-2152(EI)

BETWEEN:

FRANCOIS-PHILIPPE CLOUTIER AND JULIE FARLEY,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CAROLLE LACHANCE,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 10, 2012, at Québec, Quebec.
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellants:	Martin Bouffard
Counsel for the respondent:	Simon Vincente
For the intervener:	The intervener herself

JUDGMENT

The appeal from the decision of the Minister of National Revenue that the intervener, Carolle Lachance, held insurable employment with the appellants from August 3, 2009, to September 10, 2010, within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* is dismissed.

The decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 30th day of May 2012.

"Alain Tardif"

Tardif J.

Translation certified true
on this 12th day of July 2012
Monica F. Chamberlain, Reviser

Citation: 2012 TCC 164
Date: 20120530
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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision by the Minister of National Revenue (the Minister) that Carolle Lachance (the worker) held insurable employment with the appellants from August 3, 2009, to September 10, 2010, under the *Employment Insurance Act* (the Act).

[2] During the period at issue, the female appellant was a specialist physician; her work hours were irregular in that she had to deal with emergencies, shifts and so forth. The appellants placed tremendous importance on the qualities required of a caregiver to assume the important, but also delicate task, of taking care of their children in the family home.

[3] The evidence has established that the appellants required that a concerted effort be made to ensure the well-being, comfort, safety and happiness of their children. Anything not directly related to the children's care, such as housekeeping, was secondary.

[4] Housekeeping was secondary. The caregiver could do crosswords or word puzzles and make and receive personal phone calls, if she needed to devote more attention to them, during the children's naps.

[5] The caregiver had a somewhat different understanding of her duties although she did understand that her primary role was to care for the children. To illustrate her perception of the appellants' authority but also of her duties, the caregiver said that the female appellant had expressed dissatisfaction with the way she had cleaned a closet.

[6] The fact that the childcare work was the fundamental object of the contract was clearly established; occasionally, when the female appellant's shift ended early in the morning, she would return home and allow the caregiver to leave midway through the day.

[7] Moreover, when away on vacation or on trips, the appellants could have asked the caregiver to do certain housekeeping chores such as laundry and housework; they did not do so, and moreover, paid the caregiver the agreed amount. Why? The appellants did not want the caregiver to quit and look for employment with steady pay.

[8] Based on the testimony, it is not easy to identify elements demonstrating that the appellants exerted their authority. In this regard, the main elements are the incident concerning the closet cleaning, the fact that the caregiver had to respect a set schedule in terms of when she arrived at work, where she took care of the children, and so on.

[9] However, the evidence has clearly shown that the main consideration and fundamental object of the contract was childcare. The evidence has also shown that the caregiver had all the qualities required to assume her role.

[10] A relationship of trust was quickly formed; the parties did everything in their power to maintain that relationship except, at the end, when it deteriorated and ultimately resulted in conflict between the parties, which reached its peak when the caregiver applied for employment insurance benefits.

[11] The nature of the contract must be assessed on the basis of a single fundamental question. Was there a relationship of authority or a relationship of subordination between the parents and the caregiver? In the case at bar, this was

difficult to ascertain since the facts disclosed by the evidence do not point to clear, unambiguous situations where the payers clearly exercised their authority except when the contract was formed and the incident with the closet.

[12] On this point, it is, however, important to note that the relationship of subordination does not have to be demonstrated by specific facts or by a described or a well-documented situation. The evidence must simply show that the payers had and never waived such power.

[13] In the case at bar, did the caregiver and the appellants negotiate the working conditions as equals? Did the caregiver have the authority to find a replacement to perform her duties? Did the caregiver have the authority to insist on certain behaviours from the children? Did the caregiver have the authority to question, dispute or ignore certain instructions on how to deal with children? Did the caregiver have the authority to refuse to put the children to bed at the indicated time, and so on? These are some of the questions that could not be answered from the evidence.

[14] However, what was clear was that the caregiver's background had been taken into account. Qualities such as her values, sense of responsibility and childcare skills were evaluated, weighed and accepted. A strong relationship of trust was formed; this relationship was so strong that the caregiver was sometimes paid the agreed wages even though she had not taken care of the children. Why? Because the parents did not want to risk losing such a competent caregiver.

[15] This arrangement resulted in tremendous mutual respect, and it seems that both parties were very satisfied with the situation. In such a context, it is difficult to prove situations where discipline was contemplated or reprimands issued. In the absence of such proof, must we conclude that there was no relationship of subordination?

[16] I do not believe so. Nothing in the evidence supports the conclusion that the caregiver had the freedom, autonomy and flexibility typical of a contract for services. The mutual respect of the parties does not necessarily mean the parties negotiated as equals.

[17] Should the status of salaried employee exclude people who hold technical jobs requiring such highly specialized skills and knowledge that it is impossible to teach them anything or those who perform work with no supervision from the payer or those who have superior knowledge?

[18] The answer to all these questions is obviously no because holding the power of control is in no way tied to the payer's lack of experience; moreover, the status of employee is not inconsistent with the concepts of liberty, autonomy and flexibility.

[19] A person working in such a special field as providing childcare in the parents' home must possess a host of specific qualities that meet the latter's expectations. A relationship of total trust must quickly be established in which there is no room or almost no room for irritants that may affect or impact on the quality of care since the children are usually the parents' first and foremost concern.

[20] It is therefore clear that a caregiver who possesses all these attributes cannot leave and entrust the care of the children to anyone else without the approval of the parents.

[21] If the children are entrusted to a daycare, the relationship of trust develops between the daycare and the parent, and the personal dimension is not as important.

[22] The children were the centre of the appellants' lives; it is clear that they were unwilling to compromise in any way on the quality of the childcare service.

[23] The appellants maintain that the parties agreed that the childcare work would be performed as part of a contract for services. According to the appellants, there was no ambiguity in this regard.

[24] It all began with ads in the newspapers stating that the caregiver would have to sign receipts attesting to payment for the childcare services.

[25] The clear, obvious conditions of the contract for services as alleged by the appellants were not as clear and obvious for the person who accepted the caregiver position.

[26] Meanwhile, the argument concerning the mandatory receipt has a special dimension where childcare is concerned. The fact is that this expense has tax consequences whereas other work (for example, repairs, electricity, plumbing, painting, decor and landscaping) has no impact on the income tax return when a private residence is involved. This other type of work is generally performed by a contractor, who provides a receipt. Obtaining or requiring a receipt has no material impact when determining the nature of the childcare contract.

[27] When two parties agree on a contract of enterprise or for services, the assumption is that the parties are negotiating as equals and that neither one is influencing the other, keeping in mind that both parties have an interest in reaching an agreement. This interest may translate into behaviour suggesting a relationship of subordination or inequality between the parties.

[28] This situation is all the more probable as it is not uncommon for one of the parties to insist that the contract be one for services because of its numerous advantages, including cost, ease of management, less paperwork and tax deductions, whereas it may not be the same for the other party.

[29] The appellants argued that the determination should be made on the basis of the agreement; in other words, that the parties had agreed that the work would be performed as part of a contract for services.

[30] When the will and intent of the parties are clearly expressed and the consent is not subject to the causes of nullity provided by the civil law, the parties must assume the legal consequences of their choices, provided the facts associated with performance of the contract are consistent with the type of contract selected.

[31] In the case at bar, the appellants claimed that there was no doubt that the agreement was a contract for services. For her part, the caregiver stated that this was not how she interpreted it at all; her understanding was that she had to pay taxes at the end of the year. One thing is certain; she believed that her job was protected by employment insurance. The conclusion that can be drawn from the testimony of the parties to the contract at issue is therefore that the agreement was not as clear as the appellants claim.

[32] To be taken into account, the will and intent of the parties must be demonstrated throughout the performance of the contract. In other words, the facts relating to the performance of the work must validate and prove the alleged choice of contract.

[33] Childcare work is quite unique in that it can be performed in different ways and has certain characteristics. For instance, childcare work can be considered casual and is therefore not insurable. This is the case when parents hire a teenager, relative, neighbour or friend to babysit their child or children for what are usually short periods of time, an evening, an emergency and the like.

[34] Others choose to entrust the care of their children to a specialized, licensed outside business that is subject to all manner of administrative constraints. Others still use an unlicensed daycare or simply a caregiver who takes care of children in his or her own home. These are some of the ways childcare work can be performed.

[35] In the case at bar, the appellants sought a responsible, reliable and qualified caregiver with all the necessary qualities to provide their children with the best possible supervision in the family home, without having to make any concessions or compromises.

[36] To obtain satisfaction, the appellants were prepared to pay very generous remuneration along with several benefits by offering the caregiver shorter work hours, guaranteed pay whether or not she worked and tremendous autonomy and freedom in how the work was done, provided she directed and focused all her attention and interest on the well-being, comfort, safety and needs of the child or children. The childcare aspect was not only an important aspect of the work; it was the only important aspect of the work. Everything else was secondary.

[37] There was a strong relationship of trust between the appellants and the caregiver, who clearly acted in accordance with the appellants' expectations, so much so that they demonstrated their appreciation by allowing her to work shorter hours and paying her even when they were away with the children.

[38] The distinction between a contract for services and a contract of service depends on whether there exists a relationship of subordination, which translates into power to control the work.

[39] The power of control does not have to be exercised; it suffices to hold such power and not to have waived it. It becomes extremely difficult to determine the nature of the contract if the person hired performs the work to the satisfaction of the other party and has all the qualities, qualifications and knowledge in a context where the person enjoys his or her work.

[40] In the case at bar, did the appellants hold such power of control? Did they abdicate this power or did they exercise it? The appellants have argued that the hiring conditions were clear and specific in that a receipt was to be issued. It is true that, generally speaking, workers do not have to sign a receipt when they collect their pay. Childcare is a different situation, as explained earlier.

[41] It is very difficult to characterize work performed by the same person, for and on behalf of a single payer, the purpose of which is clearly defined and subject to a structure that is also clearly defined, for an indefinite period, on an ongoing and recurring basis, as a contract for services.

[42] A contract for services is usually quite specific as to its duration or is subject to specific elements that indicate when it ends. A contract for services may also be for an indeterminate period with an ongoing, recurring formula. This is the case for all maintenance contracts, where the contractor is free to work for more than one payer and to schedule the work as he or she sees fit.

[43] But that is where the similarity ends because the contractor has the power, ability and autonomy to have more than one payer. This autonomy, flexibility and non-exclusivity give the parties equal status where neither party has power over the other.

[44] In the case at bar, the caregiver's hours were not determined by her but by the parents' professional constraints. After evaluating her skills, which met the parents' requirements, a tremendous relationship of trust was formed, and the work clearly lived up to their expectations.

[45] In such a context, the parents did not have the opportunity to exert or even demonstrate clear or outward signs of their authority. They were fully satisfied with the caregiver's work and even paid her when she was not caring for the children to make sure not to lose her, in other words, to prevent her from looking for steadier, regular work.

[46] While insufficient or conclusive, this element supports the argument for a contract of service. It forms part of a list of other characteristics supporting the conclusion that a contract of service was involved.

[47] I therefore conclude that the work at issue was performed as part of a contract of service for the following reasons:

- the regularity, continuity and indeterminate duration of the work;
- the structure, start and end of work decided exclusively by the payer;
- the caregiver's lack of autonomy;
- the exclusivity. The caregiver could not delegate her duties to a replacement without authorization and approval;

- the special form of the remuneration;
- the unilateral power of intervention and/or control held by the payer; and
- the inequality in the contractual relationship. The parties were not equals in the negotiations despite the fact that the payer was very accommodating and respectful.

[48] When taken alone, these elements are insufficient to conclude that a contract of service was involved but taken together, they provide a preponderance of evidence in favour of a contract of service.

[49] An analysis of the control exercised by the employer, achieved by examining the instructions given by the employer with regard to the nature of the work to be performed (the "what"), concerning the manner in which it is to be performed (the "how"), the place where it is to be done (the "where") and the time at and within which it must be done (the "when") as well as the existence of a right to discipline and control the work, allows the Court to arrive at an assessment of the work relationship while remaining faithful to the rules of civil law.

[50] The Act provides no indication or definition to distinguish a contract of service from any other type of contract, such as a contract for services. It is up to the Court to determine the nature of the work by referring to the applicable civil law principles where Quebec is concerned and to the principle of common law where the other provinces are concerned.

[51] For appeals from provinces where the principle of common law applies, the Tax Court of Canada and the Federal Court of Appeal weigh the relationship between the service provider and the recipient according to the criteria set out in *Wiebe Door*. In *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, the Court of Appeal summarized the Act as follows:

> [8] The leading case on the principles to be applied in distinguishing a contract of service from a contract for services is *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (C.A.). *Wiebe Door* was approved by Justice Major, writing for the Supreme Court of Canada in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. He summarized the relevant principles as follows at paragraphs 47-48:
>
> > 47. […] 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 providers 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 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 of the particular facts and circumstances of the case.

[52] Certain recent decisions indicate that the common intention of the parties as to the nature of their legal relationship must also be included in the analysis, when this intention is consistent with reality:

> [9] In *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (C.A.), and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 87, [2007] 1 F.C.R. 35, this Court added that where there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but that it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention.
>
> [Emphasis added]

[53] Therefore, according to *TNT Personnel*, the common intention of the parties must be taken into account when the facts are consistent with this stated intention. The common intention of the parties must, however, be established; it is difficult to establish such an intention when there is no written contract and the parties to the contract offer different testimonies.

[54] This difficulty is compounded by the fact that the parties to a contract are often unequal in terms of the knowledge required to make certain distinctions and to understand the nuances. Such shortcomings may exist even in the presence of a written instrument. Consequently, it is important to demonstrate that the employee understood the legal consequences when he or she signed the contract, including the impact on the possibility of collecting employment insurance benefits.

[55] It must be pointed out that *TNT Personnel* is a case from the province of Ontario, and hence, the Court of Appeal did not have the advantage of referring to the *Civil Code of Québec* in this area. Indeed, the *Interpretation Act*, R.S.C. 1985, c I-21,

stipulates that when a federal statute includes a concept of private law, reference must be made to the applicable provincial statute:

> **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.
>
> **8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

[56] In a publication on the topic of Canadian bijuralism, Justice Archambault established the applicability of section 8.1 of the *Interpretation Act* in determining the employment relationship within the meaning of section 5 of the *Employment Insurance Act*.[1] Following a review of case law on the interpretation of federal statutes that refer to provincial private law concepts, notably after discussing the doctrines of complementarity and dissociation, Justice Archambault concluded that the correct approach, following the amendment of section 8.1 of the *Interpretation Act* in 2001, was that of complementarity:

> [33] In my opinion, before we follow precedents in which the courts have applied the principle of dissociation or the principle of uniformity, we must ask whether the interpretations that they adopted or the principles that they expounded are still justified in light of section 8.1 IA. Before the coming into force of this section, the courts allowed themselves a certain latitude to apply either the principle of uniformity or the principle of complementarity. Since the coming into force of section 8.1, they are required to adhere to the principle of parliamentary sovereignty and to use the principle of complementarity in interpreting any federal enactment.

[57] The *Civil Code of Québec*, R.S.Q., c C-1991, defines a contract of employment in article 2085:

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[1] Pierre ARCHAMBAULT (Judge), "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It," in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law (2005)* (Montréal: Association de planification fiscale et financière – Department of Justice Canada, 2005), 2:1-86, at pp. 2:15 *et seq*.

> **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.

[58] Therefore, in Quebec, the employment contract has three characteristics: (1) the work; (2) the remuneration; and (3) direction or control by the employer – which can also be referred to as a relationship of subordination.

[59] After examining the provisions of the *Civil Code of Québec* to distinguish between a contract for services and a contract of employment, Justice Archambault concludes as follows:

> [38] The definition of a contract of employment in article 2085 C.C.Q. identifies the three essential components of this type of contract: (i) the work, (ii) the remuneration and (iii) the relationship of subordination. In the case of a contract for services, there are four conditions to be met according to articles 2098 and 2099 C.C.Q.: (i) the provision of a service, (ii) for a price, (iii) freedom for the provider of services to choose the means of performing the contract, and (iv) the absence of any relationship of subordination in respect of its performance. Analysis of articles 2085, 2098 and 2099 indicates that the relationship of subordination is not only an essential "component" of a contract of employment but is also the "distinguishing" feature of this type of contract as compared to a contract for services.

[60] As such, Justice Archambault identified the relationship of subordination as the distinguishing factor between a contract of employment and a contract for services according to the *Civil Code of Québec*.

[61] With respect to the intention of the parties and the expression of the will of the parties, Justice Archambault states the following in his article:

> [97] Even if the contracting parties have manifested their intention in their written or oral contract or if their intention can be inferred from their conduct, this does not mean that the courts will necessarily view it as determinative. As Décary J.A. indicated in *Wolf*, *supra*, performance of the contract must be consistent with this intention. Thus, the fact that the parties have called their contract a "contract for services" and have stipulated both that the work will be done by an "independent contractor" and that there is no employer-employee relationship does not necessarily make the contract a contract for services. It could in fact be a contract of employment. As article 1425 C.C.Q. states, one must look to the real common intention of the parties rather than adhere to the literal meaning of the words used in the contract. The courts must also verify whether the conduct of the parties is

consistent with the statutory requirements for contracts. According to Robert P. Gagnon:[108]

> [TRANSLATION]
>
> **91** — *Factual assessment* — Subordination is verified by reference to the facts. In that respect, the case law has always refused to simply accept the parties' description of the contract:
>
> > In the contract, the distributor himself acknowledges that he is working on his own account as an independent contractor. There is no need to return to this point, since doing so would not alter the reality; furthermore, what one claims to be is often what one is not.
>
> [Emphasis added].

[98] In *D & J Driveway*, Létourneau J.A. of the Federal Court of Appeal wrote:[109]

> 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].

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[108] *Supra* (note 31), at 66.

[109] *Supra* (note 4). See also the comments of Noël J.A. in *Wolf* reproduced at para. 90 above. See also note 93.

[99] Judges may therefore recharacterize the contract so that its name reflects reality. In France, the recharacterization of a contract results from the application of the reality principle.[110] The *Cour de cassation* has adopted an approach similar to the Canadian one:[111]

> [TRANSLATION] Whereas the existence of an employment relationship depends neither on the expressed will of the parties

> nor on the name they have given to their agreement but rather on the factual conditions in which the workers' activity is performed; ...

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[110] Verdier, Coeuret et Souriac, *supra*. (note 49), at p. 315.

[111] Cass. soc., 19 December 2000, Bull. civ. 2000.V.337, No. 437 (lessee of a taxi: employee). See also Cass. soc., 23 April 1997, Bull. civ. 1997.V.103, No. 142 (pastor of Adventist churches: referred back to the Court of Appeal).

[100] In my opinion, this verification that the actual relationship and the parties' description of it are consistent is necessary when interpreting contracts of employment since the parties may have an interest in disguising the true nature of the contractual relationship between the payer and the worker. Experience shows, in fact, that some employers, wanting to reduce their fiscal burden with respect to their employees, sometimes decide to treat them as independent contractors. This decision can be made either at the outset of the contractual relationship or later on.[112] Similarly, some employees could have an interest in disguising their contract of employment as a contract for services because the circumstances are such that they do not foresee that they will need employment insurance benefits and they want to eliminate their employee contributions to the employment insurance program, or they desire more freedom to deduct certain expenses in computing their income under the *Income Tax Act*.[113]

[101] Since the EIA generally authorizes the payment of employment insurance benefits only to employees who lose their employment,[114] the courts must be on the alert to unmask false self-employed workers. The courts must also ensure that the employment insurance fund, which is the source of these benefits, receives premiums from everyone who is required to pay them, including false self-employed workers and their employers.

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[112] For a study of the problems created by this phenomenon, see the discussion paper of the Law Commission of Canada, *Is Work Working? Work Laws that Do a Better Job*, December 2004, on line: http://www.lcc.gc.ca/pdf/work.pdf.

[113] Subsection 8(2) of the *Income Tax Act* provides that no deductions may be made other than those permitted by that Act. If a worker is self-employed, he can generally deduct any current expense incurred for the purpose of gaining or producing income from a business.

[114] See note 7.

[62] Justice Archambault concludes that in all cases, the performance of the contract, that is, the manner in which the parties conducted themselves, must be examined to determine the nature of the contract:

> [102] The necessity of proving that the contract has been performed exists not only where the parties have explicitly or implicitly manifested their intention to enter into either a contract of employment or a contract for services, but in all cases where proof of their intention is insufficient or lacking. Proof that the contract has been performed involves the three essential components required in order for there to be a contract of employment. In general, proof of the first two elements (the work and the remuneration) will not be much of a problem since these are physical facts that are relatively easy to establish. Proving the existence of legal relationship of subordination, namely the power of direction or control that the employer exercised or could have exercised, is, on the other hand, a very delicate task. It will be all the more so if the employer has exercised little or no direction or control.

[63] Justice Archambault then gives indications from Quebec civil law to establish whether or not a legal relationship of subordination exists:

> [103] The best evidence will be direct evidence of facts establishing that the work was really performed under the payer's direction and control. Such evidence can be provided by documents or testimony revealing the specific instructions given to the worker not only with regard to the work to be performed (the "what"),[115] but also concerning the manner in which it is to be done (the "how"),[116] the place where it is to be done (the "where"), and the time at and within which it must be done (the "when"). To these facts can be added those showing that the payer supervised the work, [117] *inter alia*, by requiring the worker to report on a regular basis, by regularly completing evaluations of his work, by meeting with the worker to communicate to him the results of the evaluations, and, perhaps by disciplining him.[118] Taking such evidence as a whole, it could be relatively easy to conclude that a relationship of subordination exists.

[115] *Services Barbara-Rourke Adaptation Réadaptation c. Québec (Sous-ministre du Revenu*), [2002] J.Q. no. 470 (QL) (C.A. Qué.), at paras. 10, 44-48 (persons responsible for the delivery of foster home services (in the residence of a third person) recruited by a rehabilitation centre for persons with an intellectual disability: employees); *Guérette c. Lapierre*, [2003] J.Q. no. 4952 (QL) (S.C. Qué.), at paras. 25-26 (construction of a balcony at the payer's cottage by a retired worker: employee).

[116] In my opinion, when a payer imposes the methods or means of performing a job on a worker, he is directing that worker. The proof that the payer has acted in this way constitutes direct evidence of the exercise of the power of direction and is not merely evidence by indicia. It should however be noted that the line between direct evidence and indirect or circumstantial evidence may be tenuous. To the extent that the direct evidence of the facts is not considered sufficiently

probative (e.g., because of the limited number of instructions), these facts might be treated as indicia to be considered with the other indicia described below.
For examples from the case law of assessing the power of control exercised over the "how," see: *Sauvé, supra* (note 4), at paras. 19, 22; *Les Entreprises Gérald Petit, supra* (note 101), at para. 21; *Neblina Spa Enr., supra* (note 95), at paras. 5, 14, 16; *Services de santé Marleen Tassé, supra* (note 31), at paras. 12, 16, 24, 25, 30, 50, 70-74; *Québec (Commission des normes du travail) c. Desrochers*, 2001 IIJCan 8641 (C.Q.), at paras. 23-26 (work in a shoe repair shop: employee); *Dr Denis Paquette, supra* (note 99), at paras. 6, 33 (nos. 6-8), 36, 49-52.

[117] *Services Barbara-Rourke, supra* (note 115), at para. 44; *Les Entreprises Gérald Petit, supra* (note 101), at paras. 10, 15, 21; *Importations Jacsim, supra* (note 100), at para. 22; *Guérette, supra* (note 115), at para. 25*; Services de santé Marleen Tassé inc., supra* (note 31), at paras. 12, 20-22, 27-29, 73, 87*; Seitz, supra* (note 98), at paras. 15, 22, 25, 45, 62.

[64] The preponderance of evidence has established that the parties to the contract had a very different interpretation of its nature. This same evidence has also established that the appellants never abdicated or waived their power of control, expressed and demonstrated primarily when the agreement was reached. In other words, the caregiver did not have the same assessment of the nature of the contract as the appellants. As for the manner in which the work was performed, the evidence does not support the appellants' interpretation that this was a contract for services. The preponderance of evidence does not support the conclusion that the appellants met the burden of proof incumbent upon them to win this case.

[65] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 30th day of May 2012.

"Alain Tardif"

Tardif J.

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APPEARANCES:

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For the intervener:	The intervener herself

COUNSEL OF RECORD:

For the appellants:

Name:	Martin Bouffard
Firm:	Morency, Société d'avocats Québec, Quebec

For the respondent:

Myles J. Kirvan
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For the intervener: