Docket: 2012-4560(EI)

BETWEEN:

DIANE BARBEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Diane Barbeau (2013-2811(EI)),
on January 23, 2015, at Ottawa, Canada.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Agent for the appellant:	Yves Grenier
Counsel for the Respondent:	Carole Plourde

JUDGMENT

The appeal is allowed and the decision of the Minister of National Revenue dated August 2, 2012, is vacated on the basis that Marc Martineau was not engaged in insurable employment during the period from September 3, 2010, to July 9, 2011, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 22nd day of May 2015.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 31st day of August 2015

Daniela Guglietta, Translator

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on January 23, 2015, at Ottawa, Canada.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Agent for the appellant:	Yves Grenier
Counsel for the Respondent:	Carole Plourde

JUDGMENT

The appeal is allowed and the decision of the Minister of National Revenue dated September 10, 2012, is vacated on the basis that Mélanie Hamel was not engaged in insurable employment during the period from September 1, 2010, to September 8, 2011, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 22nd day of May 2015.

"Robert J. Hogan"

Hogan J.

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Citation: 2015 TCC 131
Date: 20150522
Dockets: 2012-4560(EI)
2013-2811(EI)

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REASONS FOR JUDGMENT

Hogan J.

I. Overview

[1] Diane Barbeau (the appellant) has brought before the Tax Court of Canada (the TCC) two related appeals from two decisions of the Minister of National Revenue (the Minister) made under section 91 and subsection 93(3) of the *Employment Insurance Act*[1] (the Act).

[2] Said decisions concern the insurability of work performed by the workers Marc Martineau and Mélanie Hamel (collectively the workers) during 2010 and 2011. The Minister is of the view that the work performed was insurable, whereas the appellant claims the opposite.

[3] The appeals were heard on common evidence on January 23 in Ottawa. The parties subsequently filed written submissions setting out their respective positions.

[1] S.C. 1996, c. 23.

II. Facts

A. Factual background

[4] The appellant had been operating a sole proprietorship providing cleaning services under the name Service d'entretien ménager de l'Outaouais (SEMO) since 2002. During the period at issue, the business was largely run by the appellant's spouse, Yves Grenier. She had at least a dozen workers and approximately 20 clients.

[5] Before starting the business, the appellant worked as a self-employed worker in the cleaning services field. When her contracts became too numerous, she decided to create SEMO in order to assign some contracts to other workers on a commission basis.

[6] The workers whose services were retained by SEMO did not have to find clients. That task belonged solely to the appellant. The evidence shows that she found clients through word of mouth and her Web site. No written contract was signed between SEMO and the clients to whom cleaning services were provided.

[7] When a client requested a service, the appellant paired a worker with that client. The worker could accept or reject the client assigned to him or her. In the case of rejection, and where possible, the appellant tried to provide the worker with another client.

[8] SEMO had a written contract with each of its workers, including the two workers involved in this case. However, according to Mr. Grenier's testimony, most of the clauses included in the contract were not applied and were not representative of the true relationships between the parties. This fact was corroborated by a number of workers who testified at the hearing.

[9] Prior to entering into a contract, the appellant made sure the workers had the proper skills. To that end, she asked the new workers to clean, for example, a bathroom. According to Mr. Grenier, the appellant did not tell the workers how to do their job, but they would sometimes ask the appellant for advice.

[10] In the beginning, the workers were paid directly by the clients, by cheque. However, around 2008, SEMO created a pre-authorized payment system by which the business collected the money from the clients and then remitted it to the

workers using a trust account. That system was established at the request of the clients and the workers so as to facilitate payment for services.

[11] In order to ensure that the change in method of payment did not affect the self-employed status of workers, SEMO consulted an accountant. He advised SEMO to deposit all amounts collected from the clients in a trust account.

[12] Before the workers undertook the cleaning work, the appellant visited the premises to provide a price estimate. The client then authorized payment by direct deposit, based on the estimate provided.

[13] Unless a worker spent more time than expected at a client's home, the amount taken by SEMO corresponded to the original estimate. However, the workers could, where necessary, modify the hours for which they were to be paid on the SEMO Web site. Permission by SEMO was not required to do so.

[14] SEMO took the pre-authorized amounts and placed them in the trust account the same day on which the service was provided. Exceptions aside, the workers received the amounts owing weekly. According to Mr. Grenier, the payments were made once per week to save on bank transfer fees.

[15] SEMO collected a $3 or $4 per hour[2] commission on the amounts charged and provided the workers with an invoice for that amount.

[16] Throughout the periods at issue, the workers were married. They had been performing cleaning services for SEMO since September 2010 until July (in the case of Mr. Martineau) and September (in the case of Ms. Hamel) 2011.[3]

[17] The workers began their relationships with SEMO after they answered an ad on the Emploi Québec Web site. There was a first meeting, and then a second meeting at the appellant's residence, where she asked the workers to clean a room to confirm their skills.

[18] The workers each signed a contract with SEMO. The agreement provided, *inter alia*, that the workers could only provide their services to SEMO, that they had to work a minimum of 30 hours per week, and that they had to comply with the company's code of ethics. The contract referred to the workers as

[2] Transcript, pages 20 and 21.
[3] Transcript, page 188.

self-employed workers. In the cases of Mr. Martineau, Mr. Grenier stated that he had asked him to sign a contract just so that his clients would not be stolen from him.

[19] The workers worked together, save exceptions. According to Ms. Hamel, they operated as a [TRANSLATION] "partnership." Mr. Grenier also saw the workers that way. He explained in his testimony that the maintenance contracts were only granted to Ms. Hamel and that she decided whether she wanted to undertake the cleaning duties on her own or with the help of her spouse.

[20] The amounts paid by SEMO to the workers were deposited in their joint account. On her tax returns for the 2010 and 2011 taxation years, Ms. Hamel reported all the amounts received from SEMO as business income and claimed the deduction of an expense for the portion paid to Mr. Martineau.

[21] SEMO ceased operations in September 2013. The workers who performed services for SEMO continued to serve the same clients. The only difference was the manner in which they were paid. Indeed, the workers were now paid by cheque directly from the client, as had been the case before the pre-authorized payment system was put in place.

B. The Minister's decision

[22] Following the termination of their employment, the workers applied to the Department of Human Resources and Skills Development Canada (HRSDC) for employment insurance benefits. Before accepting their application, HRSDC asked the Minister to rule on the insurability of the work performed by the workers during the duration of their contracts.

[23] On review, the Minister determined that the workers were not employees, but that they were nonetheless engaged in insurable employment pursuant to paragraph 5(1)(*d*) of the Act and paragraph 6(*g*) of the *Employment Insurance Regulations*[4] (the Regulations):

[4] SOR/96-332.

[TRANSLATION]

[2012-4560(EI)]

Based on our analysis, we have ruled that during the period at issue, Marc Martineau was not an employee. Furthermore, we have established that as a placement or employment agency, you placed him in that employment and paid him to perform services for and under the direction and control of your clients.

Accordingly, his employment was insurable under paragraph 5(1)(*d*) of the *Employment Insurance Act* as the conditions of paragraph 6(*g*) of the *Employment Insurance Regulations* were all met.

[2013-2811(EI)]

Based on our analysis, we have ruled that during the period at issue, MÉLANIE HAMEL was not an employee. Furthermore, we have established that as a placement or employment agency, you placed her in that employment and paid her to perform services for and under the direction and control of your clients.

Accordingly, her employment was insurable under paragraph 5(1)(*d*) of the *Employment Insurance Act* as the conditions of paragraph 6(*g*) of the *Employment Insurance Regulations* were all met.

[Emphasis added.]

[24] The Canada Revenue Agency (the CRA) subsequently issued a T4 Slip solely in Ms. Hamel's name for the 2010 and 2011 taxation years.

[25] The appellant appealed that decision to no avail. Upon reconsideration, the decision was confirmed by the Minister:

[TRANSLATION]

[2012-4560(EI)]

Based on an impartial review of all the information relating to this appeal, it was found that this employment was insurable. [Marc Martineau] was placed in employment by Diane Barbeau to perform services for and under the direction and control of a client of Diane Barbeau and that worker was remunerated by Diane Barbeau for the performance of those services. Accordingly, this employment was included in insurable employment.

[2013-2811(EI)]

> Based on an impartial review of all the information relating to this appeal, it was found that this employment was insurable. Although [Mélanie Hamel] was not engaged in insurable employment under a contract of service with you, said worker was placed in employment by you to perform services for and under the direction and control of your client, and said worker was remunerated by you for the performance of those services. Accordingly, this employment was included in insurable employment.
>
> [Emphasis added.]

[26] Following this setback, the appellant appealed to this Court.

III. Issues

[27] The issues raised at the hearing, and under consideration in these Reasons, are as follows:

1. Can paragraph 6(*g*) of the Regulations apply if it is determined that the workers were self-employed workers?

2. If the answer is no, can the Minister advance an alternative argument that was not set out in the decision he made pursuant to subsection 93(3) of the Act? If the answer is yes, who has the burden of proof?

3. If the Minister can advance such an argument, were the workers engaged in insurable employment with the appellant during the relevant periods under paragraph 5(1)(*a*) of the Act?

IV. Application of paragraph 6(*g*) to self-employed workers

A. Is paragraph 6(*g*) of the Regulations applicable to self-employed workers?

Applicable law

The meaning of "employment"

[28] Paragraph 6(*g*) of the Regulations provides that the work performed by a person who performs services through a placement or employment agency is insurable where that person is paid by the agency and performs services under the control of the client:

> 6 Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:
>
> . . .
>
> (*g*) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.
>
> [Emphasis added.]

[29] Under the circumstances provided for in paragraph 6(*g*), the placement or employment agency shall be deemed to be the employer of the worker for the purposes of deducting and remitting the employment insurance premiums, pursuant to section 7 of the *Insurable Earnings and Collection of Premiums Regulations*:[5]

> 7 Where a person is placed in insurable employment by a placement or employment agency under an arrangement whereby the earnings of the person are paid by the agency, the agency shall, for the purposes of maintaining records, calculating the person's insurable earnings and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the person.

[30] Paragraph 6(*g*) of the Regulations is a provision enacted under paragraphs 5(1)(*d*) and 5(4)(*c*) of the Act:

> 5(1) Subject to subsection (2), insurable employment is
>
> . . .
>
> (*d*) employment included by regulations made under subsection (4) or (5);
>
> . . .
>
> (4) The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment

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[5] SOR/97-33. According to subsection 82(1) of the Act, "[e]very employer paying remuneration to a person they employ in insurable employment shall

(*a*) deduct the prescribed amount from the remuneration. . .; and remit the amount, together with the employer's premium payable by the employer. . . to the Receiver General. . . ."

. . .

> (*c*) employment that is not employment under a contract of service if it appears to the Commission that the terms and conditions of service of, and the nature of the work performed by, persons employed in that employment are similar to the terms and conditions of service of, and the nature of the work performed by, persons employed under a contract of service;
>
> [Emphasis added.]

[31] The insurable employment described in subsection 5(1) is, broadly speaking, employment held by persons bound by a contract of employment. Subsection 5(4), however, is an exception to this rule. Indeed, it broadens the scope of subsection 5(1) by extending the Employment Insurance program to include activities governed otherwise than by "contract of service." Accordingly, regulations made under subsection 5(4) may include activities performed by persons other than employees, including self-employed workers.

[32] The Federal Court of Appeal (the FCA) accepted this view in *Sheridan v. Canada*,[6] in which the applicant was found liable for unemployment insurance premiums under the authority of the predecessor to paragraph 6(*g*) of the Regulations (paragraph 12(*g*)[7] of the *Unemployment Insurance Regulations*).

[33] In that case, the applicant carried on the business of a placement agency for nurses that provided nursing services to various hospitals and nursing facilities in the Toronto area. The nurses were subject to the control of the particular hospital when they reported to that hospital, but there was no employment contract between the nurses and the hospitals or the placement agency. The nurses were self-employed workers.

[34] The applicant claimed that paragraph 12(*g*) of the *Unemployment Insurance Regulations* could not be applied in the circumstances because its enabling provision, paragraph 4(1)(*c*)[8] of the *Unemployment Insurance Act, 1971* (the

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[6] [1985] F.C.J. No. 230 (QL), Heald, Urie and Stone JJ.A.

[7] "12 Employment in any of the following employments, unless it is excepted employment under subsection 3(2) of the Act or excepted from insurable employment by any other provisions of these Regulations, is included in insurable employment: . . . (*g*) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency where that person is remunerated by the agency for the performance of such services."

[8] "4(1) The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment. . .(*c*) any employment that is not employment under a contract of service if it appears to the Commission that the terms and conditions of service of and the nature of the work performed by persons employed in that employment are similar to the terms and conditions of service of and the nature of the work performed by persons employed under a contract of service."

predecessor of paragraph 5(4)(*c*) of the Act), was not directed at self-employed workers.

[35] Justice Heald dismissed that argument, being of the opinion that paragraph 4(1)(*c*) of the *Unemployment Insurance Act, 1971* could be directed at self-employed workers:[9]

> . . . Subsection 4(1)(*c*) applies only to those persons employed in employment not under a contract of service (including self-employed persons) in circumstances where they perform a similar type of work and under similar terms and conditions to those persons who are employed under a contract of service. In contrast, subsection 4(2) covers the wider category of persons who, while being employed, not under a contract of service (including self-employed persons) are employed where the nature of the work and the terms and conditions of that work need not be similar to the terms and conditions and nature of work of employment under a contract of service. . . .
>
> [Emphasis added.]

[36] Thus, he determined that paragraph 12(*g*) applied to this group of workers.

[37] Justice Heald based his conclusion, *inter alia*, to the decisions of the Supreme Court of Canada in *The Queen v. Scheer Ltd.*[10] and *Martin Service Station Ltd. v. M.N.R.*,[11] in which it was found that the word "employment" in paragraph 26(1)(*d*)[12] of the *Unemployment Insurance Act* (predecessor of paragraph 5(4)(*c*) of the Act) should be interpreted to include "a business, trade or occupation and not solely to designate a master and servant relationship."[13]

[38] Since *Sheridan*, it has been decided that the word "employment" in section 6 of the Regulations must be interpreted to include a business, trade or occupation, as noted by Deputy Judge Weisman in *Carver PA Corporation v. M.N.R.*:[14]

> 11 It is trite law that the term "employment" in Regulation 6(g) under the *Act* includes a business, trade or occupation and does not solely designate a master and servant relationship. It does not matter whether the worker involved is an

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[9] *Sheridan*, *supra* (note 6).
[10] [1974] S.C.R. 1046.
[11] [1977] 2 S.C.R. 996.
[12] "26(1) The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment, . . . (*d*) any employment if it appears to the Commission that the nature of the work performed by persons employed in that employment is similar to the nature of the work performed by persons employed in insurable employment."
[13] *Sheridan*, *supra* (note 6).
[14] 2013 TCC 125.

> employee or an independent contractor. Both are included in insurable employment by this Regulation. . . .
>
> [Emphasis added.]

B. Is the appellant liable for employment insurance premiums?

Applicable law

[39] For paragraph 6(*g*) of the Regulations to apply, the following criteria must be met: (i) there must be a placement or employment agency; (ii) a person must be placed in employment by a placement or employment agency to perform services for a client; (iii) the person must be under the direction and control of a client of the agency; and (iv) the person must be remunerated by the agency:

> 6 Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment
>
> . . .
>
> (*g*) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.

[40] There is no definition of "placement or employment agency" in the Act or the Regulations. However, the *Canada Pension Plan Regulations*[15] provides a definition in subsection 34(2):

> 34(1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual.
>
> (2) For the purposes of subsection (1), "placement or employment agency" includes any person or organization that is engaged in the business of placing

[15] C.R.C., c. 385.

> individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.
>
> [Emphasis added.]

[41] Considering the similarity between subsection 34(1) and paragraph 6(*g*) of the Regulations, some judges of the TCC saw fit to apply the definition reproduced above for the purposes of paragraph 6(*g*):[16]

> 15 I prefer to apply the definition found in the *Plan* to appeals under the *Act* because the cases cited above disregard the definition contained in subsection 34.(2) of the *Plan*. This provision must surely be applicable to cases decided under subsection 34.(1) of the *Plan*. If that is so, it follows that the same definition should be applied equally in proceedings under the *Act* to achieve as much consistency as possible between two provisions intended to address the same situation.
>
> [Emphasis added.]

[42] Other judges, however, opted for a more flexible solution. In the absence of a definition, they claim that the expression "placement or employment agency" must be given its ordinary meaning read in context. Thus, a placement or employment agency, for the purposes of paragraph 6(*g*), must be considered "an organization engaged in matching requests for work with requests for workers."[17]

[43] According to that definition, it is not necessary that a placement or employment agency have a particular type of arrangement for remuneration, contrary to subsection 34(2) of the *Canada Pension Plan Regulations*:[18]

> 14 . . . It was argued as well that the appellant differed from a normal employment or placement agency in respect of the arrangement as to fees. In my view, nothing in the language of regulation 12(g) ties the meaning of the term "placement agency" to the presence or absence of any particular type of arrangement for the

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[16] *Carver PA Corporation*, *supra* (note 14). See also *OLTCPI Inc. v. M.N.R.*, 2008 TCC 470, Deputy Judge Weisman, and *Pro-Pharma Contract Selling Services Inc. v. M.N.R.*., 2012 TCC 60, Deputy Judge Weisman.

[17] *Computer Action Inc. v. Canada*, [1990] T.C.J. No. 101 (QL), at paragraph 14, Judge Bonner.

[18] *Ibid*. In *Computer Action*, The term of the assignment was a matter negotiated between the consultant and the client. The hourly rate paid to the consultant was fixed by negotiation between the appellant and the client. The higher rate charged by the appellant to the client was of course a matter to be negotiated between the two. At the end of each week during an assignment the consultant completed and signed a four copy time sheet form listing hours worked each day and he secured the signature thereon of an appropriate representative of the client. Two copies of the completed form were provided to the appellant, one copy to the client and one was kept by the consultant. During the second week of each month the consultants were paid by the appellant for services provided during the previous month. The appellant billed its clients monthly and frequently had to pay its consultants for their work before it received payment from the client (therefor).

> remuneration of the agency as suggested at one point by counsel for the Appellant.

[44] I note that, thus far, the definition to be given to the expression "placement or employment agency" in paragraph 6(*g*) of the Regulations has not been definitively addressed by the FCA.

[45] However, in *OLTCPI Inc. v. Canada*,[19] the FCA agreed to analyze the appellant's status based on the definition provided in subsection 34(2) of the *Canada Pension Plan Regulations*, in part because this was the approach that the Tax Court judge took, and because the appellant never took issue with his approach:

> 27 Turning to the first issue, the relevant provisions of the EI Regulations and the CPP Regulations, which are relevant to the disposition of the appeals, are similar but not identical. For one thing, the term "placement agency" is defined in the CPP Regulations (subsection 34(2)) but not in the EI Regulations. The Tax Court Judge nevertheless applied this definition for EI purposes as well, an approach with which the appellant does not take issue.
>
> [Emphasis added.]

[46] Justice Noël stated that, in order to determine whether a person is a placement agency within the meaning of subsection 34(2), the question is whether the person concerned is merely supplying workers or is doing so in the course of providing a distinct service:[20]

> 30 In so saying, Porter D.J. was addressing the difficulty in insuring that the placement agency provisions not apply to persons, such as a subcontractor, providing services which require that workers attend to the premises of the client and perform functions, sometimes at the direction of the client. The question in this regard is whether the person concerned is merely supplying workers or is doing so in the course of providing a distinct service.
>
> [Emphasis added.]

[47] The test formulated by Justice Noël is a restatement of the words of Deputy Judge Porter of the TCC in *Supreme Tractor Services Ltd. v. Canada*,[21] in which he explained in more detail the distinction between merely supplying workers and providing a distinct service:

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[19] [2010] F.C.J. No. 379 (QL).
[20] *Ibid*.
[21] [2001] T.C.J. No. 580 (QL).

12 Thus, the first question to be asked is whether the worker is performing services for entity A as part of the business of the latter, albeit part of that business may be a contract for entity A to provide a service for entity B, or whether entity A is simply acquiring personnel as its very business with no contract to undertake anything further than to pass the worker on to entity B to undertake whatever the business of entity B might be. The simple question to ask is whether entity A is under any obligation to provide a service to entity B other than simply provide personnel. Is it obligated to perform in some other way than simply to make people available? If the answer is yes, it clearly has business of its own as does any general contractor on a building site and the worker is not covered by the Regulations under either statute. If however, the answer is no, that is, it is not obligated to carry out any service other than to provide personnel, then clearly the worker in such a situation is covered by the Regulations under both statutes.

13 The question as I see it is not so much about who is the ultimate recipient of the work or services provided as this will cover every single possible subcontract situation, but rather who is under obligation to provide the service. If the entity alleged to be the placement agency is under an obligation to provide a service over and above the provision of personnel, it is not placing people, but rather performing that service and is not covered by the Regulations.

14 I refer to the Federal Court of Appeal case of *Vulcain Alarme Inc. v. The Minister of National Revenue*, (1999) 249 N.R. 1 for an analogy, where the same principle is clearly set out in relation to whether a subcontractor becomes an employee in certain situations. Létourneau, J.A. said this:

> A contractor who, for example, works on site on a subcontract does not serve his customers but those of the payer, that is the general contractor who has retained his services. The fact that Mr. Blouin had to report to the plaintiff's premises once a month to get his service sheets and so to learn the list of customers requiring service, and consequently the places where his services would be provided, does not make him an employee. A contractor performing work for a business has to know the places where services are required and their frequency just as an employee does under a contract of employment. Priority in performance of the work required of a worker is not the apanage of a contract of employment. Contractors or subcontractors are also often approached by various influential customers who force them to set priorities in providing their services or to comply with the customers' requirements.

15 The simple facts that sub-contractors contracting with entity A are required to comply with the requirements of entity B does not per se place those persons

> under the direction and control of entity B any more than it makes entity B a customer of those persons.
>
> [Emphasis added.]

[48] According to the principles established by Deputy Judge Porter—and by extension the FCA—in order for SEMO to be considered a placement or employment agency, it is not necessary for the workers to have performed services for SEMO as part of the business of the latter, but rather it is necessary that the workers performed services by working on their own account and that the appellant's only obligation was to place personnel.

[49] In my opinion, the appellant meets this requirement.

[50] The evidence shows that the only service provided by the appellant was that of finding contracts for the workers and paying the remuneration paid by the clients in trust for the workers.

[51] The second criterion in paragraph 6(*g*) is not contentious as the parties agree that the clients served by the workers were those of SEMO. This conclusion is also supported by the evidence.

[52] In his written submissions, the Minister, without further explanation, stated that the workers were under the direction and control of the clients as it [TRANSLATION] "is clear from the evidence that the clients could tell the [w]orkers what to do even if they did not necessarily tell them how to do it."[22]

[53] In my opinion, the evidence did not support this conclusion.

[54] The workers often cleaned the clients' houses jointly, but the clients did not decide what task would be done by Mr. Martineau or Ms. Hamel or how to do it.[23]

[55] The workers each testified that the clients were rarely present when they performed their work.[24] Ms. Hamel stated that the clients did not give her orders because they trusted her and because she knew what to do.[25]

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[22] Respondent's written submissions (February 23, 2015), at paragraph 28.
[23] Transcript, page 160.
[24] Transcript, pages 133 and 187.
[25] Transcript, page 197.

[56] In 2010 and 2011, the workers provided cleaning services for Geneviève Horlings, a client of SEMO. Ms. Horlings was not present when the workers came to do the cleaning.[26] Before the Court, she stated that she initially met with Ms. Hamel to show her the house, but she did not tell her how to do her job.[27] According to Ms. Horlings, she did not have to give orders because [TRANSLATION] "they are the professionals."[28] Ms. Horlings knew that Ms. Hamel worked with Mr. Martineau, but admitted that she never met or spoke with him.[29]

[57] The relationship between the workers and Ms. Horlings was not unique. According to the testimonies heard at the hearing, there was generally a lack of control by the clients over the SEMO workers.

[58] For example, Bryan Goulet, a worker, testified that he never received orders from a client on his work methods.[30] He also stated that he could refuse if clients asked him to perform additional tasks.[31] In my opinion, this type of refusal is a strong indication of the lack of control by the clients over the workers.

[59] Jean-Marc Aubry, a client, testified that he did not tell the workers how to do their work.[32]

[60] In his written submissions, the Minister restated the comments by Deputy Judge Weisman in *Care Nursing Agency Ltd. v. M.N.R.*[33] to say that, in the case of highly skilled workers, direction and control can be established when a client explains to the worker what to do, but without telling him or her how to do it.

[61] The Minister is right in saying that control over a qualified worker can be exercised by the person giving out work, even though that control is less strict than in the case of a layperson. Deputy Judge Weisman, however, did not address the issue of control by relying on this ground alone. On the contrary, the facts of the case showed, for example, that the nurses "were bound to comply with the hospital's safety procedures and rules." In my opinion, that obligation is a strong indication of control.

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[26] Transcript, page 95.
[27] Transcript, page 94.
[28] *Ibid*.
[29] Transcript, pages 95 and 99.
[30] Transcript, pages 101 and 102.
[31] Transcript, page 103.
[32] Transcript, page 109.
[33] 2007 TCC 527.

[62] There is no indication that a similar situation existed in the case at bar. The clients had, of course, a say about the rooms in the house that had to be cleaned[34] and the quality of work to be performed, but that should not be interpreted as an indication of control. In *Le Livreur Plus Inc. v. Canada*,[35] the FCA clearly stated its approval of such a viewpoint:

> 19 Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D&J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, *supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker".
>
> 20 I agree with the applicant's arguments. A subcontractor is not a person who is free from all restraint, working as he likes, doing as he pleases, without the slightest concern for his fellow contractors and third parties. He is not a dilettante with a cavalier, or even disrespectful, whimsical or irresponsible, attitude. He works within a defined framework but does so independently and outside of the business of the general contractor. The subcontract often assumes a rigid stance dictated by the general contractor's obligations: a person has to take it or leave it. However, its nature is not thereby altered, and the general contractor does not lose his right of monitoring the results and the quality of the work, since he is wholly and solely responsible to his customers.
>
> [Emphasis added.]

[63] Thus, based on the facts presented, I cannot conclude that the workers were under the direction and control of the clients they served.

[64] According to the Minister, the payments issued to the workers by SEMO shows that the works were in fact remunerated by SEMO.[36] The appellant insists, however, that the remuneration paid to the workers came from the clients, and that SEMO merely acted as a conduit.[37]

[65] In my opinion, the Minister is correct on that point.

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[34] Transcript, pages 33 and 34.
[35] 2004 FCA 68, Desjardins, Létourneau and Nadon JJ.A.
[36] Respondent's written submissions (February 23, 2015), at paragraph 29.
[37] Transcript, pages 23 and 24.

[66] In examination-in-chief, Mr. Grenier explained that during the first years of SEMO the clients paid the workers directly by cheque or in cash.[38]

[67] Around 2008, however, the clients and the workers expressed an interest in the implementation of a pre-authorized payment system.[39] Realizing that such an arrangement could have an impact on the status of the workers, the appellant consulted an accountant for advice. To ensure that the workers were not considered employees, the accountant advised opening a trust account for the collection of payments from the clients' bank accounts and their issuance to workers.[40] This was how SEMO would operate from now on.

[68] This way of doing things was very well received by the workers. Worker Jocelyne Dinel, for instance, testified that the pre-authorized payment system facilitated the recovery of her income and saved her from chasing after clients to get paid, as was the case before she joined SEMO.[41]

[69] The workers recorded their hours worked on the SEMO Web site at the end of each day. SEMO took the amounts to be paid from the clients' banks accounts and deposited them in the trust account. Those amounts, less the commission required by SEMO, were then paid to the workers, once per week, by bank transfer in their joint account.[42] Ms. Hamel acknowledged that two or three clients paid by cheque, but contrary to what went on in the case of certain other workers,[43] the cheques were not remitted to her directly.[44]

[70] By putting in place the pre-authorized payment system, Mr. Grenier wanted to ensure that the appellant preserved the features of the old method of payment by which the clients remunerated the workers.[45]

[71] In support of his contention in this regard, he pointed out that SEMO had the clients sign a document which confirmed that the payments accepted by SEMO were for the workers and that SEMO merely acted as a conduit.[46]

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[38] Transcript, page 16.
[39] *Ibid*.
[40] *Ibid*.
[41] Transcript, pages 117 and 122.
[42] Transcript, pages 132 and 179.
[43] Bryan Goulet testified that his clients sometimes paid him by cheque made payable to him (transcript, pages 104 and 105).
[44] Transcript, page 179.
[45] Transcript, pages 23 and 24.
[46] Exhibit A-2; transcript, page 22.

[72] However, the payment acceptance forms were signed after the CRA began its tax audit of the appellant's company in 2012. The workers were no longer providing their services to SEMO at the time. The evidence presented by the appellant is self-serving, established after the fact. Accordingly, I find that it is not probative.

[73] Nor is the case law is in the appellant's favour.

[74] In *Sheridan*, *supra*, the placement or employment agency received the pay earned by the nurses from the hospitals and remitted to the nurses the pay, less the agency's fee. Counsel for the applicant in that case argued that the agency acted as a conduit, and therefore, did not remunerate the nurses. Justice Heald dismissed that argument. According to him, a mere conduit would have transmitted the remuneration in toto, without deducting the fee, and would not have fixed the quantum of the remuneration:[47]

> The only other submission of the applicant which should be addressed is to the effect that Regulation 12(g) does not apply here because the nurses placed by the applicant were not "remunerated" by the agency as the regulation requires. Counsel submitted that, on these facts, the applicant was merely a conduit of the remuneration paid by the hospitals. I do not agree with this view of the matter. As stated *supra*, the applicant here received all of the pay earned by the nurses from the hospitals. Thereafter she remitted to the individual nurses the proper amount earned by each after deducting from that amount, her fee of 10% in most cases. The *Shorter Oxford Dictionary* (3rd Ed.) defines "remunerate" and "remuneration" as follows:
>
> > 1. trans. to repay, requite, make some return for (services etc.)
> >
> > 2. to reward (a person); to pay (a person) for services rendered or work done...
> >
> > Hence remuneration, reward, recompense, repayment, payment, pay.
>
> Volume 4 of *Stroud's Judicial Dictionary* (4th Ed.) states *inter alia*, that "remuneration" a quid pro quo [Page 2324 - the authority for this definition is said to be the judgment of Blackburn *J. in R. v. Postmaster General* 1 Q.B.D. 663, 664.].
>
> Based on the above definitions and ascribing to "remunerate" its plain ordinary meaning, I conclude that this applicant "remunerated" the nurses. She was not a mere conduit. She remitted to the nurses the amount they earned for their services

[47] *Sheridan, supra* (note 6).

> which amount was dependent on their rate of pay which was determined, not by the hospitals but by the applicant. However, in 90% of the cases the remittal was not for the total amount earned since the applicant's 10% fee was deducted therefrom. In the remaining 10% of the cases, the full amount earned was remitted to the individual nurses but subject to a verbal promise by those nurses to pay the applicant's 10% fee. In any event, the applicant could not be said to be a mere conduit, whether her 10% fee was deducted before remittance or became the subject of a debt owing to her by the nurses in question. If her role was that of a mere conduit, she would simply have transmitted the remuneration in toto. I think also that a mere conduit would not have been involved in fixing the quantum of the remuneration. I therefore reject this submission by counsel for the applicant.
>
> [Emphasis added.]

[75] Thus, I must conclude that the appellant in this case remunerated the workers within the meaning of paragraph 6(*g*) of the Regulations.

[76] Since the third criterion was not met, paragraph 6(*g*) of the Regulations cannot apply in this case.

V. The Minister's alternative argument

[77] The Minister submits as an alternative argument that the employment of the workers is insurable under paragraph 5(1)(*a*) of the Act. This provision provides that insurable employment is employment by an employer under an express or implied contract of employment, written or oral.

[78] The appellant's appeals are based on an insurability decision by the Minister. They are not based on an assessment. Thus, the question that arises is whether the Minister can make an alternative argument in these appeals.

A. Can the Minister make an alternative argument?

[79] When a person is the subject of a decision by the Minister concerning the insurability of his or her employment, he or she may, if he or she wishes, to appeal to the TCC under subsection 103(1) of the Act.

[80] The TCC may then vacate, confirm or vary that decision, pursuant to subsection 103(3) of the Act:

> 103(3) On an appeal, the Tax Court of Canada

> (*a*) may vacate, confirm or vary a decision on an appeal under section 91 or an assessment that is the subject of an appeal under section 92;
>
> (*b*) in the case of an appeal under section 92, may refer the matter back to the Minister for reconsideration and reassessment;
>
> (*c*) shall notify in writing the parties to the appeal of its decision; and
>
> (*d*) give reasons for its decision but, except where the Court deems it advisable in a particular case to give reasons in writing, the reasons given by it need not be in writing.
>
> [Emphasis added.]

[81] Section 104 of the Act grants the TCC broad power to decide a case. Indeed, subsection 104(1) provides that the Court may decide any question of fact or law necessary to be decided in the course of an appeal:

> 104(1) The Tax Court of Canada and the Minister have authority to decide any question of fact or law necessary to be decided in the course of an appeal under section 91 or 103 or to reconsider an assessment under section 92 and to decide whether a person may be or is affected by the decision or assessment.
>
> [Emphasis added.]

[82] The FCA has, on numerous occasions, interpreted sections 103 and 104 of the Act as saying that the TCC not only can but must consider the alternative arguments put forward by the Minister to defend his insurability decisions.

[83] For instance, in *Canada v. Doucet*,[48] the Minister rendered a decision according to which the employment held by respondent Jacques Doucet was excepted under paragraph 14(*a*) of the former Regulations, as he owned more than 40% of the voting shares in the company by which he was employed.

[84] At trial, the Minister amended his reply to the notice of appeal to add an alternative argument. In the event that the judge would have dismissed the main argument, the Minister argued that the respondent's (the appellant at trial) employment could not be insurable under paragraph 3(1)(*a*) of the former Act because the respondent was not employed under a contract of employment.

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[48] [1993] F.C.J. No. 618 (QL), Marceau, Desjardins and Létourneau JJ.A.

[85] The trial judge refused to consider the Minister's alternative argument on the grounds that the decision sent to the respondent was not based on that argument:[49]

> It remains for me to determine whether, notwithstanding its wording, the respondent's [the Minister] decision is not tantamount to telling the appellant that his employment is not insurable and that the Minister of National Revenue could thus plead any fact or ground that could support the non-insurability of an employment in the context of the *Unemployment Insurance Act*. I do not believe this is the case. . . .
>
> . . .
>
> Since, in the instant case, the respondent indicated in the determination which he communicated to the appellant that the employment concerned was excepted, it follows that the Court is limited to determining the validity of that decision. As subsection 70(2) of the Act states, the Court may reverse, affirm or vary the determination. This last expression, "vary the determination" does not authorize this Court to substitute to a decision that the Minister of National Revenue has actually taken a determination of an entirely different nature which he might have made but that he did not make. . . .

[86] The FCA, however, overturned that decision. According to Justice Marceau, it was the Minister's determination that is in issue before the Court, rather than the grounds in support of the determination. The trial judge should have therefore considered the alternative argument put forward by the Minister:[50]

> 10 I would add, although it is not necessary to dispose of the action, that the second ground of objection raised by the applicant, one of law, also appears to me to be valid. The applicant is right to say that the judge could not, based solely on the conclusion that the employment was not excepted, at once over that the employment was insurable. In his written pleadings the Minister had indicated that in any case, excepted or not, the employment on the basis of which the respondent was claiming benefits was not one which corresponded to the definition of s. 3(1)(*a*) of the Act, in short that it was not an employment resulting from a contract of service. The judge could not refuse to consider this allegation on the ground that it was not mentioned by the Minister in his initial reply to the respondent telling him that his employment with Exolab Inc. was not insurable. It is the Minister's determination which was at issue before the judge, and that determination was strictly that the employment was not insurable. The judge had the power and duty to consider any point of fact or law that had to be decided in order for him to rule on the validity of that determination. This is assumed by s. 70(2) of the Act and s. 71(1) of the Act: so provides immediately afterwards,

[49] *Doucet v. Canada*, [1992] T.C.J. No. 588 (QL), Garon J.
[50] *Doucet, supra* (note 48).

> and this is also the effect of the rules of judicial review and appeal, which require that the gist of a judgment, which is all that is directly at issue, should not be confused with the reasons given in support of it.
>
> [Emphasis added.]

The burden of proof

[87] According to counsel for the Minister, when the alternative argument is based on the same facts as those that served as the basis for the Minister's decision, there is no need to reverse the burden of proof.[51] She submits that a reversal of the burden of proof may only take place when the alternative argument is based on new facts.

[88] I do not agree with the respondent's opinion on this issue. As noted above, first Ms. Lacoste, CRA rulings officer, decided that the work of the workers was insurable owing to the fact that they were self-employed workers serving the appellant's clients and that the appellant acted as a placement or employment agency. Ms. Lacoste concluded that the workers were subject to the direction and control of the appellant's clients as a result of a delegation of the power of control. This allegation of fact was essential for the Minister to conclude that the workers' employment was insurable under paragraph 6(*g*) of the Regulations.

[89] Ms. Lacoste's decision was upheld by the Minister, who reached the same conclusion by reiterating in his decision that the workers were subject to the direction and control of the appellant's clients. Therefore, the respondent's alternative position is partly based on facts that contradict those assumed by the Minister when he upheld Ms. Lacoste's decision. Accordingly, the Reply to the Notice of Appeal is inaccurate and incomplete when it states, at paragraph 14 in docket 2012-4560(EI) and at paragraph 15 in docket 2013-2811(EI), that the Minister determined that the workers held insurable employment based on the assumptions of fact set out at paragraphs 14(a) to (r) in docket 2012-4560(EI) and at paragraphs 15(a) to (u) in docket 2013-2811(EI).

[90] Indeed, based on my reading of the foregoing decisions, I find that the Reply failed to mention that the Minister assumed that the workers were under the appellant's direction and control rather than under the direction and control of the appellant's clients. Accordingly, I find that the burden of proof is on the respondent to establish, based on a balance of probabilities, that the workers were subject to the appellant's direction and control.

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[51] Transcript, page 46.

[91] In *Continental Bank Leasing Corporation v. Canada*,[52] the appellant objected to a proposed amendment by the respondent to the Reply to the Notice of Appeal to add alternative assumptions of fact that clearly contradicted those already pleaded in the Reply. Judge Bowman permitted the amendment, but noted that the burden of proof was on the Minister when new facts are inconsistent with those assumed before. He wrote as follows on that point:

> It is true that there are inconsistencies between the assumptions pleaded and the allegations in the paragraphs that the Minister now wishes to add. Had these paragraphs been included in the original reply those inconsistencies would not have justified striking the paragraphs. The respondent is not bound by the assumptions made on assessing. She is entitled, in support of the assessment, to allege new facts or facts that are inconsistent with those assumed on assessing, provided that she bears the onus of proving those facts. An assumption, in the sense in which the word has come to be used in income tax appeals, is not a binding admission.
>
> [Emphasis added.]

[92] In *Schultz v. Canada*,[53] the FCA reached the same conclusion as Justice Bowman, writing as follows:

> 21 I do not understand that the law as developed in these cases prevented the Minister from pleading the alternative defence before the Tax Court of Canada. It is true that in pleading he is subject to certain constraints. For example, he cannot plead an alternative assumption when to do so would fundamentally alter the basis on which his assessment was based as to render it an entirely new assessment. In my view, in the present cases the Minister has not so changed the basis of the assessments. What he did was merely to assert a different legal result flowing from the self-same set of facts by alleging that those facts show the existence of a joint venture or partnership if they do not show an agency relationship. Even if it could be said that the Minister has alleged new "facts" by adopting the alternative posture, the law as developed allowed him to do so but imposed upon him the onus of proving those facts: Pillsbury, *supra*, at page 5188; *Continental Bank Leasing Corporation et al. v. The Queen*, 93 DTC 298 (TCC), at page 302. The same opinion is implicit in *Wise et al. v. The Queen*, 86 DTC 6023 (F.C.A.) where Pratte J.A. stated at page 6024:
>
> > It is common ground that the Minister had, in this case, the burden of establishing the correctness of the assessments since he was trying to support them on grounds that were different from those on which they were based.

[52] [1993] T.C.J. No. 18 (QL).
[53] [1995] F.C.J. No. 1470 (QL).

B. Is the appellant the workers' employer?

[93] Paragraph 5(1)(*a*) of the Act provides that insurable employment is employment by an employer under any contract of service:

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

[94] The expression "contract of service" is not defined in the Act. Thus, it must be analyzed in light of the applicable private law, under sections 8.1 and 8.2 of the *Interpretation Act*[54] (Canada).

[95] In the case at bar, the applicable private law system is that of Quebec as the facts of this case took place in that province.

[96] The following provisions of the *Civil Code of Québec*[55] are therefore relevant:

> 1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.
>
> Contracts may be divided into contracts of adhesion and contracts by mutual agreement, synallagmatic and unilateral contracts, onerous and gratuitious contracts, commutative and aleatory contracts, and contracts of instantaneous performance or of successive performance; they may also be consumer contracts.
>
> . . .
>
> 1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> 1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

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[54] R.S.C., 1985, c. I-21. See *9041-6868 Québec Inc. v. Canada (M..N.R.)*, 2005 FCA 334, Décary, Létourneau and Pelletier JJ.A.

[55] C.Q.L.R., c. C-1991.

> . . .
>
> 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.
>
> . . .
>
> 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 and 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.]

[97] Notwithstanding the fact that a worker and the person giving out the work sign a contract to frame, or even define their relationship, the Minister is not bound by the terms of that contract:[56]

> 9 The contract on which the Minister relies, or which a party seeks to set up against the Minister, is indeed a juridical fact that the Minister may not ignore, even if the contract does not affect the Minister (art. 1440 C.C.Q.; Baudouin and Jobin, *Les Obligations*, Éditions Yvon Blais 1998, 5th edition, p. 377). However, this does not mean that the Minister may not argue that, on the facts, the contract is not what it seems to be, was not performed as provided by its terms or does not reflect the true relationship created between the parties. The Minister, and the Tax Court of Canada in turn, may, as provided by articles 1425 and 1426 of the *Civil Code of Québec*, look for that true relationship in the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage. The circumstances in which the contract was formed include the legitimate stated intention of the parties, an important factor that has been cited by this Court in numerous decisions (see *Wolf v. Canada* (C.A.), [2002] 4 FC 396, paras. 119 and 122; *A.G. Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54; *Le Livreur Plus Inc. v. M.N.R.*, 2004 FCA 68; *Poulin v. Canada (M.N.R.)*, 2003 FCA 50; *Tremblay v. Canada (M.N.R.)*, 2004 FCA 175).

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[56] *9041-6868 Québec Inc., supra* (note 54). See also *Grimard v. Canada*, 2009 FCA 47, at paragraph 33, Létourneau, Blais and Trudel JJ.A.

[98] The role of the Tax Court of Canada judge is to examine "whether the true nature of the contractual arrangement between the parties can be characterized, in law, as employment."[57]

[99] As for the contract of service, three characteristic constituent elements must be met in Quebec law, namely: (i) the performance of work; (ii) remuneration; and (iii) a relationship of subordination.[58]

[100] In contrast to common law, the notion of control (or relationship of subordination) is not a mere criterion. It is an essential characteristic of a contract of employment:[59]

> 37 This excerpt mentions the notion of control over the performance of work, which is also part of the common law criteria. The difference is that, in Quebec civil law, the notion of control is more than a mere criterion as it is in common law. It is an essential characteristic of a contract of employment: see *D&J Driveway*, *supra*, at paragraph 16; and *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334.

[101] However, in order to determine whether there was a relationship of subordination, the Court may take into consideration the indicators of supervision used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business:[60]

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

[102] These criteria were developed in *Wiebe Door Services Ltd. v. M.N.R.*,[61] wherein Justice MacGuigan stated that any analysis involving the relationship

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[57] *9041-6868 Québec Inc.*, *supra* (note 54), at paragraph 8.
[58] *Ibid.*, at paragraph 11.
[59] *Grimard*, *supra* (note 56).
[60] *Ibid.*
[61] [1986] 3 F.C. 553 (FCA), Pratte, Mahoney and MacGuigan JJ.A.

between a worker and the person giving out the work must subject to a single test composed, partly, of the four above-mentioned elements.[62]

[103] The criteria derived from the common law however include more than these elements. Indeed, in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,[63] the Supreme Court of Canada stated that there could be other testing criteria beyond those set out by the FCA in *Wiebe Door*:

> 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.
>
> [Emphasis added.]

[104] Before beginning my analysis, I would like to make two observations about the proximity of the relationship of subordination required in this case.

[105] First, it is generally accepted that a skilled worker has broader autonomy in performing his or her duties compared to an unskilled worker:

> [TRANSLATION]
>
> Owing to the diversification and specialization of work methods, it appears unrealistic for an employer to always direct and supervise an employee. The relationship of subordination is now much more subtle: it is the ability of the employer to determine the work to be performed, and to control and monitor the performance.
>
> The power to dismiss, the control over the work performed and the degree of supervision are elements that make it possible to define an employment relationship. Of course, the degree of subordination of an employee in a strictly supervised work environment differs significantly from that of a professional or a skilled employee who has broader discretion or professional autonomy.

---

[62] Added to these elements is the test to determine the control exercised by the alleged employer.
[63] 2001 SCC 59.

> The Tax Court of Canada found that an applicant was not a salaried employee and, therefore, did not hold insurable employment within the meaning of the *Unemployment Insurance Act, 1971*. The Federal Court of Appeal allowed the appeal, in *Gallant v. M.N.R.*, and *per* Justice Pratte, stated:
>
> > In the Court's view, the first ground is based on the mistaken idea that there cannot be a contract of service unless the employer actually exercises close control over the way the employee does his work. The distinguishing feature of a contract of service is not the control actually exercised by the employer over his employee but the power the employer has to control the way the employee performs his duties. If this rule is applied to the circumstances of the case at bar, it is quite clear that the applicant was an employee and not a contractor.[64]
>
> [Emphasis added.]

[106] In the case at bar, the evidence reveals that the workers each worked for a considerable length of time in the cleaning services field prior to joining SEMO:[65]

> [TRANSLATION]
>
> Mr. Martineau
>
> Q: What kind of work did you do before meeting Ms. Barbeau, prior to 2010?
>
> A: I worked as a cleaner.
>
> Q: You worked as a cleaner. What experience did you have in the cleaning field?
>
> A: I had a lot of experience in cleaning. I did residential cleaning. I did commercial cleaning. I did cleaning in high schools.
>
> Ms. Hamel
>
> Q: What kind of work did you do before meeting Ms. Barbeau?
>
> A: I did a bit of cleaning. I did, however, do it for a long time, and then I worked odd jobs here and there as I was at home with my five children for quite some time.
>
> Q: What experience did you have in the residential and commercial cleaning field?

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[64] A. Edward Aust and Thomas Laporte Aust, *Le contrat d'emploi*, Third edition (Cowansville, Quebec: Éditions Yvon Blais, 2013) page 220.
[65] Transcript, pages 126, 127 and 165.

> A: I had done cleaning for myself and for companies. I had quite a bit of experience in this area.

[107] Thus, a certain freedom among the workers in their work methods should not necessarily tip the scales in favour of a self-employed work status, although cleaning services do not require a high degree of skill. Therefore, although the workers were engaged in an occupation that was not as skilled as others, I must nonetheless take into account some measure of freedom with respect to how they performed their work.

[108] The contract signed between the appellant and the workers is of little use in determining their status. The agreement was a standard contract that did not reflect the true relationship between the parties.

[109] Although the agreement provides that the workers are self-employed workers and that the vacation and statutory holidays they take are at their own cost, it still contains provisions that would normally be found in a contract of employment.

[110] For instance, it provides that [TRANSLATION] "[t]he specialist shall obtain prior authorization from SEMO before changing his or her schedule" and that "[t]he specialist agrees not to provide cleaning or home support services outside this agreement." These clauses are clearly the antithesis of the contract of enterprise.

[111] Apart from the inherent contradiction, the agreement did not reflect the factual relationship between the parties. For instance, the contract provides that [TRANSLATION] "SEMO agrees to credit the specialist's account for the amount of $50 per month to cover a portion of the costs of insurance, products and equipment incurred by the specialist for fulfilling he contracts." The evidence shows, however, that no reimbursement was provided.

[112] To establish that the parties had no common intention with respect to the workers' status, the Minister cites an excerpt from *Wolf v. Canada*[66] that states that the terms of a written contract will only be "given weight if they properly reflect the relationship between the parties." I agree entirely with this statement.

---

[66] 2002 FCA 96, at paragraph 71.

[113] However, when the Minister tries to establish a relationship of subordination, he does not hesitate to rely on the terms of the agreement to support his position. The Minister's approach me puzzles me.

[114] As stated above, the Court is not bound by the terms of the contract. When the terms do not reflect the true relationship between the parties, it is for the Court to look for that true relationship by taking into account, *inter alia*, the factual background.[67]

(1) Intention

[115] The evidence shows that the parties did not have a common intention as to the workers' tax status.

[116] Mr. Grenier indicated that he wanted the workers to be self-employed workers. Despite the contradictory contractual clauses I referred to earlier, the contract, which was drafted by SEMO, indicated that the [TRANSLATION] "specialists" were self-employed workers. Furthermore, SEMO had the clients pay the GST and the QST for registered workers, but not for the others.[68]

[117] Mr. Martineau however testified that, at the time the contract was signed, he had intended to be an employee.[69] This seems odd to me because he indicated that his intention was consistent with the terms of the contract. Also, there was no provision in the contract that required Mr. Martineau to be considered an employee.

[118] As for Ms. Hamel, she stated that she had no specific intention at the time the contract was entered into, although she knew SEMO was seeking self-employed workers.[70] Her priority, at the time, was to find a job. Whether she was employed or a self-employed worker did not weigh heavily.[71] She nevertheless acknowledged that she needed liability insurance because she was a self-employed worker.[72] Moreover, she stated that she did not apply for employment insurance benefits after her association with SEMO ended because she was a self-employed

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[67] See paragraph 97 of these reasons.
[68] Transcript, pages 18 and 19.
[69] Transcript, page 129.
[70] Transcript, page 190.
[71] Transcript, pages 169 and 170.
[72] Transcript, page 190.

worker. She filed an application only at the request of the agency responsible for social assistance in Quebec.[73]

(2) Direction and control

[119] As mentioned above, the respondent has the burden to show that the workers were subject to the appellant's direction and control, owing to the reversal of the burden of proof on this question of fact. For the reasons that follow, I am of the view that the respondent failed to prove this fact on a balance of probabilities.

[120] Mr. Grenier and the workers agreed that the workers could refuse clients without any penalty.[74] Other workers also testified that this was indeed the case.[75]

[121] Notwithstanding what was set out in the agreement, the workers could provide their services to anyone; they were not bound exclusively to SEMO.[76]

[122] The facts reveal that the workers only worked for the clients of SEMO.[77] This finding does not weigh against the status of self-employed worker as, on the one hand, the workers worked [TRANSLATION] "full-time" for clients who were provided to them and therefore probably did not need to solicit their own clients. On the other hand, Mr. Martineau acknowledged that he could have provided his services to his own clients. What is important, in my opinion, is that the workers retained their ability to contract with other clients as they saw fit.

[123] Although the appellant negotiated directly with the clients the number of hours the workers were required to work,[78] Ms. Hamel acknowledged that she was free to change, without notice to the appellant, the hours billed to the clients, to account for the time she actually spent at the clients' home.[79] The figure established by the appellant is therefore approximate. The workers were not bound by it.

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[73] Transcript, pages 191 and 192.
[74] Transcript, pages 35, 137 and 172.
[75] Transcript, pages 101, 103 and 119.
[76] Transcript, page 57.
[77] Transcript, pages 130, 138 and 170.
[78] Transcript, pages 134 and 175.
[79] Transcript, pages 182, 183 and 195.

[124] Ms. Hamel testified that it was not the appellant who set her schedule, but rather it was her.[80]

[125] Finally, in my view, the fact that SEMO terminated Mr. Martineau's contract[81] is not determinative with respect to the status of the workers. Indeed, a person giving work out can terminate a self-employed worker's contract just as an employer can terminate an employee's contract. Therefore, the termination of a contract is not, in and of itself, conclusive.

(3) Chance of profit and risk of loss

[126] The evidence presented at trial shows that the chance of profit and risk of loss test tips the scale slightly in favour of the status of self-employed worker.

[127] When a client wanted to change the worker assigned to him or her, that worker was usually given another client.[82] Thus, the worker did not lose the possibility of earning income.

[128] Ms. Hamel testified that her paycheques varied from week to week, as she sometimes had fewer clients to serve or decided, on her own, not to work.[83]

[129] Ms. Hamel took out a liability insurance policy,[84] but her policy was cancelled when she defaulted on a payment.[85] Mr. Martineau never purchased liability insurance.[86]

[130] Ms. Hamel designated Mr. Martineau as an employee. She is the one who received a T4 Slip from the Minister for the full amount paid by the appellant.

(4) Tools and equipment

[131] The tools and equipment factor weighs in favour of the status of self-employed worker.

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[80] Transcript, page 183.
[81] Transcript, pages 151 and 152.
[82] Transcript, pages 38, 40 and 201.
[83] Transcript, page 181.
[84] Transcript, page 189.
[85] Transcript, page 203.
[86] *Ibid*.

[132] Mr. Grenier and the workers each testified that SEMO did not provide the workers with equipment.[87]

[133] Ms. Hamel recalled that she received payment to cover a portion of his costs once, but stated that she never received said allowance after that.[88] Mr. Martineau testified that he used the clients' cleaning products, but that, if they did not have any, he purchased them himself.[89] According to him, SEMO never paid him the $50 per month as reimbursement for his costs.[90]

[134] Although Mr. Grenier and the workers acknowledged that SEMO lent a vacuum cleaner to the workers when theirs was not working,[91] Ms. Hamel confirmed that this only happened once.[92] Mr. Grenier stated that SEMO agreed to lend his vacuum cleaner to help the workers temporarily. However, he noted that, if SEMO provided equipment, it was usually subject to payment of a rental fee.[93]

VI. Overall assessment

[135] In my view, an analysis of the factual relationship between the appellant and the workers shows that they performed their work under a contract of enterprise.

[136] The indicators of supervision considered above are inconclusive and contradictory.

[137] Thus, it is the application of the control test that will make it possible to settle the dispute. The burden of proof was on the Minister in that regard, and since the Minister failed to establish that the workers were under the appellant's direction and control, I must allow the appeals.

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[87] Transcript, pages 86, 148 and 185.
[88] Transcript, page 185.
[89] Transcript, page 148.
[90] Transcript, pages 148 and 149.
[91] Transcript, pages 86 and 87.
[92] Transcript, page 186.
[93] Transcript, page 87.

VII. Conclusion

[138] For all these reasons, I am of the view that the workers' employment was not insurable.

Signed at Ottawa, Canada, this 22nd day of May 2015.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 31st day of August 2015

Daniela Guglietta, Translator

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APPEARANCES:	
Agent for the appellant:	Yves Grenier
Counsel for the respondent:	Carole Plourde
COUNSEL OF RECORD:	
For the appellant:	
Firm:	
For the respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada