

Citation: 2005TCC461

Date: 20051109

Docket: 2004-582(EI)

BETWEEN:

TEACH & EMBRACE CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the bench on May 31, 2005, in Montreal, Quebec
and modified for comprehensiveness.)

Archambault, J.

[1] Teach & Embrace Corporation (**Payer**) is appealing a decision whereby the Minister of National Revenue (**Minister**) concluded that Ms. Catherine Stathopoulos (**Tutor**) held insurable employment during the period from January 9, 2003, to May 30, 2003 (**relevant period**). The basic issue is: what was the true nature of the contractual relationship between the Payer and the Tutor? Was it a contract of employment or a contract of service?

The facts

[2] At the beginning of the hearing, the Payer admitted the following facts described in subparagraphs 5 a), b), d) to i), k), m) to p) and r) to w) of the Reply to the Notice of Appeal:

- a) the Appellant was incorporated on December 7, 1998;
- b) the Appellant was providing a tutoring service for elementary and high school students;

...

- d) the Appellant registered the students after an agreement was reached with their parents;
- e) the Worker was studying at a University in the Education Faculty;
- f) the Worker was engaged by the Appellant as a tutor;
- g) on January 1, 2003, the Appellant and the Worker signed a service contract;
- h) the Worker's tasks were to prepare and provide academic activities to students under her charge;
- i) the Worker gave her availability of working time to the Appellant;
- ...
- k) the Worker taught to a group of 1 to 3 students;
- ...
- m) the Worker worked approximately 6 to 8 hours per week for the Appellant;
- n) the Worker had to inform the Appellant of any change in the proposed working schedule;
- o) in case of absence, the Worker had to contact the Appellant to confirm a replacement;
- p) the Worker was required to provide status reports to the Appellant with academic progress of the students;
- ...
- r) the Worker was paid \$18 per hour by the Appellant;
- s) the Worker received her remuneration every month;
- t) the Worker had to establish an invoice to receive her salary from the Appellant;
- u) the clients were the clients of the Appellant;
- v) the Worker worked in schools [*sic*] premises;

- w) the Worker used the material and equipment of the school or of the Appellant's clients in performing her tasks.

[3] Both, the president of the Payer, Mr. Kuperhause, and the Tutor testified at the hearing. There is not much dispute about the facts. The issue has to do with the interpretation to be given to them.

[4] Mr. Kuperhause described how the Payer's business was established. He was working for the Montreal English School Board as a kindergarten teacher. He started providing tutorial services on his own as an extra-professional activity. Given the success that he achieved, he began hiring other people to help in that particular endeavour. In the beginning, the services were normally provided in the students' homes. To recruit its clientele, the Payer distributed flyers to all the parents of children at a school after having been properly authorized to do so.

[5] In order to provide tutoring services to its clients, the Payer hired the Tutor. The written contract, called the Teach & Embrace Corporation Tutoring Service Contract, was entered into on January 1, 2003 (**Contract**). It provides as follows:

TEACH & EMBRACE CORPORATION

Service Contract

**Teach & Embrace Corporation Tutoring Service Contract
With Catherine Stathopoulos**

ENTERED BETWEEN

Teach & Embrace Corporation
8341 Rejane
LaSalle, Qc H8N 3C3

AND

Catherine Stathopoulos

Address

[omitted for publication]

Telephone [omitted for publication] Cel [omitted for publication]

Email address

(the "Tutor")

Teach & Embrace Corporation retains the services of the "Tutor" in order to provide tutoring services for students enrolled in the "Corporation's" after-school tutoring programs.

The "Corporation" will remunerate tutoring services based on the number of hours tutored only. The remuneration rate will be based on the conditions outlined in Annex A. The "Tutor" will provide detailed monthly invoices no later than 72 hours after the last day of the billing month. If the invoice is provided within the said deadline, the "Corporation" will process invoices no later than fifteen (15) days after the 72 hour deadline. Invoices submitted after the deadline will be processed the following billing month.

The "Tutor" declares that she/he will respect her/his responsibilities and the code of ethic [sic] as defined in annex B.

The "Tutor" recognizes, understands and accepts that she/he may not in any way compete with the "Corporation" by poaching, contracting or taking in any manner the "Corporation's" clients. As long as the "Tutor" will be contracted by the "Corporation" or in the case that this contract has been terminated or annulled, the "Tutor" declares that she/he will not compete with the "Corporation" directly or indirectly or by an intermediary, company or society, neither as an investor, employee, agent, consultant or administrator of an identical or similar organization exercised by the "Corporation" and this, up to a period of two (2) years after this contract will have been terminated or annulled. This clause is not applicable to school boards, cegeps or universities.

The parties recognize expressively [sic] that this stipulation of non-competition constitutes an essential condition to the present service contract and also refers to all products, materials, services and others owned or offered by the "Corporation".

Any and all incidences [sic] of solicitation or forms of solicitation of a Teach & Embrace Corporation client during the timeframe of this contract will be considered a breach of contract causing damages to the "Corporation" equivalent to the value of the business in progress with said client; moreover, over and above the current value of the said business in progress, damages equivalent to one-hundred [sic] dollars (\$100) per day for the length of the breach of contract will be claimed of the "Tutor" who contravenes the stipulations herein of non-competition. Said amounts of damages plus interests [sic] accumulated and demanded over and above said damages, will be submitted to a recognized tribunal in order to provide an ordinance [sic] against the "Tutor" for her/him to discontinue contravening the stipulated non-competition clauses and such, without any prejudice to other recourses.

Under the authority of the "Corporation", the "Tutor" is expected to accomplish the following results:

1. Prepare and provide academic activities appropriate to students under her/his charge
2. Respect tutoring times provided by the "Corporation"
3. Modify, in accord with the "Corporation", tutoring schedules
4. Provide individual or group tutoring based on the continuums and resources offered by the "Corporation"
5. Prepare and provide lesson plans
6. Prepare and provide academic progress reports based on the "Corporation's" Continuums
7. Converse with students in the language of instruction
8. Assure constant client satisfaction and solve any lack of satisfaction

The "Tutor" can terminate this contract with written notice with a delay of no less than thirty (30) days. However, the "Tutor" declares that she/he will respect the responsibilities herein until her/his departure. Any breach of this clause will justify damages to the "Corporation" equivalent to one-hundred [*sic*] dollars (\$100) for each day that the "Tutor" will contravene the said clause. These damages plus accumulated interests [*sic*] can and will be deducted from any open invoices [not] yet processed for the "Tutor" without any prejudice to other recourses.

By the present, the "Tutor" assumes all responsibilities of personally settling and remitting all provincial and federal contributions including income tax, employment insurance, pension premiums as well as any other contributions required because the Tutor declares that she/he prefers and wants to work as a self-employed, autonomous worker or sub-contractor [*sic*] in respect to tutoring services.

In witness whereof, this contract is signed on this 01 day of January, 2003 in Montreal, Quebec.

Signature of "Tutor"

(signature)

Name in print : Catherine Stathopoulos

Signature of authorized officer of the Corporation
(signature)

Name of officer in print: Karim Kuperhause
Position of officer: President

Annex A

Year of contract	1	2	3	4	Current
-------------------------	---	---	---	---	---------

Rate per hour	\$15.00	\$16.00	\$17.00	\$18.00	\$18.00
Name of tutor			Hourly Rate		
Catherine (Kathy) Stathopoulos			\$ 18.00		

Annex B
Code of Ethics and Policies

Tutoring Policy

- In case of absence, tutors must contact an authorized Teach & Embrace tutor to replace them. Furthermore, both the tutor **and** replacement tutor must call a Learning Coordinator to confirm the change.
- Students must never be left unsupervised, therefore:
 - Tardiness [will] not be tolerated.
 - Students should only be permitted to use the restrooms before or after tutoring. The same rule applies to tutors. In case of emergency, students should be assigned to another tutor for supervision.
 - At the end of tutoring, please ensure that students who attend the school daycare check-in [*sic*] with a daycare supervisor.
- For security purposes, tutors are required to wear their name tag at all times while on a school's property (including outdoors).
- The last five minutes of tutoring should be reserved for a recap of the tutoring session. Lesson sheets should be filled out with students. This is a great way of reinforcing lessons.
- Progress reports must be done on a timely basis. They are due around the same time as school report cards unless otherwise stated.
- Please dress professionally. Jeans are not permitted. You will be interacting with school staff and parents, it is in your best interest to look and act professional at all times. The school (and school board) you are tutoring at could be your future employer!

A Learning Coordinator is assigned to your tutoring location. Their role is to support your tutoring and to supervise the operations of the tutoring programs. As such, they are Teach & Embrace's link between students, schools, and parents. The Learning Coordinators report directly to the president of Teach & Embrace.

Discipline Policy

Teach & Embrace offers programs at many schools. Each school has a different discipline policy. Having said that, Teach & Embrace does have a standardized policy on discipline. However, please note that due to specific school policies, there could be amendments to the following:

- Tutors should be firm but fair.
- Teach & Embrace is not a public institution and, as such, reserves the right to remove any student from any of its programs at any time due to disruptive and/or unruly behaviour.
- Physical and verbal aggressiveness will not be tolerated under any circumstance. This applies both to tutors and students.
- Behaviour problems should be dealt with immediately. Moreover, they should be noted in the lesson sheets and the assigned Learning Coordinator should be informed of the situation. Students who repeatedly display disruptive behaviour will be removed from their program.

Payment Policies

Teach & Embrace contracts its tutors as self-employed teachers. As such, there are no deductions at source because you are deemed to have received *Professional Income* in terms of income tax implications. This means you retain the entire portion of your paycheques. It also means that you may claim any *allowable expense* (see below) related to the exercise of your tutoring. Therefore, you must invoice Teach & Embrace who, in turn, will pay you based on the contents of your invoice. To simplify matters, Teach & Embrace has its own invoice sheet that you may use (included herein). Please note:

- Invoices must be received no later than the last day of the month. Invoices that are not received by the last day of the month will only be processed the following month. You may send your invoice earlier than the last day of the month if you have completed your scheduled tutoring sessions.
- You may only invoice Teach & Embrace for the time you have actually been scheduled to tutor. Preparation and travel time is at your own expense (and is considered an *allowable expense*).
- If you are invoicing for one-on-one tutoring done in a client's home, please ensure that a parent or legal guardian has signed the attendance sheet. In case of discrepancy, the attendance sheet will be used as an official record (and must be included with your invoice sheet).
- Invoices will usually be processed and mailed within 72 hours of the last day of the month.
- Please retain a copy of your invoice and attendance sheet for your records.
- Because you are earning *Professional Income*, you will not receive a T4 slip at the end of the taxation year. However, Teach & Embrace does keep records of all invoices and payments.
- To find out more about *Professional Income* and *Allowable Expenses*, please visit **Revenue Canada** at <http://www.cra-adrc.gc.ca> and do a search for *T4002 Business and Professional Income*. **Revenue Quebec** has

similar standards but you may want to visit them at <http://www.mrq.gouv.qc.ca>.

[Emphasis added.]

[6] A reading of the Contract clearly reveals the Payer's intention: the Tutor was hired as a self-employed, autonomous worker or subcontractor under a contract for services. When she testified, the Tutor indicated, however, that she did not understand the technical meaning of self-employed, autonomous worker or subcontractor and, as far as she was concerned, she was being hired as an employee. This is rather surprising for someone like the Tutor, who had previously worked for 10 years as a teacher.

[7] When she entered into the Contract, the Tutor had decided to go back to university. She informed the Payer as to the hours that she would be available during her school term to provide her services to the Payer's clients. The Payer then scheduled weekly hours of tutoring with four different groups of students. The tutoring could take place either on the premises of the students' school or, as was mainly the case here, at the Payer's learning centre, located in Saint-Léonard. The Tutor had to pay for her own transportation from home to the learning centre or to a particular school. The Payer would only pay for a taxi when there was an emergency, basically, in situations beyond the control of the tutors.

[8] Tutors were expected to follow the guidelines set out in a document called "Continuum", which basically described the level of knowledge that each student should achieve at a particular grade level, and it was expected that the tutors would propose activities that would meet the goals thus set. They had quite a lot of freedom as to what material could be used and what activities could be carried on during their tutoring. The Continuum was also used in preparing student reports, which, according to the Tutor, occurred four times a year. Tutors had to provide at the end of every class a description of the activities that they had carried on during their tutoring. The Tutor stated that these daily reports were monitored by the Payer because she found annotations made by the Payer's learning coordinator.

[9] In terms of resources, the Tutor had access to a library of games and tools provided by the Payer. Given that three out of four hours of tutoring were carried out on the Payer's premises, she made use of these resources, although she was free to use, and did use, her own material as well.

[10] The Payer's learning coordinator, whose role was supervisory, would normally attend at the schools where the tutors provided their services in order to

ensure that they showed up for their lessons, otherwise the students might not be under proper supervision. The supervision of the tutors could be either very limited, that is, just a visual verification of their presence, or more extensive, so as to allow the Payer to observe the way the tutoring services were provided. If required, the learning coordinator would meet a tutor to discuss the tutor's weaknesses and suggest ways for that tutor to improve his or her performance.

[11] Mr. Kuperhause acknowledged that whenever complaints were made — and these were normally addressed to the Payer — he would meet the parents and then follow up with the tutor to determine the best action to take to improve the techniques of that tutor, or to determine if the cause of the problem was the psychological state of the student or the school environment in which the regular teaching took place. If a tutor required assistance, he or she would have access to the Payer's professional resources, meaning basically the Payer's salaried staff. This staff would suggest different methods for dealing with a difficult situation.

[12] It should be mentioned that the Payer was satisfied with the work performed by the Tutor. No complaint was ever made with respect to her work. She did not renew her contract with the Payer because her remuneration was decreased from \$18 per hour to \$10 per hour. She lived in Brossard and had to travel to the Payer's learning centre in Saint-Léonard, which she did not think was worth the trouble.

Analysis

[13] The relevant statutory provision is subsection 5(1) of the *Employment Insurance Act* (**Act**), which defines insurable employment as being employment "under any express or implied contract of service". As counsel for the Minister stated, given that the Act does not define what a contract of service is, recourse must be had to the *Civil Code of Quebec* (**Civil Code**), pursuant to the interpretation principle of complementarity.¹ When, in interpreting a federal statute, it is necessary to refer to a civil law concept of a province, to a nominate contract, for example, reference must be made to the concept in force in the province. Here, given that the Contract was entered into in Quebec, we have to refer to the Civil Code. Since 1994, the Civil Code defines the "contract of employment" and the "contract for services". The relevant provisions are article 2085 for the definition of the former and articles 2098 and 2099 for the definition of the latter. They provide as follows:

¹ See s. 8.1 of the *Interpretation Act*, L.R.C. 1985, c. I-21.

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 or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[Emphasis added.]

[14] The three essential elements for a contract of employment are: i) work, ii) remuneration, and iii) the direction or control of the employer. In the case of the contract for services, there must be services provided for remuneration, freedom for the provider of services to choose the means of performing the contract and no relationship of subordination between the parties. As stated by counsel for the Minister, it is clear that the distinguishing factor between a contract of employment and a contract for services is the existence or absence of a relationship of subordination, i.e. the difference depends on whether the contract was executed under the direction or control of an employer.

[15] This view is espoused by Quebec scholars, including Robert P. Gagnon in *Le droit du travail du Québec*, 5th ed. (Cowansville Qc: Les éditions Yvon Blais Inc., 2003), at paragraph 90:

[TRANSLATION]²

90 — *Distinguishing factor* — The most significant feature characterizing a contract of employment is the subordination of the employee to the person for whom he works. It is by this feature that a contract of employment can be distinguished from other onerous contracts which also involve the performance of

²

The English translation comes from an article of mine "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It" (**my article**) published in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Second Collection of Studies in Tax Law (2005)*, Association de planification fiscale et financière and Department of Justice Canada, 2005, p. 2:1, at p. 2:29, par. 44.

work for the benefit of another person for a price, such as a contract of enterprise or a contract for services under articles 2098 ff C.C.Q. Thus, while the contractor or the provider of services "is free", under article 2099 C.C.Q., "to choose the means of performing the contract" and while between the contractor or the provider of services and the client "no relationship of subordination exists . . . in respect of such performance," it is a characteristic of a contract of employment, subject to its terms and conditions, that the employee personally performs the work agreed upon under the employer's direction and within the framework established by the employer.

At paragraph 92, Gagnon describes the notion of subordination:

92 — *Concept* — Historically, the civil law first developed a so-called strict or classical concept of legal subordination that was used as a test for the application of the principle of the civil liability of a principal for injury caused by the fault of his agents and servants in the performance of their duties . . . This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the concept of legal subordination in a broad sense. The diversification and specialization of occupations and work techniques often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work. Thus, subordination has come to be equated with the power given a person, accordingly recognized as the employer, of determining the work to be done, overseeing its performance and controlling it. From the opposite perspective, an employee is a person who agrees to be integrated into the operating environment of a business so that it may receive the benefit of his work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over the quantity or quality of the work done, and so on. Work in the home does not preclude this sort of integration into the business.

[16] When the Quebec Minister of Justice tabled the new Civil Code, which came into effect on January 1, 1994, he stated:

[TRANSLATION]³

The definition indicates the essentially temporary nature of a contract of employment, thus enshrining the first paragraph of article 1667 C.C.L.C., and highlights the chief attribute of such a contract: the relationship of subordination characterized by the employer's power of control, other than economic control,

³ *Ibid.*, p. 2:26, par. 41.

over the employee with respect to both the purpose and the means employed. It does not matter whether such control is in fact exercised by the person holding the power; it also is unimportant whether the work is material or intellectual in nature.

[Emphasis added.]

[17] This view of the Quebec Minister of Justice corresponds with that of the Federal Court of Appeal in *Gallant v. Canada*, [1986] F.C.J. No. 330 (QL), a judgment rendered in 1986 prior to the enactment of the new Civil Code.

[18] The distinction between a contract of employment and a contract for services is not an easy one to make. The line of demarcation between these two types of contracts can be uncertain and the fact that the issue arises so often before this Court is certainly indicative of its difficulty. In my article, I describe the approach which should be followed before this Court. I state therein that the burden of proof in an appeal heard in Quebec — as is also the case for an appeal heard in a Canadian common law province — is on the appellants: they have to establish that they are entitled to have the decision of the Minister reversed.⁴ Here, it is thus up to the Payer to establish that no contract of employment existed.

[19] In this appeal, there is no problem regarding the fact that work was done and that it was remunerated. The difficulty lies in determining whether the Tutor's work was performed under the direction or control of the Payer. This determination requires a two-step approach. First, it must be determined what agreement the parties entered into and, then, whether it corresponds to reality, i.e., whether the agreement was executed as such: in other words, was the contract executed in accordance with its terms and with the relevant Civil Code provisions?

[20] Here we have a written contract which states that it is a contract for services ("service contract" being the actual term used by the Payer) and that the Tutor was to provide her services as a "self-employed, autonomous worker or sub-contractor". However, the Tutor states that she did not understand the scope of this stipulation. She believed that she was entering into a contract of employment. Indeed, the Contract does not provide expressly that it is not a contract of employment. Had this been spelled out, it would have been more difficult for the Tutor to allege that she did not understand the nature of the contract. There is therefore an element of doubt as to the common intention of the parties. In order to resolve this issue, it is necessary to refer to the general provisions of the Civil Code applicable to all contracts. Among those provisions, we have the following dealing with the interpretation of contracts:

⁴ *Ibid.*, p. 2:54, par. 80 and 81.

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

1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

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

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

[Emphasis added.]

[21] I believe that we have here a "contract of adhesion" because the Contract was not only drafted by the Payer but it is a printed form document that had to be completed by hand by the parties. The name and address of the Tutor are handwritten as is the hourly rate applicable to the Tutor. In addition, the statement in the Contract that the "Tutor declares that she/he prefers and wants to work as a self-employed, autonomous worker or sub-contractor [*sic*]" is not accurate. Rather, it appears to be a self-serving statement for the benefit of the Payer. As provided by article 1432 of the Civil Code, the contract has to be interpreted in favour of the adhering party.

[22] In interpreting a contract such as the one between the Payer and the Tutor, the courts have a duty to determine its true nature and to ensure that it meets the requirements of the Civil Code. This is what I wrote in my article:⁵

2.3. Proof of performance of a contract of employment

[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 Décarry 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

⁵ *Ibid.*, p. 2:62, footnotes omitted.

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:

[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:

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

[Emphasis added.]

[99] 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. The *Cour de cassation* has adopted an approach similar to the Canadian one:

[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

[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. 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*.

[101] Since the EIA generally authorizes the payment of employment insurance benefits only to employees who lose their employment, 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.

[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 a 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.

[23] Here, a close examination of the provisions of the Contract leads me to believe that its true nature is that of a contract of employment. Although the intention of the Payer is clear — it intended to have a contract for services — many of the stipulations regarding the conditions under which the work was to be performed are more consistent with a contract of employment. First, the provisions of the contract reveal that the Payer had the power to direct and control the work performed by the Tutor. In my view, one of the strongest stipulations disclosing such a power is the following: "Under the authority of the 'Corporation'⁶, the 'Tutor' is expected to accomplish the following results". (Emphasis added.)

[24] In addition to this general statement, there are the following:

⁶ It should be noted that this particular point was not made when I gave my reasons orally.

- tutors had to "respect tutoring times provided by" the Payer
- tutors could modify tutoring schedules only "in accord with the Payer"
- tutors had to provide tutoring "based on the Continuums and resources offered by" the Payer
- tutors were to provide academic progress reports "based on the [Payer's] Continuums"
- tutors were required to contact an authorized tutor of the Payer to replace them and to call one of the Payer's learning coordinators to confirm the change
- students were never to be left unsupervised
- tutors were required to wear their name tag at all times while on school property
- "the last five minutes of tutoring [were to] be reserved for a recap of the tutoring session"
- "progress reports [had to] be done on a timely basis"
- "jeans [were] not permitted"
- "a learning coordinator [was] assigned to [a tutor's] tutoring location [and] their role [was] . . . to supervise the operations of the tutoring programs"
- "physical and verbal aggressiveness [of tutors would] not be tolerated under any circumstance[s]"

[Emphasis added.]

[25] In addition to these contractual provisions, there is the direct evidence that the power of direction and control was exercised by the Payer. Mr. Kuperhause acknowledged that parents could complain to the Payer about the quality of the services performed by the tutors and that the Payer exercised direction and control over the tutors in giving them instructions as to how to improve their work. Given that it never received complaints about the Tutor's work, the Payer never had to exercise this power in relation to her. However, it had the power to do so should there have been any complaints, as was done with respect to other tutors.

[26] Other evidence of the power of direction or control that the Payer exercised over the Tutor is the fact that through its learning coordinator it controlled the presence of the Tutor and made annotations on her daily written reports. Where, as was the case in *Hôpital juif de réadaptation c. M.R.N.*, 2005 CCI 260, a decision of mine, a worker reports to a supervisor to find a solution for a particular problem and

follows the directions given by that supervisor, that is yet further direct evidence of the power of direction being exercised by a payer over a worker.

[27] In addition to the aforementioned direct evidence of the direction and control exercised by the Payer over the work of the Tutor, there is circumstantial evidence disclosing many indicia of subordination.⁷ One of these indicia is the integration of the work of the Tutor into the business of the Payer. Three quarters of the services of the Tutor were provided on the premises of the Payer. She was supplied with all the material that was required for her work because she had access to what is described as a "library of games and tools". It is true that the Tutor had the right to provide her own games and tools, and she did, but the fact is that the Payer had a library of games and tools and this is consistent with the fact that this Tutor was integrated into its business.

[28] Another indication of integration, and therefore of subordination, is the fact that the clients belonged to the Payer. In addition, the Tutor was subject to a non-competition clause and this has been accepted by the courts in the past as an indication of the existence of a contract of employment.⁸

[29] It is true that the Tutor was not working 35 hours a week for the Payer. However, this is because she was a student attending university. There is no indication either that she was working for somebody else. In law, you can be a part-time employee who works only for short periods of time.

[30] In conclusion, the Payer did not discharge its burden of showing that the Minister's decision was wrong. On the contrary, the Minister was right in concluding that the Payer and the Tutor had entered into a contract of employment and that she held insurable employment during the relevant period. Therefore, the Payer's appeal is dismissed.

Signed at Ottawa, Canada, this 9th day of November 2005.

"Pierre Archambault"

Archambault, J.

⁷ For a more detailed discussion of circumstantial evidence, see my article (supra) at par. 106 ff.

⁸ *Ibid.*, at p. 2:77, par. 110.

CITATION: 2005TCC461
COURT FILE NO.: 2004-582(EI)
STYLE OF CAUSE: TEACH & EMBRACE CORPORATION
AND M.N.R.
PLACE OF HEARING: Montreal, Quebec
DATE OF HEARING: June 9, 2005
REASONS FOR JUDGMENT BY: The Honourable Justice Pierre Archambault
DATE OF JUDGMENT: November 9 , 2005

APPEARANCES:

Agent for the Appellant: Robert Leitman

Counsel for the Respondent: Nathalie Labbé

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario