Docket: 2016-2865(EI)

BETWEEN:

RITA VENTI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

HANNES LAMOTHE,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 30, 2019, at Montréal, Quebec.

Before: The Honourable Justice Dominique Lafleur

Appearances:

Agent for the appellant:	Patrick Demoulin-Dorval
Counsel for the respondent:	Emmanuel Jilwan
Counsel for the intervener:	Lucie Roubin

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue rendered on February 2, 2016, determining that the appellant, Rita Venti, did not hold insurable employment during the period from June 24, 2014, to June 23, 2015,

when she worked for Hannes Lamothe, is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Québec, Quebec, this 27th day of June 2019.

"Dominique Lafleur"

Lafleur J.

Citation: 2019 TCC 142
Date: 20190627
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REASONS FOR JUDGMENT

Lafleur J.

I. BACKGROUND

[1] Rita Venti (Ms. Venti or the appellant) is appealing from the decision of the Minister of National Revenue (the Minister) of June 9, 2016, confirming the decision of February 2, 2016, of the Canada Revenue Agency (the CRA).

[2] According to the Minister's decision, Ms. Venti, when she worked as an aesthetician for Hannes Lamothe, owner and operator of Auberge & Nordic Spa Beaux Rêves, during the period from June 24, 2014, to June 23, 2015 (the period), did not hold insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the Act). The Minister therefore concluded that, since the requirements for a contract of service to exist had not been met, there was no employer–employee relationship between Mr. Lamothe and Ms. Venti.

[3] According to the appellant, the facts show rather that she had been employed by Mr. Lamothe under a contract of service, and therefore held insurable employment within the meaning of the Act during the period.

[4] According to the respondent's position and that of Mr. Lamothe, who took part in the hearing as an intervener, Ms. Venti's appeal should be dismissed because the facts clearly show that Ms. Venti was bound to Mr. Lamothe by a contract for services and not a contract of service and because she therefore acted as a [TRANSLATION] "self-employed person" when she provided aesthetic treatment services on the premises of the Auberge.

[5] Also, as part of the complaint for dismissal not made for good and sufficient cause filed by Ms. Venti under section 124 of the *Act respecting labour standards* (the ALS), the Tribunal administratif du travail (Division des relations du travail) recognized that, in performing her duties as an aesthetician at the Auberge, Ms. Venti was a [TRANSLATION] "dependent contractor whose relationship with the Auberge was characterized by a relationship of legal subordination" (decision dated August 15, 2017, paragraph 112). Ms. Venti was therefore considered an "employee" within the meaning of the ALS and was able to avail herself of the recourse against dismissal not made for good and sufficient cause.

II. THE ISSUE

[6] The issue is whether Ms. Venti held insurable employment while working for Mr. Lamothe as an aesthetician within the meaning of paragraph 5(1)(*a*) of the Act during the period. To answer this question, what must be determined is whether the requirements for a contract of service (or contract of employment under the *Civil Code of Québec* (C.C.Q.)) were met.

III. FACTS

1. Background

[7] Mr. Lamothe has been the owner of the Auberge for more than 20 years. The services offered there are the following: accommodations and dining, body treatments, including massages and aesthetic services, and activities such as snowmobiling, horseback riding, dog sledding and golf. It also includes a Nordic spa.

[8] Mr. Lamothe testified that he had worked with a hundred or so therapists as part of the operations of the Auberge and that they had always been hired as self-employed persons. The agreements entered into with these therapists were similar to the one entered into with Ms. Venti. Mr. Lamothe also stated that the CRA concluded that these individuals all had self-employment status.

[9] Ms. Venti was trained in aesthetic treatments at a private school in Belgium. She began working at the Auberge in January 2008. In 2010, she signed a contract for services with Mr. Lamothe like the one signed by all the other therapists at the Auberge, which stated that she was a self-employed person. Among other things, this contract provides details on the service fees payable to the therapist for the various treatments offered and the fees the latter must pay for room rental and equipment maintenance. The contract also includes various appended directives to which Ms. Venti was to adhere regarding invoicing timeframes and methods, deadlines for informing the Auberge of her availability, room upkeep, conditions for reimbursing an unsatisfied customer, no smoking and tips.

[10] Ms. Venti also did housekeeping at the Auberge and at Mr. Lamothe's personal residence. In that respect, the CRA considered her as an employee of Mr. Lamothe.

[11] Ms. Venti had attempted to open a beauty salon at her home, but the municipality did not allow such a business in a private residence. She had also printed business cards, but never used them.

[12] Mr. Lamothe let her go in June 2015, after allegations of theft. Ms. Venti took this very hard and even suffered serious health problems as a result of these events.

2. Conditions, treatments and remuneration

[13] Ms. Venti testified that she was supposed to be available on Sundays, Mondays and Tuesdays from 8:30 a.m. to 8:30 p.m. to provide beauty treatments at the Auberge. The treatments were provided to either overnight guests of the Auberge or individuals who came to the Auberge for treatments only. Another aesthetician was available the rest of the week. Appointments for the various treatments were made by the Auberge. The day before the days on which Ms. Venti was available, the Auberge would contact her to confirm the treatments to be provided the following day.

[14] According to Ms. Venti, she was also supposed to be available on the other days of the week in case a customer requested duo treatments. Therefore, she says that it was impossible for her to work elsewhere. If she could not provide her services, Ms. Venti could have the other aesthetician replace her by first asking Mr. Lamothe, but that never happened. However, Ms. Venti did replace the other aesthetician from time to time.

[15] According to Mr. Lamothe, Ms. Venti and the other aesthetician split the seven-day week between them. If Ms. Venti had indicated that she was available on a given day and someone requested treatments, Ms. Venti had to come to the Auberge at the agreed time. Otherwise, the agreement would not work. Ms. Venti was not required to be on-site, but she had to be available in case her services were required. Mr. Lamothe testified that he tried to accommodate the therapists and that Ms. Venti could provide her services elsewhere. Ms. Venti could have someone replace her without prior authorization, as long as the replacement was qualified and was familiar with how things were done at the Auberge. However, the Auberge had to be informed of the replacement.

[16] Ms. Venti testified that she had to arrive 20 to 30 minutes before the scheduled appointment time in order to prepare the room; she then had to stay to clean up and do the laundry. According to Ms. Venti, one-hour treatments normally required two hours of her time. However, according to Mr. Lamothe, since the amount of time between treatment sessions is 15 minutes, Ms. Venti's calculation of time is not accurate.

[17] According to Ms. Venti, all the equipment necessary was provided by Mr. Lamothe and was on-site at the Auberge, except for the music, which she brought on her iPod. When providing treatments, she used the method she had learned during her studies. Mr. Lamothe testified that all the equipment for aestheticians was provided by the Auberge, except small instruments, such as files, scissors and scrubbing tools, which were provided by the aesthetician.

[18] During a three-month period in 2014, Ms. Venti worked at a school board on the days she was available at the Auberge after having obtained Mr. Lamothe's approval. She was a replacement at the school board from 11 a.m. to 3 p.m.

[19] According to Mr. Lamothe, Ms. Venti could increase or decrease her availability. On the 15th of every month, she was supposed to indicate her availability for the following month. Ms. Venti had already asked to reduce her availability so that she could fulfil her contract as a replacement at the school

board and also sometimes made such a request so she could perform her housekeeping contracts.

[20] Ms. Venti was paid a flat fee, depending on the type of treatment provided. A sum of $5 had to be deducted from the fixed price of treatments and paid to Mr. Lamothe to cover room rental and equipment costs. Ms. Venti also received a 15% commission on products she sold. These products were supplied by the Auberge. If Ms. Venti did not provide treatments, she was not paid. Ms. Venti had no leave or vacation, nor any insurance whatsoever when she worked at the Auberge.

[21] Ms. Venti testified that she did not invoice Mr. Lamothe, but instead submitted the original sales receipts on which she wrote the treatments provided, products sold and prices and that she kept copies. She was not registered for tax purposes and so did not charge any.

[22] Ms. Venti was paid every two weeks, after submitting the sales receipts. Mr. Lamothe made no source deductions on the amounts paid to Ms. Venti and issued no records of employment to her.

[23] Since at least 2011, Ms. Venti had been stating on her tax returns that the income from her activities at the Auberge was business income. Ms. Venti also claimed various expense deductions in her income calculations.

[24] On the recommendation of Mr. Lamothe, who had told her that this could be beneficial for the Auberge, Ms. Venti took a hot stone massage course. Ms. Venti spent $190 on this course. Ms. Venti was never reimbursed for the costs of travelling from her home to the Auberge. Nor was she paid for travel time.

[25] In 2010, Mr. Lamothe asked that she attend a trade show once a year at the Palais des congrès in Montréal to represent the Auberge and sell packages there. She was not paid for doing this or reimbursed for travel expenses. Mr. Lamothe told her that this would be good for her because she could get more aesthetic treatment appointments.

[26] According to Ms. Venti, Mr. Lamothe supervised her; he asked that she arrive earlier and that she provide excellent customer service. To check service quality, Mr. Lamothe asked to receive treatments without paying her. Mr. Lamothe gave her instructions on how to do her job. She could not choose the customers. She had to report to Mr. Lamothe or her aesthetician colleague.

IV. THE ACT AND CASE LAW

[27] Section 5 of the Act explicitly states what insurable employment is and includes, in the definition of this expression, employment performed under a contract of service or apprenticeship:

> **5(1) Types of insurable employment** — 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;
>
> . . .
>
> **5(1) Sens de *emploi assurable*** — Sous réserve du paragraphe (2), est un emploi assurable :
>
> *a*) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière;
>
> […]
>
> [Emphasis added.]

Nowhere does the Act define a "contract of service."

[28] Since the facts in the case at hand took place in Quebec, we must analyze the relationship between Ms. Venti and Mr. Lamothe pursuant to private law applicable in Quebec.

[29] Therefore, the criteria set out in the C.C.Q. must be applied to determine whether we are dealing with a contract of service (or contract of employment) or a contract of enterprise or for services. Desjardins J. states as follows in *NCJ Educational Services Limited v. M.N.R.* [*sic*], 2009 FCA 131:

> [49] Since paragraph 5(1)(*a*) [of] the *Employment Insurance Act* does not provide the definition of a contract of services, one must refer to the principle of complementarity reflected in section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-2, which teaches us that the criteria set out in the *Civil Code of Québec* must be applied to determine whether a specific set of facts gives rise to a contract of employment. . . .

[30] The relevant provisions of the C.C.Q. are contained in articles 2085 and 2086 as concerns a contract of employment and in articles 2098, 2099 and 2101 as concerns a contract of enterprise or for services:

2085. A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.	**2085.** Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre personne, l'employeur.
2086. A contract of employment is for a fixed term or an indeterminate term.	**2086.** Le contrat de travail est à durée déterminée ou indéterminée.
. . .	[…]
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 another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him.	**2098.** Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.
2099. The contractor or the provider of services is free to choose the means of performing the contract and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client.	**2099.** L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et il n'existe entre lui et le client aucun lien de subordination quant à son exécution.
. . .	[…]
2101. Unless a contract has been entered into in view of his personal qualities or unless the very nature of the contract prevents it, the contractor or the provider of services may obtain the assistance of a third person to perform the contract, but its performance remains under his supervision and responsibility.	**2101.** À moins que le contrat n'ait été conclu en considération de ses qualités personnelles ou que cela ne soit incompatible avec la nature même du contrat, l'entrepreneur ou le prestataire de services peut s'adjoindre un tiers pour l'exécuter; il conserve néanmoins la direction et la responsabilité de l'exécution.

[Emphasis added.]

[31] Therefore, for a contract of service to exist within the meaning of the Act (or contract of employment within the meaning of the C.C.Q.), the following three constituent elements are required (*9041-6868 Québec Inc. v. M.N.R.)* [*sic*], 2005 FCA 334, paragraph 11):

i. The performance of work;

ii. Remuneration; and

iii. A relationship of subordination.

[32] The relationship of subordination (or the criterion of control or direction) is the determining factor that distinguishes a contract of employment from a contract for services under Quebec law. As Archambault J. states, "[t]o determine whether a contract is a contract of employment or a contract for services, a court has no choice but to determine whether there is a relationship of subordination" (*Beaucaire v. M.N.R.*, 2009 TCC 142, paragraph 24).

[33] In the requisite analysis, consideration must also be given to articles 1425 and 1426 of the C.C.Q., which provide that the common intention of the parties must be sought:

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.	**1425.** Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.
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.	**1426.** On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.

[34] In *Grimard v. Canada*, 2009 FCA 47 (*Grimard*), the Federal Court of Appeal states that it is not wrong to draw on the criteria established by the common law in analyzing the legal nature of a work relationship in order to determine the existence of a relationship of subordination, regardless of the fact that the ruling must be made under Quebec civil law.

> [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.]

[35] However, I am of the opinion that the comments made by Décary J. in *9041-6868 Québec Inc. v. M.N.R.*, *supra* (paragraph 12), are still relevant in that factors other than direction or control, which in Quebec law is the determining factor, will be merely indicators to be considered in such a determination.

[36] In *1392644 Ontario Inc. (Connor Homes) v. M.N.R.* [*sic*], 2013 FCA 85, paragraphs 39 and 40 (Connor Homes), Mainville J. describes a two-step method for answering the central question, which is whether the person who has been engaged to perform the services is performing them as a person in business on their own account (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, paragraph 47).

[37] In my view, this two-step method can also apply in Quebec if the necessary adjustments described below are made.

[38] Firstly, the subjective intention of each party to the relationship must be determined; to do this, we must examine the contract or the actual behaviour of the parties. This requires examining the invoices and verifying whether a registration for tax purposes was made and whether the person filed her tax return as an independent contractor.

[39] It is clear that under Quebec law, considering articles 1425 and 1426 of the C.C.Q., *supra*, this first step is essential. In the interpretation of the contract between Ms. Venti and Mr. Lamothe, the common intention of the parties will have to be sought and, to do so, the circumstances under which the contract was entered into and the uses will also have to be taken into consideration.

[40] Secondly, what must be determined is whether the objective reality confirms the subjective intention of the parties. More specifically, it is necessary to determine whether the facts are consistent with the declared intention of the

parties. According to Mainville J. in *Connor Homes*, *supra*, in this step we must refer to the criteria established by the case law, that is, control, ownership of tools, chance of profit and risk of loss, and integration in the payer's business. It is in this second step that I will have to determine whether there was a relationship of subordination between Ms. Venti and Mr. Lamothe.

V. ANALYSIS

1. Decision of the Tribunal administratif du travail under the ALS

[41] As stated above, the Tribunal administratif du travail (Division des relations du travail) recognized that, as part of her duties as an aesthetician at the Auberge, Ms. Venti was a [TRANSLATION] "dependent contractor whose relationship with the Auberge was characterized by a relationship of legal subordination" (decision dated August 15, 2017, paragraph 112).

[42] According to the appellant, in light of this decision, I should conclude that she was an employee of Mr. Lamothe for the purposes of the Act and that she held insurable employment during the period in accordance with this act.

[43] I asked the parties for submissions as to whether the Court should act in judicial comity with respect to the decision of the Tribunal administratif du travail.

[44] According to the respondent and the intervener, the Court is not bound by this decision. Moreover, the principle of judicial comity is not applicable because the Tribunal administratif du travail is a lower jurisdictional level than the Court, which is continued as a superior court of record (section 3 of the *Tax Court of Canada Act*), and the applicable legislative provisions are different.

[45] I am of the opinion that the position of the respondent and the intervener should be favoured. The Tribunal administratif du travail is, in fact, of a lower jurisdictional level than the Court. The applicable legislative provisions are also different. The Tribunal administratif du travail was supposed to determine whether Ms. Venti was an "employee" for the purposes of the ALS. The term "employee" is defined in section 1 of the ALS and means a person who works for an employer and who is entitled to a wage, as well as a dependent contractor. The concept of "employee" for the purposes of the ALS is therefore different from that which the Court must interpret for the purposes of the Act and the C.C.Q. In the case at hand, the aim is to determine whether Ms. Venti and Mr. Lamothe were bound by a contract of employment within the meaning of the common law during the period.

In that regard, the dissenting judges in the recent Supreme Court of Canada decision in *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28, state as follows:

> [127] By analogy, it is helpful to note that there are employment and labour statutes under which the conditions of employment of persons who are employees within the meaning of the *Civil Code* can apply to "dependent" contractors in certain circumstances (*Act respecting labour standards*, s. 1(10)); *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 3(1); *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 1(1); see, for example *Dicom*, at paras. 14-16; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 (CanLII), 315 D.L.R. (4th) 129, at paras. 31-36). Under such statutes, a person who has work done by another person can be treated as an employer even in the absence of a contract of employment under the *Civil Code*, but a certain degree of control or economic dependence is nonetheless required. In our view, this is also the minimum relationship required under the *ACAD* for a "professional employer" to exist. However, it is not essential to decide here whether a contract of employment within the meaning of the *Civil Code* is necessary for this purpose.

[Emphasis added.]

2. Relationship between Ms. Venti and Mr. Lamothe

[46] I will analyze the relationship between Ms. Venti and Mr. Lamothe using the two-step method proposed by Mainville J. in *Connor Homes*, *supra*, making the necessary adjustments.

[47] For the following reasons, I conclude that Ms. Venti was bound to Mr. Lamothe under a contract for services and not a contract of employment. During the period when Ms. Venti worked as an aesthetician, she did not hold insurable employment with Mr. Lamothe within the meaning of paragraph 5(1)(*a*) of the Act.

Subjective intention of each party to the relationship

[48] The evidence showed, on the balance of probabilities, that Ms. Venti and Mr. Lamothe each had the subjective intention of being bound by a contract for services and not by a contract of employment.

[49] The contract entered into by Ms. Venti and Mr. Lamothe states that Ms. Venti was not an employee of the Auberge, but rather a self-employed person. The contract provides for a flat-rate payment for treatments, depending on the type

of services provided by Ms. Venti, from which payment of $5 was to be deducted for room rental costs and for equipment and facility maintenance. Invoices were to be submitted to the Auberge so that Ms. Venti could be paid. The appendix to the contract setting out certain obligations does not change my conclusion in this regard, as these are rules for the sound management of the Auberge.

[50] The testimony given by Mr. Lamothe at the hearing was clear. He intended to hire Ms. Venti as a self-employed person and not as an employee.

[51] Ms. Venti, meanwhile, argued that her intention was to be considered as an employee. However, for the reasons set out below, I am of the opinion that the evidence rather showed, on the balance of probabilities, that her intention was to be considered a self-employed person and not an employee.

[52] At the hearing, Ms. Venti claimed that her recollection of the contract was vague, but did admit to signing it in 2010. However, according to Ms. Venti, this contract could not have a great deal of value as regards her because the term [TRANSLATION] "massage therapist" is used to refer to her, whereas she is not a massage therapist. I cannot accept this argument. The Court must seek the common intention of the parties to the contract rather than adhere to the literal meaning of the words used (article 1425 of the C.C.Q.). In addition, even if I were to agree with the appellant's argument that this contract does not apply to her because she is not a massage therapist, or because it dates back to 2010 and was not renewed, or because the absence of initials on all the pages renders it invalid, it is my view that the evidence shows that the parties had entered into a contract, be it written or verbal, showing that Ms. Venti was a self-employed person.

[53] In her testimony, Ms. Venti stated that she did not know the meaning of the expression [TRANSLATION] "self-employed person" used in the contract because she is European and that she instead considered herself as an employee. This part of Ms. Venti's testimony is not plausible. The same sentence of the contract that requires Ms. Venti to provide her services as a self-employed person specifically states that she is not an employee of the Auberge. Also, Ms. Venti began to provide aesthetic services at the Auberge in 2008, but the contract was not signed until 2010. Therefore, it appears to me that Ms. Venti would have had ample time to find out the difference between status as an employee and status as a self-employed person before signing the contract.

[54] Although Ms. Venti testified that she did not submit invoices, but rather sales receipts, copies of invoices were produced at the hearing. These documents,

prepared by Ms. Venti, were entitled [TRANSLATION] "invoice" and look like invoices. I therefore do not see how Ms. Venti can claim that she did not submit invoices for the treatments she provided as an aesthetician.

[55] The evidence also showed that Ms. Venti filed her tax returns for the period as a self-employed person. Moreover, since at least 2011, she deducted, in her income calculations, expenses such as management and administration fees, motor vehicle expenses, office expenses, supplies, telephone, electricity, heat and water, and depreciation. At the hearing, Ms. Venti testified that she did not remember the type of expenses she deducted and that it is on the advice of her accountant that these expenses were deducted in her income calculations. Ms. Venti testified that, since she knew nothing about tax returns, she relied entirely on her accountant; the latter prepared her tax returns and submitted them to the tax authorities without Ms. Venti even checking them. Even if I were to accept the fact that Ms. Venti knows nothing about tax returns, this is no way changes the picture Ms. Venti painted for the tax authorities: she produced her tax returns indicating that she had earned business income rather than employment income, and she claimed expense deductions in her income calculations. Ms. Venti cannot hide behind her accountant to change how she painted her situation in her tax returns.

[56] The evidence showed that Ms. Venti was paid every two weeks after submitting invoices. Mr. Lamothe made no source deductions on the amounts paid to Ms. Venti and did not issue any records of employment to her. This situation was different from the one where Ms. Venti worked for the school board in 2014, for which she received a record of employment.

[57] Lastly, the evidence showed that Ms. Venti had no employee benefits, such as a pension plan or dental and medical insurance.

Objective intention or relationship of legal subordination

[58] The evidence showed, on the balance of probabilities, that Mr. Lamothe did not have the power to control the work performed by Ms. Venti and, therefore, that there was no relationship of legal subordination between Ms. Venti and Mr. Lamothe. The following elements show this absence of control or direction by Mr. Lamothe.

[59] Ms. Venti was the only one responsible for the manner of performing the work. She is a qualified aesthetician with specific expertise. Neither Mr. Lamothe nor the Auberge directly supervised the work performed by Ms. Venti. As stated

by the Federal Court of Appeal in *Grimard*, *supra*, we must not forget the distinction between the employer's right to control the performance of the work and the client's right to control the quality and outcome of the work (*Grimard*, *supra*, paragraph 31). Mr. Lamothe controlled neither the treatments nor the execution of the work performed by Ms. Venti, but rather the quality of the services provided by Ms. Venti to Auberge customers. Therefore, the contract included some appended obligations to which Ms. Venti was to adhere. In that respect, it notably provided for non-payment of the therapist if, due to a serious failure on the part of the therapist, a customer insisted on being reimbursed for the treatments received. These obligations seem entirely appropriate as part of the provision of treatments, such as aesthetic ones. Mr. Lamothe offered Ms. Venti a pool of customers and, in return, the latter undertook to fulfil the obligations set out in the contract and appendix. The evidence reveals that Ms. Venti was completely autonomous in performing her work, so to speak.

[60] Ms. Venti stated that Mr. Lamothe supervised her; he asked that she arrive earlier and that she provide excellent customer service. These elements are not indicative of control or direction exercised by an employer as part of a contract of employment. Mr. Lamothe merely ensured the quality of the services and the environment in which they were provided; he did not control the services as such. Ms. Venti testified at the hearing that she had taken professional aesthetics training in Europe and that she used the knowledge she acquired there to provide services. Ms. Venti was also supposed to indicate her availability in advance to allow Mr. Lamothe to schedule the treatments offered to overnight guests of the Auberge or individuals who came to the Auberge for treatments only. This is not a characteristic of control or direction exercised by an employer. Mr. Lamothe was tied to Ms. Venti's availability in offering aesthetic treatments to his customers. Ms. Venti was also allowed to hold a position as a replacement at a school board for a certain amount of time, which is indicative of considerable flexibility as to her schedule at the Auberge.

[61] In addition, the evidence showed that Ms. Venti had the option of informing Mr. Lamothe ahead of time that she would be replaced by another aesthetician during her periods of availability, but this never occurred.

[62] The purpose of the contract between Ms. Venti and Mr. Lamothe was the performance of specific tasks as an aesthetician based on appointments with customers of the Auberge and on Ms. Venti's availability, indicated by her in advance. The evidence showed that Ms. Venti was not required to remain at the Auberge when the treatments were finished. She could come and go as she pleased,

depending on the appointments scheduled for the day. The evidence also showed that she was not paid if she did not provide treatments.

[63] The invoices described above show the absence of a relationship of legal subordination between Ms. Venti and Mr. Lamothe as part of their agreement for the delivery of aesthetic services.

[64] The other criteria established by the common law, which do not constitute indications of supervision under Quebec law, do not alter this conclusion.

[65] The ownership of tools indicator is fairly neutral. The contract provided that Ms. Venti was supposed to pay $5 per treatment session for room rental, facility maintenance and equipment costs, and that she was only supposed to supply small instruments, such as nail files. Given the difficulty of moving the equipment, it is completely normal for the Auberge to have provided Ms. Venti with the necessary tools.

[66] The chance of profit and risk of loss indicators are also fairly neutral, or are ever so slightly conducive to characterizing the contract between Ms. Venti and Mr. Lamothe as a contract for services. Since Ms. Venti received a 15% commission on product sales, she could increase her income by promoting these products. Ms. Venti had no guaranteed income, since her income fluctuated based on the treatments provided. However, the risk of loss was rather slim, as she did not incur expenses if she did not provide treatments. In addition, even though Ms. Venti was supposed to pay for training and incurred some travel expenses, it is unlikely that these expenses could have exceeded her income.

[67] Lastly, the integration indicator is also fairly neutral. On her days of availability, Ms. Venti was supposed to be available from 8:30 a.m. to 8:30 p.m. As stated above, she could be absent during her hours of availability, provided that she was there for the scheduled treatment time. She therefore could have provided aesthetic services at other locations, as long as she was at the Auberge at the scheduled time to provide treatments.

VI. CONCLUSION

[68] On the balance of probabilities, during the period, Ms. Venti did not hold insurable employment while working for Mr. Lamothe as an aesthetician within the meaning of paragraph 5(1)(*a*) of the Act. The requirements of the contract of service were not met, given the parties' intention to be bound by a contract for

services and given the absence of control or direction by Mr. Lamothe over Ms. Venti's work as an aesthetician, such that there was no relationship of legal subordination between them.

[69] For these reasons, Ms. Venti's appeal is dismissed and the Minister's decision is confirmed. Although Ms. Venti incurred some expenses as part of this appeal, given its dismissal and the absence of specific provisions in the *Tax Court of Canada Rules of Procedure respecting the Employment Insurance Act* permitting the Court to allow costs, no costs will be allowed.

Signed at Québec, Quebec, this 27th day of June 2019.

"Dominique Lafleur"

Lafleur J.

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COURT FILE NO.:	2016-2865(EI)
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DATE OF HEARING:	April 30, 2019
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