Docket: 2018-1773(EI)

BETWEEN:

SOPHIE PAYETTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

FÉDÉRATION DES CAISSES DESJARDINS DU QUÉBEC,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 24 and 25 and November 3, 2022
at Montreal, Quebec

Before: The Honourable Justice Gabrielle St-Hilaire

Appearances:

Agent for the Appellant:	Mercedes Diaz
Counsel for the Respondent:	Julien Dubé-Senécal
Counsel for the Intervener:	Simon-Pierre Hébert

JUDGMENT

In accordance with the attached reasons for judgment, the appeal under the *Employment Insurance Act* (the EIA) is dismissed, without costs, and the decision rendered by the Minister of National Revenue on May 4, 2018, that the appellant did not hold insurable employment under paragraph 5(1)(a) of the EIA during the period of January 1, 2017, to May 17, 2016, is affirmed.

Signed at Ottawa, Canada, this 20th day of January, 2023.

"Gabrielle St-Hilaire"

St-Hilaire J.

Citation: 2023 TCC 9
Date: 20230120
Docket: 2018-1773(EI)

BETWEEN:

SOPHIE PAYETTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

FÉDÉRATION DES CAISSES DESJARDINS DU QUÉBEC,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

St-Hilaire J.

I. Introduction

[1] Sophie Payette (the appellant) is appealing the decision rendered by the Minister of National Revenue (the Minister) on May 4, 2018 that she did not hold insurable employment with the Fédération des Caisses Desjardins du Québec (the Fédération) during the period from January 1, 2016, to May 17, 2016 (the relevant period).

[2] Between 1988 and 1999, the appellant held various positions at the Caisse Desjardins in Anjou. She then took an opportunity to work as a trainer with the Fédération for two or three years, after which point she went back to work at a Caisse Desjardins in Montreal. In 2001, following a branch merger, the appellant's position was eliminated. Although the appellant had put in a request for a coordinator position at a branch, she decided to become a mortgage consultant with the Fédération because she found this type of work very interesting. At the beginning of her job search process, the appellant had approached a former colleague at the Fédération

who was a mortgage consultant, and this person put her in contact with an executive who explained the working conditions to her. The appellant worked as a mortgage consultant from October 15, 2001, until May 17, 2016, at which point the Fédération terminated her contract.

[3] Generally, in her role as mortgage consultant, the appellant approached potential clients to offer them mortgage financing and encourage them to apply for a loan through Caisses Desjardins. She was paid entirely on commission. The appellant sought out prospective clients through real estate brokers, credit unions and contractors, especially in the new build market. She prepared pre-approval files and mortgage loans before they were approved by the Fédération.

[4] In March 2017, after her contract was terminated, the appellant requested a ruling as to her worker status for the purposes of the *Employment Insurance Act* (S.C. 1996, c. 23) (the EIA). The Minister's decision that the appellant did not hold insurable employment is the matter in dispute in this case.

II. Preliminary question – motion

[5] On January 5, 2021, the appellant submitted a motion for the Court to set aside the Minister's decision on the grounds that the Fédération's appeal under section 91 of the EIA had been served outside the prescribed time limit and was therefore illegal. The Associate Chief Justice decided that this motion would be heard by the trial judge.

[6] It should be noted that, following the appellant's request as to the insurability of her employment under section 90 of the EIA, the Canada Revenue Agency (CRA) rendered an initial decision on May 18, 2017, that the appellant's employment with the Fédération was insurable employment. Section 91 of the EIA provides that an appeal from such a ruling may be made by any person concerned within ninety (90) days after the person is notified of the ruling.

[7] On November 3, 2017, the Fédération wrote to the CRA to indicate that it was appealing the decision rendered on May 18, 2017, and was requesting to be relieved of their failure to appeal the decision within the ninety (90)-day time limit. The Fédération wrote the following:

> [TRANSLATION] First, we are asking that our client, the Fédération, be relieved of the failure to appeal this decision within 90 days of being notified. It was only after the appeal of Sylvain Marceau of the Canada Revenue Agency in mid-

> October 2017 requesting the regularization of Sophie Payette's status, that our client became aware of the existence of this correspondence and the lack of follow-up.
>
> We would also like to underscore that our client has always intended to challenge this decision, as indicated in its objection filed in an identical case that is currently being reviewed by the Appeals Division.
>
> In this context, we respectfully submit to you that our application for leave to appeal should be admissible and our client should be relieved of its failure to challenge the decision within the time limit prescribed by the Act. Otherwise, our client would experience serious and irreparable harm.

[8] According to the notes of a phone conversation on December 5, 2017, between the CRA and a representative of the Fédération, the letter informing the Fédération of the decision dated May 18, 2017, was apparently misfiled, specifically filed in a file involving a similar appeal. In a letter dated December 7, 2017, the CRA advised the Fédération that based on their explanations, they had concluded that the appeal had been received within the 90-day time limit following the notification of the decision.

[9] On May 4, 2018, after the appeal was dealt with, the Minister overturned the decision dated May 18, 2017, concluding that the appellant did not hold insurable employment. The appellant appealed her case before this Court. On October 22, 2019, Mr. Justice Tardif allowed the appeal, thereby overturning the Minister's decision and concluding that the appellant had held insurable employment (*Payette v. M.N.R.*, 2019 TCC 235). The Fédération appealed this decision, and on October 26, 2020, the Federal Court of Appeal referred the decision back to this Court for reconsideration by another Court judge (*Fédération des caisses Desjardins du Québec v. Canada (National Revenue)*, 2020 FCA 182).

[10] After hearing the parties, the Court ruled on the motion. I note that the motion submitted in January 2021 requesting that the Minister's decision dated May 4, 2018, be overturned came after the many steps mentioned above. According to the appellant, given that the Fédération received the letter informing them of the decision dated May 18, 2017, it received the notification and did not appeal within the prescribed time limit. The appellant maintains that the CRA overstepped its rights in accepting the appeal that was submitted over ninety (90) days after the date of the decision.

[11] According to the intervener, the appellant should have formally challenged the CRA's decision that was communicated in their letter dated December 7, 2017,

in which they concluded that the appeal had been submitted within the prescribed time limit, and that it is now too late. According to the respondent, the appellant could have applied for judicial review of the decision to accept the notice of appeal from the Fédération, in which case the case would have been heard by the Federal Court. After hearing the parties, the Court ruled on the motion.

Provision of the motion

[12] It is worth briefly reiterating the context of the motion. The parties agree that the notice of appeal was submitted over ninety (90) days after the letter dated May 18, 2017, informing the Fédération of the decision reached as to the insurability of the employment in question. Following the explanations provided by the Fédération, in a letter dated December 7, 2017, the CRA informed the Fédération that they were accepting that their notice of appeal had been received within the ninety (90)-day time limit following the notification of the decision. The purpose of the appellant's motion is to ask this Court to overturn this decision.

[13] The first question is what the Court's jurisdiction is in deciding the validity of the CRA's decision to accept the notice of appeal from the Fédération dated November 3, 2017. In my opinion, this decision is a matter of the Minister's discretion that must be challenged before the Federal Court in the form of a judicial review. It appears that the agent for the appellant attempted to challenge this decision several times, but not in the form of judicial review. Given the applicable rules of procedure, it is too late to apply for judicial review before the Federal Court. I note that since this decision was made by the CRA, a great many things have happened in this case, specifically a hearing on the merits before Tardif J. of this Court, an appeal before the Federal Court of Appeal and a decision of the Federal Court of Appeal referring this case back before this Court to be heard again by another judge. Under these circumstances, the motion was dismissed, and the appeal was heard on the merits.

III. Issue

[14] The issue is whether the appellant held insurable employment with the intervener for the relevant period pursuant to section 5 of the EIA. More specifically, this involves determining whether she performed her work as a mortgage consultant with the intervener under a contract of employment (and consequently as an employee) or under a contract for services (and consequently as an independent contractor).

IV. Applicable law

[15] Paragraph 5(1)(a) of the EIA specifies that "insurable employment" includes "employment in Canada by one or more employers, under any express or implied contract of service" without, however, defining a contract of service. Paragraph 5(1)(a) reads as follows:

> **5(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; [. . .]
>
> [Emphasis added]

[16] Since the facts in this case occurred in Quebec, it is essential to rely on applicable private law in Quebec in relation to property and civil rights to interpret the contract between the appellant and the Fédération. In this regard, it is worth reiterating section 8.1 of the *Interpretation Act* (R.S.C., 1985, c. I-21), which recognizes the complementarity of Quebec civil law with federal law. The Federal Court of Appeal confirmed this approach in *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334 (*9041*), *Grimard v. Canada*, 2009 FCA 47 (*Grimard*) and *Ray-Mont Logistics Montréal Inc. v. Canada (National Revenue)*, 2020 FCA 113.

[17] However, in interpreting the contract between the appellant and the Fédération to determine whether this is a contract of service, i.e. a contract of employment instead of a contract of enterprise, articles 1425, 1426, 2085, 2086, 2098 and 2099 of the *Civil Code of Québec*, CQLR, c CCQ 1991 (the Civil Code) must be considered (see Appendix A below).

[18] Article 2085 of the Civil Code provides for the following:

> **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.
>
> [Emphasis added]

[19] However, according to section 2085 of the Civil Code, the three following constituent elements define a contract of employment (see *9041* at paragraph 11):

> i) the performance of work;
> ii) remuneration; and
> iii) the direction or control of the employer, meaning a relationship of subordination.

[20] It is also instructive to consider articles 2098 and 2099 of the Civil Code concerning a contract of enterprise, which provides for the following:

> **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.
>
> **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.
>
> [Emphasis added]

[21] The applicable law cited above demonstrates that the relationship of subordination is the determining factor that distinguishes a contract of employment from a contract of enterprise. In this case, the fact that the appellant performed work for the Fédération and that she was remunerated is not being contested. It follows that the determining question is whether the appellant performed her work under the direction and control of the Fédération, or in other words, whether there was a relationship of subordination between the appellant and the Fédération.

[22] In analyzing the contract, the common intention of the parties in light of the nature of the contract, the circumstances in which it was formed, the interpretation which has been given to it by the parties or which it may have received, and usage, must all be taken into account as required by articles 1425 and 1416 of the Civil Code.

[23] I note that in *Grimard* (paragraphs 28 and 43), the Federal Court of Appeal affirmed that there is a difference in conceptualization between common law and civil law in terms of approach but also expressed the view that a court does not err in taking into consideration as indicators of supervision the other criteria used under

the common law in determining a relationship of subordination, i.e. control of the work. The Court stated the following:

> 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.

[24] I hasten to add that both case law in civil law and case law in common law specify that the legal nature of the *overall* relationship between the parties must be determined (*Grimard* at paragraph 67; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 [*Sagaz*]). However, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor, no particular factor plays a decisive role, and there is no magical formula that can be applied to determine the legal nature of a relationship in a given situation (see *Sagaz* at paragraph 46). However, in addition to the level of control exercised by the employer, the typically relevant factors to consider include determining whether the worker "provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks" (*1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85 [*Connor Homes*], paragraph 41).

V. Evidence and analysis

[25] It is important to remember that the parties are not contesting that the appellant performed work and was remunerated. Only the third constituent element defining a contract of employment—the criterion of direction and control, i.e. a relationship of subordination—is in dispute.

A. *Circumstances under which the relationship was developed*

[26] Éric Trudeau, Regional Director of Mortgage Financing for the Fédération, was called a witness by the intervener. He explained that branches, which are all independent of each other, decided to merge to create the Fédération and centralize certain services, such as mortgage financing services. Mr. Trudeau explained that he was responsible for a team of business development advisors (BDAs) who in turn played a support role for mortgage consultants. The mortgage consultants that

provide services to the Fédération solicit new opportunities and prepare mortgage financing files. Once the forms have been completed, and pursuant to section 3.2 of the contract, the consultants submit the files for approval to the Fédération's financing centre for the borrower to qualify, after which point the loan is sent to a branch that handles the business relationship. In response to the question of why consultants could not authorize the mortgage financing themselves, Mr. Trudeau explained that it was to avoid conflict resulting from allowing consultants to make the decision of whether to provide the financing when their income depends on that decision.

[27] According to Mr. Trudeau, although there is no set amount of prior experience required to become a mortgage consultant, the Fédération seeks out people with a strong business profile because consultants are responsible for developing their business. He also explained that unlike mortgage brokers, who do not work exclusively for a specific lender and must hold a mortgage brokerage licence, the Fédération's mortgage consultants work exclusively for them and are not required to have this licence.

[28] As mentioned above, after the position that she held was eliminated at a branch, the appellant had a choice to make about the work that she was going to do moving forward. According to her testimony, she decided to become a mortgage consultant because of the challenge that this represented and because it seemed very interesting to her. The appellant had discussions with Mario Rivest, an executive of the Fédération, who explained the working conditions to her. The appellant understood that as a mortgage consultant, she would be paid entirely on commission without any guaranteed minimum income and without benefits. She signed an initial contract with the Fédération in 2001, which she resigned every year until 2016 (Exhibits A-3 and I-4). The appellant explained that the amount of commissions that she earned, which were paid when the mortgage loan was approved, changed over the years: initially she earned under $100,000, but between 2003 and 2007, she earned about $150,000 in commission. The appellant indicated that the commissions that she earned decreased when economic conditions affected the new build market, which at times represented 95% of her clients. The appellant added that her income was also affected when the branches established employee positions that were dedicated to recruiting for mortgage financing since this represented another client base for her.

B. *Parties' intention and interpretation of the contract*

[29] As mentioned above, in the interpretation of the contract between the appellant and the Fédération, the common intention of the parties must be sought. For the reasons that follow, I conclude that the appellant and the Fédération had the subjective intention to enter into a contract of service (contract of enterprise) and not a contract of employment.

[30] Clause 4.4 of the contract provides that the mortgage consultant must assume all costs, expenses or fees related to the performance of the service contract, while clause 6.1 specifies that no relationship of subordination is being established between the Fédération and the consultant as a result of this agreement. Clause 6.2 also indicates that each party shall pay their own taxes and duties. The Fédération provided T4A slips (Statement of Pension, Retirement, Annuity and Other Income) to the appellant and did not withhold any deductions from the commissions paid to the appellant.

[31] In her testimony, the appellant recognized that the Fédération's representative had clearly told her that she would be paid entirely on commission, with no minimum guaranteed income and without any benefits. She had previously been an employee and fully understood what she was losing in terms of benefits, since she had previously been entitled to benefits, such as insurance and pension plans. During her discussions with the representative of the Fédération, the appellant understood that she would be "on contract" and that she could deduct expenses as a self-employed worker. She stated that she filled out her tax returns as a self-employed worker and in calculating her income deducted her expenses, including the costs incurred for a home office, for the use of her vehicle and for advertising. I note that in a letter dated March 16, 2017, addressed to the CRA concerning her request for a ruling as to her worker status, she wrote that she had been [TRANSLATION] "hired by the Fédération as an independent contractor paid on commission", and she explained her disagreement.

[32] It is important to note that the appellant was required to sign a new contract every year. In her testimony, she indicated that she had signed it every year without ever asking for a clause to be amended because she felt as though she had no choice, i.e. as though if she did not sign the contract, she would not be able to continue to work as a mortgage consultant. In my opinion, this state of affairs may indicate unequal bargaining power in the business relationship but is not in and of itself an indicator of a relationship of subordination. Every independent contractor who refuses to sign a contract with a work provider may find themself without work

provided by this payer; this does not make this person an employee of the payer. I conclude that based on the preponderance of evidence, the common intention of the parties was to enter into a contract of service.

C. Direction and control by the payer – relationship of subordination

[33] Now the overall relationship between the appellant and the Fédération must be examined to determine whether the objective reality confirms the parties' subjective intention to enter into a contract of service.

Schedule, work tools and helpers

[34] The appellant explained that she did most of her work from her car. She would go to her clients, either to their home or to their work. She confirmed that she was free to organize her own schedule and determine with her clients when she would meet them. The Fédération did not record the hours she worked or manage her schedule in any way. That said, the Fédération had an expectation that consultants would return clients' calls within twenty-four (24) to forty-eight (48) hours.

[35] The appellant did not have to obtain the Fédération's authorization to attend personal appointments or take vacation. Arnaud Guillaumont, who currently works as a mortgage consultant and was called as a witness by the Fédération, confirmed that when he was a BDA, mortgage consultants never requested authorization from him for absences. That said, if the appellant was going to be absent, she needed to make arrangements so that someone else would handle her files. In those cases, she entered into an agreement with another mortgage consultant, and the two agreed on sharing the commission that might result from the work handled.

[36] The appellant recognized that mortgage consultants had the right to retain the services of an assistant. In fact, the appellant worked with Vanessa Dufresne, the assistant of another mortgage consultant whom she was replacing during her maternity leave. The appellant confirmed that the Fédération did not determine the renumeration of assistants nor did they pay them. It was the appellant who paid Ms. Dufresne and deducted those amounts when calculating her income. France Poirier, an assistant who provided services to various mortgage consultants and was called as a witness by the appellant, simply confirmed the appellant's testimony in this regard. Mr. Guillaumont, who works with an assistant, explained that when mortgage consultants want to retain the services of an assistant, they must contact their BDA so that the Fédération can perform a credit and background check on this person. He stated that he negotiated the rate of pay with his assistant, and that

he is the one who pays her. He also confirmed that when he was a BDA, he did not deal with assistants.

[37] Clause 4.5 of the contract provides that the Fédération agreed to make a standardized smartphone and computer equipment with the Fédération's software installed on it available to the appellant. However, according to section 9 and Appendix B of the Business and Operational Processes Guide for Desjardins Mortgage Consultants (Guide, Exhibit A-4), the appellant was responsible for monthly fees set by the Fédération for using the computer and telephone equipment and for connecting to Desjardins' network services. The appellant confirmed that she was responsible for these fees. Ms. Grandchamp, a mortgage consultant and witnessed called by the appellant, confirmed that she paid phone and computer fees. Mr. Trudeau explained that the Fédération provided the computers for reasons related to software and information security.

Establishment of objectives, meetings with BDAs and evaluations

[38] Several witnesses discussed the role of BDAs and their relationship with mortgage consultants. As mentioned above, BDAs are employees of the Fédération who play a support role for consultants. During questioning, the appellant was not decisive in answering the questions asked by her agent about the objectives that she had to achieve and who set them. She said both that objectives were set by the BDA but also that it was a joint decision made by the consultant and the BDA. She stated that if she did not achieve her objectives, the Fédération would add another consultant in her sector to increase sales volume. Otherwise, the appellant recognized that there were no consequences as such if she did not reach her objectives. The appellant indicated that one time, when she did not reach her objectives because of the downturn in the new build market, her BDA proposed expanding her territory and seeking out other business opportunities to her. She confirmed that she was never subject to disciplinary measures over the fifteen (15) years that she worked as a consultant for the Fédération. In cross-examination, the appellant stated that she spoke with her BDA once or twice a week, generally on the phone. She added that she was used to working alone and that she would rarely call upon her BDA, but that her BDA could help her move things along if there was a delay in approving a mortgage financing file.

[39] The appellant also discussed the monthly meetings organized by the BDAs that she felt obligated to participate in. During these meetings, information was provided to consultants on regulatory updates, and people were encouraged to give presentations, for example on sales strategies. The appellant explained that during

these meetings, they would also discuss business development and various offices' penetration rates and that consultants' sales results would be presented.

[40] During his testimony, Mr. Guillaumont confirmed that when he was a BDA, he had objectives to meet for his territory, which were set by management. He explained that he consequently had an informal discussion with his team of fifteen (15) to twenty (20) mortgage consultants to see what their intentions were in relation to their objectives; this allowed him to determine whether he needed to sign contracts with other consultants so that he could reach his objectives. During his testimony, Mr. Trudeau confirmed that when he was a BDA, he had this type of discussion with consultants to see what their ambitions were and appetite was for business development, with the intention of having consultants set a target. Both Mr. Guillaumont and Mr. Trudeau confirmed that there were no consequences if a consultant did not meet their objectives. That said, Mr. Guillaumont explained that when a consultant did not meet a target, he had a discussion with them to determine what was not going so well and provide them with tips and tools that they could use to increase their sales volume. He confirmed that in meetings, which he in no way considered mandatory, results were discussed. According to him, consultants, as salespeople, were interested in results as well as in how they were doing in relation to their colleagues. He took that opportunity to encourages consultants.

[41] The Fédération, through an external company, conducted random surveys with clients who had dealt with mortgage consultants to obtain feedback on their experience. These surveys were known as a net promoter score (NPS). The agent for the appellant provided the following example as a question that could be asked in a survey: [TRANSLATION] "On a scale of 1 to 10, how likely are you to recommend Desjardins to a friend or colleague?"

[42] BDAs received the results of these surveys, and when results were poor, they could contact the consultant to discuss it. Mr. Guillaumont confirmed that he received these results when he was a BDA and that he contacted a representative once to discuss the survey and offer advice. He added that as a mortgage consultant, he had also received the results of these types of surveys, adding that this provided him with useful information on the quality of the services provided.

Financial risks, profits and tax returns

[43] The appellant indicated that initially, her objective was to earn commissions around $50,000, knowing that she would first have to engage in business development, and that her commissions would be under $100,000 in her first few

years. In the following years, her commissions increased to $100,000, $150,000 and beyond. I note that Mr. Guillaumont testified that when he was a BDA, the commissions earned by mortgage consultants varied between $100,000 and $300,000.

[44] As mentioned above, section 4.4 of the contract provided that the appellant had to assume all costs, expenses and fees related to the performance of the contract. The evidence revealed that the appellant covered the costs incurred for engaging in business development and earned her income on commission. These costs included, for example, expenses related to using her car, advertising costs, entertainment expenses and telephone- and computer-related costs. She confirmed that when she submitted her documents to her accountant to prepare her tax return, she provided receipts and reported her income as a self-employed worker. It is worth noting that the appellant was not incorporated, nor was this required. She registered with the Registre des entreprises du Québec after working as a mortgage consultant for about ten (10) years because she wanted to change her telephone line and needed a business registration number to do so.

[45] The appellant acknowledged that it was possible that a financing file that she prepared might not be approved, meaning that for that file, she would suffer a loss because her commission was paid only if the mortgage financing application was approved. Although this was possible, she did not indicate that she had suffered losses during the period that she worked as a mortgage consultant. In my opinion, it was possible for the appellant to suffer losses and it especially was possible to make profits; the more she increased her sales volume for not only mortgage financing but also all other Desjardins products, the more her commissions could increase. And, her commissions could fluctuate because of the nature of the work, not only in relation to the effort she put in, but also because of changes in economic conditions, and they did fluctuate.

Exclusivity and regulatory framework

[46] Clause 5.1 of the contract provides that the mortgage consultant agrees to provide services exclusively to the Fédération and branches for processing and referring mortgage financing. The appellant testified that, unlike mortgage brokers, as a mortgage consultant, she did not have the right to sell products from banking institutions other than the Fédération.

[47] The Fédération called Philip Ward as a witness; he was working as Senior Director of Specialized Financing and Payment Solutions at the time of the trial but

had previously held various positions with the Fédération. Mr. Ward stated that in all financial institutions, mortgage consultants work exclusively for their institution and that this is also provided for in the *Real Estate Brokerage Act*, which is the legislation that applies to the relevant period, since a new law now applies. He explained that the Fédération had to demonstrate that it had implemented practises and procedures to ensure that it was following the applicable guiding principles for residential mortgage loan underwriting as stipulated in the guidelines of the Autorité des marchés financiers (AMF) and the Office of the Superintendent of Financial Institutions (OSFI). Mr. Ward added that these guidelines are also included in the Guide.

[48] The agent for the appellant maintained that it was the Fédération and not regulations requiring that services be provided exclusively. Based on my understanding of the evidence presented, it seems clear that mortgage consultants, who are not brokers, are governed by the Fédération and cannot sell other institutions' products. That said, nothing prevents a broker from deciding to enter into a contract like the one signed by the appellant and become a mortgage consultant. Such a consultant would also be subject to the exclusivity clause in section 5.1, even though in principle this person, as a broker subject to the rules of practice, would have the right to sell products from various financial institutions. In his testimony, Mr. Trudeau confirmed that in order to not work exclusively for one institution, a person must be a broker and have a mortgage brokerage licence, while such a licence is not required to be a mortgage consultant. He indicated that 10 to 15% of the Fédération's mortgage consultants have a mortgage brokerage licence that allows them to sell products from various institutions.

[49] Whether this is the Fédération's choice rather than an obligation arising from applicable legislation, I note that for the vast majority of mortgage consultants, it is the fact that they are consultants who work exclusively for the Fédération that allows them to offer mortgage financing services without having a mortgage brokerage licence. I hasten to add that the question is rather determining what role this aspect plays in determining the existence of a relationship of subordination.

[50] In terms of exclusivity, in *Lamontagne v. M.R.N.*, 2018 TCC 153 (paragraph 66), Madame Justice D'Auray cited *Dicom Express Inc. v. Paiement*, 2009 QCCA 611 (paragraphs 15-16), in which the Quebec Court of Appeal indicated the following:

> [TRANSLATION] What constitutes the distinction between a contract of employment and a contract for services is the characteristic whereby the performance of the employee's work is subject to an employer's control and supervision.
>
> The criterion of legal subordination is difficult to define but must not in any case be confused with economic dependence. Being bound to a sole client that imposes certain duties and obligations in terms of standards of quality of service, sets the price of the product or dictates certain advertising standards does not necessarily mean the existence of legal subordination.

[51] Evidently, the appellant's obligation to provide services exclusively to the Fédération and branches created economic dependence for the appellant. In my opinion, this does not necessarily mean that there is a relationship of subordination. The fact that the appellant had to limit herself to selling Desjardins products is not a determining factor in establishing whether the Fédération controlled the performance of her work. In addition, I would like to reiterate that as a mortgage consultant without a brokerage licence, the appellant would not have been able to sell various institutions' products.

Eugenia Perrone's and France Grandchamp's testimony

[52] Two of the witnesses called by the appellant, Eugenia Perrone and France Grandchamp—mortgage consultants for the Fédération—also filed an appeal before this Court concerning their worker status. In an order dated October 12, 2021, Madame Justice Lafleur rejected that their appeals be combined and heard on common evidence with this appeal. I would like to reiterate, as Lafleur J. did in her order, that a factual and contextual analysis of each particular relationship must be carried out to determine the status of each worker. Their testimony is relevant only to the extent that it sheds light on the circumstances specific to the relationship between the appellant and the Fédération.

[53] Ms. Grandchamp confirmed the testimony of other witnesses on a number of points. Ms. Grandchamp was a mortgage consultant from 2004 to 2018. She stated that she signed a contract every year, otherwise she would not have had work. She was paid entirely on commission according to the commission scale for various products, with no benefits. She confirmed that during meetings with the BDA, consultants were informed about new products, and a table was presented indicating mortgage consultants' results. Ms. Grandchamp explained that when she did not reach her objectives, which happened for her insurance sales, which she found more of a struggle, she had a meeting with her BDA. She said that her BDA reminded her of the importance of meeting her objectives and offered tips and strategies to help

her. She confirmed that she never had a remedial plan and was never subject to disciplinary measures. Ms. Grandchamp worked with an assistant whom she paid as an independent contractor, according to an agreement that they had reached.

[54] I noted significant difference between Ms. Perrone's and the appellant's situation. For example, Ms. Perrone worked for chains, i.e. real estate brokerage offices like RE/MAX, which was not the case for Ms. Payette. Even more significant, Ms. Perrone was a mortgage consultant from April 20, 2017, to October 3, 2018, which is after the relevant period for the appellant. Without going over her testimony in detail, I note that she confirmed the appellant's testimony on several points. When there were differences or even discrepancies, these were circumstances specific to Ms. Perrone.

Positions of the parties

[55] The agent for the appellant maintained that Ms. Payette was an employee because the Fédération extensively controlled the quantity and quality of her work. The agent for Ms. Payette referred to other aspects as indicators of employee status, such as exclusivity, ongoing training offered by the Fédération and the fact that results were presented during meetings with BDAs. She insisted on the fact that the appellant could not amend the contract that she had to sign every year, otherwise she would not have been able to continue working as a mortgage consultant for the Fédération. The agent for the appellant read several clauses of the contract stating that they provided proof this was a contract of service. To demonstrate this, I will note a few examples. She stated that clause 3.1 of the contract and clause 2 of the Guide require the mortgage consultant to provide services personally. In fact, clause 2 of the Guide provides that the mortgage consultant must physically meet with clients at all times and obtain and verify the necessary information. According to the agent of the Fédération, this requirement stems from the obligation to confirm clients' identity and avoid fraudulent loans.

[56] The agent for the appellant maintained that the obligation to work in collaboration with the branches as provided for in clause 3.8 of the contract as well as the obligation to submit financing applications in accordance with guidelines are obligations that are inconsistent with the status of an independent contractor. Respectfully, I do not see how the work done in collaboration between the provider of work and the worker is inconsistent with the nature of a contract of enterprise. Rather, this a question of economic dependence, and there is always a level of mutual dependence between the payer and the person providing the work. However, this is not necessarily an indicator of the true nature of the relationship between the parties.

According to the agent for the appellant, the obligation to submit applications in accordance with guidelines, for example, using forms created by the Fédération in preparing files for mortgage financing approval (clause 4.2 of the Guide) is also indicative of a contract of employment. In my opinion, this obligation also allows the mortgage consultant to collect the necessary information for the file to be analyzed and for the financing decision to be made based on regulatory requirements.

[57] If I have understood properly, the agent for the appellant maintained that the fact that the Fédération could add consultants in the appellant's sector indicates that she did not have control over the amount of commissions she could earn and therefore did not have the opportunity to make profits; according to the agent for the appellant, a mortgage consultant could make profits only if the Fédération wanted that to happen. I do not agree with this observation. Firstly, the Fédération has an interest in all its consultants' making as much in commissions as possible and consequently making the highest possible profit. And the appellant had the opportunity to make profit that she controlled by deciding how much time and effort she wanted to invest in soliciting clients. I would also add that I find it normal that the Fédération be able to decide to add consultants in certain sectors to acquire a larger share of the market.

[58] In support of these claims, the appellant cited a decision, *Fédération des caisses Desjardins du Québec v. Commission des normes de l'équité, de la santé et de la sécurité du travail*, a decision of the Tribunal administratif du travail (2019 QCTAT 4997). As indicated by the agent for the Fédération, I note that the worker in question in this case was a mortgage consultant who provided services to the Fédération, but the context of this dispute is very different from the context of the case before this Court. The question put to the Tribunal administratif du travail was related to legislation that included its own definitions and that does not apply in this case. In fact, it appears that in the context of the applicable legislation for the Tribunal administratif, whether a mortgage consultant is considered an employee is based on whether they employ assistants. Such a factor considered on its own cannot be a determining factor in this case.

[59] The agent for the Fédération reviewed the different pieces of evidence and maintained that the Fédération did not control the ways in which the contract was performed and that the parties did not have a relationship of subordination, while reiterating the importance of the legislative framework in the mortgage financing field. The agent for the respondent also insisted on the relevant regulatory framework in this case, stating that the strong regulations result in nuance in how

the factors are weighed. He maintained that an overall analysis of the elements to be taken into consideration in determining the legal nature of the relationship indicated a lack of a relationship of subordination.

Conclusion

[60] It is appropriate to reiterate my conclusion that the appellant and the Fédération had a common intention to enter into a contract of service. Once this step has been completed, the Court must determine whether the objective reality confirms this intention. I would like to reiterate this Court's obligation to examine the overall relationship between the parties to the contract and to determine whether the objective reality confirms the parties' intention. Considered in isolation, certain clauses of the contract and Guide could appear to indicate that the parties signed a contract of service.

[61] It is important to recognize the strongly regulated context in which the facts in this case occurred. The Fédération had an obligation to ensure compliance with the extensive statutory and regulatory requirements as well as with the AMF's and OSFI's guidelines. This adds nuance to certain elements. For example, the obligation to physically meet with clients, the obligation to use certain forms to collect relevant personal information and the obligation to have selected assistants approved are all elements that reflect these obligations and that, in my opinion, do not demonstrate the payer's control over the worker.

[62] Many of these are elements that, when examined globally, argue in favour of a lack of a relationship of subordination. For example, the evidence demonstrated that the appellant worked from her car or from her home, determined her own work and vacation schedule, did not have paid vacation or other benefits, covered expenses incurred to earn commissions and deducted them in calculating her income, which she reported as business income, faced the risk of loss and moreover had the opportunity to make profits by increasing her sales volume, and could retain the services of an assistant.

[63] It is true that during meetings, the Fédération discussed objectives and sales results and that, through surveys, it evaluated the quality of the services received by clients. According to the agent for the Fédération, if clients' treatment is unsatisfactory, it is normal for the Fédération to intervene: if low-quality services are being provided, it is normal for a payer to intervene up to and including terminating the contract if the purchased service is inadequate.

[64] In this regard, I would like to reiterate statements made by the Federal Court of Appeal in *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*, 2004 FCA 68 (paragraph 19) in affirming that 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". The Court continued by adding that "[i]t 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". In brief, this indication demonstrates control over the result, which does not equate control over the worker.

[65] Having examined all relevant factors, with no individual factor being a determining factor on its own, I conclude that the appellant and the Fédération were bound by a contract of service and that the appellant did not hold insurable employment with the Fédération within the meaning of the EIA.

[66] For all these reasons, the appeal is dismissed, without costs, and the decision of the Minister dated May 4, 2018, that the appellant did not hold insurable employment within the meaning of paragraph 5(1)(a) of the EIA during the relevant period is affirmed.

Signed at Ottawa, Canada, this 20th day of January, 2023.

"Gabrielle St-Hilaire"

St-Hilaire J.

APPENDIX A

Provisions of the *Civil Code of Québec*, CQLR, c. CCQ-1991

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.
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.

CITATION:	2023 TCC 9
COURT FILE NO.:	2018-1773(EI)
STYLE OF CAUSE:	SOPHIE PAYETTE AND THE MINISTER OF NATIONAL REVENUE AND FÉDÉRATION DES CAISSES DESJARDINS DU QUÉBEC
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	August 24 and 25 and November 3, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice Gabrielle St-Hilaire
DATE OF JUDGMENT:	January 20, 2023

APPEARANCES:

Agent for the Appellant:	Mercedes Diaz
Counsel for the Respondent:	Julien Dubé-Senécal
Counsel for the Intervener:	Simon-Pierre Hébert

COUNSEL OF RECORD:

For the Intervener:	Simon-Pierre Hébert
Firm:	BCF LLP Complexe Jules-Dallaire, T1 2828 Laurier Blvd., 12th Floor Quebec City, QC G1V 0B9
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada