Docket: 2010-848(EI)

BETWEEN:

JACQUES BERNIER,

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent,

and

FLORENCE PRODUCTIONS INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Josée Mongeau, 2010-992(EI),
on September 24, 2010, at Montréal, Quebec.
Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the appellant:	Louis Sirois
Counsel for the respondent:	Anne-Marie Desgens
Agent of the intervenor:	Allan Joli-Coeur

JUDGMENT

The appeal by Mr. Bernier is allowed and the Minister's determination is varied as follows: Jacques Bernier held insurable employment during the period from July 12, 2008, to August 16, 2008.

Signed at Ottawa, Canada, this 17th day of February 2011.

"Pierre Archambault"

Archambault J.

Translation certified true
On this 31sth day of May 2011
Monica F. Chamberlain, Reviser

Docket: 2010-992(EI)

BETWEEN:

JOSÉE MONGEAU,

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MINISTER OF NATIONAL REVENUE,

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Appeal heard on common evidence with the appeal of
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Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the appellant:	Louis Sirois
Counsel for the respondent:	Anne-Marie Desgens

JUDGMENT

The appeal by Ms. Mongeau is allowed and the Minister's determination is varied as follows: Josée Mongeau held insurable employment during the period from July 27, 2009, to July 31, 2009.

Signed at Ottawa, Canada, this 17th day of February 2011.

"Pierre Archambault"

Archambault J.

Translation certified true
On this 31sth day of May 2011
Monica F. Chamberlain, Reviser

Citation: 2011 TCC 99
Date: 20110217
Docket: 2010-848(EI)

BETWEEN:

JACQUES BERNIER,

Appellant,

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MINISTER OF NATIONAL REVENUE,

Respondent.

and

FLORENCE PRODUCTIONS INC.,

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Docket: 2010-992(EI)

JOSÉE MONGEAU,

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Archambault, J.

[1] Jacques Bernier and Josée Mongeau have appealed from the determinations by the Minister of National Revenue (**Minister**) that they were not engaged in insurable employment under a contract of service (**employment contract**) with their respective payors. In Mr. Bernier's case, the payor is Florence Productions Inc. (**FPI**) and the

period in issue is from July 12, 2008, to August 16, 2008 (**relevant Bernier period**). FPI also filed a notice of intervention. In Ms. Mongeau's case, the payor is Les Productions Kinesis inc. (**PKI**) and the period covered by the Minister's determination is from July 27, 2009, to July 31, 2009 (**relevant Mongeau period**). PKI did not file a notice of intervention and no representative of the company testified at the hearing.

[2] The appeals by Mr. Bernier and Ms. Mongeau were heard on common evidence because the facts were common to the two appeals, in particular the fact that both of their employment contracts were governed by a "Video Collective Agreement", an agreement between the Association des producteurs de films et de télévision du Québec (APFTQ) and the Association des professionnel-le-s de la vidéo du Québec (APVQ), represented by the Alliance québécoise des techniciens de l'image et du son (AQTIS). Among other things, it provides for minimum working conditions. Both appellants are video technicians, and more specifically camera assistants who worked for film production or television production companies.

[3] Both appellants contested the Minister's determination and stated that they had been employed under a contract of employment and had held insurable employment during their relevant periods.

[4] In making his decision concerning Mr. Bernier, the Minister relied on the following presumptions of fact, set out in paragraph 16 of the Reply to the Notice of Appeal:

> [TRANSLATION]
> 16. In making his determination, the Minister determined that the appellant was not engaged in employment under a contract of service, based on the following presumptions of fact:
>
> (a) the payor was incorporated on February 4, 2008; **(noted)**
>
> (b) the payor's majority shareholder is Appartement 11 Productions Inc; **(noted)**
>
> (c) the majority shareholder of Appartement 11 Productions Inc is Jonathan Finkelstein who is also a director of the payor; **(noted)**
>
> (d) the payor operated a television program production business; **(admitted)**

(e) during the period in issue, the payor was the producer of a creation by Jonathan Finkelstein for which Nathalie Mayotte was the project manager and Lori Brau[n] was the production manager; **(admitted)**

(f) the appellant was retained to replace Sébastien Cassou who was determined by CRA to be a self-employed worker, a determination that Mr. Cassou did not appeal; **(not known)**

(g) the appellant was retained with the same conditions of employment as Mr. Cassou and for a fixed term for a children's television program project for which five episodes in the series were filmed in the United States and others were filmed in British Columbia and Quebec; **(not known)**

(h) the appellant was retained primarily as technical director and also as assistant cameraman; **(denied)**

(i) that work assignment was intended to enable the appellant to work full days; **(not known)**

(j) there was a written contract between the parties; **(admitted)**

(k) as technical director, the appellant had to go to the filming site before the crew to catalogue the scene, among other things, and he had to supervise other workers; **(denied)**

(l) as assistant cameraman, the appellant had to make sure the equipment, cameras and short-wave radios, was available for the artistic staff on the filming sites; **(admitted)**

(m) the appellant was under the supervision of the production manager; **(admitted)**

(n) the payer gave the appellant, like everyone involved in the project, including the managers, a work schedule every day that showed the break times, and in particular the various activities, hour by hour, to make sure that the work was done in order, synchronizing filming and the work schedule; **(admitted)**

(o) the appellant had to work in a team so the project could be completed; **(admitted)**

(p) the appellant's pay was decided by the payor; **(denied)**

(q) for his technical director work **(denied)**, the pay was decided following negotiations between the parties; **(admitted)**

(r) for the assistant cameraman pay, the payor adhered to the rate established by the Alliance québécoise des techniciens de l'image et du son (AQTIS); **(admitted)**

(s) the assistant cameraman work is unionized **(admitted)**, while the technical director work is not; **(denied)**

(t) although the payor was required only to pay all benefits associated with the pay for the position of assistant cameraman, it paid those benefits on the appellant's entire pay. **(denied)**

[Emphasis added.]

[5] The facts assumed by the Minister in making his determination in Ms. Mongeau's case are set out in paragraph 15 of the Amended Reply to the Notice of Appeal:

15. In making his determination, the Minister determined that the appellant was not engaged in employment under a contract of service, based on the following presumptions of fact:

(a) Les Productions Kinesis inc was incorporated on August 14, 1997; **(no evidence to the contrary)**

(b) the equal shareholders in the payer are Stéphane Tanguay and Cédric Bourdeau; **(no evidence to the contrary)**

(c) the payer is a film production company specializing in long and short feature films; **(not known)**

(d) the payer's place of business is in Montréal; **(not known; no evidence to the contrary)**

(e) the payer retained the appellant as a camera assistant; **(admitted)**

(f) there was a written contract between the parties; **(admitted)**

(g) the contract was signed on July 27, 2009; **(not known)**

(h) in the contract, the payor guaranteed the appellant five days' work; **(admitted)**

(i) the appellant's duties included helping with photography **(admitted)** and assessing lighting; **(denied)**

(j) the appellant was assistant to François Messier, lead cameraman, and followed his orders; **(admitted)**

(k) the appellant had to work closely with the production team to ensure the high quality of the film product while keeping to the schedule established by the payor; **(admitted)**

(l) the appellant had to arrive on the set at the times set by the director or producer, generally at the end of the work day for the next day; **(admitted)**

(m) the appellant worked variable hours during the period in issue; **(admitted)**

(n) the appellant could leave the set only when the producer gave the order; **(admitted)**

(o) the appellant used the payor's equipment, except her clapper board; **(admitted)**

(p) the appellant is a member of the Alliance québécoise des techniciens de l'image et du son (AQTIS); **(admitted)**

(q) the appellant was paid an hourly rate of $25.25, 50% of which would be given to her if the production was profitable, as AQTIS requires; **(admitted)**

(r) source deductions were made by the payor from the appellant's pay, as specified in the contract and required by AQTIS, amounting to 7.5% of her pay, as a contribution to the AQTIS group RRSP, the AQTIS group insurance plan and her 2.5% union dues; **(admitted)**

(s) the appellant reported the income from the payor on her 2009 income tax return as income from self-employment and claimed expenses against that income; **(denied)**

(t) the payor did not control how the appellant performed her duties; **(denied)**

(u) the appellant was not integrated into the payor's business; **(denied)**

(v) the services the appellant performed were not limited to the services she offered the payor; **(denied)**

(w) the relationship between the appellant and the payor exhibited no continuity or loyalty. **(denied)**

[Emphasis added.]

[6] To describe the role of AQTIS and certain practices in the video industry in Quebec, the appellants called Frédéric Lussier-Cardinal, an industrial relations consultant who had been employed by AQTIS for several months, to testify. He holds a diploma in industrial relations that was granted in 2010. He is also a member of the Quebec Professional Order of Industrial Relations Consultants.

[7] Mr. Lussier-Cardinal described AQTIS as an association of freelances[1] who work as image and sound technicians. AQTIS's purpose is to represent the interests of its members, for example by negotiating and signing collective agreements. It comprises 126 categories of professionals or technicians and has about 3,000 members in good standing.

[8] According to Mr. Lussier-Cardinal, APFTQ is an association of 150 to 170 production firms, including FPI and PKI. The law applicable to the video collective agreement is described in section 1.01 of the agreement:

> a) This agreement is made, in part, pursuant to the *Act respecting the professional status and conditions of engagement of performing, recording and film artists* (R.S.Q., c. S-32.1) (hereinafter the "Act"[2]) further to the

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[1] The *Petit Robert* defines "*pigiste*" [freelance] as [TRANSLATION] "typesetter, writer, journalist paid by the piece", and "*pige*" [piece] means "method of paying a journalist, a writer paid by the line, by the article". This meaning arose out of typography slang, in which, again according to the *Petit Robert*, the term means [TRANSLATION] "quantity of work a typographer must perform in an allotted time, which is used as the basis for their pay".

[2] Hereinafter PSA. The Act applies to artists and the producers who retain their services in an artistic production, including film. The *Act to amend the Act respecting the professional status and conditions of engagement of performing, recording and film artists and other legislative provisions*, S.Q. 2009, c. 32, came into force on July 1, 2009, amended the PSA by incorporating sections 1.1 and 1.2, which provide as follows:

> 1.1. For the purposes of this Act, an artist is a natural person who practises an art on his own account and offers his services, for remuneration, as a creator or performer in a field of artistic endeavour referred to in section 1.
>
> 1.2. In the context of an audiovisual production mentioned in Schedule I, a natural person who, whether covered by section 1.1 or not, exercises **on his own account** one of the following occupations, or an occupation judged analogous by the Commission, and offers his services for remuneration is considered to be an artist:
>
> (1) an occupation relating to the … making … of photography, visual or sound effects, …
>
> [Underlining and boldface added.]

recognition granted to the APVQ by the Commission de reconnaissance des associations d'artistes et des associations de producteurs (hereinafter the "Commission") by its decision of July 12, 1993, for all positions recognized as those of artists on July 12, 1993, or by subsequent;

b) With respect to positions not recognized by the Commission as those of artists, this agreement is made pursuant to the *Civil Code of Quebec*.

[Emphasis added.]

[9] A number of provisions of the collective agreement describe the scope of the agreement. The most relevant for the purposes of this case are sections 1.03 and 1.05:

1.03 This agreement pertains and applies to all technicians, including those providing their services through a corporation, hired by a producer for the production of an audiovisual work in video or digital format for which the primary market is broadcast (live or delayed) or theatrical release, for the following positions:

(a) for drama productions recorded in film style, the agreement applies to the positions listed in Table 1 of Appendix D

(b) for other productions, the agreement applies to the positions listed in Table 2 of Appendix D

1.05 This agreement does not apply to a producer's permanent employees.[3]

[Emphasis added.]

[10] And section 1.09 of the agreement describes its purposes:

1.09 The purpose of this collective agreement is to establish the minimum working conditions for technicians holding any of the positions to which it applies, to promote harmonious relations between the parties and to set out a procedure for settling grievances.

[Emphasis added.]

[11] The minimum working conditions laid out in the act include a minimum wage scale that is set out at pages 73 to 75 of the agreement (Exhibit A-1). Mr. Lussier-

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[3] On the other hand, this could mean that it applies to temporary employees.

Cardinal also confirmed that AQTIS encourages its members to negotiate pay higher than the minimum standards set out in the collective agreement.

[12] The collective agreement provides for individual written agreements to be signed by a producer and a technician. Appendix A to the collective agreement consists of an employment contract. The form shows the position, pay and working conditions. The employment contract between Mr. Bernier and FPI and the contract between Ms. Mongeau and PKI reflect that form. The individual employment contract stipulates that the parties acknowledge that the collective agreement is incorporated into the contract as if it were set out therein in full (see Exhibits A-3 and A-6, and Exhibit A-1 page 51). The individual contract is generally signed by the production manager and technician. It provides for the hourly pay rate, the number of guaranteed days of work and the dates when the work is to be performed, among other things. In the individual contract, the technician authorizes the producer to deduct from each pay an amount equivalent to a specified percentage of that pay, including vacation pay, joint RRSP contribution, APVQ group insurance premiums and union dues.

[13] That provision of the individual contract complies with section 14.09 of the collective agreement, which provides:

> The producer agrees to withhold all source deductions from the technician's remuneration and to pay the vacation indemnity in accordance with the applicable laws.
>
> This section does not apply to technicians providing their services through a corporation.
>
> [Emphasis added.]

[14] One of the applicable laws referred to by section 14.09 and cited by Mr. Lussier-Cardinal was the *Act to promote workforce skills development and recognition*, R.S.Q. c. D-8.3 (***Skills Act***).[4]

[15] It is worth noting section 1, which describes the purpose of the Act:

> 1. The purpose of this Act is to improve workforce qualifications and skills through investment in training, concerted action between management, unions and

[4] This act is commonly called the 1% act. In addition to excerpts from the *Skills* Act, the appellants produced a "Bulletin d'information aux enterprises" published by the Commission des partenaires du marché du travail, an agency of the Quebec government, in which the term "*loi sur les compétences*" is used to refer to this law.

> community partners and the education sector, the development of training modes and the recognition of employed workers' skills. …
>
> [Emphasis added.]

[16] Section 3 of the *Skills Act* relates to employers:

> Every employer whose total payroll for a calendar year exceeds the amount fixed by regulation of the Government is required to participate for that year in workforce skills development by allotting an amount representing at least 1% of his total payroll to eligible training expenditures.
>
> [Emphasis added.]

[17] There are regulations providing that only employers whose payroll is over $1 million must contribute. Of the 150 or 170 members of APFTQ, some 50 production firms are considered to be large firms, and according to Mr. Lussier-Cardinal, a large majority of them contributes to funding the Regroupement pour la formation en audiovisuel du Québec (**RFAVQ),** which was recognized in 2008 under the *Skills Act*. The president of the RFAVQ is a member of AQTIS and the vice-president is a member of APFTQ.

[18] According to the interpretation of the individual employment contracts adopted by Mr. Lussier-Cardinal, they create an employment relationship between the technicians and the production firm. In support of that argument, he referred to Appendix B of the video collective agreement, where there is a timesheet on which various information the production firm's accountants can use to calculate and pay the technician is set out. In particular, it shows the time for starting work, the time of meal breaks, traveling time, the type of recording and the total hours worked and hours guaranteed. It also shows the 4% vacation pay, calculated on total pay. However, I note that it also has the calculation for GST and QST, [TRANSLATION] "if applicable" (see p. 50 of the video collective agreement).

[19] The deductions made under the applicable laws, as indicated by Mr. Lussier-Cardinal, include the contribution that the production firms must pay under the *Skills Act*.

[20] In support of his assertion that AQTIS considers the individual employment contracts to be contracts of service and not contracts for services, he noted that AQTIS intervened in the bankruptcy of the production *Loft Story IV*, a program produced for the 2007 TQS season. AQTIS succeeded in having 115 of its members

(who did not provide their services through a corporation) considered to be preferred creditors in the distribution of the bankrupt's assets, as employees, under paragraph 136(1)(*d*) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (see Exhibit A-2).

[21] On cross-examination, Mr. Lussier-Cardinal acknowledged that the individual employment contracts did not stipulate that the pay was wages or that the technicians were employees. The individual employment contract does not specify the nature of the contract. It is referred to only as "employment contract".

[22] The collective agreement[5] contains the following provisions for replacing technicians:

> Replacement
>
> 6.18 Unless otherwise indicated in the employment contract, technicians may not have another technician replace them without the producer's prior written authorization, which shall be refused only with reasonable justification.
>
> Authorization for replacement must be requested at least seven (7) days before the scheduled workday.
>
> Justified absence
>
> 6.19 A technician's absence during the term of contract is justified by serious reasons. The technician must notify the producer at least twenty-four (24) hours in advance, except for reasons of illness or circumstances unforeseeable or out of the technician's control, in which case the technician must notify the producer as soon as possible, failing which the provisions of Paragraph c) of Section 6.17 shall apply.
>
> [Emphasis added.]

- Jacques Bernier

[23] As noted earlier, Mr. Bernier and Ms. Mongeau each signed an individual employment contract. However, for the purposes of these reasons, it is preferable to deal with the facts relating to each case separately. The report on an appeal prepared by the appeals officer sets out the relevant facts relating to Mr. Bernier's case (Exhibit A-4):

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5 Page 19 of Exhibit A-1.

Information obtained from the worker, Jacques Bernier:

1. The payer is the producer of a children's television show called "In the Real World." The program was later renamed "Real World."

2. There were several persons in charge of the daily activities of the payer: Jonathan Finkelstein, the head producer, Allan Joli-Coeur, Nathalie Mayotte and Lori Braun.

3. The worker was hired to provide services as a technical director and assistant camera man.

4. It was the payer that had contacted the worker to offer him the position. The worker's name appears on a list of unionized employees. These lists are used as [*sic*] by potential employers to recruit for certain positions.[6]

5. The worker has 30 years of experience in the film industry.

6. The worker was hired to replace Sébastien Cassou who took time off after the birth of his child. An insurability decision rendered for Sébastien Cassou found him to be an independent worker. Mr. Cassou did not appeal the decision.

7. The worker was hired under a written, formal AQTIS (Alliance québecoise [*sic*] des techinciens [*sic*] du [*sic*] l'image et du son) contract. The contract was signed in Montréal, Québec. The contract was presented to the worker by Lori Braun. She explained the terms and conditions to the worker. (TAB 1)

8. The worker was hired for a determined period of time. He was to provide services from July 12 to August 16, 2008 for approximately 12 working days.

9. The worker performed services for the payer on location, in Québec, British Columbia and in the USA.

10. The working schedule was set by the payer. The worker received from the payer every morning an instruction sheet which outlined the daily working plan and schedule.

11. The worker's daily activities were supervised by the payer. Lori Braun, the director of production, was the worker's immediate supervisor.

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[6] In his testimony, Mr. Bernier stated that he had sat an interview to get the position, but another worker, Sébastien Cassou, got it. He ultimately got the position when Mr. Cassou decided to take leave, as explained in paragraph 6, reproduced below.

12. The worker had to fill out time sheets on a weekly basis. These were handed in to Lori Braun. The payer kept track of the worker's hours because he was remunerated for his overtime.

13. The worker was remunerated every two weeks by a check made out to his name.

14. As per contract, he was paid at the rate of 375 $ per day for a 12 hour workday. Any hours worked above that were paid at the overtime rate.

15. The rate of remuneration used by [*sic*] determined by the artist's union (AQTIS). The union sets the minimum daily rate. It is possible to negotiate a higher amount with the payer. The worker was receiving about 25$ more per day than the going union rate.

16. As per contract and union regulations, the payer paid a portion of the union dues, medical insurance and the worker's RRSP contributions.

17. Initially, the worker did not receive any compensation for his vacations. However, following a decision by the Commission des norms [*sic*] de travail, the payer paid the worker his 4% vacation entitlement.

18. As per contract, the payer paid all of the worker's travelling expenses. He was remunerated at a special rate for his travelling days. In addition, the worker received a per diem from the payer when travelling.

19. The payer supplied all of the tools and equipment required for the job.

20. The only [*sic*] worker provided his own tool belt and small tools, such as a screw driver, etc…

21. The worker raised the question of his status several times. He discussed the issue with Lori Braun. He remembers how surprised everyone was when there were no deductions made on the paychecks [*sic*].

22. Lori Braun had told the worker that his status could be modified to that of an employee if he accepted a 15% cut in salary. The worker needed the money and did not accept the cut.[7]

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[7] In her testimony, the appeals officer was able to compare that statement with the statement in paragraph 39 of the report on an appeal, reproduced below. In addition to the statement shown in paragraph 39, which suggests that Mr. Bernier may have received the offer referred to there, there is the fact that Mr. Joli-Coeur stated, in his testimony at the hearing, that his production firm might have considered some technicians to be employees if the request was made to the production firm. In general, Mr. Joli-Coeur acknowledged that it was no problem for him to consider the technicians to be employees if he had the budget needed to pay them.

23. On another occasion, in order to explain his status the worker was told by Ms. Mayotte who got the information from the payer's lawyer, that contracts under 14 weeks were treated as independent contracts[8] those longer than 14 weeks were treated as salaried contracts.[9]

24. The worker believes that he was an employee because he was always treated as such by other payers when providing the same service. He also feels that the fact that he signed a union contract, that the payer set his schedule, provided the tools for the jobs, supervised him and that he was remunerated as per union rules for overtime, medical insurance, union dues and RRSP contributions, made him an employee.

Information received from the payer's representative, Alan [*sic*] Joli-Coeur:

25. The payer's representative confirmed much of the information provided by the payer. He clarified some of the facts:

26. Jonathan Finkelstein is the sole shareholder of the payer. He is also the creator of the program. Nathalie Mayotte was the project producer and Lori Braun was the director of production.

27. The worker was hired to provide services as an independent. It is the payer's policy to always fully explain to all workers the type of contract they are signing and their status. Lori Braun met with the worker. She presented the contract to him and explained the status of independent. The payer has no doubt that the worker with his numerous years of experience in the industry understood his status and the contract that he was signing.

28. It is an accepted practice in the filming industry that those who are hired for "director" positions are hired as independents and those that are hired as executors, i.e. cameramen are hired as employees. In addition, participants in short filming projects use mostly independent workers; long television series usually hire employees. The worker was hired for a short television project.

29. The worker was referred to the payer. He replaced Sébastien Cassou, who was initially hired for the project. The terms of hiring were the same for both individuals.

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8 That statement can be compared with a contradictory position offered by Mr. Bernier in paragraph 21 of the [TRANSLATION] "report on an appeal" set out above.

9 That statement must be compared with the statement in paragraph 38, in which Allan Joli-Coeur said he had never heard of that kind of criterion. However, it must be noted that it was not Mr. Joli-Coeur who allegedly stated that, it was Ms. Mayotte.

30. The worker was hired to provide services primarily as a technical director and second as an assistant cameraman. The assistant cameraman position was used as a "filler" to allow the worker to do a full day's work. The position of technical director is not a unionized position; whereas that of the assistant cameraman is. **Had the worker been hired to work as an assistant cameraman only, he would have been considered an employee**.[10]

31. The payer gave the worker an active AQTIS contract to sign because it outlined all of the conditions set for the assistant cameraman position. The AQTIS does not have a contract for the technical director because it is not a unionized position.

32. The fact that the worker signed a union contract should not be used as a determining factor to establish the worker's status. The worker's situation was particular in that he was hired to fill two positions. His primary duty was that of the technical director and his secondary duty was that of the assistant cameraman. Therefore, the fact that the primary position is that [*sic*] of an independent nature should be considered when determining status rather than the fact that a union contract was used.

33. Everyone involved in the project, including all director [*sic*] and workers, received a daily "call sheet." This is standard practice in the industry. The call sheet outlines the daily schedule, breaks and activities. This is done in order **to ensure that the work is carried out in an orderly, synchronized and timely manner**.

34. The daily schedule was determined by the payer based on the required shooting time.

35. The worker worked as part of a team. The **work done by the worker was supervised by the producer**. The worker as a technical director, in turn, supervised the work of other individuals.

36. The worker's remunerated [*sic*] was determined in the following manner: for his work as an assistant cameraman the rate set by the AQTIS was used and the rate of pay for his was [*sic*] as a technical director was negotiated. It was Nathalie Mayotte and Lori Braun that negotiated the pay of technical director with the worker.

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[10] In his testimony, Mr. Joli-Coeur stated that all the technicians hired for the project had been considered to be self-employed workers, and this did not contradict what he told the appeals officer. Moreover, he stated that it was commonplace for the technicians to be treated like self-employed workers, and he did not agree with Mr. Lussier-Cardinal, who testified that the freelance members of AQTIS are always considered to be employees.

37. Although the payer was only required to pay all of the benefits as set by the AQTIS for the assistant cameraman portion of remuneration only, the payer paid the benefits on the entire amount paid to the worker.[11]

38. The payer's representative, who is the in-house legal advisor, never told anyone that a 14 week criterion was used to determine the status of contracts. He never heard of this.

39. Although the payer's representative is unaware as to whether the worker was made an offer to accept a 15% salary cut in order to become salaried, it is an offer that was made to someone in the past.

40. The worker had contested his employment status with the Quebec Minister of Revenue. The decision was that the position held by the worker was that of an independent.[12]

41. There exists a possibility of filing a grievance with the AQTIS regarding any irregularities. The worker who is well aware of this option did not choose to exercise it.[13]

42. The payer agreed to pay the worker his 4% following the Commission des norms [*sic*] de travail decision because the amount was minimal and not worthwhile contesting. As well, the payer wanted closure and was looking to put the issue behind him.

43. The reality that the film industry does not fall into the usual labour norms should be considered when determining the worker's status. The fact that the worker held a position which consisted of two different job descriptions, the primary one being a non unionized position and the fact that the worker accepted independent status at the signature of the contract should be used as the determining factors in deciding the worker's status. The payer does not feel that [it] is fair that the worker who benefited from a tax free full pay and enjoyed benefits paid on the full amount, even though he was entitled for only a portion of the remuneration, should now also be able to collect employment insurance premiums.

[Underlining and boldface added.]

[24] In his testimony, Mr. Joli-Coeur described the various production stages for the television series *Real World*. This was a one-hour reality television series of

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11 However, as we will see in paragraph 42 of the report on an appeal, FPI had not paid the 4% annual vacation pay.

12 That question was not addressed at the hearing.

13 I do not understand the relevance of this fact. Mr. Bernier chose to complain to the Commission des normes du travail and he succeeded.

13 episodes. The production called for a lot of equipment, including 18 cameras, and for 60 people to be on the set. For that reason, the equipment had to be managed effectively. That is why it was decided to hire a technical director for a period scheduled to last two months, from June 2008 to August 16, 2008. When Mr. Cassou left, he was replaced with Mr. Bernier. The testimony given by Mr. Joli-Coeur and Mr. Bernier satisfied me that Mr. Bernier was hired primarily as technical director, and he also worked as a camera assistant when needed.

[25] The reason the pay for the two positions was combined and the employment standards and working conditions set out in the video collective agreement were adopted was to simplify the production accountant's job, Mr. Joli-Coeur said. He explained that Mr. Bernier had been paid at a higher rate because of his responsibilities as technical director.

[26] On cross-examination by counsel for Mr. Bernier, Mr. Joli-Coeur acknowledged that if a technician did not do what they should do, the delegated producer would be responsible for telling them. He therefore admitted that a camera assistant was subordinate to the producer. With respect to the duties of a technical director, Mr. Joli-Coeur acknowledged that directives sent to Mr. Bernier came from the delegated producer, Ms. Mayotte.

[27] Mr. Joli-Coeur explained that the preproduction period ran from September 2007 to June 2008, and production ran from June to August 2008. The production period is described as the filming period. He defined the preproduction period as everything that happens before filming, and the postproduction period as everything that happens after filming. During the preproduction period, the synopsis and screenplay were written and the sites for filming decided.

[28] On the first day of filming, there were 75 people on the set. Mr. Joli-Coeur acknowledged that if the work was not completed at the end of the periods shown on the "call sheets", they had to be paid for overtime and the same applied if meal breaks were delayed.

[29] Mr. Joli-Coeur explained that FPI employed four or five people on a permanent basis. To produce film or television productions, they had to hire a director, screenwriters and all the technicians needed to complete the project. All of those people were considered to be freelances.

[30] He acknowledged that some technicians were considered to be employees if they requested it and the budget allowed, and that the duties the technicians might perform did not change.

[31] In his testimony, Mr. Bernier confirmed that he had worked in audiovisual production for about 30 years and that, generally speaking, production firms made source deductions not only for his RRSP contribution but also for income taxes owing to the tax authorities and Quebec Pension Plan (**QPP**) and employment insurance premiums. He added that he drew employment insurance benefits on a regular basis when he was eligible. He stated that sometimes he was required to repay a portion of those benefits when his earnings had been too high. He acknowledged, however, that there had been no source deductions for QPP, employment insurance and income tax in the case of his contract with FPI.

[32] Mr. Bernier stated that during the production period the producer was the person who decided the "where", "when" and "how" of the work to be done. In particular, the filming schedule was decided by the producer or the director, and Mr. Bernier was not consulted. The schedule specified the period for performance of the work and the breaks for meals in precise terms. He did acknowledge that as an experienced technician he knew how to do his work. However, he was not the one who decided where the cameras would be positioned during filming. He said that his supervisor was the delegated producer in the first instance, followed by the director and the floor manager. In his testimony, he confirmed his job description, which he had given in paragraph 3 of his notice of appeal, the respondent having admitted the accuracy of that paragraph:

> [TRANSLATION]
> 3. The appellant works as a camera assistant, and in the course of his work he performs the following duties, in particular:
>
> - Prepare the cameras.
> - Install or change the lenses.
> - Install and change the videotape, as needed.
> - Change the batteries, as needed.
> - Identify the videotapes.
> - Transport the equipment.
> - Identify takes with the clapper boards.
> - Help in installing cameras.
> -.Help to tighten the equipment.
> - Check the time code regularly.
> - Stick around on the set and help the camera operators[.]
> - Drive the equipment truck.

- Charge the batteries.
- Distribute a dozen or so cameras to the camera assistants and camera operators.
- Transfer digital data to hard disks.
- Make sure that all the equipment is operating properly.
- Be the “guy in camera truck”.
- Look after the walkie-talkies.
- Deal with minor technical problems.
- Make sure all the cameras are synchronized.
- When time permits, go onto the set and perform camera assistant duties.

[Emphasis added.]

[33] Mr. Bernier also stated that he had worked on between 20 and 30 employment contracts in 2008, primarily as a camera assistant.

[34] If there were delays in filming a television production, there were risks for the producer, Mr. Bernier said, in particular in relation to the overtime it had to pay. During the relevant period, Mr. Bernier was never replaced by anyone else.

[35] He also confirmed that he had negotiated his pay. He had been offered $350 for 12 hours, when he had asked for $375. According to Mr. Bernier, his financial security depends on his reputation and his right to receive employment insurance benefits.

- Josée Mongeau

[36] Ms. Mongeau is a camera assistant, more of a second assistant than a first. She has worked in that position for about 15 years. In 2009, she worked on between 15 and 20 contracts, each of which might be one day to three months long. She stated that in the 15 years she has been working in this position, the contract with PKI is the first in which she has not been recognized as an employee. Generally speaking, she receives a record of employment at the end of her employment contracts that follow the AQTIS form. In fact, she refuses contracts that she describes as [TRANSLATION] “by billing”. Those contracts are different from the ones signed on the AQTIS form.

[37] The report on an appeal (Exhibit A-7) was produced, setting out the facts presented in the conversations the appeals officer had with Ms. Mongeau. The report also related the conversations with a representative of PKI, Mr. Bourdeau. Some of the facts are clearly stated in the Amended Reply to the Notice of Appeal, a portion of which I reproduced *supra*. I will add only a few excepts from the report that seem to me to be the most important ones:

[TRANSLATION]

...

Conversation with Josée Mongeau

(the other party / the worker)

…

15. All of the work done by Josée Mongeau as a camera assistant was performed on the various sets under the supervision and control of the photography director, François Messier.

15.1 **François Messier is the lead camera operator, video production, and also handles lighting and photography, in addition to giving Josée Mongeau her instructions as a camera assistant.**

16. Josée Mongeau's work consisted of helping with photography, estimating lighting, angles,[14] and so on.

17. When asked whether her work was supervised or controlled, she replied: [TRANSLATION] "All my instructions came from the photography director. I was to leave the set only when we got the order from the producer. I was to go to the places and at the times I was told. I had to fill out timesheets.

18. I considered myself to be an employee and not a subcontractor. I had no expenses. I was paid by the hour."

18.1. **I asked Josée Mongeau to explain why she declares her income from Les Productions Kinesis Inc as income from a business and why she deducts business expenses. She replied that she had no choice because Les Productions Kinesis Inc did not want to give her a T4 and Record of Employment so when she filed her income tax return she had only one way to declare her fees, as income from a business, and so claim her home office expenses (see Exhibit 7, attached to the record).[15]**

…

---

14 Ms. Mongeau stated that the lighting work is done by the photography director and not by a camera assistant.

15 Ms. Mongeau denied having declared her income as income from employment at interview, because she had not yet filed her tax return. The telephone conversation with Ms. Mongeau took place on February 26, 2010 (see Exhibit A-7, page 2). The report was signed by the appeals officer on March 3, 2010. Ms. Mongeau's testimony is therefore entirely plausible.

19. She explained that the payer refused to issue a ROE, claiming that it would have cost it too much to deduct EI at source.

20. When asked how she had got this job, she replied: [TRANSLATION] "An acquaintance told me they needed an assistant. I contacted them and they had me sign a contract." (Montréal, P.Q.)[16]

...

21.1 **The hours of work are decided by the producer/director and he announces them generally after the workday for the next day. The work schedule may be either in the morning or in the evening, or even at night, depending on the director's intentions for filming.**

22. The payer considers Josée Mongeau to be a self-employed worker while she considers herself to be an employee.

22.1 **Josée Mongeau told me that if the workers do not agree to the conditions of employment, they will not have a contract, and that is why she agreed to her status being self-employed even though she disagreed.**[17]

23. Both parties acknowledge that there is a relationship of subordination between them.

Conversation with Cédric Bourdeau of Les Productions Kinesis Inc (the appellant/the payor)

24. **Cédric Bourdeau corroborated what was said by Josée Mongeau in full, with the exception of the initial intention, which was never that she be an employee of the company, it was that she be self-employed/freelance.**

25. **The deductions shown on her pay stub represent the mandatory deductions that the payor is required to make for everyone who belongs to the "AQTIS" Union, as does Josée Mongeau (member number 20715). The payor must deduct the cost of the licence, union**

---

16 Ms. Mongeau disputed this version of the facts. At the hearing, she contended that it was PKI's representatives who had approached her.

17 Ms. Mongeau does not seem to accept this statement. She said she had not been hired as a freelance, because she would have refused. She said this is the first time she was not recognized as an employee under a contract of employment as provided in the collective agreement. However, I note that on the AQTIS employment contract she signed, it says: [TRANSLATION] "The undersigned freelance technician authorizes … the producer to withhold" the source deductions provided for in the collective agreement.

> **dues, group insurance and group RRSP. Those deductions do not in any way mean that Josée Mongeau is an employee.**
>
> ...
>
> **(VI) CONTRADICTIONS**
>
> The only contradiction between the parties relates to their initial intention although Josée Mongeau was perfectly aware of the payor's intention, at the time of hiring, to consider her to be self-employed/freelance.
>
> [Emphasis added. Boldface by the appeals officer.]

[38] Contrary to what occurred in Mr. Bernier's case, the insurability officer had determined that Ms. Mongeau's work was insurable.

[39] In her testimony, Ms. Mongeau gave some clarifications, in particular regarding the performance of her duties. She stated that she received instructions concerning where to place the cameras and it was the director who decided what scene to film and how clear to make the image.

[40] She confirmed her job description, as set out in paragraph 3 of her notice of appeal, in which the respondent admitted the facts stated:

> [TRANSLATION]
> 3. The appellant works as first camera assistant, and in the course of her work she performs the following duties, among others:
>
> (a) assembling of the camera parts in the morning.
> (b) checking when filming starts to get a clear image, unless otherwise informed.
> (c) maintaining the filming equipment in the best condition possible.
> (d) assisting the photography director for his ergonomic comfort by relieving him of the camera between takes if filming with a shoulder mount camera, for example
> (e) making sure the camera is secure when it is being moved.
> (f) storing the camera equipment in the cases at the end of the day.
> (g) recharging the camera batteries.

[41] Ms. Mongeau does not consider technician work to be creative work. Her work consists of meeting the director's needs. She says she receives instructions as production progresses, because there are a lot of changes over the course of production: [TRANSLATION] "Minds get changed a lot".

[42] She described the supervisors on the set as the producer in the first instance, then the director, then the floor manager. Although the director is the conductor in terms of creative activity, decisions regarding filming locations are often made by the producer, and she explained that a director may often be fired before production ends on a film.

[43] Ms. Mongeau said that she had refused contracts in the past because they did not want to treat her like an employee. She also added that she had been able to be considered to be an employee even in the case of a contract for which the form provided in the collective agreement was not used.

[44] She acknowledged that she supplied a few small tools, like a screwdriver, scissors, a pencil and chalk. Ms. Mongeau considered herself to be integrated into PKI's business, although she was not recognized as a regular employee of the business. She also stated that she had not worked for any other producer during the term of her contract with PKI.

[45] The appeals officer cited the precedents of *9041-6868 Québec Inc. v. Canada* (*Minister of National Revenue*), 2005 FCA 334 (CanLII) (***Tambeau)*** and *Productions Petit Bonhomme Inc. v. Canada (M.N.R.)*, 2004 FCA 54, (2004), 323 N.R. 356, [2004] F.C.J. No. 238 (QL). The appeals officer in Mr. Bernier's case cited only *Tambeau*.

Analysis

[46] The issue raised by these appeals is not novel. What must be determined is whether the two appellants were engaged in insurable employment for the purposes of the *Employment Insurance Act* (**Act**). The principles that the Court must apply to dispose of this issue have been discussed repeatedly by the courts. In argument, my decision in *Beaucaire v. Canada*, (*M.N.R.)* 2009 TCC 142, [2009] T.C.J. No. 207, 2009 6 C.T.C. 2347 (Eng.), was submitted. In that case, I concluded that the worker was engaged under a contract for services and not a contract of employment. Accordingly, he was not engaged in insurable employment. I described the approach the Court must take in cases of this nature as follows:

> 17 The issue is whether Mr. Beaucaire held insurable employment for the purposes of the Act. The relevant provision is paragraph 5(1)(*a*) of the Act, which states:
>
> 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.]

18 This provision defines insurable employment as employment under a contract of service (or, to use a more modern term, a contract of employment). However, the Act does not define this type of contract. The following is found at section 8.1 of the *Interpretation Act*, regarding such a situation:

> *Property and Civil Rights*
>
> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> [Emphasis added.]

19 The most relevant provisions for determining whether there is a contract of employment in Quebec and for distinguishing it from a contract for services are found at articles 2085, 2086, 2098 and 2099 of the *Civil Code of Québec* (**Civil Code** or **C.C.Q**.):

> Contract of employment
>
> 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.
>
> 2086 A contract of employment is for a fixed term or an indeterminate term.
>
> Contract of enterprise or for services
>
> 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.]

20 When these Civil Code provisions are analyzed, it is clear that there are three essential conditions for a contract of employment to exist: (i) performance of work by the employee; (ii) remuneration for that work paid by the employer; (iii) a relationship of subordination. The clear distinction between a contract of employment and a contract for services is the relationship of subordination, or the employer's power of direction or control over the worker.

21 In scholarly literature, authors have considered the concept of a right of "direction or control" and its flip side, the "relationship of subordination". Robert P. Gagnon wrote the following:

> [TRANSLATION]
>
> *(c)Subordination*
>
> 90 — A distinguishing factor - The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g., a contract of enterprise or for services governed by articles 2098 et seq. C.C.Q. Thus, while article 2099 C.C.Q.. provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> ...
>
> 92 — Concept - Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in terms of the work and the way it was performed. This concept was gradually relaxed, giving rise to the

> concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and monitor the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way.
>
> [Emphasis added.]

22 Note that the distinguishing feature of a contract of employment is not the employer's actual exercise of direction or control (the strict or classical concept) but the employer's right to do so (broad concept). In *Gallant v. M.N.R.*, [1986] F.C.J. No. 330 (QL), Pratte J.A. of the Federal Court of Appeal stated:

> ... The distinguishing feature of a contract of service is not the control actually exercised by the employer over his employee but the power the employer has to control the way the employee performs his duties.
>
> ...
>
> [Emphasis added.]

23 Mention should also be made of the commentary of Quebec's Minister of Justice on article 2085 C.C.Q. accompanying the draft Civil Code, which I quoted at page 2:26 of an article I wrote (my article) entitled "Contract of Employment: Why Wiebe Door Services Ltd. Does Not Apply in Quebec and What Should Replace It."

> [TRANSLATION]
>
> This article restates the rule enacted by article 1665(a) C.C.L.C. The definition contained in the new article establishes more clearly the difference between a contract of employment and a contract for services or contract of enterprise. The sometimes fine line between the two kinds of contracts has caused difficulties both in the scholarly literature and in the case law.
>
> 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, 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.]

24 In Québec, unlike in the common law, the main issue is whether there is a relationship of subordination, or a power of control or direction. To 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. This was the approach taken by Létourneau J.A. of the Federal Court of Appeal in *D & J Driveway*, in which he found that there was no contract of employment based on the provisions of the Civil Code and, in particular, on his finding that there was no relationship of subordination, which he described as "the essential feature of the contract of employment."

25 In addition to *D & J Driveway*, I would note the decision of the Federal Court of Appeal in *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, [2005] F.C.J. No. 1720 (QL) 2005 FCA 334 (Tambeau). Décary J.A. wrote the following at paragraphs 2 and 3:[12]

> 2 With respect to the nature of the contract, the judge's answer was correct, but, in my humble opinion, he arrived at it incorrectly. He did not say anything about the provisions of the *Civil Code of Québec*, and merely referred, at the end of his analysis of the evidence, to the common law rules stated in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*, [1986] 3 FC 533 (FCA) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. I would hasten to point out that this mistake is nothing new and can be explained by the vacillations in the case law, to which it is now time to put an end.
>
> 3 When the *Civil Code of Québec* came into force in 1994, followed by the enactment of the Federal Law - *Civil Law Harmonization Act, No. 1*, SC 2001, c. 4 by the Parliament of Canada and the addition of section 8.1 to the *Interpretation Act*, R.S.C., c. I-21 by that Act, it restored the civil law of Quebec to its rightful place in federal law, a place that the courts had sometimes had a tendency to ignore. On this point, we need only read the decision of this Court in *St-Hilaire v. Canada*, [2004] 4 FC 289 (FCA) and the article by Mr. Justice Pierre Archambault of the Tax Court of Canada entitled "Why Wiebe Door Services Ltd. Does Not Apply in Quebec and What Should Replace It", recently published in the Second Collection of Studies in Tax Law (2005) in the collection entitled *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, to see that the concept of "contract of service" in paragraph 5(1)(a) of the *Employment Insurance Act* must be analyzed

> from the perspective of the civil law of Quebec when the applicable provincial law is the law of Quebec.
>
> [Emphasis added.]

[12] It must be noted that Pelletier and Létourneau JJ. indicated they agreed with Décary J.'s decision. However, in a subsequent decision, *Combined Insurance Company of America v. M.N.R. and Mélanie Drapeau*, 2007 FCA 60, 2007 FCA 60, per Nadon J., accepted by Pelletier and Létourneau JJ., reference is again made to *Wiebe Door*. However, there is no reference in *Combined Insurance* to *Tambeau* nor is there any mention that the interpretation adopted by Décary J. was no longer legally binding in Québec. The application for leave to appeal *Combined Insurance* at the Supreme Court of Canada was dismissed on October 25, 2007. Létourneau J. had the opportunity to re-address this issue in a recent case, *Grimard v. Her Majesty the Queen*, 2009 FCA 47. At paragraph 37, he stated: "…in Quebec civil law, the notion of control is more than a mere criterion as it is in common law. It is an essential characteristic of a contract of employment…" He then cited *Tambeau* in support of his statement.

> 26 As mentioned above, there may be a fine line between a contract of employment and a contract for services. It is important that as a starting point, we consider how the parties themselves defined the nature of their contractual relationship. Here, evidence of the parties' intention is clear. ...

[47] Moreover, since counsel for the appellants quoted several excerpts from my article, referred to in paragraph 3 of the decision of the Federal Court of Appeal in *Tambeau*, I will cite extensive excerpts that, in my opinion, are relevant to the search for a solution to the problem raised by these appeals.

[48] At paragraph 51 of his reasons in *Grimard v. Canada*, 2009 FCA 47, [2009] 4 F.C.R. 592, Justice Létourneau wrote:

> **51** Paragraphs 37 to 46 show that the judge looked for and analyzed indicia of either supervision or unsupervised performance of the work. Contrary to what the appellant alleged, it is interesting to note that, in this regard, the judge examined the common law criteria.
>
> **52** For example, at paragraph 39, the judge noted that the CLP gave the appellant "an office equipped with all the tools he needed to do his work". In other words, he inquired into the ownership of the work tools.
>
> [Emphasis added.]

[49] When I wrote my reasons in *Grimard*, I intentionally did not examine the common law tests. The reason why I did not do that is that I was applying the approach followed by the Supreme Court of Canada in several decisions in which it had held that it was inappropriate to apply precedents from the English common law

and that the provisions of the civil law had to be interpreted based on its own rules. I described the approach taken by the Supreme Court of Canada (and even the Federal Court) at paragraph 4 of my article, and at paragraphs 57 *et seq*., as follows:

> [4] Arguing that making this distinction required strict reliance on the general law of Quebec, we wrote, at page 301:
>
> [TRANSLATION]
>
> … This is another reason why the courts should be receptive to the approach taken by Brossard J. in *Dennis Sport Import*. We should, as he emphasized, "rely on the general law of Quebec". Furthermore, this approach, which would respect the integrity of Quebec civil law, is consistent with the one recently confirmed by the Supreme Court of Canada in *Rubis v. Gray Rocks Inn Ltd*. [[1982] 1 S.C.R. 452, at page 469] in which Beetz J. cited the following statements of Mignault J. [in *Desrosiers v. The King* (1920), 60 S.C.R. 105, at 126]:
>
> > ... it is time to react against the habit, in cases from the province of Quebec, of resorting to English common law precedents on the ground that the Civil Code contains a rule which is in accordance with a rule of English law. … The civil law is a complete system in itself and must be interpreted in accordance with its own rules. [Emphasis added.]
>
> …
>
> **1.2.1. The use of civil law precedents to interpret Civil Code provisions**
>
> [57] First, in terms of principles, common law decisions should not be applied to interpret the civil law of Quebec. In addition to the opinion of Mignault J., cited by Beetz J. in *Gray Rocks Inn Ltd*. and mentioned in the introduction to this article, there are the following comments of Mignault J. in *Curley v. Latreille* (pages 176-177):[59]
>
> [TRANSLATION]
>
> I would like to make another comment because a number of honourable judges of the Court of Appeal have, in my opinion, equated our law as it relates to the liability of masters and employers with the English law, under whose influence it has been decided that the master is responsible for the damage caused by his servant "in the course of his employment", a phrase that, in their opinion, expresses the same idea as "dans l'exercice des fonctions auxquelles ces derniers sont employés" or, to quote once more the English version of article 1054 C.C. "in the performance of the work for which they are employed". And having noted what was, in their

> opinion, an identity of meaning, the learned judges cited some English decisions, and in particular the decision of this Court in *Halparin* v. *Bulling* [(1914), 50 S.C.R. 471] which came from the province of Manitoba.
>
> It can sometimes be dangerous to go outside one legal system and to seek precedents in another system on the grounds that the two systems have similar rules, except of course in the case where one system borrows from the other a rule that was previously unknown to it. But, although the rule is similar in both, it may be that it was not understood or interpreted in the same way in each system, and, since legal interpretation — I am speaking naturally of the interpretation that is binding on us — is actually part of the law that it interprets, it may very well happen that the two rules, despite an apparent similarity, are not completely identical at all.
>
> I will therefore not base the conclusions that I believe I should adopt in this case on any precedent drawn from the English law, not even on *Halparin* v. *Bulling*, but will rely solely on the wording of article 1054 C.C. [Emphasis added.]

[59] (1920), 60 S.C.R. 131. In this case, it had to be decided whether a master (employer) was liable for the damage caused by his servant (employee) [TRANSLATION] "in the performance of the work for which [he was] employed", under art. 1054 C.C.L.C. (now art. 1463 C.C.Q.).

[58] Brodeur J., although dissenting, adopted the same approach as Mignault J., writing at page 173:

> [TRANSLATION]
>
> . . . The comments that I have just made in this case and the spirit of the law in the two systems show how dangerous it is to go outside one system and to seek in another precedents that are sometimes based on rather poorly recognized and sometimes opposing principles, even though the wording may appear almost identical.
>
> For my part, I prefer to base my conclusion on the decision of the *Cour de cassation*, because it was rendered under legislation that our codifiers stated they had adopted themselves. [Emphasis added.]
>
> …

[60] Mignault J. returned to the question of the use of common law judicial decisions in civil law in a lecture to the students of McGill University published by the Canadian Bar Association:[60]

> And as to precedents where you seek to establish a rule of law, do not go outside of decided cases or authorities of our own jurisprudential system. Cases from Quebec often come before the Supreme Court full of references taken from the common law. It is perhaps easier to find these references on account of the English and American encyclopaedias of law which are in very common use in our province, and which are very convenient for handy reference. Remember however that the civil law is a distinct and entirely self sufficing system, that its legal literature is extremely rich and abundant, that monumental works of reference like Fuzier-Herman, the repertories of Dalloz and Sirey and the Pandectes Françaises are on the shelves of our libraries, and that, even where the common law and the civil law have a similar rule, as in many cases of mandate, suretyship and torts, to mention these only as typical of many others, it can only lead to confusion to go outside of our system to seek authorities in other systems of law where the rule in question may well be a deduction from another rule which does not exist in our code. I feel very strongly on this subject and I have lost no opportunity in my humble way since I have had the honour of a seat on the bench of our highest appellate court, to insist that each system of law be administered according to its own rules and in conformity with its own precedents. [Emphasis added.]

[60] "The Authority of Decided Cases" (1925), 3 *Can. Bar R.* 1, at 22-23. Another passage from this article was cited by Beetz J. in *National Bank of Canada (successor of the Canadian National Bank) v. Soucisse*, [1981] 2 S.C.R. 339, at 361.

[61] Finally, there is this comment by Addy J. in *Olympia and York, supra* (para.16), at page 702:

> . . . To seek by way of common law jurisprudence to reach a solution to the present issue would be to venture out on a perilous journey over rocky and tortuous roads, fraught with pitfalls, which would lead to a mere *cul-de-sac*, if one were fortunate. [Emphasis added.]

[50] I was surprised to see, when I read the reasons for decision of the Federal Court of Appeal in *Grimard*, that the taxpayer had argued that the judge should have "recused himself to avoid being accused of bias" because he referred to his article. The words of Justice Mignault, reproduced at paragraph 60 of the excerpt from my article quoted *supra*, were written in April 1921 and published in the *Canadian Bar Review* in January 1925 while he was a judge of the Supreme Court of Canada.[18] The

[18] According to Wikipedia, he was a judge of the Supreme Court of Canada from October 25, 1918, to September 30, 1929.

argument made was particularly surprising in that Mr. Grimard was a doctor who was working as an assessor with the Commission des lésions professionnelles, an administrative tribunal in Quebec, so he was familiar with the judicial world. Everything I wrote in my article I could have written in a decision. That article gave me an opportunity to do a comprehensive, detailed review of the entire issue raised by the application of section 5 of the Act in Quebec. Moreover, [TRANSLATION] "[t]here is a long and honourable tradition of judicial involvement in teaching law, publishing legal textbooks and articles in law reviews, and giving seminars or speeches about the law" (emphasis added), as the Rt. Hon. Gérald Fauteux, former Chief Justice of the Supreme Court of Canada, wrote in *Le Livre du Magistrat* (at p. 20), published by the Canadian Judicial Council in 1980.

[51] If judges had to recuse themselves every time they adopted a legal interpretation of legislation and laid out principles found in the case law, the Tax Court of Canada could no longer function. The Court is frequently asked to dispose of appeals that relate to the same kinds of problems. We need think only of appeals relating to research and development, or to the scheme involving the sale of charitable donation receipts, which has been the subject of much debate in this Court and several appeals on that subject that have been heard by the same judge.

[52] As well, judges must always come to issues with an open mind, without bias, and even consider the possibility that they may have made a decision that was wrong in fact and law. Judges are often dependent on the facts and arguments presented to them. An excellent example may be found in the decision I recently gave in *Bombardier*, 2011 TCC 48, a case that raised the issue of the value, for the purpose of computing the large corporation capital tax, of advances on contracts recognized in the balance sheet. In *Oerlikon Aérospatiale Inc. v. The Queen*, 97 DTC 694, affirmed by the Federal Court of Appeal, 1999 CarswellNat 534, 99 DTC 5318 (Eng.), I had dismissed Oerlikon's appeal, concluding that the advances on contracts were advances for the purposes of the *Income Tax Act*, including advances recognized in supplementary notes. In *Bombardier* I concluded, based on expert evidence that was different from what had been presented in *Oerlikon*, that only the advances shown in the body of the balance sheet were advances for the purposes of the tax in question.

[53] After explaining, at paragraphs 75 *et seq.* of my article, why the rules of evidence in effect in Quebec are applicable to cases that involve applying section 5 of the Act, at paragraphs 82 *et seq.*, I laid out the various evidentiary methods, including proof by presumption of fact, that may be used to establish that there is a relationship of subordination for the purposes of determining whether there is a contract of employment. Only the most important footnotes are reproduced:

2.1.2. Proof by presumption of fact

[82] Article 2811 C.C.Q. states that "proof of a fact or juridical act may be made by a writing, by testimony, by presumption, by admission or by the production of material things". There is no need to examine here each of these five means of proof. It would, however, be appropriate to analyse proof by presumption of fact[89] since this method of proof is of great use in establishing the existence of a contract of employment. As will be seen below, proof of the contract itself, of the juridical act, may be made by direct evidence, namely, by the production of the document that records it or, failing that, by testimony as to what the parties agreed upon when entering into the contract. Direct evidence of the work performed by the employee and the salary paid by the employer can be provided in the same way, that is, by a writing or by testimony. As for the relationship of subordination, which is the other side of the power of direction or control, direct proof can be provided if this power was exercised or if it is provided for in the contract. In cases where it has been neither exercised nor provided for, or was exercised only to a limited extent, it is necessary to prove the existence of the "power" of direction or control, that is, one must establish an unapparent or unknown fact, which requires indirect or circumstantial evidence. This is what the Civil Code calls evidence by presumption of fact. The same approach could be required, furthermore, if the parties did not manifest in their agreement their intention regarding the nature of the contract.

[83] Paraphrasing the wording of article 2846 C.C.Q., Professor Ducharme[90] describes this method of proof as [TRANSLATION] "an intellectual process by which the existence of an unknown fact is determined by induction from the existence of known facts". The following is the analysis provided in Professor Ducharme's work:[91]

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89 The rules are found in arts. 2846-49 C.C.Q.

90 Léo DUCHARME, *Précis de la preuve*, 5th ed. (Montreal: Wilson & Lafleur, 2001), at 159.

91 *Ibid.*, p. 182 et s.

> [TRANSLATION]
>
> **Para. I — Analysis of the presumption of fact**
>
> 599. If we break down the process by which a judge proceeds from known facts to an unknown fact, it is apparent that this induction involves three distinct stages. First, the establishment of the known facts or the search for indicia; second, the application of a principle serving to link the known facts to the fact looked for; and lastly, the outcome of the induction, which is more or less great certainty concerning the fact determined by induction. We shall briefly analyse each stage.
>
> **A — The search for indicia**

> 600. Any fact or act, provided it is validly established before the court, may serve as an indication. No specific rule can therefore be formulated as to the nature of facts that can serve as the basis for an induction, unless it be that the facts must be serious, precise and concordant, as article 2849 C.C.Q. and well established case law provide.
>
> 601. What is to be understood by this phrase? In our opinion, it simply means that the known facts must be such that they make the existence of the fact that is to be induced from them at least probable. If the known facts are as consistent with the existence as with the non-existence of the fact, they cannot serve as the basis for a presumption and it will then be said that they are not sufficiently serious, precise and concordant. It must be noted that a mere probability is sufficient and that it is not necessary for the presumption to be so strong as to exclude any other possibility. We shall examine below the problem of the admissibility of the means of proof that may be employed to prove the indicia.
>
> **B — The application of a principle**
>
> 602. Indicia in themselves prove nothing; their value rests on the interpretation that they are given, and it is by means of a principle drawn from science, psychology, physiology and so on that they may be interpreted.
>
> 603. The principle of causality plays a very important role in presumptions. According to this principle, we know that there is no effect without a cause; starting from an effect, it is accordingly possible to go back to the cause that produced it. Thus, in one particular case, the court presumed that some sheep had been killed by stray dogs on the basis of the kind of injuries that had been inflicted on them. In other cases, the principle of causality makes it possible to see the cause of another event in a certain fact, to identify, for example, as the cause of a fire the pesticide vapours that had spread throughout a building a few hours earlier. [Emphasis added.]

> [84] Thus, it is through analysing and weighing a set of factual indicia that a conclusion may be reached as to the existence or the absence of facts that are not apparent or manifest, such as the power of direction or control, or the intention of the parties regarding the nature of the contract.

[54] Here, the parties did not describe the nature of the agreement clearly in their written agreement. They simply described the agreement as an employment contract. They did not specify whether it was a contract of employment or a contract for services. It is therefore not surprising that the evidence concerning the nature of their contractual relationship would be contradictory. Both appellants insist that they always considered themselves to be employees when they signed this kind of

contract. Mr. Joli-Coeur states that the practice in his production firm was to clearly inform their technicians if they were engaged as self-employed workers.

[55] We must therefore rely on an analysis of their conduct to determine the true nature of their contractual relationship. In any event, even if its nature was stated in the written agreement, it would still be necessary to examine their conduct. I wrote the following at paragraphs 97 *et seq.* of my article:

> **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 Décary J.A. indicated in *Wolf*, *supra*, performance of the contract must be consistent with this intention. Thus, the fact that the parties have called their contract a "contract for services" and have stipulated both that the work will be done by an "independent contractor" and that there is no employer-employee relationship does not necessarily make the contract a contract for services. It could in fact be a contract of employment. As article 1425 C.C.Q. states, one must look to the real common intention of the parties rather than adhere to the literal meaning of the words used in the contract. The courts must also verify whether the conduct of the parties is consistent with the statutory requirements for contracts. According to Robert P. Gagnon:[108]
>
> > [TRANSLATION]
> >
> > **91** — *Factual assessment* — Subordination is verified by reference to the facts. In that respect, the case law has always refused to simply accept the parties' description of the contract:
> >
> > In the contract, the distributor himself acknowledges that he is working on his own account as an independent contractor. There is no need to return to this point, since doing so would not alter the reality; furthermore, what one claims to be is often what one is not. [Emphasis added.]
>
> [98] In *D & J Driveway*, Létourneau J.A. of the Federal Court of Appeal wrote:[109]
>
> > 2 It should be noted at the outset that the parties' stipulation as to the nature of their contractual relations is not necessarily conclusive and the Court which has to consider this matter may arrive at a contrary conclusion based on the evidence presented to it: Dynamex Canada Inc. v. Canada, [2003] 305 N.R. 295 (F.C.A.). However, that stipulation or an examination of the parties on the point may prove to be a helpful tool in interpreting the nature of the contract concluded between the participants. [Emphasis added.]

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

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

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

> [TRANSLATION]
>
> Whereas the existence of an employment relationship depends neither on the expressed will of the parties nor on the name they have given to their agreement but rather on the factual conditions in which the workers' activity is performed . . . .

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

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

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

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

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

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

[114] See note 7.

[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.

[56] The following is the process I describe at paragraphs 103 *et seq.* of my article, to determine the true nature of a contractual relationship between a payor and a worker, and in particular to determine whether there is a relationship of subordination:

2.3.1. Direct evidence of the power of direction or control

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

[104] As an example of work in which the worker is given many instructions on the "what", the "how", the "where" and the "when" and in which personal performance of the work by the worker (the "who") matters, actors in a theatre troupe or a movie production company spring to mind. As a general rule, their work is done under the direction and control of a director. Since a contract of employment

may be for a fixed term and is in that case [TRANSLATION] "essentially temporary", there is no reason why the employment cannot last for just a few weeks[119] (2086 C.C.Q.).

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

116 In my opinion, when a payer imposes the methods or means of performing a job on a worker, he is directing that worker. The proof that the payer has acted in this way constitutes direct evidence of the exercise of the power of direction and is not merely evidence by indicia. It should however be noted that the line between direct evidence and indirect or circumstantial evidence may be tenuous. To the extent that the direct evidence of the facts is not considered sufficiently probative (e.g., because of the limited number of instructions), these facts might be treated as indicia to be considered with the other indicia described below.

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

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

118 *Immeubles Terrabelle*, *supra* (note 31), at 1309, 1310; *Neblina Spa Enr.*, *supra* (note 95), at para. 14; *Ménard*, *supra* (note 98), at para. 8; *Importations Jacsim*, *supra* (note 100), at para. 22; *Services de santé Marleen Tassé inc.*, *supra* (note 31), at paras. 12, 27-29, 73, 83; *9088-8454 Québec*, *supra* (note 96), at para. 26; *Dr Denis Paquette*, *supra* (note 99), at para. 33 (no. 16); *Ellefsen Lebel Inc. c. Bolduc*, [1997] A.Q. no 505 (QL) (C.Q.), at para. 19 (work involving market research and analysis and soliciting clients for a "head-hunting" firm: employee); *Seitz*, *supra* (note 98), at paras. 15, 22, 62; *Québec (Commission des normes du travail) c. 9044-6337 Québec inc. (f.a.s. Les Autos Fleurimont)*, [1999] J.Q. no 6008 (QL) (C.Q.), at para. 18 (used-car salesman paid exclusively by commission: provider of services); *Beauport (Ville)*, *supra* (note 31), at para. 48; *IMS of Canada*, *supra* (note 101), at paras. 9, 11; Cass. soc., no 196, *supra* (note 106); *Dupuis c. Pro Vie Assurances*, [2004] J.Q. no 9123 (QL) (C.S. Qué.), at para. 58 (seller of two kinds of insurance: provider of services).

119 According to Pélissier, Supiot and Jeammaud, *supra* (note 50), at 197, para. 129, [TRANSLATION] "the duration [can be] prolonged or very brief". (See the passages reproduced below in para. 109 of this article.) Moreover, according to these authors, the work covered by the contract of employment may be artistic in nature (p. 181, para. 120) and be performed by an artist (p. 183, para. 121*b*)) or even by a film director (p. 200, para. 132).

The legal status of actors as employees or providers of services has generated much controversy in Canada and has led to many approaches being made to the Canadian tax authorities. See Interpretation Bulletin IT-525R and Canada Tax Service (Carswell), commentary on section 9, under the heading "Artists and Writers".

Furthermore, in *Productions Petit Bonhomme Inc. v. Canada (M.N.R.)*, 2004 FCA 54, (2004), 323 N.R. 356, [2004] F.C.J. No. 238 (QL), the Federal Court of Appeal found that the Tax Court had not committed any palpable error in concluding that technicians working on the production of television shows in Quebec were self-employed workers. It must however be noted that it was the principles from *Wiebe Door* and *Sagaz* that were applied by the Tax Court judge in this case. One

> may wonder, then, whether the result would have been the same if that judge had applied the relationship of subordination test (direction or control) as the sole test, in accordance with the Civil Code provisions.[19]

[105] Direct evidence that the employer exercised a power of direction could also consist of evidence showing that the payer has trained the worker, unless the training involved only information on the products to be sold.[120] The imposition of rules of conduct or behaviour is also direct evidence, unless the rules correspond to standards that apply regardless of the worker's status, including legal standards.[121]

[120] *Sarrazin v. Canada (M.N.R.)*, [1997] T.C.J. No. 320 (QL), at paras. 10, 13 (chicken catchers in producers' poultry buildings: providers of services); *Services Barbara-Rourke*, *supra* (note 115), at para. 44; *Yunes c. Garland Canada Inc.*, [2004] J.Q. no 8434 (QL) (S.C. Qué.), at para. 17 (door-to-door salesperson: provider of services); *Services de santé Marleen Tassé*, *supra* (note 31), at paras. 30, 74, 87; *Desrochers*, *supra* (note 116), at paras. 24-26.

[121] *Charbonneau*, *supra* (note 4), at paras. 7, 11; *Dr Denis Paquette*, *supra* (note 99), at para. 33 (no 8); *Services de santé Marleen Tassé*, *supra* (note 31), at paras. 16, 25, 63; *Neblina Spa Enr.*, *supra* (note 95), at paras. 5, 14, 16; *Ménard*, *supra* (note 98), at para. 8.

2.3.2. Circumstantial evidence of the power of direction or control (indicia of subordination)

[106] It must be pointed out that the distinguishing feature of a contract of employment is not that the employer actually exercised direction or control but that the employer had the power to exercise direction or control. Where the employer has not regularly exercised his power of direction or control, it is not easy to prove the existence of the "power". It is not surprising, then, that in order to solve this problem the common law courts have opted to apply tests other than the control test. However, in Quebec, the courts do not have such leeway. They have to find that a relationship of subordination is either present or absent before they can characterize an agreement as a contract of employment or a contract for services. It is thus necessary to resort to proof by presumption of fact, namely, indirect or circumstantial evidence.

[107] In selecting and weighing indicia, one must be mindful of the actual provisions of the Civil Code that distinguish a contract of employment from a contract for services. What must be asked is whether a fact of a circumstantial nature renders the existence of a power of direction or control probable, or whether, on the contrary, it renders probable the worker's independence in carrying out the

[19] I would add to the comments I made in my article that the decision of the Federal Court of Appeal in *Productions Petit Bonhomme Inc*. was made on February 4, 2004, that is, before its decision in *Tambeau*, which was dated October 17, 2005. Moreover, the application of s. 8.1 of the *Interpretation Act*, which came into force on June 1, 2001, was not discussed in *Productions Petit Bonhomme Inc.*, either in the decision of the Federal Court of Appeal or in the decision of this Court.

contract. The following is merely a very partial list of indicia and it can be modified or added to. The usefulness, relevance and probative value (facts that are "serious, precise and concordant") of these indicia and of those that may be added thereto must be assessed according to the particular circumstances of each case.

[108] Before proposing or commenting on indicia that might be useful, it would be appropriate to point out those described by legal scholars. Let us begin with those suggested by Robert P. Gagnon, at paragraph 92 of his above-cited work:

> [TRANSLATION]
>
> . . . In practice, the presence of a number of indicia of supervision will be sought. These can vary depending on the context: mandatory presence at a workplace, more or less regular assignment of work, imposition of rules of conduct or behaviour, reporting requirement, control over the quantity or quality of the work, and so on. The fact that the work is done at home does not preclude integration into the business. [Emphasis added.]

[109] In addition, there are the indicia described in French legal writings:[122]

> **2. The indicia**
>
> To identify the elements whose presence conditions the characterization, judges resort to indicia. These are drawn from the provisions of the contract, but even more so from the "factual conditions in which the workers' activity is carried on" and which are, basically, the means adopted or accepted for the performance of the contract. The conduct of the parties, their relationship, the time and place of the activity, the fact that the person in question works alone or with the help of others and the ownership of the equipment and raw materials are examined, as, of course, are the existence or absence of direction or control by the beneficiary of the work and the existence of remuneration and the mode thereof. A contract of employment exists when a *bundle of indicia* points toward this characterization, but the absence of one of the indicia does not exclude such characterization. The reasons for decision in some *Cour de cassation* cases provide a very good illustration of this method.

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[122] Pélissier, Supiot and Jeammaud, *supra* (note 50), at 193, 196 ff. (N.B. The footnotes are mine; those of the authors have been omitted.)

> ...
>
> **128** ***The work location***[123] ◊ The employee usually performs the work on the premises of the employer or of the employer's business, at the workstation to which he is assigned. The geographical imperative will thus constitute one indication of subordination.

[123] For examples of decisions of the *Cour de cassation*, see: Cass. soc., 20 June 1995, Bull. civ. 1995.I.186, no 268 (professor updating a work for a publisher: provider of services) and Cass. soc., no 196, *supra* (note 106).

Thus, it has been held that the following were employees: an agent who receives clients in an office made available to him by the employer; a company doctor required to be on the company's premises; the operator of a booth set up in a location assigned to her by the employer, who has at all times the power to deny her access thereto and who pays a fee for the use of that location; a teacher giving lessons in his students' homes or in an educational institution; and a measurer working in part on company premises.

Where the nature of the worker's activity is such that it is performed outside the payer's premises, indicia of subordination would include the fact that a newspaper vendor is required to follow the route assigned to him, that a professional athlete must heed the call to go to the place of a competition, that a demonstrator placing orders for household items or cosmetic products participates in the business by attending meetings that are organized and taking part in training courses, and provides after-sales service.

However, employee status was denied to: a newspaper vendor at liberty to choose his sector of activity, a collection agent working on his own premises, and a law professor having no obligation to be on the premises of the publishing company for which he works.

Determination of the place of work is obviously not conclusive in itself. Because of the nature of his activity, a self-employed worker may have to do his work on the premises of the person who is his client, as with an accountant or a consulting engineer, or at the location where the client has organized an event, as in the case of a conference interpreter..

The development of teleworking, the practice of putting workers on call (obligation to stay home and be at the employer's disposal) and the practice of work on demand are weakening the traditional significance of the place of work.

129 ***The work schedule***[124] ◊ The fact that the worker performs the work over time is inherent in the nature of this successive contract. It matters not whether the employment is for a fixed term or not, or whether it is of extended or very brief duration, although regular collaboration over a fairly lengthy period may in itself be an indication of subordination.

[124] Cass. soc., no 268, *supra* (note 123); Cass. soc. no 196, *supra* (note 106).

Subordination will be concretely manifested by the worker's obligation to remain available to the employer in accordance with the schedule established by the employer. Thus, the following will be considered employees: a newspaper vendor required to start delivering to subscribers at a fixed time, a doctor providing medical services for a business and required by his contract to be there at fixed times, and a teacher subject to schedules. Where the work is not performed continuously on a regular schedule, subordination may result from the obligation to answer any call from the person to whom the performance of that work is owed.

On the other hand, it has been held that the following were not bound by a contract of employment: a newspaper vendor not required to follow any schedule, a market porter working at hours of his own choosing, an "adviser" who does not have to adhere to a schedule in contacting his connections for the benefit of a business.

When a worker is required to go to an assigned location and follow an imposed schedule, a judge will readily find that there is "legal subordination" and consequently a contract of employment. The act of submission is significant in itself, and the obligation to be at a location at fixed times appears to be a condition of the employer's effective exercise of his power of direction and control. New trends in duration of work (individualized schedules, part-time and intermittent work, variability of work schedules during the year) do not appear to be of a nature that would lessen the significance of these indicia.

130 ***Personal and exclusive performance of work*** ◊ A contract of employment obligates the employee to perform his work personally, and he cannot substitute another person for himself, especially an employee whom he in turn has hired.

The direct or indirect imposition of a requirement for personal performance of the work points strongly toward characterization as a contract of employment. However, a contractor using workers recruited by him who work under his direction and his exclusive responsibility is not bound by a contract of employment between him and the beneficiary of his activity..

The problem has arisen in particular in the area of sales, and the legislator has settled the issue for some by explicitly imposing characterization as a contract of employment. On the other hand, the *Cour de cassation* has refused to characterize as an employee of the

firm a general agent who is in charge of employee subagents paid by him and working for him and who therefore uses work done by others for his personal gain. This is also true of a surgeon who is free to decide on his activities and operates in a clinic with nurses hired, paid and supervised solely by him.

In addition, by renouncing for a time his freedom with respect to his work and by agreeing to reserve his services for a single employer, an employee manifests his submission to the employer's authority. This may be the case for an accountant, or for a professional athlete who promises not to run or to play for another sports group or club. Where no such undertaking has been given, recognition as an employee has been refused to a street vendor free to sell other newspapers and to the organizer of training sessions who does this work for several organizations.

While exclusivity usually leads to the presumption that there is a relationship of subordination, the converse is not true: non-exclusive activity, exercised for a number of employers or a clientele, is not necessarily inconsistent with the status of employee. To work under a contract of employment and at the same time practise independently as a professional is possible, as is, of course, the simultaneous performance of a number of employment contracts (part-time, in principle, in order to comply with duration of work regulations) with different employers. Multiple employment or the simultaneous carrying on by one person of a number of different professional activities is spreading. This type of arrangement should not be viewed as blameworthy and is prohibited only exceptionally.

131 ***The provision of equipment, raw materials or products*** ◊ The employer normally provides the employee with the tools and materials required to do his work. Thereby is asserted the dependency, in a capitalist economy, of the worker on an employer who holds the means of production.

With respect to subordination, the authority of the beneficiary of the work becomes less clear when the equipment belongs to a worker who uses it as he sees fit, because the worker then ceases to be a pure lessor of services. Accordingly, the courts have refused to recognize as employees a contractor using his own tools and cement mixer, a pile-driving contractor who retains control over the operation of his machines, a representative who owns a warehouse and transportation equipment and delivers a company's products to retailers, and a tradesman advancing various supplies. The following are, however, bound by a contract of employment: the operator of a booth selling at the prices indicated merchandise exclusively furnished by the employer and returning unsold items, or masons who are provided with mortar. The same kind of circumstance, together with other indicia, favours employee

status for doctors in private medical establishments who use the facilities of those establishments.

In the case of some couriers or truckers who own their own vehicles, it is a priori likely that they will not be found to work under a contract of employment. The parties may, however, on occasion, because of various conditions governing the performance of their activity, benefit from the provisions of the Labour Code by virtue of article L. 781-1 C. trav.

132 ***Direction and control of the work***[125] ◊ This factor is determinative. The courts have found the following to be employees: a mason working clandestinely for an owner who gives him instructions; a deep-sea diver prospecting the ocean floor in return for remuneration and who sends in reports, despite the freedom given by the remoteness of the place in which he works and the technical nature of his work; a technical and commercial manager of an agricultural estate, having specific, limited and controlled duties; the manager of a commercial service receiving specific instructions; the operator of a booth receiving specific and compulsory instructions concerning the sale of publications, who is permitted to show no initiative and is subjected to inspection twice a day; a real estate agent reporting on his activities, receiving criticism and instructions; a film director hired by the producer, subordinate to the latter despite having a measure of artistic freedom; a soccer player submitting to the discipline of his club; an accountant receiving instructions and actual orders by memoranda; a trucker given "self-employed" status by his employer on whom he nonetheless continues to be dependent; a representative of a subsidiary, subject by contract to the orders and directives of the parent company.

[125] It must be pointed out that the French Civil Code does not define contract of employment. In France, as was true in Quebec before 1994, there are only *contrats de louage d'ouvrage* (contracts of lease and hire of work), which include contracts of employment and contracts for services. The distinction between the two was decided by legal scholars and the case law. Since the Quebec legislator has adopted as the test for determining the existence of a relationship of subordination the power of direction or control, proof of the exercise of this power constitutes direct evidence of the relationship of subordination. This would not be, strictly speaking, a mere indication of a relationship of subordination, as is the case in France. French judges, unlike Canadian judges sitting in Quebec, could have the necessary leeway to modify the notion of relationship of subordination.

Analysis of the case law accordingly makes clear the importance, among the various indicia of subordination, of the integration of the worker in an organized service, even if, in fact, it is now only an indication and not a possible and sufficient mode of subordination. Thus, a private teacher who

works on the premises according to an assigned schedule, teaching subjects according to a fixed program and required to follow the institution's directives concerning, among other things, attendance records and report cards, is an employee, despite his irreducible intellectual independence. Similarly, the distributor of a free advertising weekly will be considered an employee in particular because he works for someone else in the context of an organized service, and a doctor's integration into the "context of an organized service" in a hospital or clinic contributes to making him an employee. A lawyer, who may be an employee since the Law of 1 December 1990, has employee status when he does not have or cannot develop his own client base.

It does not matter if the worker carries on his professional activities outside the payer's premises if he is integrated into the context of an organized service in the business, nor does it matter if he is involved in the business only as a term employee while enjoying the freedom that comes with doing research.

The decisive factor appears to be control of the activity, which is manifested, for instance, in the reporting requirement. This requirement is a particularly useful and significant indication in view of modern forms of management by "agreements on objectives", which give workers considerable independence in return for the requirement to report on the use they make of that independence, and which, far from eliminating subordination, give it a new face.

On the other hand, it is because they enjoy complete freedom in organizing their work that the following are not bound by a contract of employment: a tradesman working unsupervised on a work site; a conference interpreter in the absence of subordination and genuine integration into an organized service; the organizer of training sessions acting like the head of a business; a doctor in a mining benefit society who freely determines his hours for consultation and visits and organizes his work as he sees fit; a person who, although a member of an association (SOS Médecins), is not subordinated to it, but works for his own gain. Likewise, an insurance adjuster who assesses cars damaged in accidents, a technical adviser enjoying total freedom of action, an academic conducting seminars, who does not have to report on his activities and has not benefited in any way from the company structures, and a sports referee escape any form of subordination because their work is not controlled. The lack of genuine direction and control makes it doubtful that contracts between companies called "*sociétés de portage salarial*" and the consultants they take in and "manage" but do not in any way direct constitute contracts of employment, despite the appearance created. ... [Emphasis added.]

Application to the facts of the appeals

[57] As we have seen, the question of law to be decided is clear. In order to determine whether Mr. Bernier and Ms. Mongeau held insurable employment during the relevant periods, the question is whether the services they performed were performed under a contract of service (contract of employment). Section 5 of the Act does not give a definition of a contract of that nature, and accordingly, under section 8.1 of the *Interpretation Act* and the *Civil Code of Québec*, it must be determined whether there was a relationship of subordination between them and their respective payors or whether, on the contrary, they were free to choose the means of performing the services. Once the right question in issue has been stated, it is easier to answer it. Because the employment contract does not determine the nature of the contract and the parties' testimony was contradictory on this point, we must look to the parties' conduct to resolve the issue.

[58] In my opinion, both the direct evidence and the proof by presumption of fact clearly establish that there was a relationship of subordination between the parties to the contracts in this case. In many appeals heard by this Court, there is often little direct evidence. The appeals before the Court in this case are the exception, as was the appeal in *Financière Banque Nationale Inc. v. Minister of National Revenue and Carlo Massicolli*, 2008 TCC 624.

[59] Here, there is considerable direct evidence showing that the work was performed under the direction or control of the employers. Moreover, some of that evidence derives from the reports on an appeal (**reports**) prepared by the appeals officers who made the determinations in the two cases. The facts stated in those reports largely corresponded to the facts proved by the evidence presented at the hearing.

[60] I find it difficult to understand how both appeals officers could have concluded that there was no contract of employment in these two cases. The most flagrant case is Ms. Mongeau's. In his report setting out the explanation given by Ms. Mongeau, the officer stated, at paragraph 23: [TRANSLATION] "The two parties acknowledged that there was a relationship of subordination between them." That is confirmed by paragraph 24, in which the officer stated that the payor's representative corroborated Ms. Mongeau's statements in their entirety, with the exception of her statement regarding the initial intention.

[61] Among the facts assumed by the Minister in making his determination, paragraph 15(j) of the Amended Reply to the Notice of Appeal in Ms. Mongeau's case states that she followed instructions from the lead cameraman, François Mercier.

Paragraph (k) states that she had to work closely with the production team while keeping to the schedule established by the payor. According to paragraph (l), Ms. Mongeau had to arrive on the set at the times set by the director or producer. Paragraph (n) states that Ms. Mongeau could leave the set only when the producer gave the order.

[62] In paragraph 15 of his report, the officer wrote that Ms. Mongeau performed her work [TRANSLATION] "under the supervision and control of the photography director". In paragraph 15.1, he reiterated that the lead cameraman gave instructions to Ms. Mongeau. Paragraph 17 states: [TRANSLATION] "When asked whether her work was supervised or controlled, she replied: 'All my instructions came from the photography director. I was to leave the set only when we got the order from the producer. I was to go to the places and at the times I was told. I had to fill out timesheets.'" In paragraph 21.1, the appeals officer stated: [TRANSLATION] "[H]ours of work are decided by the producer/director. … The work schedule may be either in the morning or in the evening, or even at night, depending on the director's intentions for filming."

[63] Having obtained confirmation from the parties that there was a relationship of subordination between Ms. Mongeau and PKI, and having noted that their statements in that regard were consistent with the facts relating to the performance of the work, the appeals officer had no choice, in my opinion, but to conclude that there was a contract of employment, and thus that there was insurable employment. However, astoundingly, he wrote the following on the final page of his report, to justify his conclusion to the contrary:

> [TRANSLATION]
>
> Here, this is really teamwork the goal of which is a high-quality film production, within a certain timeframe, in which each participant makes sure that their work is done at the right time under the control of the producer and without each one necessarily being told how to do it.
>
> This is all done in an atmosphere of collaboration among professionals. The workers in this case, therefore, have a status that is more in the nature of self-employed worker.
>
> For all these reasons, it would be difficult, and even impossible for me to satisfy any tribunal that Josée Mongeau was not a self-employed worker and that there was no business relationship between the two parties.
>
> [Emphasis added.]

[64] The officer in the Bernier case wrote, in paragraph 10 of her report: "The worker received from the payer every morning an instruction sheet which outlined the daily working plan and schedule." In paragraph 11, she said: "The worker's daily activities were supervised by the payer." According to paragraph 12 of the report: "The worker had to fill out time sheets on a weekly basis". In paragraph 25, the appeals officer wrote that the payer confirmed "much of the information" provided by the payer's representative. Also, in paragraph 35 of the report, the payer's representative confirmed: "The work done by the worker was supervised by the producer."

[65] There is no black and white statement, as in Ms. Mongeau's case, that there was a relationship of subordination between Mr. Bernier and FPI, but the appeals officer could have written that. After setting out the facts referred to above, the officer in the Bernier case stated conclusions that are as astounding as those stated by the officer in the Mongeau case

> Relationship of subordination:
>
> In this particular situation it is important to consider the uniqueness of the film industry when examining the relationship of subordination.
>
> While it is true that the payer set the daily schedule, it is important to note that is a common practice on shooting locations. The worker did not perform his duties in isolation. He was part of a team. As such his activities had to be synchronized with the rest of the crew. As pointed out by the payer's representative, the purpose of the "call sheet" was to ensure an orderly working day. I should not be looked at as a measure of control.
>
> The nature of the work performed by the worker was such that he could not be unsupervised or undirected. All workers, regardless of their status, have to follow the lead and instructions of the producers and project directors. The final product represented a collaborative guided effort. It cannot be said that the worker could not contribute his expertise as a technical director who acted as an independent contractor just because he followed the lead of the producers and directors.
>
> An analysis of the three essential elements: performance of work, remuneration and relationship of subordination, leads us to conclude that there did not exist between the parties a contract of service as defined by article 2085 of the *Civil Code of Quebec*. Therefore, we can conclude that for the period under review the worker was not employed in insurable employment pursuant to paragraph 5(1)(a) of the *Employment Insurance Act.*
>
> [Emphasis added.]

[66] Given these conclusions, which are as illogical as they are astounding, the saying quoted by my former colleague, Judge Mogan, in *Sanford v. Canada*, [2000] T.C.J. No. 801 (QL), [2001] 1 C.T.C. 2273 (Eng.), comes to mind:

> 17 An old cliché comes to mind. If a two-legged creature with feathers waddles like a duck, quacks like a duck, and looks like a duck, it must be a duck.

[67] In *Dynamex Canada Corp. v. M.N.R.*, [2010] 3 C.T.C. 2233, at paragraph 31, I quoted a decision of the California Court of Appeal that adopted the same saying to describe the trial court's reasoning in relation to the work done by FedEx employees. I think it is very applicable in this case as well. If a technical director and a camera assistant perform services under the direction or control of a payer, and there is also a relationship of subordination between them and the payer, the contract between them must be a contract of employment, under article 2085 C.C.Q.

[68] According to the testimony of the two appellants and Mr. Joli-Coeur, both appellants were supervised by their respective payers, whether the production director, the director or the floor manager, and in Ms. Mongeau's case, her cameraman. Both appellants received instructions concerning the job they had to do (the "what"), the place where they were to perform services (the "where") and the schedule they had to follow (the "when"), as the "call sheets" that were distributed every day during the production period in fact show. Ms. Mongeau confirmed that she was not entitled to leave the set until she had received permission from the director. I am satisfied that the same was true for Mr. Bernier, at least when he was working as a camera assistant. Neither appellant could take time off without serious reasons, and, in that case they had to inform the producer. The times when they could have meals were decided by their directors. Both appellants were subject to a degree of control that is not generally found in many other businesses. Examples are part-time teachers or teachers working as tutors, who were held in *NCJ Educational Services Limited v. Canada (M.N.R.)*, 2009 FCA 131 to be employees, or the case of Mr. Grimard (referred to *supra*), a specialist physician whose job consisted of working as an assessor with the Commission des lésions professionnelles.

[69] In addition to the direct evidence of the right of direction and control exercised by the two payers in these cases, there is the evidence by presumption of fact, that is, the circumstantial evidence. This includes the fact that the workers were not entitled to have someone replace them, other than with the payer's permission. There are also the indicia of supervision described by the late Robert P. Gagnon: mandatory presence at a workplace, regular assignment of work, reporting requirement. The fact

that most of the tools needed for the production were supplied by the production firms supports the hypothesis that the payer exercised a right of direction or control over the workers. The fact that the workers supplied small tools, such as a screwdriver, scissors, chalk and a clapper board, is not a good indication that they were free to choose the means of performing the contract. The fact that both workers had to work as part of a team to perform the work is, in my view, an excellent indication of supervision, and eliminates, or at least significantly reduces, the possibility that the technical director (Mr. Bernier) and the camera assistant (Ms. Mongeau) were free to choose the means of performing the work. On the contrary: the fact that a worker works as part of a filming team implies inherent subordination, and accordingly shows that the worker is required to perform services under the direction or control of the payer.

[70] As precedents, the appeals officer in the Mongeau case cited the decisions in *Tambeau* and *Productions Petit Bonhomme Inc.* The officer in the Bernier case cited only *Tambeau*. In my opinion, the officers committed an error of law in applying the relevant rules. The fact that although the first officer acknowledged that the hallmark of a contract of service is not the fact that control is actually exercised but the fact that the payer has the power to exercise it, he then said that the members of the technical team did their work under the control of the producer even though the producer did not necessarily tell each of them "how" to do it, is extremely surprising and supports my conclusion. The fact that the evidence as to the "how" is weak or scarce does not mean that the payer was not entitled to give instructions as to the "how". In fact, when Ms. Mongeau was questions about this, she said that she received instructions as to "how" to arrange the camera, and that the director might change his mind several times. Moreover, I have no doubt that if the producer had seen Ms. Mongeau moving the camera in a dangerous way that might have damaged it, he would not have hesitated to tell her how to move it. That piece of equipment was not supplied by Ms. Mongeau.

[71] One possible explanation for the officer's conclusion that Ms. Mongeau's conduct was more like the conduct of self-employed workers is that he felt bound by the decision of the Federal Court of Appeal in *Productions Petit Bonhomme Inc*. As noted earlier, that decision was made before the decision in *Tambeau*, in which Justice Décary, Justices Pelletier and Létourneau concurring, concluded that there were vacillations in the case law, "to which it is now time to put an end" (paragraph 2 of the decision). In my opinion, not only the direct evidence, but also the evidence by presumption of fact (circumstantial evidence), clearly establishes that there was a relationship of subordination between the appellants and their respective payers.

[72] Another possible explanation for the decisions made by the two appeals officers is the longstanding controversy in Canada as to how artists, actors and technicians are treated in the audiovisual industry. In fact, special legislation such as the PSA has had to be enacted to protect these people, who were denied employee status. That Act is intended to give "artists", as defined in that Act, the right to join an association similar to a union to defend and promote their economic, social, moral and professional interests, including by negotiating a group agreement (sections 24 and 27 PSA). For the purposes of the PSA, sections 6 and 12 define artists as including persons who regularly bind themselves to one or several producers by way of contracts pertaining to specified performances. The Act does not provide that the general law provisions of the Civil Code are not applicable to those persons. Like the provisions of the *Act respecting labour standards*, R.S.Q., c. N-1.1 and the *Labour Code*, R.S.Q., c. C-27, the provisions of the PSA are not relevant for the purposes of applying section 5 of the Act. Those statutes are intended to give workers greater protection by providing them with more generous employment standards and allowing them to join together to better defend their economic interests. They are not meant to strip "artists" of their right to be considered as "employees" for the purposes of the *Civil Code* and make them ineligible for the employment insurance benefits offered by the Act.

[73] Although it was not cited in the reports to justify the conclusion reached by the two appeals officers, there is another hypothesis that might explain their decisions: that the appellants are audiovisual technicians whose employment contracts are often short-term. Ms. Mongeau said that this might be from one day to three months. Her contract with PKI lasted only five days. But when we read the relevant provisions of the Civil Code, we see, in article 2086, that an employment is for a fixed term or an indeterminate term. Accordingly, there is no reason why a contract signed by the appellants cannot be short-term. As is willingly acknowledged in the legal literature: [TRANSLATION] "the duration [of an employment contract can be] prolonged or very brief".[20] As well, there is no rule in the Civil Code that states that if a contract of employment is for a term of less than 14 weeks or six days it becomes a contract for services.

[74] Nonetheless, I would like to point out that if the direct evidence of a relationship of subordination is inadequate, the length of a contract may then be circumstantial evidence. The longer the contract, the more it might be thought that it is a contract of employment. The shorter a contract, the more it might be thought that it could be a contract for services. A short term could suggest that the worker is not

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[20] See para. 104, note 119, of my article, reproduced *supra*.

subject to the direction or control of the payer. However, that would not be one of the indicia of the existence or absence of a relationship of subordination. The presence of a particular indication is not conclusive evidence. As Professor Ducharme said in the passage quoted *supra*: [TRANSLATION] "Indicia in themselves prove nothing". For example, if a taxi driver was required to be present to transport one of the production team members, or a star, during filming, brief presence on the set might be an indication of self-employment, while ongoing presence during filming on the set might be an indication of subordination.

[75] Moreover, persons who perform audiovisual technician duties, including technical director duties, are subject to the same general law rules as other workers. There is nothing in the Civil Code to exclude the work performed by actors and audiovisual technicians from employment contracts. There is no distinction based on the nature of the work to be performed. Accordingly, as we saw in the literature cited *supra*, a film director and an artist may be considered to be employees, just as may be a sports professional (such as a hockey or soccer player). It is self-evident that a technical director working on a film production may also be considered to be an employee if there is a relationship of subordination, even if he is not able to join a union.

[76] We must therefore ask what the reason is for the attitude that leads to a desire to treat people in the film, theatre or dance industry as if they were different from workers in other industries? Why not treat them like other workers, since the Civil Code makes no distinction? I think the answer given by the Privy Council 81 years ago, on October 18, 1929, in the famous decision in *Edwards v. A.G. for Canada*, [1930] A.C. 124, at page 138, is applicable here. In that decision, the Privy Council, which held that women were "persons" and could therefore be appointed to the Senate, made this comment: "The word 'person' as above mentioned, may include members of both sexes, and to those who ask why the word should include females the obvious answer is why should it not?" [Emphasis added.] Here, Mr. Bernier testified that his work was supervised by the production manager and that he might receive his instructions either from her or from the director or the floor manager. Why could a technical director not be treated like any director of a department in a manufacturing company, and be considered to be an employee?

[77] If Mr. Bernier and Ms. Mongeau had performed exactly the same services, the first as technical director and the second as camera assistant, in the same circumstances, except as full-time employees of a Crown corporation such as the Canadian Broadcasting Corporation, no one would have thought that these two workers were self-employed workers. Would the fact that they agree to work under

fixed-term contracts, for brief periods, mean that they were no longer considered to be employees? If a relationship of subordination exists, as is the case here, why would these two people not enjoy the protection of the Act, given the precarious nature of their work? If there is one type of employment contract that deserves the protection of employment insurance, certainly it is the employment of these workers, who work in a context governed by the business model adopted for producing television series or film productions.

[78] In light of Mr. Joli-Coeur's testimony, it is somewhat revealing to note that FPI was prepared to consider the camera assistants to be employees if its budget allowed. The determination of the nature of a contract does not depend on a budget existing; it depends on specific conditions being met, including, in this instance, the existence of a relationship of subordination. When that relationship of subordination exists and the other two necessary conditions for there to be a contract of employment are met, that contract exists. As set out in article 2099 of the Civil Code, the existence of relationship of subordination prevents there from being a contract of enterprise or for services. Again, whether there is a contract of employment has nothing to do with the length of the work or the nature of the work performed.

[79] For all these reasons, the appeals by Mr. Bernier and Ms. Mongeau are allowed and the determinations by the Minister are varied as follows: Jacques Bernier was engaged in insurable employment during the relevant Bernier period and Ms. Mongeau was engaged in insurable employment during the relevant Mongeau period.

Signed at Ottawa, Canada, this 17th day of February 2011.

"Pierre Archambault"

Archambault J.

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Monica F. Chamberlain, Reviser

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