Date: 20090429

Docket: A-291-08

Citation: 2009 FCA 131

CORAM: **DESJARDINS J.A.**
DÉCARY J.A.
NOËL J.A.

BETWEEN:

NCJ EDUCATIONAL SERVICES LIMITED

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Montréal, Quebec, on March 11, 2009.

Judgment delivered at Ottawa, Ontario, on April 29, 2009.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: DÉCARY J.A.
NOËL J.A.

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] This appeal of a decision of the Tax Court of Canada (Archambault P., the Tax Court Judge), 2008 TCC 300, raises once again the vexed question of where to draw the fine line between a contract of service or contract of employment and a contract for services or contract of enterprise.

[2] It is apposite, at the outset, to remind ourselves of the comments made by the Civil Code Revision Office in its *Report on the Québec Civil Code in 1977* (p. 738, ch. VI), with regard to the contract of employment and the contract of enterprise. At paragraph 667, the Report notes:

> 667 … the line of demarcation, sometimes so thin, between these two legal operations has given rise to problems both in jurisprudence and among doctrinal authors.

[3] The Tax Court Judge in the case at bar confirmed the determinations of the Minister of National Revenue (the Minister) that the services provided by seven of the appellant workers (also referred to as tutors) during the 2004, 2005 and 2006 calendar years constituted insurable employment within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

[4] Paragraph 5(1)(a) of the Act defines insurable employment as "employment … under any express or implied contract of service …". The precise wording is the following:

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

[5] The appeals before the Tax Court of Canada were heard under common evidence and informal proceedings.

THE RELEVANT FACTS

[6] Detailed facts can be found in the reported decision of the Tax Court of Canada. For the purpose of this appeal, the salient facts follow.

[7] The appellant was incorporated on June 23, 1980. Margaret Jacobs is the sole shareholder of the appellant and owns 100% of the voting shares. She describes the business as a tutoring service.

[8] During the relevant period, the appellant provided educational services such as tutoring, by retaining approximately 20 tutors a year in various fields of academic study. The appellant's clients are parents of students from elementary school, high school, CEGEP and university. The appellant’s tutoring service operated out of a tutoring hall, located in Westmount, Québec, consisting of a single room commercial space that could accommodate up to 50 people.

[9] There were no written contract between the appellant and its tutors.

[10] Tutors were paid an hourly wage by the appellant. They incurred no expenses except their disbursements in coming to work.

[11] Margaret Jacobs testified that during the school year she would be present in the tutoring hall almost at all times, seven days a week from morning until closing, that is to say, some 14 hours a day, seven days a week. She determined to which specific tutor a student was assigned. She described her typical workday in the following way:

> My role is very clear, I run the business which means I spend a fair bit of time looking for tutors. I spend time contacting families or following up on referrals that have come my way. I do all the administrative work of running the business, the banking, the answering of emails which is enormous, it's incessant. We get sixty (60) to eighty (80) phone calls a day [...]. (A.B., vol. III, p. 400.)

[12] Ms. Jacobs took it upon herself to verify not only the academic pedigree of the tutors but also their references. She also instructed male tutors to comply with a dress code.

[13] Tutors called ahead of time to advise the appellant of any absenteeism, and in this event if was incumbent on the appellant to endeavour to find a replacement. Ms. Jacobs did not continue to retain the services of tutors who would not respect his or her tutoring schedule.

[14] The tutors testified that even though they felt that they were not required to provide formal progress reports regarding the students, they would nonetheless inform the appellant verbally of their view on the students' progress.

[15] The tutors did not bill parents for lessons. Weekly invoices were prepared by the appellant. The appellant required its tutors to fill out detailed time sheets it would rely on to prepare its weekly invoices.

[16] The Minister's determinations with respect to the seven workers resulted from a request for employment insurance benefits made by one tutor, Ms. Hamdane, in the summer of 2005. None of the other workers made such a request.

[17] Subsequent to her claim, Ms. Hamdane was told by the appellant that she was an independent contractor and not an employee. A ruling under subsection 90(1) of the Act was requested by an Insurability Officer of the Canada Revenue Agency (the CRA).

[18] The Insurability Officer, relying on conversations with Ms. Hamdane, Ms. Jacobs and the appellant's accountant, concluded that Ms. Hamdane held insurable employment with the appellant during the period November 1, 2004 and June 16, 2005 (Appeal Book, Vol. II, pp. 249-267). The appellant appealed the ruling to the Minister under section 91 of the Act.

[19] Subsequently, a second Insurability Officer ruled that the six other tutors held insurable employment with the appellant during the relevant periods. The appellant again appealed the ruling to the Minister under section 91 of the Act.

[20] The Minister issued decisions regarding all of the workers on March 28, 2007, pursuant to subsection 93(3) of the Act, holding that the seven workers held insurable employment during the relevant periods (Appeal Book, Vol. I , pp. 39, 45, 50, 55, 60, 65, 70).

[21] The appellant appealed the decisions of the Minister to the Tax Court of Canada under section 103 of the Act.

RELEVANT LEGAL PROVISIONS

[22] Article 2085 of the Civil Code of Québec 1991, c.64 (the "Code") defines a contract of employment as follows:

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.	2085**.** Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre personne, l'employeur.
[Emphasis added.]	[Je souligne.]

[23] Articles 2098 and 2099 of the Code define a contract of enterprise or for services as follows:

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.	2098. Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.
2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.	2099. L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et il n'existe entre lui et le client aucun lien de subordination quant à son exécution. **À**
[Emphasis added.]	[Je souligne.]

[24] By comparison, articles 1665a), 1666.1 and 1667 of the *Civil Code of Lower Canada* read in their relevant parts:

1665a) The lease and hire of work is a contract by which the lessor undertakes to do something for the lessee for a price.	1665a) Le louage d'ouvrage est un contrat par lequel le locateur s'engage à faire quelque chose pour le locataire moyennant un prix.
…	[…]
1666 The principal kinds of work which may be leased or hired are:	1666 Les principales espèces d'ouvrage qui peuvent être louées, sont :
1. The personal services of workmen, servants and others;	1. Le service personnel des ouvriers, domestiques et autres ;
…	[…]
3. That of builders and others, who undertake works by estimate or contract.	3. Celui des constructeurs et autres entrepreneurs de travaux suivant devis et marchés.
1667 The contract or lease or hire of personal service can only be for a limited term, or for a determinate undertaking.	1667 Le contrat de louage de service personnel ne peut être que pour un temps limité, ou pour une entreprise déterminée.
It may be prolonged by tacit renewal.	Il peut être continué par tacite reconduction.
…	[…]

THE TAX COURT DECISION

[25] The Tax Court Judge indicated at the outset the differences between the contract of employment under the common law and under the civil law. Under the civil law, he stated the question is "whether there is between the parties a relationship of subordination, that is, a power of control or direction" (at paragraph 25 of his reasons, quoting paragraph 23 of his decision in *Michel Grimard v. The Queen*, 2007 TCC 755, later confirmed by this Court at 2009 FCA 47).

[26] The Tax Court Judge noted that there were no written contracts and as such, it was difficult to determine what was actually agreed to when the workers were hired by the appellant, and especially what kind of contract resulted from their agreement. He added that even in a situation where both parties clearly intend to enter into a contract for services as opposed to a contract of employment, it is the Court's duty to determine whether the label used by the parties corresponds to reality.

[27] He went on to consider whether the appellant had the power to exercise control and direction over the work of its workers. He held that this power could be inferred from direct evidence and from circumstantial evidence. He considered what he characterized as several "indicia of integration" of the workers' services into the business of the appellant, namely: the nature of the services provided; the premises where the services were delivered; the holder of the power of direction and control and the manner in which that power was exercised; the nature of the business as a whole; and the preparation of the invoices. He alluded to a lesser extent to the ownership of the tools. His key propositions are the following:

34 Although, unlike the situation in *Teach & Embrace*, there was no formal requirement to make written or verbal reports on the progress being made by the students, the reality is that Ms. Jacobs was present on the premises most of the time and verbal reports were being made to her about the students' progress. This was confirmed not only by her, but by all the workers who testified in these appeals. I cannot imagine that the owner of NCJ would not have had a keen interest in the quality of the services that her company provided to its clients. A business cannot survive for long if it does not care about the quality of its services and the satisfaction of its clientele. So Ms. Jacobs had an interest to exercise control.

…

36 So the issue, in the end, as stated in *Groupe Desmarais Pinsonneault & Avard Inc. v. Canada* (*M.N.R.*), 2002 FCA 144, [2002] F.C.J. No. 572 (QL), and in *Gallant supra* is whether NCJ had the power to exercise control and direction over the work of its workers. I believe this power can be inferred not only from the direct evidence referred to above, but also from the circumstantial evidence referred to hereunder. There are here several "indicia of supervision" (to use the words of Gagnon, above) and "indicia of integration" (to use mine) of the workers' services into the business of NCJ. First, it is important to realize that the business of NCJ is to provide tutorial services to the children of the parents who constitute its clientele. Clearly, the students and their parents are NCJ's clients and not the tutors'. In order to provide the tutorial services, NCJ requires the services of tutors. Its business is not simply to match a student with a tutor, as Ms. Jacobs claimed. The tutors do not communicate with NCJ's clients, the parents. The tutors do not have the parents' addresses and phone numbers. As Ms. Cooper stated, the tutors may not even know why the students stop attending the tutoring sessions. It is Ms. Jacobs who deals with the clients.

37 Another very strong indication of integration, indicative as well of the power of control and direction over the work of the tutors, is the fact that the tutors' services were provided on the premises of NCJ and, most of the time, in the presence of Ms. Jacobs herself. Although the tutors were free to use their own material, NCJ provided a library of books and access to the Internet. The tutors were not required to incur any expenses in providing their tutoring services other than the costs of attending at the tutoring hall, as indeed all teachers hired as salaried employees in school boards across Quebec and the rest of Canada must bear the costs of attending at the institutions at which they teach.

38 I find, on a balance of probabilities, that NCJ had the power to give direction to, and exercise control over, its tutors, a power it has had to possess in order to be successful in operating its business since 1980. That business did not consist merely in head-hunting that is, trying to fulfill the employment requirements of a particular employer, or in providing the services of a pool of tutors to other employers. Its business was to provide tutoring services directly to its students. I cannot imagine that Ms. Jacobs, in operating this business from

1980 up to today, has not encountered any problems with regard to the way that her tutors provided their services. Therefore, I have not been convinced by Ms. Jacobs' testimony that NCJ's input was limited to simply matching one student with one tutor.

39 We are not dealing here with a simple and limited service that does not require much supervision, as is the case delivery of parcels or vehicles as in *D & J Driveway Inc. v. Canada* (*Minister of National Revenue*), 2003 FCA 453, [2003] F.C.J. No. 1784 (QL), and in *Sauvageau Pontiac Buick GMC Ltée v. Canada* (*Minister of National Revenue*), [1996] T.C.J. No. 1383 (QL).

40 Here, the main object of NCJ's business is to provide tutorial services during the school year seven days per week, from 9 a.m. to 10 p.m., and this required Ms. Jacobs' presence from 9 a.m. to 9 p.m. I believe that Ms. Jacobs exercised more supervision over the tutoring of her tutors than she is prepared to admit. That this power was exercised discretely does not alter the fact that she did exercise it. I am convinced that, in the circumstances of this case, had a problem arisen, she would have had the power to exercise control and direction over her tutors. She admitted as much herself when asked what she would have done if she had seen improper (sexual) behavior. Moreover, if a tutor had not acted on any suggestion she made, she could either have reduced that tutor's workload by assigning one of the tutor's students to another tutor or terminated the tutor's services.

41 In addition, although this is a very minor point, I do not know of any entrepreneurs who ask their clients to prepare their invoices for them.

42 For all these reasons, I conclude that NCJ has failed to convince the Court that it did not have the power to exercise control and direction over the work of its seven workers during the different relevant periods. Given that a relationship of subordination existed between the seven workers and NCJ, the contract between them could not have been a contract for services (see article 2099 of the Civil Code). In my view, NCJ hired each of the workers as its employee.

43 The appeals of NCJ are dismissed.

[Emphasis added.]

ISSUES

[28] The appellant alleges three types of errors made by the Tax Court Judge.

1. It submits that the excessive interventions and lengthy judicial cross-examinations of the appellant's witnesses by the Tax Court Judge created a

reasonable apprehension of bias and were not in accordance with the principles of natural justice and procedural fairness.

2. It submits that the Tax Court Judge based his decision on erroneous findings of fact made in a perverse or capricious manner and without regard to the material before him in concluding that the appellant exercised control over the workers.

3. It submits that the Tax Court Judge erred in law by misapplying the relevant legal principles that govern the determination of whether a worker is an employer or an independent contractor.

ANALYSIS

1. Did the Tax Court of Canada judge fail to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe during the course of the proceedings?

[29] The appellant claims that the Tax Court Judge interrupted the examination in chief of his client, Margaret Jacobs, by asking key questions, often leading questions, on the criterion of subordination. They were not, it says, points of clarification. They went to the core of the case. Questions 219, 220 and 221 (A.B., Volume III, p. 404-405) were particularly brought to our attention:

[219] Q. And what do you do then when there is a change of availability of your tutor, do you replace he or she by another one or do you just change the time…

A. Well, I do both things. If there is another tutor who happens to be available because his lesson isn't coming, I ask the tutor if he would take, wants to take this lesson and he says, "yes" then I do it and…

[220] Q. It's not important that the same tutor meets the same kid all the time?

A. No.

> [221] Q. No. Normally, is that a long-term relationship or is it just for a short period of time?
>
> A. With whom? The tutors…

[30] Evidently, the appellant claims, the Tax Court Judge, whose role is to listen to the evidence, was in fact pursuing an agenda of his own.

[31] The Tax Court Judge again, says the appellant, interrupted in the middle of a line of questions put to a tutor Shawn Weiland by the appellant during his examination in chief (A.B., Volume III, pages 506, 510, 516, 521).

[32] The appellant claims the same happened during the examination of Ellen Cooper. This time, after the cross-examination of Ellen Cooper, the Tax Court Judge took over the interrogation and asked a line of questions in the style of a cross-examination. The transcript shows the following (A.B., Volume III, p. 563, questions 1096 to 1105):

EXAMINED BY THE COURT:

> [1096] Q. So, just to summarize your answers. You do remember or you don't remember having said provided some information about the reports, do you remember discussing reports with Mr. Hyland?
>
> A. Reports about my students' progress?
>
> [1097] Q. Yes.
>
> A. I might remember that question and I know what my answer would have been and it would not have been like that.
>
> [1098] Q. That one?

A. That's right.

[1099] Q. So, do you remember discussing the subject and you completely disagree that…

A. Yes, that's fake.

[1100] Q. …that doesn't reflect your understanding now and at the time you gave the answer?

A. It does not reflect the truth.

[1101] Q. Yes. Because it says there that … he says that you said "yes", that you have to provide reports to Mrs. Jacobs and you disagree with that?

A. I disagree, can explain why? Can I explain why I disagree?

[1102] Q.You were not required to?

A. I was not required to …

[1103] Q. But you did volunteer some information, that's what you said before.

A. I volunteered only verbally, exactly as I said earlier, that's all.
[1104] Q. Yes. And then, presumably, did you ever provide written reports?

A. I've never done that, ever.

[1105] Q. Never did any written reports.

A. All my years there.

[33] Counsel for the appellant acknowledges that the Tax Court Judge recognized the difficulty raised by his line of questioning at question 1106:

[1106] Q. Yes.
Okay. So, that's clear. That's the problem with leading questions, you put a lot of words in the question and the witness doesn't necessarily focus on the word "required" and that's probably what happened here. The question was, "was she required?", he said, "yes" but maybe she didn't focus on the word "required". Would you agree with that?

Me STÉPHANE ELJARRAT: A speculation, your Honour, but I don't understand …

HIS HONOUR: Yes, it is speculation, for sure, we were not present when, but …

Me STÉPANE ELJARRAT: But what I can indicate though, your Honour, on the subject, is that it's a bit interesting that in the typed-up report, same facts come up written about the same way, when we know that people speak differently.

HIS HONOUR: Uh-huh.

Me STÉPANE ELJARRAT: But this being said, I didn't understand your other expression, were you talking about who was making suggestive questions?

HIS HONOUR¨I'm saying in general when we ask a leading question, we put all kind of words in there that may not be well understood by the person who says yes or no.

Me STÉPANE ELJARRAT: No, of course, that's why it's nice to get more explanations.

HIS HONOUR: Yes. That's why it's always better to ask an open question so we don't put words in the mouth of the person. And that may have been the problem with the agent when he asked the question.
Okay. Any other questions?

Me NADIA GOLMIER: Non.

HIS HONOUR: That completes your questions. Okay.

In the questionnaire, the same questionnaire and I'm referring to the one that reflects the conversation with you, it says here that:

> Did the Payer, Mrs. Jacobs, supervise your work?

And it says:

> Yes.

And:

> If yes, how?
>
> Mrs. Jacobs is present personally.

Do you agree or disagree with this reporting on this particular issue?

A. Mrs. Jacobs never supervises my work, never stands and sees exactly how I'm going about my lesson so, I do not disagree with that, she may be present in the room at her own…

[34] The Tax Court Judge continued his interrogation of Ms. Cooper until question 1143. He then invited the appellant to reexamine his witness.

[35] The appellant claims that the Tax Court Judge later used the adverse answers in his reasons for judgment at paragraph 26:

> …
>
> Ms. Jacobs also testified that she would negotiate salary by asking the tutors to tell her what remuneration they wanted. However, she was contradicted by Ms. Cooper, who stated that she merely accepted what Ms. Jacobs offered. So Ms. Jacob's statements do not necessarily reflect what actually took place during the relevant periods and are therefore not always reliable.
>
> [Emphasis added.]

[36] The Tax Court Judge, again during the cross-examination by the appellant of Assia Hamdane, a witness for the respondent, interrupted to actively interrogate the witness (A.B., Volume IV, pp. 720-722).

[37] The Tax Court Judge, claims the appellant, even raised issues of his own, not brought by the parties. During the lengthy examination of Ms. Jacobs by the Court, at the end of her cross-examination by Mr. Golmier, the Tax Court Judge asked questions about possible misconduct by tutors and liability insurance (A.B., volume III, p. 456):

> [540] Q. You said that there was no code of ethics but if you see one of your tutors puts his hand on the knees of a student…
>
> A. I would say something, your Honour.
>
> [541] Q. You would say something?
>
> A. Yes, sir, I would.

> [542] Q. And do you have any liability insurance to cover your company if there was any kind of a claim made against you?
>
> A. Against the tutor?

[38] It is important to remind ourselves that the proceedings before the Tax Court were conducted under the informal procedure. Under subsection 18.15(3) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T- 2, the Tax Court Judges have discretion to disregard the usual rules of evidence and are permitted to conduct hearings as informally and expeditiously as the circumstances and consideration of fairness permit. Subsection 18.15(3) of the Act reads thus:

18.15(3) Notwithstanding the provisions of the Act under which the appeal arises, the Court is not bound by any legal or technical rules of evidence in conducting a hearing and the appeal shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit.	18.15(3) Par dérogation à la loi habilitante, la Cour n'est pas liée par les règles de preuve lors de l'audition de tels appels; ceux-ci sont entendus d'une manière informelle et le plus rapidement possible, dans la mesure où les circonstances et l'équité le permettent.
[Emphasis added.]	[Je souligne.]

[39] In *Kenneth James v. Her Majesty the Queen*, [2001] D.T.C. 5075 (F.C.A.) (the *Kenneth James* case), our Court determined at paragraphs 51, 52 and 53 the test applicable in situations where a reasonable apprehension of bias is raised:

> [51] The applicable principles are not in dispute. They are well established in such cases as *Yuill v. Yuill*, [1945] 1 All E.R. 183 (C.A.); *Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.); *Majcenic v. Natale*, [1968] 1 O.R. 189 (C.A.); *R. v. Brouillard*, [1985] 1 S.C.R. 39; *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300, [1991] F.C.J. No.1271 (F.C.A.)(QL); *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1, 160 D.L.R. (4th) 66 (C.A.).
>
> [52] The general rule is that a judge may ask a witness questions of clarification and amplification, but should not intervene in the questioning of a witness to such an extent as to give the impression of taking on the role of counsel. A judge who does so necessarily will be seen as having adopted a position in opposition to one of the parties. That diminishes the appearance of impartiality that is critical to the goal of ensuring that justice is not only done, but is seen to be done. It may also interfere with the effective presentation of the case by counsel.

> [53] An allegation of undue intervention in the questioning of a witness must be assessed in the context of the proceedings as a whole. The objective of such a review is not to determine whether the interventions were well motivated or well intentioned. Rather, the objective is to determine whether the intervention would cause a reasonable and well informed observer to apprehend that the mind of the trial judge was closed to a fair and impartial consideration of the case: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Where it is determined that there are interventions having that effect, the only possible remedy is to remit the matter for retrial.
>
> [Emphasis added.]

[40] In the manual "A Book for Judges", by the Hon. J.O. Wilson, written at the request of the Canadian Judicial Council, Minister of Supply and Services Canada, 1980, the following guidance is given about judicial intervention (p. 44):

> …the rule is not against any intervention; it is against excessive intervention. Edmund Burke said: "a judge is not placed in that high position to be the mere arbiter of parties. He has a further duty, independent of that, and that duty is to ascertain the truth.

[41] With regard to the questioning of witnesses, the author indicates the following (at p. 45):

> In general a judge should allow counsel to conduct examinations or cross examinations of witnesses uninterrupted. If some necessary question appears to have been omitted a judge should not too readily jump to the conclusion that it will not later be asked. As a rule, a general rule, he should wait until all counsel have concluded their examination before himself questioning the witness. But there can be no question of his right, his duty, to attempt, through questioning, to ascertain the truth about a circumstance germane to the litigation, and left in the air through the failure of counsel to ask proper and necessary questions.

[42] At pages 46 and 47 of the same manual, important pieces of wisdom are gleaned from the writing of Lord Greene M.R. in *Yuill v. Yuill*, [1945] 1 All E. R. 183 (at p. 185):

> …it is, of course, always proper for a judge – and it is his duty – to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made

> good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself.

[43] In the case at bar, the transcript indicates that the Tax Court Judge was often over-excessive and unduly persistent. Both he and the appellant, for that purpose, knew that the subject-matter in dispute required that a fine line be drawn and that it could only be drawn properly if all the facts were adduced. The topic at issue was important and, possibly, the Tax Court Judge might have wished to make sure no stone would be left unturned.

[44] His interventions often did not follow the guidelines prescribed in the manual for judges. I note, however, that the Tax Court Judge was careful, at times, at the end of his own interrogation, to give counsel the opportunity of re-examining the witness that he, the Judge, had questioned.

[45] While his interventions were often untimely and excessive, I cannot conclude that the Tax Court Judge crossed the borderline and has caused a reasonable and well informed observer to apprehend that the mind of the Tax Court Judge was closed to a fair and impartial consideration of this case (see the *Kenneth James* case quoted above) or that he had lost his impartiality (see *Morley v. Canada*, 2006 FCA 171, at paras. 3, 5, 6, 7 and 8).

[46] I would dismiss the appellant's contention that the conduct of the Tax Court Judge raises a reasonable apprehension of bias.

> *2. It submits that the Tax Court Judge based his decision on erroneous findings of fact made in a perverse or capricious manner and without regard to the material before him in concluding that the appellant exercised control over the workers.*

[47] The appellant brought our attention to findings of fact where he claims the Tax Court Judge erred in a perverse or capricious manner and without regard to the material before him.

[48] I have not been persuaded that these examples are such as to warrant the intervention of this Court.

> *3. Did the Tax Court of Canada err in law in determining that the essential distinguishing factor between a contract of employment and a contract for services under the Civil Code of Québec was that of control or subordination?*

[49] Since paragraph 5(1)(*a*) the *Employment Insurance Act* does not provide the definition of a contract of services, one must refer to the principle of complementarity reflected in section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which teaches us that the criteria set out in the *Civil Code of Québec* must be applied to determine whether a specific set of facts gives rise to a contract of employment. Section 8.1 provides:

RULES OF CONSTRUCTION	RÈGLES D'INTERPRÉTATION
Property and Civil Rights	**Propriété et droits civils**
Duality of legal traditions and application of provincial law	**Tradition bijuridique et application du droit provincial**
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.	8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

[50] Reference must therefore be made to articles 2085, 2098 and 2099 of the *Civil Code of Québec*.

[51] Under article 2085 of the *Civil Code of Québec*, there are three characteristic elements to any contract of employment, namely:

1. the performance of work;
2. the remuneration;
3. the direction or control of another person, the employer.

[52] On the other hand, article 2099, which defines with article 2098 the nature of a contract of enterprise or for services, makes it clear that in a contract for services "no relationships of subordination exist between the provider of services and the client".

[53] In *9041-6868 Québec Inc. v. Canada (Minister of National Revenue -- M.N.R.)*, 2005 FCA 334, Décary J.A. for the Court indicated, at paragraph 12 of his reasons, that:

> […] in Quebec civil law, the definition of a contract of employment itself stresses "direction or control" (art. 2085 C.C.Q.), which makes control the actual purpose of the exercise….

[54] This very test was already recognized by the case law under the *Civil Code of Lower Canada*, although it was not expressly stated in the text of articles 1665(a)(ff) of that Code.

[55] In *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1986] 3 F.C. 553, our Court emphasized the importance of the criterion of control both under the civil law as it stood at the time (the *Civil Code of Lower Canada*) and under the traditional common law. It stated at paragraph 6 and in footnote 1 of the decision:

> 6 The traditional common-law criterion of the employment relationship has been the control test, as set down by Baron Bramwell in Regina v. Walker (1858), 27 L.J.M.C. 207, at page 208:
>
> - It seems to me that the difference between the relations of master and servant and of principal and agent is this:-- A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.
>
> That this test is still fundamental is indicated by the adoption by the Supreme Court of Canada in Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent, [1978] 1 S.C.R. 605, at page 613, of the following statement: "the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work."[1].
>
> _____
>
> 1 Although this is a civil-law case, the Court's expressed view is that that law is in this respect the same as the common law.
>
> [Emphasis added.]

[56] The history of the concept of subordination in the *Civil Code of Québec* is found in Robert P. Gagnon, *Le droit du travail du Québec*, an author, now deceased, often cited by our Court (*Wolf v. The Queen*, [2002] 4 F.C. 396, per Décary J.A.; *9041-6868 Quebec Inc.*, par. 12; *Michel Grimard v. The Queen*, 2009 FCA 47, para. 36). The history he gives is strikingly in the same lines as the development shown in the common law (see Lord Wright in *Montreal (City) v. Montreal Locomotive Works Ltd*., [1947] 1 D.L.R. 161 (P.C.) at pages 169-170 (the *Montreal Locomotive Works* case).

[57] The difficulty raised by the application of the concept of subordination in modern times is well explained by Marie-France Bich, *Le Contrat de travail*, Code civil du Québec, chapitre septième, (Articles 2085-2097, C. c. Q.) La Réforme du Code civil, *Obligations, contrats nommés*, 1983, *Les Presses* de l'Université Laval, p. 752.

[58] While the test of control and the presence or absence of subordination are the benchmarks of a contract of service, the multiplicity of factual situations have obliged the courts to develop indicia of analysis in their search for the determination of the real character of a given relationship.

[59] In the most recent edition of the book of Robert Gagnon (6e édition, mis à jour par Langlois Kronström Desjardins, sous la direction de Yann Bernard, Audré Sasseville et Bernard Cliche), the indicia (underlined below) have been added to those found in the earlier 5th edition.

Those added indicia are the same as those developed in the *Montreal Locomotive Works* case and applied by this Court in *Wiebe Door*.

> 92 – Notion – Historiquement, le droit civil a d'abord élaboré une notion de subordination juridique dite stricte ou classique qui a servi de critère d'application du principe de la responsabilité civile du commettant pour le dommage causé par son préposé dans l'exécution de ses fonctions (art. 1054 C.c.B.-C. ; art. 1463 C.c.Q.). Cette subordination juridique classique était caractérisée par le contrôle immédiat exercé par l'employeur sur l'exécution du travail de l'employé quant à sa nature et à ses modalités. Elle s'est progressivement assouplie pour donner naissance à la notion de subordination juridique au sens large. La diversification et la spécialisation des occupations et des techniques de travail ont, en effet, rendu souvent irréaliste que l'employeur soit en mesure de dicter ou même de surveiller de façon immédiate l'exécution du travail. On en est ainsi venu à assimiler la subordination à la faculté, laissée à celui qu'on reconnaîtra alors comme l'employeur, de déterminer le travail à exécuter, d'encadrer cette exécution et de la contrôler. En renversant la perspective, le salarié sera celui qui accepte de s'intégrer dans le cadre de fonctionnement d'une entreprise pour la faire bénéficier de son travail. <u>En pratique, on recherchera la présence d'un certain nombre d'indices d'encadrement, d'ailleurs susceptibles de varier selon les contextes</u> : présence obligatoire à un lieu de travail, assignation plus ou moins régulière du travail, imposition de règles de conduite ou de comportement, exigence de rapports d'activité, contrôle de la quantité ou de la qualité de la prestation, <u>propriété des outils, possibilité de profits, risque de pertes</u>, etc. Le travail à domicile n'exclut pas une telle intégration à l'entreprise.
>
> [Emphasis added.]

[60] Did the Tax Court Judge misapply the law?

[61] The appellant complains that the Tax Court Judge addressed his mind exclusively to the criterion of control with the result that any indication of subordination or control, however minute or insignificant, automatically lead him to the finding of a contract of employment. The Tax Court Judge forgot, says the appellant, that the head of a business has an interest in ensuring the success of his enterprise. Yet, the Tax Court Judge's statement at paragraph 34 of his reasons

leaves no room for any type of service contract relationship as opposed to an employment relationship.

> … A business cannot survive for long if it does not care about the quality of its services and the satisfaction of its clientele. So Ms. Jacobs had an interest to exercise control.

[62] This statement, claims the appellant, runs contrary to decisions of this Court which have established that control of the result and control of the worker should not be confused (*Jaillet v. Canada (Minister of National Revenue – M.N.R.*), 2002 FCA 394, paragraph 10; *D & J. Driveway Inc. v .Canada (Minister of National Revenue - M.N.R.*), 2003 FCA 453, paragraphs 9-10).

[63] It is true to say that the Tax Court Judge considered primarily the element of control and the "power of control" as that phrase was applied in *Gallant v. Canada (Department of National Revenue) (FCA)*, [1986] F.C.J. No. 330, and in *Groupe Desmarais Pinsonneault et Arard Inc. v. Canada (Minister of National Revenue – M.N.R.*), 2002 FCA 144.

[64] The Tax Court Judge wrote (at para. 29) that "the evidence does not disclose very many acts of direction or control exercised by NCJ over the work of the workers. However, that does not mean there are none".

[65] Summarizing the direct evidence, the Tax Court Judge noted that the complainant, Ms. Hamdane, testified that she was given instructions about the work to be done. She stayed at work until Ms. Jacobs told her that she could leave. Ms. Jacobs was present most of the time during

the tutoring and was therefore capable of supervising what was going on in the tutoring hall. She acknowledged that had she seen one of the tutors behave improperly, for example, by laying a hand on the knees of a student, she would immediately intervene to ensure proper behavior by that tutor. Ms. Jacobs exercised direction or control also by adopting a dress code for her male tutors.

[66] Ms. Jacobs, the Tax Court Judge noted, exercised direction or control: by assigning the students to their tutors; by reassigning them in case of the tutor's absence by reason of illness; and by instructing the tutors regarding the length of the tutoring sessions. When a tutor could not attend for a tutoring session, that tutor would call NCJ, not the student. Ms. Jacobs was the one who would find a qualified replacement. As is normal in dealing with professionals, however, Ms. Jacobs did not tell her tutors how to discharge their duties.

[67] The Tax Court Judge added that parents who had comments to make would speak to Ms. Jacobs and not with the tutor. Ms. Jacobs would then let the tutors know about the remarks of the parents. She could even reassign the student to another tutor or cease to hire that tutor.

[68] The Tax Court Judge then addressed his mind to what he called "circumstantial evidence". He characterized (at para. 36) his analysis as a search for "indicia of supervision" ("to use the words of Gagnon, above", he wrote) and for "indicia of integration" ("to use mine", he wrote).

[69] It is unclear why the Tax Court Judge preferred the word “integration”, developed in the common law cases, to the word “subordination” of article 2099 C.C.Q. It appears, however, from his paragraph 36 (reproduced above) that the Tax Court Judge took a holistic approach and was trying to determine not only the nature of the business and the element of control but also “whose business it is”, a concept related to the integration test.

[70] It was possible for him to do so. The use that may be made of common law decisions in ascertaining the nature of a contract of employment under the civil law was set out by this Court in the recent decision of *Michel Grimard v. The Queen*, 2009 FCA 47.

[71] The Tax Court Judge looked at a number of indicia. He even considered the premises where the work is done and the power to reprimand. While neither directly points to one type of contract to the exclusion of the other, he found support in them, considering the circumstances.

[72] The Tax Court Judge concluded, on a balance of probabilities, that NCJ had the power to give direction and accordingly exercised control over its tutors and that the degree of supervision exercised by Ms. Jacobs was greater than admitted.

[73] He indicated, as a minor point, that he did not know of entrepreneurs who asked their clients to prepare their invoices for them. In doing so, he implied that the tutors could not be entrepreneurs because, had they been entrepreneurs and NCJ their client, they would not have had their invoices prepared by NCJ.

[74] While focusing on the concept of control, the Tax Court Judge used an array of permissible and relevant indicia to refine his analysis.

[75] I am satisfied that it was open to him to decide as he did. I see no reason which would warrant the intervention of this Court.

[76] I would dismiss this appeal with costs.

"Alice Desjardins"
J.A.

“I agree.
Robert Décary J.A.”

“I agree.
Marc Noël J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-291-08
(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED MAY 15, 2008.)	
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DATE OF HEARING:	March 11, 2009
REASONS FOR JUDGMENT BY:	DESJARDINS J.A
CONCURRED IN BY:	DÉCARY J.A. NOËL J.A.
DATED:	April 29, 2009

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