Docket: 2013-3292(EI)

BETWEEN:

ROMANZA SOINS CAPILLAIRES ET CORPORELS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on November 17, 2014, at Montréal, Quebec.

Decision rendered by: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant:	Andria D'Elia
Counsel for the Respondent:	Antonia Paraherakis

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed, without costs, and the decision of the Minister of National Revenue dated June 5, 2013 is varied to find that Mme Liliane Riendeau was not employed in insurable employment with the Appellant from August 8, 2012 to October 13, 2012.

Signed at Ottawa, Canada, this 15th day of December 2015.

"Patrick Boyle"

Boyle J.

Translation certified true
on this 23rd day of February 2016
François Brunet, Revisor

Citation: 2015 TCC 328
Date: 20151215
Docket: 2013-3292(EI)

BETWEEN:

ROMANZA SOINS CAPILLAIRES ET CORPORELS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The issue to be decided in this appeal is whether Liliane Riendeau was engaged in insurable employment for several months in 2012 with Romanza Soins Capillaires et Corporels Inc. ("*Romanza*") for the purposes of the *Employment Insurance Act* (the "*Act*").

[2] This appeal was originally heard by Justice Jorré of this Court. With the consent of the parties, the appeal is being decided by me on the basis of the transcript and the record.

I. The facts

[3] Romanza operated a beauty salon under the name Romanza Salon and Spa in Laval, Quebec. She has since sold the salon and is now a lawyer. It was owned and operated by Mme Andria D'Elia at the time in question. The salon offers hairdressing, beauty care, tanning, make-up, nails, laser treatment services and massage therapy. Mme D'Elia testified for the Appellant.

[4] Liliane Riendeau is an esthetician who provided esthetic and electrolysis services at the salon. This included facials, manicures, pedicures and depilatory treatments.

[5] Mme Riendeau had worked as an esthetician in a number of other salons for forty years. Before interviewing and beginning to work at Romanza, she was interested in leaving her then current position at a salon in Rosemère because her work terms were to change to percentage commission remuneration.

[6] At that time, Mme Riendeau saw an online Kijiji advertisement for a position at Romanza Salon and Spa which was described as a salaried plus commission position for a qualified esthetician who could also do laser treatments. She attended an interview with Mme D'Elia. They discussed the terms of work and her compensation.

[7] At or about the time Mme Riendeau began to work at the salon, she entered into a written agreement entitled Contrat de Travail with Romanza which provides among other things that their contract was month-to-month, that clients remained the clients of Romanza, that the worker was responsible for any damage to the tools or equipment of Romanza, and that the worker would respect the salon's opening and closing hours. The agreement also specified that the worker was a distinct person from Romanza and that Romanza would not be responsible for the debts or fiscal obligations of the worker. It also provided "le travailleur doit respecter le règlement de l'entreprise ainsi les tâches a accomplir".

[8] The terms of their arrangement provided that Mme Riendeau would be paid a $15 hourly rate for esthetician work and would receive a 10% commission for products sold from the lines Romanza carried and offered for sale. This differed from the other estheticians at the salon who all received 40% to 60% of the customer fees for their services plus product sale commissions. No one else was paid an hourly rate.

[9] Their agreement also provided that Mme Riendeau would have the opportunity to exclusively offer her naturopath, herbal remedy and nutritionist services and products at Romanza Salon and Spa. According to Mme D'Elia Mme Riendeau was to pay a fixed percentage of her fees for these services to Romanza together with a 10% commission on sales of her line of related products. According to Mme Riendeau, she was to be paid her normal hourly rate for these services. She agrees she was to keep the product sales revenues less a 10% commission. She acknowledged she set the $60 fee to be charged to clients for these consultations.

[10] Mme Riendeau began to work at the Romanza Salon and Spa in August 2012.

[11] The salon's hours were from 10 a.m. to 8 p.m. on weekdays and 9 a.m. to 3 p.m. on Saturdays. Mme Riendeau agreed to work Wednesday through Saturday. She was not provided with a key or the alarm code so that she was only able to work during the posted hours of the business. She could end her day early if she did not have a client.

[12] There were a number of other workers at the salon and there were regulatory and business restrictions on which salon services each could provide.

[13] Mme D'Elia was not often present at Romanza working, supervising or managing. Her younger sister provided laser treatments at the salon and would sometimes open and close the business in Mme D'Elia's absence, however most of the Romanza's workers had keys and could and did open and close the salon.

[14] The services offered by Mme Riendeau were offered and provided in private rooms and no one else from Romanza was present with Mme Riendeau and the client.

[15] Mme Riendeau earned an hourly rate for her work that was agreed to at the start. She was paid weekly by cheque an amount equal to her hourly rate times the number of hours worked. A particular cheque would be slightly greater if she had earned commissions on product sales during the period.

[16] Mme Riendeau ceased to work at Romanza in mid-October after a period of approximately 9 weeks. According to Mme D'Elia, the reason for their new work arrangement being so short-lived was she had received client complaints about hygiene and health concerns with Mme Riendeau's services. Virtually all of Mme Riendeau's work during the period was comprised of esthetic and electrolysis services. While she offered and promoted her naturopath and herbal remedy services, she only had a single customer for those services while working at the Romanza Salon during this brief period.

[17] Mme Riendeau filed a complaint with the Provincial Commission des Normes du Travail after her contract was terminated. She withdrew that complaint

once she received her cheque for her final week worked. She had found other work by that time.

II. The relevant legislation

[18] Insurable employment under the *EI Act* is defined in paragraph 5(1)(*a*) of that *Act* to be as follows:

> INSURABLE EMPLOYMENT
>
> **5. (1) Type of insurance employment** — Subject to subsection (2), insurable employment is
>
> (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[19] Article 2085 of the *Civil Code of Québec* (the "Civil Code") defines contract of employment as follows:

> CHAPTER VII
>
> CONTRACT OF EMPLOYMENT
>
> **Art. 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.tract of employment as follows:

[20] In contrast, article 2098 defines a contract of enterprise or for services as follows:

> CHAPTER VIII
>
> CONTRACT OF ENTERPRISE OR FOR SERVICES
>
> SECTION I
> NATURE AND SCOPE OF THE CONTRACT

> **Art. 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.

[21] Article 2099 provides as follows:

> **Art. 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.

[22] Article 1425 is relevant to the interpretation to the contract and it provides as follows:

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

[23] It is apparent from several decisions of the Federal Court of Appeal, including *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*, 2004 FCA 68, that the traditionally common law criteria or guidelines mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, 87 DTC 5025, are points of reference in deciding whether there is between the parties a relationship of subordination which is characteristic of a contract of employment or whether there is instead a degree of independence which indicates a contract of enterprise under the *Civil Code*. It is also the case that the parties' mutual intention or stipulation as to the nature of their contractual relations should be considered and may prove to be a helpful tool in interpreting the nature of the contract for purposes of characterizing it under the *Civil Code*. See for example the decisions of the Federal Court of Appeal in *D & J Driveway Inc. v. Canada (Minister of National Revenue)*, 2003 FCA 453, and in *Grimard v. Canada*, 2009 FCA 47, 2009 DTC 5056, wherein the intention of the parties is described as an important factor to be considered in characterizing a contract for purposes of the *Civil Code*. The comments of the Federal Court of Appeal regarding the intention of the parties in these Quebec cases is consistent with its more recent comments regarding the significance of intention at common law in *1392644 Ontario Inc. (Connor Homes) v. Canada (M.N.R.)*, 2013 FCA 85 below.

[24] The traditional common law tests or guidelines for a contract of service/employment versus a contract for services/independent contractor are well-settled. Insurable employment is to be resolved by determining whether the individual is truly operating a business on his or her own account. See the decisions in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, and in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, 87 DTC 5025.

[25] This question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines including: 1) the intent of the parties; 2) control over the activities; 3) ownership of tools; 4) chance of profit or risk of loss. There is no predetermined way of applying the relevant factors and their relative importance and their relevance will depend upon the particular facts and circumstances of each case.

[26] The antinomy between civil law and common law analyses of insurable employment for EI purposes is detailed by the Federal Court of Appeal in *Grimard*, at paragraphs 27 through 46. I would refer in particular to paragraph 43:

> 33 As important as it may be, the intention of the parties is not the only determining factor in characterizing a contract: see *D&J Driveway Inc. v. Canada (M.R.N.)*, 2003 FCA 453; *Dynamex Canada Inc. v. Canada*, 2003 FCA 248. In fact, the behaviour of the parties in performing the contract must concretely reflect this mutual intention or else the contract will be characterized on the basis of actual facts and not on what the parties claim.
>
> …
>
> 36 In *Wolf v. The Queen*, [2002] 4 F.C. 396, our colleague Mr. Justice Décary cited the following excerpt written by the late Robert P. Gagnon in his book entitled *Le droit du travail au Québec*, 5th ed.(Cowansville: Les Éditions Yvon Blais, 2003), page 67, and clarifying the content of the notion of subordination in Quebec civil law:
>
> > [TRANSLATION]
> >
> > Historically, the civil law first developed a so-called strict or classical concept of legal subordination that was used as a test for the application of the principle of the civil liability of a principal for injury caused by the fault of his agents and servants in the

> performance of their duties (art. 1054 C.C.L.C.; art. 1463 C.C.Q.). This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the concept of legal subordination in a broad sense. The diversification and specialization of occupations and work techniques often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work. Thus, subordination has come to be equated with the power given a person, accordingly recognized as the employer, of determining the work to be done, overseeing its performance and controlling it. From the opposite perspective, an employee is a person who agrees to be integrated into the operating environment of a business so that it may receive benefit of his work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over the quantity or quality of the work done, and so on. Work in the home does not preclude this sort of integration into the business.

37 This excerpt mentions the notion of control over the performance of work, which is also part of the common law criteria. The difference is that, 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: see *D&J Driveway*, *supra*, at paragraph 16; and *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334.

38 However, we may also note in the excerpt from Mr. Gagnon that, in order to reach the conclusion that the legal concept of subordination or control is present in any work relationship, there must be what the author calls [TRANSLATION] "indicia of supervision", which have been called "points of reference" by our Court in *Le Livreur Plus Inc. v. MNR*, 2004 FCA 68 at paragraph 18; and *Charbonneau v. Canada (Minister of National Revenue – M.N.R.)* (1996), 207 N.R. 299, at paragraph 3.

39 For example, under Quebec civil law, integration of a worker within a business is an indicator of supervision that is important or useful to find in order to determine whether legal subordination exists. Is that not also a criterion or a factor that is used in common law to define the legal nature of an existing employment contract?

40 Likewise, as a general rule, it is the employer and not the employee who makes the profits and incurs the losses of the business. In addition, the employer

> is liable for the employee's actions. Are these not practical indicators of supervision, indicating the existence of legal subordination in Quebec civil law as well as in common law?
>
> 41 Finally, is the criterion of the ownership of work tools that is used by the common law not also an indicator of supervision that would be useful to examine? Depending on the circumstances, it may reveal the degree of an employee's integration into the business or his or her subordination to or dependence on it. It may help to establish the existence of legal subordination. In a contract of employment, more often than not, the employer supplies the employee with the tools required to perform the work. However, it seems to me to be much more difficult to conclude that there is integration into a business when the person performing the work owns his or her own truck with his or her name advertised on the side and containing some $200,000 worth of tools to perform the tasks that he or she does and markets.
>
> 42 It goes without saying, in both Quebec civil law and common law, that, when examined in isolation, these indicia of supervision (criteria or points of reference) are not necessarily determinative. For example, in *Vulcain Alarme Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 749, (1999), 249 N.R. 1, the fact that the contractor had to use expensive special detection equipment supplied by the client to check and gauge toxic substance detectors was not considered to be sufficient in itself to transform what was a contract for services into a contract of employment.
>
> 43 In short, in my opinion there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.

[27] Similarly, this has been addressed by the Federal Court of Appeal in *Livreur Plus Inc.*, at paragraphs 18 through 20 as follows:

> 18 In these circumstances, the tests mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025, namely the degree of control, ownership of the work tools, the chance of profit and risk of loss, and finally integration, are only points of reference: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)* (1996), 207 N.R. 299, paragraph 3. Where a real contract exists, the Court must determine whether there is between the parties a relationship of subordination

> which is characteristic of a contract of employment, or whether there is instead a degree of independence which indicates a contract of enterprise: *ibid*.
>
> 19 Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D & J Driveway Inc. v. The Minister of National Revenue, supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.), supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker".
>
> 20 I agree with the applicant's arguments. A subcontractor is not a person who is free from all restraint, working as he likes, doing as he pleases, without the slightest concern for his fellow contractors and third parties. He is not a dilettante with a cavalier, or even disrespectful, whimsical or irresponsible, attitude. He works within a defined framework but does so independently and outside of the business of the general contractor. The subcontract often assumes a rigid stance dictated by the general contractor's obligations: a person has to take it or leave it. However, its nature is not thereby altered, and the general contractor does not lose his right of monitoring the results and the quality of the work, since he is wholly and solely responsible to his customers.

[28] The Federal Court of Appeal similarly wrote in *D & J Driveway Inc.* as follows:

> 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.

[29] The Court in *D & J Driveway Inc.* went on to acknowledge at paragraph 4 that the criteria developed in *Wiebe Door Services* can be referred to in assessing whether a relationship of subordination exists under the *Civil Code*.

III. Analysis

A. Intention

[30] The written agreement between Mme Riendeau and Romanza is written in plain language and does not refer to Mme Riendeau as an employee, the relationship as employment, nor to any form of withholdings or deductions of source, nor to vacation pay.

[31] The new work arrangement at Romanza provided Mme Riendeau with the opportunity to develop her new venture as naturopath, nutritionist and herbal remedy consultant, as well as the opportunity to sell her own chosen line of products relating to those services in a salon where no one else was to provide those services.

[32] Mme Riendeau did not say in evidence that she did not understand that she would be paid gross amounts without withholdings.

[33] It appears from Mme Riendeau's testimony describing her version of events and from her ability to answer questions asked of her, that she is a capable and articulate person. I conclude that Mme Riendeau knew and understood from the outset that she would be paid without any employee withholdings or vacation pay. She also understood and valued of the opportunity to develop her new health services and products venture. It is only reasonable to conclude that Mme Riendeau also understood that she would be an independent contractor and not an employee of Romanza.

[34] Mme D'Elia on behalf of Romanza had drafted the written work agreement and clearly intended this to not be an employment relationship, while it does not specify that clearly or expressly.

[35] Regardless of what was set out summarily in the salon's online advertisement on Kijiji about a salaried position, after an interview and some discussion and negotiation, the parties appeared to have agreed otherwise in their written agreement.

[36] In testing whether the arrangement actually worked and respected was consistent with the parties' intentions, understanding and expectations at the outset, the Court is somewhat restricted by the very short work period involved with this particular worker at Romanza Salon and Spa.

[37] Nothing the parties specifically did would have been inconsistent with the characterization of a contract for services. That does not mean that taken as a whole, having considered all of the relevant considerations and indicia, there may not be an overall degree of direction and control and subordination sufficient to make it employment.

B. Subordination, Control and Indicia of Supervision

[38] It is clear that considerations of the extent of control of the payor over the worker are significant in deciding whether there is an employment relationship by virtue of subordination. The language of the *Civil Code* contemplates an obligation or an undertaking of the worker to do work according to the instructions and under the direction or the control of the other person.

[39] Mme D'Elia was not at the salon all of the time, nor was she present when Mme Riendeau was with a customer for any of her services. The evidence does not establish that Mme D'Elia's younger sister who also worked with clients at the salon was in charge, or even always present, when Mme D'Elia was not there.

[40] There is little to no evidence of Romanza's control over its other workers at the salon. All of the other estheticians were independent contractors. In any event, it appears that Mme Riendeau's circumstances were sufficiently different and distinct given her health services and product activities in addition to her other esthetician services offered by the salon.

[41] The services provided by Mme Riendeau to customers were provided individually and, given their nature, in a private room. No one else from Romanza including Mme D'Elia was qualified to provide some of these services.

[42] I am not satisfied that this degree of control is sufficient when considered alone to be the type of direction and control to which article 2085 of the *Civil Code* is referring. Considering this aspect alone, it appears to be better described in article 2098 as the contractor undertaking to carry out physical work for, or provide a service to, another person for a price without any relationship of subordination per article 2099.

C. Ownership of Tools

[43] The salon was fully furnished and equipped to provide the services offered and these were provided to all who worked there. Mme Riendeau chose to bring a few small hand tools of her own to work because of her personal preference for specific utensils such as a spatule and pince. In a case such as this, the ownership of tools will not be a very helpful consideration as they are customarily provided for all workers, whether employees or independent contractors.

D. Chance of Profit/Risk of Loss

[44] Mme Riendeau was paid an hourly rate for her esthetician services. She therefore had little chance of increasing profit and virtually no risk of loss with respect to those services. She obviously could have earned more money had she chosen to work more hours. However, in this case Mme Riendeau's new venture of offering her naturopath, herbal remedy and nutritionist services and products at Romanza Salon and Spa was more significantly for her own account. She set the fee for those services. She would keep all of her product sales revenues subject to a 10% commission payable to Romanza. This is a very important consideration in this case. These products were not integrated into Romanza's business as its other product lines were. Mme Riendeau may also have been entitled to keep most of the fees generated for these services; the evidence is not clear and the venture was too short-lived to be successful or significant.

IV. Conclusion

[45] Having considered all of the relevant facts as they relate to the parties' intention and the indicia of subordination above, the evidence does not establish on a balance of probabilities that Mme Riendeau was an employee of Romanza during the 9 weeks she worked there.

[46] The appeal is allowed.

Signed at Ottawa, Canada, this 15th day of December 2015.

"Patrick Boyle"

Boyle J.

Translation certified true
on this 23rd day of February 2016
François Brunet, Revisor

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