Dockets: 2007-2910(EI), 2007-2911(EI),
2007-2915(EI), 2007-2916(EI),
2007-2917(EI), 2007-2918(EI),
2007-2930(EI)

BETWEEN:

NCJ EDUCATIONAL SERVICES LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on February 14 and 15, 2008, at Montreal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Stéphane Eljarrat Trevor Rowles (student-at-law)
Counsel for the Respondent:	Nadia Golmier

JUDGMENT

The appeals from the Minister of National Revenue's determinations made under the *Employment Insurance Act* are dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 15th day of May 2008.

"Pierre Archambault"

Archambault J.

Citation: 2008TCC300
Date: 20080515
Dockets: 2007-2910(EI), 2007-2911(EI),
2007-2915(EI), 2007-2916(EI),
2007-2917(EI), 2007-2918(EI),
2007-2930(EI)

BETWEEN:

NCJ EDUCATIONAL SERVICES LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Archambault J.

[1] NCJ Educational Services Limited (**NCJ)** is appealing seven determinations by the Minister of National Revenue (**Minister**) that the services provided by seven of NCJ's workers (**workers**) constituted insurable employment within the meaning of the *Employment Insurance Act* (**Act**) during the 2004, 2005 and 2006 calendar years. None of the workers intervened in the appeals of NCJ. The appeals concern the following workers:

Worker	**Period of employment**	**Appeal #**
Assia Hamdane	November 1, 2004 to June 16, 2005	2007-2910(EI)
Lara Judd	January 1, 2004 to June 15, 2006	2007-2911(EI)
Ugras Oguz	January 1, 2004 to December 31, 2006	2007-2915(EI)
Janet Odell-Bourke	January 1, 2004 to June 15, 2006	2007-2916(EI)
Ellen Cooper	January 1, 2004 to May 31, 2006	2007-2917(EI)
Shawn Weiland	January 1, 2004 to June 15, 2006	2007-2918(EI)
Andrew Sivilla	January 1, 2004 to June 15, 2006	2007-2930(EI)

[2] It appears that the determinations with respect to the seven workers resulted from a request for employment insurance benefits made by Ms. Hamdane in the summer of 2005. None of the other workers made such a request and, according to Ms. Margaret A. Jacobs, president of NCJ, Ms. Hamdane was the first worker to request employment insurance benefits since the beginning of NCJ's operations on July 1, 1980.

[3] In making his determination with respect to Ms. Hamdane the Minister relied on the following assumptions of fact:

a) the Appellant was incorporated on June 23, 1980; (admitted)

b) the sole shareholder of the Appellant and its president was Margaret Jacobs who owns 100% of the voting shares; (admitted)

c) Margaret Jacobs was present at the Appellant's premises on a regular basis; (admitted)

d) the Appellant provides educational services such as tutoring, consulting, school placement and standardized testing; (admitted)

e) the Appellant's clients are parents of students from elementary school, high school, CEGEP and university; (admitted)

f) the Appellant hired the Worker as a tutor on a verbal agreement; (admitted)

g) the Appellant considered the Worker an independent contractor [admitted] although the Worker considered herself as an employee of the Appellant; (denied)

h) the Worker provided tutorial assistance to elementary and high school students, clients of the Appellant; (admitted)

i) the Appellant obliged the Worker to give the tutorial sessions at its premises on Maisonneuve boulevard in Westmount;[1] (admitted)

j) the Appellant instructed the Worker concerning the tutorial lesson, which was based on the agenda of the student and prepared by the student's teacher;[2] (denied)

---

1 Counsel for the appellant admitted this fact, except for the word "obliged".

2 This paragraph was modified at the hearing with respect to each of the six other workers. The amended paragraph j) reads as follows:

k) the [client of the] Appellant specified to the Worker the material and the subject to cover and established the length of time of the tutorial;[3] (admitted)

l) the Appellant assigned specific students to the Worker; (admitted)

m) the Worker was required to respect a work schedule established by the Appellant [according to the availability of the tutor];[4] (admitted)

n) the Worker did not have the right to change the work schedule without the approval of the Appellant; (denied)

o) the Appellant kept a log of the hours worked by the Worker; (denied)

p) the Worker prepared a detailed time sheet for every student and presented the time sheet to the Appellant, which was verified against the Appellant's time log;[5] (admitted)

q) the Appellant required the Worker to perform the tutorial sessions personally; (denied)

r) the Worker advised the Appellant of her absence; (admitted)

> The worker gave the tutorial lesson which was based on the agenda of the student which was prepared by the student's teacher.

It should be noted that counsel for the Minister was prepared to adopt the same wording for the appeal concerning Ms. Hamdane. However, I brought to her attention that that worker had informed the Minister that she had received instructions from NCJ; so counsel for the Minister withdrew her proposed amendment of this paragraph as regards Ms. Hamdane.

[3] The wording of this statement of fact was modified by counsel for the Minister during the course of the hearing so that it would reflect what the appeals officer took into account in making his determination. The portion in brackets was added. This amendment was also made for each of the other six appeals. However, I realized after the hearing that the Report on an Appeal concerning Ms. Hamdane, filed as Exhibit A-4, states the following:

> NCJ instructed the worker concerning the tutorial lesson to give to the student. NCJ would assign the student to the tutor, specify to the tutor the material and subject to cover and establish the length of time of the tutorial.

So I consider that the admission made by counsel for the Minister with respect to Ms. Hamdane was made erroneously due to a misunderstanding of the facts.

[4] The text in brackets was added to the Reply by way of an amendment made by counsel for the Minister. Counsel for NCJ admitted this paragraph except for the word "required".

[5] This paragraph was admitted except for the word "detailed" and the statement that the timesheet was verified against the appellant's time log.

s) the Worker was required to provide the Appellant with [written and][6] verbal reports relating to the progress of the student and a final report attesting to the student's ability level; (denied)

t) it is the responsibility of the Appellant to satisfy its clients, if a student was not satisfied with a tutor, the Appellant would change the tutor; (denied)

u) the Appellant provided to the Worker the working premises [admitted], the furnishings, the equipment and the materials required to carry out her functions; (denied)

v) the Appellant had a library and a computer with internet service available for the Worker to use; (admitted)

w) the Worker received an hourly wage of $18 [admitted] determined by the Appellant; (denied)

x) the Worker was paid by cheque on a weekly basis; (admitted)

y) the Worker was not required to incur any expenses in fulfilling her functions for the Appellant; (admitted) [7]

---

[6] Counsel for the Minister amended this statement of fact by deleting the reference to "written". This amendment was also made in all the other six appeals.

[7] It should be noted that the replies to the notices of appeal are basically the same in each of the six other NCJ appeals, although there are some differences. The most important ones are those that I have mentioned already, i.e. those reflected in the amendments made by counsel for the Minister. It should be noted as well that the appeals officer did not get in touch with all seven workers; he only talked to Ms. Hamdane, Ms. Ellen Cooper, Ms. Janet Odell-Bourke and Mr. Andrew Sivilla. Therefore, there are no statements of fact indicating whether Ms. Lara Judd, Ms. Oguz and Mr. Weiland considered themselves as employees or as independent contractors. Of these three workers, only Mr. Weiland testified, and he indicated that he did not remember having been told by Ms. Jacobs that he had been hired as an independent contractor. However, he did say that he found out quickly after his hiring, on realizing that no taxes were being withheld from his remuneration, that this was indeed the basis on which he had been hired. In the case of Ms. Odell-Bourke, NCJ's counsel denied that the worker was paid on a weekly basis and this was confirmed by Ms. Odell-Bourke, who stated in her testimony that she was working on an irregular basis and therefore was paid on an irregular basis. In the case of Mr. Sivilla, it is not assumed as a fact that he was required to provide verbal reports to Ms. Jacobs. However, it is stated in the reply concerning him that "as Margaret Jacobs was [usually] present at the Appellant's location [admitted], she was verifying the work quality of the Worker and the progress of the student" [denied]. It should be noted that counsel for NCJ admitted the first portion of the paragraph when the word "usually" as shown in brackets was added. The second portion was denied.

Appeals Officer

[4] Mr. Paul Hyland, the appeals officer, testified at the request of NCJ. During his examination, he stated that, contrary to what is done in income tax matters, it is the Minister's practice to make *de novo* findings of fact at the appeal level in order to make a determination. During the course of his investigation, Mr. Hyland prefers to rely on direct contact to obtain information from the parties, that is, the payer and the workers, whether by telephone conversations or meetings, instead of proceeding through a written questionnaire. Here, the facts provided by the payer were so provided through written representations submitted by NCJ's legal representative, a lawyer from the renowned firm of Davies Ward Phillips & Vineberg. Mr. Hyland noted in paragraph 5 of his reports on an appeal that he had been informed by NCJ's legal representative that "NCJ does not direct the tutors in any respect, including as to how tutoring should be organised and how the tutors should be providing lessons to the students." Unfortunately, Mr. Hyland did not ask to talk directly to NCJ's president, Ms. Jacobs. In the case of the four workers with whom he did talk (Ms. Hamdane, Ms. Odell-Bourke, Ms. Cooper and Mr. Sivilla[8]), the interview took place by telephone. He completed the written questionnaires himself from their answers. So he did not obtain a signed written statement from these workers.

[5] Mr. Hyland acknowledged that he was not informed either by NCJ's legal representative or by any of the workers, except Ms. Hamdane, that instructions were given by Ms. Jacobs to the workers. However, he stated that, in coming to his decision that each of the seven workers was an employee, he assumed that Ms. Jacobs would have provided such instructions to the other six workers.

Margaret A. Jacobs

[6] NCJ's second witness was Ms. Jacobs, who explained the circumstances surrounding the establishment of NCJ. She stated that she had been a teacher in the city of Laval and, at one point, was put on an availability list. In order to create her own job, she started to provide English language tutoring services at home. Her teaching certificate issued by the Quebec Department of Education states that she

---

[8] With respect to Ms. Oguz, Mr. Hyland was unable to contact her because she had returned to Turkey. As to Mr. Weiland, that worker did not reply to Mr. Hyland's request for information and Mr. Hyland stated that he did not have the power to force him to do so. There is no information as to why he did not contact or obtain information from Ms. Lara Judd.

is authorized to teach English at the high-school level (Exhibit A-12). Through word of mouth, it became known in the Montreal area that she was providing tutorial services, and this activity became a full-time job for her. Ms. Jacobs decided to create NCJ in 1980 in order to respond to the growing demand for her tutorial services, not only for English, but also for mathematics, history, physics, chemistry, biology, French and Spanish. She described her business model as being a simple one: she matches students with tutors.

[7] Given that she is the only one managing NCJ, she gave up providing tutorial services herself and relied instead on a large pool of tutors whom she hires. Ms. Jacobs testified that she always tells each of them that they are being hired as independent contractors. At the end of the year, she gives them a T4A slip, which declares under "other income" (Box 28) the amount paid to each worker. Her tutors are proficient and qualified individuals with an appropriate academic record. They have to be trustworthy. In that connection, she checks their references; otherwise, she said, she does not care.

[8] Ms. Jacobs is the person responsible for dealing with the clients (basically, the parents of the students) and determining their needs. Ms. Jacobs says that she receives 60 to 80 phone calls (per week, I assume) from students who may require adjustments or changes to their schedules. She bills the clients for NCJ's services and she pays NCJ's tutors on the basis of time sheets that they provide to her. She testified that she does not keep any time log. She relies on the good faith of her tutors.[9] She admitted that it is she who prepares the invoices for the workers' services to NCJ. All this work is done on a weekly basis. Moreover, she is present most of the time on the premises where the tutoring takes place. There is not a separate office for her. Everything is done in a large hall (1,800 square feet) (**tutoring hall**) where approximately 17 tables are available for the tutors to meet their students. Each tutor chooses a table that suits his or her needs. Some tables are for one student; some are for two or more.

[9] Ms. Jacobs testified that NCJ's tutoring hall is open from 9 a.m. to 10 p.m., seven days a week, during the school year, except for certain holidays. She is there most of the time, that is from 9 a.m. to 9 p.m. The tutors have keys to give them access to the hall and to enable them to lockup. She prefers to have the tutors meet their students in this tutoring hall because it is more profitable for her and more advantageous for her tutors as well because they then do not have to travel from

---

[9] Given that NCJ bills its clients by using these time sheets and charges a top-up hourly fee, the more time billed for, the greater the fees earned by NCJ.

one school to another to see the students. She said that she asked on one occasion if the tutors would be prepared to teach at the residences of the students, but they refused to do so. She also indicated that the tutoring hall was a more secure environment for providing the tutorial services.

[10] She prepares a schedule assigning a particular student to a particular tutor according to what the tutors indicate to her to be their availability. If, on a given evening or day, it appears a tutor cannot be present for any reason, including illness, she will try to find a replacement for the tutor or ask the student to come at another time. If tutors do not show up as expected, there is no particular penalty, except that they do not get paid. In one case, one of her tutors suggested his younger brother as a potential replacement. Having been told that he was enrolled in a university program, she accepted him as a replacement. However, she did not remember when this took place. In any event, she testified that she did not tell the tutors that they could not have themselves replaced by substitutes. She acknowledged, however, that she would not accept just anybody as a replacement; that person would have to have the proper qualifications to provide tutoring services.

[11] Ms. Jacobs stated that the tutors are never required to provide written or verbal reports, whether on an interim basis or at the end of a tutoring contract, on students' progress. However, she did acknowledge that she could on occasion discuss with her tutors the progress being made by the students. She also acknowledged that she would be the one to receive positive or negative comments from NCJ’s clients, that is, the parents. She would, in turn, relay this information to NCJ’s tutors. She gave as an example of a parent’s complaint the case of a particular tutor who was described as a “whiner”. She just told him to stop. She also stated that if she was unhappy with a particular tutor, she would either assign that tutor's student to another tutor, or simply stop using the services of that particular tutor.

[12] Ms. Jacobs said that NCJ does not have any code of ethics or rules governing the services of the tutors. However, she acknowledged that she does instruct her young male tutors not to wear tee shirts; they are required to wear a shirt with a collar.

[13] Ms. Jacobs does not impose any particular material or content on her tutors. The tutors determine what has to be done based on the requests made by their students when they meet. The tutors often help the students with homework given

by the students' teachers or do work suggested by these teachers to enable students to improve in a particular subject. NCJ has in its library books which are used by the different schools attended by NCJ's students, in case the students fail to bring their own books with them. Tutors are free to use their own material. Ms. Jacobs also indicated that she does not provide any training or instructions to her tutors. She said that there is nothing to explain, except the time sheets.

Janet Odell-Bourke

[14] NCJ's next witness was Ms. Janet Odell-Bourke. Ms. Odell-Bourke is a teacher with 33 years of experience. She teaches French as a second language in high schools. She worked as a tutor for NCJ on a regular basis from 2002 to 2006. After 2006, she would only work very occasionally, to help Ms. Jacobs, since she considered Ms. Jacobs as a friend. She would indicate, during the relevant period, what her availability was and perform her tutorial services according to the schedule prepared by Ms. Jacobs. She was not required to have her teaching plan or her diagnostics of a student's needs approved by Ms. Jacobs. She did not remember whether she had discussed with Ms. Jacobs when she was hired her status as an independent contractor. She even said that she had no contract with Ms. Jacobs. However, she agreed that she was providing her tutorial services for a fee.

[15] Ms. Odell-Bourke indicated that there was no dress code (contrary to what Ms. Jacobs stated) or code of ethics. She also confirmed that NCJ did not keep a time log. She testified that she was free to use her own material to respond to the students' needs. Although she was not required to provide reports, she did have some discussions with Ms. Jacobs regarding the progress of her students. She said that she had never been disciplined for cancelling her attendance for a tutoring session at NCJ's tutoring hall. However, she acknowledged that she only cancelled twice and that was after advising Ms. Jacobs ahead of time. Ms. Odell-Bourke indicated that she was never told that she was not allowed to have herself replaced by somebody else.

[16] When questioned by Mr. Hyland, Ms. Odell-Bourke informed him that she considered herself an independent contractor. She indicated that she was not asked, however, how she was supervised by Ms. Jacobs. She would indicate to Ms. Jacobs her availability up to four months ahead of time.

Shawn Weiland

[17] Mr. Shawn Weiland was a tutor for NCJ from 2004 to 2006. He was hired to provide science and mathematics tutorial services to NCJ's students. At the time, Mr. Weiland had just graduated from university. Therefore, he was available for a significant number of hours during the week. After he had informed Ms. Jacobs as to his availability, it was she who would prepare his teaching schedule. He indicated that when he could not be present for a tutoring session, he did not have to provide any justification. He testified however that he rarely, if ever, missed his sessions. He could only remember having been absent by reason of illness.

[18] Mr. Weiland stated that he was not required to provide NCJ with written reports on his students' progress. However, he did speak informally about it with Ms. Jacobs. With respect to content or the material covered, it was normally he who responded to the students' needs. He testified that he used the material offered by NCJ, although he was free to use his own. When asked to compare his work at NCJ with his new job as a teacher at Lower Canada College, he said that he would follow for most part the dress code provided by Ms. Jacobs while, at Lower Canada College, and would always follow the dress code. At Lower Canada College, he felt more compelled as well to follow instructions respecting content and the material to be covered in class, and he provided a written report to his students four times a year. His remuneration at Lower Canada College was subject to withholdings at source.

Ellen Cooper

[19] Ms. Ellen Cooper is a professor at Vanier College with 15 years of teaching experience. She has also been working as a tutor for NCJ since 1997. Like the other tutors, she confirmed that she indicates her availability to Ms. Jacobs and is not required to work a minimum number of hours. Nor is required to make reports on the progress made with her students. However, she does volunteer this kind of information to Ms. Jacobs. She usually bases the content of her tutoring on the students' requirements. She does not need to be supervised in her work as a tutor, does not follow any guidelines or dress codes and does not feel obliged to provide any justification for her absences, although she can remember having been ill only once. Contrary to what Mr. Hyland indicated in the questionnaire reflecting his telephone conversation with her, Ms. Cooper considers herself an independent contractor and not an employee. When a student stops coming to see her at NCJ's tutoring hall, she is not made aware of the reason.

Assia Hamdane

[20] Ms. Hamdane moved to Canada in 2004 from Algeria. Prior to her move, she had been teaching at an Algerian university for a period of ten years. She started to work as a tutor for NCJ in November 2004, at a time when she had no other work. She was available to provide tutorial services not only in French, but also in various other subjects, including mathematics, science and geology. She taught from Monday to Thursday. She would normally arrive for 3:30 p.m. and wait in queue to receive from Mrs Jacobs the assignment of her students. It was also Ms. Jacobs who instructed her as to what to teach NCJ's students and informed her of the duration of her tutoring sessions. Ms. Hamdane once suggested to Ms. Jacobs extending the teaching time for a student, but was told by her not to do so. She would stay at NCJ until such time in the evening as Ms. Jacobs told her that her services were no longer required. According to Ms. Hamdane, Ms. Jacobs informed her that if she changed her schedule, she would have to advise her. When she was sick, she would call Ms. Jacobs and tell her that she could not be present; she does not know whether she was replaced on such occasions. In addition, she confirmed that she did not have to provide reports on her tutoring of her students; however, she thought it only normal to keep Ms. Jacobs informed.

[21] Ms. Hamdane testified that the rules of conduct were very strict at NCJ's tutoring hall. She indicated that “you were not allowed to speak to other tutors.” However, she admitted that this directive did not come from Ms. Jacobs, but from a co-worker, Ms. Oguz. She also admitted that she did not check with Ms. Jacobs to determine whether what she had been told was true.

[22] Ms. Hamdane indicated that she always thought that she was an employee while working for NCJ. However, in her tax returns for 2004 and 2005 she declared her income from NCJ as business income from self-employment. It should be added that she declared as employment income in 2004 her salary from teaching at another school and she also declared as employment income her remuneration from her work in a boutique in 2005.

[23] It should be noted that it is possible Ms. Hamdane may have had difficulty understanding Ms. Jacobs’ English because her knowledge of the language was not as good as it could have been. According to Ms. Hamdane, she did not receive any input from the parents of students. She ceased working for NCJ at the end of the 2004-2005 school year because she decided to return to university as a student in environmental studies in the fall of 2005.

Analysis

[24] In *Teach & Embrace Corporation v. M.N.R.*, 2005 TCC 461, I wrote the following description of the rules applicable in determining whether, for the purposes of subsection 5(1) of the Act, a contract of employment (contract of service) or a contract for services existed:

> 13 The relevant statutory provision is subsection 5(1) of the *Employment Insurance Act* (**Act**), which defines insurable employment as being employment "under any express or implied contract of service". As counsel for the Minister stated, given that the Act does not define what a contract of service is, recourse must be had to the *Civil Code of Quebec* (**Civil Code**), pursuant to the interpretation principle of complementarity.[1] When, in interpreting a federal statute, it is necessary to refer to a civil law concept of a province, to a nominate contract, for example, reference must be made to the concept in force in the province. Here, given that the Contract was entered into in Quebec, we have to refer to the Civil Code. Since 1994, the Civil Code defines the "contract of employment" and the "contract for services". The relevant provisions are article 2085 for the definition of the former and articles 2098 and 2099 for the definition of the latter. They provide 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.
> >
> > 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.]
>
> 14 The three essential elements for a contract of employment are: i) work, ii) remuneration, and iii) the direction or control of the employer. In the case of the contract for services, there must be services provided for remuneration, freedom for the provider of services to choose the means of performing the contract and no relationship of subordination between the parties. As stated by counsel for the Minister, it is clear that the distinguishing factor between a contract of employment and a contract for services is the existence or absence of a relationship of subordination, i.e. the difference depends on whether the contract was executed under the direction or control of an employer.

15 This view is espoused by Quebec scholars, including Robert P. Gagnon in *Le droit du travail du Québec*, 5th ed. (Cowansville Qc: Les éditions Yvon Blais Inc., 2003), at paragraph 90:

> **[TRANSLATION]** [2]
>
> **90** — *Distinguishing factor* — The most significant feature characterizing a contract of employment is the subordination of the employee to the person for whom he works. It is by this feature that a contract of employment can be distinguished from other onerous contracts which also involve the performance of work for the benefit of another person for a price, such as a contract of enterprise or a contract for services under articles 2098 ff C.C.Q. Thus, while the contractor or the provider of services "is free", under article 2099 C.C.Q., "to choose the means of performing the contract" and while between the contractor or the provider of services and the client "no relationship of subordination exists . . . in respect of such performance," it is a characteristic of a contract of employment, subject to its terms and conditions, that the employee personally performs the work agreed upon under the employer's direction and within the framework established by the employer.

At paragraph 92, Gagnon describes the notion of subordination:

> **92** — *Concept* — 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 . . . 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 the 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.

16 When the Quebec Minister of Justice tabled the new Civil Code, which came into effect on January 1, 1994, he stated:

> [TRANSLATION][3]
>
> 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.]

17 This view of the Quebec Minister of Justice corresponds with that of the Federal Court of Appeal in *Gallant v. Canada*, [1986] F.C.J. No. 330 (QL), a judgment rendered in 1986 prior to the enactment of the new Civil Code.

18 The distinction between a contract of employment and a contract for services is not an easy one to make. The line of demarcation between these two types of contracts can be uncertain and the fact that the issue arises so often before this Court is certainly indicative of its difficulty. In my article, I describe the approach which should be followed before this Court. I state therein that the burden of proof in an appeal heard in Quebec — as is also the case for an appeal heard in a Canadian common law province — is on the appellants: they have to establish that they are entitled to have the decision of the Minister reversed. [4] Here, it is thus up to the Payer to establish that no contract of employment existed.

[Emphasis added.]

---

[1] See s. 8.1 of the *Interpretation Act*, L.R.C. 1985, c. I-21.

[2] The English translation comes from an article of mine "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It" (**my article**) published in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Second Collection of Studies in Tax Law (2005)*, Association de planification fiscale et financière and Department of Justice Canada, 2005, p. 2:1, at p. 2:29, par. 44.

[3] *Ibid.*, p. 2:26, par. 41.

[4] *Ibid.*, p. 2:54, par. 80 and 81.

[25] I have described a similar approach in the more recent decisions *Grimard v. The Queen*, 2007TCC755[10] and *Rhéaume c. M.N.R.*, 2007TCC591. In those decisions, I dealt with the differences that exist between the common law and the civil law. At paragraphs 21 to 27 of *Grimard* I wrote the following*:*

> [21] In my opinion, the Civil Code rules governing contracts of employment are not the same as the common law rules, and this means that it is not appropriate to apply common law decisions like *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553 (F.C.A.), and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59. [14] In the common law, "there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. . . . The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account." Major J. wrote the following in *Sagaz*: [15]
>
> > 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
> >
> > 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.
> >
> > [Emphasis added.]
>
> [22] There are numerous common law decisions in which the courts have held that the "control" factor is neutral and therefore not conclusive. In the common law, it is thus possible to conclude that a contract of employment exists without making any finding of fact regarding the existence of a right of control or direction.

---

[10] It should be stated that an appeal has been filed before the Federal Court of Appeal in *Grimard*.

[23] In Quebec, unlike in the common law, the central question is whether there is a relationship of subordination, that is, a power of control or direction. To determine that a contract is a contract of employment or a contract for services, as the case may be, a court has no choice but to make a finding as to the presence or absence of a relationship of subordination. This was the approach taken by Létourneau J.A. of the Federal Court of Appeal in *D & J Driveway*,[16] in which he found that there was no contract of employment; he based that conclusion 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".[17]

[24] 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 FCA 334, [2005] F.C.J. No. 1720 (QL). Décary J.A. wrote the following at paragraphs 2-3[18]:

> 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.]

[25] After quoting the comments of Robert P. Gagnon that I have reproduced above, particularly with regard to the indicia of supervision that enable one to establish the existence of a relationship of subordination, Décary J.A. added the following at paragraph 12 of his reasons:

> It is worth noting 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 and therefore much more than a mere indicator of organization, as Mr. Justice Archambault observed at page 2:72 of the article cited *supra*.

[Emphasis added.]

[26] I would also point out the following comments made by Picard J. of the Quebec Superior Court in *9002-8515 Québec inc.*,[19] which I quoted at paragraph 121, page 2:82 of my article:

[TRANSLATION]

> 15 In order for there to be a contract of enterprise, there must be no relationship of subordination, and the Agreement contains several elements showing a relationship of subordination. A sufficient number of indicia exists in this case of a relationship of authority.

[Emphasis added.]

[27] Finally, it should be noted that the courts rightly recognize that the parties' intention regarding the nature of a contract they enter into is an important factor in characterizing that contract. However, the following qualifications set out at pages 2:62-2:65 of my article are necessary:

> [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:

[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:

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.]

[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.[20] The *Cour de cassation* has adopted an approach similar to the Canadian one:

[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. . . .

> [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. 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*.
>
> [101] Since the EIA generally authorizes the payment of employment insurance benefits only to employees who lose their employment, 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.

---

14 See the more detailed analysis in my article, *supra*.

15 Justice Major in *Sagaz*, at par. 46 and 47.

16 *D & J Driveway Inc. v. Canada (M.N.R.)*, [2003] F.C.J. No. 1784 (QL), 2003 FCA 453. See also *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (QL) (F.C.A.); *Sauvé* v. *Canada (M.N.R.)*, [1995] F.C.J. No. 1378 (QL) (F.C.A.); *Lagacé v. Canada* (*M.N.R.*), [1994] F.C.J. No. 885 (QL) (F.C.A.), affirming [1991] T.C.J. No. 945 (QL). However, it must be noted that, in *D & J Driveway* and *Charbonneau*, the Court of Appeal did not expressly rule out the application of *Wiebe Door* but held that a contract for services existed because there was no relationship of subordination; the court thus applied the Civil Code rules.

17 At par. 16 of the decision.

18 It should be mentioned that Pelletier and Létourneau JJ.A. concurred in the decision of Décary J.A. In a more recent decision, *Combined Insurance Company of America v. Canada*, 2007 FCA 60, in which the reasons were written by Nadon J.A. and concurred in, moreover, by Pelletier and Létourneau JJ.A., reference was again made to *Wiebe Door*, and the Tax Court judge was criticized for failing to "consider the tests developed by this Court in Wiebe Door" (at par. 38).

However, *9041-6868 Québec Inc.* was not referred to in *Combined Insurance* (even though that case was mentioned in the respondent's memorandum of fact and law), nor was it stated that the interpretation adopted by Décary J.A. in *9041-6868 Québec Inc.* is no longer the law when applying a federal statute in Quebec.

The application for leave to appeal to the Supreme Court of Canada in *Combined Insurance* was dismissed without reasons on October 25, 2007 ([2007] C.S.C.R. No. 156 (QL)). In his written response to the leave application, counsel for Combined Insurance took the position that the decision of the Federal Court of Appeal in *Combined Insurance* [TRANSLATION] "is in no way at odds with the same court's decision in *9041-6868 Québec inc.* in 2005" (par. 25 of the response). He added:

> [TRANSLATION]
>
> The Federal Court of Appeal . . . had to conclude that there was no relationship of subordination in the performance of the work Ms. Drapeau was required to do for the respondent. . . . Thus, the Federal Court of Appeal did indeed apply the relevant provisions of the *Civil Code of Québec* in this case. (para. 13 of the response)
>
> . . . The Federal Court of Appeal did not revive the common law tests in order to determine the existence of a contract of employment in Quebec. Rather, [it] correctly reviewed all the evidence in the record, unlike the trial judge, and concluded that there was no relationship of subordination between Ms. Drapeau and the respondent by applying several indicia of supervision, such as ownership of work tools, chance of profit and risk of loss, integration, degree of control, required presence at the workplace and observance of a work schedule, control over absences for vacation, disciplinary powers, imposition of work methods, submission of activity reports and monitoring the quantity and quality of work . . . . [Par. 15 of the response.]

[19] *Commission des normes du travail c. 9002-8515 Québec inc.*, REJB 2000-18725. See also the commentary of the Quebec Minister of Justice reproduced at par. 42 of my article, indicating that the provider of services must enjoy [TRANSLATION] "virtually total independence . . . concerning the manner in which the contract is performed".

[20] Jean-Maurice Verdier, Alain Coeuret and Marie-Armelle Souriac, *Droit du travail*, 12th ed. (Paris: Dalloz, 2002), at p. 315.

[Emphasis added.]

[26] Now, let us apply these rules to the facts of this case. Contrary to what was the case in *Teach & Embrace*, here there are no written contracts. It is therefore more difficult to determine what was actually agreed upon when the workers were

hired by NCJ, and especially what kind of contract they entered into.[11] This difficulty is illustrated by the testimony of Mr. Weiland, who, like most of the other workers, did not remember having discussed this question at the time of his hiring. Mr. Weiland testified that he did not remember having specifically agreed to be hired as an independent contractor. He only realized it was Ms. Jacob's intention that he work as one when he saw that no taxes were being withheld by NCJ from his remuneration. That Mr. Weiland remembers realizing only after he was hired that he was an independent contractor would appear to indicate that the nature of his contract was not discussed beforehand, contrary to what Ms. Jacobs stated. 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. Jacobs' statements do not necessarily reflect what actually took place during the relevant periods and are therefore not always reliable.

[27] I do not think that intent plays an important role here. Although it is clear that Ms. Jacobs wanted the sort of relationship that results from a contract for services, the evidence regarding the workers' intention is far from clear. In the case of Ms. Hamdane, there is a contradiction between her testimony that she always believed she was an employee and the fact that in her tax returns she reported her income from NCJ as business income. With respect to Mr. Weiland, as already mentioned, in all likelihood, he did not discuss the nature of his contract.

[28] Ms. Cooper and Ms. Odell-Bourke both indicated that they thought they were independent contractors. However, I doubt whether these individuals really understood the legal distinction between a contract for services and a contract of employment. As mentioned earlier, Ms. Odell-Bourke believed she did not even have a contract! There would have had to have been a meeting of the minds on the matter of NCJ not having any power to give direction or to control the work to be performed. As I stated in *Rhéaume*, at paragraph 34, "the existence of some vacillation in the case law, alluded to by Décary J.A. in *9041-6868 Québec Inc.* [the **Tambeau** case], does not help the situation".

[29] In any event, even in a situation where both parties clearly intended 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

---

[11] One worker, Ms. Odell-Bourke, even thought that she had no contract with NCJ, so it is possible for the workers to be mistaken about the true legal nature of their relationship with NCJ.

reality. Here, 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. Mrs Hamdane testified that she was given instructions concerning the work to be done. She stayed at work until told by Mrs Jacobs that she could leave. Ms. Jacobs was present most of the time when the tutoring was being done and was therefore capable of supervising what was going on in NCJ's tutoring hall. She acknowledged that if she had seen one of her tutors behaving in an

improper manner, for example, by laying a hand on the knee of a student, she would have immediately intervened to ensure proper behaviour by that tutor.

[30] She did exercise 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 (see Ms. Hamdane's testimony). 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 if a tutor could not be present for a tutoring session by reason of illness or otherwise.

[31] The evidence also discloses that when the parents (NCJ's clients) made a positive or a negative assessment of the work done by a particular tutor, they did not communicate it to the tutor, but to Ms. Jacobs. Ms. Jacobs would exercise direction or control over the tutors by informing them of the positive or negative comments of the parents. If the behaviour of a particular tutor did not change, Ms. Jacobs could assign the student to another tutor or just decide to no longer use that tutor's services.

[32] Ms. Jacobs also exercised direction over the work of her workers by adopting, for instance, a dress code for her male tutors. Being present on the premises, she therefore was in a position to control what went on.

[33] As to the manner in which the teaching was supposed to be carried out, it is normal that, in dealing with professionals such as each of the tutors who testified in this case, NCJ would rely on those professionals to adopt the proper method for discharging their duties. There is no evidence of interference by Ms. Jacobs in the teaching methods of the tutors. However, this is not unusual: for example, such was the situation in both *Teach & Embrace* and *Rhéaume*. The same can also be said about the work performed by the worker in *Grimard*.

[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.

[35] As stated by the minister of Justice in his comments when the *Civil Code of Québec* was adopted and by Robert Gagnon in his work entitled *Le droit du travail du Québec*, a relationship of subordination can exist even when there is no immediate control exercised by the employer ("classical legal subordination") if the elements of the "*concept of legal subordination in a broad sense*" are present, that is the "*subordination* [that] *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.*" (See Gagnon, paragraph 92, reproduced at paragraph 24 above).

[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)[12], and in *Gallant*[13] *supra* is whether NCJ had the power to exercise control and direction

---

[12] Justice Noël wrote at par. 5:

> 5 The question the trial judge should have asked was whether the company had the power to control the way the workers did their work, not whether the company actually exercised such control. The fact that the company did not exercise the control or that the workers did not feel subject to it in doing their work did not have the effect of removing, reducing or limiting the power the company had to intervene through its board of directors.
>
> [Emphasis added.]

[13] Justice Pratte wrote in the second paragraph of his short reasons :

> . . . In the Court's view, the first ground is based on the mistaken idea that there cannot be a contract of service unless the employer actually exercises close control over the way the employee does his work. 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

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.

> duties. If this rule is applied to the circumstances of the case at bar, it is quite clear that the applicant was an employee and not a contractor.
>
> [Emphasis added.]

[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) behaviour. 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.[14]

[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.

Signed at Ottawa, Canada, this 15th day of May 2008.

---

[14] For an example of a civil servant teaching part-time in colleges and universities in a common law province, see *Rosen v. The Queen*, 76 DTC 6274 (F.C.T.D.). Mr. Rosen was held to be an employee because (in part) "the business in which he was actively participating was the business of schools not his own" (p. 6276).

“Pierre Archambault”

Archambault J.

CITATION:	2008TCC300
COURT FILE NOS.:	2007-2910(EI), 2007-2911(EI), 2007-2915(EI), 2007-2916(EI), 2007-2917(EI), 2007-2918(EI), 2007-2930(EI)
STYLE OF CAUSE:	NJC EDUCATIONAL SERVICES LIMITED v. M.N.R.
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	February 14 and 15, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	May 15, 2008

APPEARANCES:

Counsel for the Appellant:	Stéphane Eljarrat
Counsel for the Respondent:	Nadia Golmier

COUNSEL OF RECORD:

For the Appellant:

Name:	Stéphane Eljarrat
Firm:	Davies Ward Phillips & Vineberg LLP Montreal (Quebec)

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada