Docket: 2012-4735(EI)

BETWEEN:

JACQUES VILLENEUVE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 4, 2014, at Montréal, Quebec.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Laurianne Dusablon-Rajotte, Student-at-Law Julie David

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JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (the Act) is allowed, and the decision is referred back to the Minister of National Revenue on the basis that Jacques Villeneuve did not hold insurable employment within the meaning of paragraph 5(1)(*a*) of the Act, during the period from January 1, 2010, to August 30, 2011, in accordance with the attached Reasons for Judgment.

Signed at Kingston, Ontario, this 15th day of July 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 27th day of August 2014
Margarita Gorbounova, Translator

Citation: 2014 TCC 224
Date: 20140715
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REASONS FOR JUDGMENT

Masse D.J.

[1] In this case, this is an appeal from a decision of the Minister of National Revenue (the Minister) dated August 31, 2011, and confirmed on May 30, 2012, under the *Employment Insurance Act*, S.C. 1996, c. 23, as amended (the Act), concerning the insurability of employment for the period from January 1, 2010, to August 30, 2011 (the period).

[2] The appellant is appealing from that decision.

Factual background

[3] The Canada Revenue Agency (CRA) conducted a review of the books and records of the corporation Ayotte Techno-Gaz (Techno).

[4] During the review, it was determined that Techno considered the appellant to be an independent contractor, not an employee in its service. Therefore, CRA's review officer asked the eligibility section to decide whether the work performed by the appellant for Techno had been performed under a contract of service.

[5] In a letter dated August 31, 2011, CRA's eligibility division informed the appellant and Techno that, during the period, the appellant was an employee and that his employment with Techno was insurable under subsection 5(1) of the Act.

[6] The appellant appealed this decision, and on May 30, 2012, the Minister confirmed the decision dated August 31, 2011. Hence, this appeal to the Tax Court of Canada.

[7] The issue is whether the appellant held insurable employment under a contract of service with Techno during the period at issue.

[8] Daniel Ayotte is the president of Techno. Techno operates a business specializing in manufacturing and selling industrial paint curing ovens. Techno does not manufacture paint. Its specialization is in treating surfaces and in curing paint onto industrial surfaces. Techno sells this technology all over the world. In 2009, Mr. Ayotte acquired a new technology in France, which uses a catalytic thermoreaction process in flameless ovens. As a result, this new technology would make it possible to cure the paint onto industrial surfaces in a fraction of the time required by current techniques in the industry. Mr. Ayotte realized that this new technology had enormous economic potential if he could successfully commercialize it by manufacturing thermoreactive ovens, which would be sold on the market at affordable prices. Mr. Ayotte therefore brought the technology to Quebec and started a company under the name Sunkiss-Thermoreactors Inc. (Sunkiss). Sunkiss is a company that designs equipment. The goal of Sunkiss was to develop, manufacture, market and sell catalytic thermoreactive ovens that can use the new technology. This goal could not be realized unless Mr. Ayotte successfully obtained certification from the Canadian Standards Association (CSA). Without the certification, he could not sell the ovens. Mr. Ayotte wanted to obtain certification in Canada and the United States. He also wanted to evaluate the market to see if it would be cost-effective to market the product. Therefore, he needed someone who was familiar with CSA's procedures and specialized in drafting standards needed to obtain CSA certification.

[9] At the time, the appellant worked in the aerospace field for Sico, a manufacturer of paint including aeronautical paint. The appellant had the expertise that Sunkiss was seeking. Thus, Sunkiss hired the appellant to evaluate the product, write the standards, obtain the certification needed in Canada and the United States, and evaluate the market. Mr. Ayotte testified that he did not have the means to hire someone with the appellant's expertise as a full-time employee as it is too costly. Therefore, Sunkiss and the appellant concluded a contact of enterprise dated December 17, 2009 (see Exhibit A-1).

[10] Under the terms of this 24-month contract, the appellant had to (1) produce and draft standards in order to obtain CSA certification for new products and (2)

present the new products to potential distributors in order to assess their interest. The appellant's main duties were as follows:

a. Designing and drafting technical documents that had to comply with International CSA, ISO, Military and ATEX/CEE standards;

b. Drafting technical documents concerning the use and operation of its equipment, safety instructions and user's manuals;

c. Training employees internally on the application and drying procedures for various industrial coatings and paints;

d. Drafting and producing technical documents for distribution;

e. Live presentations and demonstrations of the product's operation in workshops in order to train potential distributors.

A maximum lump sum of $30,000 per year would be paid based on the progress he made in his mandates. According to Mr. Ayotte, the lump sum included not only the appellant's fees but also his expenses. Given the nature of his work for Sunkiss, the appellant was obliged to sign a confidentiality agreement with Sunkiss (see undated Exhibit A-4). The appellant started his duties on January 7, 2010.

[11] The process of obtaining the CSA certification can take up to 36 months. The appellant successfully obtained the certification needed within 16 to 18 months. Therefore, the second phase of his mandate began, and Mr. Ayotte and the appellant agreed that the appellant would go to the United States in order to do some prospecting to gauge interest in the product. The goal was to evaluate and develop the market in order to eventually start selling the product. However, according to Mr. Ayotte, the appellant did not make sales as such; he was marketing the product. The appellant had to take Sunkiss's service vehicle in order to transport prototypes and equipment, and he travelled around the United States in order to do prospecting and make demonstrations. He also used his own vehicle. When he used his own vehicle, the appellant claimed $0.45 per kilometre.

[12] The appellant planned his own work schedule. There were no set work hours, and he was not obliged to submit a report of hours worked. The appellant could work when and where he wanted without Mr. Ayotte's agreement or interference. The important thing was obtaining the certification as quickly as possible. The appellant billed Sunkiss (except for an invoice dated February 22,

2010) for his expenses and his fees (see Exhibits A-5 and I-1). His expenses were part of the lump sum of $30,000 per year. The appellant was paid by cheque. The cheques were drawn on the bank account of Techno, not Sunkiss, because Sunkiss had no money. Techno considered its payments to be a loan to Sunkiss. Mr. Ayotte provided records of payments that were made to the appellant for 2010 and 2011 (see Exhibits A-2 and A-3). There were no source deductions for income tax, Canada Pension Plan or Employment Insurance. The appellant had no benefits, pension or vacation. He was not paid for statutory holidays.

[13] The appellant had the option of using an office at Techno as well as any equipment found there such as a computer, telephone, photocopier and furniture. That office space was at everyone's disposal at Techno including its employees and consultants. The space was not exclusive to the appellant. Mr. Ayotte told us that Techno did not provide a computer to the appellant. Mr. Ayotte provided him with an emergency telephone, but the appellant had his own cell phone. According to Mr. Ayotte, the appellant provided all of his own work tools such as a laptop computer.

[14] At the end of the 24 months, the contract was renewed. Now, the appellant sells the services of Sunkiss, but, at the time, he was not a salesperson; he assessed interest in the market among potential distributors. He made demonstrations, not sales.

[15] In cross-examination, Mr. Ayotte admitted that he did not do the accounting, and it is clear, in my opinion, that the accounting leaves a great deal to be desired. Despite the state of the invoices produced, he stated that, for 2011, all of the invoices were for Sunkiss. Techno's service vehicle was made available for the appellant's use in 2011, not 2010, in order for him to transport prototypes and equipment, because it was in 2011 that the appellant did prospecting and demonstrations. In 2010, the appellant used his own vehicle. He admitted that everything that was at the appellant's disposal came from Techno. Business cards were given to the appellant when he began presenting the product on the market, but the business cards were in the name of "Sun Spot", a company mandated to sell the product for Sunkiss. Techno was responsible for funding; Sunkiss was responsible for developing products; and Sun-Spot was responsible for developing the market. The appellant did not have business cards during the period at issue. During the period, Mr. Ayotte required activity reports in order to see the progress the appellant was making. He asked for activity reports to ensure that his objective would be attained. He has no idea how much time the appellant might have spent on his duties. The CSA certification was received only at the end of 2011,

beginning of 2012. Techno had never had another employee or consultant who carried out the appellant's duties. Mr. Ayotte told us that the appellant could have hired someone as an assistant, but I conclude that the assistant's fees would have been paid from the lump sum of $30,000. Techno issued a T4A to the appellant, not a T4 because the appellant was an independent consultant, not an employee.

[16] The appellant testified. He is a former member of the military who served for 20 years with the Canadian Forces as a special technician in aircraft refinishing. He retired in 1997. Since then, he has accepted contract mandates with several organizations including the École nationale d'aérotechnique in St-Hubert. He acquired expertise in certification of specialized paint in the aeronautical field. He worked for Sico as a consultant to integrate their new aeronautical products into the industry.

[17] He met Mr. Ayotte when he was working in a corporate job in the field of aeronautical paint. Mr. Ayotte wanted to launch a new project. He had just acquired a new French technology in the field of thermoreactive catalysts, and he wanted to develop standard equipment instead of customized equipment and to commercialize these new products. It was a very specialized technology. To accomplish this, Mr. Ayotte needed someone who had the knowledge and the aptitudes required to obtain the CSA certification. Thus, the appellant and Mr. Ayotte concluded a contract to that effect. The appellant was also mandated to assess the potential of marketing the products. That agreement was concluded at the end of 2009. Confidentially was absolutely essential, and the confidentiality agreement (Exhibit A-4) was signed before the contract of enterprise (Exhibit A-1). His mandate had two parts: (1) evaluate the prototypes through field tests and then write the standards needed for certification, and (2) evaluate the commercial potential of the products. The appellant had a network of people and organizations he knew, and he could therefore gauge the interest of potential distributors in the products.

[18] Mr. Ayotte and the appellant established a maximum budget of $30,000 per year. That lump sum amount included the appellant's expenses as well as his fees. Mr. Ayotte proposed that amount, and the appellant accepted because he believed that he could do something with that amount. It was an operating budget.

[19] The appellant stated that he worked from home; he has an office with a computer in his home. At the beginning, he was at the Techno office fairly often (about 20% of the time he says) in order to familiarize himself with all of the technology. He did not have set work hours, and he worked as he wished. He

submitted invoices, which represented his expenses. Although he could use an office at Techno, he worked from home most of the time. His work hours varied a great deal from one week to the next. He could afford to receive low fees because he did not need them given the fact that he was receiving a federal pension, was single and needed very little money. He said that he was passionate about this project. His role was not to make sales, but only to create and assess interest in the product among potential distributors. If there were sales during the period, he did not make them. He sees himself as a contractor, not an employee.

[20] In cross-examination, he said that at the beginning he prepared activity reports, but he stopped because it took too much time. He had not consulted Mr. Ayotte before making that decision. However, the two men communicated fairly often and it was easy to keep Mr. Ayotte informed. He received two certifications in December 2010 and May 2011 because there were two products. The certifications are often subject to ongoing modifications. The appellant used his own laptop computer, but he had access to an office computer if he wanted by means of a USB key. He conducted lab tests at Techno at the beginning of the certification process.

[21] The appellant decided who he needed to see in order to market the products and to evaluate the market because it was his contact network. Although Mr. Ayotte knew people and sometimes suggested to the appellant whom he should see, Mr. Ayotte left this up to the appellant's discretion. The appellant stated that Mr. Ayotte did not establish a schedule for him to see clients. He introduced himself as a consultant or technical advisor for Sunkiss. The appellant planned his own trip itinerary. He left when he wanted and stayed on the road as long as he wanted and visited the potential distributors he wanted. He used his own vehicle unless it was necessary to bring equipment to perform demonstrations in which case he used the company's service vehicle. The appellant admitted that it was part of his work to provide training on operating the equipment to the distributors and their representatives.

[22] The appellant stated that he had no other clients during the period.

[23] Elio Palladini is an appeals officer with the CRA. He prepared his CPT110 report dated May 29, 2012 (Exhibit I-2). Mr. Palladini considered that the appellant was employed as a travelling salesperson for Techno under a verbal agreement and that he was not an independent contractor. Therefore, according to Mr. Palladini, the appellant held insurable employment. However, it is clear, according to Mr. Ayotte and the appellant that the appellant worked as a sales person in 2012, at

the time of the telephone interview with Mr. Palladini, but that he was not a sales person during the period. The appellant and Mr. Ayotte stated that, during the period, the appellant worked as an independent consultant under a written contract of enterprise, not a verbal agreement. In fact, Mr. Ayotte and the appellant dispute almost all of Mr. Palladini's conclusions. According to them, if the appellant worked as a salesperson, the work began after the period at issue.

Position of the parties

[24] The appellant argues that he was always an independent contractor and therefore did not hold insurable employment. Thus, the appeal must be allowed.

[25] The respondent argues that the appellant held employment under a contract of employment within the meaning of article 2085 of the *Civil Code of Québec*, S.Q. 1991, c. 64 (C.C.Q.) and therefore that employment was insurable within the meaning of subsection 5(1) of the Act during the period at issue. Thus, according to the respondent, the appeal must be dismissed.

Analysis

[26] The relevant provisions of the Act read as follows:

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

[27] Therefore, if the appellant had been bound by a contract of service with Mr. Ayotte or with one of his companies, he was an employee who held insurable employment. However, if the appellant was an independent contractor, who performed his work under a contract of enterprise or for services, he did not hold insurable employment within the meaning of subsection 5(1) of the Act.

[28] In this case, the contract that existed between the appellant and Mr. Ayotte or one of his companies must be interpreted in light of C.C.Q. provisions. The relevant provisions are as follows:

> 1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> 1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
>
> . . .
>
> 2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> 2086 A contract of employment is for a fixed term or an indeterminate term.
>
> . . .
>
> 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.]

[29] There are three characteristic constituent elements of a "contract of employment" in Quebec law: (1) the performance of work, (2) remuneration and (3) a relationship of subordination. The element of subordination is the source of most litigation. The very definition of the contract of employment in article 2085 of the C.C.Q. emphasizes "direction or control", which makes control the purpose of the exercise, and thus, much more than a mere indication of supervision as it is in the common law: see *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334, [2005] F.C.J. No. 1720 (QL), at paragraph 12.

[30] What is the interaction between Quebec civil law and the common law in the interpretation of a contract of employment or a contract of enterprise concluded in

Quebec? In *Grimard v. Canada*, 2009 FCA 47, [2009] 4 F.C.R. 592, Justice Létourneau of the Federal Court of Appeal had to consider that question. He teaches us that Quebec civil law defines the constituent elements needed for a contract of employment or a contract of enterprise to exist. For its part, common law enumerates factors or criteria which, if present, are used to determine whether such contracts exist. A contract of employment within the meaning of article 2085 of the C.C.Q. requires the presence of direction or control by the employer. A contract of enterprise within the meaning of article 2099 of the C.C.Q. requires a lack of subordination between the contractor and the client in respect of the performance of the contract. Therefore, a contract of enterprise is characterized by a lack of control over the performance of the work. This control must not be confused with the control over quality and result. The Quebec legislature also added as part of the definition the free choice by the contractor of the means of performing the contract. Under civil law, the element of subordination or control is an essential constituent element of a contract of employment. However, common law has developed criteria for analyzing the relationship between parties. These common law tests, which Justice Létourneau calls criteria, points of reference or indicia of supervision, are useful in determining the legal character of a contract of employment or a contract of enterprise under the Quebec civil law. Justice Létourneau concludes as follows at paragraph 43 of his Reasons for Judgement:

> [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.

[31] The Federal Court of Appeal discussed that argument again in *NCJ Educational Services Limited v. Canada (National Revenue)*, 2009 FCA 131, [2009] F.C.J. No. 507 (QL). Justice Desjardins stated the following:

> [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. En pratique, on recherchera la présence d'un certain nombre d'indices d'encadrement, d'ailleurs susceptibles de varier selon les contextes : 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, propriété des outils, possibilité de profits, risque de pertes, etc. Le travail à domicile n'exclut pas une telle intégration à l'entreprise.
>
> [Emphasis added.]

[32] What are the common law criteria? Justice MacGuigan of the Federal Court of Appeal conducted a thorough analysis of relevant jurisprudence in *Wiebe Door Services Ltd. v. M.N.R.* [1986] 3 F.C. 553, [1986] 2 C.T.C. 200 (F.C.A.). He cited with approval the four-prong test discussed by lord Wright in *Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (C.P.). The four prongs are (1) control, (2) ownership of the tools, (3) chance of profit and risk of loss and (4) integration of the worker into the business. Integration is of limited importance and only plays a role from the worker's point of view. Justice MacGuigan observed that the criterion of control or the right to give orders and instructions on how to do the work is the essential criterion to determining the existence of an employer-employee relationship: see also *Laurent v. Hôpital Notre-Dame de l'Espérance*, [1978] 1 S.C.R. 605, p. 613.

[33] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, the Supreme Court of Canada, per Justice Major, approved the approach proposed by Justice MacGuigan in *Wiebe Door*, *supra*. He stated the following at paragraphs 47 and 48:

> 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.

[34] There is another line of authority that affords substantial weight to the intention of the parties: see *Wolf v. Canada*, [2002] 4 C.F. 396, 2002 D.T.C. 6853 (F.C.A.), 2002 FCA 96, and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, [2007] 1 F.C.R. 35, 2006 FCA 87. *Wolf*, *supra*, is a case that is similar to the case at bar. Mr. Wolf, an American, was a mechanical engineer specializing in aerospace. He concluded a contract with a Canadian corporation with the goal of providing specialized professional services to a third party. In the contract, Mr. Wolf is described as a consultant and an independent contractor. The Minister disallowed the deduction of business expenses (more particularly, the deduction of lodging and travel expenses) on the basis that Mr. Wolf earned employment income, not business income. The Tax Court of Canada determined that Mr. Wolf was not an independent contractor, but an employee. Therefore, the business expenses were not deductible. In allowing Mr. Wolf's appeal, the Federal Court of Appeal was unanimous in deciding that Mr. Wolf was an independent contractor, not an employee. Justice Desjardins noted that Quebec courts have recognized that the key distinction between a contract of employment and a contract for services lies with the element of subordination or control (see article 2085 of the C.C.Q.). She stated that the distinction between a contract of employment and a contract for services under the C.C.Q. can be examined in light of the tests developed through the years both in the civil and in the common law.

Justice Desjardins examined the level of control over the worker's activities, the ownership of the equipment needed to perform the work, the possibility of hiring assistants and the degree of financial risk and of profit as they relate to an individual with specialized skills hired to perform specialized work. Justice Noël was of the view that the characterization that the parties have given to their relationship ought to be given great weight. He noted that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction; but if the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded. Justice Décary was also of the view that the contractual intention was a very important factor to consider and may be determinative. He stated the following:

> [117] The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other. I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e the intention of the parties. Article 1425 of the *Civil Code of Quebec* establishes the principle that "[t]he common intention of the parties rather than the adherence to the literal meaning of the words shall be sought in interpreting a contract". Article 1426 C.C.Q. goes on to say that "[i]n interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account".
>
> [118] We are dealing here with a type of worker who chooses to offer his services as an independent contractor rather than as an employee and with a type of enterprise that chooses to hire independent contractors rather than employees. The worker deliberately sacrifices security for freedom ("the pay was much better, the job security was not there, there were no benefits involved as an employee receives, such as medical benefits, pension, things of that nature..." Mr. Wolf's testimony, Appeal Book, vol. 2, p. 24). The hiring company deliberately uses independent contractors for a given work at a given time ("it involves better pay with less job security because consultants are used to fill in gaps when local employment or the workload is unusually high, or the company does not want to hire additional employees and then lay them off. They'll hire consultants because they can just terminate the contract at any time, and there's no liabilities involved", ibid., p. 26). The hiring company does not, in its day-to-day operations, treat its consultants the same way it treats its employees (see para. 68 of Madam Justice Desjardins's reasons). The whole working relationship begins and continues on the basis that there is no control and no subordination.

> [119] Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. Should that not be enough, suffice it to add, in the case at bar, that the circumstances in which the contract was formed, the interpretation already given to it by the parties and usage in the aeronautic industry all lead to the conclusion that Mr. Wolf is in no position of subordination and that Canadair is in no position of control. The "central question" was defined by Major J. in *Sagaz* as being "whether the person who has been engaged to perform the services is performing them as a person in business on his own account". Clearly, in my view, Mr. Wolf is performing his professional services as a person in business on his own account.
>
> [120] In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.

[35] Therefore, Justice Décary attributed a very significant amount of weight to the fact that the parties stated that the worker was as an independent contractor. Justice Décary ruled that, in the absence of any evidence proving the contrary without ambiguity, the express intention of the parties should prevail when it is being determined whether the professional relationship is one of employer and employee or of client and independent contractor.

[36] In *Royal Winnipeg Ballet*, *supra*, the Federal Court of Appeal again discussed and clarified the contractual intention of the parties. The Court was of the view that some dancers employed by the Royal Winnipeg Ballet were independent contractors, not employees. Justice Sharlow was of the view that the Tax Court of Canada judge erred in finding that it was unnecessary to take into account the intention of the parties when ruling on the legal nature of the status of employees or independent contractors. Justice Sharlow traced the evolution of the case law from *Montréal Locomotive Works Ltd.*, *supra*, until present. She then summarized the applicable principles as follows:

> [60] . . . One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the

> parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.
>
> [61] I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded.
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> . . .
>
> [64] In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The Judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the Judge to an incorrect conclusion.

[37] In the recent decision in *1392644 Ontario Inc., o/a Connor Homes v. Canada (M.N.R.)*, 2013 FCA 85, [2013] F.C.J. No. 327 (QL), 444 N.R. 163, the Federal Court of Appeal gives its last word. Connor Homes is licensed by the province of Ontario to operate foster homes and group homes through which it provides care for children who have serious behavioural and developmental disorders. These services are delivered by numerous individuals retained by Connor Homes, including child and youth workers, social workers, certified therapists and psychologists. The Canada Revenue Agency concluded that some child and youth workers as well as a supervisor held insurable employment entitling them to a pension with Connor Homes during the periods at issue. The Minister confirmed the decisions, and, therefore, the appellants disputed the decisions before the Tax Court of Canada. The appeal was dismissed, and the appellants appealed to the Federal Court of Appeal.

[38] After examining the case law, Justice Mainville of the Federal Court of Appeal suggested a two-step analysis in order to determine whether someone works as an employee or independent contractor:

> [39] Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.
>
> [40] The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties intent as well as the terms of the contract may also be taken into account since they colors the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, i.e whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.
>
> [41] The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

[39] My colleague, Justice Bédard of the Tax Court of Canada clarifies the way in which the issue in this case must be analyzed: see *Promotions C.D. Inc. v. Canada (Minister of National Revenue)*, 2008 TCC 216, [2008] T.C.J. No 321 (QL), paragraphs 12 to 16:

> [12] It can be said that the fundamental distinction between a contract for services and a contract of employment is the absence, in the former case, of a relationship of subordination between the provider of services and the client, and the presence, in the latter case, of the right of the employer to direct and control the employee. Thus, what must be determined in the case at bar is whether there was a relationship of subordination between the Appellant and the workers.
>
> [13] The Appellant has the burden of proving, on a balance of probabilities, the facts in issue that establish its right to have the Minister's decisions set aside. It must prove the contract entered into by the parties and establish their common

> intention with respect to its nature. If there is no direct evidence of that intention, the Appellant may turn to indicia from the contract and the Civil Code provisions that governed it. In the case at bar, if the Appellant wishes to show that there was no employment contract, it will have to prove that there was no relationship of subordination. In order to do so, it may, if necessary, prove the existence of indicia of independence such as those stated in *Wiebe Door*, *supra*, namely the ownership of tools, the risk of loss and the chance of profit. However, in my opinion, contrary to the common law approach, once a judge is satisfied that there was no relationship of subordination, that is the end of the judge's analysis of whether a contract of service existed. It is then unnecessary to consider the relevance of the ownership of tools or the risk of loss or chance of profit, since, under the Civil Code, the absence of a relationship of subordination is the only essential element of a contract for services that distinguishes it from a contract of employment. Elements such as the ownership of tools, the risk of loss or the chance of profit are not essential elements of a contract for services. However, the absence of a relationship of subordination is an essential element. For both types of contract, one must decide whether or not a relationship of subordination exists. Obviously, the fact that the worker behaved like a contractor could be an indication that there was no relationship of subordination.
>
> [14] Ultimately, the courts will usually have to make a decision based on the facts shown by the evidence regarding the performance of the contract, even if the intention expressed by the parties suggests the contrary. If the evidence regarding the performance of the contract is not conclusive, the Court can still make a decision based on the parties' intention and their description of the contract, provided the evidence is probative with respect to these questions. If that evidence is not conclusive either, the appeal will be dismissed on the basis that there is insufficient evidence.
>
> [15] Thus, the question is whether the Workers in the case at bar worked under the Appellant's control or direction, or whether the Appellant could have, or was entitled to, control or direct the Workers.
>
> [16] The contract between the Workers and the Appellant clearly states that it is a contract of enterprise. However, even though the contracting parties in the case at bar stated their intention clearly, freely and in a fully informed manner in their written contract, this does not mean that I must consider this fact decisive. The contract must also have been performed in a manner that is consistent with its provisions. Just because the parties stipulated that the work would be done by an independent contractor does not mean that the relationship was not between an employer and an employee. Clearly, I must verify whether the relationship described in the contract was consistent with reality.

[40] After considering all of the evidence, I find that Mr. Ayotte and the appellant are credible witnesses, and I accept their testimony. Mr. Ayotte and the appellant agree that Sunkiss not Techno, was Mr. Villeneuve's client. However, the

respondent argues that Techno was the appellant's employer. In my view, who was the employer or the client of the appellant is of little importance, because it is the appellant's legal status I must determine. Indeed, the appellant's client or employer was Mr. Ayotte through one of his companies.

[41] After reviewing the Quebec and the common law jurisprudence and considering the principles stated therein, I find that the contract binding the appellant and Mr. Ayotte is a contract of enterprise or for services because there was no subordination.

Intention

[42] The common intention of the parties is a very important factor in this case. It cannot be disputed that Mr. Ayotte and the appellant intended to characterize their relationship as one of client and contractor. It is also clear that the conditions of employment reflect the legal relationship that they claim to have created. The appellant behaved as an independent contractor, and Mr. Ayotte imposed no limits on the way the appellant chose to carry out his work. It is true that at the beginning the appellant provided activity reports, but Mr. Ayotte certainly had the right to know about the progress the appellant was making. The consideration for the work was a lump sum of $30,000, which included the appellant's expenses as well as his fees. I reject the respondent's claim that the appellant worked for a fixed salary. There were no source deductions for income tax, Canada Pension Plan, Employment Insurance, etc. The appellant had no benefits such as vacation, pension, medical plan, insurance, etc. He was not paid for statutory holidays. Although he used an office at Techno, he had an office at home, where he worked most of the time. He received a T4A as a contractor instead of a T4 as an employee. I am of the view that objective reality confirms the subjective intention of the parties.

Control and subordination

[43] This is the essential factor to consider. Clearly, the appellant could work when he wanted and where he wanted without Mr. Ayotte's consent or intervention. The appellant was responsible for planning his work; he decided on the number of hours to work as well as the days of work. He decided when he took his vacation. Although he accepted Mr. Ayotte's suggestions, the appellant decided who he was going to see when he surveyed the market interest. I am of the view that Mr. Ayotte exercised very little control over the appellant's activities during

the period at issue. This important factor suggests that the appellant was an independent contractor.

Tools and equipment

[44] Techno provided an office as well as the equipment inside it. The appellant used the office about 20% of the time. The appellant used Techno's laboratory. Mr. Ayotte also gave him a cell phone in case of emergency. In addition, the appellant used Techno's service vehicle when he travelled to make prototypes demonstrations. However, the appellant used his own vehicle; he used his home office, his laptop computer and his own cell phone. In my opinion, this factor is neutral, but if I must give it weight, this factor is slightly in favour of a contract of employment.

Assistants

[45] Mr. Ayotte testified that the appellant could hire assistants to help him if he wanted to. Despite the fact that the appellant did all the work himself, the fact that he could hire an assistant suggests a contract of enterprise.

Risk of loss and chance of profit

[46] It is clear that the consideration for the appellant's services was a lump sum of $30,000. This included the appellant's expenses as well as his fees. The appellant could maximize his revenues if he could minimize his expenses. If he could not control his expenses, he risked having losses. This factor suggests a contract of enterprise.

Investment

[47] The appellant invested nothing but his time, knowledge, skills and effort. This is a factor that is neutral, but if I must give it weight, this factor suggests a contract of employment.

Integration

[48] In 2012, when the appellant made sales, he was integral to Mr. Ayotte's operations. But, during the period he made no sales. He consulted and provided specialized services to Mr. Ayotte. This factor, which should be considered from the worker's point of view, is not important and is not part of my analysis.

Conclusion

[49] I am satisfied on the balance of probabilities that the appellant performed his work under a contract of enterprise, and, therefore, he did not hold insurable employment within the meaning of subsection 5(1) of the Act.

[50] For these reasons, the appeal is allowed, and the matter is referred back to the Minister for reassessment on the basis that the appellant did not hold insurable employment within the meaning of subsection 5(1) of the Act.

Signed at Kingston, Ontario, this 15th day of July 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 27th day of August 2014
Margarita Gorbounova, Translator

CITATION:	2014 TCC 224
COURT FILE NO.:	2012-4735(EI)
STYLE OF CAUSE:	JACQUES VILLENEUVE v. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 4, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	July 15, 2014

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