Dockets: 2008-296(EI)
2008-297(EI)
2008-298(EI)
2008-299(EI)
2008-300(EI)
2008-301(EI)
2008-302(EI)

BETWEEN:

LES TRANSPORTS P.M. LEVERT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 8, 2008, at Montréal, Quebec
Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant: Jacques Provencher

Counsel for the Respondent: Mounes Ayadi

JUDGMENT

The appeals from the decisions made under the *Employment Insurance Act* (**EIA**) are allowed, and the decisions are referred back to the Minister for reconsideration and redetermination on the ground that Robert Geoffrey, Serge Levert, Rock Geoffrey, Sylvain Chiasson, Normand Larocque, Michel Durocher and Jonathan Maillet were not hired under a contract of service within the meaning of paragraph 5(1)(*a*) of the EIA.

Signed at Ottawa, Canada, this 16th day of October 2008.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 4th day of December 2008.

Brian McCordick, Translator

Citation: 2008 TCC 570
Date: 20081016
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BETWEEN:

LES TRANSPORTS P.M. LEVERT INC.

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REASONS FOR JUDGMENT

Lamarre J.

[1] The Appellant has appealed from decisions by the Minister of National Revenue (**Minister**) that seven truck drivers hired by the Appellant in 2003, 2004 and 2005 were employees and not self-employed workers within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (**EIA**). The workers concerned are Robert Geoffrey, Serge Levert, Rock Geoffrey, Sylvain Chiasson, Normand Larocque, Michel Durocher and Jonathan Maillet.

[2] André Levert is the Appellant's sole shareholder and director. He has been a truck driver by trade for 38 years and, through the Appellant, has operated a [translation] "long-distance courier transportation service" business for 15 years. For the past eight years, his only client has been the Fedex Ground company (**Fedex**). Fedex also does business with four other contractors in the Montréal region.

According to Mr. Levert, all these contractors have a structure similar to that of the Appellant.

[3] Mr. Levert explained that Fedex first assigned to him the route between Montréal and Plattsburgh in the United States, and then extended the route to Albany in the United States. In order to drive this route, Mr. Levert was required to provide a truck, the design of which was to be approved under Fedex's very specific standards. For example, the truck was to carry the Fedex logo and have the required dimensions. A truck could haul two trailers belonging to Fedex.

[4] The Appellant was then given other contracts and had to obtain additional trucks and find Fedex-accredited drivers to drive them. During the period in issue, the Appellant owned four trucks that it leased from the Pensky company. Mr. Levert therefore recruited a number of truck drivers, including the seven drivers concerned in the instant case. Most of these drivers accepted contracts of two or three days per week. In this way, Mr. Levert constituted his own bank of drivers, which was necessary in order to provide drivers for each route that the Appellant operated for Fedex. Some drivers worked under contracts of five days per week.

[5] Fedex posted the available routes at a rate that it set. If the Appellant was interested in obtaining a route offered, it had priority over the other bidders on the basis of the seniority number assigned to its trucks. Mr. Levert estimated the costs of subcontracting, fuel and truck leasing, and decided on that basis whether to accept a route offered by Fedex. He then recruited the truck drivers and offered them the route concerned. He offered them remuneration beforehand on the basis of his cost estimate; the drivers each established their own rates on the basis of their years of experience. The two parties reached an agreement on pay. Mr. Levert explained that it could be more advantageous for drivers to be self-employed because they negotiated their income on the basis of the kilometres driven, at a much higher rate than what other companies could offer drivers who were employees with paid leave and all the fringe benefits. As well, the drivers he hired could work for others if they chose.

[6] Before any negotiations with a truck driver were entered into, the driver had to meet with Fedex representatives in order to be accredited to drive for Fedex. Once all the requirements were met (for example, driving test, personal record check, possession of the required licence), the driver was registered on Fedex's list of accredited drivers and Mr. Levert could enter into negotiations with the driver to determine the route and the schedules that the driver agreed to drive, as well as the driver's pay.

[7] For routes between Canada and the United States, Mr. Levert explained that, after the pay based on kilometres driven was determined, he paid an additional $15 or $16 per hour for the time spent waiting at customs above and beyond the first two hours. He stated that the truck drivers were paid much less for the time spent waiting than for the kilometres driven and that, as a result, they were well aware that their pay could fluctuate and be lessened if more time was spent waiting at the border posts, a factor that varied a great deal from one trip to the next. Similarly, drivers were not paid for overtime resulting from the mechanical breakdown of a faulty truck.

[8] Mr. Levert explained that he did not exercise any regular supervision. Once contracts were entered into with individual truck drivers, the drivers made arrangements with Fedex to haul parcels on the routes assigned to them by the Appellant. In this way, the drivers were responsible for picking up parcels at the Fedex warehouse and delivering them to the right destination within the time determined by Fedex. If the drivers were stopped for too long at customs, experienced mechanical difficulties or anticipated not being able to arrive on time for any other reason, they contacted Fedex directly and Fedex then made the appropriate arrangements As well, the drivers each had a Fedex uniform and identification card.

[9] In response to a question by counsel for the Respondent, Mr. Levert stated that he signed an initial contract with Fedex in 1994 and subsequently signed addenda. However, these contracts were not adduced in evidence by the Appellant, who did not believe it was necessary to do so. Counsel for the Respondent stated that he had contacted a Fedex representative, who was unaware of the existence of these contracts.

[10] Sylvain Chiasson, one of the workers concerned, testified. From 2000 until August 2003 he worked as a truck driver for a transportation company called Liaison CAN-US, where he was a full-time employee. He met Mr. Levert during long waits at the border posts between Canada and the United States for goods they were hauling in their trailers to pass customs. At one point Mr. Levert suggested that Mr. Chiasson contact him. As a result, in August 2003 Mr. Chiasson set up his own company and, through it, offered his services as a truck driver to Mr. Levert. Mr. Chiasson agreed to drive the route between Montréal and Albany that Mr. Levert had obtained from Fedex. Mr. Chiasson drove that route for Mr. Levert five days per week, from Monday to Friday. He arrived at the Fedex warehouse in Dorval, near Montréal, at around 5:00 a.m. He took possession of the truck assigned to him, which was leased by Mr. Levert. He also took possession of the trailer belonging to Fedex, with all the contents that he was to haul to the destination. He was required to fill out approximately 50 to 60 manifests (that is, customs entry forms for the contents of the

trailer). He usually left the warehouse no earlier than around 7:00 a.m., drove to the destination, where he delivered the trailers full of parcels, and returned to Montréal the same evening with the empty trailers. If the time spent waiting at the border posts for the goods to pass customs was excessively lengthy, he left his trailers at a Fedex warehouse near the border (at Plattsburgh or at Champlain) and returned to Montréal. Under Société de l'assurance-automobile du Québec (**SAAQ**) rules, truck drivers may not drive more than 12 hours per day. Mr. Chiasson had agreed with Mr. Levert on fixed pay of $0.35 per mile. The rate was the same regardless of the time spent waiting at customs. If the wait exceeded two hours, Mr. Chiasson asked Mr. Levert to pay him the hourly rate ($15) that they had agreed upon.

[11] In order to cover the cost of fuel, Mr. Chiasson had a fuel credit card provided by Fedex; the expenses charged to the card were ultimately paid by Mr. Levert, who explained that Fedex deducted the cost of the fuel used for each truck from the amounts paid to the Appellant. As well, Mr. Chiasson was equipped with a cellular telephone that was provided with the truck by Mr. Levert.

[12] If Mr. Chiasson wanted to be replaced for any reason, he was responsible for finding a replacement from the Fedex list of accredited truck drivers. If he did not find one, he called upon Mr. Levert to replace him. Ultimately he could ask another Fedex contractor, a competitor of Mr. Levert, to replace him. In that case, even though Mr. Levert had been given priority by Fedex for the route concerned, Mr. Levert lost the income associated with the route, which was given to the contractor who agreed to replace Mr. Chiasson.

[13] If Mr. Chiasson was ill he could call the Fedex dispatcher directly, and the dispatcher would find a replacement. Mr. Chiasson was not paid if he was ill.

[14] If his truck had a mechanical breakdown on his route, Mr. Chiasson was responsible for contacting either the leasing company from which Mr. Levert leased the truck, or Fedex if the problem had to do with the truck trailer. He was not paid for the time spent waiting after a mechanical breakdown. He received the rate agreed upon for the kilometres driven. Thus, the fewer kilometres he drove, the less he was paid. He was not paid for any time spent waiting at customs, as a result of mechanical breakdown, for the trailer to be loaded in Dorval, or at meal breaks. He kept a travel log on which he indicated the kilometres driven and which he regularly left for Mr. Levert in a mailbox assigned to Mr. Levert at the Fedex warehouse.

[15] Mr. Chiasson had no paid leave or sick days and no fringe benefits such as disability insurance and drug or other insurance plans. He made his own

contributions to the Quebec Pension Plan (**QPP**); no one made contributions on his behalf to Quebec's workers' compensation board (**CSST**).

[16] If there were any complaints about Mr. Chiasson, they were made to Fedex, which would contact him; Fedex would decide whether to keep him on its list.

[17] In May 2004, Mr. Chiasson decided to return to work for Liaison CAN-US. At that time he wound up his company. He explained that he no longer wanted to drive only Fedex routes because too much time was spent waiting at customs. He preferred to return to work for Liaison CAN-US, which was less demanding. He no longer wanted to deal with bookkeeping, and preferred to receive a fixed wage. He received two weeks' paid leave, wage insurance, drug insurance and dental care insurance; the routes he drove for Liaison CAN-US were shorter. As well, the time spent waiting at customs was much shorter than with Fedex because he was hauling a much narrower range of goods and thus had to fill out far fewer manifests. He worked for Liaison CAN-US five days per week from 6:00 a.m. to 6:00 p.m.. If he was unable to drive, he was not responsible for finding a replacement; his employer did so. He was paid for sick days. In February 2005, he agreed to take another contract with Mr. Levert for Fedex, driving on Friday evenings only, on the route between Montréal and Syracuse in New York State. At that time he was paid $260 for the route. That route suited him because Fedex did not always deliver parcels on the weekend and Mr. Chiasson had no set time at which he was required to reach the destination. During that time he was still employed by Liaison CAN-US.

[18] Robert Geoffrey, another truck driver who worked with Mr. Levert, stated that he was hired to drive the route between Saint-Hubert and Kingston, Ontario. He considered himself to be self-employed; in addition to his contract with Mr. Levert, he could work for any of the other contractors doing business with Fedex. He did not often have to be replaced, but, when that happened, he called another driver who was registered on Fedex's list. That other driver, too, could work for a Fedex contractor other than Mr. Levert, which had happened.

[19] Mr. Geoffrey drove the night route. He arrived at the Fedex warehouse at 10:00 p.m., left at 10:30 p.m., and was back the following morning by 5:00 a.m. He took the truck provided by Mr. Levert and drove the Fedex trailer to the destination. His truck was equipped with a cellular telephone provided by Mr. Levert. It could happen that Fedex would ask him to drive longer distances; he could accept or decline these requests at his discretion. Most often he accepted them, because they gave him more kilometres and more money. For the route between Saint-Hubert and Kingston, he negotiated pay of $875 for a five-day week. If he drove longer distances, he received $0.40 per mile. Since he did not drive to the United States,

there was no time spent waiting at customs. Any leave and absences were at his own expense.

[20] If there was a mechanical breakdown on the road and Mr. Geoffrey anticipated a delivery delay, he called Fedex directly. He hardly ever dealt with Mr. Levert, except to drop off his travel log in the mailbox assigned to Mr. Levert at the Fedex warehouse.

[21] With regard to complaints, on one occasion Mr. Geoffrey forgot to put a lock on the Fedex truck trailer during a trailer transfer in Kingston. Fedex contacted him directly to inform him of this omission, in order to ensure parcel security.

[22] Mr. Geoffrey gave Fedex a copy of his log, indicating the kilometres and the hours driven, as well as his fuel receipts.

[23] Mr. Geoffrey left a list of the routes driven for Mr. Levert in the latter's mailbox at the Fedex warehouse, in order to be paid by Mr. Levert. Mr. Geoffrey was paid by cheque each week.

[24] The other workers did not testify. The parties agreed that these workers' testimony would largely repeat what had already been stated by the three witnesses.

Analysis

[25] Counsel for the Appellant and counsel for the Respondent agreed that, under the rules governing contracts in the province of Quebec, reference must be made to the *Civil Code of Québec* (**C.C.Q.**). In *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334, the Federal Court of Appeal emphasized the importance of the true nature of the contractual arrangement between the parties at paragraphs 7, 8 and 9, as follows:

> [7] In other words, it is the *Civil Code of Québec* that determines what rules apply to a contract entered into in Quebec. Those rules are found in, *inter alia*, the provisions of the Code dealing with contracts in general (arts. 1377 C.C.Q. and *seq.*) and the provisions dealing with the "contract of employment" (arts. 2085 to 2097 C.C.Q.) and the "contract of enterprise or for services" (arts. 2098 to 2129 C.C.Q.). Articles 1378, 1425, 1426, 2085, 2098 and 2099 C.C.Q. are of most relevance for the purposes of this case:
>
> | | |
> |---|---|
> | 1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several | 1378. Le contrat est un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou |

other persons to perform a prestation.

. . .

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.

. . .

1440. A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.

. . .

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 and 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

plusieurs autres à exécuter une prestation.

. . .

1425. Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.

1426. On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.

. . .

1440. Le contrat n'a d'effet qu'entre les parties contractantes; il n'en a point quant aux tiers, excepté dans les cas prévus par la loi.

. . .

2085. Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le control d'une autre personne, l'employeur.

. . .

2098. Le contrat d'entreprise ou de service est celui par lequel une personne , selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.

2099. L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et il n'existe entre lui et le client aucun lien de

of services and the client in respect of such performance.

subordination quant à son exécution.

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[8] We must keep in mind that the role of the Tax Court of Canada judge is to determine, from the facts, whether the allegations relied on by the Minister are correct, and if so, whether the true nature of the contractual arrangement between the parties can be characterized, in law, as employment. The proceedings before the Tax Court of Canada are not, properly speaking, a contractual dispute between the two parties to a contract. They are administrative proceedings between a third party, the Minister of National Revenue, and one of the parties, even if one of those parties may ultimately wish to adopt the Minister's position.

[9] The contract on which the Minister relies, or which a party seeks to set up against the Minister, is indeed a juridical fact that the Minister may not ignore, even if the contract does not affect the Minister (art. 1440 C.C.Q.; Baudouin and Jobin, *Les Obligations*, Éditions Yvon Blais 1998, 5th edition, p. 377). However, this does not mean that the Minister may not argue that, on the facts, the contract is not what it seems to be, was not performed as provided by its terms or does not reflect the true relationship created between the parties. The Minister, and the Tax Court of Canada in turn, may, as provided by articles 1425 and 1426 of the *Civil Code of Québec*, look for that true relationship in 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. The circumstances in which the contract was formed include the legitimate stated intention of the parties, an important factor that has been cited by this Court in numerous decisions (see *Wolf v. Canada* (C.A.), [2002] 4 FC 396, paras. 119 and 122; *A.G. Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54; *Le Livreur Plus Inc. v. M.N.R.*, 2004 FCA 68; *Poulin v. Canada (M.N.R.)*, 2003 FCA 50; *Tremblay v. Canada (M.N.R.)*, 2004 FCA 175).

[26] Farther on, the Court noted that in Quebec civil law the definition of a contract of employment emphasizes direction or control of the employee. The Court wrote as follows, at paragraphs 11 and 12:

[11] There are three characteristic constituent elements of a "contract of employment" in Quebec law: the performance of work, remuneration and a relationship of subordination. That last element is the source of the most litigation. For a comprehensive definition of it, I would refer to what was said by Robert P. Gagnon in *Le droit du travail du Québec*, Éditions Yvon Blais, 2003, 5th edition, at pages 66 and 67:

> [TRANSLATION]:
>
> 90-- A distinguishing factor -- The most significant characteristic of an employment contract is the employee's subordination to the person for whom he or she works. This is the element that

> distinguishes a contract of employment from other onerous contracts in which work is performed for the benefit of another for a price, e.g. a contract of enterprise or for services governed by articles 2098 and *seq*. C.C.Q. Thus, while article 2099 C.C.Q. provides that the contractor or provider of services remains "free to choose the means of performing the contract" and that "no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance," it is a characteristic of an employment contract, subject to its terms, that the employee personally perform the agreed upon work under the direction of the employer and within the framework established by the employer.
>
> 91 -- Factual assessment -- Subordination is ascertained from the facts. In this respect, the courts have always refused to accept the characterization of the contract by the parties... .
>
> 92 -- Concept -- Historically, the civil law initially developed a "strict" or "classical" concept of legal subordination that was used for the purpose of applying the principle that a master is civilly liable for damage caused by his servant in the performance of his duties (article 1054 C.C.L.C.; article 1463 C.C.Q.). This classical legal subordination was characterized by the employer's direct control over the employee's performance of the work, in terms of the work and the way it was performed. This concept was gradually relaxed, giving rise to the concept of legal subordination in the broad sense. The reason for this is that the diversification and specialization of occupations and work methods often made it unrealistic for an employer to be able to dictate or even directly supervise the performance of the work. Consequently, subordination came to include the ability of the person who became recognized as the employer to determine the work to be performed, and to control and monitor the performance. Viewed from the reverse perspective, an employee is a person who agrees to integrate into the operational structure of a business so that the business can benefit from the employee's work. In practice, <u>one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. The fact that a person works at home does not mean that he or she cannot be integrated into a business in this way.</u> (Emphasis added)

[12] 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 …

[27] In *Combined Insurance Co. of America v. Canada (Minister of National Revenue)*, [2007] F.C.J. No. 124 (QL), a case heard in the province of Quebec, the Federal Court of Appeal wrote as follows:

> **28** In subsequent decisions, this Court has reiterated the importance to be given to the parties' intent, as a contract represents the will of the parties to the contract: see *D & J Driveway v. The Minister of National Revenue*, 2003 FCA 453, *Poulin v. The Minister of National Revenue*, 2003 FCA 50. In *Le Livreur Plus Inc. v. Canada*, F.C.J. No. 267, at paragraph 17, Mr. Justice Létourneau wrote for the Court:
>
> > 17. **What the parties stipulate as to the nature of their contractual relations is not necessarily conclusive, and the Court may arrive at a different conclusion based on the evidence before it: *D & J Driveway Inc. v. The Minister of National Revenue***, 2003 FCA 453. **However, if there is no unambiguous evidence to the contrary, the Court should duly take the parties' stated intention into account**: *Mayne Nickless Transport Inc. v. The Minister of National Revenue*, 97-1416-UI, February 26, 1999 (T.C.C.). **Essentially, the question is as to the true nature of the relations between the parties. Thus, their sincerely expressed intention is still an important point to consider in determining the actual overall relationship the parties have had between themselves in a constantly changing working world**: see *Wolf v. Canada*, [2002] 4 F.C. 396 (F.C.A.); *Attorney General of Canada v. Les Productions Bibi et Zoé Inc.*, 2004 FCA 54.
> >
> > [Emphasis added]
>
> **29** More recently, in *Royal Winnipeg Ballet v. Canada (M.N.R.)*, 2006 FCA 87, March 2, 2006, this Court had to determine whether three dancers hired by the Royal Winnipeg Ballet (RWB) were employees or independent contractors. A majority of the Court (Mr. Justice Evans dissenting) found that the dancers were not RWB employees.
>
> …
>
> **32** Further, although Madam Justice Sharlow was of the view that as in most cases the control test required special attention, she nevertheless found that the control exercised by the RWB over its dancers was not inconsistent with the parties' intention to regard them as independent contractors. At paragraph 66 of her reasons she said:
>
> > [66] **The control factor in this case, as in most cases, requires particular attention. It seems to me that while the degree of**

> **control exercised by the RWB over the work of the dancers is extensive, it is no more than is needed to stage a series of ballets over a well planned season of performances.** If the RWB were to stage a ballet using guest artists in all principal roles, the RWB's control over the guest artists would be the same as if each role were performed by a dancer engaged for the season. If it is accepted (as it must be), that a guest artist may accept a role with the RWB without becoming its employee, then the element of control must be consistent with the guest artist being an independent contractor. **Therefore, the elements of control in this case cannot reasonably be considered to be inconsistent with the parties' understanding that the dancers were independent contractors.**
>
> [Emphasis added]

…

34 To conclude this review of the applicable case law, I refer to the comments made by Mr. Justice Létourneau in *Le Livreur Plus Inc. v. Canada, supra*. After having determined that the question on which the Court had to rule was always that of the true nature of the relationship between the parties, Mr. Justice Létourneau stated at paragraph 18 of his reasons, regarding the relevance of the test in *Wiebe Door, supra*:

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

35 In my view, the following principles emerge from these decisions:

1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door, supra*, and in the light of any factor which may prove to be relevant in the particular circumstances of the case;
2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.

> Although as a general rule the control test is of special importance, the tests developed in *Wiebe Door* and *Sagaz, supra*, will nevertheless be useful in determining the real nature of the contract. [Original emphasis]

[28] In the instant case, it is clear from the testimony of Mr. Levert and the other two truck drivers that they entered into an agreement under which they were considered to be self-employed workers. The truck drivers reported their income as self-employed workers on their income tax returns, and made their own contributions to the QPP. Neither the Appellant nor Fedex paid these workers' contributions to the CSST. These workers had no fringe benefits, were not paid if they did not work and had negotiated their remuneration on the basis of their expertise, in accordance with the rules of the market. This fact in itself distinguishes the present situation from that in *Truck Holdings Inc. v. Canada (Minister of National Revenue)*, [1999] T.C.J. No. 311 (QL), affirmed by [2000] F.C.J. No. 863 (QL), cited by counsel for the Respondent.

[29] Once the contract was entered into, the truck drivers accepted the terms of the contract imposed by Fedex. They agreed to haul the Fedex truck trailers from one location to another within a predetermined time. This situation is no different from that of a construction contractor who agrees to perform a contract within a predetermined time. The truck drivers assumed the risks associated with their duties. If they were unable to drive the route, or were delayed on the route as a result of a mechanical breakdown or excessively long waits at the border posts, they themselves contacted Fedex. In these situations, their pay was reduced as a result of factors beyond their control. The Appellant assumed none of these risks: it was not responsible for paying the drivers for the time lost. The drivers alone assumed these risks. The Appellant was paid by Fedex, paid the drivers only on the basis of the established kilometrage and, under the agreement entered into with them, paid a lower rate for the time spent waiting. The drivers did not report to the Appellant. The Appellant simply paid them for the routes driven.

[30] With regard to Fedex, once the security check qualifying a truck driver was completed, Fedex exercised no more control over the driver than did the Appellant. Fedex gave a mandate to the Appellant, which subcontracted with workers whom Fedex had already accredited. These drivers took charge of the truck trailers and hauled them to the right destination on routes they themselves chose. If there were problems on the way, the drivers simply notified Fedex, which looked after solving the problems. Fedex did not exercise actual control over the workers. Regardless of who did the driving, what counted for Fedex was that the parcels arrived at the right destination and on time. Thus the workers had an obligation in terms of results. Once Fedex qualified the workers to carry out the duties, it allowed them to do so in the same way as work is entrusted to any independent contractor who is qualified to do

it, in any field. As the Federal Court of Appeal wrote in *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*, [2004] F.C.J. No. 267 (QL):

> **19** Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D & J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, *supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker".
>
> **20** I agree with the applicant's arguments. A subcontractor is not a person who is free from all restraint, working as he likes, doing as he pleases, without the slightest concern for his fellow contractors and third parties. He is not a dilettante with a cavalier, or even disrespectful, whimsical or irresponsible, attitude. He works within a defined framework but does so independently and outside of the business of the general contractor. The subcontract often assumes a rigid stance dictated by the general contractor's obligations: a person has to take it or leave it. However, its nature is not thereby altered, and the general contractor does not lose his right of monitoring the results and the quality of the work, since he is wholly and solely responsible to his customers.
>
> …
>
> **24** Counsel for the respondent mentioned a number of facts in support of her argument that the applicant exercised such control over its two workers that the only conclusion could be that a relationship of subordination existed between the parties. To begin with, she strongly emphasized the fact that the delivery persons were subject to obligatory hours of availability, each worked in a defined territory and they could not alter the work schedule without the applicant's authorization.
>
> **25** With respect, I do not think that these three first points are conclusive in determining the nature of the overall relationship between the parties or suffice to change the nature of what they stated in the contract. The reason is quite simple. Under its contract of enterprise, the applicant assumed specific obligations of time and space toward its customers, the pharmacies. As appears from the contract governing their relations, specific times and places for collecting and delivering medication were agreed on between the applicant and the pharmacies. These obligations are contained in part in the subcontract with the delivery persons. The specific nature of the duties and availability to carry them out are not the characteristic features of a contract of employment. A contractor who hires the services of subcontractors to perform all or part of the duties it has undertaken to

> perform for its customers in accordance with a schedule will identify and define what they have to do and ensure that they are available to do it: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.), supra*; *Vulcain Alarme Inc. v. The Minister of National Revenue*, *supra*, at paragraph 4. Otherwise, on this basis, one would have to conclude that the applicant itself was an employee of the pharmacies, since it had to be available to serve them at the agreed times and on the agreed schedule.
>
> **26** The respondent submitted that there was also evidence of control exercised by the applicant over its delivery persons, first, in the obligation they had to file delivery reports. To that should be added the fact that the applicant checked with the pharmacies to ensure that the goods were indeed collected and delivered as agreed and to their satisfaction.
>
> **27** These two aspects relied on by the respondent are only evidence of control by the applicant of the result, a result for which it was responsible to its customers. It was established that the delivery reports were required for billing the applicant's customers so it could be paid, and by the applicant for paying its delivery persons, some of whom were paid by the volume of deliveries: see the contracts between the applicant and the pharmacies and the contracts between the applicant and the two delivery persons; see also the testimony in the record by the applicant in case A-664-02, pages 77, 85 to 87, 97 to 98, 108, 120 to 121, 151 to 152 and 157. Billing is still necessary in a contract of enterprise; and the creation of a procedure and system for billing does not as such indicate the existence of a relationship of subordination: see *Vulcain Alarme Inc. v. The Minister of National Revenue*, *supra*, at paragraphs 4 to 6.

[31] Thus, even though Fedex had strict requirements with regard to the trucks provided by the Appellant and the drivers' personal records, the case law quoted above has established that this type of control is not incompatible with the status of a self-employed worker (see also *DHL Express (Canada) Ltd. v. M.N.R.*, 2005 TCC 178, cited by counsel for the Appellant).

[32] With reference to certain factors relied upon in *9041-6868 Québec Inc.*, *supra*, in establishing whether control was exercised over the workers, it cannot be said in the instant case that presence at a work place was required. The truck drivers could have themselves replaced at any time without obtaining prior agreement from the Appellant, or from Fedex, provided that the replacement driver was registered on Fedex's list of accredited drivers. The drivers could even call upon a contractor, other than the Appellant, that did business with Fedex. With regard to the more or less regular assignment of work, the drivers accepted a particular route. If they were asked to drive farther or to drive another route, they were entirely free to accept or to decline. Neither the Appellant nor Fedex could impose this work on them. With regard to rules of conduct or behaviour, the workers practically never saw Mr. Levert; they carried out their duties under the agreement previously entered into

with him. If there were any complaints, Fedex communicated directly with the driver. At worst, the driver was taken off the list, which can happen to any professionals whose conduct or behaviour in performing their duties is undesirable.

[33] With regard to the forms regularly submitted by the truck drivers to Fedex and to the Appellant, these forms were for pay purposes only.

[34] It is true that the truck drivers did not incur many expenses beyond their meals on the road, since they did not own the trucks or pay for insurance or fuel. In my opinion, however, this factor alone does not affect the agreement between the parties, under which both parties considered the drivers to be self-employed workers.

[35] Since each case stands on its own merits, in the instant case I am of the opinion that the Appellant has established, on a balance of probabilities, that the seven workers concerned in this case were not employees but self-employed workers.

Decision

[36] The appeals are allowed, and the decisions by the Minister are referred back to the Minister for reconsideration and redetermination on the ground that the seven workers concerned were not hired under a contract of service within the meaning of paragraph 5(1)(*a*) of the EIA.

Signed at Ottawa, Canada, this 16th day of October 2008.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 4th day of December 2008.
Brian McCordick, Translator

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