Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canadian National Transportation Limited, 2013 OHSTC 24

Date: 2013-08-13
Case No.: 2012-24
Rendered at: Ottawa

Between:

Canadian National Transportation Limited, Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is rescinded
Decision rendered by:	Pierre Hamel, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Johanne Cavé and Mr. Simon-Pierre Paquette, Counsel, CN Railway Law Department

Canada

REASONS

[1] These reasons concern an appeal brought under subsection 146(1) of the *Canada Labour Code* ("the Code") by the Canadian National Transportation Limited ("CNTL" or "the Company") on April 20, 2012, against a direction issued on March 23, 2012 by Mr. Sylvain Renaud, Health and Safety Officer (HSO) with Human Resources and Skills Development Canada (HRSDC) in Montréal.

[2] That direction was the culminating point that brought closure to years of discussions between representatives of HRSDC and the Company regarding the legal nature of the relationship between a group of drivers who carry out delivery services of CN containers for CNTL. Those persons, who are designated as "Brokers Montreal" ("BMs" or "Contractors"), own their trucks (tractor) and CNTL is of the view that they are independent contractors in their business relationship with the Company. Health and safety officers from HRSDC who were successively involved in this matter, hold a different view and have concluded that the Contractors are employees of CNTL. Discussions on this matter effectively came to a head with the issuance, on March 23, 2012, of the direction that is the subject of the present appeal. The direction reads as follows :

DANS L'AFFAIRE DU *CODE CANADIEN DU TRAVAIL*
PARTIE II - SANTÉ ET SÉCURITÉ AU TRAVAIL

INSTRUCTION À L'EMPLOYEUR EN VERTU
DU PARAGRAPHE 145(1) a)

Le 23 mars 2012, l'agent de santé et de sécurité soussigné a procédé à une inspection dans le lieu de travail exploité par Canadien National Transport limité, employeur assujetti à la partie II du *Code canadien du travail*, et sis au 935, rue de la Gauchetière Ouest, Montréal, Québec, H3B2M9, ledit lieu étant parfois connu sous le nom de CNTL.

Ledit agent de santé et de sécurité est d'avis que l'article 135 (1) de la partie II du *Code canadien du travail* est enfreint.

No. / No : 1

145.(1) – Partie II du *Code canadien du travail*, -

L'employeur n'a pas constitué pour chaque lieu de travail placé sous son entière autorité et occupant habituellement au moins vingt employés, un comité local chargé d'examiner les questions qui concernent le lieu de travail en matière de santé et de sécurité.

Par conséquent, il vous est ORDONNÉ PAR LES PRÉSENTES, en vertu de l'alinéa 145(1)*a*) de la partie II du *Code canadien du travail*, de cesser toute contravention au plus tard le 23 mars 2013.

Fait à Montréal ce 23ème jour de mars 2012.

(s) Sylvain Renaud
Agent de santé et de sécurité

[3] On August 12, 2012, the Occupational Health and Safety Tribunal Canada (Tribunal) informed the Company that the appeal would be dealt with by way of written submissions and on the basis of the Tribunal's record, there being no need for an oral hearing given the nature of the issue raised by the appeal and the documentation placed on file. The Company filed its written submissions on October 5, 2012.

[4] The Company also filed an application for a stay of the direction on March 23, 2013, hours before it was to find itself in breach of the direction. The circumstances of that application are set out in the undersigned's Reasons in support of granting the stay, issued on March 29, 2013.

[5] It should also be pointed out that there is no respondent in this matter. On June 14, 2012, the Tribunal informed the Canadian Auto Workers Union (CAW) of the present appeal, and sought whether it would act as respondent in this matter. As will be seen further, the CAW represents the Contractors in the context of their collective bargaining relations with CNTL. The union expressed no intent to participate in these proceedings.

The Issue

[6] The issue raised by this appeal is whether the provisions of Part II of the Code apply to the Company in relation to the Contractors. That question requires a determination as to whether the Contractors are independent contractors working under a contract for services with CNTL, or, as the HSO found, work under a contract of employment in carrying out their delivery services for the Company.

The Facts

[7] The facts on which this determination is made are registered on the Tribunal's file, which comprises a report prepared by HSO Renaud dated April 24, 2012, an earlier report prepared by HSO François de Champlain dated June 7, 2010, various communications between representatives of HRSDC and CNTL regarding the status of the Contractors and supporting documentation, and the written submissions provided by CNTL through its counsel throughout HRSDC's investigation and in support of its appeal.

[8] The investigation was conducted over a period of more than three years, by several health and safety officers. In order to better understand the positions taken by CNTL in this appeal and the analysis later set out in these reasons, it is useful to briefly recount the chronology of events that triggered the investigation and led to the issuance of HSO Renaud's direction. As will be seen further, HSO Renaud's direction is largely based on the conclusions reached by his colleague HSO de Champlain regarding the legal status of the Contractors.

[9] The Company describes its operations as follows. CNTL is a trucking brokerage company which contracts the services of so-called independent transport trucking companies or individuals (Brokers Montreal) to move goods to and from Canadian

National Railway Company's ("CNR" or "CN") rail yards. These Contractors own their own tractor-trailer trucks and maintain a non-exclusive relationship with CNTL, meaning that they may simultaneously provide services to brokerage trucking companies other than CNTL. Brokers Montreal are not prevented from directly hiring their own employees for the purpose of moving freights brokered to service CNTL contracts. The employees hired by CNTL's Contractors are referred to by CNTL as "Replacement Montreal" ("RMs").

[10] On November 30, 2008, HRSDC was called upon to investigate a road accident that resulted in the death of Mr. Albert Foucher. Mr. Foucher was an employee of one of CNTL's Contractors, a RM. As a result of their investigation into that accident, HRSDC sought to investigate the relationship between CNTL, the Contractors and the Contractors' employees, the RMs. The purpose of this inquiry was to ascertain whether CNTL had an employment relationship with either its Contractors or the Contractors' employees in the Montreal area.

[11] In September 2009, HRSDC informed CNTL that it was of the opinion that Contractors should be deemed employees of CNTL, while RMs were more likely employees of the Contractors. In order to allow CNTL to provide HRSDC with additional information in response to HRSDC's findings, a meeting was held on September 24, 2009, between HSO Francois de Champlain and CTNL. At this meeting, CNTL explained its business operations and sought to demonstrate to HSO de Champlain that Contractors were not CNTL employees.

[12] In continuing its investigation, in January 2010, HSO de Champlain interviewed two RMs and had them fill out questionnaires to provide further information about their job functions and the nature of their relationship with CNTL and with Contractors. There is no evidence on the record that shows that any of the Contractors (BM) were interviewed at any point in time by health and safety officers involved in this matter.

[13] On June 7, 2010, HSO de Champlain provided CNTL with a report outlining his analysis and determinations concerning the relationship between CNTL, BMs and RMs. In this document, HSO de Champlain concluded that RMs are not employees of CNTL. He also concluded that a relationship of subordination exists between CNTL and the Contractors, and that they were therefore employees of CNTL for the purpose Parts II and III of the Code.

[14] Although I am mindful that the appeal proceeding is *de novo* and its purpose is not to review the investigation conducted by the health and safety officer, it is useful to set out the key points of HSO de Champlain's analysis given that it is central to many subsequent discussions between CNTL and HRSDC, and to the positions taken by CNTL in its submissions.

[15] Firstly, HSO de Champlain notes that he consulted the questionnaires filled in by two RMs as well as documents submitted by the Company to come to his conclusions. He applied the criteria for what constitutes an "employee" adopted in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59. To assist in determining whether RMs were employees of CNTL or of Contractors, he relied on the criteria outlined in *Pointe-Claire*

(City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015. The criteria HSO de Champlain adopted for determining whether one is an "employee" consisted of an inquiry on the basis of four characteristics: control, ownership of tools and equipment used, profits and risk of loss, and integration.

[16] On the question of control, HSO de Champlain found CNTL to have a large amount of control of Contractors, on the following grounds: when they enter CN/CNTL terminals, Contractors have to follow the instructions of CNTL concerning such matters as hours of work, tasks to be accomplished, and health and safety measures. HSO de Champlain found that a disciplinary process could follow if these instructions were not adhered to, possibly leading to a termination of contract; CNTL hires Contractors directly; the contract between CNTL and Contractors is an employment contract that has protection of a collective agreement dealing with work conditions in the form of pay, days-off, discipline, and benefits; there is a relationship of exclusivity between Contractors and CNTL where the former have to remain available to work at all times and when they cannot work, they must find a replacement, an RM, to do the work; some drivers work full time for CNTL and are replaced as needed.

[17] Regarding ownership of the tools and equipment of work, HSO de Champlain found that because Contractors are entirely responsible for providing the primary tool of work, their truck, the situation was indicative of an independent contractor relationship.

[18] Regarding the opportunity for profit and risk of loss, HSO de Champlain found that the possibility of making profits or incurring losses is low, indicating an employment contract. In his view, the working conditions of Contractors are negotiated and determined by a collective agreement; good maintenance of their trucks could affect their profits; the ability to replace themselves with an RM also offered a certain possibility for profits; whatever possibilities for profits were present were limited by the collective agreement; a rate of pay based on kilometers travelled or based on hours worked; Contractors' work attendance essentially determines their conditions of work.

[19] Finally, regarding the "integration" test, HSO de Champlain found that Contractors are strongly integrated into the operations of CNTL: they wear a CNTL uniform, drive trucks with the CN logo, participate in CNTL meetings, and are represented by a union, the CAW.

[20] HSO de Champlain concluded that when all those facts are taken together, the relationship between Contractors and CNTL should be considered one of employment with CNTL, for the purpose of Parts II and III of the Code.

[21] HSO de Champlain encouraged CNTL to contact him if the facts set out in his report had changed or were otherwise inaccurate, or if CNTL needed further information. On July 15, 2010, counsel for CNTL informed HSO de Champlain that CNTL would be providing him with detailed submissions aimed at addressing and correcting some of the facts set out in his report. In a document dated October 8, 2010, Counsel for CNTL provided HSO de Champlain with extensive submissions outlining the facts that, in his view, were accurate and relevant to the Contractors, and the proper conclusions to draw from those facts for the purpose of determining their legal status. In November 2010,

HSO Manon Perreault, to whom the file had been transferred by then, acknowledged receipt of those submissions and indicated that she would get back to him shortly on the matter.

[22] On March 22, 2011, a teleconference was held between Mr. Simon-Pierre Paquette, counsel for CNTL, Mr. Steve Sirois (Regional Safety Officer with HRSDC) and HSO Manon Perreault. During that conversation, Mr. Paquette raised questions about not having received a response from HRSDC regarding the submissions he provided in October 2010 addressing the June 7 Report. Mr. Paquette was informed that this matter had been forwarded to HRSDC's legal services for examination, and that that department had not yet "ruled" on the added information submitted by Mr. Paquette. It was also confirmed during this conversation that HRSDC continued to consider Contractors to be employees of CNTL, based on HSO de Champlain's June 2010 report.

[23] On September 6, 2011, HSO Sylvain Renaud, who had inherited the file in the meantime, was tasked with verifying whether CNTL had formed a work place health and safety committee, pursuant to subsection 135(1) of the Code. HSO Renaud was of the view that HSO de Champlain's report accurately identified Contractors as CNTL employees and RMs as employees of Contractors, and saw no need for a further inquiry into facts more specifically relevant to the Contractors, contrary to what CNTL was urging him to do. It is that determination that led HSO Renaud to issue the March 23, 2012 direction, so as to bring this matter to a close, and apparently with the intention to give CNTL an opportunity to appeal the direction in order to resolve the matter once and for all.

[24] The various documents exchanged between HRSDC and CNTL during that whole period establish the factual basis upon which to make a determination regarding the Contractors' legal status. Those documents tell us that CNTL is a wholly-owned subsidiary of the CNR and was incorporated in 1931. Its current activities principally involve the performance of trucking brokerage services for intermodal containers transported on CNR trains over CNR's railway network throughout Canada. Upon reaching their destination terminal, these containers are transported by road to customers' establishments. For the performance of these road delivery services, CNTL contracts with approximately five hundred independent Contractors across Canada.

[25] Prior to1995, these road delivery services were performed by CNR employees driving CN-owned vehicles. In 1995, concurrently with CNR's privatization from a Crown corporation, it was acknowledged that these activities were not financially viable and CNR ceased offering them. At that point, the positions of CNR employees who had been involved in road delivery services were abolished. The employees were offered an option. They could either remain with CNR in other positions, or leave CNR and become independent Contractors, in which capacity they could notably have the opportunity of providing delivery services to CNTL. It is noted that CNTL had not performed trucking brokerage activities prior to 1995.

[26] Those employees who wished to remain in the employment of CNR were given assignments elsewhere at CNR. Those who elected to become Contractors left CNR's employ. They received lump sum payments between $65,000 and $75,000, depending on

their length of service at CNR, in consideration of the severance of their employment with CNR. They thereafter purchased one or more highway tractor and entered into a service contract with CNTL (the “Standard Contract”) for the performance of road delivery services.

[27] Prior to 1995, the CNR employees involved in the performance of road delivery services were represented by the CAW. The CAW apparently consented to the transition of road delivery work to independent operators, with the caveat that the CAW continue to represent their interests regarding some limited aspects of their relationship with CNTL. CNTL emphasizes that this agreement is a “vestige” of the history of the road delivery work performed for CNR customers. Drivers' principal working conditions are today set out in the Standard Contract. There is no evidence to the contrary on the record.

[28] CNTL also presented the following additional facts. In terms of the autonomy enjoyed by the Contractors in the execution of their services, CNTL enters into agreements with Contractors for a given container to be picked up from a rail yard and moved to a destination chosen by CNTL’s client, or vice-versa. Provided that shipments are picked up and delivered in a manner satisfying CNTL’s clients, Contractors are free to enter or leave CNTL’s facilities at a time of their choosing, take whatever route and make whatever stops they deem appropriate on the way to complete their delivery. If the shipment in question is due to be among the first to leave CNTL’s facility in the morning, CNTL will ask the driver to be present when the facility opens, but will not otherwise determine start times. The shipment must be delivered to meet the expectations of the customer, which includes delivery at a time convenient to the customer. CNTL does not supervise the work of the Contractors, does not control the use of their time and how long they work each day. Any issue sufficiently serious to require the Contractor’s work to be redone (such as a missed delivery) are at the Contractor’s expense. Unsatisfactory performance of the services under the contract may lead to the termination of the contract.

[29] Contractors are not exclusively at the service of CNTL. They may perform as many deliveries as they choose, for CNTL or any other trucking brokerage companies, subject of course to statutory limitations over the maximum number of hours of work for truck drivers. The Contractors can decline work without penalty, provided that CNTL is given sufficient notice to enable it to find another Contractor to deliver its client’s freight on that occasion.

[30] It is noted that those facts were brought to the attention of HRSDC representatives in 2010, in the circumstances explained earlier in these reasons. There is nothing on record to show that those facts were found to be inaccurate as a result of the investigation. Likewise, there is no indication that HRSDC officers sought specific information from either a Contractor or a representative of the CAW, in light of the facts brought forward by the Company, to assist in determining, in the day-to-day reality, the actual terms and conditions under which Contractors carry out their work. In the final analysis, I take those facts as fundamentally uncontested. It is rather the relative weight and the legal consequence to draw from those facts to properly characterize the relationship that is at

the center of the dispute between health and safety officers and CNTL, and that is now before me.

Appellant's Submissions

[31] In her submissions dated October 5, 2012, counsel for the appellant essentially reiterates the points of facts and law presented by her colleague in his letter to HRSDC of October 8, 2010. Those submissions can be summarized as follows. CNTL first submits that its Contractors are not employees of CNTL, but rather are owner-operators in business for themselves and that as independent contractors, they enter into contracts of service with CNTL. The appellant submits that Contractors are thus not to be included in CNTL health and safety committees.

[32] CNTL argues that the Contractors cannot be considered employees of CNTL because they are independent business operators with a high degree of autonomy. In support of this position, CNTL points to the minimal oversight that it has over Contractors, whereby the extent of such oversight is limited to what is necessary to ensure that CNTL's obligations to its clients are fulfilled. CNTL further notes that it does not assign Contractors to specific yards or otherwise regulate their movements, as Contractors are free to decide which CNTL locations they would like to service. Citing the case of *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, CNTL argues that requiring a contractor to perform his tasks under a contract within certain parameters is not indicative of an employment relationship.

[33] The number of deliveries Contractors choose to make is left to Contractors to determine, provided that these drivers comply with relevant legislation, such as that which concerns maximum work hours for truck drivers. CNTL further notes that on the condition that sufficient notice is given to allow for the finding of a replacement, Contractors are free to decline work without penalty.

[34] All of the above is outlined by CNTL to demonstrate that the arrangement that it has with Contractors is not indicative of any control on the part of CNTL over Contractors' working hours or their autonomy of execution. It would not be reasonable to require, as a condition for the recognition of a service contract, that independent Contractors have full discretionary control over hours at which they choose to pick up and deliver shipments, as well as the locations their goods are to be delivered.

[35] CNTL points out that the fact that its Contractors have the ability to hire their own replacement drivers (RMs) is further evidence of CNTL's minimal control over Contractors. CNTL argues that this feature of their contractual relationship with Contractors further indicates that Contractors are not CNTL employees, but rather have a relationship with CNTL that is based on a contract for services. The option to hire replacements is exercised by many of its Contractors when they seek to fulfill an increased number of contracts. These replacements are employees of Contractors, wherein the latter are wholly responsible for both, the conduct and performance of RMs, and for all RM-related expenses. This, CNTL points out, was confirmed in the June 7 Report by HRSDC. In light of this arrangement, CNTL argues that the relationship

between itself and Contractors is one of service, not employment, citing *Shiposh v. Grand & Toy Ltd.*, 2008 ONWSIAT 1251. Counsel for CNTL goes on to submit that having found that the RMs are employees of Contractors precludes Contractors from being found to be employees of CNTL at the same time. This is due to the fact that such a relationship would suggest that employees could hire "sub-employees" to replace them and fulfill their duties. It is asserted by CNTL that this notion is incompatible with fundamental precepts of employment law in Canada.

[36] The power given to CNTL under the Standard Contract to summarily terminate agreements with Contractors if unsatisfied with the level of service being provided (subject to payment provided for services already rendered), is another feature CNTL relies upon to assert that it has a contract for services with Contractors and not an employment contract.

[37] Counsel for CNTL further argues that an employment relationship cannot be said to exist because Contractors have full ownership of the tools used to perform the contracted work. CNTL notes that the trucks used by Contractors must be owned by the Contractors and that it is these trucks that are the relevant "tool" for the delivery of services for CNTL and other companies with which Contractors choose to do business. Purchase and maintenance of the vehicle is exclusively the responsibility of Contractors, as trucks are not leased or subsidized by CNTL. No responsibility is borne by CNTL if a contractor's vehicle is unavailable or unusable for any reason. In this circumstance, CNTL does not provide a replacement vehicle, nor does it assist in obtaining a replacement vehicle or provide compensation to the contractor for business opportunities lost.

[38] Counsel for CNTL notes that all personal protective equipment required for the performance of the Contractors' trucking duties is provided on the Contractors' own account. In the event that a Contractor or RM loses or forgets a necessary element of such equipment, CNTL offers Contractors the option to purchase it in order to give them access to its facilities, without the option to lease such equipment. This again reflects the drivers' independent contractor status.

[39] In terms of chances for profit and risks of loss, counsel for CNTL points out that Contractors are responsible for all expenses related to the operation of their trucking business, including the purchase and maintenance of their vehicles, inspections, licences and other regulatory requirements, and procuring insurance and benefits coverage. In light of this, CNTL notes that it does not guarantee a minimum salary or earnings for Contractors or subsidize any of their expenses of doing business. CNTL explains that instead, Contractors are paid on the basis of distance traveled, where CNTL offers a given rate paid per kilometre, rather than a rate per hour. CNTL takes objection to the HSO de Champlain's statement in his report that there is little chance of profit or risk of loss for Contractors. It argues that the profits to be made through Contractors' trucking businesses are not calculated on the basis of *"one kilometre"*, but rather on a given rate paid per kilometre, of which a truck can be expected to cover several tens or hundreds of thousands each year. Beyond the fact that most trucking businesses operate on the premise of rates based on distance travelled, CNTL submits that HRSDC's overly

restrictive view that a single act does not yield a substantial amount of profit could be applied to any contractor. CNTL argues that the HSO appears to confuse the notion of profit and the amounts of it that can be generated.

[40] Additionally, counsel for CNTL asserts that to CNTL's knowledge, all Contractors are incorporated as independent businesses or partnerships and it is to these entities that CNTL delivers payments. This situation supports its position that Contractors have a risk of profit or loss in the operation of their trucking business and are thus not employees of CNTL.

[41] Concerning the degree of integration of contactors vis-à-vis CNTL's business operations, CNTL argues that the interrelation between its business and that of its Contractors is not indicative of an employment relationship. CNTL argues that if such interrelation was indicative of an employment relationship, few business dealings would fall outside of being characterized as contracts of employment. In support of this position, CNTL cites *Sagaz Industries Canada Inc. (supra)*, at para. 42.

[42] CNTL also disagrees that Contractors are sufficiently integrated into CNTL to be considered employees due to their wearing of a CNTL uniform. On the contrary, CNTL argues that Contractors are not required to wear any kind of uniform, but that some Contractors have freely chosen to purchase clothing bearing the CNTL logo. The appellant company also notes that the personal protective equipment it requires Contractors to wear when accessing CNTL facilities is a matter of occupational safety alone and thus should not be identified as being part of a "uniform."

[43] Counsel for CNTL also contests the conclusion that because Contractors attend CNTL meetings, they are integrated into CNTL to such a degree as to be deemed employees. She points out that these meetings are merely to ensure that Contractors possess updated safety information needed to safely transport merchandise shipped by CNTL's clients. As such, CNTL maintains that permitting such meeting attendance is reflective of good businesses sense on the part of CNTL and Contractors and not indicative of an employment relationship.

[44] Counsel for CNTL disagrees that Contractors can be deemed employees on the basis that they collectively bargain some of their terms of service through the CAW. CNTL points out that Contractors are identified in the collective agreement as "dependent contractors" for the purposes of Part I of the Code, which allows for their inclusion in the bargaining agreement. However, CNTL maintains that for the purposes of Parts II and III of the Code, Contractors are not considered employees because the concept of "dependent contractor" does not exist in these sections, as Parts II and III of the Code only allow one to be either an "independent contractor" or an "employee". In light of this, CNTL maintains that access to collective bargaining rights under the Code is not a determinative indication that Contractors are to be considered employees of CNTL.

[45] In conclusion, CNTL argues that Contractors do not satisfy the four-fold "employee" test set out in *City of Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161, and maintains that Contractors are not employees of CNTL and that the

company thus has no obligation to include them in or create for them a health and safety committee.

[46] Counsel for CNTL also raised a number of arguments concerning the quality of HRSDC's investigation. In summary, CNTL argues that the credibility of HSO de Champlain's report is fatally undermined by the way in which the investigation was conducted. Even after HRSDC was provided with a thorough outline of its operations and business structure in October 2010, these submissions and other information provided to HRSDC about its contractual relationship with Contractors in 2009 do not seem to have been given any notable attention. More specifically, the appellant argues that HRSDC failed to collect information from any Contractors, the investigation raised reasonable apprehension of bias and its scope was inappropriately broad.

[47] CNTL argues that by relying on the report prepared two years before by his colleague de Champlain, and refusing to conduct a fresh investigation, HSO Renaud acted with a closed mind and in a partial manner, thereby denying CNTL its right to procedural fairness. On that basis, the direction is without merit and should be overturned: *Committee for Justice & Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 (SCC); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *R. v. S. (R.D.)*, [1997] 3 SCR 484.

[48] For all these reasons, counsel for CNTL requests that I uphold the instant appeal by setting aside both the HSO de Champlain report of June 7, 2010 and the direction issued by HSO Renaud on May 23, 2012, and that I hold that Contractors are not employees of CNTL. In the alternative, CNTL requests that I remit the matter back to HRSDC for the purpose of conducting a new investigation by HSOs other than those who have been involved with CNTL's file.

Analysis

[49] The threshold issue raised by this appeal is whether Part II of the Code applies to CNTL with respect to the Contractors who provide trucking and delivery services for CNTL. That issue raises the often thorny question of the proper characterization of the relationship between persons allegedly involved in a contract for services as opposed to employment. Are those persons providing services under a contract for services, as independent Contractors, carrying out a business of their own? Or rather, are they engaged in a contract of services, meaning that they provide their personal services as employees, under the general control and direction of the Company, their employer?

[50] Before embarking upon that analysis, sections 122, 122.1 and 123 of the Code provide the departure point from which our analysis must be conducted. Those sections read as follows:

> **122.** (1) In this Part,
>
> "employee" means a person employed by an employer;

> "employer" means a person who employs one or more employees and includes an employers' organization and any person who acts on behalf of an employer;
>
> **122.1** The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.
>
> **123.** (1) Notwithstanding any other Act of Parliament or any regulations thereunder, this Part applies to and in respect of employment
>
> (*a*) on or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut;
>
> (…)

[51] Subsection 135(1) of the Code, on which the direction is founded, reads as follows;

> **135.** (1) For the purposes of addressing health and safety matters that apply to individual work places, and subject to this section, every employer shall, for each work place controlled by the employer at which twenty or more employees are normally employed, establish a work place health and safety committee and, subject to section 135.1, select and appoint its members.
>
> [Underlining added]

[52] The line between those two types of relationships is often blurred and there is a plethora of case law setting out the legal principles a decision-maker must apply in its quest for the proper characterization of the relationship between the provider of work and persons who execute the work. Essentially, as will be elaborated upon in more detail below, the answer to that question turns on the application of various legal tests developed over the years by the Courts in order to identify the intrinsic nature of the relationship. It is trite to state that the answer lies in weighing the facts of each case against that legal test, looking at the relationship as a whole.

[53] The Standard Contract under which the Contractors carry out their services for the Company specifies, at clause 8.05, that the validity and interpretation of the contract is governed by the laws of the Province of Quebec insofar as the BMs, who are operating from Montreal, are concerned. We must then start with the *Civil Code of Québec*, which recognizes both contracts of employment and contracts for services:

> 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.

[54] In *Wolf v. The Queen*, 2002 FCA 96, the Federal Court of Appeal summarized the applicable legal test, as it has evolved over the years, to deal with the question raised by the present appeal, at paragraphs 44 to 50 of its judgment:

> [44] The Quebec courts have recognized that the key distinction between a contract of employment or **of** services and a contract of enterprise or **for** services lies with the element of subordination or control. In *Quebec Asbestos Corp. v. Couture*, [1929] R.C.S. 166, a case in tort , the Supreme Court of Canada indicated at p. 169: "[l]e contrat de louage d'ouvrage se distingue du contrat d'entreprise surtout par le caractère de subordination qu'il attribue à l'employé". Article 2085 of the Civil Code of Québec mentions this criterion expressly (. . .)
>
> [45] Then came the Quebec case of *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161. The issue was whether the City of Montreal was entitled to recover from the Montreal Locomotive Works Ltd. ("the company") certain taxes which it claimed to levy under its City Charter and by-law. The company had entered into two contracts with the Government of Canada with a view to the production of tanks and gun carriages. The construction contract included an agreement for the sale by the company to the Government of the site on which a new plant would be built, the title of which to be held by the Crown. The production contract provided for the production of gun carriages and tanks for the Government. The company was entitled to incur all proper costs and was to be reimbursed by the Government. In both contracts, it was stipulated that the company undertook to act "for or on behalf of the Government and as its agent".
>
> [46] If the company was carrying on business merely as a mandatory or agent of the Government, no tax was due to the City since section 125 of the *British North America Act* made the Crown immune from taxation. If, on the other hand, the company was acting on its own behalf, the tax was due.
>
> [47] Applying its famous fourfold test of (1) control, (2) ownership of the tools, (3) chance of profit and (4) risk of loss, which I will again refer to later on, Lord Wright, for the Judicial Committee of the Privy Council, concluded that the company was an agent of the Crown and, consequently, was immune from taxation. He explained that the factory, the land on which it was built and the machinery were all government property. The company took no financial risks. The Government kept full control over the management and operation of the plant. Contrary to the Supreme Court of Canada, [1945] 4 D.L.R. 225, the Quebec Court of King's Bench, Appeal Side, [1945] 2 D.L.R. 373 and the Quebec Superior Court, [1944] 1 D.L.R. 173, Lord Wright made no reference to the provisions of the Civil Code of Lower Canada for the interpretation of the contracts, although there was an express clause in both contracts which read "This agreement shall be in all respects subject to and interpreted in accordance with the laws of the Province of Quebec", [1945] 2 D.L.R. 373 at 379 and at 400. Lord Wright referred in general terms to the case law but he, himself, did not mention the authorities he was relying on.

> [48] In *Hôpital Notre-Dame de l'Espérance et Théoret v. Laurent*, [1978] 1 S.C.R. 605, a case in tort, the Supreme Court of Canada was called upon to determine whether a medical doctor was an employee of the hospital where the claiming party had been treated. Pigeon J., for the Court, cited with approval André Nadeau, "Traité pratique de la responsabilité civile délictuelle", (Montreal: Wilson & Lafleur, 1971) p. 387, who had observed that "the essential criterion in employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work" (pp. 613-14). Pigeon J. then cited the famous case of *Curley v. Latreille*, [1929] S.C.R. 166, where it was noted that the rule was identical on this point to the common law (*ibid*. at pp. 613-14).
>
> [49] Consequently, the distinction between a contract of employment and a contract for services under the Civil Code of Québec can be examined in light of the tests developed through the years both in the civil and in the common law.
>
> [50] With this in mind, I now examine the recent decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No.61, 2001 SCC 59, where the distinction between the two contracts was analysed at length.
>
> [Underlining added]

[55] The frequently cited *Montreal Locomotive Works (supra)* case thus requires one to consider a well-established four-fold test, described by the Court as "… a complex involving 1) control; 2) ownership of the tools; 3) chance of profit; 4) risk of loss. Control in itself is not always conclusive". The application of the traditional four-fold test is often fraught with difficulty and does not necessarily lead to conclusive results, in light of the complexity or the hybrid nature of the relationship the parties have set for themselves.

[56] In *Wolf (supra)*, the Federal Court of Appeal went on and considered the judgement of the Supreme Court of Canada in *Sagaz Industries Canada Inc.(supra)*, recently issued at that time. After commenting on some of the difficulties encountered when applying the "control" test refined over the years into an analysis of the level of integration of the Contractors in the organization of the company to whom they provide services, the Supreme Court states as follows at paragraphs 46 to 48 of its judgment:

> [46] In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . ." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which

> have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> [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.
>
> [Underlining added]

[57] The jurisprudence also tells us that the intention of the parties when they established their relationship under the terms of a contract, is a factor that should be considered in the analysis. In *Royal Winnipeg Ballet v. Minister of National Revenue*, 2006 FCA 87, the Federal Court of Appeal had this to say on this point:

> [59] It seems to me from *Montreal Locomotive* that in determining the legal nature of a contract, it is a search for the common intention of the parties that is the object of the exercise. The same idea is expressed as follows in the reasons of Décary J.A. in *Wolf*, at paragraph 117:
>
> > 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.
>
> [60] Décary J.A. was not saying that the legal nature of a particular relationship is always what the parties say it is. He was referring particularly to Articles 1425 and 1426 of the Civil Code of Quebec, which state principles of the law of contract that are also present in the common law. 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.
>
> [Underlining added]

[58] The Court goes on to say that such a factor is not, in and of itself, determinative of the issue: 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. However, it is the totality of the relationship which must be considered, which means looking at all the factors mentioned above as well as what the parties to a contract have stated as their intention to establish the nature of their arrangements. In the final analysis, the review of the facts in that framework should lead us to the appropriate answer to the key question of "who's business is it: the Contractor's or the Company's?"

[59] With this summary of what I understand to be the current state of law on the appropriate test to apply to determine whether persons are working under a contract of employment or under a contract for services, I will now apply those factors to the facts of the present case. Not surprisingly, the representations submitted on behalf of CNTL are articulated around the application of these legal principles. Similarly, the analysis conducted by HSO de Champlain and relied upon by HSO Renaud as the basis on which to issue his direction, also results from the application of these principles, namely those set out in *Sagaz (supra)*, to the relevant facts of this case, as they saw them. I will set out my analysis under each of those factors.

The control by CNTL over the Contractors

[60] CNTL submits that it exercises minimal oversight of the work performed by Contractors, and only to the extent that it is necessary to allow the fulfillment of CNTL's obligations to its clients as a trucking brokerage company. Inversely, HSO de Champlain's analysis concludes to a high level of control by CNTL over the Contractors, in the same way as an employer would. I will analyze this factor in relation to the facts that HSOs de Champlain and Renaud specifically stated to conclude as they did, and the Company's explanations set out in their submissions of October 2010 and October 2012.

[61] HSO de Champlain points to the following facts in his report: CNTL "hires" the drivers directly; when they enter the terminal, drivers are subject to CNTL's directions regarding timetables, tasks and other matter, including safety matters; they are subject to a collective agreement between CNTL and the CAW, which sets out typical conditions of employment; Contractors although they may find replacements from time to time, Contractors "work" full time for CNTL.

[62] I have considered the Standard Contract and gave it appropriate weight given the evidence that it is the fundamental legal document establishing the relationship between CNTL and the Contractors. The Standard Contract does not reveal, in my view, any significant degree of control by CNTL over the manner in which the Contractors carry out their activities. There are admittedly clauses by which CNTL reserves certain rights such as: to inspect the tractor, to ensure that the Contractors and their substitute drivers have the required qualifications, permits and authorizations, and conduct themselves in a satisfactory manner. Some of those requirements are spelled out in Appendix C of the Standard Contract. While one could describe those rules as being akin to an employer's Code of conduct, they are not necessarily determinative of the existence of an employment relationship. Those requirements have their place in a proper contractual

relation, and they can be explained by the fact that CNTL, as a wholly-owned subsidiary of CNR, has a direct interest in the work of the Contractors vis-à-vis its clients. CNR owns the trailers and containers and is responsible to its clients for the goods that they contain. I do not see those requirements as being elements of control, in the context of the four-fold test, to be taken as necessarily pointing to an employer-employee relationship.

[63] Regarding the control of Contractors when they are on the CNTL and CN property, the factual basis stated by HSO de Champlain to support his conclusions that this aspect of the relationship has the features of employment is somewhat thin. All in all, I am persuaded by the argument set out by CNTL's counsel that such control so briefly described by HSO de Champlain is not necessarily indicative of subordination. The movement of trucks in close proximity to CN's railway operations must be monitored and controlled in such a way that it does not pose a safety risk to either CNTL or CN employees or property or visitors. The ability to direct and control the movements of vehicles, including those of Contractors, is integral to the exercise of CNTL and CN's property and business rights and obligations in a facility used for shipping. It is not contradicted that CNTL and CN's internal policies and regulations apply not only to drivers but also to anyone else present, irrespective of whether they are employees, Contractors or members of the general public.

[64] The record shows that Contractors decide which CNTL locations they wish to service. CNTL does not assign Contractors to specific yards or otherwise restrict their movement in their delivery activities, subject to what I referred to above. As noted by the Federal Court in *Wiebe Door Services v. Minister of National Revenue*, [1986] 3 F.C. 553, the fact that a Contractor's work must be performed within certain parameters, such as during certain working hours or on the client's property, is not necessarily indicative of an employment relationship.

[65] Regarding the autonomy enjoyed by the Contractors in the execution of their services, the following facts have been presented by CNTL and are not contradicted. CNTL enters into agreements with Contractors for a given container to be picked up from a rail yard and moved to a destination chosen by CNTL's client, or vice-versa. Provided that shipments are picked up and delivered in a manner satisfying CNTL's clients, Contractors are free to enter or leave CNTL's facilities at a time of their choosing, take whatever route and make whatever stops they deem appropriate on the way to complete their delivery. If the shipment in question is due to be among the first to leave CNTL's facility in the morning, CNTL will ask the driver to be present when the facility opens, but will not otherwise determine start times. Of course, the shipment must be delivered to meet the expectations of the customer, which includes delivery at a time convenient to the customer, an obligation one would expect to be a feature inherent to any delivery contract. CNTL does not supervise the work of the Contractors, does not control the use of their time and how long they work each day. Any issue sufficiently serious to require the Contractor's work to be redone (such as a missed delivery) are at the Contractor's expense. Unsatisfactory performance of the services under the contract may lead to its termination, which is not necessarily indicative of an employment relationship, but equally consistent with a contract for services.

[66] It should be pointed out that the Contractors are not exclusively at the service of CNTL. They may perform as many deliveries as they choose, for CNTL or any other trucking brokerage companies, subject of course to statutory limitations over the maximum number of hours of work for truck drivers. The Contractors can decline work without penalty, provided that CNTL is given sufficient notice to enable it to find another Contractor to deliver its client's freight on that occasion.

[67] All these facts considered, I am of the view that the application of the control criterion yields inconclusive results, at best. I am not persuaded that it is determinative of an employment relationship.

[68] However, it is common ground that Contractors may hire replacement drivers (RMs) to assist them in fulfilling their contractual obligations towards CNTL or other providers of work. This is specifically spelled out in the Standard Contract, at clause 2.05. If they do so, Contractors are wholly responsible for all expenses related to the employment of RMs and remain responsible for the conduct and performance of that employee. HSO de Champlain's analysis following the accident involving Mr. Foucher, a RM, concluded that RMs are employees of the Contractors, not of CNTL.

[69] Although the issue of the status of RMs is not before me, I believe HSO de Champlain was correct in his conclusion based on the evidence that he considered. That being the case, the ability to hire another person to carry out the work weighs rather heavily, in my opinion, in favour of an independent contractor relationship. As counsel for CNTL points out in her submissions, it would be rather awkward and unusual under applicable precepts of employment law, that an employee (BM) could hire a replacement worker, at his own expense, to perform services under a contract of employment: exclusivity of the person providing the services is an important feature of a contract of employment. Rather, this fact alone points heavily in my view towards a relationship of an independent contractor running a business of his own.

[70] The Standard Contract provides for the possibility of CNTL to unilaterally terminate the contract for lack of or unsatisfactory performance of the Contractor's obligations (clause 7.01). This right appeared to be seen by HSOs de Champlain and Renaud as indicative of employment. As counsel for CNTL points out, the ability to terminate a contract for services is expressly provided for in article 2125 of the *Civil Code of Québec*, subject to payment of work already performed. In fact, this right of termination is more indicative of a contractual relationship than employment. Contracts of employment cannot be unilaterally terminated by the employer unless reasonable notice is provided to the employee, as required by article 2091 of the *Civil Code of Québec*. Furthermore, it should be noted that clause 7.02 enables either party to terminate the contract with a 30-day notice.

[71] As it was noted above in our review of the case law, the "integration" or "organization" test has been adopted by the Courts over time, since the control test did not always prove useful in providing a definitive answer to the nature of the relationship. That test seeks to establish the extent to which the Contractors are integrated into the operations of the Company, as opposed to operating an independent business of their own. In the present case, HSO de Champlain is of the view that the Contractors are

highly integrated into the operations of CNTL because they wear CN's uniform, drive trucks identified with CN's logo, participate in CN's meetings and are represented by a union with CNTL.

[72] Although these facts can surely point to the existence of an employer-employee relationship, I am mindful of the caution proffered by the Federal Court of Appeal in *Wiebe Door Services Ltd. (supra)*, regarding the integration test. At paragraph 14, the Court states as follows :

> [14] Lord Denning's test [the integration test] may be more difficult to apply, as witness the way in which it has been misused as a magic formula by the Tax Court here and in several other cases cited by the respondent, in all of which the effect has been to dictate the answer through the very form of the question, by showing that without the work of the "employees", the employer would be out of business (Without the installers, the appellant would be out of business). As thus applied, this can never be a fair test, because in the factual relationship of mutual dependency it must always result in an affirmative answer. If the business of both parties are so structured as to operate through each other, they could not survive independently without being restructured. But this is a consequence of their surface arrangement and not necessarily expressive of their intrinsic relationship.
>
> [Underlining added]

[73] The businesses of CNTL and the Contractors are clearly closely interrelated. CNTL, as a trucking brokerage company, arranges for shipments throughout Canada on behalf of its clients. It does not physically move its clients' freight, as CNR used to do with its own employees prior to 1995. Rather, the shipments are completed using Contractors' trucks from rail yards to customers' locations. These two activities are obviously interdependent of each other. However, while the Contractors may be wearing garments bearing CN or CNTL identification, there is no obligation on them to do so. The fact that he CN logo appears on the tractor derives from a contractual obligation (Standard Contract, clause 3.01), and is consistent with the continuum of the shipping and delivering services provided by the CN and CNTL to its clients, through the means of Contractors.

[74] CNTL also explains that it sponsors safety conferences at its Montreal facilities. The Company explains that those conferences are aimed at sharing with Contractors information concerning safe driving operations when transporting loads that are the property of CNTL clients. Again, as I pointed out earlier, CNTL has a demonstrable business interest in ensuring the safe and appropriate handling of its property and that of its clients by persons operating the tractors. Although these meetings admittedly have some of the features of meetings held between employers and employees in a work place setting, I agree with counsel for the appellant that it is both commonplace and a good business practice for independent Contractors to meet with their clients on a regular basis to discuss their own performance and their clients' expectations. In my view, it is not determinant proof of the existence of an employment relationship.

Ownership of Tools

[75] The Contractors own their truck, which is their essential "tool" to perform their delivery services. The Contractors are entirely responsible for the purchase and maintenance of their truck (Standard Contract, clause 2.02 and 3.03(3)). Contractors also provide their own protective equipment that may be necessary for the performance of their services, such as safety boots, vests, hardhats and safety glasses. The Company has explained that when a driver whose safety gear may be defective or who may have lost his safety gears wishes to have access to CNTL or CN premises in zones that require such equipment, CNTL has sold such equipment to the drivers to enable them to carry on their work. In other words, these items are not provided free of charge to the drivers, as it would be for employees. HSO de Champlain's concluded in his report that this factor is indicative of an independent contractor relationship in this case. I agree.

Chance of profit and risk of loss

[76] HSO de Champlain recognized that the drivers have some chance of profit and risks of losses, albeit those possibilities are limited by the terms of the collective agreement. However in his view, it is primarily their attendance at work that determines their pay and other conditions of work, which is indicative of an employment relationship. Little explanation is provided in support of that conclusion. The employer presents the following facts: the Contractors are paid by CNTL based on either a zone rate or per-mile rate, as well as for wait time at terminals. Their compensation will not vary based on the amount of time required to complete a particular delivery. They receive no compensation for general holidays or vacation. This remuneration method varies significantly from the normal method of payment of employees which consist in an hourly wage rate from which various deductions mandated by statute must be made.

[77] As Contractors are paid based on distance travelled, which varies based on the amount of work they perform, in my view they exercise some control over their own chances for profit or risk of loss. I agree with the Company that the facts establish that Contractors draw their income from the profit generated by their trucking business, which is calculated by subtracting their expenses (purchase and operation of their vehicle(s), including maintenance and fuel, purchasing all necessary equipment, paying the wages of any RM's they have hired, etc.) from the amounts earned through fees charged to CNTL or other providers of work. I note that the mileage rate is set for a certain period of time and the impact of any fluctuation (increase or decrease) in the price of fuel for example would be borne by each party.

[78] The Company strongly disagreed with the HSO's conclusion that the Contractors' income is essentially determined by their attendance at the work sites. It correctly points out that Contractors who do not provide their services will simply not receive payment for them. Indeed, any form of remunerated work, whether in an employment relationship or under service contract, entails payment for work actually performed. I agree with CNTL that this issue should be seen as more indicative of a relationship of independent contractor than one of employment: while an employee can sometimes expect to receive remuneration even when absent (such as, for instance, sick leave benefits), the same is not true of independent contractors. Contractors do not receive payment for work that is

not performed and, as expressly set out in the Standard Contract, they are responsible for obtaining at their own cost whatever insurance coverage (e.g. disability) they deem appropriate for themselves and their own employees. If a contractor does not wish to execute the terms of the contract personally, he or she can engage a replacement at his or her own expense to render the service required under contract.

[79] I also note that a Contractor may own more than one truck and it appears that a few of the eighty Contractors do. As the Company points out, this situation increases the amount of profits which must be earned to remain solvent to offset the costs of their business. Inversely, this will generate additional operating costs, which are borne by the Contractors.

[80] All things considered, it seems to me that there is notionally an opportunity for profit and a risk of loss by Contractors in the carriage of their business. I find that these arrangements are indicative of the existence of a contract for services.

Other Relevant Facts

[81] I note that no deductions are made from the Contractors' payments on account of income tax, Canada Pension Plan contributions or other similar deductions typically associated with wages (Standard Contract, clause 3.03 (6)). No T4 slips or similar documentation are provided by CNTL to Contractors.

[82] Contractors must procure insurance and benefits coverage (Standard Contract, clause 3.02). This notably includes the procurement of workers' compensation coverage, both for Contractors themselves as well as any RM's in their employ. The Company filed on the record a copy of a decision issued by the Ontario Workplace Safety & Insurance Board on July 27, 2009, which held that a driver performing road delivery services for CNTL should be deemed to be an independent contractor under that legislation, and not an employee. While this ruling is not determinative of the Contractors' status for our purposes, it is one more indication of the existence of their service contract relationship with CNTL. It would indeed be an awkward legal situation for Contractors, in applying the same legal test, to be deemed "independent contractors" for the purposes of provincial workplace compensation legislation, yet be employees for the purposes of Part II of the Code.

[83] Counsel for CNTL also points out that most if not all Contractors are incorporated as independent businesses or partnerships. CNTL contracts with the Contractor's corporation, which receives the payments. This incorporation structure is beneficial to Contractors from a tax perspective, as the taxation rate applicable to a business is lower than that of an individual. Contractors have benefitted from this business structure since 1995. CNTL notes that Contractors are registered as businesses with the relevant governmental authorities for GST/QST/HST purposes; this information is provided to CNTL for the purpose of processing their invoices. These facts were brought to the attention of HSO de Champlain in 2010, but are neither contradicted nor discussed in his report or in HSO Renaud's report. I agree with the Company that the foregoing is indicative of a service contract and is hardly compatible with an employment relationship.

Existence of a Collective Agreement

[84] The existence of a collective agreement between CNTL and the CAW that applies to the Contractors (designated as "owner-operators" under that collective agreement) appears to have weighed rather heavily in favour of a finding of employment in HSO de Chaplain's mind. Indeed, that fact has left the undersigned somewhat perplexed and may be seen as inconsistent with the notion of independent contractor. Collective agreements are reached between employers and unions, usually in the context of employment. The collective agreement at hand has many features that point to the existence of control and subordination commonly found in the context of employment. I note in particular at Article 3, which sets out CNTL's management rights, which includes the right to engage, direct (…) the owner-operators, to determine schedules of work, the type of equipment, operational standards, the right to maintain order and discipline for cause, and to make and enforce rules. These are undeniably attributes of an employer.

[85] On the other hand, the parties have expressly provided in section 1.2 of the agreement that the Contractors are to be considered as "dependent contractors" for the purpose of Part I of the Code, which regulates labour relations. This clause mirrors clause 2.05 of the Standard Agreement by which the parties express the mutual desire <u>not</u> to create an employer-employee relationship. The Code defines "employee" as any person employed by an employer, and includes a "dependent contractor". That term is defined as follows:

> **3. (1)** In this Part,
>
> (…)
>
> "dependent contractor" means
>
> (*a*) the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is a party to a contract, oral or in writing, under the terms of which they are
>
> (i) required to provide the vehicle by means of which they perform the contract and to operate the vehicle in accordance with the contract, and
>
> (ii) entitled to retain for their own use from time to time any sum of money that remains after the cost of their performance of the contract is deducted from the amount they are paid, in accordance with the contract, for that performance,
>
> (*b*) a fisher who, pursuant to an arrangement to which the fisher is a party, is entitled to a percentage or other part of the proceeds of a joint fishing venture in which the fisher participates with other persons, and
>
> (*c*) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person;

[86] The objective of that definition is to extend collective bargaining rights to persons who would otherwise not be "employees" in the traditional sense of the word, but who

are involved in a hybrid type of relationship and subject to a certain degree of dependence with and control by the provider of work. The Contractors in the present case seem to fall squarely within the parameters of paragraph (*a*) to that definition. Hence, but for such an extended definition of "employee" for purposes of Part I of the Code, persons involved in those types of relationships would likely not be covered by the legislation. However, Parliament has not replicated that extended definition of "employee" in Part II of the Code. In that Part, an employee is defined as "a person employed by an employer". As we have seen above, sections 122.1 and 123 stipulate that Part II of the Code is concerned with matters arising in the course of employment and applies to and in respect of employment.

[87] Because of those fundamental differences in the statutory definition of "employee" between the two Parts, the fact that a collective agreement may exist for the benefit of the Contractors under the auspices of Part I of the Code is not determinative of those persons being in an employment relationship with CNTL for purposes of Part II. The existence of a collective agreement and the recognition by the parties of the Contractors' "dependent contractor" status for purpose of labour relations, is certainly illustrative of a certain degree of dependence that can be found in various aspects of the relationship between the Contractors and CNTL, as we have canvassed earlier. But it does not necessarily make that person an "employee" under Part II of the Code. Consequently, we must fall back on the so-called traditional test, as described above, and apply it to the totality of the facts to determine whether an employment relation exists in any given case. The existence of a collective agreement, while germane to the analysis, is thus not determinative of the question in the present case. I will discuss later in these reasons the historical perspective which provides context to the existence of that agreement, and which I consider to be of significant importance in the present analysis.

Intention of the Parties

[88] I mentioned earlier that the intention of the parties to the arrangements under review is also a relevant consideration in the legal analysis. In the instant case, I believe the historical perspective of the business arrangements between the parties must be taken into account. As the Company explained, the services performed by the BMs were performed by CNR employees prior to 1995. After that date, the positions of CNR employees who had been involved in road delivery services were abolished. The employees were offered an option. They could either remain with CNR in other positions, or leave CNR and become independent Contractors, in which capacity they could notably have the opportunity of providing delivery services to CNTL. Those who elected to become Contractors received lump sum payments in consideration of the severance of their employment with CNR. They thereafter purchased one or more highway tractor and entered into a service contract with CNTL for the performance of road delivery services.

[89] The Company further explained that the CAW, as the bargaining agent then representing the drivers, consented to the transition of road delivery work to independent operators, with the caveat that the CAW continue to represent their interests regarding some limited aspects of their relationship with CNTL. I note that in both the collective agreement (clause 1.02) and the Standard Contract (clause 2.05), the parties have

expressly mentioned that their relationship is not one of employment. I believe that in the particular context described above, the manner in which the parties have described their relationship must bear considerable weight in the overall assessment of that relationship. Not that those words are determinative of its characterization, but when added to all other factors being considered, I find that they support the existence of an entrepreneurial relationship. It is clear that the so called "owner-operators" have chosen, at one point in time, to sever their employment with the CNR in consideration of severance packages, with the knowledge of the advantages and drawbacks of an independent contractor type of arrangement. I would require very strong evidence to persuade me that I should disregard the fact that these arrangements were put in place precisely for the purpose of changing the nature of the relationship between the drivers responsible for the delivery of containers and their former employer. In fact, there is no evidence that any of the Contractors have ever claimed the status of employee during the fifteen years that these arrangements have been in place, or that they are otherwise coerced or exploited under the current arrangements. This historical factor supports my conclusion that the Contractors are not employees of CNTL.

[90] The following excerpt from the decision of a referee under Part III of the Code in *1329669 Ontario Inc.(c.o.b. Moe's Transport Trucking) v. Da Silva* [2002] C.L.A.D. No. 303, aptly summarizes the principles at play in the present case, in circumstances similar to ours. The referee, who found that there was no employment relationship in his case, stated as follows:

> **[27]** (. . .) While there are some differences in the facts of each case from the facts in this appeal (i.e. in some cases there was a written contract while in others the arrangements were made orally), it is notable that in all cases the complainant had agreed to provide truck driving services to an agency similar to MTT or a trucking company on an independent contractor basis. In all or almost all of the cases the complainant did not own the truck or trucks he was driving. In all cases the agency or trucking company agreed to pay the complainant on a per mile or percentage of gross revenue basis as opposed to an hourly, daily or weekly rate. Also, in all cases the parties had acted in accordance with an independent contractor relationship for the purposes of income tax filings and statutory deductions or benefits for the duration of the relationship and the complainant had not requested that deductions be made or benefits paid during that time. Finally, and I believe most importantly, in all cases there was no evidence that the complainant felt he was unequal in bargaining power or somehow coerced, exploited or unfairly treated with respect to his decision to provide services as an independent contractor. Although this factor is only given express significance by Referee Kaufman in the D.C. Lawson Driver Service decision, a careful reading of the other three cases suggests that they too lacked any evidence of the presence of circumstances which would require that the parties' intentions and understandings be disregarded in the interests of furthering the purposes of the employment standards protections under consideration. These cases suggest that it is legitimate to consider and give weight to the understandings of the parties concerning their relationship provided that there are not economic or social circumstances which indicate that the purposes of the legislation could be undermined by such consideration. This is particularly the case where the traditional tests for employment do not provide a clear answer. In this respect these cases are consistent with a contextual and purposive approach to the determination of whether there is an employment relationship which should be governed by Part III of the Code.
>
> [Underlining added]

Conclusion

[91] The relationship between CNTL and its Contractors is certainly a hybrid one. Certain aspects of the relationship evoke elements of control and subordination, while others point to the Contractors running a business of their own. My task is to weigh all those facts, none being determinant in and of themselves. Although the appeal process is a *de novo* process (*Martin v. Canada (Attorney General)*, 2005 FCA 156; *Campbell Brothers Movers Ltd*., 2011 OHSTC 26), it is not an appeals officer's role to embark upon an inquisition into the facts or conduct the investigation as it should perhaps have been conducted in the first place. My findings are based on the facts placed on the record in the manner outlined earlier in these reasons, without the benefit of a respondent party or of the Contractors' perspective on the matter. I am satisfied however that they provide a sufficiently reliable and credible evidentiary basis upon which to draw my conclusions, on this day.

[92] Turning again to the decision of the Supreme Court in *Sagaz* (supra), the Court set out its views regarding relevant elements to be examined in cases such as the present case, 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.
>
> [Underlining added]

[93] In summary, CNTL's business as a trucking brokerage company is to arrange for the transportation of its clients' freight by rail and truck. The Contractors' business is to move freight under a service contract using their own equipment and their own employees. They own their trucks and have a non-exclusive relationship with CNTL as provider of work: they operate distinctly from CNTL and can perform work for others. They can hire their own employees (RM) and are responsible for them. They remit the QPP, EI and other levies directly, and look after their Workers Compensation coverage. They must contract their personal and damage insurance coverage. If Contractors do not run their business efficiently, do not perform enough work or if their equipment breaks down, they run a risk of operating at a loss or going out of business altogether. Taking all those facts into consideration and looking at the whole relationship between the Contractors and CNTL, including the context in which it was formed, I conclude that, on

balance and for the reasons above, there exists no employer-employee relationship for the purpose of Part II of the Code.

[94] As sections 122.1 and 123 of the Code provide that Part II applies to and in the course of employment to "employers" and "employees", the inescapable conclusion is that Part II of the Code simply does not apply to the Contractors. Consequently, CNTL is not the employer of the Contractors and as such, has no obligation to comply with subsection 135(1) of the Code with respect to them, i.e. no obligation to establish a work place health and safety committee. As a result, the direction to the employer to establish such a committee is not correctly founded in law and should be rescinded.

Inadequate investigation and Breach of the Rules of Natural Justice

[95] The Company presented extensive arguments and case law on the fact that the investigation conducted by HSO Renaud was not impartial and breached the rules of natural justice, thereby causing it significant prejudice. His conclusions, the Company argues, were pre-empted by the fact that he simply relied on the opinion of his colleague HSO de Champlain, without conducting his own independent investigation into the facts. Be that as it may, I will first reiterate that the appeal process is a *de novo* procedure and any defect in the manner in which the investigation was conducted which may have caused prejudice to a party is deemed to be cured by the opportunity afforded to that party through the appeal process, in this instance CNTL, to present its case afresh (see: *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818). In light of my conclusion on the merits of the appeal, I see no purpose in further addressing the merits of those submissions.

[96] CNTL further argues that HSO de Champlain in his report and HSO Renaud relying on it, "exceeded their jurisdiction" by concluding that the Contractors were employees for purposes of both Parts II and III of the Code. I am of the view that this argument is without merit. Clearly, what is concerned by this decision is the direction issued by HSO Renaud under paragraph 145(1)(*a*) of the Code, regarding an alleged violation of subsection 135(1) of the Code, i.e. failure to establish a work place health and safety committee. Accordingly, my jurisdiction as an appeals officer designated under Part II of the Code is to deal with the appropriateness of that direction, within the confines of Part II of the Code. While it may be that, because of the similarity of the threshold issue, the conclusions reached in these reasons could very well apply to the determination of employee status under Part III of the Code, it is not for me to express any views on the matter. Likewise, any opinion expressed by a health and safety officer regarding the applicability of Part III of the Code is immaterial for the purpose the present proceedings.

Decision

[97] For all the above reasons, I hereby rescind the direction issued on March 23, 2012 by HSO Sylvain Renaud.

Pierre Hamel
Appeals Officer