Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-04-23
Case No.: 2017-21

Between:

Transport MTL Zénith Inc., Appellant

Indexed as: *Transport MTL Zénith Inc.*

Matter:	Appeal filed under subsection 146(1) of the *Canada Labour Code* against directions issued by an official delegated by the Minister of Labour.
Decision:	The directions are rescinded.
Decision rendered by:	Olivier Bellavigna-Ladoux, appeals officer
Language of decision:	French
For the appellant:	Mr. Charles Tremblay, Le Palier juridique
Citation:	2018 OHSTC 4

REASONS

[1] This decision concerns an appeal filed under subsection 146(1) of the *Canada Labour Code* (the *Code*), by Transport MTL Zénith Inc. (MTL Zénith), on June 19, 2017, against two directions issued on May 26, 2017 by Jessica Tran, an official delegated by the Minister of Labour (ministerial delegate) for the Labour Program of Employment and Social Development Canada (ESDC) in Montreal.

Background

[2] The directions were written following an inspection at the FedEx Freight Canada Corp. (FedEx) terminal worksite at 10765 Côte-de-Liesse Road, Dorval, Quebec, after a tragic accident that occurred on April 12, 2017, involving the death of Alain Monette. Ministerial Delegate Tran determined on May 18, 2017 that MTL Zénith was a work, undertaking or business that falls under federal jurisdiction and that there was an employer-employee relationship between the parties involved, i.e. MTL Zénith and its drivers. Pursuant to the said determination, on May 26, 2017 Ministerial Delegate Tran ordered MTL Zénith to take the measures necessary to prevent a workplace hazard under paragraphs 145(2)(a) and (b) of the *Code* by June 30, 2017 at the latest. She also directed that it complete an assessment of the risk of employees involved in ground manoeuvring being struck, hit or crushed by a motorized vehicle when connecting and disconnecting trailers at the worksite, under paragraph 141(1)(a) of the *Code*. That analysis report also had to be submitted by June 30, 2017.

[3] MTL Zénith filed an application for the stay of the directions with its notice of appeal on June 19, 2017. The said application for a stay was rejected on July 24, 2017 (*Transport MTL Zénith Inc.*, 2017 OHSTC 17).

[4] It should also be stated that there is no respondent in this case, due to Mr. Monette's unfortunate and tragic situation.

Issue

[5] The issue raised in this appeal is to determine whether the provisions of Part II of the *Code* apply to MTL Zénith and its drivers. To answer that question, it must be determined whether the drivers are independent contractors who provide their services under a contract for services concluded with MTL Zénith, or whether – as Ministerial Delegate Tran concluded – they are employees hired by MTL Zénith to drive trucks under a contract of employment.

Facts

[6] The facts on which Ministerial Delegate Tran based her findings and those considered by the undersigned are documented in the Tribunal's record, and include: the May 18, 2017 report accompanied by documents from the investigation carried out by Ministerial Delegate Tran on April 12, 2017 and discussed in a detailed report; the directions dated May 26, 2017; the appeal hearing during which the undersigned heard testimony from Ministerial Delegate Tran, from

Franscisco Riviera, a truck driver with MTL Zénith, and from Ruslan Pidashev, owner of MTL Zénith.

[7] As I stated earlier, on April 12, 2017, ESDC was called to investigate an accident involving the death of a person that occurred in the workplace. In her detailed report, Ministerial Delegate Tran wrote that 10765 Côte-de-Liesse Road in Dorval is a terminal belonging to Terminals Warehousing Inc., of which FedEx Freight Canada Corp. (FedEx) leases a part, including merchandise loading and unloading docks. MTL Zénith is a merchandise transportation company that has concluded a merchandise delivery contract with FedEx. To summarize the agreement (attached to Ministerial Delegate Tran's detailed report), MTL Zénith provides drivers and tractors to FedEx to transport merchandise between their warehouses in Dorval and London, Ontario. In addition, MTL Zénith contracts with independent drivers who are themselves incorporated. For example, Alain Monette, a driver working for MTL Zénith, was incorporated as Mona Transport Inc. According to his verbal agreement with MTL Zénith, Mr. Monette did not hire any employees and did not have to provide any essential work tools. The agreement was that a fixed amount was paid for each trip made between the warehouses.

[8] At the time of the events, Mr. Monette was teamed with another driver, Oleg Khoroujik, incorporated as 9225-4143 Québec Inc., with whom MTL Zénith had reached an agreement similar to that with Mona Transport Inc. (Mr. Monette's company). In the detailed report there is a section that describes in detail the dangers to which the drivers are exposed when the time comes to connect and disconnect trailers. Ministerial Delegate Tran also indicated that she met with and questioned other people and other drivers, including Mr. Khoroujik, without giving any further details about the contents of those meetings. Lastly, Ms. Tran did a legal analysis to determine whether MTL Zénith was an employer falling under federal jurisdiction and therefore, subject to Part II of the *Code*. Since this part of the *Code*, entitled "Occupational Health and Safety," applies to "employment" in the context of a federal work, undertaking or business, and its purpose 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" (sections 122.1 and 123 of the *Code*), in order to issue the directions, the ministerial delegate had to first conclude that an employer-employee relationship existed between MTL Zénith and the drivers transporting merchandise that belonged to FedEx.

[9] The finding of an employer-employee relationship between MTL Zénith and the drivers working for it is explained in a letter addressed to Ruslan Pidashev, dated May 18, 2017. In that letter, Ministerial Delegate Tran justifies her decision by referring to applicable case law, specifically *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161. Among other considerations, Ministerial Delegate Tran notes that there are four main elements to examine in order to determine whether a person is an employee: control, ownership of tools, possibility of loss or profit and integration. She also says that there is a distinction between a contract for services and a contract of employment. According to her, the common intention of the parties must be sought only in the first case.

[10] Regarding the question of control, Ministerial Delegate Tran found that MTL Zénith did exercise control over Messrs. Monette and Khoroujik because it dictated to the drivers the way services had to be provided throughout the term of the contract. She concluded that the drivers

are free to accept or refuse each trip, but cannot be replaced without prior authorization from MTL Zénith. Disciplinary measures for non-compliance with guidelines during the provision of services may be applied by both MTL Zénith and FedEx.

[11] As far as ownership of work tools is concerned, Ministerial Delegate Tran determined that Messrs. Monette and Khoroujik did not provide any work tools. The tractor belonged to MTL Zénith and all costs for the maintenance and tools necessary for inspection of the tractor were provided by MTL Zénith.

[12] As for losses or profits, Ministerial Delegate Tran found that there was no possibility for losses or profits by Messrs. Monette and Khoroujik. The amounts paid for each trip were set by MTL Zénith. If they could not make a trip between the FedEx warehouses they were not paid. In her opinion, non-payment is not considered a loss for the drivers, but rather represents a loss for MTL Zénith, since it still has to assume all expenses for the tractor, insurance, maintenance and repairs.

[13] Lastly, as far as the integration test is concerned, Ministerial Delegate Tran found that it was possible for Messrs. Monette and Khoroujik to drive for other transportation companies despite their contract with MTL Zénith. However, in her opinion, the maximum number of driving hours fixed by the prevailing regulations would make it almost impossible for the drivers to accept transportation contracts with other companies, due to the number of driving hours needed for the contract with MTL Zénith. The services provided by Messrs. Monette and Khoroujik were an integral part of MTL Zénith's operations – to transport merchandise under the FedEx banner – and, as a result, were part of MTL Zénith's main activity.

[14] Ministerial Delegate Tran also stated that because MTL Zénith engages in interprovincial road transport on a continuing basis, it falls under federal jurisdiction under subsection 2(b) of the *Code*, which defines the expression "federal work, undertaking or business" to include certain work, undertakings or business extending beyond the limits of a province. She concluded that, taking all the facts into consideration, the relationship between Messrs. Monette and Khoroujik and MTL Zénith should be considered an employer-employee relationship.

Hearing

Ministerial Delegate Jessica Tran

[15] At the hearing held on October 10, 2017, the first witness called by the undersigned was Ministerial Delegate Tran. During her testimony she reiterated the major points from her letter of May 18, 2017 and the detailed report prepared as a result of her investigation begun on April 12, 2017. There were no notable differences between her Letter of Determination of May 18, 2017 and her testimony. Only one new element was disclosed: the fact that on August 18, 2017, MTL Zénith complied with both directions issued by Ministerial Delegate Tran on May 26, 2017.

[16] During the cross-examination, counsel for the appellant reverted to certain points in her May 18, 2017 letter and her analysis of the employer-employee relationship. In summary,

Ministerial Delegate Tran confirmed that the provision of services is based on the transportation of merchandise from point A to point B, in this case, from Montreal to London, and the trip is made throughout the week. With regard to the provision of services, she confirmed that FedEx is the entity that generates the transportation contracts. Ministerial Delegate Tran was also questioned about the extent of the disciplinary measures and confirmed that FedEx may notify MTL Zénith about changes or corrections that drivers need to make while they are providing services.

Francisco Riviera

[17] The appellant called Francisco Riviera to testify. Mr. Riviera is a professional truck driver and has worked in the transportation industry for the past 15 years. He shed some light on details of the agreement with MTL Zénith. We learned that he started working with MTL Zénith in August 2010, that he left that type of work with MTL Zénith in 2016 and then began again in 2017. The terms of operation with MTL Zénith have been the same since the beginning. Mr. Riviera affirmed that he always dealt with MTL Zénith as a self-employed worker. He has never considered himself to be an employee of MTL Zénith.

[18] Mr. Riviera's testimony confirmed several points about the control aspect. He explained that the work schedule is essentially always the same. He arrives at the FedEx loading dock in Montreal at 5 a.m. on Mondays, and leaves for London about an hour later, teamed with another driver. They arrive in London about eight hours after leaving Montreal, including a stop for gas in Napanee. They are given a credit card to cover gas expenses. When they get to the London terminal they contact the FedEx dispatcher to find out which unloading dock the trailer is to be parked at. FedEx tells them which trailer loaded with merchandise is to be taken back to the Montreal terminal. If they are running late they must inform FedEx. They often have up to five-hour layovers at the London terminal before starting their return trip to Montreal. There are two sleeper berths in the tractor, which allows one driver to sleep during his partner's work shift. This work schedule is the same throughout the week. For example, they do not depart from it to go see their families. They make approximately five round trips per week and are paid on average between $1,500 and $2,000 per week.

[19] As far as the provision of services is concerned, Mr. Riviera said that MTL Zénith is the entity that dictates how the work is to be done and that, to date, he has never been the subject of any disciplinary measures. He also said that if he is unable to work he has to notify MTL Zénith.

[20] As far as ownership of the tools is concerned, the tractor belongs to MTL Zénith, and accordingly, the insurance and mechanical maintenance expenses are covered. Mr. Riviera said that he had to provide his own safety helmet, a pair of gloves, safety boots and a safety jacket. He told us that the uniform and log were both supplied by FedEx. If there was a mechanical breakdown, MTL Zénith would make the required repairs to the tractor; FedEx would pay to repair a flat tire.

[21] As I stated earlier, Mr. Riviera's testimony shed light on the type of contract he has with MTL Zénith and thus about the possibility of profit and the risk of loss. He first said that it was a verbal contract. He explained that MTL Zénith requires the contracting party to be self-employed

or incorporated to obtain a contract. Mr. Riviera is incorporated as 91745752 Québec Inc., and his accountant makes the deductions required for his company income and related income tax. The truck driver assumes all insurance plan premiums, as well as those for fringe benefits. MTL Zénith does not pay for any sick leave or holidays. As a result, when he is unable to work he has to contact MTL Zénith and will not be paid. The same applies if he is behind schedule due to a mechanical breakdown. He loses income when delays are caused by mechanical problems.

[22] As for integration, we understand that Mr. Riviera works year-long on a contract basis for MTL Zénith, and has no other source of income, although he would be allowed to work for other companies. For example, he told us that he could drive a truck for the Métro grocery store chain on weekends. If he wants to terminate his contract with MTL Zénith, all he has to do is to notify the company without having to give any predetermined prior notice.

Ruslan Pidashev

[23] Counsel for the appellant then had the owner and director of MTL Zénith, Ruslan Pidashev, testify. Mr. Pidashev testified as to the agreement entered into with FedEx in 2012. He also described the details of the type of contract that is in effect with the drivers and MTL Zénith. More specifically, the contract with FedEx is the only contract which MTL Zénith has as a company. In other words, it does not do business with any other merchandise delivery company.

[24] With regard to the first element, i.e. control, Mr. Pidashev stated that FedEx requires certain formalities for any driver who wants to bid for transporting merchandise. A set of forms must be filled in by the driver and approved by FedEx (those forms were attached to Ministerial Delegate Tran's detailed report). FedEx also requires several hours of driver training. Once those preliminary hiring steps have been completed, MTL Zénith may decide to offer a merchandise transportation contract to the driver. That driver cannot, however, be replaced at will. Every truck driver with whom MTL Zénith does business has to be approved by FedEx. If a truck driver cannot work he must notify MTL Zénith, which will substitute another driver with the required qualifications. Sometimes Mr. Pidashev himself has to replace an absent driver. Mr. Pidashev stated that MTL Zénith hires administrative staff who work at the company office in Chateauguay, but the drivers do not have to report to the office to perform their work. As far as the work schedule is concerned, Mr. Pidashev said that the 5 a.m. Monday starting time was set by FedEx. MTL Zénith does not impose a determined work schedule. If drivers are at fault, it is FedEx that applies disciplinary measures. For example, a driver may be disqualified if he exceeds a certain number of demerit points for offences under the *Highway Safety Code*. FedEx determines the length of the driver's suspension and the rules for his return to work.

[25] With regard to the ownership of tools, Mr. Pidashev confirmed that drivers do not own the tractors they operate. MTL Zénith has a Volvo 780 tractor and buys the trucks required for the work agreed on with FedEx. The vehicles need to be equipped with double sleepers because of the continuous work schedules. All expenses for vehicle maintenance and for compulsory inspections and qualifications stipulated in the contract with FedEx are paid by MTL Zénith. Mr. Pidashev specified that there is an inspection every 180 days, pursuant to the standards imposed by the Société de l'assurance automobile du Québec. Truck Master does additional

inspections every three months. He explained that those inspections are required by FedEx and are included in their agreement. He also said that he had a repair contract with Penske in case of mechanical breakdown during the carriage of merchandise between Montreal and London. MTL Zénith performs cosmetic repairs on the vehicles. Lastly, he explained that MTL Zénith covers the expenses if regulatory standards regarding the weight and vehicle loading controls for the front axle are infringed, while FedEx pays for the rear axle. Likewise, FedEx pays for truck towing expenses, insurance for tractors and trailers, tools required to inspect tractors, and logs for gasoline expenses and the gasoline card. FedEx installs the logos on the vehicles (tractors and trailers) and supplies uniforms and caps to the drivers.

[26] As far as the third criterion about the possibility of making a profit or the risk of loss is concerned, the agreement with the drivers provides for a fixed mode of compensation. Mr. Pidashev testified that only the number of kilometres driven counts, and arrival times are not taken into account. Compensation is dictated solely by the distance driven. The agreement does not provide for any employee benefits or salary variations. He testified that he deals with approximately six subcontractors and that drivers are replaced as they accept or refuse a contract of transport.

[27] As for the last criterion on the extent of integration, he said that every driver is limited by provincial regulations to forty (40) hours a week; that is why there are two drivers per truck.

[28] Following Mr. Pidashev's testimony, counsel for the appellant declared his proof closed and made verbal arguments as to why he considered that Ministerial Delegate Tran had misinterpreted the test, and that Part II of the *Code* does not apply because there is no employer-employee relationship between MTL Zénith and the independent truck drivers. On this point, he submitted the decision in *Les Transports P.M. Levert Inc. v. M.N.R.* 2008 TCC 570 (CanLII) (*Les Transports Levert*), which is almost identical to the case at bar and in which the Tax Court of Canada concluded that the truck driver, who was a subcontractor for an intermediary that had a merchandise delivery contract with FedEx, was not to be considered an employee but rather a self-employed worker, as the parties had intended. The key points of the argument made by counsel for the appellant will be summarized below.

Appellant's Submission

[29] In his written submissions dated November 3, 2017, counsel for the appellant argued that Ministerial Delegate Tran had not applied the proper legal notions to her determination of the status of MTL Zénith truck drivers.

[30] The appellant bases its position and submissions on the case of *Les Transports Levert* (*supra*). The appellant therefore wished to correct some of the findings made by Ministerial Delegate Tran during the investigation that led to her decision of May 18, 2017.

[31] To begin with, the appellant wished to correct some points on the notion of control, more specifically, the way MTL Zénith determines the work to be performed during the contract for the transportation of merchandise. The appellant submitted that, when trucking for FedEx, it is normal for MTL Zénith to tell the drivers what their work is, i.e. the route to take from one

terminal to another, the hours of work and the work schedule agreed on with FedEx. The terms are the crux of the agreement with FedEx and FedEx determines them beforehand. The appellant noted that MTL Zénith must honour its commitments and assume its obligations to FedEx, especially in the transportation industry where everything is calculated in terms of time and space. If it wants its agreement and its business to continue, MTL Zénith must make sure merchandise is transported efficiently so that it can maintain its commercial relationship with FedEx. In support of its position the appellant cited *Les Transports Levert* (*supra*) in which the element of hours of availability within a defined territory, coupled with a fixed work schedule, were deemed insufficient to change the express nature of the contract, which was a contract for the pickup and delivery of merchandise.

[32] Further, the appellant noted that Ministerial Delegate Tran misinterpreted the fact that when a truck driver is unable to make a trip, he has to get prior authorization from MTL Zénith to be replaced. The appellant argued that, according to Mr. Pidashev, it was only a question of efficient management of his agreement with FedEx and not of seeking permission. MTL Zénith must comply with its contract and must find a pre-qualified replacement driver for FedEx who will be able to transport the merchandise. When MTL Zénith was not able to find a replacement driver, Mr. Pidashev himself would have to drive.

[33] Lastly, counsel for the appellant contested Ministerial Delegate Tran's position on the application of disciplinary measures to an offending driver. Mr. Pidashev explained that measures would be taken by FedEx in all cases. FedEx may, however, notify MTL Zénith to advise the driver concerned about the measures to be applied.

[34] With regard to the second criterion about the ownership of tools, counsel for the appellant also affirmed that Ministerial Delegate Tran was mistaken about the drivers not supplying any work tools. Drivers are, in fact, required to supply part of their work equipment, i.e. their safety boots, safety helmets, gloves, lamps and the tools for routine inspections on the trucks. FedEx supplies only the work uniform.

[35] Another mistaken point in Ministerial Delegate Tran's report: the insurance on the MTL Zénith tractors. Mr. Pidashev explained that FedEx actually provides the insurance coverage, as well as the tools required for inspecting the tractors.

[36] The appellant argued that the fact that MTL Zénith owns the tractors used for transporting merchandise is insufficient to conclude that the drivers are employees. It again cited *Les Transports Levert* (*supra*), which states at paragraph 34 that, although drivers assume no or almost no personal expenses in their daily job performance, this factor in itself is insufficient to transform their contractual relationships. Just as in the case at bar, the drivers did not own the trucks they drove and had no gasoline or insurance expenses.

[37] With regard to the possibility of losses and profits, the appellant pointed out that, although the monetary amount is determined for each trip, drivers are subject to constant financial risk, since a mechanical breakdown could delay them and even prevent them from completing their routes. Once again, *Les Transports Levert* was cited, specifically paragraph 29, which supports the appellant's position on the risk of financial loss in such circumstances. The appellant noted that

maintenance and repair expenses are shared between FedEx and MTL Zénith, depending on the type of mechanical problem.

[38] As for the integration criterion, counsel for the appellant pointed out that each truck driver can contract with other entities if he has not reached the maximum number of driving hours (40) during the workweek as a truck driver for MTL Zénith.

[39] Lastly, the appellant argued that it is of paramount importance to consider the intention of the parties when analyzing the type of contract between the players in question. Mr. Riviera had confirmed that, when working with MTL Zénith, he agreed to do so as a self-employed worker. It was clear between the contracting parties that any contributions under the Québec Pension Plan or the Commission des normes, de l'équité, de la santé et de la sécurité du travail had to be made by themselves or their own corporations. The drivers are advised that no benefits will be calculated and no sick leave or statutory holiday will be paid. In support of its position the appellant referred to *Les Transports Levert* (*supra*), which notes at paragraph 28 that the parties had clearly concluded an agreement in which workers were considered self-employed, and reiterated the importance of the agreement of the parties on a specific type of contract. It is essential to rely on the declared intention of the parties.

[40] In conclusion, the appellant asserted that the drivers Monette and Khoroujik do not meet the four-fold test to establish the existence of an employer-employee relationship, and insisted that the truck drivers are not MTL Zénith employees. Consequently, MTL Zénith would not be governed by Part II of the *Code*. In closing, the appellant pointed out that the case was very similar to the one in *Les Transports Levert* (*supra* above), which has been cited several times, and which concluded that there was no employer-employee relationship between the parties in question.

Analysis

[41] The preliminary issue raised by this appeal is whether Part II of the *Code* applies to MTL Zénith and to the location where the drivers provide trucking and delivery services under the FedEx banner. In other words, we need to determine the nature of the relationship between the commercial players who claim to be bound by a contract of enterprise. In short, are we dealing with services provided under a contract of enterprise in which drivers act as self-employed contractors? Or is it an agreement made under an employment contract, where the employee personally performs the agreed-upon work under the direction of the employer and within the framework established by the employer?

[42] In order to answer those questions, the Tribunal will focus on a decision issued by my colleague Pierre Hamel in a case with striking similarities to the case at bar: *Canadian National Transportation Limited,* 2013 OHSTC 24. He made an exhaustive analysis of the applicable legislation and case law to determine the true relationship between parties who claimed to be bound by a contract of enterprise and for which a health and safety officer had determined an employer-employee relationship. To summarize the facts of that case and better understand its application to our file: Canadian National Transportation Limited (CNTL) described its activities as a trucking services company that employs the services of what it refers to as independent

businesses or self-employed individuals providing road transportation services (contractors) to transport goods to or from railway depots of the Canadian National Railway Company (CN). Those contractors owned their own trucks, semi-trailers, and had a non-exclusive working relationship with CNTL, meaning that they could offer their transportation service to other trucking companies. Contractors were able to directly hire their own employees (replacement drivers) to transport the goods entrusted to them under their agreement with CNTL.

[43] Another element similar to the case at bar: ESDC was called upon to investigate a motor vehicle accident that resulted in the death of a replacement driver employed by one of CNTL's contractors. As part of its investigation, ESDC sought to determine whether there was an employer-employee relationship between CNTL, the contractors and the replacement drivers hired by the contractors. ESDC concluded there was an employer-employee relationship and, as a result, decided that CNTL was subject to Part II of the *Code*.

[44] To begin our analysis, some definitions applicable to the case at bar should be noted. Sections 2(b), 122, 122.1, 123 and 141 of the *Code* read as follows:

> **2. In this Act**,
>
> *"**federal work, undertaking or business*** means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing, **(b)** a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
>
> **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;
>
> **141**(4) The Minister shall investigate every death of an employee that occurred in the work place or while the employee was working, or that was the result of an injury that occurred in the work place or while the employee was working.

[45] The two directions issued by Ministerial Delegate Tran were based on sections 141 and 145, which read as follows:

> **141 (1)** Subject to section 143.2, the Minister may, in carrying out the Minister's duties and at any reasonable time, enter any work place controlled by an employer and, in respect of any work place, may:
>
> **(a)** conduct examinations, tests, inquiries, investigations and inspections or direct the employer to conduct them;
>
> **145 (2)** If the Minister considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,
>
> **(a)** the Minister shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the Minister specifies, to take measures to
>
> **(i)** correct the hazard or condition or alter the activity that constitutes the danger; and
>
> **(ii)** protect any person from the danger; and
>
> **(b)** the Minister may, if the Minister considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the Minister's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

[46] Needless to say, in order to properly grasp the nature of the relationship between the provider of the work and the people doing the work, the case law has set out applicable legal principles. Various tools have been developed based on a detailed legal test to determine the intrinsic nature of the relationship between the people involved, taking into account the entire situation and facts of each case.

[47] In the case at bar, it was said that the parties made verbal agreements. A contract exists when two parties mutually agree on an activity to be performed. More specifically, what is at the heart of the agreement between the parties in our case is the basic and mandatory condition of contracting as a self-employed worker. The intention to do so was clearly expressed in the testimonies of Messrs. Riviera and Pidashev. The parties do not dispute that the rules applicable to a contract concluded in Quebec are set out in the *Civil Code of Québec*, including the following provisions:

> 1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.
> […]
>
> 1385. A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties subject the formation of the contract to a solemn form.
>
> It is also of the essence of a contract that it have a cause and an object.

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

1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

2085. A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work 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 another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him.

[48] The analysis that Appeals Officer Pierre Hamel performed in relation to the *Canadian National Transportation Limited* decision is extremely instructive about the evolution of the applicable law with regard to the test to be used for determining whether a contract is an employment contract or a contract of enterprise. Here, I quote a long excerpt that I believe sums up the current state of the law.

> [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 Corporation v. Couture*, [1929] S.C.R. 166, a case in tort , the Supreme Court of Canada indicated at p.169: [TRANSLATION not in the original] "the contract of lease and hire of work may be distinguished from the contract of enterprise principally by the subordinate character of the employee." Article 2085 *Civil Code of Quebec* 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.
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> [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.
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> [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 "whose business is it: the Contractor's or the Company's?"

[49] Ministerial Delegate Tran rightly applied a criterion that is still relevant today when it comes to analyzing the facts of a contractual relationship. The criterion applied by Ministerial Delegate Tran is based on the four pillars established in Montreal Locomotive Works (*supra*). However, counsel for the appellant argued that certain details in Ministerial Delegate Tran's report had been misinterpreted, resulting in an inaccurate determination for MTL Zénith. All in all, the major issue in this case revolves around the application of those four legal principles. Those principles received a very different interpretation and application for similar facts in *Les Transport Levert* (*supra*). I will now discuss my analysis for each of those factors.

The control exercised by MTL Zénith over its truck drivers

[50] MTL Zénith said it exercises minimal supervision of the work done by truckers, and only to the extent necessary to fulfil its obligations to its customers as a freight transportation service company. In contrast, Ministerial Delegate Tran concluded that MTL Zénith does exercise a certain degree of control, similar to that exercised by an employer. It is therefore necessary to analyze the impact of this factor in light of the facts reported by Ministerial Delegate Tran in her letter of May 18, 2017 and the appellant's testimony at the October 2017 hearing.

[51] According to Ministerial Delegate Tran, MTL Zénith exercises control over drivers for the following reasons: MTL Zénith dictates how work should be done throughout the term of the contract; drivers are free to accept or refuse a transportation contract but they are not able to replace themselves with another driver without MTL Zénith's agreement; in the event of a problem in the delivery of work, it is MTL Zénith that issues disciplinary measures, although they may also come from FedEx.

[52] According to my analysis, it seems that MTL Zénith does not exercise full control over the way contractors conduct their activities. It is common with trucking and delivery services to have clauses providing for the customer's right of oversight. So it is not surprising, in the case at bar, to see that a regular inspection of tractors is a condition and that truckers who carry the goods are required to have the skills and authorizations required by FedEx. Similarly, it is not surprising that a code of conduct is imposed on drivers when they are performing their work and that if they breach it, disciplinary action is taken. Moreover, this disciplinary element was clarified by Ministerial Delegate Tran, who indicated that it is indeed FedEx taking the disciplinary action, and not MTL Zénith. However, MTL Zénith can sometimes intervene with the offending driver to inform him/her of the decision made by FedEx. In *Canadian National*

Transportation Limited (*supra*), the Appeals Officer looks at some of the rules imposed by CNTL with regard to contractors and the conduct to be adopted by them:

> [62] […] 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 *[of the goods delivered by rail and unloaded for pick-up by its independent contractors]* 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.

[53] It was explained to us that drivers must contact FedEx when they arrive at their destination with the transported goods and that it is the FedEx entity, not the MTL Zénith entity (as reported by Ministerial Delegate Tran), that issues the procedures to follow to load/unload the trailer. In short, the ability to direct and control vehicle movements, as well as the goods they are transporting, is inseparable from the exercise of contractual rights and obligations with respect to FedEx's goods. We are talking about control over the movement of trucks when they arrive at the FedEx terminal where it rents unloading docks. In my opinion, on this aspect, there is no relationship of subordination between the truckers and MTL Zénith despite Ministerial Delegate Tran's finding.

[54] With regard to the work schedule, again, I do not see MTL Zénith as having direct control over the truckers. This is a delivery contract between the parties, and it is only normal for FedEx to expect its goods to be delivered as per a well-established schedule, which FedEx also has to follow with regard to its own customers. We should not forget that FedEx customers also have expectations as to when goods are delivered. The fact that contractors perform work according to certain guidelines in terms of work hours or standards and measures to follow on the client's (FedEx) property, does not in and of itself systematically indicate that there is an employer-employee relationship. This criterion is confirmed in paragraph 64 of *Canadian National Transportation Limited* (*supra*), citing *Wiebe Door Services v. Minister of National Revenue*, [1986] 3 C.F. 553, where work parameters were imposed on labour input without there necessarily being an employer-employee relationship.

[55] Another factor to consider: the delivery route for drivers. It was explained that the route was left to the discretion of the drivers and that their duty was simply to bring the merchandise they were transporting to the destination. The only thing that matters to FedEx is that parcels arrive at the destination on schedule. Once a driver was qualified under the FedEx standards, MTL Zénith let the drivers do their work based on their own organization of time and the routes they chose. The truck drivers had an obligation of result when it came to delivering the merchandise. The decision in *Les Transports Levert* (*supra*), citing a passage from *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*, [2004] F.C.J. No. 267 (QL), explains the distinction to be made between control over the result of the work and control over the worker:

> **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 1454, 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.

[56] Lastly, it should be noted that the truck drivers were free to accept or refuse a contract with MTL Zénith. The only constraint imposed on drivers when refusing a contract was that they inform MTL Zénith well enough in advance so that a replacement driver could be found. The Tribunal was not informed that MTL Zénith imposed any penalties on drivers who refuse a contract of employment. That is effective management by a company that is bound by a contract requiring it to fulfil its delivery obligations. On this issue, Mr. Pidashev said that he sometimes did the trips himself when no qualified replacement driver was available. He also said that the drivers did not have to work exclusively for MTL Zénith, and that if they wished they were free to make deliveries for any other trucking company, subject of course to regulatory limits regarding the maximum number of driving hours.

[57] So I understand that drivers who tell MTL Zénith in advance that they do not wish to accept a delivery contract can offer their services to another trucking company during that time period, without MTL Zénith imposing a penalty for the refusal to work. In other words, drivers do not have a legal obligation to work exclusively for MTL Zénith; they choose to offer their services to the company. In my view, a relationship of this nature is more like a contract for services than a contract between an employer and an employee.

[58] After analyzing all these facts, I find that the control test gives only inconclusive results on an employer-employee relationship between the parties involved. I am not convinced that they are sufficient to conclude that there was such a relationship. Like Justice Lamarre in *Les Transports Levert*, I am rather of the opinion that the control exercised by MTL Zénith relates more to the result of the work than to the drivers. According to the case law, this type of control is not inconsistent with self-employed status.

Ownership of tools

[59] According to the testimony, we know that the tractors used by the drivers belong to MTL Zénith, while the loaded trailers are the property of FedEx. However, insurance on the tractor is not covered by MTL Zénith, as contended by Ministerial Delegate Tran, but instead by

FedEx, which covers both the tractor and trailer. If an insurance claim is made, MTL Zénith pays only the deductible on the tractor. It appears that FedEx also provides the tools for tractor inspections, according to Mr. Pidashev. Drivers supply their own protective equipment that is needed to provide their services, such as safety boots, safety helmets, safety vests, work gloves, lamps, winter clothing, and the tools needed to perform routine checks on the trucks. Those items are not provided free of charge to the drivers, as would be the case if they were employees. FedEx uniforms and caps are supplied by FedEx. On this subject, counsel for the appellant noted that paragraph 34 of *Les Transports Levert* (*supra*) states:

> 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.

[60] Drivers do not appear to assume a large part of the operating costs related to the agreement with MTL Zénith, while most of the tools needed to carry out their work are provided by MTL Zénith or FedEx. I consider this element to weigh in favour of a possible employer-employee relationship. However, as pointed out by Justice Lamarre in *Les Transports Levert* (*supra*), this single test is not determinative on its own, and the intention of the parties as shown in their understanding of the terms of the agreement will be a key element to consider in the case at bar.

Possibility of loss

[61] It appears from the record that there is a risk of loss for drivers travelling between Montreal and London. Mr. Riviera's testimony indicated that, in the event of a breakdown while merchandise was being transported, although the drivers did not personally pay the repair costs for mechanical problems, they were not compensated for their lost time. Accordingly, that loss was assumed by the drivers themselves. The same would apply if there was a major traffic backup and the alternate routes extended or delayed the arrival time at a terminal. The agreement between the driver and MTL Zénith is determined and fixed for each trip between the Montreal terminal and the London terminal. No trip, no payment. The time drivers take to make their deliveries has no impact on their pay. They are at the mercy of the road conditions. They have no annual paid vacation and are not paid for statutory holidays. This is far from the usual mode of paying an employee a set hourly rate subject to the payroll deductions provided by law (such as Employment Insurance and pension). There are no tax deductions and the drivers do not receive T4 slips from MTL Zénith.

[62] In her analysis, Ministerial Delegate Tran states that not being paid is not deemed to be a loss, as would be the case for MTL Zénith. However, we do not know how she arrived at that conclusion. In that respect, I would quote from *Canadian National Transportation Limited* (*supra*):

> [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.

[63] Lastly, in the event that no delivery was made, insurance would still be covered by FedEx, just as trailer breakdowns are under FedEx responsibility. Ministerial Delegate Tran concluded that MTL Zénith assumed those costs. However, MTL Zénith was not alone in incurring the costs and losses if a problem arose during the transportation of merchandise.

[64] All told, I consider the drivers to be at a risk of loss. To some extent, they are at the mercy of complications and conditions of the road between Montreal and London, with no opportunity for income if there are any delays or if the delivery is cancelled. There is, however, an opportunity for profit. The drivers' pay can be considered an opportunity for profit, namely the difference between the lump sum paid by MTL Zénith for each trip and the drivers' expenses like meals, work clothing and tools (e.g. flashlights) that they provide. Consequently, the application of this test does not really support the argument that there is an employer-employee relationship.

[65] As I stated earlier, the drivers are free to enter into agreements with trucking companies other than MTL Zénith. Ministerial Delegate Tran stated in her letter that the work performed by drivers for MTL Zénith, which consists of transporting merchandise under the FedEx banner, is the core of MTL Zénith's operations and business activities. Mr. Pidashev stated that the business agreement with FedEx was MTL Zénith's only merchandise delivery contract. According to Ministerial Delegate Tran, MTL Zénith could not exist if it were not for the work of the drivers. Appeals Officer Pierre Hamel noted the following elements in *Canadian National Transportation Limited* (*supra*) with respect to the integration criterion:

> [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, <u>in all of which the effect has been to dictate the answer through the very form of the question</u>, 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 <u>it must always result in an affirmative answer</u>. 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 <u>not necessarily expressive of their intrinsic relationship</u>.
> >
> > [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 the 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.

[66] To summarize the principle, we cannot conclude that an employer-employee relationship is born as soon as a business relationship exists between two commercial parties, and that this implies a mutual dependence in the operation of their respective businesses. If that criterion had to be applied in such a simple way, we would have nothing but employer-employee contractual relationships. I am of the opinion that it would be too easy to rule in favour of an employer-employee relationship by giving an affirmative answer to the question of whether one can survive without the other. That is not conclusive evidence of the existence of a contract of employment.

Intention of the parties

[67] As Appeals Officer Pierre Hamel stated in *Canadian National Transportation Limited* (*supra*), over time and according to case law, one of the essential elements is to determine whether the parties' intention translates into actual contract reality. Sometimes a contract is not what the parties describe it as, or does not represent the actual relationship between them. The true intention is key, as stipulated in articles 1425 and 1426 of the *Civil Code of Québec*. Important factors to keep in mind: a legitimate intention expressed by the parties and the interpretation they have already given to the contract or which may have been given to it in the past.

[68] In the case at bar, Messrs. Riviera and Pidashev testified as to the intention and interpretation they give to the agreement between them. This agreement, which dates back to 2010, has not changed since Mr. Riviera started at MTL Zénith. Everything leads to the conclusion that the same contract existed with Mr. Monette in the investigation conducted by Ministerial Delegate Tran. There is no evidence to the effect that the terms of the agreement between Mr. Monette and MTL Zénith were any different.

[69] Their testimony showed that, to bid with MTL Zénith, truck drivers had to be self-employed workers or corporations. In the case at bar, it seems that all truck drivers did so in the names of their respective companies. The agreement between the parties clearly showed that they would not be considered employees of MTL Zénith. Truck drivers had to report their own income for tax purposes and pay their own contributions. They had no benefits, were not paid when they missed work and had no paid holidays. Since all the parties put it the same way, I consider that special importance must be given to the common understanding of the agreement by both MTL Zénith and the drivers working for it. The way they described their relationship at the hearing helps us determine its nature. An overall assessment of their relationship shows that they are independent contractors. Once again, I will cite an excerpt from *Canadian National Transportation Limited* (*supra*) in support of my conclusion:

[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]

[70] In my opinion, the parties' intention test, which was not appropriately examined by Ministerial Delegate Tran, is of special importance in this case. The evidence clearly shows that MTL Zénith and the truck drivers considered their agreement to be a contract of enterprise and acted accordingly at all levels, including between themselves and in their relationships with the authorities; for example, with regard to income tax and the payment of other government contributions.

Other relevant facts

[71] Lastly, in his argument at the hearing, counsel for the appellant filed in evidence a letter from the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), the provincial equivalent of organizations which apply provisions similar to those of the *Canada Labour Code*. That letter was addressed to Mr. Khoroujik and concerned a request for compensation for a work accident he submitted after an accident on April 12, 2017. The letter filed in evidence shows that, after checking, the CNESST ruled that Mr. Khoroujik was not an employed worker within the meaning of the law and could not have the benefit of personal protection.

[72] Even though that CNESST decision is not in itself decisive as to the status of the truck drivers in the case at bar, it is nonetheless another factor supporting the existence of a contract for service or enterprise between the parties. In terms of accident-related compensation, it would be hard to understand how contractors could legally be considered independent contractors under provincial legislation, but employees at the federal level under Part II of the *Code*.

[73] In addition, that decision confirms that third parties interpret the agreement in question as a contract of enterprise and not as an employment contract. To interpret a contract, we have to consider not only the circumstances in which it was entered into and how the parties have already interpreted it, but also how others have interpreted it. All the factors here lead to a contract of enterprise.

Conclusion

[74] Following the analysis I just conducted, I must determine whether there is a degree of independence consistent with a contract of enterprise or if there is subordination between the parties sufficient to establish an employer-employee relationship specific to an employment contract. *Wiebe Door Services Ltd* (*supra*) underlined the fact that the extent of control, the ownership of work tools, the possibility of making profits and losses and lastly, integration, are only reference points. My analysis must be conducted on the basis of all of the relevant facts in this case. Every case is specific and deserves to be considered as a whole. The relative importance of each criterion depends on the circumstances and the facts of the case.

[75] To sum up: MTL Zénith is a delivery services enterprise which organizes the transportation of merchandise belonging to FedEx. It offers to transport the merchandise between two main terminals in Montreal and London. It entered into a commercial agreement with FedEx by which it undertook to transport merchandise at defined times and in a determined space. It owns the tractors and makes those work tools available to qualified truck drivers doing the trips. The contract between MTL Zénith and the truck drivers is verbal and must be renewed each time. The drivers contract as independent contractors. They pay their own QPP, Employment Insurance and other contributions required by law. The drivers are at the mercy of road hazards and breakdowns and may suffer significant financial losses thereby. They have a non-exclusive relationship with their client, MTL Zenith. Taking all of those facts into consideration and considering the overall relationship between the parties – including their common intention – I conclude that there is insufficient subordination to consider that they have an employer-employee relationship for the purposes of Part II of the *Code*.

[76] Sections 122.1 and 123 of the *Code* state that Part II applies to employers and employees under federal jurisdiction. Due to my conclusion that there is no employer-employee relationship, Part II of the *Code* cannot apply to MTL Zenith. That company is not required to comply with the two directions issued by Ministerial Delegate Tran on May 26, 2017. The said directions are accordingly unfounded in law and must be rescinded.

[77] I do wish to underline, however, that I encourage Mr. Pidashev and MTL Zénith to maintain the new safety measures adopted on August 18, 2017. It is to be hoped that these new

measures will help prevent any other accident like the one in which Mr. Monette lost his life on April 12, 2017.

Decision

[78] For the above reasons, I rescind the directions issued by Ministerial Delegate Tran on May 26, 2017.

Olivier Bellavigna-Ladoux
Appeals Officer