Docket: 2003-633(EI)

BETWEEN:

MESSAGERIE VDL INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard November 24, 2003 at Montréal, Quebec

Before: The Honourable Justice P. R. Dussault

Appearances:

Agent for the Appellant:	Richard Benoît
Counsel for the Respondent:	Emmanuelle Faulkner

JUDGMENT

The appeals under subsection 103(1) of the *Employment Insurance Act* regarding a March 28, 2002, decision by the Minister of National Revenue for 2000 and 2001 are dismissed and the decision rendered by the Minister is affirmed.

Signed at Ottawa, Canada, this 8th day of December 2003.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 26th day of February 2009.
Elizabeth Tan, Translator

Citation: 2003TCC883
Date: 20031208
Docket: 2003-633(EI)

BETWEEN:

MESSAGERIE VDL INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Dussault J.

[1] The Appellant was assessed for unpaid employment insurance premiums for 2000 and 2001 for the following workers: Jules Bourdon, Patrick Breault, Gilles Contré, Jacques Dauphin, Roland Dubreuil, Johanne Ducharme, Jacques Lapierre and Gérard Martineau (the Workers).

[2] The details for the premiums are:

Year	EI premium	Penalty	Interest	Total
2000	$1,380.38	$88.03	$149	$1,617.41
2001	$4,643.37	$414.38	$43	$5,101.25

[3] Further to the Appellant's opposition, the assessment for 2000 was confirmed and the assessment for 2001 was reduced by removing the assessments and the penalties and interest for Gérard Martineau, who was not considered bound to the Appellant under a contract for services, contrary to the other workers mentioned.

[4] In assessing the Appellant, the Minister of National Revenue (the Minister) relied on the following presumptions of fact, found at subparagraphs 6(a) to (p) of the Reply to the Notice of Appeal (the Reply). These state:

[TRANSLATION]

(a) Since 1993, the Appellant has been operating a mail transportation service.

(b) Luc Desmarais is the Appellant's sole shareholder.

(c) The Appellant's main client is Canada Post.

(d) The Appellant covers the Lanaudière territory.

(e) In 2000 and 2001, the Appellant's total sales figure was around $200,000.

(f) The Appellant's assets are five leased/purchased trucks.

(g) The Appellant has four different routes for Canada Post; it picks up the mail at the Joliette post office and delivers it to various post offices in the region and then, at the end of the day, picks up the mail in these post offices and brings it to Joliette.

(h) To carry out the delivery and collection of mail, the Appellant hires drivers (Workers), generally retirees.

(i) The Workers use the Appellant's trucks to deliver the mail; they keep the truck outside working hours, including weekends (except in the case of Patrick Breault, who brought the truck back at the end of his day).

(j) The Workers were to go to the post office around 6:00 a.m. to pick up the mail and then deliver it to various offices; they did the same route in reverse, starting at 4:00 p.m. and brought the collected mail to the Joliette post office.

(k) The Workers' hours of work varied from week to week, but they generally carried out 30 hours per week; the schedule was "cut" because they usually worked three hours in the morning and three hours in the afternoon.

(l) The Workers used the Appellant's trucks, and the Appellant paid for gas and all maintenance and repair costs.

(m) The Workers could find replacements with the Appellant's prior permission; Luc Desmarais often carried out the replacements himself.

(n) The Appellant, not the Workers, was responsible to Canada Post for the mail delivery.

(o) All the Workers received between $300 and $350 a week; they were paid by cheque, once a month.

(p) In 2001, Gérard Martineau worked for his own company (Distribution Mel-Pat inc.) not the Appellant.

[5] All the facts in this paragraph are admitted except at subparagraph (c), because the Appellant claims that Canada Post is not his main client. However, no evidence was submitted on this subject.

[6] Jacques Dauphin, Gérard Martineau and Luc Desmarais testified briefly for the Appellant.

[7] Mr. Dauphin stated that his job was to deliver mail six hours a day and that his hours of work, from 5:15 a.m. to 8:15 a.m. and from 4:15 p.m. to 7:15 p.m., were determined by Canada Post and the Appellant.

[8] Mr. Martineau stated that the Appellant hired him to deliver mail for Canada Post, that he provided his time and the Appellant provided all that was needed to carry out the work.

[9] Mr. Luc Desmarais is the Appellant's sole shareholder. He stated that on the advice of his accountant, sub-contracts were usually signed with self-employed workers. For example, the contract with Jacques Dauphin was submitted to evidence (Exhibit A-1).

[10] This contract is reproduced as follows, with the pre-printed parts in regular font and the handwritten parts in italics:

[TRANSLATION]

CONTRACT BETWEEN

1st party *MESSAGERIE V.D.L. INC.*, company incorporated in accordance with Part 1A of the Companies Act of Québec, with head office at: *688 Roussin Pl. JOLIETTE,* hereinafter called the Company

and

2nd party Name: *Jacques Dauphin*
Address:
S.I.N.:
Hereinafter called the Subcontractor
The two parties agree as follows:

1. The Subcontractor shall have full responsibility of: *Canada Post deliveries for the Rawdon route*.

2. For this purpose, the Company shall provide the following services: *Time, availability, fuel, verifications for the Ford F-450 1994 model trucks.*

3. Wages to be paid for casual help and occasional agent's fees with clients will be the Subcontractor's responsibility.

4. This agreement is cancellable at any time by either party upon a five-day notice. *Renewable at the beginning of each month.*

5. The Subcontractor shall receive $*330.00* dollars per *week* for carrying out the duties described at #1.

6. The Subcontractor takes full responsibility for his work and the related benefits. This agreement automatically releases the Company from all employer's responsibilities such as vacation, contributions to various source deduction programs for the Québec Pension Plan, Unemployment Insurance, the RAMQ, CSST, etc.

Signed at *Joliette* this *January 7, 1997.*
Luc Desmarais *Jacques Dauphin*
President of the Company Subcontractor

[11] First, paragraph 1 violates paragraph 17.1 of the contract the Appellant signed with Canada Post, under the terms of which the Appellant is wholly responsible for the execution of service if it hires subcontractors (Exhibit I-3). At any rate, they must be actual subcontractors.

[12] Second, regarding paragraph 3, it was not shown that the workers hired anyone to carry out their work, except for the replacements the Appellant authorized and paid. There is also no evidence to show that the Workers had to pay agent's fees to anyone, let alone that they had clients. They distribute bags of mail they collected at the Joliette post office to local post offices and returned bags of mail collected in the local post offices to the Joliette post office.

[13] The evidence shows that the Workers were paid hourly, according to the time required to cover a delivery route. The time required is verified upon departure by Luc Desmarais and the Worker during a one-week period. The schedules are established according to Canada Post's requirements and the Appellant provides and pays for absolutely everything required to carry out the Workers' duties.

[14] In his Notice of Appeal, the Appellant challenges the assessments on the sole ground that it was independent subcontractors who operated their own company and not employees. However, during the hearing, the Appellant also challenged the assessments claiming they were too high (Exhibit I-1).

[15] First, the Appellant claims that there should not be any assessment for Gérard Martineau for 2001 because the Appellant had a contract with a company he incorporated. This is recognized by the Respondent and according to the Reply, the assessment for 2001 was reduced accordingly.

[16] The second point regarding the amount of the assessment is the amount used to calculate the Appellant's unpaid 2001 contribution for Jacques Dauphin (Exhibit I-1). According to Luc Desmarais, the contribution was established using earnings of $35,190 with 55% allegedly being paid to Mr. Dauphin's spouse as a subcontractor distributing mail on a rural route.

[17] On one hand, as I mentioned, this point is not at all raised in the Notice of Appeal. On the other, no document, for example Mr. Dauphin's income tax report or that of his spouse or even proof of payment by the Appellant, was submitted as evidence in support of this claim.

[18] As for the issue of whether the Workers were really self-employed workers operating their own company rather than the Appellant's employees, counsel for the Respondent stated that the applicable principles were expressed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, [2001] S.C.J. No. 61 (Q.L.), ("Sagaz"). In that decision, the Supreme Court of Canada refers to the decision by the Federal Court of Appeal, *Wiebe Door Services Ltd. v. M.N.R.* ("Wiebe Door") [1986] 3 F.C. 553, in which MacGuigan J. noted the following four elements: (1) control; (2) ownership of the work instruments; (3) possibility of profit; and (4) risk of loss, while noting that the criterion of control is not always conclusive in itself. These elements were applied by Lord Wright in *Montréal v. Montréal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (C.P.).

[19] As Major J. noted at paragraph 44 of *Sagaz* (*supra*), in *Wiebe Door* (*supra*), MacGuigan J. recognized that the best summary of the issue was by Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), when he stated, at pages 737 and 738:

> The observations of Lord Wright, of Denning LJ and of the judges of the Supreme Court in the USA suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. [Emphasis added]

[20] In *Wiebe Door* (*supra*), MacGuigan J. also acknowledges the use of the criterion of "organization" or "integration" insomuch as it is applied properly, or taken from the point of view of the "employee" and not the "employer." An analysis of this element normally results in an answer to the question of whose company it is.

[21] Also, in *Sagaz* (*supra*), at paragraph 46, Major J. shares the opinion expressed by MacGuigan J. in *Wiebe Door* (*supra*), when he states at page 563, citing the author P.S. Atiyah (Vicarious Liability in the Law of Torts. London: Butterworths, 1967 p. 38) "that what must always occur is a search for the total relationship of the parties."

[22] Major J. repeats part of the quotation from Atiyah's work in the same paragraph as follows:

> It 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 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.

[23] Despite the contract signed between the Appellant and the Workers, I find that they were not each operating their own company. They were employees of the Appellant, who established their mail delivery schedule in various post offices and who paid them based on the number of hours required to carry out this task; the hours were verified at the departure for a given route by Luc Desmarais accompanied by the Worker.

[24] The Appellant provided the truck used to carry out this task. The Appellant also paid for gas and maintenance and repair costs for the trucks. To Canada Post, the Appellant was solely responsible for the mail delivery and therefore had the power to control the Workers' execution of the task.

[25] The Workers received a set pay with no possibility of profit. They did not have a risk of loss and had no expenses or any agent's fees to pay to carry out their duties.

[26] Lastly, I feel we can say the Workers' duty was strictly carried out within the framework of postal service managed by Canada Post, in accordance with a pre-established schedule; this service was the Appellant's to provide and therefore it had full responsibility under the terms of the agreement signed with Canada Post.

[27] As a result of the above, the appeals are dismissed.

Signed at Ottawa, Canada, this 8th day of December 2003.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 26th day of February 2009.

Elizabeth Tan, Translator

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APPEARANCES:

Agent for the Appellant:	Richard Benoît
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