Docket: 2008-3752(EI)

BETWEEN:

LANGMOBILE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SONIA IBARZ,

Intervenor.

Appeal heard on August 31 and September 2, 2009 at Montreal, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Agent for the Appellant:	Nicole Bianco
Counsel for the Respondent:	Ilinca Ghibu
For the Intervenor:	The Intervenor herself

JUDGMENT

The appeal is allowed. The Language Instructors identified in the attached Reasons for Judgment were independent contractors for the period of January 1, 2006 to December 31, 2007.

Signed at Ottawa, Canada, this 16th day of November 2009.

"Robert J. Hogan"

Hogan J.

Citation: 2009 TCC 535
Date: 20091116
Docket: 2008-3752(EI)

BETWEEN:

LANGMOBILE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SONIA IBARZ,

Intervenor.

REASONS FOR JUDGMENT

Hogan J.

Factual Background

[1] The question posed in this appeal is whether the teachers employed by the Appellant, Langmobile Inc. ("Langmobile" or the "Payor") are employees or independent contractors.

[2] Langmobile has appealed from a decision of the Minister of National Revenue (the "Minister") that the 16 language instructors identified in paragraph 2 of the Reply to the Notice of Appeal (the "Language Instructors") were employees of the Appellant and not independent contractors. According to the Appellant, the Language Instructors were bound vis-à-vis the Payor by a contract for services and not a contract of employment.

[3] In reaching his decision, the Minister relied on the following assumptions of fact set out in subparagraphs 5 a) to w) of the Reply to the Notice of Appeal (the "Reply"), which are incorporated herein by reference:

a) the Appellant was incorporated on June 1, 2005;

b) the shareholders of the Appellant were Nicole Bianco and Johanne Desjardins;

c) the Appellant was offering language courses, in English, in French, in Spanish or in Italian, to children aged 18 months to 8 years old, in daycares[*sic*] centres;

d) the Appellant was in operation all year long with a day camp in summer months;

e) the Appellant hired the Workers as animators and as language monitors;

f) the Workers were responsible to give language lessons at the Appellant's client's premises from mid September to mid May and at the Appellant's premises during summer months;

g) the Workers had to sign a "Contract agreement" with the Appellant when they were hired;

h) the Appellant had a specific teaching method through games and songs;

i) the Workers received a two weeks training session from the Appellant on the Appellant's methods of instruction;

j) the Workers had to follow the directives of the Appellant on this method and they had to animate and to teach following the techniques of the Appellant;

k) the Workers received directives from the Appellant as to which daycares[*sic*] centres or schools they had to work;

l) the Workers received directives on the schedule they had to follow;

m) the Workers performed the teaching personally and they could not be replaced in case of absence;

n) the Workers were supervised by the Appellant with spot checks made by Johanne Desjardins at the clients' premises;

o) a questionnaire was sent regularly to clients to evaluate the Workers;

p) the Workers had a staff meeting every two or three months;

q) all the teaching materials required by the Workers were furnished by the Appellant;

r) all Workers received a fixed salary of $18 to $25 per hour;

s) the Workers were paid by cheque every two weeks;

t) the Workers worked with the Appellant's client;

u) the Workers had no financial risks while working for the Appellant;

v) the Appellant had a hiring and a dismissal discretion over the Workers, fixed the salary, establishes[*sic*] the schedules and the teaching methods, found the clients and supervised the Workers;

w) the Appellant considered the Workers as self employed during the school year and as employees during the summer time.

[4] Ms. Bianco, one of the principal shareholders, testified that she started the payor business with her partner and co-shareholder, Johanne Desjardins. The Payor offers language instruction principally to daycare-aged children. Initially the enterprise provided English language training to children in public and private daycare centres in the province of Quebec. The Payor's business subsequently expanded to include French, Italian and Spanish language training.

[5] The Payor recruited the Language Instructors primarily through newspaper advertisements. Candidates would be hired only if they had prior experience in language instruction and teaching young children. According to Ms. Bianco's testimony, the Language Instructors were expected to work autonomously.

[6] The Payor would negotiate language training contracts with private and public day care centres. The Payor would ask the Language Instructors whether they were willing to take on a contract for a specific period. These contracts would be for either the full school year or the fall or spring semester. According to Ms. Bianco, the Language Instructors, who all worked on a part-time basis, could either refuse or accept the work offered.

[7] Ms. Bianco testified that the Language Instructors received roughly 1 or 2 hours of training before they embarked upon the performance of their initial contract. Limited training was required as the Language Instructors were generally qualified in the field. The witness indicated that the Language Instructors were free to prepare their own curriculum material and employ their own teaching methods. Alternatively, if they so desired, they could use interactive language instruction material prepared by Langmobile.

[8] Each Language Instructor signed a contract with Langmobile recognizing that he or she was an independent contractor. As a result, the instructors would not be entitled to fringe benefits and had to assume all of the costs associated with the performance of their language instruction duties.

[9] During the hearing, the witness Ms. Bianco, who was also acting as the representative of the Payor, took issue with the facts assumed by the Minister in subparagraphs 5 a), d), f), i) to l), m), o), t), q) and v) of his Reply. Ms. Bianco pointed out during her testimony that the Canada Revenue Agency (the "CRA") agents who had reviewed the file were under the false impression that the status of the Language Instructors changed during the relevant period. The Minister's Reply and the CRA Report on an Appeal filed as Exhibit A1 make the allegation that there was such a change. In addition, the Respondent alleges in subparagraph 5 w) of his Reply that the Language Instructors were considered as employees when at a summer day camp and as self-employed workers during the school year.

[10] Ms. Bianco testified that the summer camp operated on premises leased by the Payor for a six-week period. None of the 16 Language Instructors taught at the summer day camp. The witness testified that she had hired two different individuals to teach at the day camp and treated those workers as employees because they were subject to her direct supervision and control. The work also took place on her premises. The Respondent's counsel acknowledges that the CRA agents who considered this matter had erred on this point.

Analysis

[11] The issue is whether the Language Instructors held insurable employment for the purposes of the *Employment Insurance Act* (the "*Act*"). The relevant provision of this *Act* is paragraph 5(1)(*a*), which states the following:

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

[12] This provision defines insurable employment as employment held under a contract of service, which results in an employer-employee relationship. A contract for services will result in an independent contractor relationship and thus will not fall within the purview of paragraph 5(1)(*a*) of the *Act.* Neither a "contract of service" nor a "contract for services" is defined in the *Act*.

[13] Looking, then, to provincial law for guidance, the relevant provisions for determining whether there is a contract of service (i.e. a contract of employment) or a contract for services (i.e. a contract of enterprise) in Quebec can be found in articles 2085, 2086, 2098, and 2099 of the *Civil Code of Quebec*.

> Contract of employment
>
> 2085 A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> 2086 A contract of employment is for a fixed term or an indeterminate term.
>
> Contract of enterprise or for services
>
> 2098 A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.
>
> 2099 The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[14] The Federal Court of Appeal in both *Wolf v. Canada*, [2002] 4 F.C. 396, and *Combined Insurance Co. of America v. Canada (Minister of National Revenue)*, 2007

FCA 60, considered whether there was a contract of employment or a contract for services under Quebec law.

[15] In *Wolf, supra*, Desjardins J.A. noted that this determination could be made on the basis of tests developed by the relevant case law, in both the civil and common law contexts. The leading cases are *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. Desjardins J.A., in *Wolf*, referred to comments made by Major J. of the Supreme Court at paragraphs 47 and 48 of his reasons in *Sagaz*:

> 47 . . . 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.

[16] Pratte J. noted the following in *Gallant v. M.N.R.*, [1986] F.C.J. No. 330(QL):

> . . . The distinguishing feature of a contract of service is not the control actually exercised by the employer over his employee but the power the employer has to control the way the employee performs his duties . . .

[17] *Combined Insurance*, *supra*, the Federal Court of Appeal notes that it is important to consider the evidence in the appropriate light as well as to consider the parties' intentions:

> 26 In particular, at paragraph 72 of her reasons, Madam Justice Desjardins [in *Wolf*] stated that the Court had to consider all the evidence in the light of the applicable tests and give the evidence the weight required in the circumstances of the case. In addition, she noted that the parties' intention should be considered whenever it reflected their real legal relationship.

[18] Létourneau J.A. in *Livreur Plus Inc. v. Canada*, [2004] F.C.J. No. 267(QL), notes the following with respect to intention:

> 17 What the parties stipulate as to the nature of their contractual relations is not necessarily conclusive, and the Court may arrive at a different conclusion based on the evidence before it: *D&J Driveway Inc. v. The Minister of National Revenue*, 2003

> FCA 453. However, if there is no unambiguous evidence to the contrary, the Court should duly take the parties' stated intention into account: *Mayne Nickless Transport Inc. v. The Minster of National Revenue*, 97-1416-UI, Febrary 26, 1999 (T.C.C.). Essentially, the question is as to the true nature of the relations between the parties. Thus, their sincerely expressed intention is still an important point to consider in determining the actual overall relationship the parties have had between themselves in a constantly changing working world: see *Wolf v. Canada*, [2002] 4 F.C. 396 (F.C.A.); *Attorney General of Canada v. Les Productions Bibi et Zoé Inc*., 2004 FCA 54.

[19] In *Royal Winnipeg Ballet v. Canada (M.N.R.)*, 2006 FCA 87, Sharlow J.A. also notes intention as an important factor.

> 61 . . . 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.

[20] In *Combined Insurance*, the following factors were looked at by the Federal Court of Appeal: a) ownership of work tools; b) chance of profit and risk of loss; c) integration; d) degree of control; e) required presence at workplace and observance of work schedule; f) control of absences for vacation; g) penalties; h) imposition of work methods; i) submission of activity reports; and j) control of quantity and quality of work. There is an ongoing debate whether the factors other than control are independent factors to be considered in their own right or simply additional indicia used to ascertain whether control is present in the circumstances. Because the matter is governed by the *Civil Code of Quebec* and the issue is to be determined under applicable provincial law, I adopt the latter approach. Stated differently, I will use the additional factors noted above as tools to determine whether Langmobile exercised, or had the power to exercise, control over the Language Instructors in a manner consistent with the existence of an employment relationship.

[21] Nadon J.A. in *Combined Insurance* summarizes the case law as follows:

> 35 In my view, the following principles emerge from these decisions:
>
> > 1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship must be looked at in the light of the factors in *Wiebe Door*, *supra*, and in the light of any factor which may prove to be relevant in the particular circumstances of the case;
> > 2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.

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

[22] As a starting point, the Court must consider how the parties themselves defined the nature of their contractual relationship. In the present case, there is an express contract between Langmobile and the Language Instructors which describes the instructors as independent contractors. I accept the parties' uncontradicted evidence that an independent contractor relationship was intended.

[23] While the relationship in the case at bar may not be as unstructured as the teaching relationship in *Academy of Artisans v. Canada (Minister of National Revenue)*, [2001] T.C.J. No. 241(QL), I have no doubt that it is nonetheless the same sort of relationship: the Language Instructors are independent contractors.

[24] Langmobile is in the business of providing language training to daycare-aged children. In the taxation years in question, Langmobile hired 16 Language Instructors to teach various languages to children in daycare. Langmobile was responsible for securing contracts with the daycare centres. Once a contract was secured, Langmobile would contact a Language Instructor to see if that instructor wanted to accept the particular job. It should be noted that Language Instructors are free to accept or refuse any contract. The language training took place at the daycare centre's facilities. The Language Instructors would arrive at their respective daycare centres without reporting at Langmobile's premises first. As noted by Létourneau J.A." in *Livreur Plus*, *supra*, these are factors indicative of an independent contractor relationship.

> 41 The delivery persons had no offices or premises at the applicant's location. They did not have to go to the applicant's location to do their delivery work: *ibid*., page 81. Together with the right to refuse or decline offers of services, these are factors which this Court has regarded as indicating a contract of enterprise or for services rather than one of employment: see *D&J Driveway Inc. v. Minister of National Revenue*, *supra*, paragraph 11.

[25] The Language Instructors worked on a part-time basis and the contract stipulated that they did not have to work exclusively for Langmobile. The Language Instructors did not work for Langmobile unless there was a specific contract. This was noted by Archambault J. in *Beaucaire v. Canada (Minister of National Revenue – M.N.R.)*, 2009 TCC 142, as being a main factor indicating a contract for services.

> 35 In my opinion, another indicator that a contract for services exists rather than a contract of employment is the fact Mr. Beaucaire did not work unless he received a specific contract.

[26] The teachers in the present case provided language services to daycare centres and were unsupervised in providing such services. Specifically, there was no personnel from Langmobile on site to supervise the language training provided by the teachers to the daycare centres. While Langmobile did do some follow-up with the daycare centres to determine the quality of the services provided, this does not amount to control. This distinction is well articulated in *Livreur Plus*:

> 19 Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D&J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue – M.N.R.)*, *supra*, followed in *Jaillet v. Canada (Minister of National Revenue – M.N.R.)*, 2002 FCA 394, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker".

[27] While Langmobile did admit to exercising some control over its workers, I find that the control exercised consisted in monitoring performance, not controlling the Language Instructors themselves. On Langmobile's public web site, it is noted that Langmobile operates in a team environment, provides materials to its instructors and does follow-ups. Web site information, however, has to be taken with a grain of salt as it is like any other promotional material. The Language Instructors were in fact given about one hour of basic training. While the Language Instructors were able to rent language teaching materials from Langmobile, they were also free to use their own teaching material. The control factor clearly points to an independent contractor relationship.

[28] As for ownership of tools, this is dependent on whether the Language Instructors use their own material or choose to rent teaching material from Langmobile. The premises used for teaching are those of the client, namely, the daycare centre, and not Langmobile. Further, any necessary preparation of lesson plans is done by the Language Instructors out of their own home. This factor is inconclusive.

[29] With respect to chance of profit or risk of loss, the teachers did not share in Langmobile's profit or loss, so this factor tends to indicate an employer-employee relationship, but I do not find that it carries much weight.

[30] The situation before me is distinguishable from that in *Teach & Embrace Corp. v. Canada (Minister of National Revenue – M.N.R.)*, 2005 TCC 461. That is a case in which the tutor stated that she believed she was entering into a contract of employment, and the contract itself in fact did not provide expressly that it was not a contract of employment. In the case at bar, the intention that the Language Instructors be independent contractors was shared by the parties and is clearly stated in the contract.

[31] In an article written by him my colleague Archambault J. he states the following:

> As article 1425 [*Civil Code of Quebec*] states, one must look to the real common intention of the parties rather than adhere to the literal meaning of the words used in the contract. The courts must also verify whether the conduct of the parties is consistent with the statutory requirements for contracts.

[32] Further, in *Teach & Embrace*, not only was intention at issue, but the control factor did not point to an independent contractor relationship.

> 23 . . . First, the provisions of the contract reveal that the Payer had the power to direct and control the work performed by the Tutor. In my view, one of the strongest stipulations disclosing such a power is the following: "Under the authority of the 'Corporation', the 'Tutor' is expected to accomplish the following results".

[33] In *Teach & Embrace* there were a number of additional factors which indicated control over the tutors and which are not present in the case at bar, most notably: the majority of services were provided at a central tutoring hall; a dress code was in place; tutors had to provide tutoring based on the Continuums and resources offered by the payor; there was a learning coordinator assigned to a tutor's tutoring location and the coordinator's role was to supervise the operations of the tutoring programs; tutors were to provide academic progress reports based on the payor's Continuums; and the last five minutes of tutoring were to be reserved for a recapitulation of the tutoring session. In addition to these indicia of control, the fact that the tutors in *Teach & Embrace* were subject to a non-competition clause is of importance and, as noted in that case, the existence of such a clause "has been accepted by the courts in the past as an indication of the existence of a contract of employment".

[34] The case at bar is also distinguishable from *NCJ Educational Services Ltd. v. Minister of National Revenue*, 2008 TCC 300 (affirmed by the Federal Court of Appeal, 2009 FCA 131). There were no written contracts between NCJ and the tutors

in that case and the evidence showed that the tutors were unclear about what type of employment relationship existed. A clear contract reflecting the parties' intentions does exist in the present case, however.

[35] While the tutors in *NCJ Educational Services* were allowed to use their own material, the tutoring occurred at NCJ's tutoring hall and Ms. Jacobs (NCJ's founder) was on the premises most of the time. She acknowledged that if she had seen one of her tutors behaving in an improper manner, she would have intervened. In the case at bar, the tutoring takes place at the various daycare centres and is unsupervised. Archambault J. wrote in *NCJ Educational Services*:

> 30 [Ms. Jacobs] did exercise direction or control: by assigning the students to their tutors, by reassigning them in case of the tutor's absence by reason of illness, and by instructing the tutors regarding the length of the tutoring sessions (see Mrs. Hamdane's testimony).
>
> . . .
>
> 37 Another very strong indication of integration, indicative as well of the power of control and direction over the work of the tutors, is the fact that the tutors' services were provided on the premises of NCJ and, most of the time, in the presence of Ms. Jacobs herself.

[36] Further, in *NCJ Educational Services*, Ms. Jacobs would exercise direction or control over the tutors by informing them of the positive or negative comments of parents. She further exercised control by adopting a dress code for male tutors.

[37] The case before me is more similar to *Preddie v. Canada*, 2004 TCC 181, a decision of McArthur J. in a case heard under the informal procedure. In that case, Mr. Preddie worked as a tutor for Sylvan Learning Centre, and after analyzing the *Wiebe Door* and *Sagaz* factors, the Court concluded:

> 19 In conclusion, considering all the evidence as a whole, and on the balance of probabilities, I find the Appellant was in the business of tutoring on his own account. He was so highly skilled, he needed no control. His fee of $15 an hour was a bargained amount. Both parties referred to the relationship as one of independent contractor. The business of Sylvan was to get the students and tutor together. The Appellant was in the business of tutoring.

[38] In conclusion, after considering the intention of the parties, the evidence before me and the factors noted in previous cases, I find the Language Instructors to be independent contractors and allow the appeal.

Signed at Ottawa, Canada, this 16th day of November 2009.

"Robert J. Hogan"

Hogan J.

CITATION:	2009 TCC 535
COURT FILE NO.:	2008-3752(EI)
STYLE OF CAUSE:	LANGMOBILE INC. v. M.N.R. AND SONIA IBARZ
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	August 31 and September 2, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	November 16, 2009

APPEARANCES:

Agent for the Appellant:	Nicole Bianco
Counsel for the Respondent:	Ilinca Ghibu
For the Intervenor:	The Intervenor herself

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada

For the Intervenor:

Name:
Firm: