Docket: 2011-1435(EI)

BETWEEN:

SAMQO TRANSPORT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on March 27, 2012, at Montreal, Quebec.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant:	Amany Naguib
Counsel for the Respondent:	Amin Njonkou Kouandou

JUDGMENT

The appeal is allowed and the decision made by the Minister of National Revenue on February 25, 2011 under the *Employment Insurance Act* is varied in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 2nd day of May 2012.

"Patrick Boyle"

Boyle J.

Citation: 2012 TCC 132
Date: 20120502
Docket: 2011-1435(EI)

BETWEEN:

SAMQO TRANSPORT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The issue to be decided in this case is whether Mr. Mahmoud Nasser was engaged in insurable employment in parts of 2009 and 2010 for purposes of the *Employment Insurance Act* ("*EI Act*") with respect to the work he did for the Appellant. The business of the Appellant, Samqo Transport ("Samqo"), was carried on by Mr. El Haj. The work done by Mr. Nasser for Samqo consisted of helping Mr. El Haj load and unload items being delivered in the truck.

[2] It is significant to note that the Respondent bears the burden of proof in this case because, at least according to its Reply, the Crown was of the view that the work was insurable employment by virtue of paragraph 5(3)(*b*) of the *EI Act* relating to non-arm's length employees and whether their employment constitutes insurable employment. The assumptions relied upon by the Respondent were all in support of that characterization. At the hearing, Respondent's counsel acknowledged that paragraph 5(3)(*b*) of the *EI Act* was irrelevant in helping to determine whether the contract was one of employment or not, and that the Respondent had the onus of establishing that Mr. Nasser was an employee and not an independent contractor.

I. Facts

[3] Mr. El Haj operated Samqo as a delivery business. It had one truck and he was its sole driver. In the period in question, Samqo was delivering for retail establishments such as Sears, Ikea, Bureau en Gros, and Xerox. For some of Samqo's clients, such as Sears, it hired out a truck and driver only. The customer was responsible for loading the truck and for unloading the truck at its delivery customer's destination. For other customers, such as Ikea, Samqo undertook to complete the required deliveries including loading the articles at its customer's premises and unloading the articles at the ultimate customer's home.

[4] If Samqo's services were needed, its customers would contact Mr. El Haj in the evening for deliveries the following day. For Samqo customers for which it agreed to do the loading and unloading, Mr. El Haj would find out the nature of the items to be delivered in order to determine if any were large enough that he would need a helper the following day. Where Samqo had to load and unload large items such as sofas and appliances, Mr. El Haj would contact one of several people he uses for this purpose. In such a case, he normally called Mr. Nasser first as he was experienced and dependable and, in addition, his wife's brother. Mr. El Haj would offer Mr. Nasser work for the following day at a particular customer's beginning at a certain time. There was no predictable end time or fixed end time. Mr. Nasser had the right to accept the work offered for the following day or not. Mr. Nasser had many times refused Mr. El Haj's work offers. Mr. Nasser had other work for other clients and, in addition, worked at his parents' restaurant. Mr. Nasser has a business registration under the name M.O. Transport for his delivery-related work for Samqo and for others.

[5] On occasions, when Mr. Nasser turned down the offered work, Mr. El Haj would go on to call one of the two other subcontractors he used for this purpose in the years in question.

[6] Samqo paid Mr. Nasser $8.00 for each drop-off. This was set at Mr. Nasser's request when he was offered to be paid either by the hour or by the delivery. He received no benefits and no vacation pay.

[7] There was no written contract evidencing this. There was an oral contract that Mr. Nasser agreed to be a subcontractor.

[8] The truck and the dolly used belonged to Samqo and were Samqo's responsibility.

[9] Mr. Nasser paid for his own delivery person's uniform, for his footwear, and for his expenses of getting to the loading destinations. At times he would ride to the loading destination in the Samqo truck with Mr. El Haj.

[10] At the Samqo customer's business, Mr. El Haj and Mr. Nasser loaded the truck together. Mr. El Haj, being the driver, decided upon an efficient delivery schedule based upon the delivery orders he had just received and his knowledge of the city and surrounding area. Once the driving route was set, the loading order followed in reverse so that the last items for delivery were the first items in the truck.

[11] If there was damage to the customer's home or furnishings in the course of the delivery, whichever of Mr. El Haj or Mr. Nasser was responsible for the damage or the breakage was responsible for attending to the needed repairs. The evidence was that Mr. Nasser had caused damage in one case to a customer's light fixture and in another case to a customer's floor and that he was responsible for attending to the repairs or replacements.

[12] Mr. Nasser reported the income received from Samqo as self-employment income for income tax purposes. Samqo issued a T4A to Mr. Nasser as a subcontractor.

[13] Mr. Nasser was paid every second week by cheque. The cheque was on an account named Awni El-Haj/Samqo Transport and was made out to Mahmoud Nasser with M.O. Transport's name also written above the payee line on the cheque. These were paid against M.O. Transport invoices to Samqo identifying the number of orders, the total amount payable and the Samqo cheque number used in payment. No GST or PST is listed however, at least for GST purposes, this may be because Mr. Nasser qualified as a small supplier. There was no evidence either way on this point.

[14] Mr. Nasser worked at least part of 20 days each month on average, although that ranged from 9 days in a month through to 27 days in a month. Samqo did deliveries 7 days a week and took work whenever it could. Samqo's busiest time is on weekends coinciding with weekend shopping habits. There was no clear evidence of either how many deliveries were made in the period in question or any part thereof, or how much Mr. Nasser earned working for Samqo in the period in question. The evidence establishes that the days were far from even with there being only a handful of items to deliver some days, and other days there being 20 or more deliveries.

[15] I could observe that Mr. Nasser was genuinely not good with numbers or dates. He says that, as a result, he does not keep records. He takes a simple approach of choosing to only work with people he trusts. He trusted Mr. El Haj to pay him accurately.

[16] It was clear from the evidence that both Samqo Transport/Mr. El Haj and Mr. Nasser intended their relationship to be one of independent contractor status and not employment status, that they considered it thus throughout the work period and that they reported it as such.

[17] It was clear that neither of them had made any commitment to the other to offer available work nor to accept it when offered.

II. Law and Analysis

[18] Insurable employment under the *EI Act* is defined in paragraph 5(1)(*a*) of that *Act* to be as follows:

INSURABLE EMPLOYMENT	EMPLOI ASSURABLE
5. (1) Type of insurance employment — Subject to subsection (2), insurable employment is	**5. (1) Sens de « emploi assurable »** — Sous réserve du paragraphe (2), est un emploi assurable :
(*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;	*a*) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière;

[19] Article 2085 of the *Civil Code of Québec* (the "*Civil Code*") defines contract of employment as follows:

CHAPTER VII	CHAPITRE SEPTIÈME
CONTRACT OF EMPLOYMENT	DU CONTRAT DE TRAVAIL
Art. 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.	**Art. 2085.** Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre personne, l'employeur.

[20] In contrast, article 2098 defines a contract of enterprise or for services as follows:

CHAPTER VIII	CHAPITRE HUITIÈME
CONTRACT OF ENTERPRISE OR FOR SERVICES	DU CONTRACT D'ENTREPRISE OU DE SERVICE
SECTION I NATURE AND SCOPE OF THE CONTRACT	SECTION 1 DE LA NATURE ET DE L'ÉTENDUE DU CONTRAT
Art. 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.	**Art. 2098.** Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige a lui payer.

[21] Article 2099 provides as follows:

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

[22] It is apparent from several decisions of the Federal Court of Appeal, including *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*, 2004 FCA 68, that the traditionally common law criteria or guidelines mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, 87 DTC 5025, are points of reference in deciding whether there is between the parties a relationship of subordination which is characteristic of a contract of employment or whether there is instead a degree of independence which indicates a contract of enterprise under the *Civil Code*. It is also the case that the parties' mutual intention or stipulation as to the nature of their contractual relations should be considered and may prove to be a helpful tool in interpreting the nature of the contract for purposes of characterizing it under the *Civil Code*. See for example the decisions of the Federal Court of Appeal in *D & J Driveway Inc. v. Canada (Minister of National Revenue)*, 2003 FCA 453, and in *Grimard v. Canada*, 2009 FCA 47, 2009 DTC 5056, wherein the intention of the parties is described as an important factor to be considered in characterizing a contract for purposes of the *Civil Code*.

[23] The traditional common law tests or guidelines for a contract of service/employment versus a contract for services/independent contractor are well-settled. Insurable employment is to be resolved by determining whether the individual is truly operating a business on his or her own account. See the decisions in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, and in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, 87 DTC 5025.

[24] This question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines including: 1) the intent of the parties; 2) control over the activities; 3) ownership of tools; 4) chance of profit or risk of loss. There is no predetermined way of applying the relevant factors and their relative importance and their relevance will depend upon the particular facts and circumstances of each case.

[25] The decision of the Federal Court of Appeal in *Royal Winnipeg Ballet v. Canada (Minister of National Revenue),* 2006 FCA 87, 2006 DTC 6323, and in several later cases, highlights the importance of the parties' intentions and of the control criterion in these determinations.

[26] The antinomy between civil law and common law analyses of insurable employment for EI purposes is detailed by the Federal Court of Appeal in *Grimard*, at paragraphs 27 through 46. I would refer in particular to paragraph 43:

> 33 As important as it may be, the intention of the parties is not the only determining factor in characterizing a contract: see *D&J Driveway Inc. v. Canada (M.R.N.),* 2003 FCA 453; *Dynamex Canada Inc. v. Canada,* 2003 FCA 248. In fact, the behaviour of the parties in performing the contract must concretely reflect this mutual intention or else the contract will be characterized on the basis of actual facts and not on what the parties claim.
>
> . . .
>
> 36 In *Wolf v. The Queen*, [2002] 4 F.C. 396, our colleague Mr. Justice Décary cited the following excerpt written by the late Robert P. Gagnon in his book entitled *Le droit du travail au Québec*, 5th ed.(Cowansville: Les Éditions Yvon Blais, 2003), page 67, and clarifying the content of the notion of subordination in Quebec civil law:
>
> > [TRANSLATION]
> >
> > Historically, the civil law first developed a so-called strict or classical concept of legal subordination that was used as a test for the application of the principle of the civil liability of a principal for injury caused by the fault of his agents and servants in the performance of their duties (art. 1054 C.C.L.C.; art. 1463 C.C.Q.). This classical legal subordination was characterized by the immediate control exercised by the employer over the performance of the employee's work in respect of its nature and the means of performance. Gradually, it was relaxed, giving rise to the concept of legal subordination in a broad sense. The diversification and specialization of occupations and work techniques often mean that the employer cannot realistically dictate regarding, or even directly supervise, the performance of the work. Thus, subordination has come to be equated with the power given a person, accordingly recognized as the employer, of determining the work to be done, overseeing its performance and controlling it. From the opposite perspective, an employee is a person who agrees to be integrated into the operating environment of a business so that it may receive

> benefit of his work. In practice, one looks for a number of indicia of supervision that may, however, vary depending on the context: compulsory attendance at a workplace, the fairly regular assignment of work, imposition of rules of conduct or behaviour, requirement of activity reports, control over the quantity or quality of the work done, and so on. Work in the home does not preclude this sort of integration into the business.
>
> [Emphasis added.]

37 This excerpt mentions the notion of control over the performance of work, which is also part of the common law criteria. The difference is that, in Quebec civil law, the notion of control is more than a mere criterion as it is in common law. It is an essential characteristic of a contract of employment: see *D&J Driveway*, *supra*, at paragraph 16; and *9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334.

38 However, we may also note in the excerpt from Mr. Gagnon that, in order to reach the conclusion that the legal concept of subordination or control is present in any work relationship, there must be what the author calls [TRANSLATION] "indicia of supervision", which have been called "points of reference" by our Court in *Le Livreur Plus Inc. v. MNR*, 2004 FCA 68 at paragraph 18; and *Charbonneau v. Canada (Minister of National Revenue – M.N.R.)* (1996), 207 N.R. 299, at paragraph 3.

39 For example, under Quebec civil law, integration of a worker within a business is an indicator of supervision that is important or useful to find in order to determine whether legal subordination exists. Is that not also a criterion or a factor that is used in common law to define the legal nature of an existing employment contract?

40 Likewise, as a general rule, it is the employer and not the employee who makes the profits and incurs the losses of the business. In addition, the employer is liable for the employee's actions. Are these not practical indicators of supervision, indicating the existence of legal subordination in Quebec civil law as well as in common law?

41 Finally, is the criterion of the ownership of work tools that is used by the common law not also an indicator of supervision that would be useful to examine? Depending on the circumstances, it may reveal the degree of an employee’s integration into the business or his or her subordination to or dependence on it. It may help to establish the existence of legal subordination. In a contract of employment, more often than not, the employer supplies the employee with the tools required to perform the work. However, it seems to me to be much more difficult to conclude that there is integration into a business when the person performing the work owns his or her own truck with his or her name advertised on

> the side and containing some $200,000 worth of tools to perform the tasks that he or she does and markets.
>
> 42 It goes without saying, in both Quebec civil law and common law, that, when examined in isolation, these indicia of supervision (criteria or points of reference) are not necessarily determinative. For example, in *Vulcain Alarme Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 749, (1999), 249 N.R. 1, the fact that the contractor had to use expensive special detection equipment supplied by the client to check and gauge toxic substance detectors was not considered to be sufficient in itself to transform what was a contract for services into a contract of employment.
>
> 43 In short, in my opinion there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.

[27] Similarly, this had been addressed by the Federal Court of Appeal in *Livreur Plus Inc*., at paragraphs 18 through 20 as follows:

> 18 In these circumstances, the tests mentioned in *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025, namely the degree of control, ownership of the work tools, the chance of profit and risk of loss, and finally integration, are only points of reference: *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)* (1996), 207 N.R. 299, paragraph 3. Where a real contract exists, the Court must determine whether there is between the parties a relationship of subordination which is characteristic of a contract of employment, or whether there is instead a degree of independence which indicates a contract of enterprise: *ibid*.
>
> 19 Having said that, in terms of control the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it: *Vulcain Alarme Inc. v. The Minister of National Revenue*, A-376-98, May 11, 1999, paragraph 10, (F.C.A.); *D & J Driveway Inc. v. The Minister of National Revenue*, *supra*, at paragraph 9. As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, *supra*, followed in *Jaillet v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 394, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker".

> 20 I agree with the applicant's arguments. A subcontractor is not a person who is free from all restraint, working as he likes, doing as he pleases, without the slightest concern for his fellow contractors and third parties. He is not a dilettante with a cavalier, or even disrespectful, whimsical or irresponsible, attitude. He works within a defined framework but does so independently and outside of the business of the general contractor. The subcontract often assumes a rigid stance dictated by the general contractor's obligations: a person has to take it or leave it. However, its nature is not thereby altered, and the general contractor does not lose his right of monitoring the results and the quality of the work, since he is wholly and solely responsible to his customers.

[28] The Federal Court of Appeal similarly wrote in *D & J Driveway Inc.* as follows:

> 2 It should be noted at the outset that the parties' stipulation as to the nature of their contractual relations is not necessarily conclusive and the Court which has to consider this matter may arrive at a contrary conclusion based on the evidence presented to it: *Dynamex Canada Inc. v. Canada*, [2003] 305 N.R. 295 (F.C.A.). However, that stipulation or an examination of the parties on the point may prove to be a helpful tool in interpreting the nature of the contract concluded between the participants.

[29] The Court in *D & J Driveway Inc.* went on to acknowledge at paragraph 4 that the criteria developed in *Wiebe Door Services* can be referred to in assessing whether a relationship of subordination exists under the *Civil Code*.

III. Control

[30] It is clear that considerations of the extent of control of the payor over the worker are significant in deciding whether there is an employment relationship by virtue of subordination. The language of the *Civil Code* contemplates an obligation or an undertaking of the worker to do work according to the instructions and under the direction or the control of the other person.

[31] It is the Respondent’s position that each day during which Mr. Nasser worked for Samqo, having agreed to work the evening before, constituted separate employment for a day. While it may be possible to be an employee for a day, it would certainly be unusual and out of the ordinary. I will also consider whether Mr. Nasser undertook some form of employment throughout the period in question.

[32] It is clear from the evidence that it was not open to Samqo and Mr. El Haj to require Mr. Nasser to work on any given day. The days of work were entirely in the control of Mr. Nasser who had the right to accept or not whether to work the following day upon the work being offered to him the evening before. Mr. Nasser was not subject to any obligatory hours or days of availability.

[33] On the other hand, once he had agreed to work on any given day, it was Mr. El Haj, being the driver, who set the route and therefore determined the order in which articles were to be loaded into the truck and then unloaded at their destination. The work involved was manual labour involving loading and unloading articles into and from a truck. The method of doing that on a repetitive basis does not require much direction or control with respect to any particular piece being loaded and unloaded.

[34] The evidence was that on the days Mr. Nasser worked, he and Mr. El Haj worked evenly in an obvious manner and that indeed, many of the persons to whom the goods were delivered dealt with Mr. Nasser as though he were in charge and Mr. El Haj was merely the driver.

[35] I am not satisfied that this degree of control is sufficient when considered alone to be the type of direction and control to which article 2085 of the *Civil Code* is referring. Considering this aspect alone, it appears to be better described in article 2098 as the contractor undertaking to carry out physical work for another person for a price without any relationship of subordination per article 2099.

IV. Intention

[36] It is clear that it was always the intention of both parties that this be an independent contractor relationship and that they treated it as such. This was the terms of their oral contract. Samqo issued a T4A and Mr. Nasser reported it as self-employment income. Nothing the parties specifically did would have been inconsistent with the characterization of a contract for services. That does not mean that taken as a whole, having considered all of the governing indicia, there may not be an overall degree of direction and control and subordination sufficient to make it employment.

[37] I would note that this would appear to be less control than the Royal Winnipeg Ballet exercised over its dancers in its business, given that Mr. Nasser could always turn down work offered for the following day. So it would certainly not be a degree

of control that would preclude or be necessarily inconsistent with Mr. Nasser having independent contractor status having regard to the *Wiebe Door Services* common law analysis.

V. Ownership of Tools

[38] In this case, Samqo and Mr. El Haj owned the truck and the dolly and were responsible for maintaining and operating the truck. Since Mr. Nasser was only hired to do loading and unloading, ownership of the truck is not particularly relevant or helpful either way.

[39] The evidence is that Mr. Nasser was responsible for purchasing the uniform required, was responsible for his footwear and was responsible for the expenses of getting to the morning loading point each day, although he did sometimes make arrangements to travel with Mr. El Haj. This is consistent with an independent contractor relationship.

VI. Chance of Profit/Risk of Loss/Financial Performance

[40] In this case Mr. Nasser was not assured of any regular income or work. His revenues would be simply $8.00 per delivery made on days he was offered and accepted work. While he had no risk of actual loss, he was at risk of receiving little or no income. Mr. Nasser also took the financial risk of damages caused by him during deliveries which risk he bore and on occasion incurred.

VII. Conclusion

[41] Having considered all of the relevant facts as they relate to the indicia of subordination, I am not satisfied that the Respondent was able to discharge the burden of proof on it in this case to establish on a balance of probabilities that Mr. Nasser was an employee of Samqo. In reaching this conclusion, I am mindful of the comments of the Federal Court of Appeal in *D & J Driveway Inc.* wherein it concluded that ". . . it is legally incorrect to conclude that a relationship of subordination existed, and that there was consequently a contract of employment, when the relationship between the parties involved sporadic calls for the services of persons who were not in any way bound to provide them and could refuse them as they saw fit."

[42] The appeal is allowed.

Signed at Ottawa, Canada, this 2nd day of May 2012.

"Patrick Boyle"

Boyle J.

CITATION:	2012 TCC 132
COURT FILE NO.:	2011-1435(EI)
STYLE OF CAUSE:	SAMQO TRANSPORT AND THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	March 27, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	May 2, 2012

APPEARANCES:

Agent for the Appellant:	Amany Naguib
Counsel for the Respondent:	Amin Njonkou Kouandou

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada