Docket: 2004-1336(EI)

BETWEEN:

9079-6038 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 18, 2005, at Sherbrooke, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Louis Panneton

Counsel for the Respondent: Agathe Cavanagh

JUDGMENT

The appeal is dismissed and the decisions made by the Minister are confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 1st day of December 2005.

"Paul Bédard"

Bédard J.

Translation certified true
on this 1st day of May 2008.

Brian McCordick, Translator

Citation: 2005TCC743
Date: 20051201
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REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal from decisions that the work done by the following workers for the Appellant meets the requirements of a contract of service within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* ("the Act"):

> Patrice Blais, from October 1, 2002 to April 8, 2003,
> Gino Gauthier, from June 18 to July 19, 2002,
> Rémi Jean, from September 3 to October 31, 2002,
> Nicolas Élie Rodrigue, from June 18 to July 23, 2002,
> Stéphane Thiboutot, from August 5 to December 31, 2002,
> André Tremblay, from June 18 to July 23, 2002,
> Éric Tremblay, from October 8 to December 31, 2002,
> ("the promotional agents"),
>
> Pierre-Luc Blackburn, from December 2 to December 23, 2002,
> Benoît Gauthier, from January 1 to June 22, 2002,
> ("the representatives") and
>
> Nathalie Gagnon, from June 17 to July 24, 2002,
> ("the team leader").

[2] In order to explain his decisions, the Minister of National Revenue ("the Minister") relied on the following assumptions of fact, which are set out in paragraph 5 of the Reply to the Notice of Appeal, and were admitted to or denied by the Appellant, as stated in parentheses:

[TRANSLATION]

5. (a) The Appellant was incorporated on July 9, 1999. (admitted)

(b) The Appellant operated a business that sold and installed security systems. (admitted)

(c) The Appellant carried on business under the name Maxxcom systèmes de sécurité. (admitted)

(d) The Appellant was an authorized agent of ADT Canada. (admitted)

(e) The Appellant had its head office in Sherbrooke and branch offices in Chicoutimi and St-Jean-sur-Richelieu. (admitted)

(f) The Appellant had customers in these three municipalities and their environs. (denied)

(g) The Appellant gave its customers an alarm system provided they signed a three-year service contract with ADT Canada. (denied as worded)

(h) The Appellant had a telemarketing department which solicited customers by phone. (admitted)

(i) In addition, the Appellant had two categories of salespeople: promotional agents and sales representatives. (admitted)

(j) The promotional agents went from door to door in order to sell ADT Canada's services. (admitted)

(k) The representatives visited potential customers that the telemarketing service had already identified. (denied as worded)

PATRICE BLAIS, GINO GAUTHIER, RÉMI JEAN, NICOLAS ÉLIE RODRIGUE, STÉPHANE THIBOUTOT, ANDRÉ TREMBLAY AND ÉRIC TREMBLAY

(l) Patrice Blais, Gino Gauthier, Rémi Jean, Nicolas Élie Rodrigue, Stéphane Thiboutot, André Tremblay and Éric Tremblay (the promotional agents) were hired by the Appellant as promotional agents. (admitted)

(m) Each promotional agent signed a work agreement with the Appellant. (admitted)

(n) The promotional agents were grouped together in a team placed under a team leader. (denied as worded)

(o) They worked as a team. (denied as worded)

(p) The Appellant motivated and trained the promotional agents. (denied)

(q) The Appellant assigned each promotional agent team territories to canvass (denied as worded)

(r) The promotional agents were not free to choose the territory that they canvassed. (denied)

(s) The promotional agents travelled together in a vehicle that belonged to the Appellant. (denied as worded)

(t) Each promotional agent had to comply with the work schedule set by the team leader for the team members. (denied as worded)

(u) The teams's work schedule was generally Monday to Friday from 8 a.m. to 5 p.m. or from 1 p.m. to 8:30 p.m. (denied as worded)

(v) A promotional agent had to notify his or her team leader in the event of an absence. (denied)

(w) The promotional agents' hours of work were controlled by the Appellant because they travelled with the team leader. (denied)

(x) The promotional agents had to learn a presentation script prepared by the Appellant. (denied as worded)

(y) The promotional agents had to follow the pricing established by ADT Canada. (admitted)

(z) The promotional agents had to leave a placard on the lawn of the visited house in order to show their team leader where they were. (admitted)

(aa) At the end of each day, the promotional agents handed their team leader the contracts that were signed. (admitted)

(bb) The promotional agents were paid solely by commission. (admitted)

(cc) The promotional agents received a $100 commission per three-year service agreement and a 15% commission on additional products sold. (admitted)

(dd) The promotional agents were paid weekly by direct deposit. (admitted)

(ee) The Appellant transported the promotional agents to the area where they were to canvass from door to door and supplied them with ADT Canada contracts, flyers, placards, binders and vests. (denied)

(ff) The promotional agents had no expenses to incur as part of their work. (denied)

(gg) The promotional agents bore no financial risks. (denied)

(hh) The promotional agents had no sales quota to meet, but they were dismissed if the Appellant considered their sales insufficient. (denied as worded)

(ii) The Appellant paid the requisite workers' compensation premiums to the CSST for the promotional agents. (admitted)

(jj) The promotional agents could not get someone to perform their duties for the Appellant in their place. (denied)

(kk) The promotional agents' work was integrated into the Appellant's activities. (denied)

(ll) On or about August 29, 2002, the Commission des normes du travail claimed $835.38 from the Appellant, consisting of $802.25 in unpaid wages and $32.13 in vacation pay for promotional agent Nicolas Élie Rodrigue. (admitted)

PIERRE-LUC BLACKBURN AND BENOÎT GAUTHIER

(mm) Pierre-Luc Blackburn and Benoît Gauthier were hired by the Appellant as representatives. (admitted)

(nn) Benoît Gauthier spent 20% of his time at work as a promotional agent and the rest of his time as a representative. (admitted)

(oo) Each representative signed a work agreement with the Appellant. (admitted)

(pp) The Appellant scheduled the representatives' appointments with prospective customers. (denied as worded)

(qq) The representatives had to comply with the appointment schedule set by the Appellant. (denied as worded)

(rr) The representatives were not free to choose a territory. (denied)

(ss) The representatives' work schedule was usually Monday to Friday from 1 p.m. to 9 p.m. (denied as worded)

(tt) The representatives' hours of work were controlled by the number of appointments. (denied as worded)

(uu) The representatives had to follow the pricing established by ADT Canada. (admitted)

(vv) The representatives submitted the signed contracts to the Appellant as quickly as possible. (admitted)

(ww) The representatives had to contact the Appellant every week in order to report. (denied as worded)

(xx) The representatives were paid solely by commission. (admitted)

(yy) The representatives received a $100 commission for each three-year service agreement and a 15% commission on additional products sold. (admitted)

(zz) The representatives were paid weekly by direct deposit. (admitted)

(aaa) The Appellant provided the representatives with the ADT Canada contracts and the flyers, placards, binders and vests. (denied as worded)

(bbb) The representatives generally provided their own cars. (admitted)

(ccc) For a period of time, the Appellant provided a vehicle and cell phone to representative Benoît Gauthier. (admitted)

(ddd) The Appellant paid the representatives $20 in automobile expenses per contract signed. (admitted)

(eee) The representatives had no sales quotas to meet but were dismissed if the Appellant considered their sales insufficient. (denied as worded)

(fff) The Appellant paid the requisite workers' compensation premiums to the CSST for the representatives. (admitted)

(ggg) The representatives could not get someone to perform their duties for the Appellant in their place. (denied)

(hhh) The representatives' work was integrated into the Appellant's activities. (denied)

NATHALIE GAGNON

(iii) Nathalie Gagnon was hired by the Appellant as an administration specialist for the first two weeks, and was then made a team leader. (admitted)

(jjj) As an administration specialist, Nathalie Gagnon did office work for the Appellant and was in charge of hiring and dismissing staff. (denied)

(kkk) She worked at the Chicoutimi office. (admitted)

(lll) Two weeks later, Lise-Anne Boucher replaced Nathalie Gagnon as an administration specialist at the Chicoutimi office. (admitted)

(mmm) As a team leader, Nathalie Gagnon determined the neighbourhood that her team's promotional agents would canvass each day, drove the Payor's vehicle, and collected the signed contracts. (admitted)

(nnn) The Appellant and Nathalie Gagnon signed a work contract. (admitted)

(ooo) As a team leader, Nathalie Gagnon travelled with the promotional agents in a vehicle belonging to the Appellant. (admitted)

(ppp) As team leader, Nathalie Gagnon had the same work schedule as the promotional agents on the team. (denied as worded)

(qqq) As team leader, Nathalie Gagnon's work schedule was generally Monday to Friday from noon to 8:30 p.m. (denied as worded)

(rrr) Nathalie Gagnon's hours of work were controlled by the Appellant because she worked and travelled with the promotional agent team. (denied)

(sss) At the end of each day, Nathalie Gagnon submitted the signed contracts to Lise-Anne Boucher. (admitted)

(ttt) Nathalie Gagnon was paid solely by commission. (admitted)

(uuu) Nathalie Gagnon received a $150 commission if her team's promotional agents made 10 sales during the week. (admitted)

(vvv) If there were more than 10 sales, she received an additional bonus. (admitted)

(www) She did not receive a commission if there were fewer than 10 sales during the week. (admitted)

(xxx) Nathalie Gagnon was paid weekly by direct deposit. (admitted)

(yyy) Nathalie Gagnon had no expenses to incur as part of her work. (denied)

(zzz) The Appellant paid the necessary workers' compensation premiums to the CSST for Nathalie Gagnon. (admitted)

(aaaa) Nathalie Gagnon could not get a replacement to perform her duties for the Appellant. (denied)

(bbbb) Nathalie Gagnon's work was integrated into the Appellant's activities. (denied)

Preliminary remarks

[3] Martin Croteau, an appeals officer with the Canada Customs and Revenue Agency, was the Respondent's only witness.

[4] The Appellant's witnesses were François Landreville, the Appellant's president; Hélène Lemire, a Canada Pension Plan and Employment Insurance interpretation officer in 2000 and 2001 who made a determination, on March 13, 2001, that the employment of the Appellant's employees was not insurable; and Luc Baril, a representative working for the Appellant but who was one

of its agents in 2002. It should be noted that Mr. Baril was not covered by the Respondent's decisions in the case at bar.

[5] Counsel for the Respondent objected to Hélène Lemire's testimony from the outset, because Mr. Landreville testified that he sent a letter to Ms. Lemire because he knew her, as she was the person who had rendered a decision in 2001 regarding those of the Appellant's workers who were not contemplated by the instant appeal and involving periods not in issue here. I would immediately like to emphasize that I did not take Ms. Lemire's testimony into account in my decision. Firstly, the decision which she rendered, and which, of course, is not binding on me, was about the workers not contemplated by the instant appeal and pertained to periods not covered by the instant case. Secondly, her decision was particularly uninformative because it was based entirely on information that Ms. Lemire obtained from the Appellant, and thus, was obtained without questioning and meeting the workers to whom her decision applied.

[6] The parties provided the Court with certain decisions, including the decisions of this Court in *Shaw Communications Inc. v. Canada (Minister of National Revenue – M.N.R.)*, 2003 D.T.C. 1459, [2002] T.C.J. No. 314, affirmed by the Federal Court of Appeal, 2003 D.T.C. 5707, [2003] F.C.J. No. 541, and *Fatt v. Canada (Minister of National Revenue – M.N.R.)*, [2001] T.C.J. No. 239, as well as the decisions of the Federal Court of Appeal in *Hennick v. Canada (Minister of National Revenue – M.N.R.)*, 179 N.R. 315, [1995] F.C.J. No. 294, *Vulcain Alarme Inc. v. Canada (Minister of National Revenue – M.N.R.)*, 249 N.R. 1, [1999] F.C.J. No. 749, and *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553.

Analysis

The law

[7] When the courts must define concepts from Quebec private law to apply federal legislation such as the *Employment Insurance Act*, they must follow the rule of interpretation in section 8.1 of the *Interpretation Act*. To determine the nature of a Quebec employment contract and distinguish it from a contract for services, one must apply the relevant rules of the *Civil Code of Québec* (the "Civil Code"), at least since June 1, 2001. These rules are not consistent with the rules stated in decisions such as *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.R. 983 and *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553. Contrary to the situation with the common law, the constituent elements of a contract of employment have been codified, and, since the coming into force of articles 2085 and 2099 of the Civil Code on January 1, 1994, the courts no longer have the same latitude as the common law courts to define what constitutes an employment contract. If it is necessary to rely on previous court decisions to determine whether there was a contract of employment, one must choose decisions with an approach that conforms to civil law principles.

[8] The Civil Code contains distinct chapters governing the "contract of employment" (articles 2085 to 2097) and the "contract of enterprise or for services" (articles 2098 to 2129).

[9] Article 2085 states that 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.

[10] Article 2098 states that a contract of enterprise

> . . . 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.

[11] Article 2099 follows, and states:

> 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.

[12] It can be said that the fundamental distinction between a contract for services and a contract of employment is the absence, in the former case, of a relationship of subordination between the provider of services and the client, and the presence, in the latter case, of the right of the employer to direct and control the employee. Thus, what must be determined in the case at bar is whether there was a relationship of subordination between the Appellant and the workers.

[13] The Appellant has the burden of proving, on a balance of probabilities, the facts in issue that establish its right to have the Minister's decision vacated. It must prove the contract entered into by the parties and establish their common intention with respect to its nature. If there is no direct evidence of that intention, the Appellant may turn to indicia from the contract and the Civil Code provisions that govern it. In the case at bar, if the Appellant wishes to show that there was no employment contract, it will have to prove that there was no relationship of subordination. In order to do so, it may, if necessary, prove the existence of indicia of independence such as those stated in *Wiebe Door*, *supra*, namely the ownership of tools, the risk of loss and the chance of profit. However, in my opinion, contrary to the common law approach, once a judge is satisfied that there was no relationship of subordination, that is the end of the judge's analysis of whether a contract for services existed. It is then unnecessary to consider the relevance of the ownership of tools or the risk of loss or chance of profit, since, under the Civil Code, the absence of a relationship of subordination is the only essential element of a contract for services that distinguishes it from a contract of employment. Elements such as the ownership of tools, the risk of loss or the chance of profit are not essential elements of a contract for services. However, the absence of a relationship of subordination is an essential element. For both types of contract, one must decide whether or not a relationship of subordination exists. Obviously, the fact that the worker behaved like a contractor could be an indication that there was no relationship of subordination.

[14] Ultimately, courts will usually have to make a decision based on the facts shown by the evidence regarding the performance of the contract, even if the intention expressed by the parties suggests the contrary. If the evidence regarding the performance of the contract is not conclusive, the Court can still make a decision based on the parties' intention and their description of the contract, provided the evidence is probative with respect to these questions. If that evidence is not conclusive either, the appeal will be dismissed on the basis that there is insufficient evidence.

The promotional agents

Relationship of subordination

[15] Did the promotional agents work under the control or direction of the Appellant, or, alternatively, did the Appellant have the ability or right to direct or control them?

[16] It is certainly true that the work agreement between the Appellant and the promotional agents unambiguously states that the agent understands that he or she is an independent contractor. However, even though the parties to the contract clearly manifested their intention in their written contract, I am not required to consider this decisive. In order for it to be decisive, the contract must also have been performed in a manner that is consistent with its content. The fact that the parties stipulated that the work would be performed by an independent contractor does not mean that there is no employer-employee relationship. There is simply no question that I must verify whether the contractual stipulation is consistent with reality. In my opinion, this verification is essential, because it is too often in the parties' interests to conceal the true nature of a contract. Indeed, too frequently, employers who wish to reduce the tax burden associated with their payroll decide to treat their employees like independent contractors. Often, employees do not negotiate their contracts on a level playing field, and this leads to contracts that I would describe as contracts of adhesion. Those employees generally need work urgently, and sign the contract as submitted to them by their employer without any negotiation whatsoever. This is why one must carefully verify whether the contractual stipulation is consistent with the actual facts.

[17] I feel it important to restate that, if the Appellant in the case at bar wishes to show that there was no employment contract, it must prove, on a balance of probabilities, that there was no relationship of subordination. I also feel it worth noting that, if the evidence discloses elements that point both to autonomy and subordination, I must find that there was an employment contract, because there can be no subordination in a contract for services. This is what Picard J. held in *Commission des normes du travail v. 9002-8515 Québec Inc.*, REJB 2000-18725 at paragraph 15 (item 5) (Que. S.C.), where he stated:

> [TRANSLATION]
>
> 15 In order for a contract of enterprise to exist, there must be no relationship of subordination. In the case at bar, there are sufficient indicia of a relationship of authority.

[18] Were the promotional agents free to choose the "time and place" of work? These are two of the indicia that must be examined in cases such as this one, where it must be determined whether there was a relationship of subordination between the promotional agents and the Appellant. To state the question in another way, could the promotional agents freely choose their territory and hours of work? Although the answer to this question is not necessarily decisive in and of itself, the issue must nevertheless be analyzed. It must also be examined and assessed having regard to a whole series of factual indicia that will also be considered.

[19] The facts set out in the Reply to the Notice of Appeal with respect to the time and place of the work, and on which the Respondent relied in determining that the promotional agents were employed in insurable employment under a contract of service, are as follows:

> [TRANSLATION]
>
> 5. (o) They worked as a team.
>
> 5. (q) The Appellant assigned each promotional agent team territories to canvass.
>
> 5. (r) The promotional agents were not free to choose the territory that they canvassed.
>
> 5. (s) The promotional agents travelled together in a vehicle that belonged to the Appellant.

5. (t) Each promotional agent had to comply with the work schedule set by the team leader for the team members.

5. (u) The teams's work schedule was generally Monday to Friday from 8 a.m. to 5 p.m. or from 1 p.m. to 8:30 p.m.

5. (v) A promotional agent had to notify his or her team leader in the event of an absence.

5. (w) The promotional agents' hours of work were controlled by the Appellant because they travelled with the team leader.

[20] The Appellant needed to demonstrate, on a balance of probabilities, that these factual statements were inaccurate. The Appellant's evidence in this regard essentially relied on the testimony of its president Mr. Landreville, and on the testimony of Mr. Baril.

[21] Mr. Landreville's testimony can be summarized as follows:

(i) The promotional agents were free to choose their territory, provided it was located within the sector that ADT had assigned to them.

(ii) They were free to work as a team. They were also free to travel in the Appellant's vehicle. Mr. Landreville's testimony on this point is worth quoting:

> [TRANSLATION]
>
> Some travelled in a municipal bus. Others travelled in their own vehicle. Normally what happened was that these people were friends outside work as well, so they liked to work together because it was more enjoyable to work as a team than to work alone.[1]

(iii) The promotional agents were free to work at the times that suited them.[2] No hours of work were imposed on them.

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[1] Page 43 of the transcript.

[2] *Ibid*.

(iv) The Appellant did not control its promotional agents' hours of work.[3] The agents did not notify their team leaders when they were going to be absent. Mr. Landreville even added that several days sometimes elapsed before the Appellant found out that a promotional agent had decided not to work anymore.[4]

[22] Mr. Baril lent some support to Mr. Landreville's testimony on these facts. It should be recalled that he was not one of the promotional agents or sales representatives contemplated by the Respondent's decisions. However, he testified that he was a sales representative with the Appellant at the time of the hearing, and that he was one of its promotional agents in 2002.

[23] Mr. Landreville's testimony on these points struck me as being worthy of little credence because it was implausible. If I am to believe the two witnesses, anarchy reigned. There was no direction or control over the time or place of work. The Appellant's management did not monitor the agents' activities. The promotional agents randomly hit the ground within the territory. I cannot imagine that an authorized ADT agent with a modicum of intelligence, and therefore interested in having its territory covered by its promotional agents in a rational manner, would give those agents total freedom of choice over their territory and complete freedom to work on the days and at the times that suited them, without being monitored in any way. In my humble opinion, anarchy and profit-seeking do not go hand in hand. I can understand how the Appellant could and had to be flexible in these regards, given the nature of the work and the method of remuneration, but trying to have me to believe that the Appellant issued no directives and did not monitor the time and place of work is going too far. The Appellant was free to call the agents as witnesses to support its assertions on these points. It did not do so. The inference that I draw from this is that such evidence would have been unfavourable to the Appellant. The Appellant preferred to support its assertions with the testimony of Mr. Baril, who, as we know, was still working for the Appellant.

[24] In addition, the following facts were established by the testimony of Mr. Croteau, whose credibility is not in doubt, and by his report,[5] to which I accorded great probative value even though it constitutes hearsay:

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[3] *Ibid*.

[4] Page 73 of the transcript.

[5] Exhibit I-3.

(i) All the agents questioned by Mr. Croteau worked as a team and travelled with the other agents in the Appellant's vehicle, which was driven by a team leader who supervised them.

(ii) All the agents questioned by Mr. Croteau worked Monday to Friday, either from 8 a.m. to 5 p.m or from 11:30 a.m. to 9 p.m. Only Rémi Jean worked part-time for the Appellant, because he worked part-time for another employer as well.

(iii) Certain agents sometimes worked Saturdays.

[25] In my opinion, the Appellant's control over the time and place of work was indirect and subtle, if not insidious. The agents were unemployed. They needed to work. For practically all the agents, this was their only job. The Appellant did not reimburse any expenses. However, the agents could get to the places that they would have to canvass for free in the Appellant's vehicle. In fact, almost all the agents told Mr. Croteau that they used this transportation method, which the Appellant made available to them free of charge.[6] In my opinion, the Appellant thereby indirectly controlled the promotional agents' work schedules because the agents travelled with their team leader in the Appellant's vehicle. Indeed, given the particular facts of this case, the promotional agents' freedom with respect to the "time and place" was illusory at best. As Mogan J. of this Court noted in *Shaw*:[7]

> An individual who sells a single product . . . provided by a single supplier . . . at a price determined by the supplier, and is compensated 100% by commission may appear to have significant freedom in choosing when and where to work. That freedom, however, is more apparent than real when the individual relies on the commission income to earn a living. . . . The need to earn a living is a powerful incentive for self-discipline and a strong work ethic. . . .

Based on this, I find that, in the case at bar, the Appellant controlled the time and the place of the promotional agents' work – two important factors in determining whether or not a relationship of subordination existed.

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[6] Exhibit I-3.

[7] *Shaw Communications Inc. v. Canada (Minister of National Revenue – M.N.R.), supra,* at paragraph 44.

[26] Moreover, most of the promotional agents told Mr. Croteau[8] that they worked as a team under their team leader's supervision. The team leader's supervision was not demonstrated solely by the team leader's decision as to the time and place of work; in addition, the promotional agents also had to work in accordance with the rules of conduct and behaviour imposed on them by the Appellant. Moreover, certain workers stated as follows to Mr. Croteau:

(i) The team leaders did simulations to help the workers learn sales techniques.

(ii) The promotional agents had a script to learn and had to recite it to the customer in order to increase their chances of a sale. The team leaders helped the agents when they had problems.

(iii) The promotional agents had to leave an ADT placard on the lawn of the house that they were visiting so that their team leader would know where they were.

(iv) At the end of each day, the promotional agents handed the signed contracts to their team leader.

[27] Did the Appellant itself not acknowledge that the promotional agents were employees when at least two of them, Mr. Tremblay and Mr. Rodrigue, signed its departure form, in which the terms [TRANSLATION] "cessation of employment", [TRANSLATION] "termination of employment" and [TRANSLATION] "employment" are repeatedly used?[9] Mr. Landreville's testimony on this point during his cross-examination is worth quoting:[10]

[TRANSLATION]

Q. This is a departure form signed by Maxxcom…

A. Yes.

Q. … and by the employee.

---

[8] Exhibit I-3.

[9] Exhibit I-1.

[10] Page 88 of the transcript.

> A. Yes. Nicolas Élie. Well, he was one of the employees, perhaps more of a professional one, who met with his team leader to tell him that he was leaving in order to start a new job. At that time, where possible, a departure form was signed in order to avoid a dispute.

[28] It is important to recall that the Appellant admitted to making the requisite workers' compensation premiums to the CSST in respect of its promotional agents. Would a business that considers its workers independent contractors generally pay such premiums?

[29] Furthermore, I find that the following facts adduced in evidence demonstrate very clearly that the agents' work was highly integrated into the Appellant's activities. Not only are the following facts indicia of subordination when considered individually, they also constitute, when considered as a whole, what I would call the "integration into the enterprise" indicia of subordination:

(i) Almost all the promotional agents worked only for the Appellant during the periods in issue.[11]

(ii) The Appellant provided them with all the supplies, equipment and other items necessary to do their work. Specifically, the flyers, placards, contracts, binders, vests and polo shirts were all supplied to them.[12]

(iii) They did not personally have a travelling salesperson permit that allowed them to do door-to-door sales. In the case at bar, they did this under the Appellant's travelling salesperson permit.

(iv) The customers who were served were not the promotional agents' customers, but, rather, ADT's or the Appellant's customers.[13]

(v) The agents could not negotiate the terms and conditions of the contracts of sale. The Appellant set the prices of the products to be sold and the agents could sell only the Appellant's products.

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[11] Exhibit I-3.

[12] Exhibit I-3.

[13] Exhibit I-2.

(vi) Almost all the agents worked as a team.

(vii) Almost all of them used the transportation method that the Appellant made available to them. They travelled together to the door-to-door canvassing location in the Appellant's vehicle, which was driven by a team leader.

(viii) The agents attended information and motivation meetings (known by their French abbreviation "RIM").

[30] In his oral argument, counsel for the Appellant submitted that the following facts show that the agents were not under the Appellant's direction or control:

(i) The promotional agents did not carry out their duties at the Appellant's place of business. I do not see how this is relevant in any way, given the nature of the work that they did: they had to sell the Appellant's or ADT's products door-to-door in the territories designated by the Appellant.

(ii) The promotional agents did not have the benefit of any of the Appellant's services. They did not use the Appellant's secretarial services, telephones, fax machines or computers. Once again, given the nature of their work, I do not see how this is relevant in any way. They simply did not need the tools referred to by counsel for the Appellant. Moreover, the evidence very clearly established that the promotional agents used what tools of the Appellant they needed: the Appellant's vehicle, its travelling salesperson permit, and its promotional materials (placards, clothing, flyers and binders).

(iii) The promotional agents sold alarm systems that were manufactured by ADT, not by the Appellant. I simply do not see how this fact is relevant in the instant case.

(iv) The promotional agents were not paid for the training that they got from the Appellant. Even though I am of the opinion that this fact is usually an indicia of independence, not subordination, I note that it does not, in itself, mean that it is more likely that a contract for services existed, since most of the other facts adduced in evidence favour the existence of a contract of employment.

(v) The customers were ADT's, not the Appellant's. Once again, I do not see how this fact is relevant in the case at bar. By making this submission, counsel for the Appellant is at least admitting that the customers were not the promotional agents' customers. If they had been, this could have been an interesting indicia of independence to consider.

(vi) The promotional agents could get someone to replace them, or get someone else to perform their duties. Assuming that they even had this freedom, which would be an indicia of independence, I am of the opinion that it was more of an illusion than a reality. In fact, did the evidence not disclose that the agents never took advantage of this purported freedom?

The team leader

[31] The team leader was essentially a promotional agent with additional duties: he had to drive the promotional agents in a vehicle owned by the Appellant to the neighbourhoods where they would have to canvass from door to door, and he collected the signed contracts at the end of the day and handed them to the Appellant's management. He was also the leader at the information and motivation meetings, whose purpose was to inform and motivate the promotional agents.

[32] In my opinion, the team leader is clearly an employee of the Appellant, not only for the reasons set out in my analysis concerning the promotional agents, but also, quite simply, because the relationship of subordination between the team leader and the Appellant's management in this specific instance is more direct due to the additional duties referred to above (obligation to report, to transport the promotional agents and to assist them) and the use of an additional work tool of the Appellant's, namely its automobile.

The representatives

[33] It should be recalled that the Appellant recruited its customers in two different ways. It sent promotional agents, who criss-crossed the areas where it did business, to enlist customers by going from door to door. The Appellant also had a telemarketing department that scheduled appointments with interested customers so that representatives could meet with them and sign contracts in person. It should be emphasized from the outset that it was admitted that the representatives used their own cars for their work and that the Appellant did not reimburse any expenses incurred by the representatives in the performance of their duties. However, it was admitted that the Appellant paid the representatives $20 for automobile expenses per contract signed.

[34] Were the representatives free to choose the time and place of work? These are two indicia that must be considered in cases such as this, where it must be determined whether there was a relationship of subordination between the representatives and the Appellant. In other words, could the representatives freely choose the territory in which they carried out their activities, and work at the times that suited them?

[35] The facts set out in the Reply to the Notice of Appeal with respect to the time and place of work and on which the Respondent relied in determining that the representatives were employed in insurable employment under a contract of service are as follows:

> [TRANSLATION]
>
> (pp) The Appellant scheduled the representatives' appointments with prospective customers. (denied as worded)
>
> (qq) The representatives had to comply with the appointment schedule set by the Appellant. (denied as worded)
>
> (rr) The representatives were not free to choose a territory. (denied)
>
> (ss) The representatives' work schedule was usually Monday to Friday from 1 p.m. to 9 p.m. (denied as worded)
>
> (tt) The representatives' hours of work were controlled by the number of appointments. (denied as worded)

[36] The Appellant's evidence in this regard essentially rested on Mr. Landreville's testimony, which can be summarized as follows: the meetings with customers were scheduled by the Appellant, but were based on the representatives' availability (which was made know to the Appellant's telemarketing department in advance) and the representatives were free to work at the times that suited them.[14]

[37] In addition, during a telephone interview on January 26, 2004, Pierre Blackburn told Mr. Croteau that he had to work 36 hours a week, Monday to Friday, from 1 p.m. to 9 p.m.[15]

[38] Thus, there are two conflicting versions of the facts on this point. In light of the little credibility that I have accorded to Mr. Landreville's testimony in general, I accept the version of the facts given to Mr. Croteau on this point, even though it constitutes hearsay. Mr. Landreville was free to have the representatives affected by the decisions testify in order to support his assertions on this point. He did not do so. The inference that I draw from this is that this evidence would have been unfavourable to him. I can understand why the Appellant was sometimes flexible with respect to the representatives' work schedules, given the nature of the representatives' work and the method by which they were remunerated, and given that it was difficult for the Appellant to recruit representatives. However, it is my opinion that the Appellant controlled the time and place of the representatives' work by scheduling appointments with prospective customers within a work schedule that was determined by the Appellant and was not, as Mr. Landreville submitted, based on the representatives' availability.

[39] I am also of the opinion that the following facts adduced in evidence demonstrate very clearly that the sales representatives' work was highly integrated into the Appellant's activities, a fact that is, in and of itself, an indicia of the relationship of subordination between the Appellant and its representatives:

(i) The Appellant supplied all the materials necessary for them to perform their work.

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[14] Pages 56 and 92 of the transcript.

[15] Exhibit I-3, at paragraph 56.

(ii) The representatives did not personally have a travelling salesperson's permit that allowed them to do door-to-door sales. In this instance, they used the Appellant's travelling salesperson's permit for this purpose.

(iii) The customers were not the representatives' customers, but rather, the Appellant's or ADT's customers.

(iv) The representatives could not negotiate the terms and conditions of the contracts of sale. The Appellant set the prices of the products to be sold and the representatives could sell only the Appellant's products.

(v) The representatives' work, as mentioned earlier, was very closely tied to the Appellant's telemarketing department, which scheduled the representatives' appointments with prospective customers during the hours that the representatives had to work.

[40] It should also be noted that Mr. Blackburn told Mr. Croteau that his work was supervised by Jean Landreville, the Appellant's sales director in Sherbrooke. Moreover, Mr. Blackburn had to contact the Appellant's sales director every week to report on his activities during that period. In my opinion, this obligation to report is another indicia of the relationship of subordination between the Appellant and its representatives.

[41] I feel it important to repeat that the Appellant admitted that it paid the requisite workers' compensation premiums to the CSST in respect of its representatives. Would a business that considers the workers that provide it with services independent contractors normally pay such premiums?

[42] The representatives were not paid for the training that they received from the Appellant. The representatives used their own cars in the performance of their duties, and the Appellant did not reimburse any expenses incurred by the representatives as part of their work. However, it was admitted that the Appellant paid the representatives $20 for automobile expenses per contract signed. Even though I am of the opinion that these two facts are usually indicia of independence, not subordination, I note that they do not, in themselves, mean that it is more likely that a contract for services existed, since most of the other facts adduced in evidence favour the existence of a contract of employment.

[43] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 1st day of December 2005.

"Paul Bédard"

Bédard J.

Translation certified true
on this 1st day of May 2008.

Brian McCordick, Translator

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