Docket: 2003-4675(EI)

BETWEEN:

ROBERT CHAGNON o/a MIRODI ENR.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MICHEL PERREAULT,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 22, 2004, in Montréal, Quebec

Before: The Honourable S.J. Savoie, Deputy Judge

Appearances:

Counsel for the Appellant:	Katherine Tsetsos
Counsel for the Respondent:	Stéphanie Côté
For the Intervener:	The Intervener himself

JUDGMENT

The appeal is allowed and the Minister's decision is vacated in accordance with the attached Reasons for Judgment.

Signed at Grand Barachois, New Brunswick, this 21st day of January 2005.

"S.J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 6th day of April 2005.

Jacques Deschênes, Translator

Citation: 2005TCC146
Date: 20050121
Docket: 2003-4675(EI)

BETWEEN:

ROBERT CHAGNON s/n MORODI ENR.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Deputy Judge Savoie:

[1] This appeal was heard in Montréal, Quebec, on November 22, 2004.

[2] The issue is the insurability of the employment of worker Michel Perreault while in the appellant's service from September 2, 1999, to August 6, 2003 ("the period in issue"). By letter dated December 9, 2003, the Minister of National Revenue ("the Minister") notified the appellant of his decision that the worker held insurable employment.

[3] The Minister relied on the following assumptions of fact in making his decision:

[TRANSLATION]

(a) The appellant operates a business that delivers grocery orders to homes; (admitted in part)

(b) the appellant is the sole proprietor of the business, which operates under the business name Mirodi Enr.; (admitted)

(c) the appellant has two delivery trucks the total value of which is $10,000–$15,000; (admitted in part)

(d) the appellant's main customer is Supermarché Pierre Chagnon Inc., which is operated under the IGA banner; (admitted)

(e) the appellant operates his business from Monday to Sunday during the IGA supermarket's delivery hours; (denied)

(f) the appellant hires two delivery persons to drive his trucks; (denied)

(g) the worker was hired as a delivery person for the appellant; (denied)

(h) the worker was on the road delivering grocery orders and collecting the cost of delivered orders; (denied)

(i) to get paid, the worker had to give the appellant the detachable portion of the bill for the deliveries he made; (denied)

(j) the worker generally worked on Tuesdays and Wednesdays (10:30 a.m. to 6 p.m.), Thursdays and Fridays (10:30 a.m. to 8:00 p.m.) and Saturdays (10:30 to 4:00 p.m.) for a total of more than 40 hours per week; (denied)

(k) the appellant provided the worker with a delivery truck (Dodge Van) and assumed all costs associated with its operation; (admitted)

(l) the worker had no expenses to incur and carrying out his duties for the appellant; (denied)

(m) the appellant's pay was $1.10 per delivery made; (admitted)

(n) the worker was paid weekly; (admitted) and

(o) the appellant's main customer belonged to the appellant's delivery business, not to the worker. (admitted.)

[4] The evidence disclosed that the appellant owns Mirodi Enr. He operates a business from his home office in Longueuil. Its activities consist of delivering food and other products from certain supermarkets, chiefly Supermarché Pierre Chagnon Inc., which belongs to his father and does business under the IGA banner. Supermarché Pierre Chagnon Inc. is open seven days a week, 24 hours a day.

[5] The appellant finds delivery persons by placing classified advertisements in the newspaper. The delivery persons are paid by the piece each week on a regular basis. They receive no regular wages with source deductions.

[6] At the time of hiring, the appellant requires his delivery persons to provide a certificate confirming their status as independent contractors. He also requires that they produce a valid driver's licence at that time.

[7] Based on the evidence, the working hours are set by mutual agreement between the delivery persons. The delivery persons do not have to punch in or out. They are not assigned a work schedule. Working hours are based on the opening hours of the appellant's main customer, Supermarché Pierre Chagnon Inc.

[8] The appellant has three delivery persons to run his deliveries. It was established that he does not require his delivery persons to work exclusively for him. The evidence showed that the appellant does not tell his delivery persons how to do their jobs. They do their deliveries based on priorities they set themselves.

[9] The delivery persons are paid every Thursday at the appellant’s office when the appellant receives the coupons confirming the deliveries. The coupons are accounted for and the delivery persons are paid $1.10 per delivery.

[10] It was established that the delivery persons have no guaranteed pay and obtain no minimum wage from the appellant. Sometimes certain delivery persons collect money upon making a home delivery, but this is a very occasional occurrence. Each delivery person's remuneration is based on the number of deliveries made. If the appellant pays a delivery person who has not done the deliveries, the matter is settled between the delivery persons involved.

[11] It was established that the appellant does not replace delivery persons who are unable to work. Each delivery person is entitled to get someone to replace him,

provided the replacement has a valid driver's licence and a certificate establishing his or her self-employed status. Delivery persons occasionally get tips and are entitled to keep them. At the hearing, the appellant said that has nothing to do with these tips; they belong to the delivery persons.

[12] The appellant supplies two trucks. The remaining work tools, which include a calculator, a uniform, a sack and a notebook, are supplied by the workers themselves. It was acknowledged at the hearing that a delivery person can use his own truck if necessary.

[13] Liability in the event of a motor vehicle accident causing injury or damage is covered by the appellant's insurance. However, at the hearing, the appellant said that a driver could be sued, though this has never happened.

[14] The evidence discloses that the worker has had a certificate establishing his self-employed status since 2002. It also shows that any complaints made about a worker following a delivery would be settled by the appellant's main customer, the IGS supermarket, of which the appellant was also the manager according to his testimony.

[15] The evidence discloses that the delivery persons set their own schedules based on the store's opening hours. They would arrange their schedules by mutual consultation. If they could not agree on their schedules, the appellant would find another delivery person rather than settle the dispute. The appellant does not require his delivery persons to wear a uniform.

[16] As for the worker, it was established that he reported for work at about 8:30 a.m., depending on his availability and the supermarket's hours. The supermarket required deliveries to begin at approximately 10:30 a.m., so the delivery person reported there in advance of that time to load his truck.

[17] The appellant said that the delivery persons could refuse to make certain deliveries if they wished. The worker used his own cellular phone but the appellant did not require his delivery persons to be equipped with one.

[18] It was established that the delivery person could run deliveries elsewhere if he wished, even with the appellant's truck.

[19] The worker Michel Perreault testified at the hearing. He has been working for the appellant for more than four years. He confirmed that he could set his own

schedule and grocery delivery priorities. He specified that when he shared delivery tasks with another delivery person, this was a mutual arrangement in which the appellant did not intervene.

[20] At the hearing, the worker stated that he considered himself a self-employed worker and that he actually identified himself as such on his tax return.

[21] The *Employment Insurance Act* (the Act) defines insurable employment as follows in subsection 5(1):

> 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;

[22] This is an appropriate point to reproduce an excerpt from *Wiebe Door Services Ltd. v. Canada* (*Minister of National Revenue*), [1986] 3 F.C. 553, where the following was held:

> Case law has established a series of tests to determine whether a contract is one of service or for the provision of services. While not exhaustive the following are four tests most commonly referred to:
>
> (a) The degree or absence of control, exercised by the alleged employer.
>
> (b) Ownership of tools
>
> (c) Chance of profit and risks of loss.
>
> (d) Integration of the alleged employee's work into the alleged employer's business.

[23] The evidence shows that the appellant exercised no control. In this regard, the worker corroborated the comments made by the appellant, who established that the delivery persons set their own working hours and adjusted their arrival at work

based on the supermarket's opening hours. It was also established that the delivery persons determined their own deadlines and priorities by mutual agreement. In addition, the evidence showed that a delivery person could have himself replaced as the need arose without notifying the appellant. When this occurred, the appellant paid the worker, and the worker paid his replacement.

[24] In *Wolf v. Canada* (*Minister of National Revenue*), [2002] 4 F.C. 396, the Federal Court of Appeal has considered the question whether a taxpayer was an employee or an independent contractor. The Court held that the key distinction between an employment contract, and a contract of enterprise or for services, lies with the element of subordination or control. The Court added that the completion bonus, the absence of health insurance and pension plan, and the risk factors favoured the status of independent contractor and that the parties' intention is an important consideration. In the instant case, it was established on a preponderance of the evidence that the parties' intention was clear. The worker considered himself an independent contractor and the appellant, his employer, shared this view. In fact, the appellant demanded a certificate of registration as a self-employed worker at the time of hiring.

[25] In *Le Livreur Plus Inc.*, 2004 FCA 68, the Federal Court of Appeal considered a similar problem and held as follows:

> 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 Minister of National Revenue*, 97-1416-UI, February 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.
>
> 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.*

[26] As for the integration test, when one asks whom the business belongs to from the perspective of the worker, the facts indicate that this factor is neutral. The worker does make deliveries based on tasks assigned by the appellant's business, but he enjoys considerable flexibility in performing the work and acts like a small business owner in that he sets his own schedules, deadlines and delivery priorities and determines the quality of his delivery work which earns him tips. An analysis of the evidence on this factor leads me to a neutral result.

[27] Having analysed the evidence in view of the above factors, I find that the worker's working conditions were more like those of a self-employed person. The agreement between the parties, as formed and later confirmed by the appellant and the worker, constitute persuasive support for this finding.

[28] Consequently, this Court finds that the worker did not hold insurable employment within the meaning of the Act.

[29] The appeal is accordingly allowed and the Minister's decision is vacated.

Signed at Grand Barachois, New Brunswick, this 21st day of January 2005.

"S. J. Savoie"

Deputy Judge Savoie

Translation certified true
on this 6th day of April 2005.

Jacques Deschênes, Translator

CITATION:	2005TCC146
COURT FILE NO.:	2003-4675(EI)
STYLE OF CAUSE:	Robert Chagnon o/a Mirodi Enr. and M.N.R. and Michel Perreault
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 22, 2004
REASONS FOR JUDGMENT BY:	The Honourable S.J. Savoie, Deputy Judge
DATE OF JUDGMENT:	January 21, 2005

APPEARANCES:

For the Appellant:	Katherine Tsetsos
For the Respondent:	Stéphanie Côté
For the Intervener:	The Intervener himself

COUNSEL OF RECORD:

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For the Intervener: