Docket: 2006-1557(EI)

BETWEEN:

DYNAMEX CANADA CORP.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with appeal **2006-1558(CPP)** on
October 9 and 10, 2008, and October 1 and 2, 2009,
at Quebec City, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Guy Dussault
Counsel for the Respondent:	Josée Tremblay

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of January 2010.

"Pierre Archambault"

Archambault J.

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Citation: 2010 TCC 17
Date: 20100111
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BETWEEN:

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REASONS FOR JUDGMENT

Archambault J.

[1] Dynamex Canada Corp. (**Dynamex**) is appealing decisions made by the Minister of National Revenue (**Minister**) under the *Canada Pension Plan* (**CPP**) and the *Employment Insurance Act* (**Act**).[1] The issue raised in both appeals is whether Mr. Roger Fontaine was employed by Dynamex under a contract of service and therefore held with that corporation pensionable and insurable employment within the meaning of the above acts during the period from January 1, 2002 to March 1, 2005 (**relevant period**). The Minister ruled that Mr. Fontaine was indeed an employee of Dynamex during the relevant period. Dynamex, on the other hand, contends that Mr. Fontaine was an independent contractor. The two appeals were heard on common evidence.

[2] In making his decisions, the Minister relied *inter alia* on the following facts, which are set out in the reply filed in the appeal brought under the Act:

a) the Appellant carries on the business carries on the business [*sic*] of pick-up and delivery of envelopes and parcels in Canada; [**admitted**]

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[1] The hearing of these appeals spanned a period of almost one year, having taken place on two days in October 2008 and two days in October 2009.

b) the Appellant hired Mr. Roger Fontaine for the purpose of delivering envelopes and parcels of the Appellant's customers in the Winnipeg area; **[admitted]**

c) the Appellant directed, controlled and supervised the pick ups and deliveries made by Mr. Roger Fontaine; [**denied**]

d) at all material times, Mr. Roger Fontaine and his co-workers of the Winnipeg area were collectively represented by the Canada Union of Postal Workers - Red River Local; [**admitted**]

e) at all material times, a collective agreement between the Appellant and the Canada Union of Postal Workers - Red River Local - was in applicable; [**admitted**]

f) the Appellant provided, amongst other things, security identification card, uniforms and workers compensation coverage; [**denied**]

g) Mr. Roger Fontaine has to perform his task personally; [**denied**]

h) Mr. Roger Fontaine was paid twice a month by the Appellant and his remuneration was partially based on a percentage of the deliveries he effected; [**admitted**][2]

i) Mr. Roger Fontaine was obliged to

   i) immediately reports [*sic*] any accident; [**admitted**]
   ii) maintains [*sic*] daily summary of the pick up and deliveries effected; [**admitted**]
   iii) presents [*sic*] his requests for holidays or other time off work in advance; [**denied**]
   iv) physically appear in a manner acceptable to the Appellant who, if unsatisfied, could request Mr. Roger Fontaine to return home; [**denied**]
   v) provides [*sic*] his own vehicle to perform his tasks; [**admitted**]

j) Mr. Roger Fontaine was not registered as a supplier for the purpose of the Goods and Services Tax. [**admitted**]

Factual background

[2] Like the parties herein, I shall describe this remuneration as "**commissions**".

[3] Dynamex's main business activity in Winnipeg is same-day pickup and delivery of envelopes and parcels (both herein referred to as **parcels**). It also provides overnight delivery and logistic services in Canada and in the United States. Dynamex is a subsidiary of a U.S. public corporation, Dynamex Inc. (see Exhibit R-33, Tab 42). Dynamex has business centres all across Canada, from St. John's to Victoria. According to Mr. James Aitken, Dynamex's president,[3] it is the only national same-day delivery company in Canada. Dynamex has about 600 employees and all the drivers who do its deliveries are independent contractors. In its business, Dynamex uses the services of delivery people who walk (referred to as **walkers**), delivery people who use a bicycle (referred to as **bikers**) and delivery people who use their own vehicle (referred to as **owners-operators** or **drivers**). According to Mr. John McMaster, a representative of the Canadian Union of Postal Workers (**Union**) and a Dynamex walker, there were in 2002 in the Winnipeg area 3 or 4 walkers, one biker and 140-145 owners-operators. During the relevant period, the walkers and the bikers were treated by Dynamex as employees for the reason that, according to Mr. Aitken, these people did not use and did not need to own substantial assets to make their deliveries, and by reason of the application of the control test developed by the courts. The owners-operators used their own vehicle, which could have been a car, a minivan, a van or even a tractor and trailer. Some of the owner-operators were also operating aircraft.

[4] The types of deliveries carried out within the city of Winnipeg during the relevant period can be divided into two categories. The first is "delivery on demand", which involved the delivery of parcels from one point to another in the city. The orders for such deliveries came from a dispatcher, an employee of Dynamex, who, through communication equipment, kept in contact with the delivery persons and transmitted to them the addresses at which the parcels were to be picked up and those to which they were to be delivered. The second category was called the "dedicated route delivery". This work involved servicing the delivery needs of a particular client, such as a bank. The delivery person had a regular schedule whereby he or she attended at the premises of the customer, that is, the bank, and received there his or her delivery orders for that particular customer.

[5] Mr. Fontaine was first hired in 1989 by a courier company called Zipper Courier Service Ltd. (**Zipper**), which was purchased by Dynamex in 1995 or 1996, according to Mr. Aitken.[4] At that time, Dynamex assumed certain of Zipper's

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[3] Regrettably, Mr. Aitken passed away sometime after October 2008.

[4] According to Mr. Brian Bachinski, a Dynamex human resources coordinator during the relevant period, and Mr. Fontaine, Zipper was bought in 1996. Referee Taylor made a

obligations towards its drivers. For instance, Zipper provided its independent contractors with a health benefits plan to which Zipper made financial contributions. Mr. Fontaine continued to be entitled to such benefits after the purchase of Zipper. During the relevant period, Mr. Fontaine was generally involved in delivery on demand. One exception was with respect to the dedicated route delivery for IBM, which he had for a short period of time.

[6] On June 16, 1998, the director at the Winnipeg Tax Services Office issued a ruling that Mr. Fontaine's employment could not be considered pensionable pursuant to paragraph 6(1)(*a*) of the CPP or insurable pursuant to paragraph 5(1)(*a*) of the Act. This ruling was "binding for the period January 1, 1997 to the present".

[7] According to Mr. McMaster, a collective agreement (**Collective Agreement**) between Dynamex and the Union was first entered into effective March 1, 2000, and it expired on January 31, 2003. This agreement was renewed and was to expire on January 31, 2006 (see Exhibit R-1, Tabs 1 and 2). The purpose of the Collective Agreement was to establish and maintain rates of remuneration, hours of work and other working conditions and to "provide appropriate procedures for the resolution of grievances and problems arising during the term of the Collective Agreement" (Article 1.01 of Exhibit R-1, Tab 1).

[8] Mr. Fontaine was required to sign with Dynamex a contract for services entitled "Owner Operator Contract for Retention of Services" (**Fontaine contract**). Mr. Fontaine was not given an opportunity to negotiate the terms of this contract. He had to sign it if he wanted to continue providing his services to Dynamex. He was told by the Union that it was all right for him to sign the contract. It is useful to reproduce here the main provisions of this contract dated March 13, 2000:[5]

> . . .
>
> **WHEREAS** the Company carries on a same day transportation and distribution business and is licensed to use certain trademarks in connection therewith;

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similar finding in the decision *In the matter of a reference under section 251.12 of Division XVI, Part III of the Canada Labour Code, Dynamex Canada Inc. v. Mamona, Hepner and Cyr* (*Mamona* decision), dated August 9, 2000 (Exhibit R-32, Tab A, page 2). According to Referee Deeley in the decision *In the matter of a wage recovery appeal under section 251.12 of Part III, Division XVI of the Canada Labour Code, Dynamex Canada Inc. v. Dennis Morgan, Tom MacKinnon and Noel Herie* (which decision is dated March 28, 2002 (*Morgan* decision)), Zipper Transportation Services Ltd. (**ZTS**) was sold to Dynamex in early 1997 (Exhibit R-32, Tab B, page 5). Since ZTS's name is different from Zipper's, I assume they were two different but related companies.

[5] Exhibit A-1, Tab 6.

AND WHEREAS the Owner Operator owns/leases a vehicle[6] (the "Vehicle") suitable to the business and the provision of services for the Company, and the Owner Operator desires to perform, and the Company desires to engage the Owner Operator to perform, certain distribution and delivery services for the Company;

AND WHEREAS, subject to the prevailing provisions of any applicable Collective Agreement, the Company and the Owner Operator desire to fix and determine between themselves their respective rights and obligations:

NOW THEREFORE in consideration of the mutual covenants and agreements hereinafter contained the parties hereto agree as follows:

1. The Owner Operator making use of the Vehicle shall perform the Services by Company standards in a timely and efficient manner.

2. The Owner Operator shall maintain the Vehicle in a safe, damage-free, serviceable and clean condition and shall maintain, repair, license, insure (for Public Liability and Property damage in the amount of $1,000,000 all-inclusive coverage and supply proof of same to the Company), and operate each Vehicle used by it at its own expense.

3. Provide all services in a safe, efficient, courteous and lawful manner and comply with all relevant laws, rules and regulations concerning the operation of the Vehicle and the provision of services hereunder. The Owner Operator shall at all times conduct itself so as not to jeopardize the relationship between the Company and its customers.

4. In consideration of the Company entering into this Agreement with the Owner Operator and allowing the Owner Operator to Service the Company's customers, the Owner Operator hereby covenants, agrees, acknowledges and confirms that during the term hereof, and upon the cancellation of this Agreement for any cause or means whatsoever, then for a period of one (1) year from the cancellation of this Agreement, the Owner Operator shall not either personally or by its agents, or by letters, circulars or advertisements, or in any manner whatsoever, whether on its own behalf or on behalf of any person, persons, firm, association, syndicate, company or corporation, canvas, solicit or do business of a similar nature as that of the Company with any person, persons, firm, association, syndicate, company or corporation who:

4.1 Either are customers of the Company at the time of the cancellation of this Agreement, or,

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[6] Mr. Fontaine owned during the relevant period a small car, a 4-door Pontiac Firefly (Exhibit R-24).

4.2 Have been customers of the Company within a period of twelve (12) months prior to the cancellation of the agreement; and,

4.3 Have become known to the Owner Operator as customers of the Company, and,

4.4 By reason of the Owner Operator having over a period of time Services [*sic*] such customers, have become known to the Owner Operator.

5. In consideration of the Company entering into this Agreement with the Owner Operator and allowing the Owner Operator to Service the Company's customers, the Owner Operator hereby covenants, agrees, acknowledges and confirms that, during the term hereof, and upon the termination of this Agreement for any cause or by means whatsoever, then for a period of one (1) year from the termination of this Agreement, the Owner Operator shall not use or disclose any information concerning the business or customers of the Company which may have been acquired by it during the course of its relationship with the Company for its own benefit or to the detriment or to the intended or probable detriment of the Company.

. . .

9. Upon termination of this Agreement, the Owner Operator shall forthwith remove from the Vehicle all trademarks, logos and other elements of decoration which are distinctive of the Company or its customers and immediately return, in good condition, any Company property, material or documentation, including all communication equipment.

10. The Owner Operator undertakes to indemnify and hold the Company harmless from all claims, debts, demands, suits, actions and causes of action whatsoever for loss, damages, delay and liability of any nature or kind whatsoever made or brought by any person, firm or corporation with the Services rendered by the Owner Operator.

. . .

12. The Owner Operator acknowledges and agrees that the Owner Operator's function and status under this agreement shall be, and is intended to be wholly and exclusively that of a dependent contractor. No partnership, employer-employee, joint venture or other similar relationship is intended. The Owner Operator agrees that the Owner Operator shall, at all times, hold himself out as a dependent contractor, not as an agent, employee or legal representative of the Company, in any respect. The Owner Operator shall take all necessary steps and shall be responsible for the payment of all federal, provincial and local taxes arising out of his activities.

13. The Owner Operator expressly acknowledges that the Company will not on behalf of the Owner Operator remit employment insurance premiums, nor withhold income tax, C.P.P. or provide T-4 slips and that the Owner Operator shall be solely and wholly liable and responsible therefore.

14. The Owner Operator shall protect and indemnify the Company, and any of its officers, directors, employees and agents from all losses, claims, costs, damages, or liabilities which the Company may suffer or incur, whether at law or in equity, directly or indirectly, from any act or omission, made or not made by the Owner Operator in providing services to the Company under this agreement, including without limitation, any damage to person or property whether it be that of the Company, its customers or accounts or that of a third party.

15. This contract may not be sold, assigned or transferred without the express written consent of the Company.

. . .

19. Lease from the company suitable Radio and Pager or other communications equipment as may be designated by the Company with the terms and conditions contained in the form of lease attached hereto.

20. Either obtain at its own expense, or reimburse the Company for the cost of a Fidelity Bond as per attached Fidelity Bond Schedule.

21. Charge no expense whatsoever for any reason to the Company except where authorized by the company.

22. The Parties hereto acknowledge and agree that they both would benefit by the greater exposure of the Company's presence in the marketplace and to that end agree as follows:
    i) The Owner Operator shall wear uniforms approved by the Company while servicing the company's customers. Uniforms for purchase by the Owner Operator at the Company's cost price, plus applicable taxes, payable by the Owner Operator on invoice therefore.
    ii) When the Company's trademarks, tradename, logos or decals are displayed or shown on a uniform or the Owner Operator's motor vehicle, not to place any other name, notice, advertising, decal or painting of any nature or kind whatsoever on the uniform or motor vehicle other than as expressly permitted by the Company which may not be unreasonably and arbitrarily withheld.
    iii) The trademark "Dynamex", distinctive colour and designs used in connection therewith, are all the property of the Company and their use accrues wholly to the benefit of the Company. Upon written

request of the Company, the Owner Operator shall immediately surrender to the Company, any item bearing any of its trademarks and shall remove any such trademarks from its vehicle.

23. In the event the Contractor is successful in obtaining a new customer for the Company, the Company shall pay the Owner Operator as additional compensation five percent (5%) of the first three (3) months billings the customer uses the Company's service. This compensation shall only apply if the amount billed to the customer exceeds one hundred dollars ($100.) per month. IN [*sic*] the course of accepting new business, the Owner Operator may pledge the credit of the company to the limited extent of such credit being acceptable to the Company and subject to a credit application being completed and turned in to the Company by the Contractor and the new client subsequently passing the Company's credit check.

24. The parties agree that this Agreement shall be terminated as follows:
    i) With 2 weeks notice by the Owner Operator or the Company upon written notice of either to the other; or
    ii) By the Company following a material breach by the Contractor of the terms of this agreement; or
    iii) Upon the insolvency or bankruptcy of either Party. In the case of drivers, only if unable to provide the requisite equipment to perform the work.

25. Upon the demand from the Company the Owner Operator shall immediately return to the company, but not limited to, all equipment loaned and provided, including identification cards, radios and advertising signs.

. . .

28. This agreement shall be interpreted in accordance with the Laws of the Province in which the Owner Operator's services are primarily performed, and if any provisions of this Agreement contravene the Law of such Province, then such provisions shall be deemed not to be part of this Agreement, but all other provisions shall remain in full force and effect.

[My emphasis.]

[9] The Fontaine contract was terminated at the end of March 2005 because Mr. Fontaine was asked to choose between devoting himself full-time to Dynamex and carrying on the massage therapy business that he had started in September 1999. It is my understanding that at first he saw his massage clients during the evening and on weekends. Later, Dynamex allowed him some flexibility to devote time to this new business during Dynamex's regular business hours. For instance, he was authorized to leave work on a short notice to provide service to his own clients. The

massage therapy business grew over the years. It produced revenues of $ 2,500 in 2002 and $ 7,800 in 2004. Mr. Fontaine considered himself to be working for Dynamex part-time as of November 1, 2004. He worked only 3 days for Dynamex in January 2005 and 5 days in February 2005 (up to February 23). (See Exhibit A-2.)

[10] My colleague Justice Bowie issued a decision on January 31, 2008 in which he concluded that a Mr. Gareth Palmer provided his services to Dynamex under a contract for services during the period from August 13, 2003 to April 11, 2004. His work was performed in the city of Toronto and the surrounding area. The decision in question is *Dynamex Canada Corp. v. the Minister of National Revenue*, 2008, TCC 71 (*Palmer* decision).[7] Dynamex's counsel began his argument in the present appeals by stating that his client did not understand why it had to argue again the status of its owners-operators given the fact that independent contractor status was the norm in the industry, that this status had been recognized in the *Palmer* decision and in many other similar decisions of this Court and of the Federal Court of Appeal. In particular, he referred to Justice Bowie's statement in *Palmer* that, "in view of the number of previous decisions of this Court that have reached the same result in similar circumstances," he regretted that he was "unable to make a substantial award of costs to the appellant" (paragraph 20). In addition, counsel stated that the courier business is a very competitive one and that the margin of profit is narrow. A finding of employee status could therefore have a detrimental impact on his client's business. However, I was informed by the respondent's counsel that the worker, Mr. Palmer, did not testify before Justice Bowie and this was one of the reasons why the Minister did not appeal the decision to the Federal Court of Appeal. In addition much of the documentary evidence introduced in these appeals, such as the Dynamex Driver's Handbook (Exhibit R-2) and several of the internal memoranda referred to below, was not before the Court in *Palmer*.

[11] In addition to *Palmer*, there are four referees' decisions concerning 27 of Dynamex's workers who performed similar delivery services in Winnipeg and Saskatoon. All 27 workers were found to be employees of Dynamex. The relevant periods for those 27 workers are the 1997 to 2001 calendar years. The decisions in question are the *Mamona* and *Morgan* decisions (*supra*) and two other decisions rendered by two different referees, namely: the *Hogg* decision by Referee Wallace, dated January 20, 2003 and the *Derksen* decision by Referee Hood, dated March 8, 2005 (see Exhibit R-32, Tabs C and D). Counsel for Dynamex in the appeals before me and a union representative were involved in each of these cases, except possibly *Derksen* as in that decision the names of counsel are not mentioned.

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[7] Both counsel in *Palmer* were the same as in these appeals.

[12] Like the other 26 Dynamex workers, Mrs. Mamona was found to be an employee of Dynamex for the purposes of the labour standards provisions found in Part III of the *Canada Labour Code* and was therefore entitled to vacation pay. Unlike Part I, Part III of the *Canada Labour Code* does not define what an employee is. Therefore, the referees had to apply common law principles in making their determinations. The *Mamona* decision of Referee Taylor was affirmed by the Federal Court, Trial Division, and by the Federal Court of Appeal. See ***Dynamex Canada Inc. v. Mamona***, (2002) 218 F.T.R. 269 (F.C.T.D.), 2002 FTC 393, and (2003) 305 N.R. 295 (F.C.A.), 2003 FCA 248. Leave to appeal to the Supreme Court of Canada was denied in March 2004. [8] As a result of the aforementioned referees' decisions, Dynamex, with the consent of the Union, adjusted the rate of commission paid to its drivers to take into account its higher costs of remuneration. According to Mr. Fontaine, his rate of commission went from 71% to 66%. It was the workers' success in *Mamona* that encouraged Mr. Fontaine to attempt to get his status as an employee recognized by the respondent. His goal was to have Dynamex contribute to the Canada Pension Plan. If successful, he would get a refund of half of his own contributions to the Plan. Mr. Fontaine did not ask for employment benefits.

Dynamex's detailed position

[13] Counsel for Dynamex outlined in his Notice of Appeal the reasons why independent contractor status should be held to exist here:

> 16. The Appellant states that Mr. Fontaine was an independent contractor for the following reasons:
> The Appellant applies a four-fold test in reaching the conclusion that Mr. Fontaine was not an employee.
>
> **Control test**
>
> 17. Mr. Fontaine decided when he wanted to work and he set his own schedule. In addition to the services he provided to the Appellant, Mr. Fontaine operated his own message [*sic*] therapy business. Mr. Fontaine decided when he wanted to perform services to Dynamex and when he wanted to work, or not work at his message [*sic*] therapy business.
>
> 18. Mr. Fontaine would decide whether he was going to provide services to the Appellant on a given day or work in his other business, or work the morning

[8] *Dynamex Canada Inc. v. Mamona*, 329 N.R. 198.

for the Appellant and the afternoon for his other business or vice versa. These were choices for Mr. Fontaine to make.

19. The hours of service were dictated by the customer. Mr. Fontaine was a member of a fleet of drivers servicing the downtown core of Winnipeg. This again was Mr. Fontaine's choice. He could have provided service throughout numerous areas of the city of Winnipeg.

20. When Mr. Fontaine decided to provide his services were [*sic*] up to him. If he wanted to start at 7:00 a.m. or 9:00 a.m. that was his choice. If Mr. Fontaine wanted to quit work at 3:00 p.m., 4:00 p.m. or 5:00 p.m. – that was his choice. The start times and the ending days were within the exclusive domain of Mr. Fontaine.

21. These arrangements fit directly with the concept of being an independent contractor nor [*sic*] an employee.

Ownership of tools test

22. Mr. Fontaine, as an independent contractor, had to provide his own vehicle. He could decide what type of vehicle to use.

23. Furthermore, he supported all the expenses related to his vehicle like insurance coverage, maintenance of licenses, upkeep of the vehicle and fuel.

24. Such onerous obligations clearly indicate that Mr. Fontaine was an independent contractor.

Risk of profit and loss test

25. The key in the courier business is to use the asset, i.e. the vehicle for as long as possible and as efficiently as possible.

26. Profit is of course also related to expenses. The operation of Mr. Fontaine's vehicle is an expense, and the higher that expense the less his profit. Of course how Mr. Fontaine operated the vehicle and how he maintained the vehicle were solely factors within Mr. Fontaine's control.

27. Mr. Fontaine as an independent contractor needs to maximize his time receiving commission generating work and reduce his operating expenses. But it all depends on how he determines and plans his deliver [*sic*] routes and the number and types of deliveries he decides to do.

28. Generally, a person in Mr. Fontaine's position wants the quickest fastest deliver [*sic*] as they are the most profitable, and it allows the best use of his time. If Mr. Fontaine decided his priority was to take call [*sic*] from

downtown to the far west end of the city of Winnipeg – that would be his decision to make. The downside, less time spent in the downtown core means missing the quick high profit business inter office traffic.

29. As previously noted Mr. Fontaine controlled the crucial asset, his vehicle. How he utilized his crucial asset to maximize his earnings and minimize his expenses was solely up to him and is indicative of a contract for services.

Integration test

30. Mr. Fontaine's business is not integrated into the Appellant's business. Mr. Fontaine is working on his own behalf. He is not dependent on the Appellant's clients. Mr. Fontaine can move to another courier company and take his equipment – the key asset his vehicle with him. There is no non-competition covenant in Mr. Fontaine's services agreement.

31. Furthermore, as already mentioned, Mr. Fontaine operated a second business (message [*sic*] therapy) and he even decided when he wanted to perform services to Dynamex and when he wanted to work at his message [*sic*] therapy business.

Common Intention of the parties

32. In addition, or in the alternative to the above, the Appellant states, that in accordance with the modern approach applicable to taxing statutes, that the common intention of the taxpayers supports the Appellant's view that Mr. Fontaine is an independent contractor. In particular, we note the following:

a) In 1998 the Minister of National Revenue decided that Mr. Fontaine was [an] independent contractor. In our view nothing has changed in the nature of that relationship to now make him, Mr. Fontaine, an employee;
b) Since 1998, Mr. Fontaine has freely entered into other contracts with the Appellant confirming that he is an independent contractor and not an employee. – See the March 2000 Agreement; and
c) The March 2000 Agreement expressly states that Mr. Fontaine is not an employee in any circumstances.

33. To the knowledge of the Appellant, Mr. Fontaine has always declared himself to be an independent contractor to the taxing authorities. This would include of course filing tax returns claiming business expenses.

34. Clearly, the parties freely contracted with each other. The parties clearly signalled an intention that they were contractors and not in an employee and

employer relationship. Since 1998 until this current claim, Mr. Fontaine has never claimed that he was an employee, but always represented himself as an independent contractor. Clearly Mr. Fontaine operated "at will" – he decided when to provide service to the Appellant – or his other business interests. That relationship between the parties should be respected.

Collective Agreement

35. There is a Collective Agreement for Owner Operators and employees of the Appellant in Winnipeg. The Collective Agreement is not determinative on Fontaine's status. We refer the Court to the decision of the Tax Court in DHL Express Canada Ltd. vs. MNR 2005 docket 2004 – 4055 (EI) & 2004 – 4057 (CPP).

36. The independent contractor may be entitled to collective bargaining, but that does not mean they are employees. In particular, according to the DHL Express Canada Ltd. case, independent contractor [sic] certified under Part I of the code are not employees for tax purposes.

37. It is interesting to note that the contractors at issue in DHL Express Canada Ltd. were assigned a dedicated route. Mr. Fontaine operated off a call board in the downtown area of Winnipeg taking calls as they came in, or not. It would seem the assigned route is a greater control factor than Mr. Fontaine's situation.

38. Like the Appellant, the DHL Express Canada Ltd. Collective Agreement requires that independent contractors provide their own vehicles and insure their own vehicles.

39. The nature of DHL Express Canada Ltd. business dictated the service level. For instance, packages had to be delivered by 9:00 a.m. That in our view, is not much different than Mr. Fontaine's situation where he must get a package from A to B within a certain time window. It is that certain time window that the customer is paying for.

40. Like DHL Express Canada Ltd., the Appellant provides independent contractors, like Mr. Fontaine, with the opportunity if they wish under the Collective Agreement to have replacement drivers. The purpose of course, is to allow the independent contractors to keep their vehicle working – when the Owner Operator does not want to provide the service. There is, however, no indication that Mr. Fontaine ever took advantage of this part of the Collective Agreement – although other the Appellant independent contractors has [*sic*].

41. The DHL Express Canada Ltd. driver had to provide a route sheet giving details of the delivery, pickup, weight etc. Mr. Fontaine has to provide a bill of lading with similar information.

42. The DHL Express Canada Ltd. case acknowledges that DHL Express Canada Ltd. had some control over the independent contractors. For instance packages had to be delivered within certain times – just like the Appellant. However, the Tax Court in DHL Express Canada Ltd. dealt with the control issue by quoting the Federal Court of Appeal in Livreur Plus Inc. vs. Minister of National Revenue 326 NR 123:

> "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 . . . It is indeed rare for a person to give out work and not insure that the work is performed in accordance with his or her requirements at the locations agreed upon . . ."

43. Given all the factors stated above, the relationship of Mr. Fontaine and Dynamex had been that on [*sic*] an independent contractor.

[My emphasis.]

Analysis

Statutory provisions

[14] The relevant provisions for the purpose of deciding the appeals herein are paragraph 5(1)(*a*) of the Act and subsections 6(1) and 2(1) of the CPP:

> **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;
>
> 6(1) Pensionable employment is
> (*a*) employment in Canada that is not excepted employment;
> (*b*) employment in Canada under Her Majesty in right of Canada that is not excepted employment; or
> (*c*) employment included in pensionable employment by a regulation made under section 7.

> 2(1) In this Act,
> . . .
>
> "employment" means the performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office;
>
> [My emphasis.]

Common law principles

[15] To decide if Mr. Fontaine was employed in insurable employment under the Act and pensionable employment for the purposes of the CPP, this Court must determine whether the contract between him and Dynamex was a contract of service or a contract for services. If it was the latter, Mr. Fontaine could not be found to have held either pensionable or insurable employment during the relevant period while working for Dynamex. Given that neither act defines what a contract of service is, it is necessary to refer to concepts of the law of property and civil rights of the province where the contract was entered into in order to determine whether or not it was a contract of service.[9] Here, the Fontaine contract was governed by the laws of Manitoba pursuant to section 28 of that contract (reproduced above) given that Mr. Fontaine's services were provided mainly in Winnipeg. It is therefore the common law rules[10] that must govern the determination whether Mr. Fontaine was employed under a contract for services or under a contract of service, even though these appeals were heard in Quebec City.

[16] The two leading cases dealing with the distinction between these two kinds of contracts are *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (***Sagaz***), a decision of the Supreme Court of Canada, and *Wiebe Door Services*

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[9] Section 8.1 of the *Interpretation Act* provides as follows:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> [My emphasis.]

[10] No one contended that there are statutory rules in Manitoba governing the distinction between a contract for services and a contract of service.

Ltd. v. M.N.R., [1986] 3 F.C. 553 (***Wiebe Door***), a decision of the Federal Court of Appeal. The Supreme Court of Canada stated that there is no one conclusive test which can be universally applied to make the determination. The key passage of the Supreme Court's pronouncement on this point is at paragraphs 47 and 48:

> 47 . . . The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. 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.
>
> [My emphasis.]

[17] One of the limitations of the approach adopted by the Supreme Court of Canada in *Sagaz* and the Federal Court of Appeal in *Wiebe Door* is that it focuses on the distinction between employee status and independent contractor status without defining the essence of an employment relationship. However, I found enlightening the following analysis in *Employment in Canada*.[11] The author refers to the English decision *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance*, [1968] 2 Q.B. 497,[12] in which MacKenna attempts to better define what an employment relationship is:

> **2.13** . . . His Lordship stated that there are three necessary conditions for the existence of an employment relationship. First, there must be a wage or remuneration paid by the employer because, without consideration, there could be no contract of any kind, and the servant "must be obliged o provide his own work and skill".
>
> **2.14** Second, the employer must exercise a sufficient degree of control over the essential incidents of the parties' relationship as follows:

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11 Geoffrey England, *Employment Law in Canada*, 4th edition, Volume 1, looseleaf (Markham, Ont.: LexisNexis, 2005), Chapter 2, paragraph 2.13 *et seq*.

12 Also cited by Referee Taylor in the *Mamona* decision, *supra* at pages 37-38 (Exhibit A-32, Tab A).

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All theses aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

2.15 The prerequisite that the employer must exercise a sufficiently high degree of control over the worker (the modern law emphasizes control in the sense of directing the residual "when and where" employment is carried on rather than the manner in which the job is done, as was the case in the previous century) reflects a fundamental truth about the nature of the employment relationship that the courts have long sought to reflect in their determinations of "employee" status and to defend in their formulation of the employee's implied duty of fidelity. The truth is that there is more to the employment contract than an economic exchange of work for remuneration. Rather, given employer's need for flexibility in deploying its labour force in the dynamic economic and technological environment of the workplace, the primary "consideration" for which the employer bargains is the right of command, the power to direct the worker to suit the changing needs of the labour process. Since the hallmark of the employment relationship in the social sense is subordination, it makes sense for the courts to make subordination its legal hallmark too, and this is exactly what they have done. Nevertheless, it appears that a relatively low level of control will pass the threshold for "employee" status if it is clearly harmonious with the broader policy goals of the legislation that the worker in question qualify as an employee.

2.16 Two recent decisions involving the alleged wrongful dismissal of salesmen are illustrative. In the first, a real estate salesman was held to be an employee despite the fact that he had considerable freedom to set his own working hours, was paid entirely by commission and declared himself as "self-employed" for income tax purposes. This is because he was subject to "substantial control" by the company in several ways: he was bound by company policy regarding discipline and dismissal; he used the company's office and secretarial services according to prescribed policies; he was covered by the company's fringe benefit package; and he was eligible for promotion in the company hierarchy. In the second case, a worker who incorporated his own company and sold advertising for a broadcasting station was held to be an "employee" because he was subject to close direction and supervision by the station over his working hours, which clients he was to service, the number of clients he could meet each day, how he should present the station's offerings to clients and even the sort of business lunches he could order on his expense account.

2.17 The third requirement for "employee" status, according to Mckenna [*sic*] J. in *Ready Mixed Concrete*, is that the other provisions of the contract must be consistent with its being a contract of service.

. . .

> **2.19** What, then, are the "economic realities" which will point to the relationship being characterized as either "employee" status or "independent contractor" status? The most comprehensive recent attempt by a Canadian court to categorize the relevant "economic realities" is that of Wood J. of the British Columbia Supreme Court in a case involving the alleged wrongful dismissal at common law of a salesman. He listed the following criteria as being of "major importance":
>
> 1. Whether or not the agent was limited exclusively to the services of the principal;
> 2. Whether or not the agent is subject to the control of the principal not only as to the product sold, but also as to when, where and how it is sold;
> 3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to the service;
> 4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission; and
> 5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?
>
> [My emphasis.]

[18] The author offers his own observations, which I find useful. I will reproduce some of them here:

> **2.21** . . .
>
> 2. The ownership of tools and equipment must not be accorded decisive weight in and of itself since many employees, such as carpenters, meatcutters and garage mechanics own their own tools. However, usually it suggests independent contractor status if the worker personally makes a substantial capital investment, such as purchasing a vehicle of his or her own.
>
> 3. The question of "chance of profit and risk of loss" also must be handled carefully. It does not refer to incentive pay but rather inquires whether the person in question has something in the nature of a financial investment in the business, so that his or her gains or losses are dependent on something **other than his or her own work effort**. Thus, in *Lycar v. Lonnie W. Orcutt Farms Ltd.*, a truck driver was held to not be an employee for the purpose of a wrongful dismissal suit, despite the facts that his truck was registered in the employer's name and the employer signed the financing agreement, primarily because he had purchased the truck in his own name with a downpayment of $12,000 of his own money. The court reasoned that this represented a substantial capital investment, given the worker's means, and was consistent with him running a business of his own. In contrast, in *Racz v. Southern Trucking Ltd.*, a truck driver was held to be an employee for the purpose of Part III of the *Canada Labour Code* primarily because the employer leased the vehicle to the driver and limited the fee he could charge other customers for each trip. Therefore, the driver could only make more money by his own work efforts,

> namely making more trips, and this was insufficient to establish him as an independent business owner.
>
> . . .
>
> 7. The traditional employment relationship is one in which an employee works for only one employer, whereas the typical independent contractor is available to anyone who will pay for his or her services. Consequently, it will point towards "independent contractor" status if the individual has his or her own business name and address, stationery, invoice forms, business card and advertising brochures, and provides his or [her] services to several customers rather than one. However, there is no rule of common law that an "employee" cannot work for more than one employer. Indeed, the recent expansion of part-time and casual work has resulted in more employees becoming multi-job holders. Thus, the fact that a person works for more than one employer does not necessarily indicate he or she is an independent contractor rather than an employee. On the other hand, if a self-styled "independant [*sic*] contractor" is expressly bound by the terms of his or her con-tract [*sic*] to perform services exclusively for one customer, this will indicate the relationship is really one of "employee" status. In a similar vein, if a self-styled independent contractor is legally entitled to sell his or her services to the world at large but in practice works entirely or substantially for one employer, this suggests that the individual is really an employee.
>
> 8. In the traditional employment relationship of indefinite duration, the employee will usually be expected to perform a relatively wide range of job duties upon demand by the employer, whereas an independent contractor will usually be brought in to perform a single task or tasks, often within a specified time period. Accordingly, it may indicate "employee" status if the employee is expected to perform a relatively broad range of tasks. This is not determinate [*sic*], however, for "employees" are often hired to perform narrow or specialized work functions, and have very little work variety in the course of their careers.
>
> [My emphasis.]

Referees' decisions concerning Dynamex

[19] There are a number of court and referees' decisions dealing with the status of drivers in the courier business. As mentioned above, these include the *Palmer* decision by Justice Bowie of this Court and the *Mamona* decision by Referee Taylor. Indeed, the latter decision was invoked by the respondent's counsel in *Palmer* in support of her position that Mr. Palmer should be treated as an employee. At paragraph 11, Justice Bowie concluded that the *Mamona* decision was of no assistance to the respondent for several reasons, one of them being that Mr. Aitken had testified that the drivers in *Mamona* had formerly worked for Zipper and "that at

the time to which the decision pertained their terms of employment were not the terms on which Dynamex couriers elsewhere worked". Before me, counsel for Dynamex attempted to establish the same fact in questioning Mr. Aitken as follows: "Now I'd like to talk about the famous Mamona case . . . can you tell the Court whether this was based on Zipper facts or on Dynamex facts? (Question 246, page 65 of Volume 2 of the Transcript.) Counsel for the respondent objected to this question and counsel for Dynamex stated at pages 65 and 66: "I'm rather surprised to hear Ms. Tremblay because I asked the very same question to Mr. Aitken in front of Mr. Justice Bowie and she made no objection at all . . . . It's central to the distinction that needs to be made concerning the *Mamona* case. . . ." I overruled the objection and allowed the question. This is the answer that was given by Mr. Aitken at page 67: "Yes, the decision was based on, you know, on the way that the owner-operators were treated in the Zipper years, prior to the takeover of Dynamex." I then asked: "So the relevant year that was under issue was when the employees were working for Zipper, is that what you're saying?" His answer was: "Yes." (Question 247, pages 67 and 68.) He went to explain: "Most of . . . you know, there could have been, you know, one or two little carryovers, but, you know, but ninety-nine per cent (99%) of the stuff was from the Zipper years and the way they were treated . . . " (question 248, page 68). "Prior to the acquisition", I said, to which he responded: "Correct" (question 249, page 68).

[20] The Zipper facts had been established just prior to the above-mentioned questions as follows:

> **[244]** Q. Let's talk about the Zipper acquisition now. Could you please tell the Court when that was made in the first place and describe this company as it was then . . . .
>
> **[245]** . . .
>
> A. Okay. It was made in . . . it was at the IPO, so it would have been late '95, early '96 when the transaction was completed. And Zipper had a wide variety of, you know, people. They had walkers, they had employee drivers, they had drivers that they were treating like owner-operators, but in fact they were employees by our standards.
>
> As I say, they were given a vehicle that the company was paying the vehicle and they were just paying them an hourly wage, it was all over the place and, you know, and they were, you know, they were disappointing people at will. They had no rules and regulations and terminating at will. The owner ran a pretty, you know, hard nose shop at the time.

[My emphasis.]

[21] A reading of the decision rendered by Referee Taylor in *Mamona* contradicts Mr. Aitken's testimony. If not misleading, that testimony is at least mistaken. First, the relevant period in *Mamona* is 1997, 1998 and a portion of 1999 for two of the workers, that is, Mrs. Mamona and Mr. Cyr, and from January 1, 1997 to October 15, 1998 for Mr. Hepner. According to the evidence given by Mr. Aitken, Dynamex acquired Zipper in late 1995 or early 1996, so the relevant period in *Mamona* was not prior to the acquisition by Dynamex but subsequent to it. The workers in *Mamona* were therefore working under Dynamex's new management. It is true that the workers' original contracts were signed with Zipper. However, this is what Referee Taylor said:

> Each Respondent signed a contract with Zipper Courier Service Ltd. ('Zipper'), a corporation acquired in 1996 by Dynamex Canada Inc., the present Appellant. I shall be referring to Zipper and Dynamex interchangeably throughout these Reasons, since the contracts in question were those of Zipper but, by operation of law, became equally those of Dynamex. (Exhibit R-32, Tab A, page 2)

[22] I have also reviewed the facts as described by Referee Taylor and I find them substantially similar to the facts before me. Therefore, there is no substantial basis for distinguishing the *Mamona* case from this one. To illustrate my point, it is worth citing from Referee Taylor's decision the following extract dealing with the similarities of the contracts of the three drivers (Exhibit R-32, Tab A, pages 2-4):

> . . . Those contracts, while containing many provisions in common, were not identical. The distinctions between them will be discussed later in these reasons, but the salient, common factors may be summarized this way:
>
> i. Zipper agreed to employ the Respondent as an independent driver to provide courier, messenger and delivery services to Zipper's customers;
> ii. the driver was described, in each case, as an "independent contractor" and, in the cases of Messrs. Hepner and Cyr, the phrase "and not an employee" was added;
> iii. the driver was required to wear uniforms provided by Zipper, with the driver contributing to the cost of the uniforms;
> iv. either expressly, or by necessary implication, the driver was to provide his or her own vehicle and was to display on that vehicle, in such place and in such prominence as Zipper might designate, logos or designs depicting Zipper's trademarks. The logos were to be paid for by the driver and no other name, notice, advertising or painting of any kind was to be allowed on that vehicle without the prior approval of Zipper "which consent may be unreasonably and arbitrarily withheld";

v. the driver was made fully responsible for all losses to cargo and was required either to contribute to a 'Driver' claim fund' or to pay an insurance premium to cover potential losses in that regard;
vi. the driver was to maintain the vehicle in good working order, neat and presentable;
vii. the driver was required to lease from Zipper a mobile radio unit, the monthly rental being paid in advance at the beginning of each month;
viii. all customers, including any new customers introduced to Zipper by the driver, were and were to remain customers of the company and not of the driver;
ix. the customers were invoiced by Zipper, and Zipper paid each driver an agreed rate of commission based upon the invoice, whether or not the customer had paid its bill; a small percentage of the commissions otherwise payable to each driver was deducted for bad debts;
x. the driver was to be responsible for all maintenance, repairs, registration, licensing and insurance for the driver's vehicle, although the required amount of insurance coverage differed—Messrs. Hepner and Cyr agreed to carry at least $200,000 of third-party liability coverage, whereas Mrs. Mamona undertook to carry $500,000;
xi. the driver was to use daily manifest forms, waybills and other documents supplied by the corporation;
xii. each driver agreed to be bonded (Mrs. Mamona in the amount of $10,000, Messrs.Cyr and Hepner for $5,000 each) and to reimburse the corporation for the bond premium by equal monthly instalments;
xiii. the contract was of indeterminate duration but could be terminated by either party on written notice;
xiv. the corporation, while promising to act fairly, reserved the right to allocate work amongst its owner-drivers as it saw fit, and to dispatch any driver to any customer, regardless of location.

[My emphasis.]

[23] There are obviously some differences in the facts, as there are always. Some are favourable to Mr. Fontaine and some to Dynamex. For instance, the drivers in *Mamona* were made fully responsible for all losses to cargo and the cargo insurance premiums were paid by the drivers. Here, the cargo insurance premium was paid by Dynamex. Under the Zipper contract, the drivers were required to show on their vehicules "in such prominence as Zipper might designate logos . . . depicting Zipper's trademarks". There was no similar requirement in Mr. Fontaine's case. However, it should be stated that, under the Zipper contract, the drivers were entitled to a higher commission if they displayed the Zipper logo. In Mrs. Mamona's case, had her car not been marked with a decal containing the corporate logo she would have been entitled to receive only 65% of gross earnings instead of 70% (see page 5 of *Mamona*). Mrs. Mamona was required to have her vehicle painted polar white or

have her commission rate reduced to 65%. Such was not the case for Mr. Fontaine. In *Mamona*, Dynamex deducted a small percentage of the commission to cover bad debts and workers' compensation premiums. There is no evidence in Mr. Fontaine's case of any deductions for bad debts. The workers' compensation premiums in Mr. Fontaine's case were paid by Dynamex. Overall, I believe it would have been easier in *Mamona* to conclude that there was independent contractor status, but the referee still held that the workers were employees!

[24] It should also be stressed that the decision of Justice Bowie in *Palmer* was based only on the testimony given by Dynamex managers, namely Mr. Aitken and the operations manager. The worker, Mr. Palmer, did not testify.[13] Furthermore, counsel for the respondent stated that the Driver's Handbook and many of the memoranda that were filed as exhibits before me were not introduced as evidence before Justice Bowie. So Justice Bowie did not have a complete picture of what really took place in Toronto during the relevant years. The *Palmer* decision is therefore of no assistance to Dynamex.

[25] However, the decision rendered by Referee Taylor is of great assistance to the respondent in the present case. As mentioned earlier, Referee Taylor concluded on the basis of common law principles that each of the workers was an employee and thus entitled to vacation pay. His decision was subjected to judicial review by the Federal Court of Canada, Trial Division. Justice Kelen concluded that Referee Taylor's decision was not patently unreasonable "even if the decision was contrary to jurisprudence before the Tax Court that the courier industry is normally made up of independent contractors, not employees of the courier company . . .".[14] That decision was affirmed by the Federal Court of Appeal.[15] Sharlow J.A. stated: "The referee went on to identify the applicable common law principles as those set out in *Wiebe Door Services* . . . . In my view, his analysis of the relevant common law principles discloses no error of law." At paragraph 50, she concluded that the referee's application of the common law principles to the facts was "reasonable and should not be disturbed". As mentioned above, Dynamex was refused leave to appeal to the

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13 In addition, it should be stated that counsel for Dynamex relied heavily in his notice of appeal on the decision rendered by Justice C. Miller of this Court in *DHL Express (Canada) Ltd. v. Canada (M.N.R).* [2005] T.C.J. No 119 (QL). That decision was also based only on evidence presented by two employees of the courier company and not by the worker: the worker did not intervene in that appeal nor did he testify before Justice Miller (see paragraph 2 of his decision). Had the worker testified, a different picture might well have emerged, as is the case here.

14 *Dynamex Canada Inc. v. Mamona*, [2002] F.C.J. No 534 (QL), paragraph 29.

15 (2003), 305 N.R. 295, at paragraph 49.

Supreme Court of Canada. Given that seal of approval, it should not be inappropriate to rely on the precedent created by the *Mamona* decision of Referee Taylor, provided that the evidence before me supports a similar conclusion herein.

US Case law

[26] In his testimony in the appeals concerning Mr. Fontaine, Mr. Aitken was asked to describe the practices of the courier industry. He stated that the courier industry, for both same-day and overnight deliveries, "just about exclusively uses independent contractors" (question 195, pages 47 and 48 of Volume 2 of the Transcript). He then added: "the odd time they could have employees, you know, we run into that, but for the most part they are independent contractors" (question 196, page 48). In cross-examination, however, he acknowledged that UPS and Fedex in Canada treated their drivers as employees (see questions 576 to 578 in Volume 2 of the Transcript).

[27] Similar statements were made in at least one other case relied on by Dynamex and submitted in its book of authorities: the decision of the British Columbia Supreme Court in *Tajarobi v. Corporate Couriers Ltd.,* [2006] B.C.J. No. 639 (QL). In that case, DHL-Loomis was a third party. The defendant, Corporate Couriers, operated a same-day courier service for his own customers and provided route courier service on behalf of DHL Worldwide Express for customers of DHL. At paragraph 40, Justice Halfyard states that a witness for Corporate Couriers testified that it's "drivers were contract drivers, and that in his experience, all courier drivers in North America were independent contractors." (My emphasis.) In concluding that the plaintiff had failed to meet his burden of establishing that he was an employee, Justice Halfyard stated the following in paragraphs 56 and 57:

> **56** The second additional factor is that the conduct of the parties during this six year period occurred in the context of an industry in which (according to the evidence) couriers are generally considered to be independent contractors. Except for Mr. Lalli's assertion that he considered himself to be an employee, the evidence supports the inference that all of the other route drivers were treated as being independent contractors, and considered themselves to be such.
>
> **57** Both of these additional factors point to the conclusion that the plaintiff was an independent contractor, although the second cannot carry much weight.

[My emphasis.]

[28] Given that Dynamex is a Canadian subsidiary of a U.S. Corporation which happened to own the logo used by Dynamex's drivers on their vehicles, and given the position taken by Mr. Aitken that the industry almost exclusively uses independent contractors, it is worth noting that in the U.S. the status of owner-operators is far from being as clear as it is described as being. The business model followed by the courier industry, which treats its drivers as independent contractors, is under attack in the U.S. courts. A major class action involving Fedex Ground Package System, Inc. is under way in the U.S. District Court for the Northern District of Indiana, South Bend Division.[16] Judge Robert Miller granted on July 27, 2009 motions for class certification with respect to eight American states. In 2007 and 2008, he had ruled on similar motions concerning 28 other American states.

[29] In addition, there are three decisions of the Court of appeal of California holding that drivers in the courier business are to be treated as employees notwithstanding their being described in contracts as independent contractors. These decisions are: *Estrada et al. v. Fedex Ground Package System, Inc.,* 154 Cal. App. 4th 1; 64 Cal. Rptr. 3d 327; 2007 Cal. App. Lexis 1302; 154 Lab. Cas (CCH) P60, 485; *Air Couriers International et al. v. Employment Development Department et al.,* 150 Cal. App. 4th 923; 59 Cal. Rptr. 3d 37; 2007 Cal App. Lexis 738; 2007 Cal. Daily Op. Service 5325; and *JKH Enterprises, Inc. v. Department of Industrial Relations/State of California,* 71 Cal. Comp. Cas 1257; 2006 Cal. Wrk. Comp. Lexis 329; 142 Cal. App 4th 1046; 48 Cal. Rptr. 3d 563.

[30] In *Estrada*, the drivers worked full time for Fedex, were paid weekly, had regular schedules and regular routes, received many standard employee benefits, wore uniforms, used company-specific scanners and forms, and were required to work exclusively for the company. The common law principles applied by the California Court of Appeal are to a great extent similar to the common law principles applied in Canada, as appears from this dictum[17] by Vogel J.:[18]

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16 In re *Fedex Ground Package System, Inc.*, *Employment Practices Litigation,* 2009 U.S. Dist. Lexis 65244.

17 Described as [HN2] under the heading "Discussion", in the LexisNexis published text. At page 7 of the printout of the LexisNexis electronic version under the heading "Discussion".

18 This similarity should not be a surprise given that the common law principles developed in Canada have a U.S. source. The Supreme Court of Canada in *Sagaz* adopted to a great extent the approach followed by the Federal Court of Appeal in *Wiebe Door* and by the Privy Council in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), which, according to Major J. in *Sagaz* (paragraph 39) and MacGuigan J.A. in *Wiebe Door* (page 559) applied the fourfold test known as the "entrepreneur test" as set out by W. O. Douglas (later a U.S. Supreme Court judge) in an article entitled "Vicarious Liability and Administration of Risk I" (1928 - 1929), 38 *Yale L.J.* 584.

> (**1**) Because the Labor Code does not expressly define "employee" for purposes of *section 2802*, the common law test of employment applies. (*Reynolds v. Bement (2005) 36 Cal.4th 1075, 1087*.) The essence of the test is the "control of details" — that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work—but there are a number of additional factors in the modern equation, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship . . . . The parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship.
>
> [My emphasis.]

[31] The California Court of Appeal concluded that the trial court's findings that the drivers were employees were supported by substantial evidence. What follows is the trial judge's decision as described by the Court of Appeal of California :

> The trial court found, and set forth in its statement of decision, that the drivers were FedEx employees, not independent contractors, and that they had not been indemnified for any of the expenses at issue. The court described the Operating Agreement as "a brilliantly drafted contract creating the constraints of an employment relationship with [the drivers] in the guise of an independent contractor model"—because FedEx "not only has the right to control, but has close to absolute actual control over [the drivers] based upon interpretation and obfuscation."[6] . . .
>
> The court found, in addition, that the drivers are "totally integrated into the [FedEx] operation," that they perform work essential to FedEx's core business, that they are required to work exclusively and full time for FedEx, that their customers are those assigned to them by FedEx, that no specialized skills are required, that they must wear uniforms and conform absolutely to FedEx's standards and that, in the end, each driver has a "job" with "little or no entrepreneurial opportunities." Although the drivers provide their own trucks and equipment, FedEx is involved in the purchasing process, providing funds and recommending vendors.

The essence of the trial court's statement of decision is that if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck.[19]

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6 The court found the drivers' right to control their own routes and schedules was illusive because they were "constrained by customer pick up and delivery windows contracted by the [FedEx] sales force" and by FedEx's paperwork requirements that required the drivers' presence at the terminal.

[My emphasis.]

[32] Vogel J. himself concluded that the drivers were employees:

FedEx's control over every exquisite detail of the drivers' performance, including the color of their socks and the style of their hair, supports the trial court's conclusion that the drivers are employees, not independent contractors. The drivers must wear uniforms and use specific scanners and forms, all obtained from FedEx and marked with FedEx's logo. The larger items—trucks and scanners—are obtained from FedEx-approved providers, usually financed through FedEx, and repaid through deductions from the drivers' weekly checks. Many standard employee benefits are provided, and the drivers work full time, with regular schedules and regular routes. The terminal managers are the drivers' immediate supervisors and can unilaterally reconfigure the drivers' routes without regard to the drivers' resulting loss of income. The customers are FedEx's customers, not the drivers' customers. FedEx has discretion to reject a driver's helper, temporary replacement, or proposed assignee.

. . .

Drivers—who need no experience to get the job in the first place and whose only required skill is the ability to drive—must be at the terminal at regular times for sorting and packing as well as mandatory meetings, and they may not leave until the process is completed. The drivers are not engaged in a separate profession or business, and they are paid weekly, not by the job. They must work exclusively for FedEx. Although they have a nominal opportunity to profit, that opportunity may be lost at the discretion of the terminal managers by "flexing" and withheld approvals, and for very slight violations of the rules. Most drivers have worked for FedEx for a long time (an average of eight years), and drivers employed by FedEx's competitors (UPS, DHL, and FedEx's sister corporation, FedEx Express) are classified as employees.

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19 This approach can also be described as the ''elephant test'', which may be more prevalent than appears (given the lack of a clear definition of a contract of service in common law jurisdictions) and goes thus: "I can recognize an elephant when I see one!"

[My emphasis.]

Characterization of the contract by the parties

[33] Before we apply the common law principles to the facts of these appeals, it is necessary to deal with another preliminary legal matter. It has to do with the weight to be given to the statement in the Fontaine contract that Mr. Fontaine acknowledges and agrees that his status is that of a dependent contractor and that there is no employer-employee relationship. (See section 12 of the contract, above.) The law on this issue is clear. Sharlow J.A. in *Dynamex* (above) expressed it well at paragraph 52:

> **52** The referee recognized, correctly in my view, that in determining whether a person is an employee or an independent contractor, the terminology used in his or her contract is not determinative (see *Sagaz*, *supra*, at paragraph 49). Such a contractual term cannot prevail if the evidence of the actual relationship between the parties points to the opposite conclusion, as the referee found to be the situation in this case. The referee also recognized that a person whose employment status is ambiguous may well find it advantageous to take inconsistent positions in different proceedings. That is relevant but not by itself determinative of which of the two inconsistent positions is correct in fact and law.

[My emphasis.]

This statement has been approved in many other Federal Court of Appeal decisions such as *D & J Driveway Inc. v. Canada (Minister of the National Revenue)*, [2003] F.C.J. No. 1784 (QL), at paragraph 2.

[34] In my view, the courts have a duty to verify that the terms of a contract have been adhered to and that the terminology used adequately reflects the true intent and the conduct of the parties, so that a "brilliantly drafted contract" does not create a contract of service (employment) "in the guise of" a contract for services. Failure by the courts to be alert in this regard would give true employers the ability to unjustly deprive their true employees of many benefits that have been legislated by Parliament and its provincial counterparts. Alertness is of even greater necessity in circumstances such as those in the present case where the parties to the contract come to different conclusions as to the true nature of their relationship.

[35] The Fontaine contract was drafted by Dynamex and Mr. Fontaine was not offered any opportunity to negotiate it. The contract may clearly express the intent of

Dynamex but not necessarily that of Mr. Fontaine. On the contrary, it appears that Mr. Fontaine was not comfortable with signing this contract. He consulted his union representative and asked whether he should sign. He had no choice but to sign in order to keep his employment with Dynamex. The Union was also of the view that the relationship of the drivers with Dynamex was an employer-employee relationship even though it was not successful in having its point of view acknowledged in the Collective Agreement. It had to sign the Collective Agreement, which defined employee/owner-operator as including a dependent contractor. In any event, it remains to be determined if Dynamex acted in a way that was consistent with its intent that Mr. Fontaine not be considered as part of its personnel, that is, one of its employees.

[36] At first glance, the Fontaine contract contains many provisions which appear to be more consistent with an employment contract (contract of service) than a contract for services. For instance, section 2 provides that the owner-operator must maintain his vehicle in a safe, damage-free, serviceable and clean condition. But how many of Dynamex's clients require Dynamex to fulfil such a requirement? In section 3, the contract states that the services are to be provided in a safe, efficient, courteous and lawful manner. So the worker is being told how to perform his services. Section 22 of the contract stipulates that the owner-operator shall wear a uniform approved by the company and forbids the placing of any name, advertising or decal (other than those of Dynamex) on the owner-operator's uniform or motor vehicle, except as expressly otherwise permitted. Obviously, Dynamex would not have allowed Mr. Fontaine to wear on his uniform or display on his car a corporate logo of another courier company.

[37] It is true that there are also provisions in the Fontaine contract that could be consistent with the existence of a contract for services. For example, section 14 provides that the owner-operator shall protect the company from, and indemnify it for, all losses, claims, costs, damages or liabilities which the company may suffer or incur from any act or omission of the driver in providing services to the company under the agreement. (See also section 10 of the Fontaine contract.) So an overall analysis of the conduct of the parties is necessary to determine the true nature of the relationship between them.

Application of the common law principles to the facts

- Whose business is it?

[38] Let us see, then, if the "evidence of the actual relationship between the parties points to the opposite conclusion". As stated in *Sagaz*, the central question is whether Mr. Fontaine was performing services as a person in business on his own account or whether he was performing them on behalf of Dynamex. Taking into account the evidence as a whole introduced before this Court, I have no hesitation in concluding that Mr. Fontaine was not carrying on any courier business on his own account.

[39] First, Mr. Fontaine did not hold himself out as carrying on a business. He did not have a registration number for GST purposes.[20] There is no evidence that Mr. Fontaine sent any invoices to Dynamex for the purpose of receiving his remuneration, as a normal business person would have done. His remuneration was paid by Dynamex without any request from him.[21] All of the work involved in computing his remuneration was performed by Dynamex, as any employer normally does (see Exhibit R-25). Mr. Fontaine did not have any customers. He was delivering parcels to Dynamex's customers. These customers belonged to Dynamex. It was Dynamex that had to take the trouble to get those customers, to negotiate its remuneration with them and to collect that remuneration. It bore the risk of not being paid. There was no contractual relationship between Mr. Fontaine and Dynamex's customers. The drivers, of whom Mr. Fontaine was one, only had to show up and wait for the dispatcher's instructions concerning pickup and delivery location for the parcels.[22]

[40] Given that the customers that Mr. Fontaine serviced belonged to Dynamex, Mr Fontaine could not have sold any list of customers nor benefited from the value

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20 It is true that no GST registration is required if the income generated on a yearly basis is less than $ 30,000. However, in his testimony, Mr. Aitken suggested that some of the drivers could make up to $100,000. If so, these workers would have to be registered for GST purposes. However there is no evidence that invoices with the required GST number were issued by such drivers to Dynamex. It is true that Mr. Fontaine reported his income as being from self-employment, but this was the result of having been issued a T4A slip. He had asked for a T4 in 1997 but this was refused. It should be added that Dynamex started issuing T4As at the request of the Minister in 1993.

21 He handed in, as requested by Dynamex, a manifest on which all the deliveries that he made were listed. This allowed Dynamex to bill its clients and compute the driver's share of the proceeds.

22 It is true that the Fontaine contract provided for compensation for Mr. Fontaine if he succeeded in obtaining new customers for Dynamex. However, there is no evidence that Mr. Fontaine was ever paid anything under the clause in question. Mr. Bachinski did not know whether Mr. Fontaine was paid any money for new customers. In any event, there is nothing inconsistent with an employer-employee relationship in an employer paying its employees for referring clients to it.

resulting from the goodwill associated with such a list. Under the Fontaine contract, he could not provide similar services to competitors of Dynamex nor could he, for one year following the termination of the contract, solicit or do business similar[23] to that of Dynamex with any persons who were then, or had been within the last year, customers of Dynamex (see section 4 of the Fontaine contract reproduced above).

[41] An opportunity to make a profit did not really exist. It would have existed had Mr. Fontaine not been limited to providing his services to Dynamex only. In such a situation, there would have been an incentive to hire employees of his own and to be in business on his own account. That is what Dynamex did. It delivered parcels coming not only from its own customers but also from other courier businesses such as DHL and Purolator. Furthermore, the price paid for the delivery was decided by Dynamex.[24] Had Mr. Fontaine had the freedom to service any customers and to fix the remuneration for the delivery, he would have had an opportunity to increase his profit, as entrepreneurs do. His only opportunity for higher income, however, was to work longer hours (overtime), as many employees do.

[42] Dynamex was the only national same-day-delivery courier company in Canada (according to Mr. Aitken) and therefore Mr. Fontaine's services (as also those of the other drivers, the walkers and the bikers) were used in the core activities of Dynamex.[25] The Driver's Handbook makes it perfectly clear that the drivers are integrated into Dynamex's business, stating the following at page 6: "by being professional, courteous, friendly and helpful, you present a polished image when making the customer's overall experience a good one with Dynamex . . . . -You are not just an [*sic*] Driver − in the eyes of our customers − **YOU ARE DYNAMEX**". Mr Fontaine, like the other drivers, walkers and bikers, provided a service which was essential to Dynamex. In addition, Mr. Fontaine worked for Dynamex and it predecessor, Zipper, for close to 16 years on a full-time basis, Mondays to Fridays, between the hours of 8:00-8:30 a.m. to 4:30-5:30 p.m., just as employees (such as the walkers and the bikers) would normally do.

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23 Contrary to what Dynamex's counsel argued in his notice of appeal.

24 It is true that under the Collective Agreement there was a rate committee of which representatives of the Union were members. See Exhibit R-1, Tab 1, article 15.02 dealing with the rate committee. However, at the end of the day, the rate to be charged its customers was Dynamex's decision.

25 At page 3 of the Driver's Handbook (Exhibit R-2), we find the following description :

> Dynamex was established in 1962 with one car and today, operates the most extensive local courier network of any company. Our fleet is made up of approximately 1,700 units, from bike couriers, to cars, to vans, to highway transport trucks. [My emphasis.]

[43] He was paid regularly (twice a month) by Dynamex. There is no evidence that Mr. Fontaine ever experienced a loss. The remuneration paid by Dynamex and Zipper from 1991 to 2002 varied from a low of $ 21,302 in 1991 to a high of $ 28,113 in 2000.[26] From those amounts, Mr. Fontaine would have had to deduct at least his car expenses.

[44] Dynamex was the one providing most of the mandatory equipment[27] necessary for the courier business, including the radio equipment[28], a telephone book, an extra set of keys, notepads, waybills, a handcart, a map book, an ID tag, and manifests and bills of lading. It also provided the trade name and the Dynamex logo. One big exception was the car, which had to be provided by Mr. Fontaine (in which respect he was like the other drivers). The car in question was a small personal vehicle, namely a Firefly. There is no evidence that Mr. Fontaine would not have purchased the car had he not been working for Dynamex. It is reasonable to expect that Mr. Fontaine would have owned such a car in any event.[29] Therefore, Mr. Fontaine was in no different situation than many salespersons who are required to provide their own cars to provide their services on behalf of their employer. It is true that it is normal practice for such an employer to provide a car allowance to cover vehicle expenses. Here this was achieved by paying a substantial commission. It is fair to assume that the costs incurred by the drivers for the operation of their vehicles were taken into account in determining the level of commission paid by Dynamex. When it lost the *Mamona* case, Dynamex reduced commissions by approximately 4% to take into account paid vacation. Mr Fontaine's commission went from 71% to 66%.

[45] In addition, the conduct of ZTS/Dynamex as described in the *Morgan* decision further supports this inference. Mr. Morgan was originally hired to work for ZTS. Initially, he drove a one-ton cube truck which was owned by ZTS. ZTS also paid for

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26 (See Exhibit R-22) This level of income is more consistent with low-earning employees than successful business persons.

27 My emphasis, page 9 of the Driver's Handbook.

28 The licence for the radio was taken out in Dynamex's name. It is true, however, that the cost of the use of the radio was charged generally to the drivers (see section 19 of the Fontaine contract). The details of that charge were not introduced in evidence. However, in my view, this cost was taken into account in determining the rate of commission paid to the drivers. Furthermore, if there was a problem with the use of the communication equipment, it was Dynamex that had to deal with it (see Exhibit R-10). Even when the battery in his pager had to be replaced, Mr. Fontaine staid, it was done, at no cost to him, by Dynamex.

29 This may well explain why he never hired substitutes to replace him when he was not available to work: he used his car for his personal needs.

all gas and maintenance with respect to this vehicle. For his services, Mr. Morgan received a commission of 40% (of the amount received by ZTS for its services). Before starting to work for ZTS, he had signed an agreement, in March 1996, under which he was required to operate his own vehicle at his own expense.[30] His rate of compensation in that case would be 60% (64% if his vehicle was painted white and had decals on it). (See Exhibit R-32, Tab B, at pages 4-5.) Its seems that in 1997 Mr. Morgan purchased a five-ton truck that had previously been owned by Dynamex, and that he then became entitled to receive a commission of 80% (see page 5 and 6 of Exhibit R-32, Tab B).

[46] It is clear that the management of the delivery services was carried out by Dynamex thorough its dispatchers, managers and supervisors. They were the ones investing time and energy in increasing the efficiency of Dynamex's courier business. It was Dynamex that — as any other employer would do — drafted or revised a handbook[31] instructing not only its employee walkers and bikers but also its drivers on how to perform their delivery services. In addition to the Drivers' Handbook, there are many internal memoranda containing directives in this regard. I will review these in greater detail below.

[47] Another example is the fact that Dynamex instituted on June 13, 2000 a national fuel purchase program in order to reduce its drivers' vehicle expenses. It provided its drivers with a Petro-Canada credit card which enabled them to avail themselves of a discount. It is true that the cost of fuel under this national program was borne by the drivers. However, what is significant here is that the program was implemented by Dynamex, which shows that it, not the drivers, was devoting management time to making the business more efficient (see Exhibit R-8). By so doing, Dynamex was able to reduce the risk of being asked by its drivers to increase their commission.

[48] The drivers were contractually required to maintain their vehicles in a good state of repair, and Dynamex inspected them twice a year. It should be noted that in the event of an accident involving the vehicle or the parcels, a form prepared by Dynamex and bearing its logo had to be filled out by the drivers and handed in to Dynamex (see Exhibit R-31). This, in my view, is also indicative of the fact that it

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30 In his testimony before me, Mr. McMaster confirmed that some of the drivers working for Zipper drove vehicles belonging to the company. However, this changed when Dynamex took over Zipper: all vehicles were then to be owned by the drivers.

31 It should be noted that the Driver's Handbook has existed since 1995 and, according to the union representative, Mr. McMaster, it was derived from the handbook prepared by Zipper. He also confirmed that the Driver's Handbook was equally applicable to walkers and bikers.

was Dynamex and not the drivers (in this case Mr. Fontaine) who devoted management time to matters concerning how to carry on the business in the most efficient manner.

[49] The stipulation in the Fontaine contract that Mr. Fontaine must indemnify Dynamex with respect to all liabilities is consistent with the existence of a contract for services. However, in my view, it should not be given much weight because the likelihood of such circumstances occurring was not very high. Dynamex had cargo insurance for which it paid the premium. Mr. Fontaine, being the owner of the car, had to obtain his own car insurance. So Dynamex's exposure would have been limited. In my view, the indemnification provision is not sufficient to detract from the overall conclusion that Mr. Fontaine was not carrying on a business on his own account.

[50] Mr. Fontaine had to perform his services personally (see section 1 of the Fontaine contract, above). While the contract does not expressly so provide, such was nonetheless the reality because, although Mr. Fontaine had the right to hire helpers, this was subject to the control of Dynamex (see the Collective Agreement, article 17.08, in Exhibit R-1, Tab 1). In any event, this right was not exercised by Mr. Fontaine. He did not hire any helpers, nor did he not look for substitutes when he did not show up for work.

[51] In my view, to state, in an attempt to establish that he was behaving like an entrepreneur, that Mr. Fontaine was free to decide when he would work, to accept a proposed delivery or not and to choose the best routes for making his deliveries, is inaccurate. The evidence referred to above and below contradicts these allegations by Dynamex. In particular, as to the alleged freedom to refuse less profitable deliveries, article 15.02 of the Collective Agreement specifically provides that the employee/owner operator (which term includes the drivers, the walkers and the bikers) "will not refuse to handle such calls" (the less profitable ones). We will see below the consequences of refusal by a driver in such a case (see Exhibit R-13). Thus, Mr. Fontaine had no (or little) freedom in this regard.

[52] As far as Dynamex's lack of control over which routes to take to make deliveries is concerned, it did not have to exercise such control because of its choice of method of remuneration for its drivers. Like the walkers and the bikers, the drivers received a percentage of the fee collected for the delivery, that is, a commission. This formula ensured that Dynamex's employees would use the most efficient route for a delivery. In any event, Mr. Fontaine was in no different a situation than that of most sales representatives working on commission for their employer. These employees

are given a considerable degree of freedom in servicing their employer's customers. Whatever freedom Mr. Fontaine may have had during the relevant period, it does not conclusively establish that he was carrying on a business.

[53] In my view, the degree of financial risk taken by Mr. Fontaine, his degree of responsibility for investment in tools and for management of the deliveries and his opportunity for profit and risk of loss are not sufficient to establish that he was an entrepreneur and that he carried on a business on his own account.

- Relationship of subordination with Dynamex

[54] Not only does the evidence here clearly establish that Mr. Fontaine was not performing his services on his own account, but it clearly establishes as well that he was an employee of Dynamex because of the degree of direction and control that the company exercised over him.

[55] First of all, it is interesting to note that in a memo addressed to all drivers respecting the transportation of dangerous goods, one Candace Shadlock is described as "Driver Services Supervisor", which not only is clearly consistent with Dynamex having the right to exercise control over the work performed by Mr. Fontaine, but also shows that it had a supervisor responsible for exercising that right with respect to all its drivers. (See Exhibit R-12. Many other examples of similar memoranda are referred to below.)

[56] There is also plenty of evidence that Dynamex exercised direction and control over the work of its drivers in general and over Mr. Fontaine in particular. For instance, through its employee dispatcher, Dynamex told him what to do and where to do it, that is, where to pick up and where to deliver parcels. It is interesting to note as well that the assignment of the deliveries by the dispatcher was done in a similar fashion for the walkers and the bikers. Not only were there no differences in the ways in which they were directed in the performance of their work, they also had similar remuneration formulas. The only significant difference between drivers on the one hand and walkers and bikers on the other is that the drivers had to provide their own vehicle.

[57] Dynamex did not limit itself to "control of the result" or of the quality[32] of the work; its aim was to control the performance of the work, that is, how it was to be

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[32] See par. 9 of *D & J Driveway Inc.*, above.

done. First, there was a 29-page Driver's Handbook which was designed to assist the drivers in carrying out their work.[33] According to Mr. McMaster, this handbook applied equally to him (a walker) and to bikers. One of the three objectives of the handbook is stated thus:

> a. Gives you some practical advice on how to do your job a little better and provides Policy and Procedure information on Dynamex standards.
>
> [My emphasis.]

[58] The Handbook, at page 20, describes the role of the dispatcher as consisting of three functions:

> 1) To dispatch the order to the driver most capable of completing the delivery on time.
> 2) To organize and efficiently move drivers throughout the city such that income level targets are met and exceeded.
> 3) To track the status and update pending orders until completion by the driver.
>
> [My emphasis.]

It also indicates that the drivers are to "[l]et the dispatch department know where you are at all times, when you are out of your vehicle, when you pick up or make a delivery." (My emphasis.)

[59] In addition to these statements in the Driver's Handbook, there are internal memoranda addressed to the drivers. One of these, by Mr. Brian Bachinski, dated sometime in 2002 (Exhibit R-26) , deals with requests for time off:

> We are currently experiencing problems servicing our customers on Many [*sic*] days. This seems especially a problem Mondays, Fridays and month-ends where some drivers may have booked appointments, time-off or simply not shown up for work. Since these are busier days at work, it's created service failures or poor service to many of our customers. Our customers are now starting to compare rates to other couriers because of service issues. We DO NOT want that to happen.
>
> To help alleviate this problem we request you do not book time-off on these days. Please schedule your appointments or necessary time off at other times. If you have

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[33] Exhibit R-2. At page 3, Dynamex welcomes the drivers in the following way:

> We are pleased that you have chosen to become a member of the Dynamex team. We hope you will have a rewarding career with our organization. [Emphasis added.]

> some special circumstance needing time-off on these days, please see Michelle Leber to discuss.
>
> We need all drivers to be at work to care for our customer base. At times we have had 20, 30 or more drivers off at the same time. As you can appreciate, this makes it nearly impossible to meet our service commitments to our customers. We try not to hire more drivers than needed, but the present circumstances are requiring us to hire more drivers just to cover off unscheduled absenteeism.
>
> Your cooperation in making sure you're available for work is appreciated. We will continue to use the Time Off request form (with a few changes) to book your necessary appointments.

[60] Another memorandum, this one drafted by Brian Bachinski's brother, Chris Bachinski, general manager of Dynamex, a few months later, on November 20, 2002, is stronger in its directives. Dealing with the availability of drivers[34] and the refusal of calls, it reads as follows (Exhibit R-13):[35]

> We continue to work at providing great service to our customers, and to provide proper earnings to our drivers. To do this we balance many different issues each day such as call volume, driver availability, and other daily variables.
>
> We want to utilize drivers efficiently, please be reminded of our company policies on working hours and refusal of calls.
>
> **WORKING HOURS:**
>
> 1) Appointments may not be accommodated on Friday's [*sic*] and Month End days.
> 2) All drivers that book-on are expected to be available for a full day. Our Dispatch opens at 7:45a.m., Monday to Friday, and drivers should be available to start work between 7:45-8:30a.m. Monday to Friday, unless scheduled runs require an earlier start time. In addition drivers **must** be available to work until the calls are completed; this usually is between 4:45-5:45p.m., depending on volumes and scheduled runs.
>
> Drivers who continue to book on late and leave early will follow the same procedures as listed below for refusal of calls.
>
> Note: We will be reasonable when extenuating circumstances arise.
>
> **REFUSAL OF CALLS:**

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[34] It should be stressed that this policy on availability and the refusal of calls was equally applicable to walkers and bikers.

[35] This memorandum was replaced by another one dated February 23, 2005 (see Exhibit R-14).

Drivers are not allowed to refuse calls, other than for Health & Safety reasons. We will continue to impose the following:

1st Refusal by a Driver:	driver will be placed at the bottom of the driver list.[36]
2nd Refusal:	driver will be requested to meet with manager/supervisor to discuss the incident.
3rd Refusal:	driver will be suspended for 1 (one) day.

Note: further repeated refusal of calls will lead to termination of your contract with Dynamex.

The above policies are assist [*sic*] in accomplishing two objectives. One, great service to our customers, this allows us to keep our prices up. Two, ensures work is distributed fairly and driver earnings are at a fair level. These two objectives help you as the drivers to make more money.

We appreciate the drivers who are continuing to commence early and work until the calls are completed, and appeal to the other drivers to recognize how imperative it is that we improve our service. Customers are the driving force of our business, without our customer there is no income for the 165 personnel associated with our branch.

We thank you in advance for your co-operation.

[My emphasis.]

[61] This memorandum showing displeasure and reminding the drivers of their obligation to show up for work must be set in its proper contractual context. Article 8.12 of the Collective Agreement deals with the availability of "employee/owner operators" (see Exhibit R-1, Tab 1):

> (a) The Company shall endeavor, within the reasonable confines of ensuring a high quality of customer service, to use the least amount of employee/ owner operators as possible.
>
> (b) Within Six (6) months of the ratification of this collective agreement the company will reduce the size of the on demand fleet by Five Per Cent (5%) with the aim of redistributing the work equitably amongst the remaining drivers. This reduction of the fleet size is contingent on average fleet attendance not dropping below Ninety Three Per Cent (93%), including authorized leaves, and maintenance of an overall average on time delivery rate of Ninety Six and One-half Per Cent (96.5%).

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[36] In his testimony, Mr. Fontaine stated that on at least on occasion the dispatcher stopped assigning him pickups until he had discussed the matter with the operations manager.

[My emphasis.]

[62] Although Mr. Brian Bachinski indicated in his testimony that the memorandum drafted by his brother was written out of frustration, it does reflect the fact that drivers were not allowed to refuse calls other than for health and safety reasons and that the company expected all drivers to be available for a full day. In addition, the drivers had to be available to work until all calls were completed, which was normally around 4:45 or, 5:45 p.m. In Mr Fontaine's case, he would sign in (book in) between 8:00 and 8:30 a.m. and sign off between 4:30 and 5:30 p.m., Monday to Friday. However, he was sometimes unavailable by reason of his having to provide services to clients of his massage therapy business. In those circumstances, he needed the authorization of the operations manager (see Exhibit R-19).

[63] Another example of the constraints on the drivers' choice to work or not is the "Scheduled Leave Request - Drivers" form (Exhibit R-17). It states the following: "To assist in scheduling time-off please indicate below your 1st, 2nd and 3rd choices. We will endeavor to accommodate your request . . . ." It also says: "If you are taking time-off in July or August this form must be returned by May 1st, 2000." Article 14.02 of the Collective Agreement provides that a driver with five years of service or less is entitled to "absent himself/herself and his/her vehicle" for a period of up to two weeks, and that the company has the right to allocate time off on a rotation basis. In addition, as mentioned above, Mr. Fontaine was not required to find a substitute to perform his work while he was on scheduled leave. Moreover, he had no employee working for him either.

[64] One can see from these facts that there were both important legal and economic constraints that limited the so-called freedom of the owner-operator to work or not to work for Dynamex. The Union certainly wished that its members, the owner-operators, might be given an opportunity to make enough money, and the consideration for Dynamex agreeing to give them that opportunity was that they had to be available most of the time (93%). Therefore, this is not a situation in which the drivers (the owners-operators) were truly free to refuse any particular delivery order. The situation is thus actually different from the facts in *Sauvageau Pontiac Buick GMC Ltée v. Canada*, [1996] T.C.J. No. 1383 (QL), a decision which I rendered regarding workers who were completely free to accept or refuse a car delivery assignment.

[65] As mentioned above, there are provisions in the Fontaine contract dealing with how the work is to be done. Section 3 stipulates that all services are to be provided in a courteous manner. The Driver's Handbook provides a lot more detail on this

subject. For instance, on page 5 it says that "[c]ustomers are not people to match wits or argue with". The Driver's Handbook (at page 7) also tells drivers what to do when dealing with angry and emotional customers:

> It is very important that you remember not to react to this anger . . . . Identify and deal with the concern or issue, which has created the anger. Do not take the situation personally and never argue back . . . . If it is an issue or a concern that you cannot resolve . . . suggest that they call the Operations Manager/Assistant or the Branch Manager for immediate action . . . . [If] you are having a bad day . . . do not take your frustration out on a customer![37]

[66] The Driver's Handbook also tells drivers: "When you detect the first sign of difficulty with a delivery or a pick up contact the customer directly. If further assistance is required. Please contact **Dynamex Help Desk** . . ." (Exhibit R-2, page 19). The Handbook further states at p. 20: "When you encounter difficulties at a customer site do the best you can to resolve the situation but remember it is always okay to inform dispatch." (My emphasis.)

[67] Directives in the Driver's Handbook specify how signatures are to be obtained on delivery (Exhibit R-2, page 23). The following are the detailed instructions with respect to delivery:

> 1. Your greeting and brisk pace have made the receiver aware of your presence, so while you have his/her attention, get the signature. Do not make the receiver wait.
>
> 2. Offer your pen (and route sheet or bill of lading) posed [*sic*] over the line where the signature is required and indicate the area for signature.
>
> 3. Always say "Thank You" when accepting the pen and documentation from the receiver.
>
> 4. If the receiver is on the phone, place the pen and documentation before him/her and position the pen where the signature is required.
>
> 5. If the delivery is a third party charge, then dispatch will give you all the proper information for writing up you own waybills. Account numbers must be on all third party billings.

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[37] Mr. Brian Bachinski testified that this section was taken out of the Driver's Handbook sometime during the relevant period for the reason that it may have deterred some potential drivers from working for Dynamex.

> 6. All deliveries must be delivered the same day. If you cannot complete the delivery, check with dispatch as to whether or not you should mail-slot the delivery or deliver it the next day by 9:30 a.m. Always get authorization from a Dispatcher or Supervisor for items that you are holding.
>
> [My emphasis.]

[68] The Handbook also sets out the following "Signature Requirements" (page 24):

> 1. Under no circumstances are deliveries to be left outside a building unless prior authorization directly from the client or your dispatcher has been received.
>
> 2. All deliveries made during business hours must have a signature unless prior authorization has been given by a Dispatcher, is received on your pager, or is given by the customer (the person's name must be obtained and written on the waybill).
>
> 3. The following guidelines must be met at single family dwellings if no signature is available and only when approved by the Dispatcher, is received on your pager, or is given by the customer (the person's name must be obtained and written on the waybill).
>
> a. The package is hidden from the passing public
> b. The package is protected from inclement weather
> c. The location is consistent with the customer's preference
> d. The customer can find it easily; and
> e. A door-knocker is left identifying any unusual location (eg. parcel left next door)
>
> [My emphasis.]

[69] The section of the Driver's Handbook dealing with waybills specifies at page 10:

> Waybills, manifests or other shipping documents ***MUST*** be filled out neatly and thoroughly, with all the relevant information . . . . A clear signature and time of delivery is ***MANDATORY*** . . . . *Waybills, Manifests and Shipping Documents* for the previous days work must be turned in daily ***BEFORE NOON*** at one of our drop boxes.[38]

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[38] Exhibit R-2, page 10. This was confirmed by Mr. Fontaine's testimony.

[70] The section on Waybill procedures states that the waiting time "must be authorized and signed for by the client, if you are not at the client's office, the dispatcher may give authorization on the client's behalf." (Page 13; my emphasis.] The Driver's Handbook also states that proof of delivery must be communicated by radio ("called in") for certain deliveries, such as those performed for DHL or Purolator or as a result of calls from other Dynamex branches (pages 13 and 21). In addition, "[a]ll changes to pces and weight must be radio'd [*sic*] back to your Dispatcher, they will make the change and re-page you the call. Do not highlight these on your manifest." (Page 13; my emphasis.)

[71] The Driver's Handbook also describes pickup procedures setting out all the information that is to be provided and obtained at each pickup. The driver is asked to check the "[j]ob number in the upper right hand corner" (page 22). If there is any discrepancy between that number and the number that was given by the dispatcher, the driver is to call the dispatcher. The drivers are also to call the dispatcher if there is a waiting time over five minutes or if there is any change in the service level agreed upon. The drivers are also told to look for new business. When a driver has completed a pickup and returns to his vehicle, he is to contact the dispatcher for further instructions.

[72] The Driver's Handbook details the manner in which the drivers are to turn in their waybills. It says that "waybills are placed in a manifest envelope in two bundles . . ." (page 16). The first bundle includes cash, cheque, prepaid stamp or C.O.D. call. It includes as well "Multiple Manifests Various Deliveries"; with respect to this category, the drivers are asked to highlight the total, and the Handbook goes on to state: "If you have any trouble pricing your manifest, call the Admin Department or your Schedule Run Manager." The Handbook further indicates that "[i]f you go into a customer's for a call and they give you another delivery not called in: please call the office . . . ." It then says at page 16: PAPERCLIP THE ABOVE WAYBILLS TOGETHER & SET ASIDE AS BUNDLE #1". (My emphasis.) With respect to Bundle #2, the Handbook says: "Write your drop times beside your job numbers with 1 hour & 2 hour services only, except schedule runs, and do not highlight them." (Page 17; my emphasis.)

[73] The Fontaine contract provides that Mr. Fontaine is to perform his services "making use of the Vehicle" (section 1). In addition, the driver "shall maintain the Vehicle in a safe, damage-free, serviceable and clean condition and shall maintain, repair, license, [and] insure" the vehicle for a specific amount. The vehicle was inspected twice a year by Dynamex according to Mr. Fontaine's testimony. Similar

obligations with respect to the vehicle are described in article 8.13 of the Collective Agreement, which provides as follows (Exhibit R-1, Tab 1):

> 8.13 The employee/owner operator shall:
>
> (a) Obtain and maintain all licenses and permits required to carry out services to be performed by him/her under this Agreement;
> (b) Maintain in sound physical and mechanical condition, repair, insure (in a manner and for amounts prescribed by the Company) and operate each vehicle used by him/her, at his/her expense under the applicable laws of the province in which he/she works and provide proof;
>
> [My emphasis.]

[74] The Handbook also covers preventive maintenance for the drivers' vehicles (page 25), providing, among other things, recommendations regarding things that should be done twice a year and things that should be done for the winter months. For example, it provides the following recommendations with respect to fuel stops and monthly checks:

> **Fuel Stops**
>
> a. Check the engine oil level;
> b. Check the windshield washer fluid level; and
> c. Look for low or under-inflated tires, this will help reduce fuel consumption
>
> **Monthly**
>
> - Check the tire pressure — always check tires when cold, not after a long drive;
> - Check coolant in the coolant recovery reservoir;
> - Check the operation of all exterior lights including the brake lights, turning signals and hazard warning flashers

[75] I am confident that the delivery contracts between Dynamex and its customers do not require that Dynamex maintain its delivery vehicles in clean condition, that preventive maintenance measures be taken and that the vehicles be insured.

[76] According to Mr. Brian Bachinski, Mr. Fontaine was allowed to choose the colour of the vehicle he used for the purpose of delivering Dynamex's parcels. Although there were no colour requirements for his vehicle, Mr. Fontaine could have used magnetic decals identifying Dynamex. However, the letter issued on August 7, 2002 by the general manager of the TD Centre in Winnipeg required that "[a]ll courier vehicles delivering to TD Centre must have clearly visible signs identifying

them as such". The letter stated that "[Y]our company name displayed on the side, or on the windshield is fine — so long as the TD Centre Security and Dock Master can see the ID at a reasonable distance" (Exhibit R-3). Mr Fontaine testified that he had to use a 2 inch by 2 inch decal (small decal) on his windshield but said that he did not use the large decals.

[77] Towards the end of the Driver's Handbook, there is a section providing "Useful Information and Tips". This section lists things that will hinder service and reduce the driver's earning potential. Among the items listed are not following the dispatcher's instructions, refusing calls/disappearing from the air, not keeping in constant contact with the dispatcher, poor attendance, starting late, booking off early, missing days, unwillingness to "hustle" (page 27 of the Handbook).

[78] Evidence of direction and control with respect to how the drivers' work was to be done can be seen as well in the fact that new drivers were given orientation training when they begun working for Dynamex. In addition, training was given by employees of Dynamex on specific subjects such as the transportation of dangerous goods.

[79] Mr. Fontaine was not only subject to the direction of Dynamex, but he was subject also to disciplinary action if he did not comply with the policies and directives of Dynamex. For instance, as seen above, if Mr. Fontaine turned down a parcel delivery, he would be placed at the bottom of the drivers' list after the first refusal. After the second refusal, he would be requested to meet with his "manager/supervisor" (my emphasis) to discuss the incident before he could be assigned any deliveries by the dispatcher. He would be suspended for one day after the third refusal (see Exhibits R-13 and R-14). So he would lose both delivery time and money as a consequence of refusal.

[80] If Dynamex's customers were unhappy with the service of a particular driver, they would complain to Dynamex. This happened in the case of Mr. Fontaine, who was described as having been rude with a particular customer. As a result, he was put on probation for one year. If he was rude again during that period, his contract could have been terminated. It was the policy of Dynamex to put a letter in the files of its drivers in such cases.

[81] Section 22 of the Fontaine contract requires the drivers to wear uniforms approved by the company. It should be added that Dynamex contributed a portion of the cost of these uniforms (see Exhibit R-23). The Driver's Handbook describes the uniform requirements at page 8. For example, it says that the drivers must wear the

Dynamex shirt and jacket with clear identification markings consisting of the Dynamex logo and colour. Furthermore, the drivers are required to keep the uniform neat, clean and tidy. "**NO blue jeans**" are permitted (Exhibit R-2, page 8). Under subparagraph 22(ii) of the Fontaine contract, the drivers are not allowed to place any other name, notice, advertising, decal or painting of any nature or kind whatsoever on the uniform (or the motor vehicle), except if expressly permitted by Dynamex.

[82] Not only does the Dynamex uniform policy detail what constitutes an acceptable uniform, but it is Dynamex's policy that it be strictly enforced. There is a driver uniform deficiency form that must be signed by the "Supervisor/Manager" (my emphasis) of the driver when he or she notices that a driver is not in a full uniform as required by Dynamex. It is indicated on this form that repeated failure to comply with the uniform policy may lead to suspension and/or termination of the driver's contract (Exhibit R-5). In its memorandum dated August 13, 2002, addressed to all Dynamex drivers, the management team states that the uniform policy will be strictly enforced: "Drivers that are observed not in uniform will be subject to having no work offered to them and/or suspension and cancellation of their contract" (see Exhibit R-4).

[83] The conclusion that Mr. Fontaine was an employee during the relevant period is very consistent with the decisions of the four referees who concluded that the 27 drivers working for Dynamex in the Winnipeg and Saskatoon areas were employees for purposes of the *Canada Labour Code* and were entitled to vacation pay.[39] Holding otherwise here would create an odd situation: independent contractors would be entitled to vacation pay from their client!

[84] In addition to being consistent with the four referees' decisions rendered under the *Canada Labour Code*, this is consistent with U.S. decisions, in particular the three California Court of Appeal decisions mentioned above. Although it is true that courier companies have generally preferred for whatever reasons, including greater efficiency and competitiveness, to have their drivers treated as independent contractors, they are failing to get the approval from several American judges for this practice, contrary to the perception reflected in some Canadian court decisions. It should be stressed, however, that the situation is not completely settled given that there is a large number of class actions that are under way in the United Stated.[40]

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[39] In addition, the fact that Dynamex paid workers compensation premiums and contributions to certain group benefit plans for its drivers is consistent with these drivers being employees of Dynamex. I do not know of any client that pays medical or dental plan costs for the independent contractors that it hires.

[40] See *Fedex Ground Package System,* above.

However, the decisions of the California Court of Appeal holding that the drivers of courier companies are employees may become the norm as opposed to the exception. This should be so, in my view, as long as the courier companies continue to exercise a high degree of control over the work of their drivers. I might add that it would appear difficult for these companies not to exercise such control given their inherent interest in remaining efficient in carrying on their courier businesses.

[85] For all these reasons, Dynamex's appeals are dismissed.

Signed at Ottawa, Canada, this 11th day of January 2010.

"Pierre Archambault"

Archambault J.

CITATION:	2010 TCC 17
COURT FILE NOS.:	2006-1557(EI) and 2006-1558(CPP)
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