Date: 20071122

Docket: T-1469-05

Citation: 2007 FC 1225

Ottawa, Ontario, the 22nd day of November 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

CP SHIPS TRUCKING LTD.
(formerly known as
CAST TRANSPORT INC.)

Applicant

and

GUNTER M. KUNTZE
and
ENTREPRISE GUNTER M. KUNTZE & FILS INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

SUMMARY

[1] In *Dynamex Canada Inc. v. Mamona*, 2003 FCA 248, [2003] F.C.J., No. 907 (QL), at paragraph 52, Madam Justice Karen Sharlow quotes the judgment of the Supreme Court in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, noting that "the terminology used in his or her contract is not determinative . . . . 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". In other words, what matters is the factual reality behind appearances.

INTRODUCTION

[2] The applicant is applying for judicial review of the interlocutory arbitral award of adjudicator Michel A. Goulet, who ruled that the respondent is a "person" within the meaning of section 240 of the *Canada Labour Code*, R.S.C., 1985, c. L-2 (Code) and that the tribunal had jurisdiction to hear and decide the respondent's unjust dismissal complaint.

FACTS

[3] The applicant, C.P. Ships Trucking Ltd. (formerly known as Cast Transport Inc.) is a business under federal jurisdiction that ships certain types of goods, particularly containers, to and from the port of Montréal.

[4] The respondent, Gunter M. Kuntze, is the owner of a heavy vehicle used for the transportation of goods.

[5] The defendant, Entreprise Gunter M. Kuntze et Fils Inc. (the Enterprise), is a business enterprise under provincial jurisdiction, incorporated on April 19, 1999, in the province of Quebec. Mr. Kuntze is the sole shareholder and director of the Enterprise.

[6] The Enterprise is a party to a written contract (Montréal Local Owner Contract) with C.P. Ships which is binding on the parties since January 2001. (Applicant's Record (AR), Exhibit P-2, page 27).

[7] In this contract, the Enterprise is described as [TRANSLATION] “Owner”, while C.P. Ships is described as the [TRANSLATION] “Company”. C.P. Ships retained the services of the Enterprise to pull trailers belonging to C.P. Ships, using a vehicle which belonged to the Enterprise (AR, Adjudication Award, page 13).

[8] On December 23, 2003, C.P. Ships terminated the contract, claiming that Mr. Kuntze was in serious breach of his obligations under said contract (AR, Exhibit P-7, page 91).

[9] On January 19, 2004, Mr. Kuntze filed a complaint alleging that he had been unjustly dismissed. Mr. Goulet was appointed adjudicator on September 22, 2004, to hear and decide the complaint brought by Mr. Kuntze.

[10] Before the hearing on the merits of the complaint filed by Mr. Kuntze, the applicant raised a preliminary argument concerning the admissibility of the complaint made by Mr. Kuntze. More specifically, the applicant submits that Mr. Kuntze is not a “person” within the meaning of section 240 of the Code because he essentially offered his services through an incorporated company. On July 29, 2005, Mr. Goulet rendered an interlocutory decision to the effect that Mr. Kuntze is a “person” and that the tribunal therefore has jurisdiction to hear and decide the unjust dismissal complaint. Mr. Goulet ordered the parties to continue the hearing on the merits of the complaint.

[11] On the basis of the evidence submitted, particularly the obligations contained in the contract (AR, Exhibit P-2, page 27), the code of professional conduct (Respondent's Record, Exhibit D-3, page 28) and the oral evidence, the adjudicator concluded that the Enterprise or Mr. Kuntze is a "person" and that he therefore had jurisdiction to [TRANSLATION] "decide the merits and the propriety of the company's decision to dismiss the complainant" (AR, Adjudication Award, page 17). He based his decision on evidence concerning control, ownership of equipment, dispatching of transportation, conditions governing the performance of the contract, monetary compensation, whether or not the parties were dealing at arm's length, legal subordination, integration and disciplinary authority of the applicant.

IMPUGNED DECISION

[12] The applicant alleges that the adjudicator made palpable errors in assessing the facts and also erred in law in stating that [TRANSLATION] "the trucker's incorporation was an inescapable precondition for carrying out the shipment" because the "inescapable precondition" arose in 1994. (AR, Adjudication Award, page 14)

[13] In addition, the applicant alleges that the adjudicator made another palpable error in assessing the facts when he stated that [TRANSLATION] "the owner was required to sign said contract, and no negotiation took place" because, according to the applicant, the evidence on this specific point shows that it was the respondent who solicited a contract. (AR, Adjudication Award, page 14)

[14] The adjudicator decided that he had jurisdiction and [TRANSLATION] "came to the conclusion that the incorporated owner, the company or Gunter M. Kuntze is a person who was dismissed by the company [C.P. Ships]. There is no doubt that the complainant Kuntze was in a situation of total economic dependency and is indeed a person entitled to the right provided for under section 240 of the CLC". (AR, Adjudication Award, page 17)

ISSUES

[15] The issues raised in this application for judicial review are as follows:

(i) Does adjudicator Goulet have jurisdiction to hear and decide the complaint made by Mr. Kuntze because he is a "person" within the meaning of section 240 of the Code, even though he offers his trucking services through an incorporated company?

(ii) Did adjudicator Goulet render a correct decision on the question of law, that is, concerning the determination of status as a "person" for the purposes of subsection 240(1) of the Code?

(iii) Did adjudicator Goulet render a reasonable decision in the applying the relevant principles to the facts of the case?

ANALYSIS

The legal framework of arbitration under Part III of the *Canada Labour Code*

[16] In this case, adjudicator Goulet heard the respondent's complaint under section 240 of the Code, which provides as follows:

Unjust Dismissal	**Congédiement injuste**
Complaint to inspector for unjust dismissal	Plainte
240. (1) Subject to subsections (2) and 242(3.1), any person	**240.** (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :
(*a*) who has completed twelve consecutive months of continuous employment by an employer, and	*a*) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(*b*) who is not a member of a group of employees subject to a collective agreement,	*b*) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	

Standard of review

[17] To establish the standard of review applicable to a decision of an adjudicator appointed under section 242 of the Code, it must be determined whether or not Parliament intended that the issue in this case, namely, status as a "person" for the purposes of section 240, be subject to an adjudicator's jurisdiction.

[18] Sharlow J.A. conducted a pragmatic and functional analysis to determine the standard of review applicable to an adjudication award to the effect that persons hired as independent contractors for a courier company were "employees" within the meaning of Part III of the Code (*Dynamex, supra*).

[19] At paragraph 45 of *Dynamex, supra,* Sharlow J.A. concluded that "determination of the status of a person as an employee should be reviewed on the standard of correctness . . . despite the privative clauses, because it is a question of law . . . . However, the manner in which those principles are applied to the facts, which is a question of mixed law and fact, should be reviewed on the standard of reasonableness".

[20] In light of the preceding, the Court submits that the standard of review applicable to the adjudicator's determination of the status of a person for the purposes of subsection 240(1) of the Code is correctness, and that the standard to be used when applying the principles to the facts is reasonableness *simpliciter*.

Assessment of the evidence

Introduction

[21] The applicant submits that Mr. Kuntze's complaint cannot be heard or is not arbitrable because Mr. Kuntze is not a "person" within the meaning of section 240 of the Code, is not an employee and is an independent contractor who offers his services as a truck driver through the respondent's Enterprise.

[22] The applicant's main argument concerned the adjudicator's alleged errors in assessing the facts with regard to the obligation to incorporate, its effects with respect to lifting the corporate veil, and the solicitation of the contract, which led him to make errors in law when applying subsection 240(1) of the Code.

[23] Therefore, the adjudicator had no jurisdiction to hear the complaint and decide whether or not the dismissal of the respondent, Mr. Kuntze, was unjust.

[24] Mr. Kuntze notes that, in his decision dated July 29, 2005, the adjudicator did not act without jurisdiction, exceed his jurisdiction or retain a jurisdiction he did not have under the provisions of the Code.

[25] In addition, Mr. Kuntze points out that the two arguments or submissions made by the applicant concerning incorporation and the contract were not supported by the evidence adduced before the adjudicator.

Law

[26] Part III of the Code does not define the term "employee", nor does it define the term "person".

[27] In *Dynamex, supra*, the Federal Court of Appeal stated that it is "correct" for a decision-maker hearing a matter under Part III to disregard or rely very little on the definition of "dependant contractor" in paragraph 3(*c*) and contained in Part I of the Code and to use common law criteria in determining status as an "employee". (*Dynamex, supra*, paragraph 49).

[28] In the case at bar, the adjudicator specifically stated that the word "person" in section 240 of the Code did not allow him to simply apply the definitions of "employee" given elsewhere in the Code:

> [TRANSLATION]
> Because section 240 in Part III of the Code grants a person, as opposed to an employee, the right to bring a complaint, it must be acknowledged that persons other than employees may have this right, which is granted to "any person".
>
> Since there is nothing to indicate that the word "person" excludes a legal person, it must be concluded that this right is extended to legal and physical persons alike. In section 240, Parliament presumably used the word "person" instead of "employee", which is most commonly used, because it intended to include persons other than those who are employees within the ordinary meaning of the word and within the meaning of the definitions found in the Code at sections 3.1 and 122.

(AR, Adjudication Award, page 12.)

[29] Consequently, when he determined that the word "person" included a [TRANSLATION] "larger category of persons" than the word "employee" within the meaning of Part III, which is qualified as a "person" within the meaning of subsection 240(1) of the Code, the adjudicator was not only reasonable but correct, as he applied the relevant common law criteria to the determination of status as an "employee" and reasonably interpreted the evidence adduced before him.

Application of the facts to the law

[30] If we ignore the effect of the respondent's incorporation, the issue is whether or not the complainant is an "employee" within the meaning of Part III and qualifies as a "person" within the meaning of subsection 240(1) of the Code.

[31] The applicant retained the respondent's services as a driver sometime around the month of January 2001.

[32] On December 23, 2003, the applicant sent following notice to the respondent:

> Based upon the events of the 11th, 12th, and 13th of December 2003, we are terminating our contract with your company (Ent. Gunther & Fils). You are in violation of article 3(c) of the present contract. In addition, you indulged in the use of obscene language against your dispatcher Chantal Provencher.
>
> It is your responsibility to remove all our company logo's from your tractor, as well as return all company property, such as the shift lock, company identification card, Port of Montreal identification card, etc. We also take this opportunity to inform you that your tractor is no longer covered under the company insurance policy.

(AR, Exhibit P-7, page 91.)

[33] There is in fact a contract entitled [TRANSLATION] "Montréal Local Owner Contract" which was binding on the applicant and the respondent "Enterprise". (AR, Exhibit P-2, page 27).

[34] Mr. Kuntze is the sole shareholder and director of the company "Entreprise Gunter M. Kuntze & Fils Inc.".

[35] Under the contract, the [TRANSLATION] "owner" (the [TRANSLATION] "truck owner-operator", that is, the incorporated company) is required to supply a heavy vehicle (a [TRANSLATION] "tractor") to pull trailers belonging to the applicant corporation.

[36] In addition, under that contract:

(i) Mr. Kuntze promised to supply and make available a 1990 Kenworth road vehicle (article 7 of the contract);

(ii) Mr. Kuntze was responsible for all direct or indirect costs and charges related to the performance of his obligations, especially any [TRANSLATION] "employment-related costs", income tax, permits, registration, periodic maintenance and repairs, as well as all operating expenses for his equipment (articles 6, 12 and 14 of the contract);

(iii) The contract could not be assigned or transferred, except by the [TRANSLATION] "company", that is, the applicant (article 4 of the contract);

(iv) Mr. Kuntze was not guaranteed any volume of goods to ship, as dispatching was at the sole discretion of the applicant (article 5 of the contract);

(v) Mr. Kuntze had to operate his vehicles strictly for his own benefit or for that of the applicant and for no other purposes (article 8 of the contract);

(vi) Mr. Kuntze had to submit to safety inspections required by the applicant (article 9 of the contract);

(vii) Mr. Kuntze had to apply symbols, signage, decals, stickers or other types of identification of the applicant to his truck at the applicant's expense (article 30 of the

contract) and replace or remove this material at his own expense (articles 10 and 31 of the contract);

(viii) The applicant made available to Mr. Kuntz and installed in his truck the radio and tracking equipment required for the performance of his obligations (article 11 of the contract);

(ix) Mr. Kuntze was liable for all negligently caused damage to the equipment supplied by the applicant (article 13 of the contract);

(x) Mr. Kuntze had to obtain authorization from the applicant if he intended to have his truck driven by someone other than himself (article 15 of the contract);

(xi) Mr. Kuntze acknowledged that he was not an employee, partner or an agent of the applicant (articles 16 and 17 of the contract);

(xii) Mr. Kuntze agreed to recognize and indemnify the applicant against any claim made against it following a breach of a condition in a bill of lading or delivery order while the goods were in the possession of Mr. Kuntze (article 20 of the contract);

(xiii) The work was to be performed in accordance with the applicant's terms and conditions (article 21 of the contract);

(xiv) The applicant had total discretion to take control, at the expense of Mr. Kuntze, of any shipment it considered to be in breach of the terms and conditions of the contract (article 23 of the contract);

(xv) The applicant was entitled to deduct all legal expenses incurred in connection with any proceedings served on it in connection with a claim against Mr. Kuntze (article 24 of the contract);

(xvi) The applicant contracted appropriate insurance coverage in Mr. Kuntze's name, and Mr. Kuntze was responsible for paying any deductible (articles 25 and 26 of the contract);

(xvii) Mr. Kuntze agreed to indemnify the applicant against all expenses incurred by it for any violations or offences under the law (article 28 of the contract);

(xviii) Mr. Kuntze had to advise the applicant of any accident, event, claim or offence, as required under the applicant's policies, procedures and operations manual (article 29 of the contract);

(xix) Mr. Kuntze consented to be bound by all of the applicant's regulations, and these regulations were deemed to form part of the contract (article 34 of the contract);

(xx) The applicant was to reimburse Mr. Kuntze, on presentation of supporting documentation, for all tolls and for all permits required by the applicant (article 22 of the contract);

(xxi) The applicant could cancel the contract without notice (a) if Mr. Kuntze did not respect the terms and conditions set out in the contract, operations manual and regulations, (b) because of use or consumption of alcohol, drugs or other chemical products or because of his negligence, (c) if Mr. Kuntze **repeatedly** failed to respect the pickup or delivery schedule for goods or **repeatedly** failed to obey instructions given by the applicant's dispatcher, (d) if Mr. Kuntze did not behave politely or

> civilly with the applicant's clients, or (e) if the respondent's accident record exceeded the limits established by the applicant (article 3 of the contract);
>
> (xxii) Once his expenses were deducted, Mr. Kuntze was to keep the amount paid to him for the performance of his work, according to the rates unilaterally determined by the applicant (article 22 of the contract).

(Respondent's Record, paragraph 49, pages 120-122).

[37] The obligations in the contract were described by adjudicator Goulet as being a true contract of adhesion, not only because it was not negotiated, but also because the contract represented a series of strict obligations for Mr. Kuntze and unilateral rights for the applicant.

[38] In addition, the adjudicator noted that the incorporation of Mr. Kuntze's Enterprise was a mandatory condition for transporting the applicant's goods.

[39] Starting in January 2001, Mr. Kuntze rendered exclusive services to the applicant. He was the only person authorized to drive his truck and was the only person who did drive it in practice.

[40] In the performance of his duties, Mr. Kuntze had to report to the applicant's dispatcher, who gave him his instructions.

[41] Mr. Kuntze reported on his activities, parked his truck where permitted by the applicant, respected the work schedules given to him, accounted for his time and received compensation as determined by the applicant.

[42] In addition, like all employees, Mr. Kuntze was subject to a code of professional conduct, which specified the following, among other things:

(i) Work in compliance with all current and future regulations and procedures established by the applicant;

(ii) Refrain from entering into competition with the respondent;

(iii) Refrain from disclosing confidential information;

(iv) Be available for a medical examination, take a course in hazardous materials every three years and draft accident reports or any other report required by the applicant;

(v) Keep all required documentation up to date (hours of service, mechanical inspections and hazardous materials);

(vi) Abide by company policies concerning drugs and alcohol;

(vii) Make deliveries at the time specified by the dispatcher;

(viii) Dress appropriately;

(ix) Refrain from using vulgar language with other employees;

(x) Obey the maximum speed limit tolerated by the applicant (100 km/h);

(xi) Refrain from carrying any passengers in the truck;

(xii) Refrain from carrying any goods not authorized by the applicant;

(xiii) Give at least 30 minutes' notice of any expected delay;

(xiv) Advise the dispatcher in case of sick leave;

(xv) Contact the dispatcher every day before 10:00 a.m. to confirm the driver's availability, failing which he would be deemed to be on the list of departures (presumed availability);

(xvi) Advise the dispatcher when waiting time at a client's place is longer than two hours.

(Respondent's Record at paragraph 55, page 123).

[43] An breach of the code of professional conduct may lead to disciplinary measures which may include a permanent withdrawal of authorization to operate a vehicle for the applicant.

[44] In this contract, the applicant expressed itself more as an employer than as a party to a contract of enterprise, insofar as its powers included the possibility of terminating the contract with the Enterprise and Mr. Kuntze.

[45] In addition, the applicant had broad general authority over management and discipline. The contract clauses, particularly paragraph 3(c), as well as the reasons for dismissal alleged by the applicant in its letter dated December 23, 2003, show that [TRANSLATION] "company management definitively exercised authority belonging to an employer" (AR, Adjudication Award, page 17).

[46] As regards the ownership of tools, Mr. Kuntze could use only his own tractor on trips for the applicant, had to use the applicant's insurance plan, could not develop his own goodwill, had to

display the applicant's logo, was the only person authorized to make any trips and had to park his truck where authorized by the applicant.

[47] In addition, the analysis shows that the control and dependency of Mr. Kuntze were obvious. The above-mentioned contract, which was totally to the applicant's advantage, was scrupulously applied: Mr. Kuntze reported in to the dispatcher every day, logged his activities, followed the work schedules given to him, accounted for his time, was subject to the same code of professional conduct as for all employees, and was subject to the employer's disciplinary authority, as appears from the contract, the code of professional conduct and the dismissal letter.

[48] In terms of the chances of profit and risks of loss, the ability turning a profit did not depend on Mr. Kuntze's ability to negotiate a price, his "profit" being nothing more than compensation on a fee-for-service, piecework or per-mile basis, as Mr. Kuntze had no control over the number of trips he could make, other than confirming his availability, and the applicant was entirely responsible for any losses, since it was the applicant that developed its clientele and dispatched trips on the basis of its capacity to develop its transportation business.

[49] In *Stanley v. Road Link Transport Ltd.* (1987), 17 C.C.E.L. 176, adjudicator Pyle had to rule on an objection made by the employer to the effect that the employee who complained of unfair dismissal was not his employee, but an independent contractor.

[50] In that case, as in the case at bar, the complainant was a truck owner-operator who was constituted as a "registered business" and a party to a written contract under the terms of which he was required to, among other things, supply his own truck to perform the contract and use it according to the conditions specified in that contract.

[51] Although adjudicator Pyle was of the opinion that the word "person" included the term "dependent contractor", he nevertheless applied the common law test to the case in question.

[52] The following excerpts are from pages 190 and 191 of the decision:

> . . . If I were to apply the tests such as those set out by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, [1946] 3 W.W.R. 748, [1947] 1 D.L.R. 161 (P.C.), I would have difficulty in concluding that Mr. Stanley had any significant degree of control over his operations. He owned the tractor but for all practical intents and purposes he surrendered that equipment to Road Link. Any chance he retained for the possibility of profit, or loss, in the sense of applying his entrepreneurial skills, is simply not apparent in the evidence adduced in these proceedings.
>
> If I were to apply the general test described as the "organization test" and set out by Denning L.J. in *Stevenson Jordan & Harrison Ltd. v. Macdonald & Evans*, [1952] 1 T.L.R. 101, 69 R.P.C. 10 (C.A.), I would find, on the basis of the evidence before me, that Mr. Stanley was under a contract of service, was employed as a part of the business of Road Link and his work was done as an integral part of the business, I would not find that he was under a contract for services where [work], although done for the business, was not integrated into it but only accessory to it. Mr. Stanley was required to afford to Road Link the complete use of his tractor in the general conduct of its business. Further, he was required to paint his tractor so as to identify it with Road Link, to wear a Road Link uniform and he was treated as an employee for the purposes of the rules and regulations, as well as for the purposes of a comprehensive health and welfare plan.

[53] In *Masters v. Bekins Moving & Storage (Canada) Ltd.*, [2000] C.L.A.D. No. 702, the complainant was also a trucker who became the owner of his truck for a trucking company.

[54] Having signed a non-negotiated contract as an independent contractor, the complainant performed his functions exclusively for the employer.

[55] The employer insured the goods delivered by the complainant, gave him his assignments and obliged him to abide by its policies and procedures, including ones concerning mechanical inspections, display of the employer's name on the truck and the code of discipline.

[56] Regarding the general purpose of labour legislation, adjudicator Love stated the following at paragraph 57: "A major purpose of employment standards legislation such as the Code, is to ensure that those persons, in a position of economic dependency are not exploited by those with economic power" (*Masters, supra*).

[57] In raising the legislative anomaly caused by granting protection under Part I of the Code while depriving him of his recourse for unfair dismissal under Part III of the Code, the adjudicator analyzed the complainant's relationship with the employer from the standpoint of the common law.

[58] The adjudicator wrote the following at paragraph 82:

> In my view the only opportunity for profit and loss in this case is whether Masters was called in to work by Bekins. He did not perform work for others, and under the terms of the contract could not perform work for others given that he had the use of a "branded truck" (cl. 1(b)), and was restricted by contract (cl. 17(b)) from using that truck to provide moving services in competition with the Bekins. Masters work was completely integrated into the business of Bekins, and was integral to the business of Bekins. While he had some "interest" in the tools, namely the truck, a company

> controlled by Rosenberg had an interest in the truck, and repossession of the truck was taken by Bekins or ABC, after the contract was terminated by Rosenberg.

[59] In ruling that the complainant was a "person" within the meaning of subsection 240(1) of the Code, the adjudicator concluded as follows at paragraph 84:

> In my view there is a strong dependency of Masters on Bekins, he performed the tasks usually performed by an employee, the lack of opportunity for profit and loss, and the high degree of control, all support a finding that Masters was an employee of Bekins, and a person to whom s. 240 of the Code applies.

[60] In *Dynamex*, *supra*, it was decided that persons hired as independent contractors for a courier company were "employees" within the meaning of Part III of the Code for a claim other than a dismissal complaint, according to the common law criteria applicable to the definition of "employee".

[61] In this case, the claimants decided to claim payment of annual leave and statutory holidays, alleging that they were employees and not independent contractors.

[62] The adjudicator agreed. The employer's application for judicial review was dismissed by both the Trial Division and the Federal Court of Appeal, and the application for leave to appeal to the Supreme Court was dismissed.

[63] Writing for the Federal Court of Appeal, Sharlow J.A. noted at paragraph 49 of *Dynamex*, *supra*, that "the adjudicator concluded that a person is an employee for purposes of Part III only if

he or she is an employee under common law principles. This aspect of the Adjudication Award has not been challenged, and in any event it seems to me to be correct".

[64] Sharlow J.A. went on to note that in analyzing the evidence on the basis of common law principles:

> [50] . . . The referee recognized that some facts favoured the conclusion that the claimants were employees, and some facts favoured the opposite conclusion. He concluded that, on balance, the claimants were employees. At that stage of the analysis, the referee was engaged in determining a question of mixed fact and law, and his decision should stand if it is reasonably supported by the evidence.

[65] In addition, she underlined the apparent contradiction in the facts, which the referee dealt with in the following terms:

> [51] . . .
>
> I remain troubled by the fact that, in arriving at the conclusion (as I now do) that the Respondents were employees for the purposes of Part III of the Code, I am allowing them to 'run with the hare and hunt with the hounds', since they all freely admit that they were fully aware that their contracts designated them as independent contractors and that, indeed, they were quite content with that category since it meant fewer deductions at source from their paycheques. Nonetheless, I must base my decision on the facts as I find them and, in the cases now under review, the scales come down on the side of employment rather than entrepreneurship. The effect of my present ruling upon other payroll deduction questions is not within the mandate of this reference.

At paragraph 52 of *Dynamex*, *supra*, the judgment of the Supreme Court of Canada in Sagaz, *supra*, was cited, with Sharlow J.A. noting that "in determining whether a person is an employee or an independent contractor, the terminology used in his or her contract is not determinative . . . . 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". In other words, it is the factual reality underneath appearances that matters.

[66] In the case at bar, as in *Dynamex, supra*, the adjudicator correctly identified and applied the relevant legal rule and applied the facts to the law in a reasonable manner.

[67] Because there is no doubting that an "employee" is a "person" within the meaning of subsection 240(1) of the Code, we must now ask whether or not the mere fact of being incorporated causes the respondent to lose status as an "employee" or as a "person".

The effect of incorporation

[68] The issue is whether incorporation by the respondent affects his status as an "employee" or as a "person" within the meaning of Part III.

[69] In *Transport Damaco International Ltée* (1991), 84 di 84, the Canada Labour Relations Board dealt with the argument regarding the incorporation of truck owner-operators as follows:

> It is true that, in corporate law, it is recognized that corporations have a legal personality distinct from the persons who incorporated them and that the latter can only be directly sought out in very exceptional circumstances. When this is done, it is called "lifting the corporate veil." The common law courts only allow this veil to be lifted in cases of fraud or where it is clearly established that the incorporation is used in order to attempt to circumvent the provisions of a law.
>
> But in labour law, the objectives are not the same. In any case, not the labour law that this administrative tribunal, the Canada Labour Relations Board, must apply, that is, the Canada Labour Code.

> The Board is obliged to ensure that the right to unionize is available to any person who is an employee within the meaning of the Code. Because the concepts regarding dependent contractors are specifically set forth in the Code, the Board believes that it has and is intended to have the legal authority to lift the corporate veil in order to uncover the particulars that will allow it to determine the degree of economic dependence facing these incorporated contractors. It is in this regard that the grounds for lifting the corporate veil go beyond those found in other legislation, namely fraud or an attempt to circumvent the provisions of a law.
>
> The Board could stop there. Of course, in a case where the Board is faced with examining this issue, as in this case, the Board may sometimes uncover situations that come close to being attempts to circumvent the provisions of the law it must apply, through incorporation or otherwise, and that might bear some similarity to fraud; a company that turns out not to be really managed by itself, a company that has been imposed upon someone in order to block an application for certification, a company that is not really a company when faced, for example, with the requirements of the OHSC. While all this is not the main purpose of this Board, its discoveries in this direction can only add additional elements to the assessment that it makes of the economically dependent nature of the incorporated contractors which, within the meaning of the Code, makes employees of them.

[70] In *Côté (9069-0462 Québec Inc.) v. Far-Nic Transport Inc.*, [2002] D.A.T.C. No. 583, the complainant, an incorporated truck owner-operator was dismissed following a refusal make a trip.

[71] As in the case at bar, Far-Nic Transport raised an objection to the adjudicator's jurisdiction, arguing that the complainant's remedy was not available to him under subsection 240(1) of the Code.

[72] Having signed a transportation sub-contract with the employer, which the adjudicator characterized as a contract of adhesion, the complainant nevertheless had to display the symbols, logos or identification of Far-Nic Transport on his tractor.

[73] While working exclusively for Far-Nic Transport, the complainant had to be available to make the required trips, respect the conditions for performance of work, log his trips and account for his time.

[74] Adjudicator Rodrigue Blouin determined that the complainant:

> [TRANSLATION]
> [27] . . . is a person who, under the guise of an incorporated company, personally carries out transportation services on behalf of the respondent. He is the owner-operator of a tractor truck who performs work for the respondent, in this case, the delivery of trailers. He performs his work in compliance with the respondent's instructions, and his activities and actions are controlled by the respondent. For all intents and purposes, he receives remuneration, as he cannot capitalize in any way. The complainant is simply a person described in subsection 240(1), as he has a legal relationship of personal dependency with the respondent in every respect.

[75] He concluded as follows:

> [TRANSLATION]
> [10] In short, a comparative examination of these provisions shows that Part III concerns "any" person, while Parts I and II only concern certain categories of persons, in this case, the employee who is equated with a dependant contractor, on the one hand, and the sole employee, on the other. This conclusion is inevitable because of the rule of interpretation to the effect that Parliament does not speak gratuitously. The definitions are different.
>
> [11] Accordingly, it is clear that the expression "any person" used in Part III includes not only an employee and a dependent contractor, but also any other person who is integrated into the enterprise of the supplier of work for the purposes of performing the allotted work.

[76] In *Transport Damaco*, *supra*, the Canada Labour Relations Board underlined the fundamental distinctions between an employer-employee work relationship and that of a dependent contractor to determine whether or not an incorporated truck owner-operator could nevertheless benefit from the provisions of Part III of the Code.

> The right of ownership implies the exclusive and unlimited right over a property, the right to possess it, to use it, to enjoy it and to dispose of it in one's absolute discretion. There is no point in restating in this regard all restrictions on the right of ownership of the alleged independent drivers, incorporated or not, bound to Damaco through their work tool, their tractor, which restrictions emerge from the evidence in this case.
>
> . . .
>
> The right to use it is limited in many ways. They can only use it to make trips for Damaco. The tractors are limited to Damaco's exclusive use and in the name of that company without exception. They cannot develop any personal customer base. They cannot affix signs indicating the identity of their own legal entity if incorporated or their personal identity if not incorporated. Only Damaco's colours and emblems are to be displayed on the tractors.
>
> . . .
>
> How can it be contended that they enjoy their tractors when they are bound by a clause under which they cannot refuse any type of load, any kind of trip?
>
> They cannot have any other driver of their choice drive them. That choice is subject to the express consent of Damaco.
>
> They cannot choose their own route to deliver a cargo. They cannot buy fuel where they please.
>
> They cannot insure their property with the insurer of their choice.
>
> All dealings with the Transport Commission are handled by Damaco. All licences are the property of Damaco.
>
> In several cases, the accounting for the incorporated truckers is done by Damaco. Several incorporations were done by Damaco agents: notaries and accountants.
>
> Under the heading of control, their dependence is obvious . . . .

(*Transport Damaco, supra*, page 117.)

[77] For all these reasons, the Court is of the opinion that the incorporation of Mr. Kuntze does not cause him to lose status as an “employee” or even as a “person”.

CONCLUSION

[78] The adjudicator rendered a correct decision on the question of law, that is, concerning the determination of status as a “person” for the purposes of subsection 240(1) of the Code, in particular by making findings of fact and conclusions of law which meet the common law tests established by case law with regard to the determination of “employee” status.

[79] The adjudicator rendered a reasonable decision in applying the legal principles to the facts of the case, in particular by making reasonable findings of fact in connection with the conditions under which the respondent performed his duties and by ruling that the fact of being incorporated did not make Mr. Kuntze lose status as an “employee” or as a “person”.

[80] Accordingly, the adjudicator has jurisdiction to hear and decide the complaint brought by Mr. Kuntze because he is a “person” within the meaning of section 240 of the Code, even though he rendered trucking services through a corporation.

JUDGMENT

THE COURT ORDERS that

1. This application for judicial review be dismissed;

2. The matter be returned to the adjudicator so that he hear the case on the merits and dispose of the complaint filed under subsection 240(1) of the *Canada Labour Code* by the respondent, Gunter M. Kuntze.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1469-05
STYLE OF CAUSE:	C.P. SHIPS TRUCKING LTD. (formerly known as Cast Transport Inc.) v. GUNTER M. KUNTZE and ENTREPRISE GUNTER M. KUNTZE ET FILS INC.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 23, 2007
REASONS FOR JUDGMENT AND JUDGMENT BY:	THE HONOURABLE MR. JUSTICE SHORE
DATED:	November 22, 2007

APPEARANCES:

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