IN THE MATTER OF A COMPLAINT OF ALLEGED UNJUST DISMISSAL UNDER S. 240 OF THE *CANADA LABOUR CODE*

BETWEEN

LUC BROUILLETTE

Complainant

and

H & R TRANSPORT LIMITED

Respondent

Before:

Morley R. Gorsky - Adjudicator

Appearances:

On behalf of the Complainant:

Yan David Payne - Counsel
Bianca Tse – Articling Student
Luc Brouillette – Complainant
Louise St. Pierre – Complainant's Spouse

On behalf of the Respondent:

Erin Ludwig – Counsel (Armstrong Management Lawyers)
Shawn Johnson – Eastern Fleet Personnel H & R Transport Limited

Hearing held on April 23, 2010, at the Toronto Regional Office of HRSDC, 4900 Yonge Street

INTERIM DECISION

A. Background

Following a request by the complainant, Luc Brouillette, I was appointed by the Minister of Labour as the adjudicator to hear Mr. Brouillette's complaint under Division XIV – Part III of the *Canada Labour Code* against the Respondent, H&R Transport Limited ("H&R") for alleged unjust dismissal. By letter dated October 2, 2009, Guy Baron, Director General, Federal Mediation and Conciliation Service, Human Resources and Skills Development Canada, notified the parties of my appointment.

B. Preliminary Objections With Respect To Jurisdiction

In her letter to me of November 26, 2009 Ms. Ludwig, counsel for H&R, raised two preliminary objections with respect to my jurisdiction to hear the Complaint, which she reiterated at the hearing:

> **Division XIV does not apply as Mr. Brouilette was not an "employee" as defined under section 3 of the *Code* with the Company; and**
>
> **In the alternative: If Mr. Brouilette is found to be an "employee" pursuant to section 3 of the *Code*, then the Company states Mr. Brouilette was not employed for "12 consecutive months of continuous employment" with the Company as required by section 240 of the *Code*.**

The sections referred to are:

> **Section 3**
>
> **"dependent contractor" means**
>
> **(*a*) the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is a party to a contract, oral or in writing, under the terms of which they are**
>
> > **(i) required to provide the vehicle by means of which they perform the contract and to operate the vehicle in accordance with the contract, and**

(ii) entitled to retain for their own use from time to time any sum of money that remains after the cost of their performance of the contract is deducted from the amount they are paid, in accordance with the contract, for that performance,

....

(*c*) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person;

'employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;

240. (1) Subject to subsections (2) and 242(3.1), any person

(*a*) who has completed twelve consecutive months of continuous employment by an employer, and

(*b*) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

There was a considerable delay in arranging the hearing date as Mr. Brouillette experience difficulty in retaining counsel. Given the relative complexity of the issues before me, I wished to afford him every opportunity to obtain legal representation. I thank Ms. Ludwig for her forbearance in this regard.

This interim decision relates to the objections to my jurisdiction.

C. The Evidence

Shawn Johnson gave evidence on behalf of H&R. At the time of the hearing he had been employed by it for approximately five years and was, at the relevant times, its Manager for Driver Relations – Eastern Canada. His duties included the recruiting of company drivers and owner-operators of equipment for H&R's "fleet."

There were a number of different arrangements with respect to the attainment of its operational objectives, which are described below:

1. Through the use of "company drivers," who were H&R "employee[s]" without any ownership or leasehold "interest" in the "equipment" they operated, which was described as "company equipment." They were paid by H&R which made the requisite payroll "source deductions." H&R only issued T4 slips to "company drivers."

In addition, company drivers received benefits, such as medical benefits. Insurance was maintained on the equipment by H&R, which paid all licence fees with respect to its equipment operated by company drivers. "Workers' Compensation" coverage with respect to its drivers was provided for under a "company program." H&R was also responsible for paying for fuel and repairs in the case of equipment operated by company drivers. "System wide," H&R had "about 1100 drivers," "about 650" of whom were "company drivers."

2. "Owner-operators," who either owned their equipment or leased it from a "holding company" controlled by H&R, and were not regarded by it as being its employees, but as independent contractors, as was Mr. Brouillette from approximately April 30, 2008 to December 12, 2008. By letter dated December 12, 2008 (Exhibit 1, Tab 11), Mr. Johnson, there described as "Eastern Canada Driver Relations," wrote to Mr. Brouillettte, described as "Lease Operator, Unit L3947, informing him that his "contract with [H&R] [was] terminated effective immediately" for reasons there stated.

H&R did not differentiate between owners and lessees of equipment, treating them all as owner operators for operational purposes. Owner operators who "leased through H&R" usually did so because they "lacked money" to be able to "get a truck on their own." They "selected" the driver(s) hired by them and were responsible for the payment of expenses relating to "all aspects of [operating] a vehicle"; examples given being "maintenance and repairs." Owner operators had no limits imposed on them as to how many drivers they employed, which was usually dictated by the number of trucks they operated. Owner operators were said to be the employers of any drivers they hired to drive their trucks and to be responsible for the payment of such drivers, including the making of required "source deductions." Mr. Brouillette was said to have been employed as an owner operator drover by an owner operator, Boomerang Express Inc. ("Boomerang") from about August 31, 2006 to about April 30, 2008, when he became an owner operator.

H&R controlled who could become a driver of an owner operator vehicle, including owner operators. See Exhibit 1 Tab 6: "Owner Operator Hiring Standards Lease Career Mileage Fleet. From H&R's perspective, owner operator drivers had no contractual relationship with them but were, at all times, employees of the owner operator whose vehicle(s) they drove.

In addition to the approximately 650 company drivers, the balance of the driving was performed by "owner operators," "owner operator drivers and the persons who drove for "third parties," to be referred to below.

Mr. Brouillette, when he became an owner operator, "could and did employ other drivers." Exhibit 2 is the "Driver Application" form (set out in Tab 1 of Exhibit 1) of Steve Walsh, who was employed by Mr. Brouillette as an owner operator driver for H&R. The number "L3947," hand written on exhibit 2, was the "truck tractor" number of Mr. Brouillette's equipment, which indicated the owner operator by whom

Mr. Walsh was employed. Another owner operator driver for Mr. Brouillette was Linda Nault.

Para. A. 4 of Tab 4 of Exhibit 1 states: "The LEASE OPERATOR will provide EXCLUSIVE SERVICE to the CARRIER unless otherwise authorized by the CARRIER in advance." Mr. Johnson testified that while it was possible for such a request to be granted he was unaware of a case where Mr. Brouillette had requested the right to use his leased vehicle to work for anyone else. He acknowledged that H&R would be within its rights to refuse any such request. Although conjectural, he said that any approval would depend on whether the outside work would interfere with the existing insurance or other terms of the lease. He was aware of examples where this had been done "occasionally" by other owner operators, but no supporting evidence was tendered.

Paragraph B. 8 of Tab 4 of Exhibit 1 provides that "The lease operator will be fully responsible for any secondary driver he may hire. All secondary drivers ... must be approved by the CARRIER before they are allowed in the equipment ... ." The secondary drivers were required to "fill out" the application form found at Tab 1 of Exhibit 1 in order to comply with government regulations. Any person driving a truck performing deliveries for H&R customers had to be "processed and approved" by it, including reference checks and road and drug tests.

3. H&R also used "third parties," who provided "hired trucks" (truck and driver) for it, who did not "run regularly" but were "called" upon on a "day to day" basis. No estimate was provided as to the extent of the use of third parties.

Tab 1 of Exhibit 1, headed "H&R Transport Ltd. Driver Application" (referred to by Mr. Johnson as a "generic driver application form" which had to be completed by all applicants for any driver position), was completed by Mr. Brouillette and is dated August 15, 2006. Of the three possible positions applied for, being: "Company Driver," "Owner Operator" and "Owner Operator Driver," Mr. Brouillette's selection, "Owner Operator Driver," was indicated by his circling that designation

in ink. In his case the owner operator being referred to was Boomerang. Boomerang was said to have leased vehicles, which it also furnished with drivers to H&R in accordance with lease agreements described in Tab 4. Exhibit 1. Mr. Brouillette's Driver Application (Exhibit 1 Tab 1) as an owner operator driver was "supplied" to H&R by Auldin Bilow of Boomerang. At the time of the application the expectation was that he would be employed by Boomerang and drive its truck to service H&R customers exclusively.

Company drivers, owner operator drivers and owner operators who drove their owned or leased vehicles were required to complete the "generic" application. This enabled H&R to "verify the employment history of a driver" as part of its obligations under U.S. and Canadian legislation.

Mr. Brouillette testified on his own behalf. He stated that his first association with H&R followed upon his reading an advertisement posted by Boomerang, at what he referred to as the "unemployment office" located in Smooth Rock Falls, Ontario, which application stated that it was "looking for drivers." He then attended at the offices of Boomerang located in New Liskeard, Ontario where he completed what he described as an "H&R application."

After he was approved of as an owner operator driver by representatives of H&R he was assigned as a "team driver for" it with assurance that he could later "go single."

Referring to Tab 1 of Exhibit 1, he said that he had filled out such a form provided by Mr. Bilow of Boomerang, with whom he had discussed the nature of the work to be performed: "Hauling for H&R [exclusively] throughout North America." Referring to pages 2 and 3 of Exhibit 1-Tab 1, he testified that he probably filled them out on the same day, but did not then meet Mr. Johnson. After meeting with Mr. Bilow and "filling out" the form he proceeded to the Toronto area office of H&R (located in Mississauga) for "orientation" along with other "people" for approximately 2 ½ days. The person responsible for providing the orientation was Mr. Johnson, which Mr. Brouillette

described as relating to the "day to day duties" which were part of "that operation."

Following the period of orientation, he left for New Liskeard, where he was assigned to a "Boomerang truck" and "started work for H&R the same day."

He testified that he never drove the Boomerang truck on other than H&R jobs.

In describing his "working relationship" with Mr. Bilow, as the representative of Boomerang, he said that he saw him about "once a month." He referred to periodic conversations with Mr. Bilow which related to his being required to deliver the truck to the Boomerang shop for service and with respect to his conveying this information to the H&R dispatch office so he could be dispatched for this purpose. He added that other than such communications he did not speak to Mr. Bolow or any other representative of Boomerang about the performance of his duties for H&R.

Mr. Johnson referred to Tab 3 of Exhibit 1 which is a Record of Employment, dated December 16, 2008, showing the employer as Boomerang, and the employee as Mr. Brouillette. It was faxed to Mr. Johnson by Auldin Bilow on behalf of Boomerang, at Mr. Johnson's request. It shows Mr. Brouillette's first day of work for Boomerang as being August 31, 2006, and the last day for which he was paid as April 30, 2008. The "comments" section of the ROE states, "leased own truck," as the reason for leaving.

Mr. Johnson testified that Boomerang had "provided" seven trucks to H&R that it "leased and insured" through H&R for the latter's "exclusive" use, although he later indicated that it was possible that some of the trucks were owned by Boomerang. He added that H&R had approached Boomerang with a view to it entering into such an arrangement. Mr. Brouillette was said to have been "brought on board" in the sense that he had "worked on one of the trucks" and was "assigned to work exclusively" on jobs serving H&R's customers.

Mr. Johnson testified that there was no significant difference between the work assigned to drivers depending on whether they where company drivers, owner operators who drove their vehicles or owner operator drivers. He said that the first "available load" would be assigned to the driver of the first "available truck." Accordingly, Mr. Brouillette would be assigned the first "available load" in preference to another driver if he was "back" first. Mr. Brouillette "probably" could have been involved in selecting a trip through phone conversations with the dispatcher. All drivers were responsible for filling out log books daily to comply with "federal law" and Mr. Brouillette did so when he was an owner operator driver and an owner operator.

Mr. Johnson stated that a trip might be "assigned" to Mr. Brouillette, when he was an owner operator driver, as a result of Mr. Bilow, on behalf of Boomerang, communicating by telephone with H&R's "central dispatch" office to check on H&R's "equipment" requirements. He added that Mr. Bilow "might" call "daily" to check.

He testified that information with respect to a driving assignment involving Mr. Brouillette was sent to the "truck" by "dispatch ... via satellite." As far as he knew Mr. Brouillette worked "exclusively" performing deliveries for H&R when he was a Boomerang driver. He added that a fuel card was "at this time" given to Boomerang and not to Mr. Brouillette, as it was the lease operator for the purpose of the contract, and was regarded as the owner of the truck. As noted above, he indicated that he could not recall whether Boomerang was a lessee of the truck driven by Mr. Brouillette or owned it outright, but maintained that for the purposes of the relationship there was no difference. He also testified that it did not matter whether the driver was an owner operator or an owner operator driver when it came to determining where a driver could "fuel up."

In cross-examination it was put to Mr. Johnson that there was a change in the "arrangement" between H&R and Mr. Brouillette in April of 2008, when he started to drive for it as an owner operator. Mr. Johnson testified that this was incorrect and that Mr. Brouillette then

drove what he described as "Pembroke leased trucks," by which he meant trucks leased by Boomerang from another company. He explained that the reason for the change in April of 2008 was Mr. Brouillette's desire to be an "independent owner operator" and not an "owner operator driver." He elaborated that Mr. Brouillette told him that he was "tired" of "driving for Boomerang," that H&R had "newer trucks," and that by driving a newer truck he expected to achieve "higher productivity." He acknowledged that the "actual" day to day "work" as a driver performed by Mr. Brouillette did not change depending on whether he was functioning as an owner operator driver or an owner operator. The only change when he became an owner operator was that he was subject to the obligations arising from the "new relationship."

Tab 4 of Exhibit 1 entitled "Lease Agreement," dated April 25, 2008, is made between H&R as "Carrier" and Mr. Brouillette as "Lease Operator." The preamble provides that the "Lease Operator" is the "Registered Owner" of a 2006 "Tractor Unit", referred to as the "Equipment." The lease agreement further provides that the lease operator "being an independent contractor agrees to lease this EQUIPMENT furnished with a driver to the CARRIER under the terms and conditions herein contained."

Attached to Tab 4 is a document entitled "H&R Transport Ltd. Career Lease Agreement Schedule 'B'," where the term of the lease is shown as being nine months beginning with its stated date of execution, shown as April 1, 2008. Para. 2 of this document provides that Mr. Brouillette would "run exclusively" for H&R.

In cross-examination he was referred to the lease agreement between himself and H&R (Tab 4 of Exhibit 1). He testified that he understood that para. 3 of Schedule "B" found at p. 10, stating that the term of the lease was "9 months" ending "December 31, 2008, was inserted because the truck had been leased by H&R from a leasing company, "Penske," and that lease would expire on the latter date. He added

that Mr. Johnson informed him that he would be able to lease another truck from H&R at that time.

Exhibit 1 Tab 6 is entitled "Owner Operator Hirings [sic] Standards Lease Career [sic] Mileage Fleet." The exhibit sets out, along with other provisions, the standards imposed with respect to the hiring of drivers who will drive owner operator equipment for H&R's lease carrier mileage fleet, as well as the "hiring procedure," "pay schedule," items "supplied by H&R," items paid for the "Operator," and "Benefits Available." An examination of Tabs 5 and 6 of Exhibit 1 discloses a difference between the mileage and other rates paid in the case of owner operator drivers and company drivers. This was said to be because of the additional costs borne by owner operators, such as fuel, equipment repairs and maintenance. Clause A. 1. of Tab 4, entitled "Equipment," provides that the "Lease Operator" [owner operator] is responsible for "The operation, maintenance and upkeep of the EQUIPMENT with all of the related costs ... ."

Exhibit 3 is comprised of a number of Mr. Brouillette's "pay statements" and associated documents prepared by H&R: mileage and other amounts due, less deductions for expenses. Page 375 of Exhibit 3 is entitled "Operator Settlements Summary Breakdown" (referred to as a "pay sheet") prepared by H&R with respect to Mr. Brouillette, dated October 1, 2008, the truck number being shown as "L3947." The amount of $2,853.81 shown at the bottom of the document represents the "net deposit to his bank account" arrived at after deducting "Gross Pay Due Owner" for mileage expenses, such as "fuel, lease fee, insurance, administration." Payments to Mr. Brouillette vary from period to period depending on his mileage and other related credits, and the applicable expenses.

The entries in Exhibit 3 under deductions with respect to fuel are as a result of the equipment being fuelled through the use of fuel cards issued by H&R to the "drivers" to "insure" that there were funds to fuel the truck. The amount for fuel was "charged back to the driver."

Page 363 of Exhibit 3 is an operator settlements summary breakdown with respect to Mr. Brouillette, where the payment due was for a lesser amount: $2.576.10.

Other examples were given from the operator settlement summary breakdowns, where different amounts were payable to Mr. Brouillete based on a number of factors such as there being "days off" or the nature of the destination of a trip. An example given was where mileage was not recorded because the truck did not reach its destination by Sunday so that the earnings attributed to this trip would not be shown until the next week's statement. Another example of expenses was an invoice included in Exhibit 3 concerning a mandatory drug test with respect to Stephen Walsh (one of the drivers employed by Mr. Brouillette, referred to above). Page 342 shows a negative balance. This evidence was given to show that owner operators, unlike other drivers, were "responsible for "losses and profits."

Referring to who had the "power to hire or fire drivers hired by Mr. Brouillette," Mr. Johnson testified that Mr. Brouillette would be advised by a representative of H&R to do what was necessary in case it decided an employee's services "were not required." He said that H&R couldn't directly terminate a person such as Mr. Walsh, as he was not its employee.

Notwithstanding the provision in the Lease Agreement (Tab. 4 of Exhibit 1), which provides that "Lease operator and secondary drivers" must "conform to [H&R's] standards of performance which include but are not limited to": [accepting] any load offered by dispatch and compliance of all dispatch instructions (para. 11 g. and h), Mr. Johnson testified that H&R did not have any "control" over where Mr. Brouillette "would go," in that it did not have a system where he could be compelled to accept work. Rather he could "turn down a load for valid reasons," an example given of what would be an acceptable excuse was that he had already worked hours beyond the statutory maximum number of hours. He said that there was no "forced dispatch" policy applied to "all drivers."

Mr. Brouillette described discussions he had with Mr. Bilow "around April of 2008," where Mr. Bilow inquired whether he was interested in purchasing a truck. He, in turn, inquired as to whether he could "instead" lease an "H&R truck" as the truck he had been offered to purchase by Mr. Bilow was an "older, high mileage" one. Mr. Bilow indicated that he had no objection to his doing so.

He then communicated with Mr. Johnson to whom he proposed that he lease an H&R truck and was informed that this should be "O.K." He was "contacted" a week later by Mr. Johnson" and they "discussed terms." Mr. Johnson explained how the lease agreement would work and reviewed its term. Mr. Johnson further explained that any lease of a truck to him would mean that he could use it only for H&R's "purposes."

Mr. Brouillette testified that from "August of 2006" until his "termination," during which period he first drove as an owner operator driver, then as an owner operator, he only drove H&R "routes." At no time during that period did he ever "advertise" that his "services" were available to drive for any other carrier. His insurance coverage only applied when he drove H&R routes.

Referring to Exhibit 3, he said that as an owner opeator his insurance coverage was "set up" by H&R, and he paid premiums "every week" which were deducted from the amount to be paid to him, as shown in that exhibit. Licensing was arranged by H&R "only." Whether he worked "through" Boomerang or "under" H&R, when he "took time off" he had to obtain approval from H&R's "head office."

He had a discussion with Mr. Johnson relating to his using other drivers in the vehicle he was to lease from H&R, with particular reference to Mr. Walsh. He said that he was informed that he would have to be in the truck at all times when it was carrying a load for H&R, as he was "responsible" for the truck and could not have "other drivers go alone." He was further informed that he could not hire another driver without first receiving H&R's permission. Any driver he

hired would first have to satisfy H&R's "criteria" and complete its "orientation" program.

He said that his reason for wanting to hire another driver was so that he could "put on more miles," and "make more money off of the truck." Using another driver, he could drive for 12 hours and then sleep, following which the other driver would drive for 12 hours and then sleep. The situation (12 hours on and 12 hours off) was the same whether one of the drivers was an owner operator and the other a company driver or owner operator driver. He said that it was not uncommon for drivers to "run in teams," whatever their status, to increase their income.

The trucks were equipped with on board computers by means of which satellite communication was maintained with H&R's "office." During regular communications he would be informed every morning where he could fuel up "for that day." It was his understanding that he was bound by such instructions and could not fuel up "at any other place."

When he drove for Boomerang he negotiated what payment he would receive "with Auldin." When he drove with another driver, "Auldin chose the team." When he drove for Boomerang he drove the truck to its "shop" for servicing and repairs. It was his understanding that Boomerang either owned or leased the truck.

As an owner operator for H&R, he was responsible for paying drivers he hired, determined their "rate," and was responsible for all payroll related paperwork including issuing T4 slips to them.

He acknowledged that he could have applied for the job of company driver with H&R but chose not to do so because he believed it would be more profitable for him to "lease."

In cross-examination he testified that if he wanted "time off" he had to make a request to and receive permission from H&R. The granting of a request was sometimes delayed when "too many people were off."

When he took "time off" he would let Mr. Bilow know to see if "he had work for the truck."

Further in cross-examination, he said that when he drove for H&R he used the fuel card it issued to him. This enabled him to take advantage of the rate guaranteed H&R. If he did not use it he would become responsible for payment of the "full price" where it was higher.

D. Submissions on behalf of H&R with respect to its preliminary objections

Ms. Ludwig relied on *1329669 Ontario Inc. (c.o.b. Moe's Trucking v. DaSilva*, [2002] C.L.A.D. No. 303), being a wage recovery appeal under Division XVI of the *Code*, decided by Referee, B. Etherington. She described the case as being factually most like the one before me, in that there it was alleged by the respondent that the alleged employee was an independent contractor and not an employee or was an employee of another company. She made specific reference to the following, which incorporated both of her objections:

> **(1) [T]hat the relationship between the complainant and [the respondent] was that of an independent contractor and not employee/employer, in which case the provisions of Part III of the [*Code*] ... would have no application to the relationship; (2) in the alternative, the complainant was in fact an employee of [another named company, Laser] and [the respondent] had merely played the role of an employment agency in introducing the complainant to [Laser]."**

Reference was made to para. 5 at page 52, which must be read in the context of para. 4 at pp. 51-2:

> **4. ... The complainant had answered an advertisement placed in the Windsor Star by MTT in early February for qualified A Z truck drivers. He was interviewed by Moe Faddoul. At the interview Mr Faddoul told him that he needed a driver to carry loads for Laser. He told the complainant that if he did not have a truck he could provide him with a truck owned by a numbered company which was owned and operated by Mr Faddoul's wife, Kay-Marie Abi-Samra. MTT had made an arrangement with Laser that it would provide it with trucks with drivers that Laser could use to satisfy its customers' trucking needs. Laser is a trucking and brokerage company which has all of the necessary federal and U.S. trucking licences to enable it to provide both**

interprovincial and Canada-U.S. trucking services. During the period in question, MTT did not possess interprovincial or U.S. trucking licences and for that reason could not provide interprovincial or cross border trucking services directly to customers. Sometime after the period at issue in this complaint MTT did acquire the necessary authorities to provide interprovincial and cross border trucking operations and it is currently a competitor of Laser.

5. Following the interview, Mr Faddoul introduced the complainant to officials from Laser and the complainant completed a job application and a written driver's examination administered by Linda Bezaire of Laser. He also underwent a medical examination by a Windsor physician at the request of Laser. Mr Pernasilici testified that Laser requires any person who will be driving loads for its customers, including Laser employees, independent owner/operators, and drivers provided by driver service agencies, to complete the above mentioned application forms and tests. Mr Pernasilici [of Laser] testified that Laser is required to have all of these forms and tests completed by anyone who might drive a truck to provide services to Laser customers in order to satisfy the requirements of Canadian and U.S. licensing authorities. The application forms and tests are in no way an indicator of employment as they must be completed by drivers who are clearly independent owner/operators as well as drivers who are employees of Laser. They are simply part of the process which Laser is required to maintain to ensure that it only uses qualified drivers that are able to operate safely.

The description of the "set up" in the latter two paragraphs was said to be "universal in the trucking industry" and consistent with the facts of the case before me, and had been developed to meet the rules of "licensing authorities." The difference in the *MTT* case and the one before me was said to be that Mr. DaSilva was an owner operator and Mr. Brouillette was initially an employee of Boomerang who serviced H&R's customers and only later an owner operator.

Dealing with the period from April of 2008 to December of 2008, Ms. Ludwig relied on *Innis and Dicom Express Inc.*, [1998] C.L.A.D. No. 109 (D.J. Baum – Adjudicator), being an adjudication under the same provisions of the *Code* as are before me. I was referred to the common law test for determining employment status, set out at para. 19 p. 6. In particular, reference was made to the "four-fold test" applied by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.) at pp. 169-170.

In dealing with the control test, Ms. Ludwig referred to para. 31 at p. 13-14, especially noting para. 31(g):

> **The Company insured the contents of each vehicle, that is, the load carried, but it did not insure the vehicles of the owner-operators, as such. That was the responsibility of the owner-operator.**

Ms Ludwig also relied on the statement in para. 34 at pp. 14-15, indicating that "control ... [can] no longer be seen as the only element to be evaluated ..." and that "the claimed employer might have control over the worker within the meaning of the common law but nonetheless be deemed not to be the employer of that person" because control is just one of the elements in the fourfold test.

Although there were some controls over Mr. Brouillette, such as where he could fuel up, what routes he would take (with respect to which he would contact H&R's dispatchers), he was said to have otherwise had the essential control over how he carried out his responsibilities.

Reference was made to the ownership of tools, in relation to Mr. Brouillette having been an "owner operator" of the equipment he leased, as commented on in para. 35 at p. 15. Ms. Ludwig argued that Mr. Brouillette made a deliberate choice to be an owner operator rather than a company driver, because he expected that it would be more profitable. In anticipating more profit, he also accepted the risk of loss from the enterprise. Reference was made to Exhibit 3 (Operator Settlements – Summary Breakdown sheets) which demonstrated that there were large fluctuations in his earnings. To that end, when he drove as an owner operator it was he and not H&R who hired two drivers (Mr. Walsh and Ms. Nault). It was Mr. Brouillette and not H&R who established the rate to be paid them, and it was he who looked after all paperwork, including that related to income tax and insurance claims, as it applied to them. Reference was made to the treatment of the "chance of profit" element of the four-fold test, discussed in para. 43 at p. 16 of *Dicom.*

Reference was made to the lease agreement (Tab 4 of Exhibit 1), whereby he assumed responsibility for the vehicle leased to him, including maintenance, fuel cost (including decisions as to whether to use the fuel card issued to him), "major" deductibles for insurance claims, locks, hard hats and other safety equipment.

Ms. Ludwig relied on statements in *Dicom*, in paras. 53-57 at p. 18, based on the reasons of MacGuinan J. In *Wiebe Door Services Ltd. V. M.N.R.* (1986), 3 F.C. 585, in support of her submission that it was not the individual tests set out in the fourfold test which of themselves define the employment relationship but the fourfold test "rather as a four-in-one test, with emphasis on what Lord Wright ... calls 'the combined force of the whole scheme of operation,' even while the usefulness of the four subordinate criteria is acknowledged." (*Wiebe* at p. 562.) I was asked to apply the four-in-one test and conclude that "the combined force of the whole scheme of operation" demonstrated that Mr. Brouillette made a deliberate choice to be an independent contractor, as doing so provided opportunities for his efforts to be "more profitable." Opportunities which would be denied him as a company driver for H&R. Ms. Ludwig submitted that Mr. Bouillette having "at all times [in] his relations with H&R" chosen his status as an "independent operator" and not as an employee "couldn't be a "bit of both."|

Ms. Ludwig submitted that her argument was valid even though Mr. Brouillette did not use a numbered company, as was the case on *Dicom*.

Ms. Ludwig also relied on statements made in para 12. of *1075752 Ontario Ltd. v. M.N.R.,* [2006] TCC 141, which was a successful appeal pursuant to subsection 103(1) of the *Employment Insurance Act* from a decision of the Minister of National Revenue on the basis that a worker was not employed under a contract of service and therefore was not employed by the appellant in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*:

> **[12] It is my understanding that Mr. Buchanan deliberately chose to offer his services as a self-employed contractor rather than as an employee when he first met Mr. Ellis. It is also clear that Mr. Ellis chose to hire independent contractors rather than employees (indeed, Mr. Ellis subcontracted with another truck driver, who was an independent contractor) ... .**

Ms. Ludwig also relied on *Nationair (Nolisair International Inc.)* (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630), where the Canada Labour Relations Board established the test in certain tripartite relationships to determine the existence of an employment relationship as between two entities (at. pp. 68-73), which will be discussed below.

E. Submissions on behalf of Mr. Brouillette with respect to the preliminary objections

Mr. Payne submitted that the issues before me "come down to [who had] control." He stated that he regarded certain "points [not to be] in dispute": (1) That Mr. Brouillette was "recruited to work exclusively for H&R." (2) The he filled out an H&R application form (Exhibit 1-Tab 1); completed H&R's orientation program; drove a truck exclusively for H&R, which the latter leased to him through a subsidiary, as well as insured; used an H&R "gas card at approved locations"; took directions only from H&R's dispatchers as to where he would drive; could only take time off if his request to do so was approved by H&R; that the noted controls applied to him during the periods when "Boomerang was involved" and after. He emphasized that the H&R policies governing his conduct as a driver were the same during the entire period he drove trucks servicing H&R customers. At no time was he said to have had a meaningful "right to refuse work," and the way work was assigned remained the same at all times.

That it was clear when Mr. Brouillette, on April 25, 2008, entered into the lease agreement Exhibit 1-Tab4, that he would be bound to drive exclusively for H&R; and Mr. Brouillette's evidence was that he did not drive for anyone else and that it was understood that the leased truck

was not to be used "in any other capacity." This submission was said to be supported by para. 4 of Section A of the lease, "Equipment":

> The Lease Operator will provide EXCLUSIVE SERVICE to the CARRIER unless otherwise authorized by the CARRIER in advance.

Such a provision was said to be inconsistent with Mr. Brouillette being an independent contractor. Reference was made to Mr. Johnson's evidence that he did not know of any case where H&R had authorized use of the leased equipment for non-H&R purposes.

Mr. Payne also referred to Mr. Johnson's evidence that it was H&R's normal practice to dispatch drivers in teams on long haul trips. This was said to make sense from the standpoint of the "client, the company and the drivers," and allowed for deliveries to be made as quickly as possible, by allowing the drivers to exchange driving responsibilities while complying with existing laws governing how long a person could drive without an extended break. This requirement meant that Mr. Brouillette had to hire other drivers in order to meet "H&R's requirements."

Mr. Payne reiterated that H&R, as part of its rights, tested all persons who drove trucks servicing its clients and decided which of them satisfied its requirements, including its obligations to various government authorities.

Mr. Payne argued that none of the cases relied on by Ms. Ludwig described situations where the driver was under the "level of restrictions imposed on Mr. Brouillette." The level of restrictions imposed on him precluded a finding that he was an independent contractor. Referring to the *Dicom* case, it was submitted:

Mr. Innis, unlike Mr. Brouillette, could use his truck for purposes unrelated to that of his work for Dicom. H&R was unrestricted in its powers to require Mr. Brouillette to use the truck exclusively to service H&R customers (para. 59). Mr. Payne referred to the similar analysis found in para. 14 of *MTT*:

> **[14]** The case of ***Bicz Transport Corp. v. Canada***, [2001] T.C.J. No. 511 (QL), cited by counsel for the respondent, does not change my conclusion. The truck driver here was not required to comply with the appellant's instructions. The truck driver here could have worked for other companies. Although he did not own the truck, he was providing his truck-driving services, and this he did at his own convenience. Furthermore, the fact that Mr. Buchanan had a different arrangement when he started working directly for Cassidy's does not alter my conclusion either. The common intention in that situation was that he would be an employee, and that made sense considering the control exercised by Cassidy's over their truck drivers. But, while Mr. Buchanan was working for the appellant the arrangement was different. The common intention of the parties was that he be hired as a self-employed contractor. Mr. Ellis did not have control over Mr. Buchanan's work. Mr. Buchanan determined his own work schedule, and accordingly, his own income. In my view, Mr. Buchanan was offering his services as an independent contractor. He was self-employed.

Mr. Payne reiterated the same position, referring to *MTT,* the difference being said to be that the alleged employer (MTT) acted as a "middle man" to supply a truck and driver for another, in that case Laser. MTT in the latter case was likened to Boomerang in the case before me. Mr. Payne referred to the following statement at para. 6 of the latter case:

> During the 18 months that followed the complainant used the trucks provided by Mr. Faddoul's spouse's company to perform trucking deliveries for customers of Laser ... . Mr. DaSilva was dispatched by Laser dispatchers to deliver loads for Laser customers. He was not dispatched by MTT except on one or two very rare occasions.

Mr. Payne relied on *Stanley v. Road Link Transport Ltd.*, [1987] C.C.E.L. 176, referred to in para. 59 of *Dicom*, being a decision of Adjudicator Pyle on a claim for unjust dismissal under what is now s. 240(1) of the *Code.* In *Dicom*, Adjudicator Baum distinguished *Stanley*, because it "concerned a broker-driver in the trucking industry [where] the employer required complete control over the use of his tractor."

In addition, reference was made to the following statement in para. 43:

> **If I were to apply the tests such as those set out by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.* ..., 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 and loss in the sense of applying his entrepreneurial skills, is simply not apparent in the evidence adduced in these proceedings.**

Mr. Payne also relied on para. 44 of *Stanley*, where the following statement appears:

> **To all intents and purposes Mr. Stanley was regarded as an employee save that he was paid differently, in recognition of the fact that he had loaned his tractor to the company and was responsible for its maintenance, etc.**

Mr. Payne emphasized the element of "exclusivity," which he submitted existed in the case of Mr. Brouillette's relationship with H&R.

Mr. Payne referred to *Louise Mary Skidmore and Sonat Offshore Canada Limited*, an unreported decision of Adjudicator H.J. Dyer, dated August 24, 1984, with respect to a complaint of unjust dismissal pursuant to what is now s. 240 of the *Code.* The position of the respondent was that the complainant had not completed twelve consecutive months of employment by the employer. The adjudicator stated, at pp. 4-5:

> **... Ms. Skidmore was hired by Crosbie Offshore Services Limited on 22 November, 1982. As an employee of this companyshe was required to work for Sonat Offshore Canada Ltd. On 1 November, 1983, she was hired directly by Sonat and place on its payroll. Her employment with Sonat ceased on 10 February, 1984. Thus Ms. Skidmore was on the Crosbie payroll for eleven months and 21 days. She was on the Sonat payroll for three months and nine days. Sonat argued that since Ms. Skidmore worked for it for only approximately three months her case does not come under the jurisdiction of the *Code.***
>
> **A case similar to [*Skidmore*] is *United Steelworkers of America, C.I.O. Local 3696 and Norton Company of Canada Limited* (1953), 4 L.A.C. 1451. In the case Canadian Corps of Commissionaires supplied a security guard to the company. The guard was under the control of the company because he was instructed in**

> his work by company personnel and his work and his work was checked by them. The majority of the board held that the contract entered into between the Norton Company and the Canadian Corps of Commissionaires was a contract of service and not a contract for services, and therefore the security guard was an employee of the Norton Company. I am of the opinion that the same holds true for the case before this adjudicator. Although Ms. Skidmore was recruited by Crosbie Offshore and paid by them for approximately 12 months, she was, during that period, bound to obey the orders of Sonat as to which work she was to execute and the manner of its execution. Thus she was an employee of Sonat for approximately 15 months. Consequently she can seek redress under [s. 240] of the *Code*.

F. Reply Submissions on behalf of H&R:

Ms. Ludwig argued that *Skidmore* was inapplicable as there was insufficient evidence before me to enable me to conclude that Boomerang was a "personnel or staffing agency." She referred to the fact that unlike the facts in *Nationair* (discussed below), Boomerang was not a recruiting agency which hired truck drivers for H&R. Rather, relying on the evidence of Mr. Johnson, Boomerang owned its own property where it maintained its trucks with its own mechanics and where its trucks were parked. He emphasized that "much more" than the extent of H&R's control over Mr. Brouillette must be considered in order to arrive at a finding as to who was Mr. Borouillette's "true employer."

Ms. Ludwig distinguished the *Stanley* case relied on by Mr. Payne because (1) the complainant in that case did not "hire other drivers" and (2) there was a different and greater "measure of control" exerted over him with respect to the way he conducted himself in carrying out his work responsibilities than was the case for Mr. Brouillette: referring to p. 11, para. 43. Facts said to support this position were that Mr. Brouillette chose to be an owner operator for H&R rather than an employee, hired two persons to drive his truck and to set their rates, which would give him a greater chance of earning higher "profits."

Ms. Ludwig also referred to the following statement found in para. 49 of *Stanley*, quoting from Bendel, "The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law" (1982), 32 U.T.L.J. 374, which was noted in the *Weibe* decision:

... Another owner-operator driving for the respondent was held to be a "small businessman," not an employee, because he owned two trucks, employed two other persons, and some of the other trappings of a small entrepreneur.

Ms. Ludwig submitted that this conclusion should also be reached in Mr. Brouillette's case.

Ms. Ludwig also referred to item 7 of the "broker contract" reproduced in para. 9 of *Stanley*, which provided that only the complainant could "[operate] the equipment," thus differentiating it from the case before me, where a "substitute driver," could operate the equipment. In fact, "team driving" was contemplated as a result of Mr. Brouillette being permitted to hire other drivers.

Ms. Ludwig concluded that, as was the complainant in *MTT*, Mr. Brouillette was free to "choose whether to take a particular delivery assignment ... or not to take any loads on a particular day."

G. Discussion and Decision

1. Clarification of the Issues Before Me

Although Ms. Ludwig's first objection to my hearing the case on its merits was based on her submission that I am without jurisdiction to do so because Mr. Brouillette was "not and 'employee' as defined under section 3 of the *Code*," it must be that he was "not a " 'person' within the meaning of section 240 of the *Code*, is not an employee and is an independent contractor ... ." The issue was thus expressed at para. 21 in *C.P. Ships Trucking Ltd. v. Kuntze*, 2007 FC 1225 (CanLII), a decision of Shore, J., on a review of an application for judicial review of the interlocutory ... award of adjudicator Michel A. Goulet, who ruled that the respondent (complainant) in that case was a "person" within the meaning of section 240 of the *Code*, and that the tribunal had

jurisdiction to hear and decide the respondent's unjust dismissal complaint. This is not to say that cases dealing with the former definition cannot be of assistance in cases dealing unjust dismissal under Part III as long as heed is paid to the admonition of Shore J.

In the light of the framing of the issue in *CP* and certain other concerns, I invited counsel to make further written submissions, which they did, and which I will refer to further in the course of my reasons.

Dealing with the application of the definition "employee" in Part I of the *Code*, Shore J. stated:

> **26 Part III of the *Code* does not define the term "employee", nor does it define the term "person".**
>
> **27 In *Dynamex,* [2003 FCA 248], 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"* (my emphasis). (*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.

In her further written submissions of September 20, 2010, Ms. Ludwig stated:

> ... we agree with your expression of the law in ***C.P. Ships Trucking Ltd. V. Kuntze*** ... . Shore, J.'s reasons in ***Kuntze*** contained a thorough review of the jurisprudence regarding when a complainant is to be considered a "person" under s. 240 of the ***Code***. The complainant in that case was found to be such a "person" on the basis that he satisfied the common law tests of an employee, specifically the "organization" and "control" tests. Furthermore, the cases cited by Shore, J. in support of his finding were cases in which successful complainants satisfied the common law definition of an employee or at least of a very high level of personal dependency on the impugned company.

2. Analysis Of Relevant Law Relating To Ms. Ludwig's First Objection, Based On Her Submission That Mr. Brouillette Was An Independent Contractor And Its Application To The Facts Before Me

In *CP*, Shore J. also stated, referring to *Stanley* and other cases:

> 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 [sic] 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 (sic) 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*** **[my emphasis].**

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:

> 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***, [***671122 Ontario Ltd. v. Sagaz Industries Canada Inc.***, 2001 SCC 59 (CanLII), [2001] 2 SCR 983], 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.

In *CP*, Shore J. reviewed the limitations placed on the complainant under the terms imposed by the respondent in *Transport Damaco International Ltée* (1991), 84 di 84; and 92 CLLC 16,055 (CLRB no. 853):

> **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.

...

Under the heading of control, their dependence is obvious ... .

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

In the *MTT* case relied on by Ms. Ludwig, Referee Etherington reviewed the law relating to determination of whether a complainant, in that case under the wage recovery provisions of Part III of the *Code*, was an employee or an independent contractor:

24 In arriving at the conclusion that the complainant was operating as an independent contractor during the period in question, I have considered the traditional tests for an employment relationship presented in the case law submitted by all the parties and Laser in their closing argument. The frequently cited *Montreal v. Montreal Locomotive Works Ltd*, [1947] 1 D.L.R. 161 (P.C.) decision requires one to consider " ... a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss" but goes on to recognize that "... in many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties" (at 169). Subsequent common law cases have made reference to a business organization test in which one tries to determine whether the person works as an integral part of a business or merely provides services for a business but is not integrated into the business (see *Stevenson Jordan & Harrison Ltd v. MacDonald*, [1952] 1 T.L.R. 101 (C.A.) (Denning L.J.)). Even more recently, prominent text writers have talked about the importance of a purposive approach to interpreting and applying the legal definition of employee in order to further the protective policy goals and remedial purposes of labour and employment legislation (see for example England, Christie and Christie, *Employment Law in Canada* (3d ed.), (Butterworths Canada Ltd. 1998 looseleaf) at para. 2.1 and 2.2). This of course means that a person may be found to be an employee for the purposes of some legislative instruments but not for others. But it also means that an employment

relationship is more likely to be held to exist, regardless of the intentions or understanding of the parties, where there is a situation of unfairness, vulnerability, or need for protection which the legislation in question was designed to address.

25 If one merely applies the four factors from *Montreal Locomotive* without taking a contextual or purposive approach there is some support for a finding of an employment relationship between the complainant and MTT or Laser. If ownership of tools is given prominence, then one can argue MTT is the employer by virtue of the ownership and control over repair of the truck by Mr Faddoul's spouse's company. If one looks solely at control over the day to day activities of the complainant, one could suggest that Laser played the most prominent role by dispatching the complainant to make deliveries on an almost daily basis and requiring him to fill out and submit Laser pro bills and trip sheets on a weekly basis. It is also notable that MTT apparently did not exercise control over what loads were delivered by the complainant, how many kilometres he drove each day or what routes he took to deliver his loads. But even on this single criteria the picture is not that clear as MTT did issue 3 or 4 directives to Mr DaSilva concerning some aspects of carrying out his duties during the 18 months in question (re where to purchase fuel and importance of timely submission of documents to Laser etc.). The control issue is also significantly impacted by testimony from all parties that suggested that Mr DaSilva could decide on his own whether to accept a particular delivery assignment offered by Laser on a day to day basis. As such the complainant was more or less in control of his hours and days of work. In terms of chance of profit or risk of loss, it is significant that both MTT and the complainant were paid solely on a commission basis and thus the complainant exercised considerable control over his own chances for profit or risk of loss and those of MTT as well, although one suspects that if the complainant became too inactive he would no longer be allowed to use a truck provided by Mr Faddoul or his spouse's company. It is also notable that the complainant was paid solely by MTT during the period in question and did not receive payments directly from Laser or any other customers of the trucking services which he was providing.

26 The prohibition against contracting out of the employment standards protections of the *Code* is found in s. 168. Such a prohibition is common to virtually all employment standards legislation and it is extremely important to prevent the policy objectives of the legislation from being undermined by the very inequality in bargaining power which made legislative standards necessary in the first place. Nevertheless,

there are several recent decisions by referees in wage recovery appeals under the *Code* which have considered the parties' understandings and intentions concerning their relationship as important determinants concerning whether there is an employment or independent contractor relationship.

27 Employer counsel presented four recent decisions of this type in wage recovery appeals for my consideration in this appeal: ***KLR Transportation Service Inc. v. Kopka***, [2001] C.L.A.D. No. 73 (Ref. B. Kirkwood); ***Knetsch v. D.C. Lawson Driver Service***, [1996] C.L.A.D. No. 122 (Ref. S.D. Kaufman); ***Charles Bednar Investments Ltd (c.o.b. Ron Bednar Trucking) v. Langille***, [2000] C.L.A.D. No. 78 (Ref. Lister); and ***Fuson v. Libra Transport***, [1995] C.L.A.D. No. 832 (Ref. Mellors). In all four cases the complainant trucker was held to be an independent contractor and not an employee for the purposes of the wage recovery provisions of the *Code*. While there are some differences in the facts of each case from the facts in this appeal (i.e. in some cases there was a written contract while in others the arrangements were made orally), it is notable that in all cases the complainant had agreed to provide truck driving services to an agency similar to MTT or a trucking company on an independent contractor basis. In all or almost all of the cases the complainant did not own the truck or trucks he was driving. In all cases the agency or trucking company agreed to pay the complainant on a per mile or percentage of gross revenue basis as opposed to an hourly, daily or weekly rate. Also, in all cases the parties had acted in accordance with an independent contractor relationship for the purposes of income tax filings and statutory deductions or benefits for the duration of the relationship and the complainant had not requested that deductions be made or benefits paid during that time. Finally, and I believe most importantly, in all cases there was no evidence that the complainant felt he was unequal in bargaining power or somehow coerced, exploited or unfairly treated with respect to his decision to provide services as an independent contractor. Although this factor is only given express significance by Referee Kaufman in the ***D.C. Lawson Driver Service*** decision, a careful reading of the other three cases suggests that they too lacked any evidence of the presence of circumstances which would require that the parties' intentions and understandings be disregarded in the interests of furthering the purposes of the employment standards protections under consideration. These cases suggest that it is legitimate to consider and give weight to the understandings of the parties concerning their relationship provided that there are not economic or social circumstances which indicate that the purposes of the legislation could be undermined by such consideration. This is particularly the case where the traditional tests

for employment do not provide a clear answer. In this respect these cases are consistent with a contextual and purposive approach to the determination of whether there is an employment relationship which should be governed by Part III of the *Code*.

28 The circumstances of the appeal under consideration share the above mentioned similarities of recent trucking cases in which a complainant has been held to be an independent contractor rather than an employee. In my view the application of a contextual and purposive approach to the issue of whether there was an employment relationship between the complainant and *MTT* leads to the same conclusion of independent contractor status when the particular facts of the complainant's case are considered. I note as well that in *D.C. Lawson Driver Service*, supra, the fact that the complainant had been deemed to be an employee of the respondent for the purposes of WSIB coverage was not considered to be determinative of employee status for the purposes of Part III of the *Code*. Referee Kaufman arrived at the following conclusion:

> In view of all the evidence, I find, on the balance of probabilities, that at the outset of his relationship with D.C. Lawson Driver Service, Mr Knetsch freely and willingly, and without economic or psychological duress, and with the knowledge of the advantages and disadvantages of self-employment as opposed to employee status, agreed to provide his services to D.C. Lawson ... as a self-employed independent contractor or subcontractor. He thereafter willingly participated in and conducted himself so as to perpetuate that arrangement. I find no unfairness, coercion or power imbalance on the facts of this case which might justify finding Mr Knetsch an employee, to further the protective policy goals of the legislation. (at para. 27)

Although it dealt with the an application for review under subsection 116(1) of the *Employment Standards Act, 2000*, S.O. 2000, c. 41, as amended (the "Act") with respect to an Order to Pay issued by an Employment Standards Officer ("ESO"), *Andrew Beyers Carpentry Inc. v. Mohammed*, 2010 CanLII 23842 (ON L.R.B.) provides a useful statement of the law relevant to determining whether a person is an employee or an independent contractor:

> 25. The harm the *Act* and its predecessors address is the potential negative effects of unequal bargaining power between employees and employers that could cause core terms of employment such as hours of work, payment of

wages, overtime, and vacation pay to fall below a standard acceptable to the people of Ontario. The Supreme Court of Canada's recognition of this inequality in *Machtinger* v. *HOJ Industries Ltd.* 1992 CanLII 102 (S.C.C.), [1992] 1 S.C.R. 986 at page 1003 mirrored, without specific citation, what many adjudicators under the *Act* had stated over more than a decade and a half. One regularly-cited decision, *Majestic Maintenance Services Ltd.*, E.S.C. 479A, February 8, 1977 (said to have established the "statutory purpose test" for employment standard issues) stated the purpose of the Act was to "adjust [this] inequality in bargaining power between the individual supplying services and the user of such services upon whom the individual is economically dependent by providing entitlement to minimum standards of the *Act*".

26. The statutory purpose test is tailored to the inclusive nature of the definition more than other interpretive tests developed by the Courts in other common law or statutory contexts. In *Eiler (Re)*, E.S.C 95-73 (April 7, 1995), subsequently endorsed by the Ontario Divisional Court, unreported decision dated January 15, 1996, O'Leary, J., Court File No. 544, an adjudicator under a predecessor to the *Act* offers persuasive reason for that conclusion:

> **Much has also been written about the various tests which should be used to construe the definition [of employee under the *Act*]. ... Suffice to say, that there is significant authority validating the use of each of the following three tests: the four-fold test (*Montreal v. Montreal Locomotive Works Ltd* [1947] 1 D.L.R. 161), the organization test (Mayer v. J. Conrad Lavigne Ltd. (1979), 27 O.R. (2d) 129), and the statutory purpose test (*Majestic Maintenance Services Limited*, E.S.C. 479A, February 8, 1977 (Burkett)).**
>
> **The latter two tests, which have significantly "enlarged" the four-fold test, have evolved for various reasons. The organization test arose in order to address certain perceived rigidities in the application of the criteria of control, ownership of tools, chance of profit, and risk of loss in the face of 'novel situations'. Under the newer test, the two main questions asked are: 1) is the alleged employee an integral part of the company's business and organization or merely ancillary to it? and 2) "was his work subject to co-ordinational control as to 'where' and 'when' rather than the 'how'?" (*Stevenson, Jordan & Harrison Ltd. v. MacDonald*, [1952] 1 T.L.R. 101 at 111).**
>
> **Arguably, the statutory purpose test formulated in *Majestic*, supra is even more inclusive. Referee Burkett held there that the common law tests were not appropriate for interpreting the scope of the *Act* when the *Act* was clearly designed to expand upon or enhance the**

protections of the common law. He concluded, therefore, that the existence of an employment relationship should be assessed by reference to the purpose of the statute, which he characterized as "intended to provide certain benefits to persons who by reason of their economic dependence or lack of 'bargaining power' in the market place, might otherwise have to work on terms below the basic minima established in the *Act*". (*Majestic*, supra, at p.18). Referee Burkett further observed at p.24-25 that:

> The Legislature has decided that it is in the public interest that all persons who perform work or supply services to an employer be entitled to minimum standards of employment. The *Act* implicitly recognizes the inherent inequalities which may exist in a modern industrial society and redresses the inequality between the individual and his employer to the extent that the employer is required by statute to comply with the minimum standards.
>
> Whereas the *Act* is not designed to protect or underwrite the independent businessman (see *Becker* decision, affd., supra) it must be said (and indeed it follows from the *Becker* decision) that it is designed to protect those who are dependent in their employment.

27. This was not break-through logic because the *Montreal Locomotive* four-fold test and other tests developed for other purposes by the Courts had earlier been shown by respected academics to have little or no conjunction with effecting the purposes of the *Act* (see primarily "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power", 16 U.T.L.J. 89 (1965) by Professor H.D. Arthurs).

28. Although the statutory purpose of the *Act* is easy to state, its application in the variety of contractual arrangements created by organizations to obtain skills and services in a cost-effective way means that no universal set of considerations has emerged that automatically determines in all workplaces and all varieties of relationships whether an individual is an employee under the Act. There is also no comparable set of such considerations at common law (see *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 S.C.R. 983 and *McKee et al.* v. *Reid's Heritage Homes Ltd.*, unreported decision of the Court of Appeal dated December 23, 2010).

29. The ever-changing contractual configurations for the provision of services over the past few decades in response to changing economic times call for nuanced interpretive approaches to discern if there is economic dependence where those configurations were specifically developed to include many

indicia traditionally associated with independent contractors. (see *Noramtec Consultants Inc.,* [1998] O.E.S.A.D. No. 299 and *Bayer Inc.* v. *Mark Elliott et al.* 2005 CanLII 38076 (ON L.R.B.), 2005 CanLii 38076, OLRB decision dated October 11, 2005).

Although the lease agreement, being part of Exhibit 1 Tab4, executed on April 1, 2008, with respect to the vehicle Mr. Brouillette drove for H&R, is shown to be between him, as lessee, and "H&R Transport" as lessor, the signature page, as well as other references in the body of the document, show the lessor to be H&R Transport Limited. Mr. Johnson testified that the lessor was said to be a subsidiary of H&R. In *Stanley* and *CP*, the claimants were each a truck owner-operator and parties to written contracts under the terms of which each of them 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 [*CP* at para. 50]. Mr. Brouillette as the "lease operator" shown in the lease agreement (Exhibit 1 Tab4) with H&R, as carrier, was described as the "Registered Owner" and treated as an owner operator.

As was the case in *Stanley* (at pp. 190-1), referred to in *CP* (at para. 52), if I applied the tests set out by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.* to the facts of the case before me, I too would have difficulty in concluding that Mr. Brouillette "had any significant degree of control over his operations." He leased the tractor from a company said to be controlled by H&R (as noted above, the lease documentation indicates the lessor to be H&R Transport Limited), but for all "practical intents and purposes he surrendered that equipment to" it. As in *Stanley* and *CP*, 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, given the terms of the lease and lease-back.

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.), referred to in para. 52 of *CP*, quoting further from pp. 190-1 of *Stanley*, "I would

find, on the basis of the evidence before me, that [Mr. Brouillette] was under a contract of service, was employed as a part of the business of [H&R] 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], [brackets in original] although done for the business, was not integrated into it but only accessory to it. [Mr. Brouillette] was required to afford to [H&R] the complete use of his tractor in the general conduct of its business." Although he was not "required to paint his tractor so as to identify it with [H&R, or] to wear [an H&R] uniform," he was, under the terms of the lease-back to have indicia attached to the truck identifying it as being in the service of H&R (see below).

He was "treated as an employee [of H&R] for the purposes of the rules and regulations," as is disclosed by the terms of the lease-back. Although he was not treated as an employee "for the purposes of a comprehensive health and welfare plan," the overwhelming evidence supports a finding of his integration into H&R's operations.

As in *CP* and *Masters*, referred to in the former case, at para. 53, Mr. Brouillette was, treated by H&R, as an owner operator of the truck he leased from it. As in *CP* (para. 53), Mr. Brouillette "performed his functions exclusively for" H&R (*CP* para. 54). As in *CP* (ibid.), the contract was non-negotiated, in the sense that it was the standard H&R contract used when it contracted with "owner operators," and there was no suggestion of there being any room for individual terms to be negotiated.

Mr. Brouillette was required to insure the truck with a company satisfactory to H&R, which insured the goods to be delivered to its customers by Mr. Brouillette.

H&R provided his assignments, and required him to adhere to its policies and procedures, including the holding of mechanical inspections, displaying identifying decals, and adhering to a code of discipline (cf. *CP* para. 55).

Mr. Brouillette's only opportunity for profit and loss was limited to whether he was called in to work by *H&R*. There was no evidence of his every having performed work for others, and under the terms of the contract with H&R could not perform work for others without H&R's consent. It was not suggested that this possibility was realistic given that he had to accept any offer of work from H&R, his services having been completely integrated into H&R's business (see below).

Although he had some "interest" in the tools, namely the truck he drove, it was leased to him by H&R and leased back to it. Cf. *CP* para. 58, referring to *Masters* para, 82.

There was a strong dependency by Mr. Brouillete on *H&R.* He performed the tasks usually performed by an employee (in this case company drivers). Given his being limited, both by contract and on the basis of the history of their relationship, to working solely for H&R, there was no real opportunity for profit and loss that one normally associates with entrepreneurship. The preceding viewed along with the high degree of control, all support a finding that he was an employee of H&R, and a person to whom s. 240 of the *Code* applies. (Cf. *CP* (at para. 59) quoting from *Masters* (para. 84).

As in *Transport Damaco, supra*, referred to in *CP* para. 76, Mr. Brouillette's rights with respect to the leased truck were subject to a host of restrictions as to how he might use it. There was no realistic basis for his developing a customer base outside of his relationship with H&R, especially as he could not refuse a trip when offered by it. H&R controlled who he might wish to drive the truck and what routes he might take. Insurance on the truck had to satisfy its requirements. All details with respect to licences were handled by H&R. As in *Domaco*, Mr. Brouillette's dependence on H&R was obvious.

An examination of the *MTT* case relied on by Ms. Ludwig discloses significant factual differences between those in that case and the one before me. In para. 25 of *MTT* Referee Etherington notes that the

alleged employer, MTT, did not exercise control over what loads the complainant delivered, the number of kilometres he drove each day or what routes he took to deliver his loads. Also, unlike the *MTT* case, Boomerang, when it "employed" Mr. Brouillette, did not issue any significant directives as to how he carried out his duties. Nor could Mr. Brouillette, as could the claimant in *MTT*, control his hours and days of work. (Para. 25 *MTT*.)

In the case before me, even if Mr. Brouillette was granted time off by H&R for vacation, a situation referred to in *MTT*, one suspects that if he became too inactive he would no longer be offered work. (Cf. *MTT* at para. 25.)

In relying on *MTT*, Ms. Ludwig referred to the portion of the decision that emphasized the importance of "parties' understandings and intentions concerning their relationship as important determinants concerning whether there is an employment or independent contractor relationship," (*MTT* para. 26.) Significantly, Referee Etherington viewed all of the cases cited in support of this conclusion as suggesting that "it is legitimate to consider and give weight to the understandings of the parties concerning their relationship provided that there are not economic or social circumstances which indicate that the purposes of the legislation could be undermined by such consideration." More importantly, this was said to be "particularly the case where the traditional tests for employment do not provide a clear answer."

The *MTT* case differs from the one before me in that there the evidence in favour of entrepreneurship was much stronger, as is evident from my reciting of the elements relating to control which the complainant in *MTT* retained and Mr. Brouillette did not. In the *MTT* case, at para. 25, the complainant is shown to have had the "freedom to decide on his own whether to accept a particular delivery assignment offered ... on a day to day basis." As such the complainant "was more or less in control of his hours and days of work."

As was noted in *CP*, in cases such as the one before me, there are usually facts supporting a conclusion that a claimant is an employee and others supporting the opposite conclusion. Shore J. in *CP* (para. 64) approved of the statement of the referee in *Dynamex* (para. 50), which Sharlow J.A. agreed with (para. 65), even where anomalies may emerge whereby a claimant may have some of the trappings of an independent contractor. Ultimately, the decision will depend on where the scales come down: on the side of employment or entrepreneurship. It is not the designation in a contract that the claimant is an independent contractor which governs. Rather it is the "factual reality underneath appearances." (*CP* para. 65, referring to para. 52 of *Dynamex*, where Sharlow referred to *Sagaz*.)

In the additional submissions, dated September 15, 2010 made on behalf of Mr. Brouillette, reliance was had on *CP* and *Sagaz*. Further in these submissions reliance was had on:

1. *Tiltins v. RIM Transportation International Inc.,* Ont. Sup. Ct., 2003 CarswellOnt 3764, where the plaintiff hired drivers, including himself, through his own corporation to perform trucking work for the defendant. The defendant ultimately terminated the plaintiff and the court held that the relationship between the plaintiff and the defendant bore sufficient similarity to an employment contract to warrant the plaintiff's entitlement to reasonable notice. A similar case, *Mancino v. Nelson Aggregate Co.,* Ont. Ct. of J. (Gen. Div.), 1994 CarswellOnt 3641, was also relied on.

2. *Decision No. 1064/00* (2000 CarswellOnt 8385), where a panel of the Ontario Workplace Safety and Insurance Appeals Tribunal held that a driver leasing his truck "bore some risk of loss in that if work dried up, he remained liable for the lease payments"; however, the panel found that "the nature of this risk is more akin to an employee's risk of lay-off rather than a self-employed individual's risk of bankruptcy" (at para. 48).

3. *Active Transport Inc. v. Ladizhinsky,* Canada Arbitration Board, 2006 CarswellNat 2296; *99 Transport Inc. v. Ni,* Canada Artbitration Board, 2009 CaswellNat 3537, in support of the proposition that the designation of persons as "independent contractors" or "owner operators" was not determinative.

In the case before me an examination of the "factual reality," based on the terms of the lease from H&R to Mr. Brouillette (Exhibit 1 Tab 4) and the lease agreement being part of the same exhibit, which has many of the attributes of a lease back, and the evidence as to how the arrangement worked in the real world, discloses:

From the lease:

> **1. Mr. Brouillette is to "... run [the truck] exclusively for H&R Transport Ltd (para. 2); and**
> **2. "to keep [the truck] insured by such company or companies as [H&R] shall approve ... and for the benefit of [H&R] ... (para. 4(h)).**"

From the lease-back, Mr. Brouillette, must:

> **1. Meet safety "specifications outlined by [H&R]" (para. A. 2).**
> **2. "[O]btain appropriate door ... decals which shall be applied as per [H&R's] standards. Upon termination of the AGREEMENT (sic) all means of [H&R] identification must be either obliterated or removed at the cost of [H&R]" (para. A 3.).**
> **3. "[P]rovide EXCLUSIVE SERVICE (sic) to [H&R] unless otherwise authorized by [H&R] in advance" (para. A. 4).**
> **3. Be the "primary driver of the [truck] ..." (para. B. 7).**
> **4. "Accept any load offered by dispatch" (para. B. 11. g.**
> **5. Comply with "all dispatch instructions" (para. B. 11. h)."**
> **6."[I]nstall and maintain Cancom mobile communications units," (para. A. 5) by means of which H&R dispatch can maintain communication with the truck and convey instructions.**

7. Be the "primary driver" of the truck (para. B. 7) and must be "fully responsible for any secondary drivers he may hire," with all secondary drivers being "approved by" H&R (para. B. 8).
8. Along with other "drivers ... meet ... standards outlined by [H&R]," with H&R having "... the right to inspect drivers ... at any time to ascertain compliance with these standards" with H&R having the further right to "take whatever action it deems necessary for compliance, at the cost of [Mr. Brouillette]."

Mr. Brouillette lacked too many of the significant indicia of independence to fit comfortably within the designation of independent contractor. Unlike an independent contractor who has to get the assigned work done and is independent with respect to how he gets that work done, Mr. Brouillette was under strict controls approximating those affecting an employee driver. Mr. Brouillette was no more free than a company driver to choose the route he wished to travel.

Nor would he, if he were an independent contractor, be bound under contract, as he was, to work exclusively for a single motor carrier. He was dependent on H&R in that he worked exclusively for it and was limited in the business decisions which could be made by a true independent contractor. An independent contractor owner operator would be able to transport goods for one carrier on one trip and for another carrier on another trip. This was the case for the third party truckers sometimes used by H&R.

The hiring policies and other criteria used by H&R for hiring company drivers were essentially the same as those used for obtaining owner-operators who drove and owner operator drivers, as were its dispatch policies.

It is understandable that H&R would prefer to hire owner operators with whom they are familiar and who furnish them with a comfort level that their service quality standards will be maintained. It is also

understandable that H&R would wish to have someone who is going to be available for dispatch, meet its safety and other requirements. Perhaps most important, H&R would prefer to retain someone who would not be transporting goods for competing carriers. It is therefore not surprising that in order to attain these objectives H&R would organize its enterprise so as to best achieve these goals. For this it cannot be faulted. However, when an owner operator, such as Mr. Brouillette, enters into contractual arrangements intended to achieve H&R's purposes, the analysis of such arrangements for the purpose of determining whether someone is an employee or an independent contractor must focus on factual situation rather than the form of the transaction.

An excellent statement of the approach to deciding if there is economic dependence in a relationship is found in *Andrew Beyers Carpentry Inc. v. Mohammed*, 2010 CanLII 23842 (ON L.R.B.), at para. 29:

> **The ever-changing contractual configurations for the provision of services over the past few decades in response to changing economic times call for nuanced interpretive approaches to discern if there is economic dependence where those configurations were specifically developed to include many indicia traditionally associated with independent contractors. (see *Noramtec Consultants Inc.*, [1998] O.E.S.A.D. No. 299 and *Bayer Inc. v. Mark Elliott et al.* 2005 CanLII 38076 (ON L.R.B.), 2005 CanLii 38076, OLRB decision dated October 11, 2005).**

In *Joey's Delivery Service v. Workplace Compensation Committee*, 2001 NBCA 17 (CanLII), (2001) 239 NBR (2nd) 300. application of the so-called "mischief rule," or "purposive approach" was discussed at paragraph 98:

> ***Bluntly stated, this factor applies on the understanding that most legislative schemes that distinguish between employees*** **and independent contractors are directed at providing needed benefits to employees. Therefore, it is understandable that the law should lean towards classification as an employee, at least in those cases where conventional analysis leads to an indeterminate conclusion. Everyone**

> is aware that it is to the benefit of employers to outsource work traditionally undertaken by employees and this is the mischief that decision – makers must consider. *[Emphasis added in original]*

Although *Joey's* dealt with a Workplace Compensation case, the quoted portion is relevant to the case before me as it applies to most statutes directed at providing needed benefits to employees.

In the case before me the level of control over Mr. Brouillette by H&R in the performance of his duties imposed by the lease and lease back entered into, his limited interest in the "tools," as well as the level of restrictions and requirements he had to agree to, prevents his interest in the truck being given much weight in determining his status as a "person" under s. 240.

The Labour Program of Human Resources and Skills Development Canada required Mr. Brouillette (as it does all other complainants in his circumstances), to fill out a form which asks a number of questions which are categorized in accordance with the format outlined by the Supreme Court of Canada in *Sagaz* so that it can "determine whether or not [his] relationship with H&R Transport Limited is an employer/employee relationship to which the *Canada Labour Code* applies." His answers were consistent with the evidence he gave at the hearing.

In the recent case of *Ligocki v. Allianz Insurance Company of Canada*, 2010 ONSC 1166 (CanLII), the parties sought a determination of whether the plaintiff was working as an employee or as an independent contractor for the purposes of determining how to calculate his income replacement benefits (IRBs) under a policy of disability insurance. In *Ligocki* there is a useful statement involving how the *Sagaz* list of factors can assist in the determination of whether a party is an employee or an independent contractor, and which is consistent with my analysis above:

<u>The Law</u>

[18] **The determination that a worker is an employee or an independent contractor is largely a finding of fact. There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. The labour market is constantly evolving and the relationships between individuals and institutions relating to work and service have too many variables to permit a single approach that would be a fair method of distinguishing between the two. The court must take into account the total relationship of the parties: *6781122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 S.C.R. 983 [*Sagaz*], at para. 46. In saying this, the Supreme Court of Canada rejected the traditional control test as the sole test of employment status. Among other tests, the Supreme Court considered the entrepreneur test articulated in *Wiebe Door Services Ltd., v. MMR.*, [1986] 3 F.C. 553 (C.A.) [*Wiebe Door*], to be determined by examining the following non-exhaustive list factors. (*Sagaz*, at paras. 40, 46- 48):**

- **Level of control over the worker's activities;**
- **Whether the worker provides his own equipment;**
- **Whether the worker hires his 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.**

[19] **The key question is whether the individual has been engaged to provide services as a person in business on his or her own account, weighing each of these factors against the particular facts and circumstances of the case (*Sagaz*, at para. 47).**

[20] **While courts have noted that a single test will not necessarily produce a fair result, (*Sagaz*, at para. 37) they have also questioned whether the search for a formula to identify a contract for service any longer serves a purpose. Be that as it may, the distinction between employment relationships and independent contractor relationships continues to trigger significantly different consequences for the parties.**

[21] **In addition to what may be called objective factors which can determine the status of the relationship, some courts at the federal level have**

begun to consider the intention of the parties, or what might be called subjective factors.

[22] Beginning in *Wolf v. Canada*, 2002 FCA 96 (CanLII), [2002] 4 F.C. 396 (C.A.) and continuing through *Poulin v. Canada* (M.N.R.) 2003 FCA 50 (CanLII), (2003), 228 D.L.R. (4th) 675 (F.C.A.); *Royal Winnipeg Ballet v. Canada* (M.N.R.), 2006 FCA 87 (CanLII), [2007] 1 F.C.R. 35 (F.C.A) and *Fraser v. Canada* (M.N.R.), 2008 T.C.C. 569, at para. 18, a number of Federal Court decisions have recognized the relevance of the common intention of the parties as an important factor to consider in the analysis of the legal relationship. *It is clear that the declared common intention as to the legal character of the relationship cannot be determinative of the legal nature of the relationship: it cannot trump the de facto relationship. A declared or found common intention of the parties will be disregarded if it does not reflect the actual legal relationship the parties profess to have intended.* (RWB, at para. 61). (My emphasis)

[23] Since *Wolf* and *RWB*, the Federal Court and the Tax Court have continued to consider the intention of the parties or one of the parties in the analysis to determine the legal relationship: see *Fraser*, at para. 18 and *Viel v. Canada (M.N.R.)*, 2007 TCC 299 (CanLII), [2008] 2 C.T.C. 2188, at para. 26.

[24] In *RWB* at para. 64, Sharlow J.A. said that where there is uncontradicted evidence of the parties as to their common understanding of their legal relationship, the court should consider the *Wiebe Door* factors in the light of this uncontradicted evidence and ask whether, on balance, the facts are consistent with the conclusion that the parties originally declared or are more consistent with the opposite conclusion.

For all of the above reasons, I find that Ms. Ludwig's first objection fails and that Mr. Brouillette was an employee of H&R and not an independent contractor during the period when he was an owner operator for it.

3. Analysis Of Relevant Law Relating To Ms. Ludwig's Alternative Objection, Based On Her Submission That Mr. Brouillette Was An Employee Of Boomerang from to August 31, 2006 to April 30, 2008 And, Accordingly "Was not employed by [H&R] for twelve consecutive months of employment ... as required under section 240 of the *Code*

In considering this objection I do so in the context of a tripartite arrangement which makes it necessary to determine whether Mr. Broullette was employed by Boomerang or H&R during the period in question for the purposes of his being found to be a person within the meaning of s. 240 of the *Code.*

The leading case dealing with such tripartite arrangements is *Pointe-Claire (City) v. Quebec (Labour Court)*, 1997 CanLII 390 (S.C.C.), [1997] 1 S.C.R. 14, referred to in *Royal Canadian Mint*, 2003 CanLII 63059 (C.I.R.B.), where Paul Lordon, Q.C., Chairperson, stated:

> **14 Chief Justice Lamer, speaking for the majority of the Supreme Court of Canada indicated his agreement with a balanced approach to the determination of the true employer, in situations where it was necessary for a labour tribunal to choose *from two possible employers in a tripartite relationship and where the identity of the real employer is in question.* The Chief Justice, on behalf of the majority, would have determined the true employer by broadly considering all of the factors relevant to the determination of who was the employer of an employee in the circumstances. The Chief Justice noted that the factors could include the employee selection process, their hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration, and integration into the business, or other factors (emphasis mine). The Chief Justice indicated:**
>
> > **According to this more comprehensive approach, the legal subordination and integration into the business criteria should not be used as exclusive criteria for identifying the real employer. In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work - and not only over the supervision of their day-to-day work. *Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business* (emphasis mine).**
>
> **(ii) Canadian Cases**

In applying collective labour relations legislation that is similar to that in Quebec, Canadian administrative agencies have also dealt with how to identify the real employer in a tripartite relationship. Most of the decisions of those agencies, and specifically the Ontario Labour Relations Board ("OLRB") and the Canada Labour Relations Board ("CLRB"), have noted that the essential test for identifying an employer-employee relationship in a tripartite context is that of fundamental control over working conditions. The application of the fundamental control test leads to an analysis of which party has control over, inter alia, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business. In the final analysis, the application of the fundamental control test involves an examination of a series of factors that are similar to those suggested by the comprehensive approach set out in *Vassart* [*Hôpital Royal Victoria v. Vassart*, [1990] R.J.Q. 1961], and in the Court of Appeal's decision in the instant case.

In applying the fundamental control test, the OLRB and the CLRB have generally concluded that the client is the temporary employee's real employer. See, for example: *Labourers' International Union of North America, Local 183 v. York Condominium Corp.*, [1977] O.L.R.B. Rep. 645; *Hotel and Club Employees' Union, Local 299 v. Sutton Place Hotel*, [1980] O.L.R.B. Rep 1538; *United Electrical, Radio and Machine Workers of Canada v. Sylvania Lighting Services*, [1985] O.L.R.B. Rep. 1173; *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada v. Nichirin Inc.*, [1991] O.L.R.B. Rep. 78; *Labourers International Union of North America, Local 607 v. Grant Development Corp.*, [1993] O.L.R.B. Rep 21; *International Brotherhood of Electrical Workers, Local 586 v. Dare Personnel Inc., [1995] O.L.R.B. Rep. 935; Nationair (Nolisair International Inc.*) (1987), 70 di 44. However, Canadian administrative agencies have not reached this conclusion systematically. In some decisions, the factual situation led the OLRB and the CLRB to find that it was the personnel agency or supplier that actually had the attributes of an employer. See, for example: *United Brotherhood of Carpenters & Joiners of America, Local Union 93 v. Templet Services,* [1974] O.L.R.B. Rep. 606; *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819 v. Tower Company (1961) Ltd.*, [1979] O.L.R.B. Rep. 583; *Nolisair International Inc. (Nationair Canada*) (1992), 89 di 94.

(*Pointe-Claire (City) v. Quebec (Labour Court*), supra, pages 1047-1048)

> **15 Therefore, when the situation requires that a distinction be made between true employees of the Mint, agency referred employees or third party contractors working with the Mint, the situation should be viewed from this perspective. While there is no limit on the employer's capacity to contract out for work or services, in situations where individuals are working for the Mint under a contract for services, the relationship between them and the Mint will be subject to examination within the context and principles outlined in *Pointe-Claire (City) v. Quebec (Labour Court)*, supra. If, based on a complete examination of their working situation and relationship with the Mint, the relevant individuals fall within the definition of "employee" within the *Code*, applied from the perspective of the principles outlined in *Pointe-Claire (City) v. Quebec (Labour Court)*, supra, they may well be found to fall within the bargaining unit. ...**

In *Downtown Eatery (1993) Ltd. v. Ontario* 2001 CanLII 8538 (ON C.A.), (2001), 200 D.L.R.(4th) 289, the Ontario Court of Appeal referred to an often-cited summary of the rationale behind recognizing more than one employer for a single employee:

> **[1] In his valuable text, *Canadian Employment Law* (Aurora, Ont.: Canada Law Book, 1999), Stacey Ball states, at p. 4-1:**
>
> > **The courts now recognize that, for purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer. The courts now regard the employment relationship as more than a matter of form and technical corporate structure. Consequently, the present law states that an individual may be employed by a number of different companies at the same time.**

Ms. Ludwig submitted that the facts of the case before me did not demonstrate that there was such a tripartite relationship as might lead to an analysis as was undertaken in *Nationair* (an approach also followed in *Pointe-Claire*) because Boomerang was said not to have supplied drivers to H&R on an agency basis. I find that it does not require one of the parties to a tripartite arrangement to be an employment agency. The significant fact is not the existence of an agency in the equation but of "a tripartite relationship ... where the identity of the real employer is in question." (See *Royal Canadian Mint*

at para. 14.) Accomplishing this requires the analysis set out by the Chief Justice in *Pointe Claire*, who did not limit the application of the analysis to cases where one of the potential employers was an agency.

In *CAW-Canada v. National Waste Services Inc* 2009 OLRB 415, the Board stated:

> 52 The Supreme Court of Canada in *Pointe-Claire (Ville) c. Syndicat des employées & employés professionnels-les & de bureau, local 57*, [1997] 1 S.C.R. 1015 (S.C.C.) has noted the difficulty of determining the true employer in this type of triangular relationship among the agency, the client and the employee. ... [The Supreme Court] noted that the difficulty of determining who is the true employer in these triangular relationships arises from the fact that both the personnel agency and the client have some of the traditional attributes of an employer and that what is essential is determining which party exercises the greatest control over all aspects of the employees' work. ...

It is not the fact that the tripartite relationship included an agency, but that both of the parties whose relationship with the "employee" was being scrutinized had "some of the traditional attributes of an employer," as is the case in the matter before me. It can also be fairly said that Boomerang has some of the attributes of an agency retained to furnish another entity with employees.

In *Pointe-Claire* the Supreme Court can be seen to have provided an analytical framework which allows the true employer to be identified where an employee has a relationship with two employers. Cf. *RMS Pope Inc. v. Chaisson* [2004] C.L.A.D. No. 463, being an unjust dismissal case under the same provisions as are before me.

Also Cf. *Grain Services Union and Saskatchewan Wheat Pool (Adamko Grievance)*, [1998] C.L.A.D. No. 151, 70 L.A.C. (4th) 335 at paras. 43, 44 and 45, where *Nationair* and *Pointe-Claire* are discussed as setting out the analytical approach for determining who the employer is in a tripartite (or triangular) relationship.

In *Atomic Energy of Canada Ltd.* (Re), [2009] C.I.R.B.D. No. 41, the Canada Industrial Relations Board, in a certification application stated:

> **69 Even before the Supreme Court's decision in *Pointe-Claire (City), supra,* the CIRB had issued decisions finding employees supplied by a temporary help agency to be employees of the client. The applicant referred to *Nationair (Nolisair International Inc.)* (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630), where the Board found that flight attendants hired through personnel agencies were employees of the airline.**

In the *Nationair* case relied on by Ms. Ludwig, the Board established the applicable test to which it will abide in such applications. Having reviewed the decisions involving a single employer issue (pages 68-73), the Board outlined the applicable test:

(at. pp. 68-73):

> **It is therefore in the light of the factual situation rather than the form of the transaction that the employment relationship must be assessed. Certainly the contracts between the agency and its client must not be ignored. However, a careful examination of the factual situation of the employees will be determinative.**
>
> **As many others before us have said, the existence of an employment relationship between A and B must above all be examined in the light of what the facts reveal about the performance of the work and the establishment of such a relationship. (See *Re Société Radio-Canada/Canadian Broadcasting Corp. And Union des Artistes* (1982), 1 CLRBR (NS) 129, 44 di (CLRB No. 383).)**
>
> **1. *The Board will assess the factual situation but will not give decisive weight to agreements where they are not confirmed by the facts* (emphasis in original.**
>
> ***Thus, in our jurisdiction, significant weight cannot be given to the payment of wages. The Canada Labour Code* speaks of an employee (employé) and makes no reference to remuneration in the definition of this term, contrary to the *Quebec Labour Code*, for example, which gives a salaried employee (salarié) freedom to associate. *More significant will be the identification of the person who does the paying, who ultimately bears the cost, and the impact this has on the employment relationship* (emphasis in original).**

2. Another indicator will surely be the person who *controls access to employment*: the person who hires or who gives the work to be performed. Here, regard must be had to the selection process and the criteria used. The person who in fact has the power to approve the selection and influence it decisively is more akin to an employer than a mere occasional user. The lessee who retains or exercises a veto or the equivalent over the selection of personnel is certainly not extraneous to the employment relationship (emphasis in original).

3. *A third criterion concerns the actual establishment of working conditions.* Who actually establishes working conditions? An agency that is merely a disguised employment office, a kind of clearing house with a title, could hardly be termed an employer. In this situation, it would merely be an agent acting on behalf of the employer, the equivalent of the personnel department of a company of which it is an integral part and whose wishes it carries out as an employee. (Emphasis in original.)

4. Another criterion concerns the actual performance of work. How is the work performed on a day-to-day basis? Who assigns the work? Who is fact determines and approves the standards governing the performance of the work? In this regard, who has the last word, the final say? Is it the person who evaluates, who decides, who determines that an employee will work or be terminated because of his performance? What expertise does the agency have with respect to the work performed? What is the degree of similarity between the duties performed by regular employees and those performed by employees from outside?

5. Other criteria may also assist the Board in its determination: the employees' perception, their identification with the company, their degree of integration into the company, the fortuitous, temporary or permanent nature of their employment with the leasing company.

In the case before me there existed a tripartite relationship, with Mr. Brouillette having been hired by Boomerang in 2006, which entity supplied him to H&R, along with a truck. It was not in dispute that Mr. Brouillette was to drive the truck exclusively for H&R to service its customers, which he did until April of 2008, when he commenced to drive for it as an owner operator of a truck he rented from H&R. The evidence demonstrated that Mr. Brouillette went from being a driver for H&R supplied by Boomerang to being an owner operator driver for H&R without any break in service.

Ms. Ludwig, in referring to the criteria for answering the question of who is a person's employer set out in *Nationair*, made the following submissions:

"Who hires the employees?" She submitted that Boomerang had done so originally. That "Auldin had posted a job" to which Mr. Brouillette had "responded."

The evidence was clear that it was H&R which had the power to decide who would drive for it, and that Boomerang did little more than furnish the persons to be considered as potential drivers. It was entirely up to H&R to establish and enforce standards. Boomerang's involvement was little more than serving as a rubber stamp, and its role was not that different from an agency which supplied employees to work for another enterprise.

"Who controls the employee's work?" When he was selected to drive for H&R it was Boomerang that had essential control of the work and could terminate him, although H&R had some partial "control." Because he was hired to drive in the performance of H&R's work it was natural that H&R would have control over his being dispatched. However, as the truck belonged to Boomerang, Auldin Bilow, on its behalf, could decide when and where the truck would be serviced. Reference was made to Mr. Brouillette's calling Mr. Bilow once a week to receive instructions relating to the service of its vehicle, as evidence of the "degree" of Boomerang's control.

Mr. Brouillette testified that he had much more limited communication with Mr. Bilow and that none of it related to the performance of his driving responsibilities. H&R's control was almost complete as it related to Mr. Brouillette's work. Should H&R decide to terminate him, Boomerang's role was, again, in the nature of a rubber stamp. The fact that Boomerang serviced the truck is a minor factor when the extent of H&R's control is considered, including having to give clearance to Mr. Brouillette to drive the truck to Boomerang's facility for service.

"Who effectively establishes wages and working conditions?" And, "Who controls any negotiations with respect to [wages and working conditions]?" It was submitted that Mr. Brouillette's evidence was that he negotiated with Mr. Bilow on behalf of Boomerang, both as to his "wages" and as to "when" and how he would "run." Referring to "working conditions" it was submitted that "initially" Mr. Bilow made the decision as to whether Mr. Brouillette would work as part of a team or as a "single." It was not H&R but Boomerang, through Mr. Bilow, which "set wages" for persons, such as Mr. Brouillette, who drove its trucks. Also, it was Mr. Bilow who decided which truck Mr. Brouillette drove.

This above recitation greatly overestimates Boomerang's role. The fact that Mr. Brouillette's wages were paid by Boomerang is of little significance given all of the other factors, including the source of payment. To repeat what was said in *Nationair* about the significance of the payment of wages in test 1:

> ***More significant will be the identification of the person who does the paying, who ultimately bears the cost, and the impact this has on the employment relationship*** **(emphasis in original).**

The Chief Justice, in *Pointe-Claire*, also referred to the significance of who pays the employee's wages:

> **15. Judge Prud'homme acknowledged that the agency had some control over two of Ms. Lebeau's working conditions: discipline and wages. He was of the view, however, that the City's involvement with respect to discipline and wages diluted the impact of the agency's role in these areas. As regards discipline, the judge noted that the City would have been at the source of any action taken by the agency concerning Ms. Lebeau. With respect to the setting of wages, the judge pointed out that the rate of pay was directly affected by the type of service requested by the City and the number of hours the temporary employee worked there. For all these reasons, the judge held that the City was Ms. Lebeau's employer for the purposes of the *Labour Code*, at p. 13:**

[TRANSLATION] This analysis necessarily leads to the conclusion that the City was Ginette Lebeau's employer within the meaning and for the purposes of the Labour Code. The Code is concerned with the realities of the "employer-employee" relationship rather than the form in which that relationship has been established; those realities essentially relate to the working conditions that the Code seeks to ensure are set up in a certain way. In this case, the conditions surrounding Ginette Lebeau's work were predominantly determined by the City, not the agency; in addition, Ginette Lebeau was legally subordinate to the City, as shown by the fact that it was the City that issued instructions with respect to, and controlled the actual performance of, her work.

Judge Prud'homme added that this conclusion was consistent with the majority of the Labour Court's decisions on the subject.

Superior Court **(District of Montreal, No. 500-05-005556-939, November 5, 1993)**

53. In addition to considering the criterion of control over Ms. Lebeau's day-to-day work and her general working conditions, the Labour Court looked at other aspects that define the employer-employee relationship, namely wages, discipline and the feeling of integration into the business.

54. With respect to wages, the judge noted that although Ms. Lebeau's wages were paid by the agency, they were entirely dependent on the number of hours she actually worked for the City. ...

If the factual situation in the case before me is examined in the light of the criteria established in *Pointe-Claire* or *Nationair*, I would conclude that Mr. Brouillette was an H&R employee based on its having fundamental control over him as explained in *Pointe-Claire*. In fact, As noted, above, *Nationair* was one of the cases referred to by Lamer J. as examples where:

In applying the fundamental control test, the OLRB and the CLRB have generally concluded that the client is the temporary employee's real employer.

Ms. Ludwig's second objection was raised as a fallback position should I find that Mr. Brouillette was an employee of H&R and not an independent contractor from April 30, 2008 to December 12, 2008. In that event her position was not that there was a break in Mr. Brouillette's employment during the period he serviced H&R's customers. Rather, it was based on his allegedly having been employed by Boomerang for the period August 31, 2006 to April 30, 2008, in which case he would have failed to meet the 12 month twelve consecutive months of employment with H&R as required under section 240 of the *Code*.

Does it make a difference that *Pointe-Claire* deals with the *Quebec Labour Code* which relates to inclusion of employees in a bargaining unit and the case before me which deals with a complaint of unjust dismissal under the *Code*? *Plante v. Entreprises Réal Caron Ltée*, 2007 FC 1104 (CanLII), was an application for judicial review from a decision in a wage recovery proceeding made on January 15, 2007 by an adjudicator appointed pursuant to section 242 of the *Code*, in which the appeal from the decision of the Canada Human Resources Development inspector was allowed and the payment order quashed. In that case the relevant facts were:

> **[2] In September 2003 the applicant Claude Plante answered an advertisement which appeared in *La Tribune de Sherbrooke* for a Class 1 driver's position which contained no mention of Flexi-Ressource Inc. (the agency) or Les Entreprises Réal Caron Ltée (the respondent).**
>
> **[3] In March 2004 Stéphane Boyer, who said he was from "Transport Réal Caron", contacted the applicant and they agreed that the applicant would go to the respondent's premises to do some road trials.**
>
> **[4] The applicant and Mr. Boyer subsequently met again and Mr. Boyer gave the applicant a business card with the logo and name of "Les Entreprises Réal Caron Ltée", on which appeared the name of [TRANSLATION] "Stéphane Boyer, Operations Manager / Eastern Townships". The applicant was also told of the employment procedures at that meeting.**

> **[5] On April 5, 2004 the applicant took possession of a truck with the Entreprises Réal Caron logo in the Québécor yard at Magog.**
>
> **[6] The applicant received his pay from the agency.**
>
> **[7] On May 28, 2004 a letter was sent by the agency to all drivers in the Montréal and Eastern Townships regions: drivers working for the respondent were to indicate the name of the dispatcher authorizing "No lunch" on the trip sheet used for the salary payment made by the agency. The letter was signed by Stéphane Boyer.**

In the latter case Blais, J. relied on the reasons in *Pointe-Claire*, noting the difference between the statutes involved and their purposes, but regarded the principles enunciated by the Supreme Court as being relevant to the determination of who was the employer in the tripartite situation described, which would affect whether the applicant was the employer for purposes of the wage recovery provisions of the *Code*. I also view the principles in *Pointe-Claire* as germane to the determination I have to make.

In her additional submissions of September 20, 2010, Ms. Ludwig referred to *Beothuk Data Systems Ltd., Seawatch Division v. Dean,* [1998] 218 N.R. 321 (F.C.A.). where, "In the course of coming to his conclusion in *Beothuk,* the Chief Justice of the Federal Court of Appeal opined that there are clear limits to a 'broad' or 'liberal' interpretation of Part III":

> **This, of course, does not mean that the Court is at liberty to extend the protections afforded by the *Code* to those who do not meet the qualifying conditions expressed therein. Rather, it means simply that, in interpreting these qualifying conditions, the Court ought to keep in mind the *overriding purpose of the unjust dismissal provisions, which is to provide non- unionized employees with some protection from unjust dismissal.* [Emphasis added]**

Ms. Ludwig added:

> **We would argue that this purpose imposes limits on an overly broad use of "person" under Part III. It is also noteworthy that this passage in *Beothuk***

was recently referenced by the Canadian Arbitration Board in *Anderson v. Kamloops Indian Band, [2010]* CarswellNat 2778 at paragraph 24.

v. Kamloops Indian Band, [2010] CarswellNat 2778 at paragraph 24.

The immediately preceding paragraph to the one quoted is:

> Since the overall purpose of the *Act* is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant.

In her additional submissions of September 20, 2010, Ms. Ludwig also stated:

> We would also refer you to *Aizenberg v. D.H.L. International Express Ltd.,* [2001] 16 CCEL (3d) 140 702 (Can. Adjud. app. under Can. Lab. Code) in which the complainant was found to be offering services through a separate company as an independent contractor *("Aizenberg").* We find the situation of Mr. Brouilette to be more closely aligned to the complainant in *Aizenberg* and rely upon it to support the proposition that between August 31, 2006 and August 31, 2008 [sic] Mr. Brouilette was not an employee of the Company but in fact was employed by Boomerang Express Inc.

In *Aizenberg*, the significant facts were quite different from the ones before me. The adjudicator, in that case set out the facts, including:

> 2 The proof reveals that complainant, who describes his occupation as that of a "self-employed independent contractor" provided messenger services through a personal corporation, H.A. Courier Service Inc.-Service de Messager H.A. Inc. (hereinafter "H.A. Inc."), which he incorporated on October 13, 1989.
>
> 4 In June of 1998, the contract between D.H.L. and Phil Xpress was terminated and the territories serviced by the former was given over by D.H.L. under contract unto 9019-1719 Québec Inc. (hereinafter "9019"). 9019 contracted with H.A. Inc. to continue to service certain of D.H.L.'s routes. It is admitted by complainant that he never applied for a job directly with D.H.L. and that he never had a contract with D.H.L. It is also admitted that complainant's corporation was paid by 9019 for its services in accordance with complainant's own request and that no deductions at source on account

of taxes, pension, employment or health insurance benefits were withheld. In turn, complainant was paid by H.A. Inc. *Complainant further admitted that H.A. Inc. provided its own vehicle, incurred the costs of operating same, and that the deliveries assigned by 9019 which designated H.A. Inc.'s territory, could be effected by complainant personally (on behalf of his corporation) or by others if he so chose. The actual route followed within the designated territory was determined by complainant and the prospects of profits or losses were at the risk of H.A. Inc. In fact, at times complainant was obliged to put in his own money by way of loan to H.A. Inc. in order to meet expenses.* [Emphasis mine.]

5 The principal of 9019, Robert Coza, stated that his corporation had been doing pick-ups and deliveries for D.H.L. for 11 years and when the contract between D.H.L. and Phil Xpress was terminated, he took over the letter's delivery routes at D.H.L.'s request, without, however, making any agreement with Phil Xpress nor did he purchase anything from the latter. He met complainant and two other former employees of Phil Xpress and offered them employment. This was done on his own and without any directions from D.H.L. The only matters discussed with these recruits were the rates and policies of D.H.L. relating to time frames for deliveries and customer politeness. Arrangements as to *payment for complainant's services were, at complainant's request, concluded between complainant's corporation and Mr. Coza's corporation and no taxes or other deductions were withheld with regard to H.A. Inc.'s services which were carried out by complainant.* If D.H.L. did not pay 9019, 9019 was, according to Mr. Coza, still responsible to pay H.A. Inc. for its work as performed by complainant. The contract with H.A. Inc. was terminated on May 31, 1999 by 9019 following a request from D.H.L. that 9019 address certain concerns and complaints received with regard to complainant's activities. [My emphasis.]

6. ... *Accordingly to Mr. Curran* [General Manager of DHL] *D.H.L. had no direct relationship with the complainant whose corporation was a service provider to 9019 and D.H.L. has no say in the selection of drivers. D.H.L. only asks to know who has been hired by its owner operators for security control reasons at its warehouse. In sum, complainant was never considered an employee nor did he apply to become an employee or owner-operator of D.H.L., whether personally or through his corporation.*

...

10 Dealing with the fact that the contractual relationship of complainant with 9019 and with D.H.L., if indeed he was a dependent contractor, was through his personal corporation, complainant points to the fact that he incorporated his courier business for tax purposes and this should not be held

to be determinative of the situation. In support of his pretension, he cites: *Truong v. British Columbia*, [1999] B.C.J. No. 2049, 98 C.L.L.C.:

(headnote summary)

> ... Employee was court interpreter who was terminated for improper conduct - Employer claimed she was not an employee but independent contractor on the basis that no deductions were made from her fees and she received no benefits of T-4 forms - Court found employment relationship because of employer's control over payment of wages, method of work and conduct in and out of the courtroom - Employee was wrongfully dismissed because allegations of improper conduct made against her were unsubstantiated.

11 In appeal, the above decision was upheld:

(headnote summary)

> " The Employment relationship - Wrongful dismissal - Court interpreter was employee, rather than independent contractor - Control was exerted over manner of doing work through Code of Professional Conduct - Ability to work for other agencies was illusory, as it could result in removal from the court list of interpreters - Status for tax purposes was not determinative - Award of six months' pay in lieu of notice was upheld."

12 It is to be noted, however, that this case dealt with the relationship of a natural person being a dependent contractor-employee and not with that of a corporate-employee as in the case of complaint. The case of Truong is therefore distinguishable from the present cause. And it is this distinction, namely: an agreement between two corporations which constitutes the major hurdle which complainant must overcome in order that his complaint may be considered under article 240 of the *Canada Labour Code*.

13 Relying upon *Stanley v. Road Link Transport Ltd.* (1987), 17 C.C.E.L., 176, complainant urges that I not apply a narrow interpretation of the word "person" used in article 240 C.L.C. by limiting it to that of a natural person. However, I am unable to find a case in which the word "person" has been defined as including a corporate entity when used in conjunction with the status of an employee as opposed to the status of an employer. In point of fact, a corporate entity is not subject to deductions at source on account of income taxes, pension, health insurance and/or employment insurance all of which are withheld with regard to an employee. Additionally, a corporation

would not be entitled to health or disability benefits or leaves of absence on account of illness etc. as is in the case of natural person-employee.

14 I do not think the legislature had in mind corporate persons as complainants when it drafted article 240 of the *Canada Labour Code*. Rather, I adopt the reasoning expressed by justice Jean Frappier in the matter of *Groupe Yoga Adhara inc. c. Coopérative de travail le collège de St-Césaire, Soquij, J.E. 98-1744*. In this matter, this issue was whether the plaintiff, a corporate entity, who sued for damages when defendant unilaterally terminated its service contract illegally and without reason, could be considered an employee. If not article 2125 C.C.Q. would permit the cancellation of the contract.

...

18 Complainant who describes himself as an independent self-employed contractor is, in my view, an entrepreneur as foreseen under articles 2098 and 2099 C.C.Q. as will be discussed hereinafter. At this juncture, it is sufficient to note that upon termination of his services, he did not request a record of employment as would have been the case had he been a natural person employee of D.H.L.

...

21 Applying these decisions to the present matter, it is clear that the contract of services was between H.A. Inc. and 9019 and complainant has no right of claim on his personal behalf as filed herein. Furthermore, even if H.A. Inc. was a dependent contractor of D.H.L., it would have had no right to file a complaint of unjust dismissal under article 240 of the *Canada Labour Code* as this right avails to a natural person and not to a corporate person. In this connection, it should be noted that the case of *Stanley v. Road Link Transport Ltd.* cited by complainant involved a complaint of unjust dismissal filed by a natural person.

22 Strong arguments were submitted by employer counsel that complainant was an independent contractor or entrepreneur who was the owner of his equipment, *determined the manner of servicing his route*, was responsible to defray his operating expenses and who accepted the uncertainties of earning profits or sustaining losses. Complainant, it was noted, could also designate the personnel to perform the contracted services *and could accept work from other courier companies if he so desired. The memos of D.H.L., it was submitted, were simply to facilitate and expedite the work and there was in fact no direct supervision thereof. In essence, it was argued that complainant was performing the services in question for his own account.* [Emphasis mine.]

...

29 ... *Control was basically limited to being told what to do within prescribed hours, but there was minimal direction as how to do it.* ...The examples of differences between the degree of control and integration of Road Link brokers as compared to that of complainant's relationship with D.H.L. also impels me to this view.

...

31 Considering therefore, that the contract for services was between H.A. Inc. and 9019, that a corporate person has no right of filing a complaint under article 240 C.L.C., that there is no lien de droit (legal link) between complainant and D.H.L., that complainant was not a dependent contractor of D.H.L. but, rather, as an independent entrepreneur operating a business for his own account through his corporation of which he was the employee, for these reasons, the preliminary exception of D.H.L. is maintained and the complaint of complainant is dismissed.

Leaving aside the Adjudicator's conclusions that the complainant had "no right of claim on his personal behalf," the facts disclose that Mr. Brouillette's "degree of control and integration" into H&R's operations was clearly evident, as was not the case of the claimant in *Aizenberg* as it related to D.H.L. I therefore am unable to agree with the submission that Mr. Brouillette's "situation ... [was] more closely aligned to the complainant in *Aizenberg*."

In the additional submissions of September 15, 2010, in support of Mr. Brouillette's position that he was at all times an employee of H&R for the purposes of making him a person under s. 240, reference was made to *Assn des chauffeurs de camions de Transport Belanger Lemire Inc.,* 1990 CarswellNat 994, where the Canada Labour Relations Board held that where truckers were formally employed and paid by one trucking company (Emplois Nordiques Inc.) and were assigned to work exclusively for another trucking company (Belanger Lemire), they were employees of the latter notwithstanding that they were being formally employed by the former.

I have endeavoured to interpret the meaning of "person" in Part III in accordance with the purposes of its provisions and the mischief it was enacted to address. In doing so, my conclusion is based on the answer being clear and not indeterminate that Mr. Brouillette was an employee of H&R and not of Boomerang during the period he drove as an owner operator driver for the purposes of his being found to be a "person" within the meaning of s. 240 of the *Code.*

For all of the above reasons, I find that Ms. Ludwig's second objection fails and that Mr, Brouillette was also an employee of H&R during the period that he was an owner operator driver.

4. DECISION

Because, I have dismissed both of the objections raised on behalf of H&R, I find that Mr. Brouillette is a "person" entitled to make a complaint under s. 240(1) of the Code that his dismissal by H&R was unjust.

Because evidence on the merits of the complaint has not yet been adduced, any statements made with respect to the merits in the parties' submissions has been ignored by me.

I will be communicating with the parties to schedule a date for the hearing of the complaint on its merits.

Delivered at Toronto, Ontario, this 15th day of October, 2010

M. R. Sunley

Adjudicator