

LETTER DECISION
BCLRB No. B282/94

July 20, 1994

To Interested Parties:

Re: Prince George Citizen (the "Citizen") -and- Communications,
Energy and Paperworkers Union of Canada, Local
Union No. 868 (the "Union")
(Application for Certification - Case No. 19252)

(i) Nature of the Application

The Union applies for certification under Section 28 of the *Labour Relations Code* to represent dependent contractors who deliver the Prince George Citizen. The Citizen objects to the application stating that the individuals in the proposed unit are independent contractors.

In the event that the application is successful, there is no issue between the parties on the appropriateness of the unit or whether it is proper that the Union represent the individuals in question.

(ii) Background

The Citizen employs 14 individuals to deliver newspapers (the "drivers"). Part of the dispute about the status of these drivers is an issue about categorizing the 14 drivers into four distinct groups. The Industrial Relations Officer that carried out the investigation into the application for certification divided the drivers into four groups described as follows:

"A"-those who normally perform the deliveries themselves and have no other known source of income.

"B"-those that normally perform the deliveries themselves and also have other jobs, not related to the delivery/cartage business, from which they derive income.

"C"-those that are contracted and paid to perform the work but frequently or

normally have other individuals do the deliveries.

"D"-those that normally perform the deliveries themselves but also derive income from providing delivery services to other employers, including the Post Office and competing publications.

The Union called four witnesses, one from each group. It was agreed between the parties that the evidence from each of the individuals could be applied to their representative group. The Citizen further agreed that the evidence could be relied on to establish several facts about all 14 individuals.

(iii) Facts

Bonnie Smith, Joe Miller, Laurette Miller and Laurel Thorell testified. L. Miller testified as part of group A; J. Miller, group B; Smith, group C; and Thorell, group D. The facts I find that distinguish the individuals into the four different groups relate to whether they drive full time or receive other income. Otherwise, essentially the facts about all the drivers are consistent.

These facts can be summarized as follows:

- (a) The drivers do not have signed contracts with the Citizen. Their work for the Citizen involves delivery of bulk loads of newspapers and some single deliveries.
- (b) Some of the drivers use replacements to perform their duties when they are unavailable; ie. if they are working at another job, are on vacation or unavailable for other reasons. Some of the drivers take their children along on their route.
- (c)The drivers use their own vehicles and pay for any necessary maintenance and insurance. Although there may be some restrictions on the type of vehicle the driver uses due to the size of their route, essentially the choice of vehicle is up to the drivers.
- (d)"Delivery" insurance on the vehicles is required by the Citizen.
- (e) The Citizen pays no benefits to the drivers.
- (f)The drivers file income tax returns and deduct their expenses while driving their vehicles for the Citizen. From this perspective, they do "make money" from their work.
- (g)The drivers follow a "manifest" for their route prepared by the Citizen. The drivers

may vary the route in order to increase the efficiency of the delivery time. However, the drivers have no control over the customers to which they must deliver papers.

- (h) It is assumed that each route takes a set number of hours. If the driver takes a longer or shorter period of time to complete their route, there is no change to the amount of pay received.

Where the driver believes that the time and mileage set for their route is not correct, the drivers can ask a management representative of the Citizen to drive their route with them to review the time it takes and the mileage involved. Any change is within the control of the Citizen.

The drivers are paid an \$ 8.50 per hour and 23 cents per kilometre based on the length of time and mileage established by the Citizen for their route. They are not paid for driving to and from the loading bay where they pick up their papers.

The drivers who also deliver singles (a traditional paper route) are paid extra for those deliveries.

- (i) The drivers are required to be at the loading bay to pick up their papers approximately 15 minutes before their loading time. If the drivers are delayed in the loading bay, they are paid extra for that time.
- (j) The drivers have no uniform or badge, nor are their vehicles identified in any way to indicate they work for the Citizen.
- (k) The drivers cannot give away or sell their "contracts" with the Citizen. The Citizen determines who it will let "contracts" to in the event a driver quits.
- (l) Some of the drivers work for other employers and the Citizen does not object. No restrictions are placed on the drivers from working elsewhere.

Specific facts relating to the four drivers who testified were as follows:

- (a) The drivers have worked for different lengths of time with the Citizen, ranging from almost two years up to 8 years.
- (b) L. Miller and J. Miller are not employed elsewhere.
- (c) Smith works at Costco 25 to 35 hours per week depending on the time of the year, and

her husband replaces her on her route about one third the time.

(d)Thorell works at a health club in the evenings and delivers the "Buy and Sell" on Saturdays. She previously worked for Canada Post delivering flyers.

(iv) Positions and Arguments of the Parties

The Union says the drivers all meet the tests for dependent contractors, and on that basis there is no substantive difference between the four groups. However, even if I find that one or more groups should not be included, the Union says it has the requisite support amongst the remaining drivers for automatic certification.

The Union relies on *OK Builders Supplies Ltd.*, IRC No. C240/92, to argue that the drivers are not independent contractors. It says I should draw a similar conclusion in this case. The drivers are not treated like employees in many regards. However, they also have characteristics that do not fit the independent contractor description. That must mean they fall within the category of dependent contractors.

The Union argues that although the drivers do not meet all of the criteria for dependent contractors set out in *West Fraser Mills Ltd.*, BCLRB No. B97/93, they are still dependent contractors. A contractor can be a dependent contractor without displaying all of the features.

The Union also relies on *Kamloops News Inc.*, IRC No. C215/90, (Reconsidered in IRC No. C72/91), and *The Kelowna Daily Courier*, BCLRB No. B233/93, where drivers doing similar work were found to be dependent contractors. The Union says the working conditions, geography covered, the public serviced and the work at the Citizen are not distinguishable. As such, I should conclude the drivers here are also dependent contractors.

The Employer argues that each case involving a dependent contractor issue requires close scrutiny of the facts. Here, the facts demonstrate that the drivers are independent contractors. In particular, the Employer says the oral contract creates a flexibility which limits the "practical dependency" of the drivers.

As far as economic dependency, the drivers make the free choice whether they work solely for the Citizen. This should not result in them being categorized as dependent contractors. Rather, the drivers more closely resemble independent contractors. The Employer points to the following facts which I have summarized: the Citizen does not exercise true control over the drivers; the drivers must invest their own capital in their vehicle and take the risk of loss; the drivers are not paid like employees; and, nothing identifies the drivers as associated with the Citizen.

(v) Analysis and Reasons

The criteria for determining where an individual falls on the range of possible status from independent contractor to employee are set out in *OK Builders Supplies Ltd, supra*, and are also referred to in *Dannburg Floors*, BCLRB No. B125/93. The issue to be decided is where the drivers fit on this spectrum. Both parties concede the individuals are not employees, so what remains is whether the individuals are dependent contractors or independent contractors.

A summary of the various factors to consider when determining whether individuals are dependent contractors was set out in *West Fraser Mills Ltd, supra*. These factors are:

1. the way the industry operates;
2. the type of work involved and its source;
3. the nature of the applicant's operations;
4. the organization of the employer's operations and the degree to which the contractors are a continuing part of it (does the employer generally expect the contractors to work on a daily basis and are the contractors generally available for work during working hours; is a long term, stable relationship between the parties evident?);
5. any contractual arrangements between the parties and others;
6. the type and extent of control and direction exercised by the employer with respect to such matters as hiring, firing, discipline, work assignment, hours of work, and so forth;
7. the nature and manner of compensation and how it is determined;
8. the percentage of income which the contractor derives from the employer (generally, the lion's share of the contractor's income must derive from the relationship with the employer);
9. the opportunity for the contractor to make a profit through the exercise of independent entrepreneurial judgement;
10. the contractor's opportunity for economic mobility and whether the

contractor advertises or solicits customers elsewhere. (at p. 18)

In reviewing all of the factors, I find that all 14 of the drivers are not independent contractors, but rather are dependent contractors.

There are elements of the relationship between the drivers and the Citizen which are like those of an independent contractor. There was consistency in the evidence about five:

- (a)The set amount of pay regardless of time worked, except for delay at the loading bay.
- (b)The choice, use, insurance and maintenance of vehicles and the resulting benefit on the drivers' income tax returns.
- (c)The freedom of the drivers to choose their own replacements.
- (d)No driver is identified as working for the Citizen.
- (e)The Citizen does not pay the drivers any benefits.

There are four characteristics about the relationship between the Citizen and the drivers that indicate the drivers are not independent contractors, as follows:

- (a)The Citizen controls the delivery of the papers through the manifest.
- (b)The Citizen controls the reporting time for the drivers.
- (c)The Citizen controls the amount of remuneration paid to the drivers.
- (d)The Citizen controls the routes and letting of contracts to drivers.

These characteristics are like those found in an employee/employer relationship. Thus, the drivers shift away from the independent contractor end of the spectrum of possible status. Since they are not employees, they drivers migrate towards the dependent contractor status.

Further, the drivers make no profit through the exercise of independent entrepreneurial judgement. Although the drivers acknowledge they "make money" from their job, this relates to the advantage they are able to achieve by writing off their vehicle expenses when filing their tax returns. The Citizen sets their rate of pay and the drivers are not freely able to negotiate it. Although there may be some adjustment if the driver requests a review, the ultimate decision to

make a change is still within the hands of the Citizen. These factors distinguish the drivers from independent contractors who have within their control the ability to negotiate changes to the rates they charge for services performed.

In addition, based on their length of service, the drivers who testified have a significant continuing relationship of providing a service to the Citizen. Further, the drivers perform the majority of work under the "contract". Even though Smith's husband replaces her when she works at Costco, she too drives the route the majority of the time. I find that none of the drivers use replacement drivers as an opportunity to initiate some sort of entrepreneurial gain that might exist if the drivers were independent contractors.

The one final factor to consider is the income levels of the drivers and whether they receive a "lion's share" from the Citizen. This factor may affect their economic dependency and status as dependent contractor. The levels of total income for the drivers varied. Some income was derived from other work. However, *The Kelowna Daily Courier, supra*, sets out that income from a source unrelated to the work performed for the Citizen is not a fact which detracts from a finding of dependency:

It is income from work performed which is similar to the work done under the contract which is relevant. It is relevant because if a person performs, for instance, delivery work for several employers and earns the majority of his or her income from carrying on a business as a delivery driver this may indicate that the driver is an independent contractor. (p. 13)

This reasoning was adopted recently in *Bel Construction Ltd.*, BCLRB No. B193/94.

The only driver who had income from work similar to that performed for the Citizen was Thorell. However, I find based on the reasoning above, the income she earned is not significant enough to find she is different than the other drivers.

On the basis of the evidence before me, I am not satisfied there exists a significant difference between any of the drivers, so as to conclude they should be treated separately. Therefore I find that no group nor driver should be excluded from the determination whether the Union has the requisite support amongst all 14 drivers for automatic certification.

(vi) Conclusions

I find the individuals in dispute are dependent contractors; the unit applied for is appropriate; the Union is a trade union and has the requisite support for automatic certification. The certification with the Citizen is therefore granted as follows:

"dependent contractors employed as delivery drivers at and from Prince
George, B. C."

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