



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

**DECISION NO. 1098/09**

**BEFORE:** B. Kalvin : Vice-Chair

**HEARING:** June 1, September 21 & 22, 2009 at Toronto  
Oral

**DATE OF DECISION:** October 5, 2009

**NEUTRAL CITATION:** 2009 ONWSIAT 2306

## **APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE**

### **APPEARANCES:**

**For the applicant:** D. Greenside, Lawyer

**For the applicants:** P. J. Monaghan and C. Lui, Lawyers

**For the respondent:** P. Lennon, Lawyer

**For the respondent:** M. Krylov, Lawyer

**For additional party:** J. Cvijan, Lawyer

**Interpreter:** E. Markow, Russian

**Workplace Safety and Insurance  
Appeals Tribunal**

505 University Avenue 7<sup>th</sup> Floor  
Toronto ON M5G 2P2

**Tribunal d'appel de la sécurité professionnelle  
et de l'assurance contre les accidents du travail**

505, avenue University, 7<sup>e</sup> étage  
Toronto ON M5G 2P2

## REASONS

### (i) Introduction

[1] These are the reasons for the decision of the Workplace Safety and Insurance Appeals Tribunal with respect to two applications under section 31 of the *Workplace Safety and Insurance Act* (the “WSIA”). The applications are brought by various defendants in two separate civil actions arising out of the same motor vehicle accident. The applicants seek a determination that the plaintiffs’ (and respondents to this application) right to sue is taken away by the WSIA.

### (ii) Background

[2] The background to this application is as follows. During a snowstorm on the night of November 23, 2003, three tractor-trailers collided on a highway near Longlac, Ontario. One truck driver died and two others were seriously injured.

[3] In one vehicle were Vyacheslav Shyrokyy (“Shyrokyy”), who was driving, and Rimvydas Narusevicius (“Narusevicius”) his co-driver. The tractor they were driving was owned by Jerzy Meuszynski (“Meuszynski”). The trailer was owned by a company called Concord Transportation Inc. (“Concord”).

[4] Another vehicle was being driven by Richard Bisson (“Bisson”). The tractor of Bisson’s vehicle was owned by a corporation called Prime Source Capital One (“Prime Source”) and the trailer was owned by an Ontario numbered company operating under the name of Mike Godin Transport (“Godin”).

[5] The third vehicle was being driven Lyle Mryglod (“Mryglod”) who owned the tractor he was driving, as well as the trailer attached to it.

[6] Bisson was killed in the accident and Shyrokyy and Narusevicius sustained serious injuries.

[7] The November 23, 2003 accident spawned several civil actions. Two of those actions are germane to the present applications. The first is an action brought by Shyrokyy, his spouse Olena Vasylyeva, and their minor children against Mryglod, Godin, and the estate of Bisson. The second civil action was brought by Narusevicius and his spouse Vida Naruseviciene against Shyrokyy, Meuszynski, Concord, a company called G. E. Capital Leasing Ltd, Bisson, Prime Source, Godin, and Mryglod.

[8] The first application resulting from these civil actions is brought by Godin and Bisson’s estate. These applicants seek a determination that the actions brought against them by Shyrokyy and by Narusevicius are barred by the WSIA. The second application is brought by Meuszynski, Concord and Shyrokyy who seek a determination that the action brought against them by Narusevicius and his spouse is barred by the WSIA.

**(iii) Issues**

[9] Sections 27 and 28 of the WSIA prohibit a worker injured in the course of employment from suing his or her employer, another employer, or another worker acting in the course of his or her employment. Further, if the injured worker's right to sue is barred then so is that of his or her spouse, children, dependants and survivors. These provisions read as follows:

**Application of certain sections**

**27(1)** Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.

**(2)** If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the Family Law Act.

...

**Certain rights of action extinguished**

**28. (1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

...

**Restriction**

**(3)** If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

[10] In the present case, there is no dispute that Shyroky and Narusevicius were acting in the course of employment at the accident. There is also no dispute that the defendant Bisson was a worker in the course of employment at the time of the accident. The parties also agree that Godin, Meuszynski and Concord were Schedule 1 employers. Thus, if Shyroky and Narusevicius were "workers" at the time of the accident, then they would be persons entitled to benefits under the WSIA and would be prohibited from suing a Schedule 1 employer or another worker acting in the course of employment. This would mean that Shyroky and Narusevicius could not sue Godin or Bisson. Similarly, Narusevicius would be prevented from suing his co-worker, Shyroky as well as Meuszynski and Concord. However, if Shyroky and Narusevicius were not workers but rather were independent operators, then their rights of action would not be barred. Accordingly, the narrow questions on which these applications turn are as follows:

1. Was Shyroky a worker or an independent operator at the time of the November 23, 2003 accident?
2. Was Narusevicius a worker or an independent operator at the time of the November 23, 2003 accident?

**(iv) The relationship between Shyroky, Narusevicius, Meuszynski, and Concord**  
**Meuszynski and Concord**

- [11] In order to determine whether Shyroky and Narusevicius were workers or independent operators, it is necessary to understand the working relationship between them and Meuszynski and Concord.
- [12] Meuszynski owns a fleet of tractors. He has agreements with various companies which are in the business of transporting freight, one of which is Concord. During the time relevant to these applications, Meuszynski had about six tractors which he allocated to Concord. Meuszynski supplied these tractors, along with drivers to drive them, to Concord. The tractors which Meuszynski allocated to Concord were exclusive to Concord, that is, Meuszynski would not allocate those specific tractors to any other transportation company.
- [13] The trailers to which Meuszynski's trucks were attached were owned or leased by Concord. Concord's logo would be affixed to both Meuszynski's tractor as well as the trailers owned by Concord. Concord would also install, at its own expense, a satellite tracking system in Meuszynski's tractors. Concord would secure its own customers who paid Concord directly.
- [14] Under their agreement, Concord would pay Meuszynski a fixed rate for each mile driven by one of Meuszynski's tractors. At the end of a trip, the driver would fill out logs and forms prepared by Concord and submit them to Concord. Concord would then pay Meuszynski. Meuszynski would then pay the drivers. The drivers were paid a fixed rate per mile driven.
- [15] Although Meuszynski was obligated to supply Concord with both a tractor and a driver, Concord exercised a significant measure of control over the suitability of the drivers. After Meuszynski found a driver, the driver's application was submitted to Concord for approval. Concord required that a criminal record check be included in the application. Concord would review the application and conduct reference checks. If all that proved satisfactory, Concord would require the driver to undergo a drug test and would also schedule a driving test by an independent tester. If problems arose with a driver, Concord would, at first instance, refer its concerns to Meuszynski. If the problems were not resolved, Concord could suspend a driver.
- [16] Under the agreement with Meuszynski, Concord paid for the insurance on Meuszynski's tractor, however, Concord recouped the insurance costs by deducting them from amounts owed to Meuszynski. Insurance on the freight was paid for by Concord. The licence plates affixed to Meuszynski's tractors were paid for and belonged to Concord. Under the agreement, Meuszynski was required to "supply Workplace Safety and Insurance Board coverage" for the drivers. The agreement states that Concord would deduct premiums for workers' compensation coverage from amounts owed to Meuszynski and would remit the premiums to the Workplace Safety and Insurance Board on Meuszynski's behalf.
- [17] It is against this background that Shyroky and Narusevicius began their relationship with Meuszynski and Concord.

**Shyrokyy**

- [18] Shyrokyy did not testify at the hearing of this application. There was some suggestion that the injuries he sustained in the motor vehicle accident of November 23, 2003 rendered him incapable of providing useful testimony. However, his wife, Olena Vasylyeva, did testify.
- [19] Shyrokyy and his family came to Canada from the Ukraine in 2000. In the Ukraine, Shyrokyy worked as a civil engineer, however he was not able to do so in Canada. In Canada, Shyrokyy found a job in a factory which manufactures hardwood flooring. The pay was low and he began to look for other opportunities.
- [20] In 2002, Shyrokyy began a construction business. He registered a business in his own name as a sole proprietorship. He was issued a business account number and a GST/HST account number. He opened a bank account for the business. The business registration issued to him lists the business activity as "Construction services 100%."
- [21] Business did not go as well as planned. In the fall and winter, in particular, business was slow. Accordingly, Shyrokyy began to look around for other sources of income. He decided to get into trucking. He took a driving course to learn how to drive a tractor-trailer, after which, in September 2002, he obtained the requisite driving licence. Ms Vasylyeva testified that Shyrokyy intended to operate his own trucking business and, to that end, attempted to buy his own truck. He was unable to do so because he did not have sufficient funds. He managed to secure some work driving for various trucking companies. In March 2003, Shyrokyy and his family moved from Toronto to Burlington.
- [22] In July 2003, Shyrokyy began his working relationship with Meuszynski. He entered into an oral agreement with Meuszynski under the terms of which he would be paid a fixed rate per mile driven. The rate was higher if he drove alone, and lower, if there was a co-driver. Between July 2003, when he began driving for Meuszynski and Concord, and November 23, 2003, when the accident occurred, Shyrokyy did not drive for anyone else. Shyrokyy deposited the cheques issued to him by Meuszynski into his personal bank account. He did not charge Meuszynski GST. Shyrokyy was free to accept or decline trips offered to him by Concord. The work which he did for Meuszynski and Concord kept Shyrokyy busy on a full-time basis.

**Narusevicius**

- [23] Narusevicius is originally from Lithuania where he worked as a truck driver before coming to Canada 13 years ago. In Canada, Narusevicius worked as a superintendent of an apartment building for two or three years before deciding that he wanted to get back into trucking. He took a driving course and obtained a licence to drive a tractor-trailer. He worked for a variety of transportation enterprises, including trucking companies, a large courier company, and a friend who paid cash, before beginning his working relationship with Meuszynski in April 2003. Narusevicius was paid according to the same fixed rate per mile as was Shyrokyy. Like Shyrokyy, Narusevicius was free to decline trips offered to him by Concord.

[24] Like Shyroky, Narusevicius registered a business as a sole proprietor. He applied for and was issued a GST/HST account; however, he did not charge Meuszynski GST. Narusevicius opened a business bank account.

[25] From April 2003, when he began working for Meuszynski to November 23, 2003, when the accident occurred, Narusevicius did not work for anyone else, with the exception of one occasion on which he hauled a few boxes for a friend. The circumstances of this job are unclear and it appears that Narusevicius may have made unauthorized use of Meuszynski's for this job. Like Shyroky, the work provided by Meuszynski and Concord kept Narusevicius busy on a full-time basis.

(v) **Law**

**A. The WSIA**

[26] A "worker" is defined in the WSIA as follows:

"worker" means a person who has entered into or is employed under a contract of service or apprenticeship ...

[27] The definition goes on to set out a non-exhaustive list of workers.

[28] An "independent operator" is defined as follows:

"independent operator" means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose

**B. Jurisprudence**

[29] In *71122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,<sup>1</sup> the Supreme Court of Canada considered the question of whether a person was an employee or an independent contractor. The court stated that there is no single, universal test to determine whether a person is an employee or an independent contractor. Major J. stated the following:

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

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<sup>1</sup> 2001 SCC 59 at paras. 47 – 48.

[30] This Tribunal has, on numerous occasions, considered the question of whether persons operating a truck on behalf of another company are independent operators or workers. A number of tests have been used to examine the issue, most commonly the "business reality test." In *Decision No. 785/91*, the Panel stated the following:

The best a panel can do in these situations is weigh the various indicia and form an impression as to the prevailing character of the relationship. *WCAT Decision No. 921/89* (1990), 14 W.C.A.T.R. 207, traced the evolution of tests developed by the Tribunal to deal with these situations. It is not necessary to trace the evolution outlined in that decision. The decision went on to characterize the test which has evolved at the Appeals Tribunal as, in essence, a "hybrid test" or "business reality test".

[31] In *Decision No. 921/89*, the Panel stated:

The actual name applied to the test, whether "integration" test, "organization" test, "hybrid" test or "business reality" test is not important. What is important is that parties have an idea of the factors to be considered by the Appeals Tribunal in determining status as a "worker" or "independent operator". By referring to these factors, parties may themselves develop a sense of the character or reality of the business relationship and thus make a realistic assessment of the situation. It is the opinion of this panel that the factors enumerated in this decision in this goal to a greater extent than merely asking whether the work is "integral" to the overall business operation. The question to be asked is 'what is the true nature of the service relationship between the parties, having regard to all relevant factors impacting on that relationship?' The resulting analysis, based on business reality, should lead to a decision in accordance with the real merits and justice of the case.

[32] The criteria commonly considered under the business reality test are as follows:

- whether the individual is in a business sufficiently independent that he or she bears the costs and risks of compensation;
- ownership of equipment;
- evidence of control;
- method of payment;
- business indicia;
- the degree of integration;
- furnishing of equipment;
- chance of profit or loss;
- the parties' intentions;
- business or government records which reflect on the status of the parties;
- whether the individual must supply the services personally or can substitute other persons;
- the economic or business market;
- the influence of legislative and licensing requirements;

- whether the person structures his or her affairs for various purposes as if he or she is an independent operator.

**(vi) Analysis**

[33] Applying the principles and criteria set out in the cases referred to above, I find that when they were injured in the accident on November 23, 2003, both Shyrokyk and Narusevicius were workers and not independent operators. My reasons for this conclusion are as follows.

[34] Neither Shyrokyk nor Narusevicius owned any business equipment to speak of. Neither owned the tractor which they drove for a living. Neither owned the trailers which the tractors hauled. The satellite tracking system in the tractors belonged to Concord and was installed in the tractors at Concord's expense. All equipment used to generate income belonged to others. Shyrokyk and Narusevicius supplied their labour to operate that equipment and were paid at a fixed rate of pay for doing so. Moreover, neither Shyrokyk nor Narusevicius was responsible for the cost associated with the maintenance of the equipment they used to earn their living. This is not surprising since they did not own that equipment. The tractors they drove were owned by Meuszynski and it was he who paid for the repair and maintenance of the tractors. If the drivers had to pay for repairs of a tractor during the course of a trip, Meuszynski would reimburse the driver for those costs. As noted earlier, the insurance of the equipment which Shyrokyk and Narusevicius used to earn income was paid for by Concord and Meuszynski.

[35] At the hearing of this appeal, Narusevicius testified that he had a computer and a computer program called "PC Miler" which he took with him on his trips. PC Miler is a program which computes the distance by road between various locations. It is a standard program used in the trucking industry to eliminate disputes with drivers who are paid at a fixed rate per mile driven. The drivers are paid according to the distances determined by the PC Miler program. In my view, the fact that Narusevicius owned his own laptop computer and a copy of the PC Miler software program is marginal evidence, at best, of ownership equipment for business purposes. If there was some evidence of more generalized ownership of business equipment then perhaps the computer and software program could be classified as "business equipment." On its own, in the absence of ownership of any other equipment, such as a truck, a trailer, an office, tools, and so on, I find the fact that Narusevicius owned a computer and the PC Miler software program to be of little probative value. I note that Narusevicius did not claim the cost of this computer as a business expense on his 2003 income tax return. In fact, he claimed no business-related expense on that tax return. It is possible that the computer and software program were bought prior to 2003, however; there is no evidence that these items had ever been previously claimed as business-related expenses. In my view, the evidence in this case shows that neither Shyrokyk nor Narusevicius owned any equipment on which they relied to generate income in 2003. The equipment which they did use was owned by others and bore the business logo of others.

[36] At the hearing of these applications, counsel for Narusevicius submitted the truck-driving licence was the primary piece of business equipment owned by Narusevicius. In this case, both Shyrokyk and Narusevicius took a driving course and obtained their trucking licences at their own expense. In my opinion, a licence or qualification to do something does not constitute "equipment" for the purposes of the tests used to determine whether a person is a worker or an independent operator. A licence is a qualification which is personal to the individual who



obtained it. It is not something which can be bought or sold, or which had a determinable market value. Any person employed as a driver needs to have a driver's licence. This is merely a pre-requisite for the job and does not make the driver's licence an item of business equipment. A person licensed to drive truck, or practice pharmacy or medicine or law may do so in the capacity of a worker or an independent business person. The fact that the person holds the requisite licence does not advance the inquiry as the person's employment status.

[37] The evidence indicates that neither Shyrokyy nor Narusevicius had any real chance of profit or risk of loss. Since they began their relationship with Meuszynski in 2003, he was the only one who paid them, with one possible exception in Narusevicius's case when he made what appears to have been an unauthorized use of Meuszynski's truck to haul a load of goods for cash. Moreover, Meuszynski paid the drivers according to a fixed scale that he set. At the hearing of these applications, Meuszynski testified that he determined the rate of pay and communicated that figure to the drivers when he first interviewed them. There was no negotiation over the rate of pay, the drivers could either accept Meuszynski's offer or not. While it is true that the drivers' pay varied from paycheque to paycheque this was only because the drivers drove different distances during those times. The fact that a worker can increase his or her pay by working more hours, or driving more miles, is not a chance of profit. In *Decision No. 1584/08*, the Vice-Chair stated:

The Respondent's work for the Coopers entailed no chance of profit or risk of loss. The Respondent was paid \$8 per hour by the Coopers during the entire course of the working relationship. The fact that a wage earner can increase his or her wages by working more hours is not a "chance or profit." This has been commented on by this Tribunal on several occasions. For instance, in *Decision No. 1648/02*, the Vice-Chair stated the following:

There was no chance of profit or risk of loss, as he either worked the hours for the rate quoted or did not.

[38] In his testimony at the hearing of these applications, Narusevicius suggested that he could make a profit by finding a shorter route to his destination than the mileage indicated on PC Miler. In such circumstances, he would be paid according to the number of miles indicated by the computer program even though he had actually driven a shorter number of miles. In my view, this is not persuasive evidence that he had a chance of profit. His pay for the particular trip was fixed and determinable when he began his trip. At best, this is evidence that, on occasion, he could complete an assigned task in shorter than usual time. He was not paid any more for his efforts, he simply ended up with more free time. There is no evidence that he used this extra time to take on more loads or to generate extra income. Further, there was no evidence with respect to how frequently Narusevicius was able to better the PC miler's mileage calculation. It seems unlikely, in my opinion, that the mileage determination software which is standard use in the trucking industry, would generate anything other than the most direct and shortest distance between two points. It is possible that on occasion Narusevicius was able to find a route which was somewhat shorter than the figure determined by PC Miler, however, in my view, this does not constitute evidence that Narusevicius stood a meaningful chance of making a profit from his work as a truck driver. Finally, I note that Narusevicius's testimony in this regard was contradicted by that of Ian Wylie, a manager at Concord, who testified that drivers were not free to choose their own routes without first obtaining approval from Concord.

[39] Counsel for Narusevicius referred to the reconciliation forms which were generated by Meuszynski for the purposes of calculating how much a driver was to be paid for a trip. The forms refer to the "profit" the driver makes. The fact that the parties to the employment relationship call the funds which pass between them "profit" does not make those funds business income when virtually all other characteristics of the relationship suggest that it was employment income. It may, however, constitute evidence of the parties' intentions, which is a factor to be examined under the business reality test and is discussed later in these reasons.

[40] Thus, not only did Shyroky and Narusevicius have no chance of profit, they also bore no risk of loss. They got paid their fixed rate per mile driven, no matter what. If the truck broke down, the drivers did not bear the risk associated with the cost of repair. If a client whose goods were being transported failed to pay the delivery, Concord bore the risk of that loss. If the goods being transported were damaged or stolen then they were covered by insurance which was not paid for by Shyroky or Narusevicius. There is simply no evidence in this case that Shyroky and Narusevicius had any chance of making a profit or bore any risk of financial loss.

[41] There is some evidence in this case that parties intended to structure their relationship as one between businesses rather than use the traditional employer-employee model. As noted earlier, both drivers registered business and opened business accounts, although in Shyroky's case, it appears this was done for his construction business which had essentially lapsed by the time he started working for Meuszynski. Shyroky deposited all cheques paid by Meuszynski into his personal and not his business bank account. Meuszynski did not make income tax or other deductions from the amounts paid to the drivers. There was also some indication in Meuszynski's testimony that he regarded the drivers as having their own business. On the other hand, I note that under the contract between Meuszynski and Concord, it was a requirement that Meuszynski have an account with the Workplace Safety and Insurance Board and that remittances to that account be paid for the drivers. A similar ambiguity is found in the *Employer's Report of Injury* which Meuszynski filed with the Board following the accidents. In that form, Meuszynski indicates that the drivers were independent operators, yet, later in that form, he indicates that they were engaged in full-time employment. Moreover, if Meuszynski did indeed regard the drivers as independent operators, then one wonders why he filed injury reports with the Board following the accident. Thus, the evidence with respect to the parties' intentions is ambiguous. It is far from clear, in my view, that the parties intended to create a business rather than an employment relationship; however, there are some factors which do signal an intention to establish the former rather than the latter.

[42] With respect to their tax returns for 2003, I note that Narusevicius reported \$28,574.54 of employment income and \$5,770 of other income, described as "Miscellaneous Transportation Services." Since most of the work which Narusevicius did in 2003 was for Meuszynski and Concord it seems likely that the \$28,574.54 relates to income he earned from Meuszynski. As noted, this income is described in his tax return as employment income. It is not clear what the \$5,770 of "other income" relates to but it appears not to have been regarded as business income because it is not listed on the tax return in the business income line. Moreover, Narusevicius's tax return makes no deductions for business expenses. In short, in 2003, Narusevicius did not report having earned any business income and accordingly, made no deductions for business expenses.

- [43] Shyroky's 2003 tax return reveals that he reported all his income as business income, with the exception of a small amount of rental income. He did not report any employment income. Further, he claimed various deductions for business related expenses. He claimed deductions for interest, insurance, maintenance and repairs, property taxes, and utilities. Presumably, these are expenses related to his home, since some of this list an amount described the "personal portion." Shyroky also claimed capital cost allowances for a computer, furniture and tools, and instruments. No evidence was led at the hearing of this appeal to explain these expenses and claims for capital cost allowances. For instance, what the tools against which a capital cost allowance was claimed, is unknown. It is possible that these were tools which Shyroky had used in his construction business. Certainly, no evidence was led to suggest that these were tools used during the course of the driving that he did for Meuszynski. The same is true of the capital cost allowances claimed for a computer and for furniture.
- [44] In my view, the evidence in this case suggests that Concord exercised a high degree of control over Shyroky and Narusevicius. They were told when and where to pick up and drop off loads. Concord's dispatcher maintained regular contact with the drivers during the course of their trips. They were required to confirm with Concord's dispatcher that a load had been delivered. They were required to undergo a drug test and to take a road test from an independent tester approved by Concord. They could not take passengers with them unless authorized to do so by Concord. They were required to take training on how to use the satellite system which Concord installed in the tractors. There was a three-month probation during which Concord assessed the drivers' suitability.
- [45] At the hearing of these applications, much was made of the fact that the drivers were free to refuse to take a load offered by Concord. While this is evidence of some degree of independence, however, that degree, in reality was very small. In this regard, I note that while Meuszynski confirmed that the drivers could refuse to take a trip offered to them, he testified that he was not aware of any occasion in which either driver had done so. There was no evidence that either driver turned down trips on a regular basis. Rather, the evidence indicates that they drove Meuszynski's trucks on a full-time basis. The fact that the drivers *could* turn down trips does little to advance their status as independent operators in the absence of evidence that they actually were turning them down in favour of other income generating opportunities.
- [46] The evidence strongly suggests that Shyroky and Narusevicius were not free to work for others during the course of their relationship with Meuszynski. Meuszynski testified that once he assigned a tractor and a driver to a transportation company, such as Concord, both tractor and driver became exclusive to the transportation company. Meuszynski testified that the driver would not be permitted to drive for a competitor of that transportation company. Meuszynski's testimony in this regard is confirmed by the fact that there is no evidence that Shyroky drove or provided any form of transportation services to anyone else after he began working from Meuszynski in July 2003. The same is true of Narusevicius, with the exception of one occasion on which it appears made an unauthorized use of Meuszynski's tractor to deliver some goods for friends and for which he was paid in cash.
- [47] Finally, it is apparent that neither Shyroky nor Narusevicius could substitute another person to fill in for them. They were hired in their personal capacities after extensive testing and

checking by Concord. If they were not available for a trip, they were not permitted to send in a substitute truck driver to take their place.

[48]

For all these reasons, I find that when all the evidence is measured against the criteria identified in the business reality test, both Shyroky and Narusevicius were workers and not independent operators when they were injured in the accident on November 23, 2003. Accordingly, their right to sue a Schedule 1 employer, and their right to sue a worker of a Schedule 1 employer who was in the course of employment at the time of the accident, is taken away by section 28 of the WSIA.

**DISPOSITION**

[49] The applications are allowed:

1. The right of Vyacheslav Shyrokyy and Rimvydas Narusevicius to commence an action against Richard Bisson and 1282743 Ontario Inc., operating as Mike Godin Transport with respect to injuries sustained in the motor vehicle accident of November 23, 2003 is taken away by the WSIA.
2. The right of Rimvydas Narusevicius and Vida Naruseviciene to commence an action against Vyacheslav Shyrokyy, Jerzy Meuszynski and Concord Transportation Inc. with respect to injuries sustained in the motor vehicle accident of November 23, 2003 is taken away by the WSIA.

DATED: October 5, 2009

SIGNED: B. Kalvin