

Docket: 2006-2975(CPP)

BETWEEN:

R. WAYNE AND ELAINE COZART,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DENNIS FOULSTON,

Intervenor.

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Appeal heard on common evidence with the appeal of  
*R. Wayne and Elaine Cozart (2006-2976(EI))*  
on June 6, 2007 at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellants:	Kerry R. Chow
Counsel for the Respondent:	Julien Bedard
For the Intervenor:	The Intervenor himself

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**JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeals are allowed, and the decision of the Minister of National Revenue is vacated on the basis that the work performed by Dennis Foulston, Kelvin Olson and Dwayne Cozart during the periods under appeal was not pensionable.

Signed at Ottawa, Canada, this 9th day of October, 2007.

"G. A. Sheridan"

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Sheridan, J.

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**JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeals are allowed, and the decision of the Minister of National Revenue is vacated on the basis that the work performed by Dennis Foulston, Kelvin Olson and Dwayne Cozart during the periods under appeal was not insurable.

Signed at Ottawa, Canada, this 9th day of October, 2007.

"G. A. Sheridan"

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Sheridan, J.

Citation: 2007TCC528  
Date: 20071009  
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BETWEEN:

R. WAYNE AND ELAINE COZART,

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THE MINISTER OF NATIONAL REVENUE,

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Intervenor.

### **REASONS FOR JUDGMENT**

Sheridan, J.

[1] The Appellants, Wayne and Elaine Cozart, are appealing the determination of the Minister of National Revenue that Dwayne Cozart<sup>1</sup>, Kelvin Olson<sup>2</sup> and Dennis Foulston<sup>3</sup> were working as employees and that their work was pensionable<sup>4</sup> and insurable<sup>5</sup>. Mr. Foulston intervened in their appeal and shared the Cozarts' view that he, like Dwayne and Kelvin, had been working as an independent contractor. Dwayne and Kelvin did not intervene nor were they present at the hearing.

[2] Mr. and Mrs. Cozart testified at the hearing and were forthright in the presentation of their evidence and entirely credible. Mr. Foulston also testified; I found his evidence equally persuasive.

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<sup>1</sup> For the period January 1, 2005 to September 30, 2005.

<sup>2</sup> For the period March 25, 2004 to December 31, 2004.

<sup>3</sup> For the period January 1, 2004 to April 30, 2004.

<sup>4</sup> Pursuant to paragraph 6(1)(a) of the *Canada Pension Plan*.

<sup>5</sup> Pursuant to paragraphs 5(1)(a) and 5(2)(i) of the *Employment Insurance Act*, and in Dwayne's case only, subsection 5(3) of the *Act*.

[3] During the relevant periods, the Cozarts farmed near Brownlee, Saskatchewan where they also operated a long-haul trucking business. The business had originally been their son Dwayne's. They came reluctantly to the enterprise after Dwayne ran into financial difficulties and they took over his obligations under the lease of the truck tractor unit.

[4] The Cozarts had an agreement with Schneider's Trucking Ltd. in Regina. Pursuant to that agreement, the Cozarts provided drivers and the truck tractor to pull loads assigned by Schneider's on trailers leased to them by that company. Schneider's (through its dispatcher) communicated directly with the drivers to assign loads for pickup and to give instructions as to the schedules, trips, time frames and destinations. The drivers kept logs and bills of lading and remitted time sheet reports to Schneider's and the Cozarts. Mrs. Cozart, the partnership's bookkeeper, paid the drivers based on their time sheet reports.

[5] This was the general context in which Mr. Foulston, Kelvin and Dwayne were working. Counsel for the Respondent submitted that the appeals must be decided on an "all or nothing" basis; that is to say, that if one driver was found to be an employee (or an independent contractor), they all ought to be. I do not think this is so. Even where the same "payor" is involved, the determination of the status of each worker must be considered according to the evidence of the relationship of each individual worker with the payor.

[6] Both counsel referred to the four-fold test for the determination of whether a worker is an employee or an independent contractor. The test was developed in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*<sup>6</sup> and applied by the Supreme Court of Canada in *671121 Ontario Ltd. v. Sagaz Industries Canada Inc.*<sup>7</sup>:

[47] 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.

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<sup>6</sup> 87 DTC 5025.

<sup>7</sup> [2001] 2 S.C.R. 983.

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

[7] Counsel for the Respondent referred the Court to *Andres (c.o.b. L. Andres Transport) v. Canada (Minister of National Revenue)*<sup>8</sup> in which Porter, J. cited a passage from *Charbonneau v. Canada*<sup>9</sup>. In that case, Décary, J.A. set out the approach to be followed in the application of these tests:

The tests laid down by this Court ... are not the ingredients of a magic formula. They are guidelines which it will generally be useful to consider, but not to the point of jeopardizing the ultimate objective of the exercise, which is to determine the overall relationship between the parties. The issue is always, once it has been determined that there is a genuine contract, whether there is a relationship of subordination between the parties such that there is a contract of employment ... or, whether there is ..., such a degree of autonomy that there is a contract ... for services. ... In other words, we must not pay so much attention to the trees that we lose sight of the forest. ... The parts must give way to the whole.<sup>10</sup> [Emphasis added.]

[8] In addition to the consideration of control, ownership of tools, chance of profit and risk of loss and the degree of integration, the Court may also take into account the intentions of the parties<sup>11</sup>.

[9] To succeed in their appeals, the Cozarts (and in his intervention, Mr. Foulston) bear the onus of showing the assumptions upon which the Minister based his decisions are incorrect. The Minister's assumptions are largely, if not entirely, based on Mrs. Cozart's brief written responses to the questions in the department's standard form questionnaires<sup>12</sup>. While useful for eliciting a rough sketch of the facts, such forms rarely provide the same quality or quantity of information as a hearing. In the present case, the evidence of Mr. and Mrs. Cozart and Mr. Foulston provided a much fuller picture of the context in which the workers provided their services. I am satisfied that they have met their onus of proving that the workers were engaged as independent contractors. The evidence in respect of each worker's relationship with the Cozarts is dealt with separately below.

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<sup>8</sup> [2000] T.C.J. No. 89.

<sup>9</sup> [1996] F.C.J. No. 1337 (F.C.A.).

<sup>10</sup> *Supra*, at paragraph 7.

<sup>11</sup> *Wolf v. Canada*, 2002 DTC 6853 (F.C.A.); *The Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, 2006 DTC 6323 (F.C.A.).

<sup>12</sup> Exhibits R-2,3 and 4.

Dennis Foulston

[10] Mr. Foulston is a farmer and neighbour of the Cozarts. He worked for only four months, from January to April of 2004. At that time of the year, things were slow on the farm. Having heard that the Cozarts' son Dwayne was unable to work because of a broken shoulder, Mr. Foulston approached the Cozarts about working until he had to start seeding in the spring. He wanted to work as a "subcontractor" because he did not want to be bothered with deductions and other paperwork for such a short period. This suited the Cozarts who, until the Minister's determination, had always believed they were contracting with their drivers as independent contractors. They offered a rate of 30 cents per mile, duly accepted by Mr. Foulston.

[11] Having had prior experience in trucking, and already in possession of the requisite Class 1A licence, Mr. Foulston did not need, and was not offered, any training. As he said, after their discussions, he "jumped in the truck" and headed off with the load already waiting at the Cozarts' farm.

[12] From then on, except for the odd neighbourly call from the Cozarts to see how things were going, Mr. Foulston had no contact with them regarding his work. They did not tell him how to do his job or monitor his performance. He received his assignments and instructions directly from Schneider's.

[13] Mr. Foulston set his own hours, subject only to externally imposed industry regulations limiting a driver to a maximum of 13 hours per day and 70 hours per week. He was responsible for the payment of any tickets, fines or similar costs that were attributable to his own conduct. Mr. Foulston worked as much as he could during the short period he was with the Cozarts to maximize his earnings. While he could have hired a replacement worker (assuming that person had the necessary industry certification), that would have defeated the purpose of taking the job. Mr. Foulston's time sheet reports<sup>13</sup> effectively served as his invoices. It was based on these documents that Mrs. Cozart calculated the amount due to Mr. Foulston from the amounts they received from Schneider's. She made no government deductions from these payments. Mr. Foulston was not entitled to holiday or sick pay or other benefits. Mr. Foulston reported his income as self-employed.

[14] As for the ownership of tools, this factor is of limited application in the present case. The Cozarts provided the truck tractor unit. Schneider's provided the trailers. To

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<sup>13</sup> Exhibits A-2, 3 and 4.

the extent that other tools were necessary, Mr. Foulston provided his own small tools in case of a breakdown. He was also responsible for buying the Class 1A licence required for truckers. Beyond that, all he needed to do the job was his own skill and judgment, which in today's economy are increasingly the primary tools of the independent contractor.

[15] I agree with counsel for the Respondent that "chance of profit" and "risk of loss" factors are also of limited applicability on the present facts. It must be remembered that no one factor takes precedence over the other. It is the entire context that matters.

[16] On this last point, counsel for the Respondent argued that because Mr. Foulston had no business name or licence, and was not a GST registrant, he must have been an employee. Such details, however, must not be allowed, in the words of Justice Décaré, to "jeopardiz[e] the ultimate objective of the exercise" of determining "the overall relationship" between the parties. Mr. Foulston's primary work was as a farmer; given the short term of his contract with the Cozarts, it would not have made sense to obtain a business name or licence. Further, in the short time he worked as a driver, it is unlikely that he earned the threshold amount necessary to trigger GST registration.

[17] Having considered the overall relationship between Mr. Foulston and the Cozarts and, in light of their clear intention that he work as an independent contractor, I am satisfied that the evidence shows a degree of autonomy consistent with Mr. Foulston's having worked under a contract for services as an independent contractor.

### Kelvin Olson

[18] Many of the above findings apply equally to Kelvin Olson. Like Mr. Foulston, he was not supervised or trained by the Cozarts; he received his instructions from Schneider's; he controlled his own hours; submitted his invoices for payment; received no benefits and had no deductions taken from his payments. In addition, Kelvin had a written agreement<sup>14</sup> with the Cozarts. Paragraph 2 of the written agreement supports the Cozarts' evidence that it was always intended that Kelvin work as an independent contractor:

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<sup>14</sup> Exhibit A-4.

The Owners [Wayne and Elaine Cozart and Dwayne Cozart] and the Contractor [Kelvin Olson] (hereinafter "The Parties") agree and confirm this Agreement as an independent contract for services rendered, and not an exclusive contract of service between the Parties. The Parties acknowledge and confirm that responsibility for deductions in consideration of Canada Customs and Revenue Agency, Canada Pension Plan, Employment Insurance, and any other benefits regularly payable under a contract of service do not form part of this independent contract services Agreement.

[19] Notwithstanding this written agreement, Kelvin (whose last day with the Cozarts was December 31, 2004) reported his income for 2004 as employment income. Agreeing to one thing and doing another seems to have been a bit of a habit with Kelvin. For example, contrary to what was expected of him, when he had the Cozarts' truck in his possession, he often used it for his personal transport. In addition to wrongly increasing the Cozarts' fuel and maintenance costs, this practice also resulted in inflated invoices as the calculation of his earnings was mileage-based. Counsel for the Respondent argued, quite rightly, that Kelvin's bad behaviour was not relevant to the determination of his status as a worker. I include my findings with regard to his conduct only for its effect in diminishing the significance of Kelvin's having filed his 2004 income tax return as an employee. Overall, I am satisfied that the Cozarts adduced sufficient evidence to show that Kelvin Olson was working as an independent contractor during the period in question.

#### Dwayne Cozart

[20] Having determined that Dwayne was working under a contract of service, the Minister exercised his discretion under subsection 5(3) to determine that Dwayne and the Mr. and Mrs. Cozart would have entered a substantially similar contract of employment if they had been dealing with each other at arm's length. While I agree with the Minister's discretionary conclusion, I do not believe that the evidence shows the contract to have been one of employment.

[21] The Cozarts' trucking business was originally Dwayne's. Whether any formal arrangements were made defining their respective roles in the new business was not clear at the hearing. I am satisfied, however, that Dwayne originally set himself as a self-employed person and that he continued in that capacity after his parents took over the business. An injury and other problems in 2004 kept him from working for some period. When he returned in 2005, even though he carried on in the same fashion as before, the Cozarts' accountant advised Mrs. Cozart to make payroll deductions and to issue a T-4 for Dwayne who then reported his income as employment income. There was no evidence at the hearing as to what the



accountant's reasoning may have been. I accept, however, the Cozarts' unchallenged evidence that it was always intended that Dwayne, like Mr. Foulston and Kelvin, would work as an independent contractor. Taken as a whole, the evidence satisfies me that Dwayne was working as an independent contractor during the relevant period.

[22] The appeals are allowed and the decision of the Minister of National Revenue is vacated on the basis that the work performed by Dennis Foulston, Kelvin Olson and Dwayne Cozart during the periods under appeal was not pensionable or insurable.

Signed at Ottawa, Canada, this 9th day of October, 2007.

"G. A. Sheridan"

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Sheridan, J.

CITATION: 2007TCC528

COURT FILE NOS.: 2006-2975(CPP) AND 2006-2976(EI)

STYLE OF CAUSE: R. WAYNE AND ELAINE COZART AND  
THE MINISTER OF NATIONAL  
REVENUE AND DENNIS FOULSTON

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: June 6, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: October 9, 2007

APPEARANCES:

Counsel for the Appellants: Kerry R. Chow

Counsel for the Respondent: Julien Bedard

For the Intervenor: The Intervenor himself

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