

Docket: 2007-281(EI), 2007-282(CPP)

BETWEEN:

MOIRA-EILEEN DROSDOVECH,  
O/P PAWSITIVE VETERINARY CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JACQUELINE KILBURN

Intervenor.

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Appeals heard on August 24, 2007, at Kelowna, British Columbia

By: The Honourable Justice E.A. Bowie

Appearances:

For the Appellant:	The appellant herself
Counsel for the Respondent:	Christa Akey
Agent for the Intervenor:	Moira-Eileen Drosdovech

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**JUDGMENT**

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are dismissed and the rulings of the Minister of National Revenue on the appeals made to him under section 91 of the *Act* and under section 27 of the *Plan* are confirmed.

Signed at Ottawa, Canada, this 1st day of April 2008.

“E.A. Bowie”

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Bowie J.

Docket: 2007-292(EI), 2007-293(CPP)

BETWEEN:

MOIRA-EILEEN DROSDOVECH,  
O/P PAWSITIVE VETERINARY CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SHANNON CLOUTIER,

Intervenor.

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Appeals heard on August 24, 2007, at Kelowna, British Columbia

By: The Honourable Justice E.A. Bowie

Appearances:

For the Appellant:	The appellant herself
Counsel for the Respondent:	Christa Akey
Agent for the Intervenor:	Moira-Eileen Drosdovech

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**JUDGMENT**

The purported appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are quashed.

Signed at Ottawa, Canada, this 1st day of April, 2008.

“E.A. Bowie”

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Bowie J.

Docket: 2007-287(EI)  
2007-288(CPP)

BETWEEN:

JACQUELINE KILBURN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MOIRA-EILEEN DROSDOVECH,

Intervenor.

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Appeals heard on August 24, 2007, at Kelowna, British Columbia

By: The Honourable Justice E.A. Bowie

Appearances:

Agent for the Appellant:           Moira Eileen Drosdovech

Counsel for the Respondent:       Christa Akey

For the Intervenor:                 The Intervenor herself

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**JUDGMENT**

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are dismissed and the rulings of the Minister of National Revenue on the appeals made to him under section 91 of the *Act* and under section 27 of the *Plan* are confirmed.

Signed at Ottawa, Canada, this 1st day of April, 2008.

“E.A. Bowie”

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Bowie J.

Docket: 2007-294(EI)  
2007-295(CPP)

BETWEEN:

SHANNON CLOUTIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MOIRA-EILEEN DROSDOVECH,

Intervenor.

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Appeals heard on August 24, 2007, at Kelowna, British Columbia

By: The Honourable Justice E.A. Bowie

Appearances:

Agent for the Appellant:           Moira Eileen Drosdovech

Counsel for the Respondent:       Christa Akey

For the Intervenor:                 The Intervenor herself

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**JUDGMENT**

The purported appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are quashed.

Signed at Ottawa, Canada, this 1st day of April, 2008.

“E.A. Bowie”

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Bowie J.

Citation: 2008TCC178

Date: 20080401

Docket: 2007-281(EI), 2007-282(CPP)  
2007-292(E), 2007-293(CPP)

BETWEEN:

MOIRA-EILEEN DROSDOVECH,  
O/P PAWSITIVE VETERINARY CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JACQUELINE KILBURN  
and SHANNON CLOUTIER,

Intervenors.

Docket: 2007-287(EI), 2007-288(CPP)  
2007-294(EI), 2007-295(CPP)

AND BETWEEN:

JACQUELINE KILBURN  
and SHANNON CLOUTIER,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MOIRA-EILEEN DROSDOVECH,

Intervenor.

## **REASONS FOR JUDGMENT**

### **Bowie J.**

[1] There are eight appeals before me, four under the *Employment Insurance Act* (the *Act*) and four under the *Canada Pension Plan* (the *Plan*).

[2] Moira-Eileen Drosdovech is a veterinarian. She operates a veterinary clinic as a proprietorship under the firm name Pawsitive Veterinary Care. During the period

between January 1, 2005 and July 14, 2005 (the period) Shannon Cloutier and Jacqueline Kilburn worked with her in the clinic from time to time.

[3] By rulings dated October 24, 2005, a Rulings Officer of the Canada Revenue Agency determined that Shannon Cloutier and Jacqueline Kilburn were both employed by Ms. Drosdovech under contracts of service, and that their employment was therefore both insurable employment under the *Act* and pensionable employment under the *Plan*. These rulings were appealed to the Minister of National Revenue under section 91 of the *Act* and section 27 of the *Plan*.

[4] The Minister allowed the appeals in respect of Shannon Cloutier, concluding that she was employed under a contract for services rather than a contract of service, and that her employment was therefore neither insurable nor pensionable. He dismissed the appeals of Jacqueline Kilburn. Shannon Cloutier and Jacqueline Kilburn have now appealed from the Minister's decision to this Court under sections 103 of the *Act* and 28 of the *Plan*. Ms. Drosdovech has also appealed all four of the Minister's decisions, as well as intervening in support of the four appeals brought by Ms. Cloutier and Ms. Kilburn. Ms. Drosdovech acted in her own behalf, and as agent for each of the other two appellants. She was also the only witness.

[5] From the foregoing it is apparent that the appeals taken by Ms. Cloutier and Ms. Drosdovech from the Minister's decision in relation to Ms. Cloutier are appeals from success. Neither Ms. Drosdovech nor Ms. Cloutier could explain why these appeals were brought, other than to say that it was from an abundance of caution. As the appellants in those two appeals seek no relief, the appeals will be quashed.

[6] The hearing of the appeals in relation to Ms. Kilburn began with two preliminary objections from Ms. Drosdovech. The first relates to the authority for the Rulings Officer to make the initial determinations. The letter of October 24, 2005 that embodies the ruling begins with this paragraph:

We received a request for a ruling regarding the insurability and pensionability of Jacqueline Margaret Kilburn's employment for the period January 1, 2005 to July 14, 2005. This request originates from Canada Revenue Agency's Revenue Collections Division.

Ms. Drosdovech refers to section 90 of the *Act* and section 26.1 of the *Plan*, and argues that they do not authorize the Canada Revenue Agency (formerly the Canada Customs and Revenue Agency) to initiate the process by making a ruling, except

where there has been a request for a ruling made by one of the persons mentioned in those sections. Those sections read:

- 90(1) An employer, an employee, a person claiming to be an employer or an employee or the Commission may request an officer of the Canada Revenue Agency authorized by the Minister to make a ruling on any of the following questions:
- (a) whether an employment is insurable;
  - (b) how long an insurable employment lasts, including the dates on which it begins and ends;
  - (c) what is the amount of any insurable earnings;
  - (d) how many hours an insured person has had in insurable employment;
  - (e) whether a premium is payable;
  - (f) what is the amount of a premium payable;
  - (g) who is the employer of an insured person;
  - (h) whether employers are associated employers; and
  - (i) what amount shall be refunded under subsections 96(4) to (10).

#### Time limit

- 90(2) The Commission may request a ruling at any time, but a request by any other person must be made before the June 30 following the year to which the question relates.

#### Ruling

- 90(3) The authorized officer shall make the ruling within a reasonable time after receiving the request.

#### Presumption

- 90(4) Unless a ruling has been requested with respect to an insured person,
- (a) an amount deducted from the remuneration of the person or paid by an employer as a premium for the person is deemed to have been deducted or paid in accordance with this *Act*; or

- (b) an amount that has not been so deducted or paid is deemed not to have been required to be deducted or paid in accordance with this *Act*.

26.1(1) The Minister of Social Development, an employer, an employee or a person claiming to be an employer or an employee may request an officer of the Canada Revenue Agency authorized by the Minister of National Revenue to make a ruling on any of the following questions:

- (a) whether an employment is pensionable;
- (b) how long an employment lasts, including the dates on which it begins and ends;
- (c) what is the amount of any earnings from pensionable employment;
- (d) whether a contribution is payable;
- (e) what is the amount of a contribution that is payable; and
- (f) who is the employer of a person in pensionable employment.

#### Time limit

26.1(2) The Minister of Social Development may request a ruling at any time, but a request by any other person must be made before June 30 of the year after the year in respect of which the question relates.

#### Ruling

26.1(3) The authorized officer shall make the ruling within a reasonable time after receiving the request.

#### Presumption

26.1(4) Unless a ruling has been requested with respect to a person in pensionable employment,

- (a) an amount deducted from the remuneration of the person or paid by an employer as a contribution for the person is deemed to have been deducted or paid in accordance with this *Act*; or
- (b) an amount that has not been so deducted or paid is deemed not to have been required to be deducted or paid in accordance with this *Act*.



Ms. Drosdovech argues that since the persons authorized by those sections to request a ruling do not include the Canada Customs and Revenue Agency's Revenue Collections Division the proceedings were begun without authority and the rulings ought to be vacated for that reason alone. This argument is without merit. The Minister of National Revenue is empowered by section 94 of the *Act* and section 27.3 of the *Plan* to make a decision on his own initiative. They read as follows:

- 94 Nothing in sections 90 to 93 restricts the authority of the Minister to make a decision under this Part or Part VII on the Minister's own initiative or to make an assessment after the date mentioned in subsection 90(2).
- 27.3 Nothing in sections 26.1 to 27.2 restricts the authority of the Minister to make a decision under this Part on the Minister's own initiative or to make an assessment after the date mentioned in subsection 26.1(2).

The Rulings Officer is a person acting on the Minister's delegated authority, and his rulings in this case are authorized by those sections

[7] Ms. Drosdovech also advanced an argument that, if I understood it correctly, is to the effect that she carries on her veterinary practice as, in her words, "a natural person", and her contractual arrangements with Ms. Kilburn are between two "natural persons", all outside the scope and beyond the reach of the *Act* and the *Plan*. She apparently conceives the *Act* and the *Plan* as creating a scheme of employment insurance and a scheme of retirement savings that the people of Canada – all "natural persons" – may opt into or out of as they individually choose. This argument also is without merit.

[8] Canada's constitution makes specific provision for Parliament to legislate in relation to unemployment insurance<sup>1</sup> and old age pensions and supplementary benefits.<sup>2</sup> No matter how much these appellants may dislike the idea, the *Act* and the *Plan* establish mandatory schemes. They apply to all Canadians who come within their terms. If the employment of one person by another meets the definitions of insurable employment and pensionable employment found in the two statutes then the worker and the employer are both bound to contribute according to the provisions of the statutes, and the workers are entitled to the benefits that the statutes provide.

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<sup>1</sup> *The Constitution Acts, 1867 to 1982*, head 2A of s. 91.

<sup>2</sup> *Ibid.*, s.94A.

[9] The Minister's decisions that the employment of Ms. Kilburn by Ms. Drosdovech was insurable and pensionable employment was based on certain assumptions of fact which are set out in the Reply to the Notice of Appeal in each case. They are the following:

- a) the Appellant operated a veterinary clinic during the Period;
- b) the Appellant hired Kilburn to work with the Appellant's clients performing dog obedience counselling duties and in addition, Kilburn provided receptionist duties (the "Duties") during the Period;
- c) the Appellant controlled and directed Kilburn in the performance of the Duties;
- d) the Appellant required Kilburn to perform the Duties at the Appellant's place of business;
- e) the Appellant provided the supplies, tools and equipment used by Kilburn in the performance of the Duties;
- f) the Appellant scheduled Kilburn's hours and days of work;
- g) the clients belonged to the Appellant;
- h) Kilburn did not have clients of her own during the Period;
- i) Kilburn did not risk incurring a loss in the performance of the Duties; and
- j) Kilburn did not have an opportunity to profit in the performance of the Duties.

[10] Before Ms Drosdovech gave her evidence, I advised her of the significance that these assumptions have in cases of this kind. Her immediate response to this was to the effect that none of these assumptions were accurate. When cross-examined by Ms. Akey, however, her answers were much different. The cross-examination established that Ms. Kilburn does in fact work for her at the veterinary clinic, where she sits in a reception area, at a desk, equipped with a telephone and a computer for her use. She greets the customers, answers the telephone by identifying the clinic, and does some clerical work. The equipment that she uses is provided by Ms. Drosdovech, and Ms. Drosdovech pays her at the rate of \$17.25 per hour for some, but apparently not all, of the time that the clinic is open. She is paid monthly, and Ms. Drosdovech testified that she established the duties to be performed by Ms. Kilburn.

She agreed that Ms. Kilburn cleans the kennels at the clinic, but maintains that this is not part of her duties, but is something that she does voluntarily.

[11] Ms. Kilburn, according to the evidence of Ms. Drosdovech, performs some dog obedience training for clients of the clinic, but does so on her own account and not as an employee of the clinic. Sometimes the clients pay Ms. Kilburn for these lessons, and sometimes they pay the clinic. That, at least, was Ms. Drosdovech's evidence.

[12] The evidence satisfied me that the Minister's assumptions in this case are correct. Ms. Drosdovech testified that there is a written contract between her and Ms. Kilburn. However, she said that she did not bring the contract with her because, in her opinion, it is not relevant to the issues. Without either the written contract or evidence from Ms. Kilburn corroborating Ms. Drosdovech's evidence, I am not inclined to accept the evidence that Ms. Kilburn's obedience training activities were conducted entirely on her own account. That evidence could easily have been corroborated by Ms. Kilburn, but she chose not to testify. It may be a matter that is covered by their written agreement, but they chose not to bring it to Court with them.

[13] Clearly the work done by Ms. Kilburn in the office is done under a contract of service. She is subject to the direction and control of the employer; she works on the employer's premises, using the employer's equipment. She is paid at a fixed rate, with no opportunity either to earn a profit or to suffer a loss. She has no investment in the business. Applying the well-settled legal principles found in the Supreme Court's recent decision in *671122 Ontario Ltd v. Sagaz Industries Canada Ltd.*<sup>3</sup> to these facts leads inexorably to the conclusion that Ms. Kilburn is engaged by Ms. Drosdovech under a contract of service, with the result that her employment is insurable under the *Act* and pensionable under the *Plan*.

[14] In the result, then, the appeals in respect of the employment of Ms. Cloutier, 2007-292(EI), 2007-293(CPP), 2007-294(EI), and 2007-295(CPP), are quashed. The appeals in respect of the employment of Ms. Kilburn, 2007-281(EI), 2007-282(CPP), 2007-287(EI), and 2007-288(CPP), are dismissed.

Signed at Ottawa, Canada, this 1st day of April, 2008.

“E.A. Bowie”

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<sup>3</sup> [2001] 2 S.C.R. 983.

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Bowie J.

CITATION: 2008TCC178

COURT FILE NO.: 2007-281(EI), 2007-282(CPP),  
2007-292(EI), 2007-293(CPP) and  
2007-287(EI), 2007-288(CPP),  
2007-294(EI), 2007-295(CPP)

STYLE OF CAUSE: MOIRA-EILEEN DROSDOVECH, O/P  
PAWSITIVE VETERINARY CARE, and M.N.R.  
and JACQUELINE KILBURN &  
SHANNON CLOUTIER  
and  
JACQUELINE KILBURN &  
SHANNON CLOUTIER and M.N.R.  
and MOIRA EILEEN DROSDOVECH

PLACE OF HEARING: Kelowna, British Columbia

DATE OF HEARING: August 24, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice E.A. Bowie

DATE OF JUDGMENT: April 1, 2008

APPEARANCES:

For the Appellants:	Moira-Eileen Drosdovech
Counsel for the Respondent:	Christa Akey
For the Intervenors:	Moira-Eileen Drosdovech

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