Docket: 2008-654(EI)
2008-655(CPP)

BETWEEN:

ZAZAI ENTERPRISES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on September 9 and October 23, 2008,
at Toronto, Ontario

Before: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant:	Ed D. Sarmiento
Counsel for the Respondent:	Alexandra Humphrey

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 and assessments of the Minister of National Revenue on the appeals made to him under section 92 of the *Act* and under section 27 of the *Plan* are confirmed.

Signed at Ottawa, Canada, this 6th day of November 2008.

" Campbell J. Miller"

C. Miller J.

Citation: 2008 TCC 606
Date: 20081106
Docket: 2008-654(EI)
2008-655(CPP)

BETWEEN:

ZAZAI ENTERPRISES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Miller J.

[1] Zazai Enterprises Inc. appeals the Minister of National Revenue's assessment of Canada Pension Plan contributions, Employment Insurance premiums, penalties and interest assessed as follows:

	2004	2005	2006
CPP contributions	$2,467	$4,375	$4,344
EI premiums	1,137	1,272	2,065
Penalties	360	565	641
Unidentified penalties	400	400	0
Interest	484	330	204
Totals ($19,044)	$4,848	$6,942	$7,254

[2] In the Reply to the Notice of Appeal, the Minister confirmed the unidentified penalties related to failure to file T4s.

[3] Mr. Ed Sarmiento, agent for the Appellant, argued at the beginning of the trial that the Minister's assessment be quashed on the basis of what I would call a procedural irregularity. I ruled orally at that time as follows:

> "This is a case in which the Appellant, Zazai Enterprises Inc., has been assessed by the Minister of National Revenue pursuant to CPP and EI legislation on the basis that certain workers were engaged by the Appellant in pensionable and insurable employment. As a preliminary matter, the Appellant's agent has raised a procedural irregularity, which the Appellant maintains should decide this case. The issue is the application of section 26.1 of the CPP legislation (section 90 of the EI legislation) which reads as follows:
>
> 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.
>
> (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.
>
> (3) The authorized officer shall make the ruling within a reasonable time after receiving the request.

> (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*.

The effect of these provisions, as Mr. Sarmiento has pointed out, is to provide a procedure for the determination of a number of issues; a procedure which includes a request for a ruling by certain entities. In this case, no such entity made a request, but the Minister of National Revenue made a decision in any event. The Appellant contends that, as there has been no valid request for a ruling, the presumption of the status quo arises. In effect, he argues that subsection 26.1(4) operates to deem the amounts not deducted by the Appellant not to have been required to be deducted.

Mr. Sarmiento explained his theory of the reason for the procedural protocol. I have no doubt there are good and sensible reasons for the procedure and for the presumption. The stumbling block however facing the Appellant is section 27.3 of the CPP legislation which reads as follows:

> **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).

This seems clear to me to be an overriding provision that allows the Minister to reach a decision or make an assessment without engaging the ruling request process. Mr. Sarmiento suggests that section 27.3 of the CPP only comes into play if there has been a valid ruling request. I disagree. I find that interpretation could render these provisions meaningless. Further, if the Minister can make a decision on such matters as who is the employer, and whether there is pensionable or insurable employment, it would make no sense that the presumption of

> the status quo set out in subsection 26.1(4) of the CPP legislation remains determinative. That would take away the very authority that section 27.3 of the CPP legislation bestows upon the Minister. I find the wording of section 27.3 of the CPP and section 90 of the *EI Act* to be very clear, and in this case, the Minister has exercised the authority to make a decision and make an assessment regarding the workers and their relationship with the Appellant. The Appellant objects and appeals that decision, but I find it is a decision to be determined on the facts of the working relationship, not on the basis of the interplay between provisions in the CPP and EI legislation.
>
> I was not referred to any case exactly on point. Mr. Sarmiento suggested the case of *Care Nursing Agency Ltd. v. Canada (Minister of National Revenue)*,[1] now under appeal to the Federal Court of Appeal may be of some assistance, and perhaps I should defer my decision until that case has been heard. I have read the Tax Court of Canada decision in that case: it does not deal with the role of section 27.3 and I fail to see how an appeal of that decision could have any bearing on this case.
>
> This case is about whether the workers were employees of the Appellant or were self-employed. I need to hear the facts surrounding their work Mr. Sarmiento, and that is what we should now turn to."

[4] Subsequent to my ruling on this matter, the Federal Court of Appeal did hear the case of *Care Nursing Agency Ltd. v. The Minister of National Revenue*,[2] and although the Tax Court of Canada decision did not refer to these provisions, the Federal Court of Appeal decision did, as follows:

> [2] The appellant argues that it was under no obligation to make remittances of EI premiums or CPP contributions in respect of any of the workers, except Ms. Sunshine Smith, because no rulings as permitted by subsections 90(1) of the *EI Act* and 26.1(1) of the *Plan* were obtained in respect of any of the workers other than Ms. Smith. Despite the able arguments of counsel for the appellant, in our view, sections 94 of the *EI Act* and 27.3 of the *Plan* permit the Minister to make assessments under those acts in the absence of such rulings. Moreover, we are not persuaded that the consequences of this interpretation are either unreasonable or absurd. Accordingly, the Tax Court Judge correctly rejected this argument.

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1 [2007] T.C.J. No. 418.

2 2008 FCA 334.

Facts

[5] The only evidence given at trial was that of Mr. Zazai, the sole shareholder of the Appellant. It is easiest to describe the facts by relating Mr. Zazai's evidence to the Minister's assumptions in the Reply to the Notice of Appeal. The Minister assumed:

(a) the Appellant operates a trucking business;

(b) the Appellant's sole shareholder is Nasrullah Zazai;

(c) the Appellant's shareholder and Jamila Zazai are Directors of the corporation;

(d) the Appellant's shareholder controlled the day to day operations of the business and made the major business decisions for the business;

(e) the Appellant has an "Independent Contract Carrier Agreement" (the "Agreement"), dated April 1, 2004, with Pizza Pizza Limited (the "Appellant's client") to deliver food and other related supplies and products to their customers;

(f) the Appellant's client is a distributor and manufacturer of food and other related supplies and products;

(g) the Appellant had to adhere to the terms and conditions set out in the "Agreement";

(h) the Worker, Robert Wallis [*sic*], was hired as "Driver", under a verbal agreement;

(i) the Workers, Muhammad Riaz and Fawad Noori, were hired as "Helpers", under a verbal agreement;

(j) the Worker, Robert Wallis [*sic*], was provided with a Helper by the Appellant;

(k) the Workers' duties were to load, drive and deliver loads to different cities or municipalities in Southern Ontario;

(l) the Workers were required to report to the Appellant's shareholder in person, or by phone to receive delivery instructions;

(m) the Workers were supervised by the Appellant's shareholder;

(n) the Workers were required to obtain the Appellant's shareholder approval prior to taking certain actions when there was a deviation from the delivery instructions as the Appellant's shareholder needed to advise and discuss the changes with the customer;

(o) the Workers were paid by cheque, to their personal names, on a weekly basis by the Appellant;

(p) the Workers' rate of pay was determined by the Appellant's shareholder;

(q) the Workers' did not receive vacation pay, paid vacation, bonuses or any benefits such as medical, dental, life insurance;

(r) the Workers had to advise the Appellant's shareholder if they wanted some time off, at least two weeks in advance;

(s) the Worker, Robert Wollis, worked 3 days a week, Monday, Wednesday and Friday, from 2:00 a.m. to finish;

(t) the Worker, Robert Wollis, hours of work were determined by the Appellant's client and recorded in his logbook;

(u) the Workers were provided with the required tools and equipment such as leased trucks, maps, landcarts, loadbars and security devices by the Appellant, at no cost to the Workers;

(v) the Appellant was responsible for all the expenses related to the maintenance of the truck and equipment and related insurance;

(w) the Workers did not incur any expenses in performing their duties;

(x) the workers were required to follow the Appellant's client standard policy and operating procedures;

(y) the Appellant was ultimately responsible for resolving customer complaints;

(z) the Appellant provided the guarantee on the work performed by the Workers;

(aa) the Workers were required to wear a company uniform with the business logo;

(bb) the Workers had to perform their services personally;

(cc) the Appellant had the right to terminate the Workers' services;

(dd) the "Management fees" paid to Nasrullah Zazai are contributory salary and wages;

(ee) the amount of money received by Nasrullah Zazai is considered as income from an office or employment;

(ff) income from an office or employment is considered as "Pensionable income" and Canada Pension Plan contributions have to be deducted and remitted.

[6] Assumption (e) - The relevant provisions of the Agreement read as follows:

1.1 Services. The Carrier hereby agrees to supply the Vehicle with all necessary fully bonded and properly licensed personnel as may be required from time to time, during the term of this Agreement for the delivery of Supplies to PPL customers as PPL may, in its sole discretion from time to time, determine or direct.

…

2.1 Owner. The Carrier warrants that he/she is the legal owner of the Vehicle or has a good and valid lease for the Vehicle in accordance with Schedule "B", and is responsible for the full and complete payment of same, including any taxes, and for the discharge of any and all encumbrances against the Vehicle, including any liens for unpaid repair work on the Vehicle.

2.2 Properly Equipped. The Carrier warrants that the Vehicle is properly equipped to perform the Services, including, without limiting the generality of the foregoing, where applicable to pull PPL's trailers and that the Vehicle is at all times road worthy and is equipped with operating refrigeration and meets all safety standards set out in any application legislation and the regulations thereunder.

2.3 Logos and Condition of Vehicles. The Carrier shall ensure that the Vehicle shall be orange and white and that it has displayed on its main panels, the logo and colours as PPL may from time to time designate. PPL will be responsible for the maintenance of the logo of PIZZA PIZZA. The Carrier shall ensure that the Vehicle is in excellent condition, kept clean and in no way whatsoever detrimental to the image and reputation of PPL. PPL may, at any time, examine the Vehicle to ensure that the Vehicle conforms with PPL's policies.

2.4 Maintenance. The Carrier shall at his/her own expense, maintain the Vehicle in safe, reliable and clean operating condition at all times, as necessary not only to comply with all laws relating to the operation of the Vehicle and safe working conditions and PPL's safety requirements.

2.5 Operation Costs. All costs and expenses of any kind whatsoever connected with providing the Services, including but not limited to, all fuel, oil, salaries,

> compensations, tolls and any other operating costs associated with the Vehicle and with the fully bonded personnel so as to ensure the delivery of the Supplies within PPL's delivery requirements shall be paid solely by the Carrier.
>
> …
>
> **4.2 Negligence.** The Carrier hereby agrees to indemnify and save harmless PPL of and from all damages which may result from any accident to any employees of the Carrier, or any accident to any person by reason of any negligence of any employee of the Carrier, whether upon the premises of PPL or otherwise, such indemnity to include any additional assessments which the Workmen's Compensation Board or equivalent may assess to PPL as a result of any accident involving the Carrier or any employee of the Carrier. It is understood and agreed that PPL shall not be called upon to contribute to the Workmen's Compensation Board for any employee of the Carrier delivering the products of PPL, but the same shall be paid for by the Carrier and PPL indemnified therefore for the Carrier's failure to do so.

The Appellant was to be paid by Pizza Pizza on the basis of how far the truck had to travel, how many drops had to be made and how much weight was being carried. These payments would be made weekly.

[7] Assumption (i) - Mr. Zazai claimed that the workers wanted an independent contractor arrangement from the outset. They were to be responsible for their own taxes. Mr. Zazai indicated they would be getting more money from him as there would be no deductions.

[8] Assumption (j) - Mr. Zazai claimed that Mr. Riaz and Mr. Noori would agree between themselves who would work with whom and when.

[9] Assumption (l) - Mr. Zazai testified that there was no reporting as such. Mr. Wollis, as a professional driver, knew what to do and where to go.

[10] Assumption (m) - Mr. Zazai claimed he did not directly supervise Mr. Wollis, though did indicate Mr. Wollis received instructions from Pizza Pizza.

[11] Assumption (n) - Mr. Zanai denied this assumption.

[12] Assumption (p) - Mr. Zazai confirmed that he paid his driver Mr. Wollis $250 a day and the other two workers, who primarily loaded and unloaded the truck, $150 a day. According to Mr. Zazai, there was a waiting list for drivers to get their own Pizza Pizza agreement.

[13] Assumption (v) - The Appellant was also responsible for the gas for the truck.

[14] Assumption (y) - Mr. Zazai indicated there were no complaints.

[15] Assumption (bb) – Mr. Zazai denied this assumption as he suggested Mr. Wollis could get another driver to fill in for him. My impression was that there were several Pizza Pizza approved drivers who may have had an informal arrangement to switch shifts, but there was no detailed evidence whether Mr. Wollis ever did this, and if he did, who paid the other driver. The lack of evidence on this crucial point causes me some real concern. On balance, I have not been satisfied the Appellant has proven this point.

Analysis

[16] Notwithstanding my ruling with respect to the application of sections 27.3 and 26.1 of the *Canada Pension Plan*[3] (and the *Employment Insurance Act*[4] equivalent), Mr. Sarmiento again raised this matter and specifically the application of subsection 26.1(4) of the *CPP*, not in the context of a procedural irregularity, but that the assumption itself contained in subsection 26.1(4) of the *CPP* is a complete answer to the Government's assessment. The Appellant's position appears to be an acknowledgment that the Minister may have the authority to assess, but in so doing the Minister is stuck with the subsection 26.1(4) presumption. Mr. Sarmiento must be suggesting that the presumption is irrebuttable. With respect, I believe Mr. Sarmiento is chasing illusions.

[17] Looking at these provisions as a whole, the Minister is unrestricted in assessing as he did in this case. To put the interpretation on subsection 26.1(4) that Mr. Sarmiento seeks, would be to completely fetter the Minister's authority; indeed, it would render section 27.3 useless (a result that could not have been intended by the legislators), as it would allow the Minister to assess but with no ability to hold that non-payment was not in accordance with the *Act*. Excuse the triple negative but the result is nothing to assess. I grant that the wording of these provisions is not a clarion of clarity, but they must be interpreted to make some sense. And the sense I make of them is that the lack of a ruling request in no way handcuffs the Minister. This interpretation is supported further by subsection 26.1(2) of the *CPP* which allows the

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[3] R.S.C. 1985, c. C-8, as amended.

[4] 1996, c. C.23, as amended.

Minister of Human Resources and Development to request a ruling at any time; all to say the Government can always overcome Mr. Sarmiento's hurdle by simply making the request. My view of this matter appears to be borne out by the Federal Court of Appeal's comments in *Care Nursing Agency Ltd.* cited earlier.

[18] The substantive issue, as I indicated in my oral ruling, is whether the workers were in pensionable and insurable employment. There is considerable jurisprudence on this issue, starting with *Wiebe Door Services Ltd. v. Minister of National Revenue*,[5] tweaked by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[6] and further refined by the Federal Court of Appeal in more recent cases such as *Royal Winnipeg Ballet v. Minister of National Revenue.*[7]

[19] In *Sagaz*, after reviewing the traditional four factors cited in the *Wiebe Door* decision, the Supreme Court of Canada commented:

> 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.
>
> 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.

[20] In the subsequent decision of the Federal Court of Appeal in *Royal Winnipeg Ballet*, the Federal Court of Appeal addressed the role of intention in grappling with the distinction between employee and independent contractor. The Federal Court of Appeal stated:

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5 [1986] 2 C.T.C. 200 (F.C.A.).

6 [2001] 2 S.C.R. 983.

7 [2008] 1 C.T.C. 220 (F.C.A.).

> 60 …The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.

And further:

> 64 In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[21] It is interesting to note how these more recent comments with respect to intention are being argued at trial. In Mr. Sarmiento's Notice of Appeal he stated:

> 10(b) In ***"Royal Winnipeg Ballet versus MNR" (2006 FCA 87)*** the Federal Court broke away from the traditional judicial thinking. Majority of the judges held that the parties' intentions were paramount in determining whether a worker was engaged as an employee or independent contractor for the purpose of EI and CPP remittance obligations. The traditional "4-in-1" tests of degree of control, ownership of equipment, financial risks of profit or loss and integration were outweighed by the existing agreement on the parties working relationship.
>
> (c) The above FCA decisions have clearly placed due importance on Taxpayer Right to Freedom of Contract.
>
> (d) The Federal Court has ruled in the above decisions that the agreed working relationship between the parties is of paramount importance and outweigh the traditional "4-in-1" tests. Without evidence of "sham" in the stated working relationship, such agreement must be respected in law by third parties. The CRA auditor evidence is based on conjecture and not "sham".

[22] This approach appears to ignore Justice Sharlow's comment in paragraph 61 of *Royal Winnipeg Ballet* where she stated:

> 61 I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered

> in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded.

[23] Starting then with the issue of intention, what evidence do I have of the Appellant's and the workers' intention vis-à-vis the legal relationship they had entered into. Firstly, there is no written agreement to which I can refer. Secondly, there is no oral evidence of any of the third party workers. The only evidence is that of Mr. Zazai, who said that an independent contractor relationship was what the workers wanted. He later clarified that answer by indicating the workers would get more money from him as they would be looking after their own deductions. So this raises the question that often lurks in the weeds – was there an intention to be an independent contractor and all that entails, or was there an intention to simply not have source deductions taken from their pay? How does one truly determine the intention, especially where evidence is presented from just one side of the contract? Are workers really expected to understand all the elements of the employee versus independent contractor relationship, so they can state with absolute certainty that in law they are one or the other? Or, not meaning to be unfair, do workers really intend the result of such a legal relationship, without perhaps a full appreciation of the distinguishing factors? Until the factor of stated intention had been elevated by the Federal Court of Appeal to a factor to be given some considerable weight, I was of the view that intention as to the legal relationship can best be determined by how the parties acted, not simply by what they said was their intention or understanding of the legal relationship.

[24] In this case, the evidence of intention of both sides to create an independent contractor relationship is not strong. I have Mr. Zazai's evidence only, and that evidence itself casts some doubt on whether the intention went to the legal relationship itself or to the desired effect of the legal relationship (i.e., no withholdings). All to say, I shall review the factors in the light of the relatively weak evidence that workers intended to be self-employed. Is this borne out by a review of the following factors: control, ownership of tools equipment, risk of loss, chance of profit, hiring of helpers, degree of responsibility for investment and management.

[25] There are three levels of worker at issue here. First, Mr. Zazai himself had an agreement with his company: this is only an issue in the context of the *Canada Pension Plan*. Second, Mr. Wollis had a contract to drive for the Appellant. Third, Messrs, Riaz and Noori were contracted as helpers to load and unload.

[26] Firstly, with respect to Mr. Zazai himself. The question of employee versus independent contractor is only an issue in the context of the *CPP* legislation as it

pertains to the management fees received by Mr. Zazai. He performed the function of both a driver and the manager of the Appellant. It was indeed his company. It is awkward, at best, to apply the traditional factors when the moving force of the employer is the worker himself. How does the element of control play a role for example? Mr. Zazai gave little evidence of what he did, or how he performed his managerial duties. There was no written agreement. It was up to Mr. Zazai what his company would pay him. There was no discussion of any tools used by Mr. Zazai in delivering his managerial duties. The only element that has any bearing on determining his legal relationship in his company is the chance of profit and risk of loss. While Mr. Zazai could, on behalf of the company, set the management fee, the chance of profit or risk of loss was not at the individual level but at the corporate level. Mr. Zazai's fortunes did not rise or fall based on any individual business he was carrying on: they rose or fell based on the success of the company. Somewhat circuitously that success depends on Mr. Zazai's efforts, but those efforts I find were not expended as an individual in the business of providing management services. They were expended as part of the company's business. I heard no evidence to suggest Mr. Zazai contemplated two businesses being carried on by him, one personally and one through the corporation. He established his company to conduct the business. I find he has not proven he was performing management services as a person in business on his own account.

[27] Turning now to the driver Mr. Wollis, what factors suggest he was in business on his own account?

Control

- he was not under any direct supervision of Mr. Zazai;
- he was a professional driver who knew what to do; and
- he could work for anyone else.

Chance of Profit/Risk of Loss

- by taking other's shifts he could increase his revenue.

[28] What factors suggest Mr. Wollis was an employee of the Appellant?

Control

- he was required to wear a Pizza Pizza uniform;
- he took the shifts assigned by Mr. Zazai;

- Mr. Zazai looked after all expenses such as gas, insurance, etc.; and
- he took instructions from Pizza Pizza.

Chance of Profit/Risk of Loss

- Mr. Zazai set the daily rate: there was no room for increased profit; and
- Mr. Wollis had no expenses or liability exposing him to risk.

Tools/Equipment

- the major piece of equipment, the truck, was leased by the Appellant, not Mr. Wollis.

Responsibility for Investment and Management

- Mr. Wollis had no such responsibility.

[29] While the Supreme Court of Canada was clear that the control factor is always significant, the relevant strength of each factor can vary depending on the nature of the work. Here, I am faced with a truck driver, who, if I accept Mr. Zazai's testimony, wants to be treated as an independent contractor, yet brings to his "truck driving business" no truck: he is not responsible for insurance on the truck, he pays no gas, effectively has no exposure to liability. He shows up for work to drive the Appellant's truck, and he does so in a uniform the Appellant is required by contract with Pizza Pizza to have its drivers wear. I cannot find in these circumstances that some lack of control by the Appellant in supervising how Mr. Wollis might drive the truck outweighs the overall view that Mr. Wollis is not in business on his own account. Had the Appellant been able to prove that Mr. Wollis indeed hired other drivers to drive the Appellant's truck, that may still have been insufficient evidence to tip the balance to an independent contractor relationship. The *Income Tax Act* recognizes in subparagraph 8(1)(i)(ii) that an employee can pay for substitute help and, if such is required by the employment contract, the employee can get a deduction for the payment of salary to the substitute. All to say, in this case, a substitute in and of itself would not be conclusive of an independent contractor relationship.

[30] With respect to the workers who loaded and unloaded the trucks, I heard very little evidence from Mr. Zazai as to their working relationship, other than they received $150 per day and had some flexibility as to who would work for which driver. These workers were manual labourers: no equipment was required, they had

no chance of increasing profits, they ran no risk of loss; they simply showed up when Mr. Zazai or Mr. Wollis had a shift to drive for Pizza Pizza and helped load and unload. Apart from some flexibility in scheduling there were no elements to suggest either of these helpers were in business on their own account.

[31] Weighing factors in the employee versus independent contractor issue is not an exact science. I find it helpful to step back to look at the overall situation, considering all the factors that the jurisprudence suggests we consider. Taking the global approach, my assessment is that these individuals were employees. I have come to the realization, however, that the reason the Courts have grappled with this distinction is because it takes very little to flip from one side to the other. The more evidence the Court can hear about the working relationship the better equipped it is to draw the distinction. Regrettably, the Appellant's agent concentrated more on the technical argument of the interplay between sections in the legislation, rather than exploring in greater detail the nature of the work provided by the workers and the real relationship that existed. The Appellant has been unable to demolish the Government's assumptions which lead to the inescapable conclusion that these workers were employees, notwithstanding an intention not to have withholdings taken from their pay. The appeals are dismissed.

Signed at Ottawa, Canada, this 6th day of November 2008.

"Campbell J. Miller"

C. Miller J.

CITATION:	2008 TCC 606
COURT FILE NO.:	2008-654(EI) and 2008-655(CPP)
STYLE OF CAUSE:	ZAZAI ENTERPRISES INC. AND MINSTER OF NATIONAL REVENUE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 9 and October 23, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT:	November 6, 2008

APPEARANCES:

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Counsel for the Respondent:	Alexandra Humphrey

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