

Docket: 2008-2509(CPP)

BETWEEN:

GILPIN FURNITURE AND  
FUNERAL SERVICE LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on common evidence with the appeal of *Robert Gilpin*  
(2008-2510(CPP)), on February 25, 2009, at London, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant: Ronald Gilpin

Agent for Robert Gilpin: Ronald Gilpin

Counsel for the Respondent: Tanis Halpape

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**JUDGMENT**

The appeal under the *Canada Pension Plan* is allowed and the Minister's decision of July 18, 2008 is vacated in accordance with the Reasons herein.

Signed at Ottawa, Canada, this 9<sup>th</sup> day of April 2009.

"Patrick Boyle"

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Boyle J.

Docket: 2008-2510(CPP)

BETWEEN:

ROBERT GILPIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on common evidence with the appeal of *Gilpin Furniture and Funeral Service Limited* (2008-2509(CPP)), on February 25, 2009, at London, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant: Ronald Gilpin

Agent for Gilpin Furniture and  
Funeral Service Limited: Ronald Gilpin

Counsel for the Respondent: Tanis Halpape

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**JUDGMENT**

The appeal under the *Canada Pension Plan* is allowed and the Minister's decision of July 18, 2008 is vacated in accordance with the Reasons herein.

Signed at Ottawa, Canada, this 9<sup>th</sup> day of April 2009.

"Patrick Boyle"

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Boyle J.

Citation: 2009 TCC 192  
Date: 20090409  
Dockets: 2008-2509(CPP)  
2008-2510(CPP)

BETWEEN:

GILPIN FURNITURE AND  
FUNERAL SERVICE LIMITED,  
ROBERT GILPIN,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

**REASONS FOR JUDGMENT**

(Delivered orally from the Bench on February 25, 2009, in London, Ontario  
and modified for clarity and accuracy.)

**Boyle J.**

[1] The issue in these appeals is whether Gilpin Furniture and Funeral Service Limited and Robert Gilpin were in a relationship of pensionable employment for Canada Pension Plan purposes in 2006 through 2008 in respect of his work in the funeral home business.

[2] Gilpin Furniture and Funeral Service is wholly owned by Ron Gilpin, Robert Gilpin's father. The company operates a furniture business and several funeral homes in small towns in South Western Ontario. In addition, the company owns several parcels of real estate. The company had formerly owned and operated the local ambulance service as well until that was taken over by the county. Robert Gilpin had worked in the ambulance business while the family owned it and is still employed full-time by the county as a paramedic.

[3] Before I go further and while I still have Ron Gilpin's attention, I must make two preliminary remarks: First, you would be very well advised to be paying more attention to your bookkeeping and recordkeeping than you testified to this morning.

You are running a successful series of businesses. You should be paying more attention to the structuring and to the paperwork than you say you are. If not, I really fear you may find yourself in more significant difficulties with the tax system than you are today. If you have not, I would urge you to consider getting good knowledgeable professional help to review what you are doing and advise you how things might be done better to save you at least greater grief and perhaps money.

[4] Second, Mr. Gilpin, I must say that your personal remarks about the Department of Justice lawyer, however well intentioned and positive, have no place in a courtroom and they never did. If I failed to express my concern clearly at the time, I apologize to Ms. Halpape.

[5] Returning to today's CPP issue, the company operates three funeral homes in Forest, Thedford and Grand Bend, Ontario. Ron Gilpin is 65 years old and lives in Grand Bend where he operates the company's funeral home in that town. He also operates a funeral home and furniture business in Thedford. The company's main funeral home is the one in Forest. The evidence is that it is operated on a day to day basis virtually entirely by his son Robert Gilpin with some assistance from his wife.

[6] Ron Gilpin said he did not really do anything with respect to the Forest funeral home and that his son did everything, including ordering the caskets and maintaining the supplies, marketing the Forest business to the local community, as well as picking up bodies, cleaning and embalming corpses, et cetera. The phone for the funeral home in Forest is in Robert's house. Robert decided what expenses should be incurred and these were paid for by the company.

[7] Robert was a full-time paramedic. While seemingly successful, these are small town funeral homes. The Forest business had to be worked around Robert's paramedic employment schedule. There were other employees of the company who took care of things in his absence. With respect to the Forest funeral home, those employees were under Robert's direction.

[8] Robert Gilpin was paid \$2,000 per month by the company to operate the Forest funeral home. There was no written agreement, there were no set hours, no maximum hours, no overtime, no vacation pay, and seemingly, no obligation to help out in the company's other funeral homes or its furniture business if things were slow in Forest. The minimum hours per week were the 15 required by Ontario law to maintain his funeral director's licence.

[9] Business levels at the Forest funeral home obviously depended upon and fluctuated with the number of local deaths and with Robert Gilpin's success or lack thereof in marketing the Gilpin goodwill to the elderly and to surviving family members within his community.

[10] Robert had worked in this way for a long number of years. For the years 2003 through 2005, the company had withheld taxes and CPP and had issued T4s to Robert. Ron Gilpin explained that was intended only to ensure Robert had the correct information to pay his taxes and that it has now become apparent he or his wife had used the wrong form and taken the wrong approach.

[11] Ron Gilpin testified that he and his son had both intended for the relationship to be one of independent contractor, not of employment. Robert had a well paying full-time employment and had his CPP and presumably EI coverage fully in place and paid for through that job.

[12] There is no written agreement governing this relationship. Ron Gilpin testified he viewed their relationship as something like a partnership where his son was responsible for the Forest funeral home. Robert Gilpin was not present to testify. I was not asked to draw any adverse inference from his absence.

[13] The issue of employee versus independent contractor for purposes of the definition of pensionable employment is to be resolved by determining whether the individual is truly operating a business on his own account. This is the question set out by the British court in its 1968 *Market Investigations, Ltd. v. Minister of Social Security* decision, [1968] 3 All E.R. 732 (Q.B.D.), approved by our Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, and adopted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. This question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines, including: (1), the intent of the parties; (2), control over the work; (3), ownership of tools; (4), chance of profit and risk of loss; and (5), what has been referred to as the business integration, association or entrepreneur criteria.

[14] More recent decisions of the Federal Court of Appeal highlight the particular importance of the parties' intentions and the control over the work considerations in such determinations. These Federal Court of Appeal cases are *Royal Winnipeg Ballet v. Canada*, 2006 FCA 87, [2007] 1 F.C.R. 35, *Combined Insurance Co. of America v. Canada*, 2007 FCA 60, [2007] F.C.J. No. 124 (QL), and *City Water International Inc. v. Canada*, 2006 FCA 350, [2006] F.C.J. No. 1653 (QL). Helpful decisions of

the Tax Court on this issue can be found in *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada*, 2006 TCC 534, [2006] T.C.J. No. 570 (QL), which discusses *Royal Winnipeg Ballet* and the former Chief Justice's reasons in *Lang v. Canada*, 2007 TCC 547, 2007 D.T.C. 1754.

### I. The intention of the parties

[15] I accept Mr. Ron Gilpin's testimony that both he and his son intended the relationship to be that of contractor in the years in question. He has provided a credible explanation for the T4s having been issued in some earlier years than those under appeal. In argument, Crown counsel first conceded that the father and son's intentions were not to be employer and employee. However, she later reverted to the position that the evidence of intention was not entirely clear and could be described as grey. I agree that it is not a case of black and white evidence on this point, but I find on a balance of probabilities that the parties intended the relationship to be a contract for services, independent contractor, not a contract of service, employment, in the years in question.

[16] I was not told of any provincial regulatory or other reason that would preclude a licensed funeral director working as an independent contractor and not an employee, nor do I find that the parties did anything necessarily inconsistent with their relationship being that of independent contractor.

### II. Control of the work done by Robert Gilpin

[17] The importance of the control of the work consideration has been described by my colleague, Justice Webb, in several decisions, as such that unless the application of it and the other *Wiebe Door* considerations to the Gilpins' particular facts more strongly indicate an employment relationship than in the case of *Royal Winnipeg Ballet*, the Gilpins, intending to have an independent contractor relationship in the years in question, did have one.

[18] In this case, all of Robert Gilpin's work for the company was in respect of the Forest funeral home. Robert was himself in complete charge of the day-to-day operations of that location. He was responsible for himself and for the success of the Forest home, which was the company's principal funeral home. It appears he marketed it in the community as and when he wished. He met with potential customers and responded to inquiries, agreed to or declined potential new business, set fees and entered into contracts with the customers. He controlled when and how

much he chose to work. It all had to be worked around his personal schedule as an employed paramedic/ambulance personnel for the local government.

[19] The evidence in this case is clear that the amount of control that the company had over the worker was less than the amount of control that the Royal Winnipeg Ballet had over its dancers as set out in the *Royal Winnipeg Ballet* court decision.

[20] Robert Gilpin operated the Forest funeral home with almost complete autonomy on a day-to-day basis. My consideration of the extent of control over the work inclines in favour of independent contractor status, not of an employment relationship.

### III. Ownership of tools of the trade

[21] In this case all the equipment and supplies needed by Robert Gilpin to provide the services were provided by the company. While they were purchased by Robert, they were paid for by the company. I find the consideration of ownership of tools of the trade is entirely consistent with an employment relationship. However, that is not to say it is necessarily inconsistent with an independent contractor relationship.

### IV. Chance of profit and risk of loss

[22] In this case, Mr. Robert Gilpin was always paid the same \$2,000 per month. Against that he appears to have incurred little, if any, expenses. This fact could be consistent with either employment or independent contractor status. The Gilpins' particular circumstances appear to be more a reflection of their non-arm's length relationship as father and son in a family-owned business than a helpful indicator pointing towards or away from a contract of service or contract for services. I therefore do not regard it as relevant or helpful in this case.

### V. Conclusion

[23] In these circumstances, I find Robert Gilpin was not in pensionable employment with Gilpin Furniture and Funeral Service in providing his funeral director and funeral home management services to that company. Each of the intent and control considerations leans in favour of independent contractor status. Independent contractor status was not prohibited, nor did the parties do anything inconsistent with the relationship being the desired independent contractor relationship.

[24] For these reasons, I will be allowing these appeals and vacating the Minister's decisions.

Signed at Ottawa, Canada, this 9<sup>th</sup> day of April 2009.

"Patrick Boyle"

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Boyle J.



CITATION: 2009 TCC 192

COURT FILE NOS.: 2008-2509(CPP), 2008-2510(CPP)

STYLE OF CAUSE: GILPIN FURNITURE AND FUNERAL SERVICE LIMITED v. HER MAJESTY THE QUEEN, ROBERT GILPIN v. HER MAJESTY THE QUEEN

PLACE OF HEARING: London, Ontario

DATE OF HEARING: February 25, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: April 9, 2009

APPEARANCES:

Agent Gilpin Furniture and Funeral Service Limited:	Ronald Gilpin
Agent for Robert Gilpin:	Ronald Gilpin
Counsel for the Respondent:	Tanis Halpape

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Ottawa, Canada