Citation: 2008 TCC 687
2008 TCC 688

Docket: 2007-4469(CPP);
2007-4468(EI)

BETWEEN:

1517719 ONTARIO LTD. O/A EXPERIENCE WORKS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

CERTIFICATION OF TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Toronto, Ontario, on October 27, 2008, be filed.

"N. Weisman"

Weisman D.J.

Signed in Toronto, Ontario, this 9th day of January 2009.

Court File Nos. 2007-4469(CPP)
2007-4468(EI)

TAX COURT OF CANADA

IN RE: The Canada Pension Plan Act
and The Employment Insurance Act

BETWEEN:

1517719 ONTARIO LTD. OPERATING AS EXPERIENCE WORKS

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent

* * * * *

DECISION WITH REASONS

HEARD BEFORE JUSTICE WEISMAN
at the Courts Administration Service, 180 Queen Street West,
Toronto, Ontario
on Monday, October 27th, 2008 at 9:42 a.m.

* * * * *

APPEARANCES:

Mr. Davorin Jurovicki — for the Appellant

Ms. Samantha Hurst — for the Respondent

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1 Toronto, Ontario
2 --- Upon commencing the Decision with Reasons on
3 Monday, October 27th, 2008 at 3:25 p.m.
4 JUSTICE WEISMAN: I have heard
5 appeals against decisions by the respondent Minister
6 of National Revenue that the Appellant is responsible
7 for Employment Insurance premiums and *Canada Pension*
8 *Plan* contributions for a number of workers listed in
9 Schedule B, and I think I can now give you the
10 number; yes. It looks like we are down to 54, there
11 being six people who are incorporated. So we are now
12 talking about 54 workers.
13 For clarity's sake, of the people
14 listed in Schedule B of the Minister's Reply, the
15 appeal has been withdrawn with reference to four,
16 being Peter Bandi, David Mick, Surjit Purewal and
17 Melissa Schofield; and conversely, the appeals have
18 been allowed on consent of the Minister with
19 reference to Renato Chiappe, Paul Wilfred Gascoigne,
20 Jeyabalan Gunasingam, Kamal Hamzic, Anton Milanov,
21 and Mark Scanion. That brings me to 54.
22 For the record, notwithstanding the
23 fact that it came out rather late in the trial that
24 all these workers are not exactly equal because some
25 were paid on an hourly basis if they work in the

1 city, and others were paid on a mileage basis because
2 they were on the highway, and some have expenses that
3 others do not have, all counsel and representatives
4 have agreed that I am to treat them equally on the
5 evidence I have heard.
6 The Minister, in making his
7 assessments, relied on Regulation 6(g) under the
8 *Employment Insurance Act* and Regulation 34(1) under
9 the *Canada Pension Plan*. Starting with reference to
10 the *Employment Insurance Act* and whether these
11 appeals should be allowed or dismissed with reference
12 to that, because there are quite different
13 considerations between the *Act* and the *Plan*, we have
14 the first issue as to whether or not the *Act* in 6(g)
15 applies to independent contractors. That is
16 important, because many appellants assume that
17 independent contractors are free of employer
18 contributions and only employees have to be honoured
19 with a payer's portion.
20 But there is jurisprudence that is
21 quite clear, and it is adverted to by Counsel for the
22 Minister, a case called *Sheridan v. M.N.R.*, which is
23 cited at [1985] F.C.J. No. 230 in the Federal Court
24 of Appeal. In construing the predecessor section to
25 section 6(g), which is 12(g), which has identical

1 wording, it found that nurses placed by an appellant
2 agency in employment in hospitals which were its
3 clients, were in insurable employment, even though
4 they had no contract of service either with the
5 agency or with the hospital.
6 In *OLTCPI Inc. v. M.N.R.*,
7 [2008] T.C.J. No. 359, I said I could see no material
8 difference between nurses and dieticians, and in the
9 case before me, I can see no material difference
10 between nurses and these truck drivers.
11 The important issues in order to
12 decide whether the Appellant is responsible for
13 employment insurance premiums, is whether or not it
14 fits into 6(g) of the Regulations, and that requires
15 four things: that it be a placement agency, and it
16 was clearly admitted by Mr. Murphy that, yes, the
17 Appellant is an employment agency.
18 Next, there has to be a placement of
19 workers by the agency with its clients, and that
20 again was admitted by the Appellant.
21 The third requirement is that these
22 workers be placed under the direction and control of
23 the client of the agency. That takes a little
24 discussion, so I will dispose of the fourth one
25 before I go back to the third one.

1 There has to be remuneration by the
2 agency. In this case, it is admitted that it was the
3 agency who remunerated these drivers, and then the
4 money, with a mark-up, was billed back to the client.
5 As far as direction and control is
6 concerned, I have to differentiate between what
7 happens before the worker accepts the assignment,
8 from the situation where the assignment is not
9 accepted at all. I raise that because in this case
10 the evidence is clear that both types of worker had
11 this freedom to accept or reject assignments, in town
12 or out.
13 When you come to a placement agency,
14 the *Acts* talk about what happens once the worker is
15 placed, which presupposes that they accepted the
16 placement. So, in all these cases in which the
17 placements were accepted and the trucks were driven,
18 the question is: Did the client have direction and
19 control of these people who were placed with them and
20 who accepted the placement? The evidence that I have
21 heard indicates that there was direction and
22 control. These drivers had to take a direct route to
23 their destination, and if they wasted gas, they were
24 responsible at their own expense for replacing it.
25 They were told where and what to deliver.

1 The client owned the truck. This is
2 relevant not only to who owns the tools, but the
3 jurisprudence seems to indicate it is a matter of
4 control, because if the client owns the truck, then
5 the client has the right as the owner to say how that
6 truck is to be used. It is a little different if the
7 worker owns the truck. So the fact that the client
8 of the agency, the Appellant, owned the truck goes to
9 control and fortifies the conclusion that there was
10 direction and control.
11 To summarize, there are four
12 requirements under Regulation 6(g) of the *Employment*
13 *Insurance Act*. All four have been satisfied by the
14 Minister that indeed these truck drivers retained by
15 the Appellant, even though they may be independent
16 contractors, are brought into the scheme of the
17 *Employment Insurance Act* by Regulation 6(g), and
18 therefore with reference to the 54 workers, I find
19 that the appeal has to be dismissed.
20 Let us see if it makes any
21 difference under the *Canada Pension Plan*. There is a
22 difference, and I can read what Regulation 34(1)
23 says. It is a little lengthy:
24 "Where any individual is
25 placed by a placement or

1 employment agency in
2 employment with or for
3 performance of services for a
4 client of the agency and the
5 terms or conditions on which
6 the employment or services are
7 performed and the remuneration
8 thereof is paid constitute a
9 contract of service or are
10 analogous to a contract to a
11 contract of service, the
12 employment or performance of
13 services is included in
14 pensionable employment and the
15 agency or the client,
16 whichever pays the
17 remuneration to the
18 individual, shall, for the
19 purposes of maintaining
20 records and filing returns and
21 paying, deducting and
22 remitting contributions
23 payable by and in respect of
24 the individual under the Act
25 and these Regulations, be

deemed to be the employer of the individual." (as read)

In other words, my function is to review the evidence and see if the terms or conditions under which these truck drivers were working constituted a contract or service or were analogous thereto.

In order to resolve this question, I must examine the total relationship of the parties and the combined force of the whole scheme of operations, and to this end, the evidence has to be subjected to the four-in-one test laid down as guidelines by Lord Wright, in *Montreal City v. Montreal Locomotive Works Ltd. et al.*, and that is cited at [1947] 1 D.L.R. 161, and adopted by Justice MacGuigan in *Wiebe Door Services v. M.N.R.*, which is cited at (1986), 87 DTC 5025 in the Federal Court of Appeal.

The four guidelines are the payer's control over the worker; whether the worker or the payer owns the tools required to fulfill the worker's function; the worker's chance of profit; and risk of loss in his or her dealings with the payer.

Starting with the element of control. In analyzing this case as it pertains to

1 the Regulations under the *Employment Insurance Act*, I
2 found that there was clearly direction and control
3 and it is no different here, under the *Plan*, which
4 indicates that the truck drivers were employees.
5 As far as the tools are concerned, I
6 note that the main tool, the truck, was provided by
7 the client of the Appellant, and not the Appellant
8 itself. But that mainly goes to control, as I have
9 already said, because he who owns the truck has the
10 right to control how it is to be used. It was argued
11 today by the Minister that this truck was such an
12 important tool that that would weigh heavily in
13 favour of, again, these people being employees.
14 The problem is that there is a case
15 called *Precision Gutters Ltd. v. M.N.R.* in the
16 Federal Court of Appeal, and *Precision Gutters* is
17 cited at [2002] F.C.J. No. 771, and it is a case
18 where the company was making eavestroughing, and the
19 installers had their usual hammers, or whatever, but
20 a very large, very expensive machine that took raw
21 aluminum and formed it into eavestroughs and
22 downspouts, that was owned and provided by the
23 payer. The Court of Appeal says:
24 "It has been held that if the
25 worker owns the tools of the

1 trade which it is reasonable
2 for him to own, this test will
3 point to the conclusion that
4 the individual is an
5 independent contractor even
6 though the alleged employer
7 provides special tools for the
8 particular business." (as
9 read)
10 I think that is exactly what we are
11 talking about. In this case, I have evidence that
12 there were the usual tools provided by the truck
13 driver, such as his aids to navigation, maps and GPS,
14 safety goggles, safety boots, hard hats and gloves.
15 So I think this fits, as I said, into *Precision*.
16 We have here workers who are
17 providing the usual tools required, and that tends to
18 point to their being independent contractors. So
19 control points to their being employees; tools points
20 to their being independent contractors.
21 Now we get to the chance of profit.
22 We have workers working in the city at $17 an hour,
23 and we have workers driving on the highways at some
24 undisclosed sum per mile. I note, first of all,
25 these rates were not negotiated, which is something

1 that independent contractors normally do. They were
2 set by the Appellant. That was the testimony of the
3 president. That non-negotiation of rates tends to
4 indicate that the person is an employee, but that is
5 not the end of the chance of profit story, because
6 all these people, wherever they worked, in town or
7 out, did not have to work exclusively for the
8 Appellant; they were free to go where they could get
9 the best money. And this, in fact, is why the
10 Appellant pays 70 per cent of the benefit plans, as
11 an incentive to have these people stay loyal to the
12 Appellant.
13 My conclusion from that is that both
14 categories of worker had an opportunity to profit
15 from sound management. They could choose to go
16 wherever they could get the highest rate of return.
17 In the one case of Amir Kilic, the evidence is that
18 he only had 20 per cent of his income from the
19 Appellant. In his case, it was very clear that he
20 could profit by sound management. Therefore, on
21 balance, even though there is that one factor that
22 tends to make it look like these people could be
23 employees, on balance the chance of profit factor
24 indicates that they are independent contractors.
25 Now we get to the risk of loss.

1 This is the main difference, if any, between people
2 who work per hour in the city and those who work per
3 mile on the highway, in that the expenses are
4 different and therefore it may make a difference in
5 the risk of loss. There were these expenses the
6 people on the highway incurred, navigational aids,
7 maps and GPS, safety goggles, boots and hard hats and
8 gloves, and out-of-town expenses for food and
9 accommodation.
10 I note that the people in the city
11 may need some sort of a city map. I doubt that a GPS
12 is as necessary in the city as it is on the highway,
13 but nevertheless, I guess this city is big enough
14 that a GPS would not be a completely useless
15 instrument. So I find that the expenses are
16 comparable, except for the out-of-town expenses for
17 food and lodging incurred by those who are on the
18 highways. Also, the drivers in and out were
19 responsible for minor damages to the truck and the
20 cost of wasted fuel if they took the wrong route and
21 otherwise got lost.
22 But the evidence did not satisfy me
23 that these expenses were significant. There is a
24 difference between fixed and variable expenses, as
25 the accountants here well know, and if one has fixed

1 expenses, they run on whether or not the person is
2 working. The variable expenses are only incurred
3 when one is on the job. The only fixed expenses that
4 I see were these pieces of safety equipment, which
5 did not add up to a lot of money. The hotels and
6 food were only incurred if they were on the job on
7 the highway and earning money. The number of times
8 that there was minor damages to trucks, I did not
9 hear evidence that that was a significant risk of
10 loss.
11 The other thing that was relevant
12 to me is that if one has the freedom to decline jobs,
13 that surely cuts down their risk of loss, because
14 they can simply turn down those jobs that did not
15 sound like they were attractive because there was a
16 long period out of town, and therefore a lot of
17 hotels and a lot of meals. So I did not find that
18 there was a significant risk of loss with either
19 category of worker, and therefore the risk of loss
20 factor, in my view, indicated that these workers were
21 employees. Of course, the hourly workers had even
22 less expenses and therefore even less risk of loss.
23 I want to advert briefly to this
24 right to refuse assignments, which seems to be
25 getting increasing attention and importance in the

1 jurisprudence. If one has the right to refuse an
2 assignment, the law seems to be that that indicates
3 independence, as opposed to subordination and control
4 which indicates that the person is an independent
5 contractor. And, in addition, it goes to profit and
6 loss. Again I would refer you to *Precision Gutters*,
7 where the court said:

8 "In my view, the ability to
9 negotiate the terms of a
10 contract entails a chance of
11 profit and risk of loss in the
12 same way that allowing an
13 individual the right to accept
14 or decline to take a job
15 entails a chance of profit and
16 risk of loss." (as read)

17 That is the Federal Court of Appeal,
18 setting down the significance of one's right to turn
19 down a job; it goes not only to control, but to
20 profit and loss.

21 That is the usual case, but the case
22 before me is a little different, and I have already
23 talked about this, because we are not dealing with
24 people who accept or turn down jobs. We are talking
25 about people who have already accepted a placement,

1 and so they are a little different. If that is not
2 clear, I can hope to make it clearer.
3 The Court of Appeal is mainly
4 talking about people who, when they are offered a
5 job, either take it or do not. But here we have
6 people who have been placed by a placement agency,
7 and they have accepted that placement, which is what
8 I was saying earlier, and in my view that is a little
9 different.
10 Under both Regulations 34(1) and
11 6(g) there is an assumption that the placement has
12 been accepted, and once accepted, the question is
13 whether the worker is under the direction and control
14 of the client. Here, except for those factors that I
15 have talked about, the right to refuse a project will
16 mitigate expenses, but when it comes to the right to
17 refuse projects generally, it is excluded from this
18 analysis. It does not fit into the same category as
19 *Precision Gutters*, because as I have said more than
20 once, the project has already been accepted when
21 someone accepts a placement by a placement agency.
22 Now we are in a position where the
23 control factor indicates that these people were
24 employees, the tools factor that they were
25 independent contractors, the chance of profit that

1 they are independent contractors, and the risk of
2 loss that they are employees. There are two on one
3 side and two on the other.
4 Which brings us to *The Royal*
5 *Winnipeg Ballet v. M.N.R.*, [2006] F.C.J. No. 339 in
6 the Federal Court of Appeal. The Federal Court of
7 Appeal in *Royal Winnipeg Ballet* gives me direction as
8 to what I am to do in these circumstances. As I
9 indicated in *Logitek Technology Ltd. v. M.N.R.*,
10 [2008] T.C.J. No. 309, while the common intention of
11 the parties that a worker be an independent
12 contractor in their working relationship is not
13 determinative of its legal nature, *Royal Winnipeg*
14 *Ballet* offers the following guidance as to its
15 relevance. It is paragraph 81 of *Royal Winnipeg*
16 *Ballet*:
17 "… what the Tax Court judge
18 should have done was to take
19 note of the uncontradicted
20 evidence of the parties'
21 common understanding that the
22 workers should be independent
23 contractors and then consider,
24 based on the *Wiebe Door*
25 factors, whether that

1 intention was fulfilled."
2 (as read)
3 In this case, the *Wiebe Door* factors
4 are not determinative, and we have cases such as
5 *Wolf v. Canada* that offer guidance that the intention
6 of the parties takes on greater significance when the
7 four-in-one or *Wiebe Door* factors do not produce
8 conclusive results. *Wolf v. Canada*, by the way, is
9 [2002] 4 F.C. 396 in the Federal Court of Appeal.
10 Here, we have very clear evidence
11 that the common intention of the parties is that
12 these people be independent contractors, which
13 resolves the issue, because the *Wiebe Door* factors
14 are equivocal.
15 That leads to the conclusion that I
16 have to allow the appeals under the *Canada Pension*
17 *Plan*, that the terms or conditions under which these
18 workers, both within and without the city, who were
19 working were not analogous to a contract of service.
20 Finally, I need to address myself to
21 the assumptions in the Minister's Reply in the Notice
22 of Appeal. They present difficulties which I have
23 already alluded to, but quite often -- and to a
24 certain extent in this case, which is why I mention
25 it -- the assumptions may be true, but they are not

1 probative of anything germane.
2 For instance, here we have
3 assumption 9(d), that Mr. Murphy is the sole
4 shareholder. That is surely nothing that can be
5 rebutted by the Appellant, and I have seen many
6 replies -- and this one fits a good deal into the
7 category of replies where you cannot rebut any of the
8 assumptions, because they are true; but they are not
9 probative of the four *Wiebe Door* factors or they do
10 not go into whether or not this employment is
11 analogous, and that creates problems because the
12 Minister can say, the assumptions have not been
13 demolished. I am afraid that is not good enough.
14 In this case, I think the only
15 assumption that was really demolished was 9(n),
16 having to do with the expenses, whether the workers
17 have expenses. All the rest of them, even though
18 they were not demolished, they were not conclusive.
19 So I would think that I have heard sufficient new
20 facts, or the facts were not very sufficiently
21 assessed or correctly assessed by the Minister when
22 he was dealing with known facts with reference to the
23 *Canada Pension Plan*, that I conclude that his
24 decision was objectively unreasonable, whereas under
25 the *Employment Insurance Act* I found it objectively

1 reasonable.

2 That is all I have to say.

3 I appreciate your assistance. We

4 have a split result, which is quite unusual.

5 --- Whereupon the excerpt concludes.

I HEREBY CERTIFY THAT I have, to the best

of my skills and abilities,

accurately recorded and transcribed therefrom,

the foregoing proceeding.

Catherine Keenan, Computer-Aided Transcription

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APPEARANCES:

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Counsel for the Respondent:	Samantha Hurst

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