Dockets: 2010-2343(EI)
2010-2344(CPP)

BETWEEN:

BRUCE A. THOMPSON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence on November 26, 2010,
at Halifax, Nova Scotia.
Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant:	The Appellant himself and Sandy Findlay
Counsel for the Respondent:	Gregory King

JUDGMENT

The appeals from the decisions of the Minister of National Revenue (**Minister**), ruling that Neil Collins, Daniel Scott and James Richard (collectively the "workers") were all engaged in insurable and pensionable employment within the meaning of the *Employment Insurance Act* and the *Canada Pension Plan* (CPP) with V1 Labs Ltd. from June 2, 2008 to August 15, 2008, and that Neil Collins from August 16, 2008 to March 6, 2009 and Daniel Scott and James Richard from August 16, 2008 to March 16, 2009 were engaged in such employment with V1 Labs Inc. and that, pursuant to subsection 10(1) of the *Insurable Earnings and Collection of Premiums Regulations* and subsection 8.1(1) of the CPP Regulations, the appellant was the deemed employer of the workers when they were thus employed by V1 Labs Inc., are dismissed, and the decisions of the Minister are confirmed.

Signed at Montreal, Quebec, this 9th day of February 2011.

"Lucie Lamarre"

Lamarre J.

Citation: 2011 TCC 81
Date: 20110209
Docket: 2010-2343(EI)

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REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from rulings by the Minister of National Revenue (**Minister**) on April 15, 2010 and April 16, 2010, determining that Neil Collins, Daniel Scott and James Richard (collectively the "**Workers**") were engaged in

insurable and pensionable employment within the meaning of the *Employment Insurance Act* (**EI Act**) and the *Canada Pension Plan* (**CPP**) with V1 Labs Ltd. (a corporation registered in Nova Scotia, Canada) for the period from June 2, 2008 to August 15, 2008[1], and were employed by V1 Labs Inc. (a corporation registered in Delaware, USA) under a contract of service within the meaning of the EI Act and the CPP for the period from August 16, 2008 to March 6, 2009 (in the case of Neil Collins) and from August 16, 2008 to March 16, 2009 (in the case of the other two workers, Daniel Scott and James Richard). The appellant owned 22.34% of the shares of V1 Labs Ltd. and 50% of the shares of V1 Labs Inc. and held the position of chief operating officer with both corporations. The Minister determined that, pursuant to subsection 10(1) of the *Insurable Earnings and Collection of Premiums Regulations* (**IECPR**) and subsection 8.1(1) of Part 1 (Collection and Payment of Employees' and Employers' Contributions) of the *Canada Pension Plan Regulations* (**CPP Regs**), the appellant was the deemed employer of the workers when they were employed by V1 Labs Inc.

Statutory provisions

Employment Insurance Act

Insurable Employment

Types of insurable employment

5. (1) Subject to subsection (2), insurable employment is

(*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

Excluded employment

(2) Insurable employment does not include

. . .

(*e*) employment in Canada by an international organization;

[1] In the case of Neil Collins and Daniel Scott, the Minister ruled on the period from January 1, 2008 to August 15, 2008, but the issue before me concerns only the period from June 2, 2008 to August 15, 2008, when they were with V1 Labs Ltd.

Defining certain expressions

(7) The Commission may, with the approval of the Governor in Council, make regulations defining, for the purposes of this section, the expressions "casual nature", "government", in relation to a government of a country other than Canada or of a political subdivision of the other country, and "international organization".

Employment Insurance Regulations

Interpretation

1. . . .

(2) For the purposes of these Regulations and section 5 of the Act, "international organization" means

(*a*) any specialized agency of which Canada is a member that is brought into relationship with the United Nations in accordance with article 63 of the *Charter of the United Nations*; and

(*b*) any international organization of which Canada is a member, the primary purpose of which is the maintenance of international peace or the economic or social well-being of a community of nations.

Insurable Earnings and Collection of Premiums Regulations

10. (1) Where, in any case not coming within any other provision of these Regulations, an insured person works

(*a*) under the general control or direct supervision of, or is paid by, a person other than the insured person's actual employer, or

(*b*) with the concurrence of a person other than the insured person's actual employer, on premises or property with respect to which that other person has any rights or privileges under a licence, permit or agreement,

that other person shall, for the purposes of maintaining records, calculating the insurable earnings of the insured person and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the insured person in addition to the actual employer.

[Emphasis added.]

Canada Pension Plan

Definitions

2. (1) In this Act,

"employer" means a person liable to pay salary, wages or other remuneration for services performed in employment, and in relation to an officer includes the person from whom the officer receives his remuneration;

"employment" means the performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office;

Pensionable employment

6. (1) Pensionable employment is

(*a*) employment in Canada that is not excepted employment;

Excepted employment

(2) Excepted employment is

. . .

(*j*) employment in Canada by the government of a country other than Canada or by an international organization;

Canada Pension Plan Regulations

Interpretation

2. (2) For the purposes of the Act and these Regulations,

. . .

"international organization" means

(*a*) any specialized agency of which Canada is a member that is brought into relationship with the United Nations in accordance with Article 63 of the Charter of the United Nations, and

(*b*) any international organization of which Canada is a member, the primary purpose of which is the maintenance of international peace or the economic or social well-being of a community of nations;

8.1 (1) Every person by whom the remuneration of an employee for services performed in pensionable employment is paid either wholly or in part is, for the purpose of calculating the employee's contributory salary and wages, maintaining records and filing returns, and paying, deducting and remitting the contributions payable thereon under the Act and these Regulations, deemed to be an employer of that employee in addition to the actual employer of that employee.

[Emphasis added.]

Facts

[2] It is not disputed that the workers worked in insurable employment for V1 Labs Ltd. from April 2007 to May 30, 2008. The appellant testified to explain that V1 Labs Ltd. was a corporation doing business in Halifax in the development of software. The workers were all specialists in that field. They were first hired in 2006 as independent contractors, but in April 2007 their status changed and they became employees, a status to which benefits (such as health insurance, paid vacation and paid sick days) were attached.

[3] At the end of May 2008, V1 Labs Ltd. found itself in a precarious financial situation and the appellant advised the workers that they would be temporarily laid off. Each received on June 1, 2008, a Record of Employment stating that it was a temporary layoff and that the date of recall was unknown (Exhibit R-1, Tabs 13, 24 and 31).

[4] However, on June 2, 2008, all three workers were called back to work. According to the appellant, they went back voluntarily with the understanding that they were now working under contractual agreements with V1 Labs Inc. and that they should have no expectation of being paid until V1 Labs Ltd. was sold. The appellant testified that each worker had shares in V1 Labs Ltd. as they had been offered stock options on January 1, 2007, and they had accepted the offer (Exhibit A-1, Documents 14, 15 and 16).

[5] In fact, the workers continued working from V1 Labs Ltd.'s premises in Halifax and were paid by cheques issued by V1 Labs Ltd. on July 3, 2008 and August 18, 2008 (Exhibit A-1, Document 21). According to the workers, these two payments covered their remuneration for the work they had done up to those dates. The appellant admitted in cross-examination that the amounts paid by V1 Labs Ltd. on those two dates corresponded to the workers' net pay for four pay periods (Transcript, pp. 54-55). He denied, however, that the workers could have assumed that V1 Labs Ltd. was still withholding and remitting the proper deductions because they knew that there was only a limited amount of funds available (Transcript, p. 55). Nevertheless, it appears that those amounts were included in the T4s issued by V1 Labs Ltd. to the workers for 2008 (an example of this is the T4 issued to Daniel Scott, which covered 16 biweekly pay periods with V1 Labs Ltd., to mid-August 2008, as per Exhibit R-1, Tab 23, and as

acknowledged by the appellant at pages 74 and 75 of the Transcript). The appellant testified that during the period from July to August 2008, V1 Labs Ltd. secured a loan in an effort to try to maintain the ability to sell the business, and some of those funds were given to the workers to cover their living expenses. According to him, they did not perform any services for V1 Labs Ltd. during that time.

[6] From September to November 2008, they allegedly worked for V1 Labs Inc. on a project for a US organization (TV Anywhere) of which the appellant was apparently a shareholder. According to him, the workers agreed to be paid their net salaries but, being independent contractors, they could not assume that source deductions were being made. He said in cross-examination that the workers accepted a pay cut equal in amount to the deductions at source made when they were employees (Transcript, pp. 55-56). At the same time, the appellant admitted that the workers never invoiced V1 Labs Ltd. or V1 Labs Inc. for their services, and that they kept the group health insurance provided by V1 Labs Ltd. (Transcript, pp. 61-62). The appellant also admitted that the structure in place did not change after June 2, 2008: Neil Collins was still acting as supervisor for V1 Labs Ltd. or V1 Labs Inc., assigning duties to the other workers, while Collins himself reported to the company (Transcript, p. 62). With respect to vacation, the workers submitted requests to their supervisors (evidence of that was filed regarding Neil Collins, who sent one request to the appellant directly in July 2008, as per Exhibit R-1, Tab 14, and a second request, on October 6, 2008, to Michael Earle, who was the president and chief executive officer (CEO) of V1 Labs Inc., as per Exhibit R-1, Tab 15). The appellant said that the workers were permitted to hire someone else to help them perform their duties, but acknowledged that it never happened (Transcript, pp. 64-65). The workers all testified that they could not hire anyone (Transcript, pp. 96, 106, 132, 140, 153 and 154). The appellant also testified that the workers would share in the proceeds of sale of the business, pursuant to a verbal agreement (Transcript, p. 68). This was also denied by the workers. Although they were offered stock options in 2007, they never exercised the options and never acquired shares (Transcript, pp. 107, 140, 141, 160, 161 and 170)

[7] The appellant testified that in November 2008 the workers started working under a Product License Agreement signed between an American corporation by the name of NeoNova Network Services Inc. (**NNS**) and V1 Labs Inc. (Exhibit R-1, Tab 2). That agreement, referred to by the appellant, was signed on November 12, 2008. Exhibit A to that agreement provided, among other things, that NNS would pay V1 Labs Inc. an amount of $75,000 USD in software fees,

and operating fees of $1,500 USD to reimburse V1 Labs Inc. for operating expenses. The appellant testified that these operating expenses were rental, heating and electricity costs for the premises previously occupied by V1 Labs Ltd. in Halifax. The agreement also provided that V1 Labs Inc. would provide the services of Neil Collins, who would be paid directly by V1 Labs Inc. NNS agreed to pay the latter a fee of $7,000 CAD for those services which were to be provided for a period of 30 days following delivery of the source code for the V1 Labs Inc. products. After that period, NNS had the authorization of V1 Labs Inc. to "contract for services". It was made clear in that agreement (paragraph 16 m) that V1 Labs Inc. was acting as an independent contractor and that its personnel would not be considered employees or agents of NNS. In connection with the Product License Agreement, NNS asked the workers to sign an Independent Contractor Agreement, and in an addendum thereto, V1 Labs Inc., agreed that the worker would remain its employee. That agreement, dated November 17, 2008, was never signed (Exhibit R-1, Tab 9). In fact, NNS contracted for the services of the workers through V1 Labs Inc. for the period from November 16, 2008 to March 13, 2009. For those services total fees in the amount of $79,585.50 were paid by NNS (Exhibit A-1, Document 18). This amount was based on invoices sent to NNS from V1 Labs Inc. for the workers labor services provided by the workers (Exhibit R-1, Tab 5) and on the rates set by contract, and took into account any workdays missed due to vacation or other things (Exhibit A-1, Document 19).

[8] The appellant testified that the workers were paid regularly, on a biweekly basis, from the moment the Product License Agreement was signed with NNS. NNS would pay V1 Labs Inc., which in turn put the money in the personal bank account of the appellant, who then paid the workers, either by cheque or in cash. Apparently, it was done this manner because that was the easiest way, as V1 Labs Inc. did not have a bank account in Canada and V1 Labs Ltd.’s bank account had been frozen by the Canada Revenue Agency (**CRA**). The appellant said that he agreed to act as a conduit and transfer the money to the workers on the express understanding that they were being treated as independent contractors and that no withholdings were required.

[9] With respect to the assignment of work, the appellant said that the workers reported directly to Mike Earle of V1 Labs Inc. and that, during the project with NNS, they were solely under the direction of Jason MacInnis, Vice-president, Technology Operations, with NNS. It was the appellant’s understanding that requests for vacation were addressed to either Mike Earle or Jason MacInnis, and that the workers were not paid for any time not worked (Transcript, pp. 29-30).

[10] Ms. Gail Leblanc, an accountant, testified for the appellant. It was she who issued the Records of Employment to the workers. She confirmed that the workers were laid off by V1 Labs Ltd. because there would be no future revenue coming in. She also confirmed that the workers returned to the office right after being laid off, because they were shareholders and it was in their interest to work in view of potential future income. She said that up until June 2008 she claimed scientific research and experimental development rebates from the CRA for V1 Labs Ltd., but did not do so after that because the workers were no longer employees. Had she been able to make such a claim for such rebates, she said, it would have been advantageous for the company because it could have thereby recovered 35% of the wages paid to the workers. In re-examination, she acknowledged that V1 Labs Inc., being a US company, would not have been entitled to those rebates even if the workers had been treated as employees (Transcript, p. 88).

[11] Neil Collins testified. He was first hired to write test documentation with respect to software. He then became vice-president responsible for product development and started managing the other employees. He said that prior to becoming an employee he used his own laptop for his work. After he became an employee in April of 2007, he used only equipment provided by V1 Labs Ltd. and never paid any of the company's operating expenses. In addition, source deductions were withheld from his biweekly pay. He also had three weeks of paid vacation, was entitled to paid sick days and could join the company's health plan. His work was supervised by Mike Earle and the appellant, from both of whom he received directives. He worked from Monday to Friday, from 9 a.m. to 5 p.m.

[12] He said that after receiving his Record of Employment he was called back to work by the appellant, and neither the location nor anything else had changed (Transcript, p. 113). Although there were periods when he was not paid, he was nevertheless compensated for all his time at the same rate of remuneration after deductions as before. His understanding was that the EI and CPP deductions were still being made by the employer. His vacation was still paid and he had to make requests for any vacation he took. Sick days also continued to be paid. As he never received any pay stubs from "V1 Labs", it was only when he received his T4 for 2008, which showed only 60% of his full earnings (Exhibit R-1, Tab 12), that he realized something was wrong. He immediately contacted the appellant (Exhibit R-1, Tab 16), who told him that he would look into it. The appellant ultimately advised him that the missing remuneration on the T4 had to be considered remuneration for services provided as contractor. As he was responsible for paying his tax on that remuneration, Mr. Collins e-mailed the

appellant asking to be paid the amount of tax owing (Exhibit R-1, Tab 18). He testified that this e-mail was not intended to show that he was accepting independent contractor status (Transcript, p. 105). He raised the problem with the CRA when he filed his tax return for 2008 (Exhibit R-1, Tab 20); in preparing that return, he estimated his total employment income and the total deductions at source that should have been made for the year 2008 given that the T4 did not reflect the full amounts. As evidence that he never intended to become an independent contractor, he indicated that he refused to sign the independent contractor agreement with NNS, one of the reasons being that he wanted to remain an employee of "V1 Labs" (Transcript, pp. 109-110).

[13] In cross-examination, when confronted with evidence of amounts paid on four occasions by V1 Labs Ltd., or by the appellant directly, in July, August, September and November 2008 (Exhibit A-1, document 21), he acknowledged that the four amounts shown there did not correspond to his full net salary, but stated that "[t]hat can't be correct". He maintained that he "always got paid what was owing to [him] of [his] standard bi-weekly payments. So however they paid it, pay it in cash from an account paid from a personal cheque. [He] always got paid the right amounts" (Transcript, p. 116).

[14] In fact, he stated that he even got a pay raise that year. With respect to the stock options, when the appellant showed Mr. Collins a capitalization table (Exhibit R-1, Tab 1) for V1 Labs Ltd., which showed that 210,000 shares were committed to him, he did not understand and said that it was news to him. The appellant was of the view that Mr. Collins did not have to exercise his option in accordance with the agreement, that the shares automatically vested in him, and further, that Mr. Collins would have profited from the proceeds of the sale of the company. On scrutinizing this capitalization table, it can be seen that it does not say that shares were issued to Mr. Collins. The figures given are for "options to be allocated/committed" and, in Mr. Collins' case, shares were committed but not issued. Further, it is clear from Schedule A to the Notice of Grant of Stock Options and Option Agreement (Exhibit A-1, Document 14), that the exercise of the option had to be in writing, and there is no evidence of such exercise having taken place.

[15] Daniel Scott and James Richard also testified. Their testimony was in line with that of Neil Collins. They reported to Neil Collins and their remuneration was somewhat lower than his. They both thought that from June 2, 2008 they were still working for V1 Labs Ltd., regardless of the source of the work. They did not see any changes after June 2, 2008, apart from the fact that they were not paid

regularly during some periods, a circumstance which they attributed to V1 Labs Ltd.'s financial difficulties. But they confirmed that, in the end, they received their entire net pay, and even had a raise before the end of 2008. It was their understanding that deductions were being made at source by their employer. They never considered themselves as independent contractors. They also said that they never exercised their options to acquire shares of V1 Labs Ltd., the major reason being that they had to pay to acquire those shares and did not have the money to do so.

Analysis

[16] The appellant first raised the point that the decisions made by the Minister were contradictory in that the Minister appeared to have changed horses in mid-stream. With respect, I do not find this to be so. I do not have any difficulty understanding the rulings made by the Minister on April 15, 2010 and April 16, 2010. In the letter dated April 16, 2010 sent to V1 Labs Ltd. (Exhibit A-1, Document 10), it was determined that for the period from January 1, 2008 to August 15, 2008, the workers Neil Collins and Daniel Scott were employed by V1 Labs Ltd., but for the period from August 16, 2008 onward, those workers were not employed by V1 Labs Ltd. In the letter dated April 15, 2010, sent to V1 Labs Inc. (Exhibit A-1, Document 11), it was determined that for the period from August 16, 2008 to March 6, 2009 (in the case of Neil Collins) and to March 16, 2009 (in the case of Daniel Scott), they were "engaged" under a contract of service (meaning employed) by V1 Labs Inc., and Bruce Thompson, the appellant, was deemed to be the employer responsible for deducting, remitting and reporting the applicable contributions and premiums. In the case of the worker James Richard, the court file shows that a letter was sent to Bruce Thompson on April 15, 2010. The letter stated that that worker was "engaged" under a contract of service with V1 Labs Ltd. from June 2, 2008 to August 15, 2008, and with V1 Labs Inc. from August 16, 2008 to March 16, 2009, and that Bruce Thompson, the appellant, was deemed to be the employer responsible for deducting, remitting and reporting the applicable contributions and premiums for the latter period. A separate letter was sent to V1 Labs Ltd. on April 15, 2010, stating that James Richard was employed by V1 Labs Ltd. for the first period but not for the second.

[17] In due course, the appellant personally filed an appeal before this court against all of the aforementioned decisions. Therefore, this court has now to determine whether the workers were employees of V1 Labs Ltd. for the period from June 2, 2008 to August 15, 2008 and of V1 Labs Inc. for the subsequent period, and if so, whether the appellant is the deemed employer for that

subsequent period for the purposes of the deductions at source under the EI Act and the CPP.

[18] First of all, it would appear that all the remuneration received by the workers from V1 Labs Ltd. up until August 15, 2008 was already considered as employment income and included in the T4s issued by V1 Labs Ltd.

[19] In any event, the workers all testified that they came back to work on June 2, 2008 at the request of the appellant. They all denied that they held shares in V1 Labs Ltd. They all said that V1 Labs Ltd. paid them their usual net remuneration until August 15, 2008. This was even admitted by the appellant (Transcript, pp. 54-55 and p. 69). The workers all said that the situation was exactly the same both before and after their Records of Employment were issued. They were working at the same place with equipment supplied by V1 Labs Ltd. and, in the case of James Richard and Daniel Scott, received their directives from Neil Collins; as for Mr. Collins, he received his instructions from the appellant at least until August 2008.

[20] It is my understanding, from the appellant's testimony, that things started to really change in September 2008. For two months, he said, the workers worked for V1 Labs Inc. and did not receive their full net salary. The appellant said that the workers did not report to him. Neil Collins received his directives directly from Mike Earle at V1 Labs Inc., and the other two workers reported to Neil Collins. The appellant was only facilitating the payments to the workers by agreeing to have the funds for paying the operating expenses for V1 Labs Inc., including the workers' net pay, transit through his bank account. He said that he did so on the express condition that the workers would be treated as independent contractors and that he would not have to be responsible for any deductions and remittances to the government. As evidence of that, he relied on the Product License Agreement between NNS and V1 Labs Inc. in which it is clearly stipulated that the latter was to carry out the agreement as an independent contractor (Exhibit R-1, Tab 2, paragraph 16 m). That agreement was entered into in November 2008.

[21] On the other hand, the workers all stated that they never saw any differences. For them, the work was coming from "V1 Labs". They knew that V1 Labs Ltd. was experiencing financial difficulties and this explained why, for a time, they were not being paid regularly. But they all said that they were paid their full net pay for the whole period and that they even got a pay raise at the end of 2008. It was only when they received in 2009 their T4s for the year 2008 that they

noticed that something was wrong. They all said that they thought that “V1 Labs” was their employer and that they thought that the deductions at source were being made.

[22] This is a black or white case. If I accept the appellant’s version, the workers agreed to take the financial risk of working for a reduced salary, even running the risk of not being paid at all. They did not seek to work elsewhere, being devoted to "V1 Labs", and having accepted stock options in 2007, they had a chance of profiting from the proceeds of the sale of V1 Labs Ltd. They worked voluntarily on that basis, with a clear understanding that they had lost their employee status.

[23] Unfortunately for the appellant, his version does not appear to me to be realistic. The evidence did not reveal that the workers had any shares in V1 Labs Ltd. Although Gail Leblanc and the appellant maintained that the workers owned shares, the fact that they were granted stock options in the course of their employment does not automatically make them shareholders, as contended by the appellant. The stock option agreement specifically stated that the acquiring of shares had to be done in writing, and the workers would have had to pay money to acquire shares, which they did not. The capitalization table in Exhibit R-1, Tab 1, does not show that the workers owned issued shares. So, the appellant’s assertion that the workers returned voluntarily, drawn by the chance of profiting from the proceeds of the sale of V1 Labs Ltd., is simply unbelievable. As for the risk of not being paid for work performed or of having to take a reduction in salary, neither actually occurred according to the workers’ testimony. They were all under the impression that they continued under the same benefits plan with their employer. They were aware of their employer’s financial difficulties, but were told by the appellant that V1 Labs Ltd. was securing a loan in order to be able to pay them. Apart from that, nothing had changed. When the work started coming from V1 Labs Inc., on projects either for TV Anywhere or for NNS, the workers received their remuneration directly from the appellant. However, they did not make any distinctions in that regard. In their words, they were working for "V1 Labs".

[24] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, Major J. said at paragraphs 46 and 47:

> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that

> "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . . " (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose. . . . The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> 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.

[25] Taking into account those factors, I believe that the workers kept their employment status with V1 Labs Ltd. until August 15, 2008, and thereafter were employed by V1 Labs Inc. They always received instructions for their work from their immediate supervisor whether their employer was V1 Labs Ltd. or V1 Labs Inc.; they continued to work the same hours and did so at V1 Labs' premises in Halifax; they did not provide their own equipment; they did not hire anyone to help them with their work; they did not have any responsibility for investment or with respect to management of the company. None of this was really challenged by the appellant. Further, I am satisfied that they did not expect to have any opportunity for profit.

[26] They did, however, incur a risk in that their salaries could be put on a hold while the employer was trying to secure funds to pay them and keep the business afloat. Further, there was a dispute as to whether the workers received their full net salary from mid-August 2008 to the beginning of December 2008. All the workers said they did. Neil Collins was firm on that point. The appellant said that there is a discrepancy in that regard, as shown by the cheques issued by him for that period. My recollection is that the appellant admitted that he sometimes paid the workers in cash (Transcript, p. 25, and see the appellant's bank statements showing

significant cash withdrawals, in Exhibit R-1, Tab 6). The existence of this point of controversy, in my view, does nothing to change the workers' status into that of independent contractors. In the first place, I am more inclined to believe the workers. In the second place, not all the factors have the same weight, taking into account the circumstances surrounding the relationship between the parties concerned.

[27] The common intention of the parties may also be considered as determining the existence of a contractual relationship. However, in a case like this one, where the parties present conflicting evidence as to what they intended their legal relationship to be, intent cannot be a factor to be considered (see *Lang v. MNR*, 2007 TCC 547, at par. 33).

[28] All in all, analyzing the factors referred to in *Sagaz* (*supra*), and balancing the evidence presented before me, I conclude that the contractual relationship between the parties points more to employee status than to independent contractor status.

[29] With respect to the employment with V1 Labs Inc., it is clear from subsection 10(1) of the IECPR and subsection 8.1(1) of the CPP Regs that the appellant is the deemed employer of the workers for the purpose of deducting and remitting the contributions and premiums. As a matter of fact, the appellant admitted that he paid the workers through his own bank account to facilitate payment. This alone is sufficient for the appellant to be liable under the above provisions, even though the source of the funds was the actual employer, V1 Labs Inc. As stated by the Federal Court of Appeal in *Canada v. Insurance Corp. of British Columbia*, [2002] FCA 104, at paragraph 8:

> 8 The purpose of the Regulations and the statute which authorizes them is in part to facilitate collection of employment insurance premiums, an activity which is essential to the scheme as it now exists. The Act clearly authorizes the kind of provision which has been adopted by the Governor in Council in section 10 of the Regulations. In examining section 10 one sees that it is to apply *inter alia* where an employed insured person is being "paid by a person other than [his or her] actual employer". In such case that "other person" must maintain records of employment and calculate, deduct, and remit the appropriate premiums. The proposition is simple enough and its purpose clear: premiums are to be deducted at the source where salary or wages are calculated and administered, and where checks or pay-packets are issued. The term "paid" ought to be interpreted in context, and it is not necessary to examine technical sources in order to attribute to it a meaning that would defeat the clear purpose of the section. It would be equally possible, if one were to dwell on abstract legal concepts, to hold that a person can be an "actual employer" only if that

> person is paying the "employee" from his or her own resources and not at the expense of another. But that would also defeat the purpose of the section by precluding its application to any situation where a third party was actually providing and administering the wages or salary.

[30] Finally, the appellant raised a last-minute argument that the employment for an American company was excepted employment pursuant to paragraph 5(2)(*e*) of the EI Act and paragraph 6(2)(*j*) of the CPP because it was for an international organization. This argument cannot stand. The term "international organization" is defined in subsection 1(2) of the *Employment Insurance Regulations* and in subsection 2(1) of the CPP Regs, and V1 Labs Inc. is definitely not an international organization as so defined.

[31] For all these reasons, the appeals are dismissed.

Signed at Montreal, Quebec, this 9th day of February 2011.

"Lucie Lamarre"

Lamarre J.

CITATION:	2011 TCC 81
COURT FILE NOS.:	2010-2343(EI) 2010-2344(CPP)
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APPEARANCES:

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COUNSEL OF RECORD:

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