

Docket: 2010-2075(EI),
2010-2077(CPP)

BETWEEN:

RAPID TRANSIT SYSTEMS 2000 LTD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

STEPHEN BOUTILIER,

Intervenor.

Appeals heard on April 11, 2011, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Agents for the Appellant: Janet Robertson and
Richard Robertson
Counsel for the Respondent: Leslie Ross

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 decision of the Minister of National Revenue on the appeals made to him under section 92 of the *Act* and the determination of the Minister on the application made to him under section 27.1 of the *Plan* are confirmed.

Signed at Ottawa, Canada, this 20th day of April 2011.

"Campbell J. Miller"

C. Miller J.

Citation: 2011 TCC 219
Date: 20110420
Docket: 2010-2075(EI),
2010-2077(CPP)

BETWEEN:

RAPID TRANSIT SYSTEMS 2000 LTD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

STEPHEN BOUTILIER,

Intervenor.

REASONS FOR JUDGMENT

C. Miller J.

[1] Rapid Transit Systems 2000 Ltd (RTS) has appealed the Minister of National Revenue's (the "Minister") ruling that for the period January 2008 to February 2010, Mr. Stephen Boutilier was in insurable and pensionable employment with RTS, as he was under a contract of service and, therefore, an employee. RTS holds the view that Mr. Boutilier was an independent contractor. Mr. Boutilier has entered the fray as an Intervenor.

[2] For four months in 2006 and then again for the period January 2008 to February 2010, Mr. Boutilier acted as a bicycle courier for RTS serving the downtown Toronto core. It is the latter period which is in issue before me.

[3] Mr. Boutilier testified that he agreed to work for RTS through a conversation with Mr. Randy Robertson, the founder of RTS. The initial remuneration was set by Mr. Robertson at \$500 per week. Mr. Boutilier was expected to provide his own bicycle and backpack, while RTS supplied the necessary walkie-talkie. Ms. Janet Robertson, who testified on behalf of RTS, indicated that normally the

couriers were charged \$60 a month for a walkie-talkie, but acknowledged that Mr. Boutilier did not pay any amount. Mr. Boutilier testified that his arrangement with Mr. Robertson was that there would be no charge for the walkie-talkie.

[4] Within a few months, the remuneration was altered by the added requirement of GST. Invoices in 2008 were presented at trial, indicating a new payment of \$550 per week plus GST. There was a meeting with the couriers and management where they were advised by RTS to get a GST number, and also advised of a change of procedure from the bi-weekly invoices to a new lengthier contract. Mr. Boutilier obtained a GST number, believing that he had to do so to keep his position. The new contract, prepared by Mr. Robertson was more in the form of an invoice rather than a contract. It is worth reproducing:

RAPID TRANSIT SYSTEMS 2000 LTD,
ANNUAL SUBCONTRACTOR
INVOICE

NAME: Stephen Boutilier
ADDRESS: 200 White Oaks Court # 1004
Whitby, ON
L1P 1B8
TELEPHONE#: 905-493-2747
BILL TO: Rapid Transit Systems 2000 Ltd.
35 Johnson Street
Thornhill Ontario
L3T 2N9

For services rendered by independent subcontractor for the period of:
February 16, 2009 to August 31, 2009

Total payable G.S.T. included: \$14,950.00
To be paid in 13 equal payments of: \$1,150.00

BROKER#: 054 INVOICE#: 054100

G.S.T.# 681204378

SIGNATURE: "Stephen Boutilier"

It was signed by Mr. Boutilier but not by anyone from RTS.

[5] RTS only had a handful of couriers, and only two of them were bicycle couriers. RTS had just a few clients: Rogers and Dominion Securities were their largest clients.

[6] The family run operation operated as follows. RTS clients would be provided with a rate card and waybills. The rates would be determined based on distance and urgency. There were four categories: emergency, urgent, same day and overnight. Mr. Boutilier would report in to the dispatcher at 8:30 a.m., though Mr. Randy Robertson, Randy and Janet's son, who worked casually in the business, testified that the couriers would report in at any time between 8:30 a.m. and later in the morning. The dispatcher for RTS would receive a request, would contact a courier, the courier would go to the shipper and pick-up the delivery and waybill (occasionally the courier would provide a spare waybill if RTS's customer did not have one), the courier would proceed to make the delivery and then let the dispatcher know he had done so, and also let the dispatcher know his whereabouts. The dispatcher was to be kept aware of the courier's location at all times. The courier could refuse a package if it was too big for the bicycle. Mr. Boutilier said he could think of no other reason for a refusal. RTS suggested a courier could always refuse a package and RTS would simply look for someone else.

[7] Mr. Boutilier described a relatively loose arrangement, but praised RTS as a good, ethical employer. Mr. Boutilier did not feel he could have couriered for anyone else as he needed to be at the ready for the emergency or urgent calls. RTS suggested it was always open to Mr. Boutilier to work for others. He claimed it would be impossible. Similarly, RTS maintained Mr. Boutilier could have found a substitute to deliver for him, but Mr. Boutilier suggested he would only work with the RTS existing couriers. He never paid anyone to do a delivery for him. It is evident there were many terms in the understanding that were simply not made clear, as they were never put in writing.

[8] Mr. Boutilier was not required to wear a uniform or any other signs of an association with RTS.

[9] RTS carried insurance but Mr. Boutilier did not. He did, however, maintain his bicycle.

[10] Due to lack of work, Mr. Boutilier was let go without notice, which upset him. He brought a claim through the Ministry of Labour, for vacation pay, severance pay, public holiday pay and terminal pay. During that claim it was found that he was an

employee. RTS settled the matter for \$1,932 and obtained a release from Mr. Boutilier.

[11] Was Mr. Boutilier an employee of RTS, or was he an independent contractor? The law is well established in this area and was recently well explored by Justice Archambault in the 2010 case of *Dynamex Canada Corp. v. Canada*.¹ *Dynamex*, which also ran a courier service, though primarily vehicle deliveries, had at the relevant time a bicycle courier whom they treated as an employee. The principles to follow can be summarized as follows:

1. The terminology used in the contract is not determinative: a contractual term cannot prevail if the evidence of the actual relationship points to the opposite conclusion.
2. The central question is whether the individual is performing the services as a person in business on his own account.
3. Control is always a factor.
4. Other factors to consider are ownership of equipment, whether the worker can hire his own helpers, the degree of financial risk, the degree of responsibility for investment and management, the opportunity for profit.
5. Where there is a common understanding or intention, the above factors should be assessed as consistent with that understanding.

[12] A couple of preliminary points then, following from these principles, before I explore the factors suggested by the caselaw. First, the use of the term "subcontractor" in the Annual Subcontractor Invoice is not persuasive. I am satisfied it was a self-serving insert of a term by RTS, and that although Mr. Boutilier signed this document, he made it clear he did not believe he was a subcontractor and only signed the contract to keep working at a place where he enjoyed working. The title "subcontractor" in this context means nothing.

¹ 2010 TCC 17.

[13] Second, I have not been satisfied there was any meeting of the minds as to the true nature of the working arrangement between Mr. Boutilier and RTS. It is impossible to analyse the factors in the context then of any common understanding.

[14] Was Mr. Boutilier performing his courier services in business on his own account? There is no question RTS was carrying on a courier business: it had got and retained the customers who wished to have deliveries made, it set the rate, it prepared the waybills, it insured for loss or damage, it attended to collections, it dispatched the couriers when and where required, it kept books etc. What did Mr. Boutilier do: he reported to work at 8:30 a.m. by contacting RTS's dispatcher, he went where the dispatcher sent him, picked up and dropped off deliveries, kept copies of RTS's waybills, kept the dispatcher advised of his whereabouts, initially would render bi-weekly invoices which were later rendered simply as one multi-month invoice, was paid bi-weekly a set amount, worked only for RTS and kept no books.

[15] The overall impression is that Mr. Boutilier was in RTS's business, not in business on his own account, but let me explore the key factors to determine if they support or conflict with this impression.

Control

[16] Mr. Boutilier had control over how he went from A to B on a delivery, but other elements of his services were controlled by RTS. He was told where to go and when to go. He could only refuse work if it was unsafe or simply impractical. In this regard, I accept his testimony in preference to Mr. Robertson's, who suggested he could refuse for any reason: that is not plausible. He could not negotiate remuneration – it was set by RTS. He believed he could not take on any other work as it would be impossible to fulfill his responsibilities to RTS. Again, RTS disagreed, suggesting it was open to Mr. Boutilier to work for others: this rings hollow given the rigors of the work, including the requirement to be always at the ready. The ultimate control, in an ironic twist of strategy, is that he could not refuse to get a GST number for fear of losing the work altogether.

[17] It is important not to lose sight of the nature of this work: it is not the type of work that requires a significant element of control. The courier is more under the constraints of the very nature of the work than meticulous control of RTS. So, while, as the Supreme Court of Canada stated, control is always a factor, I conclude in this case it is not a dominating factor, though slightly favours an employment relationship. It is necessary though to put this in the context of the other factors.

Ownership of equipment

[18] As I indicated at trial, the bicycle courier requires three major pieces of equipment: his bike, his body and an instrument of communication. He clearly supplied two out of three and was responsible for maintaining those two. The walkie-talkie was RTS's responsibility. This factor favours an independent contractor arrangement.

Hiring helpers

[19] This is another example of a difference of interpretation of the underlying contract between RTS and Mr. Boutilier. RTS's position is that Mr. Boutilier could have hired someone to serve in his place, provided the substitute was known to RTS. Mr. Boutilier never did such a thing. I am satisfied that even if he had, RTS has admitted to retaining some say over who. This factor is not indicative of an independent contractor arrangement.

Degree of financial risk

[20] Mr. Boutilier did not carry insurance. RTS did. If packages were lost or damaged or complaints received it was for RTS to deal with this. Mr. Boutilier's remuneration was set, no matter how many deliveries he made or how many complaints were received. He received more remuneration when he agreed to do a later shift, working into the early evening to make late deliveries. This upped his weekly amount, though he was not on commission or any other form of piece work payment.

[21] The only risk, and it is not insignificant, is risk of injury, though there was some unsubstantiated suggestion of WSIB (Workplace Safety and Insurance Board) coverage. On balance, this factor reflects an employment arrangement.

Chance of profit

[22] As mentioned, the only way for Mr. Boutilier to possibly increase profits was by making himself available later in the day. This upped his weekly rate, but it was still set by Mr. Robertson: there was no evidence of negotiation. Mr. Boutilier got his weekly pay regardless of the volume of work. The nature of the work precluded seeking other work from other courier outfits. I find this factor is significant. There is no room for increased profit. It far more resembles a salary than business income.

Degree of responsibility for investment and management

[23] Apart from his bicycle, there is little to suggest any great degree of investment in a business or any element of management. He simply had to show up for the work and make his deliveries.

[24] On balance, the factors favour a finding of employment though it is not overwhelming. I wish, however, to review a case I decided a few years ago also dealing with a bicycle courier, where I reached the opposite conclusion. There are a number of significant differences between the facts before me and the facts in *Velocity Express Canada Ltd. v. Minister of National Revenue*:²

1. In *Velocity*, the courier could sign on and off at will: that was not the impression Mr. Boutilier left me. He either delivered or remained ready to do so throughout the day.
2. In *Velocity*, couriers were responsible for the loss of deliveries through the contract with *Velocity*; that is not the case here.
3. In *Velocity*, couriers could negotiate a better rate. Here it was simply set by the employer, Mr. Robertson.
4. In *Velocity*, couriers could employ others. Mr. Boutilier could not.
5. In *Velocity*, the pay was based on volume.
6. In *Velocity*, the courier admitted he entered something other than an employment arrangement.

[25] Taken together, these factors tipped the scale in the opposite direction. This does point out how elusive the definition of "employment" can be. The facts require little tweaking to shift the balance. It remains a difficult area of the law as the grey area between independent contractor and employee is broad, with no bright line distinction. In these circumstances, I conclude the Minister's ruling was reasonable and the appeals are therefore dismissed.

Signed at Ottawa, Canada, this 20th day of April 2011.

² 2002 CarswellNat 594 (T.C.C.).

"Campbell J. Miller"

C. Miller J.

CITATION: 2011 TCC 219

COURT FILE NO.: 2010-2075(EI) and 2010-2077(CPP)

STYLE OF CAUSE: RAPID TRANSIT SYSTEMS 2000 LTD
AND THE MINISTER OF NATIONAL
REVENUE AND STEPHEN BOUTILIER

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 11, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF JUDGMENT: April 20, 2011

APPEARANCES:

Agent for the Appellant: Janet Robertson and
Richard Robertson

Counsel for the Respondent: Leslie Ross

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm:

For the Respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada