

Dockets: 2019-454(EI)
2019-456(CPP)

BETWEEN:

SKYLIGHT TRAVEL & TOURS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Dockets: 2019-443(EI)
2019-441(CPP)

BETWEEN:

SURESH KUMAR ARAVINDAKSHAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Dockets: 2019-450(EI)
2019-451(CPP)

BETWEEN:

TITUS GEORGE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on October 20, 2021 and April 26-27, 2022, at
Ottawa, Canada

Before: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellants: Rod Vanier

Counsel for the Respondent: Dina Elleithy

JUDGMENT

Having considered the evidence and the submissions presented by the parties, and in accordance with the attached Reasons for Judgment, it is adjudged that:

1. The Appeals are allowed.
2. The Assessments that are the subject of Appeal No. 2019-443(EI) and Appeal No. 2019-441(CPP) are vacated.
3. The Assessments that are the subject of Appeal No. 2019-450(EI) and Appeal No. 2019-451(CPP) are vacated.
4. The Assessments that are the subject of Appeal No. 2019-454(EI) and Appeal No. 2019-456(CPP) are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that, during the period from January 1, 2015 to October 31, 2017 inclusive:
 - (a) neither Suresh Kumar Aravindakshan nor Titus George was engaged in insurable employment or pensionable employment with Skylight Travel & Tours Inc. (“Skylight”);
 - (b) Selvy Thomas was engaged in pensionable employment, but not insurable employment, with Skylight; and
 - (c) Sheela Thomas and Akhill Jolly were engaged in both insurable employment and pensionable employment with Skylight.

5. No costs are awarded.

Signed at Ottawa, Canada, this 28th day of February 2024.

“Don R. Sommerfeldt”

Sommerfeldt J.

Citation: 2024 TCC 26
Date: 20240228

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REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals brought by Skylight Travel & Tours Inc. (“Skylight”), Suresh Kumar Aravindakshan (“Suresh”) and Titus George (“Titus”) in respect of assessments issued to them, under the *Employment Insurance Act* (the “EIA”)¹ and the *Canada Pension Plan* (the “CPP”)², by the Minister of National Revenue (the “Minister”), as represented by the Canada Revenue Agency (the “CRA”). The fundamental question in respect of these Appeals is whether Suresh, Titus and other workers were engaged in insurable employment and pensionable employment. In particular, in the case of Skylight’s Appeal, two specific issues are whether Selvy Thomas (“Selvy”) was engaged in pensionable employment and whether Sheela Thomas (“Sheela”) was engaged in insurable employment and pensionable employment.

[2] As is apparent, Selvy and Sheela have the same surname; however, they are not related. To avoid confusion, I will refer to them by their given names. To be consistent, I will also refer to the two individual Appellants and the other workers by their given names.

[3] On July 9, 2018, the Minister issued Notices of Assessment for the period from January 1, 2015 to October 31, 2017 (the “Relevant Period”) to assess premiums under the *EIA* and contributions under the *CPP*. Those assessments (the “Assessments”) were based on the assumptions that Sheela, Suresh, Titus and Akhill Jolly (“Akhill”) were employed by Skylight in insurable employment, and that Selvy, Sheela, Suresh, Titus and Akhill were employed by Skylight in pensionable employment. After considering objections in respect of the Assessments, on November 7, 2018 the Minister confirmed the Assessments.

¹ *Employment Insurance Act*, SC 1996, c. 23, as amended.

² *Canada Pension Plan*, RSC 1985, c. C-8, as amended.

II. FACTS

[4] Skylight was incorporated in 2004. Initially, Selvy was the sole shareholder of Skylight. Sometime thereafter, Sheela became a 50% shareholder of Skylight, and Selvy continued to own the other 50% of the issued shares of Skylight.

A. Particulars Concerning Selvy

[5] During the Relevant Period, Selvy was an executive, a director and a shareholder of Skylight. She stated that she “started Skylight Travel & Tours Inc. in the year 2004.”³

[6] Initially, Selvy was the sole shareholder of Skylight. Sometime after October 31, 2017, Selvy’s equity interest in Skylight was reduced to 50%.⁴

B. Particulars Concerning Sheela

[7] At some point in time, after October 31, 2017, Selvy arranged for Sheela to become a 50% shareholder of Skylight. Selvy said that Sheela was her partner and that Sheela “work[ed] selling packages.”⁵

C. Particulars Concerning Akhill and Giya

[8] While testifying, Selvy explained that, during the Relevant Period, Skylight had four employees, i.e., herself, Sheela, Akhill and Giya Joy (“Giya”). Selvy stated that Akhill and Giya had been engaged as employees and were treated as such. Akhill and Giya each received a salary, were issued T4 slips after each taxation year, had a work station at Skylight’s premises, had fixed office hours, and were supervised as employees. Selvy stated that the circumstances in respect of the employment of Akhill and Giya were substantially different from the circumstances in respect of the arrangements that Skylight had with Suresh and Titus.

³ Transcript, vol. 1, p. 8, lines 2-3. Selvy’s full name is *Meena Selvy Thomas*. During the hearing, some of the witnesses occasionally referred to Selvy by her first name, i.e., *Meena*.

⁴ Transcript, vol. 1, p. 8, lines 2-4.

⁵ Transcript, vol. 1, p. 83, lines 1-6; and Exhibit R-4, p. 2 in the particular document or p. 42 in the Respondent’s Book of Documents.

[9] Although Skylight seemed to treat Akhill as an employee, the Minister approached the audit of Skylight on the premise that Skylight had viewed Akhill as an independent contractor.⁶

D. Particulars Concerning Suresh

[10] During his direct examination, Suresh stated that he came to Canada from India in 2015. However, during cross-examination he indicated that he came to Canada in 2010, and then worked for three years as a shift manager at a fast food restaurant in Toronto, before enrolling in a travel and tourism course at Everest College. After completing that course, Suresh learned of a vacancy at Skylight and applied. During his initial interview, he was asked by Selvy whether he would like to work as a contractor or as an employee. He chose to work as a contractor, on a commission basis.

[11] A primary aspect of Suresh's work was to assemble tour packages. Drawing on his prior experience working as a hotel operations manager in India and as a worker in food services positions in Saudi Arabia, Suresh prepared tour packages for South Asia. The packages were all-inclusive, in the sense that they included flights, hotels, ground transportation (or transfers) and excursions. He worked with two suppliers, which he identified as Tamarind Services International (which made the specific arrangements with the various hotels and transportation companies in South Asia)⁷ and Tours East (which provided airline tickets). Sometimes, using SABRE, Suresh arranged the airline transportation for his clients.⁸

[12] Suresh stated that he primarily worked at home, where he had a home office or work space. The furniture in his home office included a desk, which he had purchased himself, a chair, a laptop computer and his cell phone. He attended at Skylight's place of business occasionally, generally on a monthly basis, to drop off a list setting out the tour packages and other travel arrangements that he had made and the commissions earned in respect thereof. Suresh stated that he did not have any assistance from Skylight in compiling the tour packages. He typically dropped off his sales reports, which were entitled "Agent Commission Forms" and which were sometimes referred to as invoices.

⁶ See Exhibits R-4 and R-5.

⁷ Transcript, vol. 2, p. 82, line 4 to p. 83, line 27.

⁸ "SABRE" is an acronym for "Semi-automated Business Research Environment" and refers to the airline travel reservation system used by many travel agents.

[13] The commissions earned by Suresh in respect of his sales were split with Skylight. Suresh was entitled to 70% of each commission, and Skylight was entitled to 30% of each commission. This had been discussed and negotiated during Suresh's initial meeting with Selvy, and was referenced in the confirmation letter signed by Selvy and Suresh on April 5, 2015.⁹

[14] Suresh found his clients primarily through social media, friends and connections within his community in Toronto. His social media advertising was generally done by posts (which he called fliers) on Facebook.

[15] Suresh stated that he obtained no support from Skylight in assembling tour packages, other than access to SABRE and the use of Skylight's name, which he acknowledges had some value.

[16] Suresh was not aware of Skylight's office hours, as he worked primarily at home and set his own hours, and was his own boss.

[17] He stated that Selvy did not question the amount of his production or suggest that he should increase his production, nor did she review his work.

[18] Suresh could take days off whenever he wished. He did not need to obtain permission from Selvy or anyone else at Skylight to take a vacation. However, if he was going to be away for more than a few days, as a courtesy, he advised Skylight that he would be on vacation. Skylight did not provide vacation pay to him.

[19] Skylight made business cards available to its workers. However, Suresh stated that he made his own business cards, which he apparently preferred to use. He paid for the printing of his own business cards. His business cards showed both Skylight's name and his name, as well as the telephone numbers and fax number of Skylight and his own cell phone number. The business cards also showed his Skylight email address and the domain name of Skylight's website.

[20] Suresh stated that he could not be reached by calling Skylight's office telephone number. If someone called that number, asking for him, whoever answered the phone at Skylight's office generally gave the caller Suresh's cell phone number.

⁹ Exhibit A-1, tab 1.

[21] Suresh purchased a cell phone in 2013. During the Relevant Period, he owned it and paid the monthly phone bills.

[22] Although his business cards showed Skylight's fax number, his clients never sent faxes to him. They always communicated with him by email or by calling him on his cell phone. They did not try to reach him by calling the telephone number of Skylight's office.

E. Particulars Concerning Titus

[23] Decades ago, Titus, who was 69 years of age when the trial commenced, had been a travel agent in Dubai. In 1996, he came to Canada for a brief period of time, then went abroad for almost five years, and subsequently returned to Canada sometime in 2000. For approximately 15 years he worked in non-travel-related endeavours. Desiring to return to the travel field, in 2015 Titus approached Skylight, seeking a part-time position. He selected Skylight because it focused on travel to South India, which was his preferred area of work.

[24] According to Selvy and Titus, at their initial meeting, on January 11, 2015, Selvy arranged for a brief letter to be printed on Skylight letterhead, after which they both signed the letter. As the letter is quite brief, the substantive portion thereof is quoted below:

We would like to confirm that you (Mr. Titus George) are presently working with Skylight Travel & Tours Inc as a contractor in the department of Travel and Tourism. You are employed as travel agent based on commissions to be paid as agreed at the time of acceptance. Please note that you will be responsible for filing your own income taxes and paying all the applicable government taxes at the end of the year with your accountant directly.¹⁰

[25] Selvy testified that she understood that Titus had been engaged by Skylight to work as an independent contractor. It was not expressly clear from Titus' testimony as to what was his precise intention in respect of his status. It seems that he was more concerned about ensuring that he would be engaged on a part-time, rather than a full-time, basis.

[26] Although Titus had worked extensively in Dubai as a travel agent, that was a number of years previous to his being engaged by Skylight. In Dubai, he had not used the SABRE airline reservation system. Accordingly, he needed training in

¹⁰ Exhibit A-2.

respect of SABRE and other aspects of the Canadian travel industry. That training took about one week, in respect of which he did not receive any remuneration or other payment from Skylight.

[27] All travel agents in Ontario are required to be licensed with the Travel Industry Council of Ontario (“TICO”). Titus wrote the TICO exam and paid, out of his own pocket, the \$200 examination fee. Skylight did not reimburse him for that amount.

[28] Titus did not book tours. His work consisted of making airline reservations for clients, for which he earned commissions.

[29] Skylight did not control Titus’ work hours. Titus only advised Skylight, and did not seek permission, before going on vacation. The amount of his production was never questioned.¹¹ Skylight did not provide Titus with office supplies, other than business cards.¹²

F. Billing and Compensation Arrangements for Suresh and Titus

[30] Neither Suresh nor Titus was paid a salary or wages by Skylight. As noted above, the only earnings received by Suresh and Titus were 70% of the commissions received by Skylight in respect of their sales. Given the nature of the airline, hotel and other travel-related industries, and the manner in which travelling customers purchase tickets, accommodation and other tour-related amenities, the commissions pertaining to the work done by Suresh and Titus were paid to Skylight. On a periodic basis, Suresh and Titus each provided Skylight with tabulations showing the tickets, tours or other packages that had been purchased by their respective clients and the amount of commission paid to Skylight on behalf of Suresh or Titus, as the case may have been. Upon receiving those statements and upon confirming that the commissions had been received by Skylight, Skylight then periodically issued cheques to Suresh and Titus, so as to pay their respective 70% portions of those commissions.

III. ISSUES

[31] The issues in respect of these Appeals are the following:

- a) During the Relevant Period, was Selvy engaged in pensionable employment?

¹¹ Transcript, vol. 1, p. 201, line 20 to p. 202, line 14.

¹² Transcript, vol. 1, p. 211, line 14 to p. 212, line 12.

- b) During the Relevant Period, was Sheela engaged in insurable employment and pensionable employment?
- c) During the Relevant Period, was Akhill engaged in insurable employment and pensionable employment?
- d) During the Relevant Period, was Suresh engaged in insurable employment and pensionable employment?
- e) During the Relevant Period, was Titus engaged in insurable employment and pensionable employment?

IV. EVIDENTIARY CONCERNS

A. Letter Agreements

[32] Early in the trial, a *voir dire* was conducted to determine the admissibility of a letter agreement dated April 5, 2015 between Skylight and Suresh,¹³ and, eventually, a somewhat similar letter agreement dated January 11, 2015 between Skylight and Titus (most of which is quoted above).¹⁴ Counsel for the Minister objected to the introduction of those two letter agreements, on the ground that the Notice of Appeal stated that there was only a verbal agreement.¹⁵ It seems that counsel for the Minister was also concerned that the letter agreements were late-produced, self-serving documents. A copy of Suresh's letter agreement was provided to counsel for the Minister only a week before the trial began, and a copy of Titus' letter agreement was not made known to his own counsel, let alone counsel for the Minister, until partway through the *voir dire*.

[33] A further concern related to the letterhead on which the two letter agreements were printed, as the two letter agreements showed different addresses for Skylight. By way of background, Selvy explained that, from the time of its incorporation, in 2004, until sometime before 2015, Skylight's address had been located at 3428 Sheppard Avenue East, Scarborough, Ontario. In 2015, Skylight's address was located at 3300 McNicoll Avenue, Scarborough.¹⁶ Sometime thereafter, Skylight

¹³ Exhibit A-1, tab 1.

¹⁴ Exhibit A-2.

¹⁵ See the EI Notice of Appeal of Skylight, ¶6; and the CPP Notice of Appeal of Skylight, ¶6. Counsel for the Minister did not indicate which Notice of Appeal she was referencing; however, I think that it was likely either or both of the two Notices of Appeal described at the beginning of this footnote. Counsel for the Minister also indicated that the witnesses for the CRA would likely say that the Appellants had indicated "that there was only a verbal agreement and no written agreement." See Transcript, vol. 1, p. 5, lines 19-24.

¹⁶ Transcript, vol. 1, p. 61, line 4 to p. 64, line 8.

moved its office to 3341 Markham Road, Toronto. Titus testified that, when he met with Selvy in January 2015 for his initial application interview, Skylight's office was located at 3300 McNicoll Avenue. However, the address shown on Titus' letter agreement, which was dated January 11, 2015, was 3341 Markham Road. The address shown on Suresh's letter agreement, which was dated April 5, 2015, was 3428 Sheppard Avenue East.

[34] Selvy explained the above discrepancies by indicating that, when Skylight moved its office from Sheppard Avenue to McNicoll Avenue, Skylight had a large supply of unused letterhead showing the Sheppard Avenue address. Skylight continued to use that letterhead until it was exhausted. It was for that reason that the letter agreement between Skylight and Suresh showed the Sheppard Avenue address. Selvy also explained that, in 2017 or thereabouts, Titus needed to send a copy of his letter agreement to TICO, but could not find his copy of it. The text of the letter agreement was still stored in Skylight's computer; therefore, Selvy arranged for the letter agreement to be reprinted on Skylight's letterhead, which, at that time, showed the new address on Markham Road.

[35] Selvy, Suresh and Titus each testified that she or he (as the case may have been) had signed the applicable letter agreement. In my view, there is no question as to the authenticity or genuineness of the two letter agreements, although there may be a question as to whether they were backdated. Accordingly, at the conclusion of the *voir dire*, I admitted the two letter agreements into evidence, but indicated that I would determine the weight, if any, to be given to them.

[36] In making the above decision (to admit the letter agreements into evidence), I accepted Selvy's explanation. It is not uncommon for a business to use up outdated letterhead before switching to new letterhead that contains up-to-date information. Both Selvy and Titus (who was not present in the courtroom when Selvy testified) confirmed that the letter agreement of January 11, 2015 had been reprinted in 2017 or thereabouts, as a copy of it was required by TICO. A further point to note is that, if Selvy, Suresh and Titus had desired to fabricate the letter agreements on the eve of the trial of these Appeals, it is likely that both letter agreements would have been printed on the same letterhead. The fact that the two letter agreements were printed on different letterhead tends to confirm that they were not fabricated on the eve of trial.

[37] As indicated above, the Minister and the CRA are concerned that they had apparently been told by Selvy, Suresh or Titus that the only agreements between Skylight and Suresh and between Skylight and Titus were verbal agreements, and

not written agreements. In reviewing the EI Notice of Appeal and the CPP Notice of Appeal filed by Skylight, I note that paragraph 6 of each of those pleadings stated, “The verbal agreement with Skylight and these individuals ... envisaged the following”, and there then followed a list of nine terms describing the arrangements between Skylight and Suresh and between Skylight and Titus. I did not find any provision in either of those Notices of Appeal that said that there was only a verbal agreement, and not a written agreement, as well. In reviewing the EI Notice of Appeal and the CPP Notice of Appeal filed by Suresh and the EI Notice of Appeal and CPP Notice of Appeal filed by Titus, I did not find any specific reference to a verbal agreement or a written agreement *per se*. As is clear from reviewing the two letter agreements, the substantive portions of those two agreements are extremely brief. I do not find it unusual or inconsistent that each letter agreement would be supplemented by a verbal agreement setting out additional terms of the arrangement between Skylight and Suresh and the arrangement between Skylight and Titus. Furthermore, I did not find any statement, in the pleadings or otherwise, where Skylight, Suresh or Titus stated that there was only a verbal agreement and no written agreement.

[38] After the trial, as I reviewed the various reports prepared by two CRA officers (whose reports will be discussed below), I noted that they had acknowledged that the intention of Skylight, Suresh and Titus was that those two individuals would work for Skylight as independent contractors, and not as employees.¹⁷ Accordingly, I have determined that sufficient weight may be put on the letter agreements to confirm the intention of the parties thereto and the general nature of their respective relationships.

[39] Although there was the occasional memory lapse,¹⁸ I found Selvy, Suresh and Titus to be credible and generally reliable witnesses. Having considered their testimony and having reviewed the letter agreements and the circumstances of their formation, I have concluded that I may rely on each letter agreement as indicating an intention on the part of the parties thereto to create an independent-contractor relationship, and not an employment relationship.

B. Auditor’s Reports and Testimony

¹⁷ Exhibit R-2, p. 1, 3, 6 & 7; Exhibit R-3, p. 1, 3, 6 & 7; and Exhibit R-5, p. 8 & 10.

¹⁸ Such as when Suresh stated in direct examination that he came to Canada in 2015, but stated in cross-examination that he came in 2010, and when Selvy, Suresh and Titus were discussing the various locations of Skylight’s offices.

[40] Counsel for the Minister called two witnesses from the CRA. The first CRA witness, to whom I will refer as the “Rulings Officer”, is currently an acting CPP/EI Appeals Officer. She worked as a CPP/EI Rulings Officer from 2013 to 2021. The second CRA witness, to whom I will refer as the “Appeals Officer”, began to work for the CRA in 2008. In 2014 she became a CPP/EI Appeals Officer, and in 2018 she became a Resource Officer in CPP/EI Appeals. She is currently a Program Advisor in Developing Program and Learning for the CPP/EI Appeals Division.

[41] The Rulings Officer wrote a Ruling Report in respect of Suresh¹⁹ and another Ruling Report in respect of Titus.²⁰ The contents of the two Reports were almost identical. During her testimony, the Rulings Officer acknowledged that she had done a lot of cutting and pasting.²¹

[42] Each of the two Ruling Reports is a composite document, beginning with details and particulars concerning Suresh (in the case of Exhibit R-2) and Titus (in the case of Exhibit R-3). There then follows a larger portion entitled “Facts” which is approximately six pages long, and which, among other things, purports to summarize separate telephone conversations that the Rulings Officer had on June 7, 2017 with Suresh and Titus respectively, as well as with Selvy. The next portion of each Ruling Report is entitled “Employment Status”; it analyzed the facts that the Rulings Officer had purportedly obtained from Suresh and Titus respectively, as well as from Selvy. Each Ruling Report came to the conclusion that the particular worker (i.e., Suresh or Titus) was engaged in insurable employment and pensionable employment. The final portion of each Ruling Report is entitled “Decision”. It seems to indicate that the status of the respective working arrangements in respect of Suresh and Titus was changed from “Contract for Service” [*sic*] to “Contract of Service”.

[43] As noted above, the Rulings Officer acknowledged that she had done a lot of cutting and pasting in preparing her Reports. The analysis portions of the two Reports (i.e., the portions entitled “Employment Status”) were identical. More troubling is the similarity between the summary of the two telephone conversations that the Rulings Officer had with Suresh and Titus respectively on June 7, 2017. Large portions of the summaries of those two conversations are identical. There are a few differences, such as an indication in the summary of the conversation with Titus, where he indicated that he was “paid strictly commission”,²² whereas there was no such statement in the summary of the conversation with Suresh. The

¹⁹ Exhibit R-2.

²⁰ Exhibit R-3.

²¹ Transcript, vol. 2, p. 153, line 25 to p. 154, line 8.

²² Exhibit R-3, p. 3.

summary of the conversation with Suresh states, “He confirmed all paperwork bears the name of Skylight.”²³ There is no such statement in the summary of the conversation with Titus. Apart from these and a few other minor variations, the wording of the two summaries is essentially identical, subject to a few obvious efforts to make the two documents look different, such as referring to Suresh as a “Ticketing Agent” and to Titus as a “Travel Agent”, or using the word “stated” in one summary and the word “confirmed” in the corresponding place in the other summary, or using the word “quotas” in Titus’ summary and the phrase “sales targets” in Suresh’s summary. Another example of this, which will be discussed below, is the use of “He laughed...” in Suresh’s summary and “He chuckled...” in Titus’ summary.

[44] The extremely close similarity between the two Ruling Reports was explored during the examination in chief of the Rulings Officer in these terms:

MS. ELLEITHY: ... I did notice that ... a lot of the wording is very similar. So, for example, ... if we compare the ruling report at Tab 7 [Exhibit R-2] and Tab 8 [Exhibit R-3], there’s a lot of similarities to the way it’s structured, the order it’s written and the wording. Could you explain why that is?

[RULINGS OFFICER]: Yes, it is -- a lot of it is cut and paste because it’s the same for each file. Like, again, when I reached out to the owner, that information would be a direct cut and paste into -- because I called at the same time. Again, if I left a message for -- to call me back regarding, you know, each worker, I certainly would change the name. But honestly, with this particular position, there’s only -- and doing so many files, there’s only so many ways you can write, you know, “Tools and equipment were not provided by the worker.”

So, again, a lot of it has the same flow because that’s just my writing style and addressing, you know, tools and equipment, and then subcontracting, and then getting into expenses. *But again, it’s personalized, too, because if something has been -- you know, to go back to the previous ruling report [i.e., Exhibit R-2], in respect of Suresh where I’ve noted that they chuckled to a question, you know, that’s specific to that individual.*

So, that’s why a lot of it appears to be the same because it is the same. A lot of it, the answers are the same, but *I like to, again, make it specific to that worker as well that, you know, a conversation has taken place with this individual, because not everybody is going to chuckle to the same question* or add their own comments.

We can’t put, as I mentioned before, our personal opinions in the file, so that’s sort of what we do, and in this case, I have done, is information that was

²³ Exhibit R-2, p. 4.

substantially similar I've put it in, and then *tweaked* it based on the specifics of that worker.²⁴ [*Emphasis added.*]

[45] As indicated in the italicized portions of the above exchange between counsel for the Minister and the Rulings Officer, which took place during the discussion of the Ruling Report in respect of Titus (i.e., Exhibit R-3), the Rulings Officer made reference to her comment about “the previous ruling report” (i.e., Exhibit R-2, being the Ruling Report in respect of Suresh), where she noted that the interviewee had chuckled to a question and pointed out that that was specific to that individual. That comment about “the previous ruling report” occurred earlier in her testimony, when she was discussing the Ruling Report in respect of Suresh, and when she was asked by counsel for the Minister why she had included the “He laughed...” comment in her Report. The Rulings Officer replied:

MS. ELLEITHY: And I wanted to ask, why would you -- why is that something to notate?

[RULINGS OFFICER]: Well, it's an interesting reaction to the question, I think, and it speaks to -- like, it almost is -- you know, with somebody laughing and thinking the question is a joke, when it is a serious question, but to have that sort of reaction. And in the file, you know, *I always like to add* something that's sort of -- you know, because you can only write certain paragraphs, the information, the same way, so to add *a little sort of personalized comment or reaction to the question.*

*But that particular question -- that's what I remember about this file.*²⁵ [*Emphasis added.*]

[46] When discussing Suresh and Exhibit R-2 (shortly before the above-quoted exchange), the Rulings Officer had said that she remembered “the one gentleman chuckling about not going on vacation,” but she could not remember whether the gentleman was Suresh or Titus.²⁶ The Rulings Officer may have been referring to the following comment that she wrote in the Ruling Report in respect of Suresh (as set out in Exhibit R-2):

²⁴ Transcript, vol. 2, p. 153, line 25 to p. 155, line 8.

²⁵ Transcript, vol. 2, p. 145, line 22 to p. 146, line 7.

²⁶ Transcript, vol. 2, p. 144, lines 24-27. See also p. 145, line 4 to p. 146, line 13. What is interesting about this comment is that, although the Rulings Officer was endeavouring to show that she remembered a particular conversation, her comment about “the one gentleman chuckling” appears to have been made in reference to the summary of her telephone conversation with Titus, while the quotation read to her by counsel for the Minister (see Transcript, vol. 2, p. 141, line 8 to p. 146, line 5) was taken from the summary of her telephone conversation with Suresh.

He laughed when asked if he's received any personal invitations to experience resorts and stated that Selvy Thomas has as the owner of the travel agency.²⁷

Or she may have been referring to a comment that she wrote in the Ruling Report in respect of Titus (Exhibit R-3), which is quoted in the next paragraph.

[47] Although I had initially understood that the Rulings Officer's reference to the chuckling was intended to show that she had remembered the distinct conversation and that her summary of that conversation was personalized to particularize that specific conversation,²⁸ I now question whether that was really the case, in light of the following statement from the summary of her conversation with Titus (i.e., Exhibit R-3):

He chuckled and stated he has not received any personal invitations to experience resorts and stated that Selvy Thomas has as the owner of the travel agency.²⁹

[48] During cross-examination, counsel for the Appellants noted that significant portions of the Rulings Officer's summaries of her telephone conversations with Suresh and Titus appeared to be "word for word" the same and that they "looked like a cut and paste."³⁰ Then, when counsel for the Appellants suggested to the Rulings Officer that she had not tweaked the two summaries (as she had claimed),³¹ she replied:

There are parts that are specific to each of the individuals. But after doing this job so many times, it gets a little - - it's not a creative writing assignment.³²

[49] I am deeply concerned by the manner in which the Ruling Reports were prepared. With respect to the Rulings Officer's summaries of her telephone conversations with Suresh and Titus, I am left with the impression that she had anticipated in advance the answers that she was seeking and that she had already developed the language needed to record those answers. With respect to the analytical portions of the Ruling Reports, the precisely identical wording of the analyses of the respective working arrangements pertaining to Suresh and Titus raises the question of whether one analysis was copied from the other, or whether both were copied from the same precedent.

²⁷ Exhibit R-3, p. 5.

²⁸ Transcript, vol. 2, p. 145, line 7 to p. 146, line 7.

²⁹ Exhibit R-2, p. 5.

³⁰ Transcript, vol. 2, p. 174, lines 17-19.

³¹ See the penultimate line of the statement quoted in paragraph 47 above.

³² Transcript, vol. 2, p. 175, lines 2-7.

[50] Given the manner in which the Ruling Reports were prepared, I have concerns as to whether the Rulings Officer addressed the situations of Suresh and Titus separately, or whether she took a “one size fits all” approach to her audit. Consequently, where her Reports differ from the testimony of the Appellants, I am inclined to rely on that testimony, rather than the Reports.

[51] To the extent that the Ruling Reports set out statements made to the Rulings Officer by Selvy, Suresh or Titus, a question arose during the trial as to whether those Reports contained hearsay evidence. Initially, counsel for the Minister had advised the Court that she desired to adduce the Reports for the truth of their contents. However, after the hearsay concern had been raised, counsel for the Minister stated that she was relying on the Reports only to challenge the credibility of the workers, i.e., to show that the particular statements had been made, and not that they were necessarily true. Based on the manner in which the Ruling Reports were drafted, I am not persuaded that those Reports correctly recorded the statements that had been made.

[52] I do not consider that the Ruling Reports have impeached the credibility of Selvy, Suresh or Titus. Rather, given the “cut and paste” nature of the Reports, I question whether the Reports have accurately reproduced the statements that may have been made by Selvy, Suresh and Titus to the Rulings Officer.

[53] A possible explanation for the similarity between the Ruling Reports in respect of Suresh (Exhibit R-2) and Titus (Exhibit R-3) might relate to a communication barrier between the Rulings Officer on the one hand and Suresh and Titus respectively on the other hand. Intending no disrespect, I found that, during their oral testimonies, it was difficult to understand Suresh from time to time, and even more difficult to understand Titus. In addition, there were various instances during Titus’ testimony where it seemed that he had a general understanding of the questions that were put to him, but he did not understand those questions precisely. The communication difficulties that I observed during the hearing may well have been exacerbated over the telephone, which is the way in which the Rulings Officer interviewed Suresh and Titus.

[54] Regardless of whether there was a communication barrier or not, there were several instances (such as the question of whether Suresh and Titus worked at home or in Skylight’s office) where the statements written by the Rulings Officer in her Ruling Reports were diametrically opposed to the statements given by Suresh and Titus on the witness stand. As already mentioned, I found Suresh and Titus, as well

as Selvy, to be credible and generally reliable. Accordingly, as indicated above, I prefer their evidence over the Ruling Reports prepared by the Rulings Officer.

[55] Turning to the Appeals Officer, she had originally anticipated that she would testify on October 20, 2021; however, as the trial progressed more slowly than expected, she did not begin to testify until April 26, 2022. She stated that, in preparation for her anticipated testimony on October 20, 2021, she had, in October 2021, reviewed her Memo For File (Form T2020)³³ and her Report On An Appeal (Form CPT110).³⁴ However, she acknowledged that she had not reviewed the Memo and Report during the period between October 20, 2021 and the commencement of her testimony on April 26, 2022. She also acknowledged that she could not remember the specific conversations that she had had with Suresh and Titus. Accordingly, I have reservations about the reliability of her memory and her testimony.

[56] I wish to make a comment about the terminology used by the Rulings Officer and the Appeals Officer (together, the “Officers”) in their respective Reports. Rather than using the terms *employment contract* and *independent contract*, the Officers generally used the traditional historical terms *contract of service* and *contract for services*. While either set of terms is acceptable, when referring to a *contract for services*, the Officers often used the term *contract of services*. I found this terminology to be confusing, as it was not always clear whether they were referring to a *contract of service* and inadvertently put an *s* at the end of *service*, or whether they were referring to a *contract for services* and inadvertently substituted the word *of* for the word *for*. An example of this confusion is the following excerpt from one of the Appeals Officer’s reports:

It is recommended that the parties involved in this appeal be advised, by Ministerial Notification, that after a complete and impartial review of information, the workers, Selvy Thomas, Sureh [*sic*] Aravindaksha [*sic*], George Titus [*sic*], Akhill Jolly and Sheela Thomas were engaged by the payer, Skylight Travel & Tours Inc., under a contract of *service* during their respected [*sic*] periods under review. The requirements of contract of *services* were met; therefore, employer-employee relationships existed.³⁵ [*Emphasis added.*]

V. ANALYSIS

³³ Exhibit R-4.

³⁴ Exhibit R-5.

³⁵ Exhibit R-5, p. 14 (being p. 58 behind Tab 11 in the Respondent’s Book of Documents).

A. Selvy's Status

[57] In Skylight's Notices of Appeal, Skylight pleaded that Selvy and Sheela each owned 50% of the common shares of Skylight, and that it was incorrect for one of the CRA auditors to state that Selvy owned 100% of the common shares of Skylight. However, during her testimony, Selvy clarified that she had owned 100% of the common shares of Skylight upon its incorporation and during the Relevant Period,³⁶ and that, sometime after the Relevant Period, Sheela acquired 50% of the issued common shares of Skylight.

[58] As Selvy has always owned more than 40% of the common shares (which are presumed to be the only voting shares) of Skylight, her employment with Skylight was not insurable.³⁷

[59] In the course of the trial, Selvy acknowledged that, during the Relevant Period, she had been employed by Skylight in pensionable employment.³⁸

B. Sheela's Status

[60] In its EI Notice of Appeal, Skylight took the position that Sheela and Selvy each owned 50% of its voting shares, such that, by reason of paragraph 5(2)(b) of the *EIA*, Sheela was not engaged in insurable employment.³⁹ As indicated above, during her testimony, Selvy stated that she and Sheela are currently equal voting shareholders of Skylight. However, during the Relevant Period, Selvy owned all of the voting shares of Skylight. Accordingly, while it appears that Sheela's current employment with Skylight is not insurable employment, her employment with Skylight during the Relevant Period was insurable employment.

[61] In the course of the trial, Skylight conceded that, during the Relevant Period, Sheela had been employed by Skylight in insurable employment and pensionable employment.⁴⁰

C. Akhill's Status

³⁶ Transcript, vol. 1, p. 112, line 22 to p. 113, line 4.

³⁷ Paragraph 5(2)(b) of the *EIA* states that "Insurable employment does not include ... the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation...."

³⁸ Transcript, vol. 1, p. 113, lines 5-7; and p. 144, lines 11-14.

³⁹ Notice of Appeal in Appeal No. 2019-454(EI), ¶4(b).

⁴⁰ Transcript, vol. 1, p. 132, lines 1-3; and p. 144, lines 11-14.

[62] Skylight's Notices of Appeal focus primarily on the particulars of Suresh and Titus, with a minor reference to Selvy and Sheela, and no reference to Akhill. In the course of the trial, it was acknowledged by Skylight that, during the Relevant Period, Akhill had been employed by Skylight in insurable employment and pensionable employment.⁴¹

D. Legal Principles Applicable to Suresh and Titus

[63] Based on the pleadings, it is the position of Skylight, Suresh and Titus that, during the Relevant Period, Skylight had engaged each of Suresh and Titus pursuant to an independent contract (sometimes called a contract for services), and not pursuant to a contract of employment (sometimes called a contract of service). On the other hand, the Minister takes the opposite position. To resolve this matter, it is necessary to apply the two-step analytical process described by the Federal Court of Appeal in *Connor Homes*.⁴²

[64] In *Connor Homes*, the Federal Court of Appeal noted that, in determining whether a worker is an employee or an independent contractor, it is necessary to consider the intention of the worker and the person who hired the worker, as well as considering the traditional factors enunciated in *Sagaz Industries* and *Wiebe Door*.⁴³ Those factors are:

- (a) Does the hirer control the worker's activities?
- (b) Does the hirer provide the tools and equipment required by the worker, or is the worker required to provide his or her own tools and equipment?
- (c) Does the worker hire his or her own helpers?
- (d) What is the degree of financial risk taken by the worker? In other words, does the worker have a risk of loss?
- (e) What is the degree of responsibility for investment and management held by the worker?

⁴¹ Transcript, vol. 1, p. 132, lines 1-4.

⁴² *1392644 Ontario Inc. o/a Connor Homes v. MNR*, 2013 FCA 85.

⁴³ *Sagaz Industries Canada Inc. et al. v. 671122 Ontario Limited*, [2001] 2 SCR 983, 2001 SCC 59; and *Wiebe Door Services Ltd. v. MNR*, [1986] 3 FC 553, [1986] 2 CTC 200, 87 DTC 5025 (FCA).

(f) Does the worker have an opportunity for profit in the performance of his or her tasks?⁴⁴

[65] Over the past couple of decades, some courts have noted that, rather than there being a sharp dichotomy between an employment contract and an independent contract, there is a continuum, with the employer-employee relationship at one end, the independent-contractor relationship at the other end, and a hybrid, intermediate or dependent-contractor relationship somewhere in the middle.⁴⁵ It is generally recognized that a hybrid, intermediate or dependent-contractor relationship is akin to, but not the same as, an employer-employee relationship.⁴⁶ In determining whether a worker is an employee or a dependent contractor, courts have typically applied the same principles that are used to determine whether a worker is an employee or an independent contractor.⁴⁷

[66] As the principles used to distinguish a dependent contractor from an employee are similar to those used to distinguish an independent contractor from an employee, in these Reasons, I will sometimes simply use the term *contractor*, rather than *independent contractor* or *dependent contractor*.

E. Suresh's Status

[67] Following the guidance provided by the Federal Court of Appeal in *Connor Homes*, I will first consider whether there was a mutual understanding or common intention between Skylight and Suresh regarding their relationship. I will then consider the factors identified in *Sagaz* and *Wiebe Door* in light of such mutual intent (if any) for the purpose of determining if, on balance, the relevant facts sustain and are consistent with such intent, or, if there was not a mutual intent, determining whether those factors point to employment or independent contract.

(1) Intention

⁴⁴ See *Sagaz*, *supra* note 43, ¶47. For a more fulsome discussion of the relevant jurisprudence, see *Anderson v. MNR*, 2021 TCC 28; and *0808498 BC Ltd. v. MNR*, 2023 TCC 53.

⁴⁵ *DHL Express (Canada) Ltd. v. MNR*, 2005 TCC 178, ¶32; *Dynamex Canada Corp. v. MNR*, 2008 TCC 71, ¶19; *Med Express Inc. v. MNR*, 2021 TCC 8, ¶13-14; *Marbry Distributers Ltd. v. Avrean International Inc.*, 1999 BCCA 172, ¶19; *Glimhagen v. GWR Resources Inc.*, 2017 BCSC 761, ¶44; *TCF Ventures Corp. v. The Cambie Malone's Corporation*, 2016 BCSC 1521, ¶53; affirmed in part, 2017 BCCA 129; and *Pasche v. MDE Enterprises Ltd. et al.*, 2018 BCSC 701.

⁴⁶ *Marbry Distributers*, *supra* note 45, ¶19 & 46; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916, ¶30 & 32; *Jacks v. Victoria Amateur Swimming Club et al.*, 2005 BCSC 778, ¶12; *TCF Ventures*, *supra* note 45, (BCSC) ¶53 and (BCCA) ¶1-2 & 10; and *Pasche*, *supra* note 45, ¶104, 106-107 & 110.

⁴⁷ *McKee*, *supra* note 46, ¶32.

[68] At the commencement of Suresh's relationship with Skylight, Selvy and Suresh signed a letter agreement, dated April 5, 2015, on Skylight letterhead. As the letter agreement was relatively brief, containing only one paragraph, I have quoted that paragraph below:

We would like to confirm that you (Suresh Aravindakshan) is [*sic*] presently working with Skylight Travel & Tours Inc as a contractor in the department of Travel and Tourism. Mr. Aravindakshan is earning 70 % agent's commissions as agreed at the time of acceptance. Please note that you will be responsible for filing your own income taxes and paying all the applicable government taxes at the end of the year with your accountant directly.⁴⁸

[69] Based on the above letter, as well as the testimony of Selvy and Suresh, it is my understanding that they both understood and intended that Suresh would work for Skylight as an independent contractor, and not as an employee. As well, it appears that the Rulings Officer and the Appeals Officer also acknowledged that Selvy (on behalf of Skylight) and Suresh intended that Suresh would work as an independent contractor.⁴⁹

(2) Control

[70] Concerning the question of whether Skylight had control over Suresh in respect of the work which he undertook for Skylight, Selvy testified that Skylight did not expect Suresh to work a certain number of hours each week or to produce a certain volume of sales.⁵⁰

[71] Suresh could take sick days or vacation whenever he wanted.⁵¹ In his testimony, Suresh confirmed that he set his own work hours and that he could take time off whenever he wanted,⁵² although he did advise Skylight when he was going on vacation and indicated the days that he would not be available for work.⁵³

[72] When Suresh made a sale to a client, he generally did not report the sale to Selvy.⁵⁴ However, Suresh did advise Selvy of clients coming to Skylight's office to

⁴⁸ Exhibit A-1, tab 1.

⁴⁹ Exhibit R-2, p. 1, 3, 6 & 7; and Exhibit R-5, p. 8 & 10.

⁵⁰ Transcript, vol. 1, p. 91, lines 2-13.

⁵¹ Transcript, vol. 1, p. 167, line 28 to p. 168, line 17; vol. 2, p. 66, line 26 to p. 67, line 11; and p. 67, line 20 to p. 68, line 1.

⁵² Transcript, vol. 2, p. 24, lines 10-24; p. 54, lines 14-26; p. 56, lines 1-4; p. 68, lines 16-20; and p. 109, line 1 to p. 110, line 9.

⁵³ Transcript, vol. 1, p. 92, lines 15-27.

⁵⁴ Transcript, vol. 1, p. 140, line 25 to p. 141, line 19.

pay for a tour package,⁵⁵ so that Skylight could promptly wire the money to the particular tour operator.⁵⁶

[73] Suresh prepared his own invoices in respect of the commissions that he earned in respect of the sales that he made. He took the invoices to Skylight's office every two weeks.⁵⁷

[74] Skylight regularly issued cheques to Suresh to pay 70% of his earned commissions to him, while Skylight retained the other 30%.⁵⁸

[75] Skylight did not conduct performance reviews in respect of Suresh, or set sales targets for him.⁵⁹

[76] Suresh's title at Skylight was *Travel Tour Coordinator*. This was a title that he selected himself. Skylight had no issue with that title.⁶⁰

[77] Based on my understanding of the evidence, Skylight did not control Suresh's activities. This factor points strongly toward independent-contractor status.

(3) Tools and Equipment

[78] Suresh worked primarily from home, where he had established a home office or other work space. He paid for the office furniture, including a desk and chair, himself. He provided his own laptop computer and his own cell phone.⁶¹ The office maintained by Skylight was quite small (approximately 450 to 550 square feet in size) and was regularly used by Selvy, Sheela, Akhill and Giya. There was little physical room for Suresh to work in Skylight's office, and he did not have a desk or work space in that office.⁶² Suresh used his personal cell phone to conduct business,

⁵⁵ Transcript, vol. 1, p. 180, line 25 to p. 181, line 16.

⁵⁶ Transcript, vol. 1, p. 180, line 25 to p. 181, line 16; and vol. 2, p. 115, line 9 to p. 116, line 14.

⁵⁷ Transcript, vol. 2, p. 17, line 12 to p. 18, line 13; p. 63, lines 24-27; and p. 71, lines 22-28.

⁵⁸ Transcript, vol. 1, p. 117, line 16 to p. 118, line 25.

⁵⁹ Transcript, vol. 2, p. 24, line 23 to p. 25, line 13; and p. 55, lines 12-22.

⁶⁰ Transcript, vol. 1, p. 179, line 13 to p. 180, line 11; and vol. 2, p. 27, line 26 to p. 28, line 5; and p. 89, lines 2-5.

⁶¹ Transcript, vol. 2, p. 32, line 11 to p. 33, line 5; p. 56, lines 13-14; and p. 99, line 1 to p. 100, line 25.

⁶² Transcript, vol. 1, p. 143, line 17 to p. 145, line 3; and vol. 2, p. 16, line 13 to p. 17, line 11; p. 33, lines 6-24; p. 67, lines 12-19; p. 68, lines 2-10; and p. 109, line 1 to p. 110, line 10.

and he paid the cell phone bills himself.⁶³ Suresh provided all of his own office supplies and office equipment.⁶⁴

[79] Skylight provided Suresh with password access to Skylight's license to use SABRE, as well as with business cards showing Skylight's general phone number, toll-free number and fax number.⁶⁵ Suresh stated that he obtained from Skylight the template for its business cards, and he printed his own cards at his own expense.⁶⁶ Suresh's clients generally called him on his cell phone, and rarely used Skylight's office phone when trying to reach him; they did not send faxes to him.⁶⁷ Skylight also provided Suresh with an email address and the use of Skylight's email system.⁶⁸

[80] Suresh did not pay a specific fee to Skylight for the use of SABRE, the use of the business card template or the use of Skylight's email system. Selvy and Suresh explained that a portion of Skylight's 30% share of Suresh's commissions was intended to cover those costs.⁶⁹

[81] This factor points in both directions.

(4) Hiring of Helpers

[82] Selvy stated, on behalf of Skylight, that Suresh could engage a third party as a subcontractor and that he could hire helpers to assist with his work.⁷⁰ Suresh stated that he did not have any occasion to engage a subcontractor or to hire a helper or assistant. It is unclear, from his testimony, whether Suresh understood that he did, or did not, have the authority to hire a helper.⁷¹ While Selvy's evidence points toward an independent contract, rather than employment, given that Suresh did not hire any subcontractors or other helpers, and given that he did not seem to understand fully and clearly the questions put to him in respect of this factor, I am inclined to treat this as a neutral factor.

⁶³ Transcript, vol. 2, p. 29, line 21 to p. 30, line 11; and p. 87, line 25 to p. 89, line 1.

⁶⁴ Transcript, vol. 2, p. 32, line 11 to p. 33, line 5; p. 33, line 25 to p. 34, line 19; p. 56, lines 13-14 & 25-26; p. 68, lines 11-15; and p. 99, line 1 to p. 100, line 25.

⁶⁵ Transcript, vol. 1, p. 80, lines 8-22; and p. 81, line 5 to p. 82, line 10.

⁶⁶ Transcript, vol. 2, p. 26, lines 7-14; p. 27, lines 22-25; p. 56, lines 8-12; p. 71, lines 15-21; p. 79, line 27 to p. 80, line 19; and p. 112, lines 11-13.

⁶⁷ Transcript, vol. 1, p. 147, lines 12-18; and vol. 2, p. 30, line 12 to p. 31, line 20.

⁶⁸ Transcript, vol. 1, p. 174, lines 3-27.

⁶⁹ Transcript, vol. 1, p. 101, line 27 to p. 102, line 26; p. 174, lines 10-12; vol. 2, p. 57, lines 6-15; and p. 100, line 26 to p. 102, line 25.

⁷⁰ Transcript, vol. 1, p. 125, line 14 to p. 126, line 9.

⁷¹ Transcript, vol. 2, p. 59, line 25 to p. 60, line 15.

(5) Risk of Loss

[83] Before Suresh had even begun to work for Skylight, he had incurred expenses. In 2014, Suresh took various courses in respect of travel and tourism at Everest College, at his own expense.⁷² Suresh also took preparatory courses for, and passed, the requisite TICO licensing exam, again at his own expense, before he began to work for Skylight.⁷³

[84] Given that Suresh worked from home, and had to provide his own laptop, cell phone, office furniture, supplies, advertising and other work-related items, he incurred work-related expenses on a regular basis. If a client were to book a trip with Suresh, and then subsequently cancel the trip, Suresh would not receive a commission, although he would receive a cancellation fee.⁷⁴ As well, as he was paid by commission only, it was possible that there may have been months in which his expenses exceeded his revenue.

[85] My sense is that Suresh had relatively modest work-related expenses. Nevertheless, as there was always a possibility that those expenses would exceed his revenue, Suresh had a risk of loss. This factor points toward independent contract.

(6) Responsibility for Investment and Management

[86] There was no evidence adduced in respect of this factor. Therefore, I consider it to be a neutral or inapplicable factor.

(7) Opportunity for Profit

[87] Akhill and Giya, who were travel consultants and who were acknowledged by Skylight to be employees, were paid by salary.⁷⁵ On the other hand, Suresh was paid by commission only. Furthermore, as Suresh had his own clients, he was able to negotiate a 70%/30% split of the commission, rather than a 60%/40% split, which (according to Selvy) is the standard allocation in the travel industry.⁷⁶

[88] Suresh assembled his own tour packages, which included airfare, hotel accommodation and day tours. He prepared his own fliers to advertise the packages,

⁷² Transcript, vol. 2, p. 10, line 22 to p. 11, line 11.

⁷³ Transcript, vol. 2, p. 91, line 28 to p. 92, line 28.

⁷⁴ Transcript, vol. 2, p. 61, lines 21-25.

⁷⁵ Transcript, vol. 1, p. 174, line 28 to p. 176, line 12.

⁷⁶ Transcript, vol. 1, p. 117, line 16 to p. 118, line 25.

which were often scheduled to coincide with “some festival time” or holiday.⁷⁷ He advertised his tour packages by word of mouth, social media and other promotions. The flights included in the packages were booked through Skylight’s SABRE system, but all other arrangements were made by Suresh without any support from Skylight.⁷⁸ Suresh, and not Skylight, set the prices of the tours that he sold.⁷⁹

[89] During cross-examination, Suresh described the process that he used to assemble a tour package. Suresh typically engaged the services of a vendor or supplier in India, such as Tours East or Tamarind Services International, as he found that it was preferable to have all aspects of the package (such as flights, hotels and ground transportation) arranged through a single entity. However, Suresh prepared the package himself and then gave instructions to the vendor selected for that package to make the bookings in his name (or perhaps sometimes his clients’ names). The vendor charged a price to Suresh, which he paid. In subsequently billing his clients, Suresh added a markup of 5%, 10%, 15% or thereabouts, as negotiated with his clients, who sometimes bargained with him in the hope of getting a discount.⁸⁰

[90] With respect to flights that Suresh booked using Skylight’s SABRE account, he could not change the price that was available through SABRE, but he could, and did, decide the markup that he would add to that price.⁸¹

[91] Suresh testified that he had his own clients. At the time of the trial, he stated that he had been working for six or seven years, and had a list of more than 500 clients. He also stated that Skylight does not have access to his list (or folder) of clients.⁸²

[92] Selvy stated that, if Suresh were to have left Skylight, he would have been able to take his client list with him to another travel agency.⁸³

[93] Suresh stated that he built his client list through contacts in his own community, through social media and other means, and that he did not get clients from Skylight.⁸⁴ However, Selvy indicated that Skylight occasionally referred to

⁷⁷ Transcript, vol. 2, p. 22, lines 2-25.

⁷⁸ Transcript, vol. 2, p. 22, line 27 to p. 23, line 21.

⁷⁹ Transcript, vol. 1, p. 166, line 25 to p. 167, line 1; and vol. 2, p. 55, lines 7-11.

⁸⁰ Transcript, vol. 2, p. 82, line 4 to p. 86, line 3.

⁸¹ Transcript, vol. 2, p. 102, line 26 to p. 103, line 14.

⁸² Transcript, vol. 2, p. 86, lines 4-20.

⁸³ Transcript, vol. 1, p. 170, line 21 to p. 171, line 7.

⁸⁴ Transcript, vol. 2, p. 86, line 24 to p. 87, line 7.

Suresh clients who desired to book a tour.⁸⁵ When asked, during cross-examination, about referrals from Skylight, Suresh indicated that it happened “very, very rarely.”⁸⁶

[94] The above summary of Suresh’s commission-based compensation system, with his ability to determine and negotiate the amount by which he marked up the base prices that he obtained from his vendors and other suppliers, clearly indicate that he had an opportunity for profit. This factor points strongly toward independent contract.

(8) Weighing, Balancing and Resolving

[95] The *control* factor, the *risk of loss* factor and the *opportunity for profit* factor point strongly toward an independent-contractor relationship between Skylight and Suresh. The *tools and equipment* factor points in both directions, but I think that it tilts toward an independent-contractor relationship. The *hiring of helpers* factor and the *responsibility for investment and management* factor are neutral or inapplicable factors.

[96] After having considered, weighed and balanced the above factors, I have concluded that, during the Relevant Period, Suresh worked as an independent contractor, and not as an employee. In other words, on balance, the factors considered in *Sagaz* and *Wiebe Door* are consistent with the mutual understanding that Suresh worked for Skylight as an independent contractor, and not as an employee. Therefore, during the Relevant Period, Suresh was not engaged in either insurable employment or pensionable employment with Skylight.

F. Titus’ Status

[97] Following the guidance provided by the Federal Court of Appeal in *Connor Homes*, I will first consider whether there was a mutual understanding or common intention between Skylight and Titus regarding their relationship. I will then consider the factors identified in *Sagaz* and *Wiebe Door* in light of such mutual intent (if any) for the purpose of determining if, on balance, the relevant facts sustain and are consistent with such intent, or, if there was not a mutual intent, determining whether those factors point to employment or independent contract.

⁸⁵ Transcript, vol. 1, p. 184, lines 9-19.

⁸⁶ Transcript, vol. 2, p. 122, lines 24-28.

(1) Intention

[98] Based on Selvy's testimony and on the letter agreement dated January 11, 2015,⁸⁷ Skylight's intention was to engage Titus as a contractor. While Titus acknowledged signing the letter agreement, it is my impression that he did not fully understand the distinction between a contractor and an employee. In his testimony, Titus indicated that he was more concerned about ensuring that he would only be expected to work on a part-time basis and that he would be permitted to work from home, rather than being required to work from Skylight's office.⁸⁸

[99] Titus explained the manner in which his relationship with Skylight came together, as follows:

MR. VANIER: Okay. And I understand you wanted to get back into the travel agency business.

MR. GEORGE: Yeah, I -- I am interested in travel business because the reason I - - again, re-doing the -- with the part-time job. I don't want full-time job.

MR. VANIER: Okay. Well, how did the relationship with you and Skylight, how did it begin?

MR. GEORGE: I came to know them through one of my friends, because they are the only travel -- community travel doing business in South India travel business. They are the only one goes there.

MR. VANIER: Okay. Did you approach them with a plan?

MR. GEORGE: One of my friend introduced them, then I approached them. They are willing to help me with a part-time job.

MR. VANIER: So can you tell me what was agreed to?

MR. GEORGE: It was do my own business. They will give me the commission. That is the agreement.

MR. VANIER: Was there much negotiation on the commission split?

⁸⁷ Exhibit A-2, part of which is quoted in paragraph 24 above.

⁸⁸ Transcript, vol. 1, p. 205, lines 19-27.

MR. GEORGE: They do 70 percent of the commission, and I am okay for that.⁸⁹

[100] During his testimony, Titus stated that he was not an employee of Skylight, but he then went on to say that he was only a part-time employee.⁹⁰ These statements were a bit confusing as they seemed to indicate that Titus may have been uncertain as to his status, or more likely (particularly given the language difficulties), he may not have fully understood the meanings of the terms *contractor* and *employee*.⁹¹ Nevertheless, although there was a slight element of ambiguity, it seems that, overall, Skylight and Titus mutually understood that Titus worked for Skylight as an independent contractor, and not as an employee.

[101] Furthermore, it is my understanding that the Rulings Officer and the Appeals Officer acknowledged that Skylight and Titus intended that Titus would work as an independent contractor.⁹²

(2) Control

[102] During his testimony, Titus indicated that he was not concerned about earning a large amount of money, but he did want to work part-time in the travel industry.⁹³ Titus explained that he had a number of connections through his religious affiliation and that he had established a number of business connections because of the friendships that he had made in his church activities. Titus did not actively advertise. Rather, new clients came to him by word of mouth from other satisfied clients. Titus explained that he had a substantial amount of repeat business from long-time clients.⁹⁴

[103] Selvy testified that there was no legal prohibition to keep Titus from working for somebody else. In other words, he was allowed to work for other people.⁹⁵ Titus stated that he understood that he had the ability to work for other travel agencies besides Skylight, but he was not interested in doing so.⁹⁶

⁸⁹ Transcript, vol. 1, p. 191, line 13 to p. 192, line 8. Incidentally, the above passage illustrates the comment made previously about the challenges faced by Titus when communicating in English. He could understand and make himself understood, but with some difficulty.

⁹⁰ Transcript, vol. 1, p. 225, lines 10-20.

⁹¹ Transcript, vol. 1, p. 205, lines 19-27; p. 223, lines 3-15; and p. 224, line 23 to p. 255, line 20.

⁹² Exhibit R-3, p. 1, 3, 6 & 7; and Exhibit R-5, p. 8 & 10.

⁹³ Transcript, vol. 1, p. 230, lines 12-24.

⁹⁴ Transcript, vol. 1, p. 192, line 25 to p. 193, line 25.

⁹⁵ Transcript, vol. 1, p. 93, lines 2-10.

⁹⁶ Transcript, vol. 1, p. 230, lines 12-24.

[104] Titus performed almost all of his work at his home. He only went to the office to drop off his biweekly invoices and occasionally to meet with Skylight staff or airline representatives.⁹⁷

[105] Titus set his own hours, had his own customers, and worked whenever he liked.⁹⁸ Titus did not report to Skylight, other than when he submitted his invoices for the commissions that he had earned.⁹⁹

[106] Titus did not have fixed hours during which he was expected to work, and he could take sick days or vacation whenever he needed or wanted.¹⁰⁰ Titus notified Skylight when he was going on vacation for an extended period of time.¹⁰¹

[107] Skylight permitted Titus to pick the title to be used by him while working with Skylight. He selected the title *Sales Executive*.¹⁰²

[108] Titus explained the typical manner in which his clients utilized his services. They typically telephoned him, explained that they would like to take a trip and gave him the details of the trip. They had often already ascertained the price of the flight that they would like to take. Titus proceeded to do the booking for the flight and he sent the details of the flight to a consolidator, which then issued the tickets and sent them to him by email, whereupon he forwarded the tickets to the clients. Titus explained that approximately 90% of his clients paid for their flights by credit card, and their credit card numbers were entered into the SABRE system as part of the booking process. The entire process was done without Titus having any physical contact with the clients, and without Titus interacting with Skylight, other than using the password provided by Skylight to access the SABRE system. After the booking had been made and the tickets had been issued, Titus sent an invoice to Skylight, to bill for 70% of the commission that was to be paid to Skylight by the airline.¹⁰³

[109] Skylight did not have any financial expectations of Titus (other than to receive 30% of the commissions earned by Titus). Skylight did not impose any financial

⁹⁷ Transcript, vol. 1, p. 202, line 15 to p. 203, line 14; and p. 204, lines 4-12.

⁹⁸ Transcript, vol. 1, p. 158, line 3 to p. 159, line 20; and p. 207, line 22 to p. 208, line 6.

⁹⁹ *Ibid.*

¹⁰⁰ Transcript, vol. 1, p. 201, line 20 to p. 202, line 3.

¹⁰¹ Transcript, vol. 1, p. 92, lines 15-17.

¹⁰² Transcript, vol. 1, p. 178, line 28 to p. 180, line 11.

¹⁰³ Transcript, vol. 1, p. 194, line 2 to p. 195, line 5. As indicated above, Titus does not book tour packages. He books only airline flights.

goals, sales targets or benchmarks on Titus, nor did Skylight conduct any performance reviews in respect of Titus.¹⁰⁴

[110] The evidence indicates that Skylight did not control Titus. This factor strongly points toward independent-contractor status.

(3) Tools and Equipment

[111] Skylight provided Titus with access to SABRE, business cards and an email address. Titus worked primarily from his home. Titus was required to provide his own computer, telephone, office furniture (which was located at his home) and vehicle.

[112] Titus did not make specified payments to Skylight in respect of his use of SABRE or his email address and business cards. Rather, the compensation received by Skylight for those items came out of its 30% share of the commissions earned by Titus.¹⁰⁵

[113] Skylight did not provide Titus with office supplies.¹⁰⁶

[114] While this factor points in both directions, in my view it tilts toward contractor status.

(4) Hiring of Helpers

[115] Titus testified that he could not subcontract his work to a third party, nor could he hire anyone to help him with his work.¹⁰⁷

[116] This factor points toward employment.

(5) Risk of Loss

[117] As noted above, Titus incurred work-related expenses, as he was required to provide his own laptop, cell phone, office furniture and office supplies.

¹⁰⁴ Transcript, vol. 1, p. 202, lines 4-14.

¹⁰⁵ Transcript, vol. 1, p. 174, lines 10-27; p. 212, line 5 to p. 213, line 11; p. 230, lines 25-28; and p. 231, line 7 to p. 232, line 9.

¹⁰⁶ Transcript, vol. 1, p. 211, line 28 to p. 212, line 1.

¹⁰⁷ Transcript, vol. 1, p. 214, lines 12-24.

[118] Titus was also required to pay the fee for the TICO examination which he took at the commencement of his work with Skylight. He was not reimbursed by Skylight for that payment.¹⁰⁸

[119] Given that Titus was required to pay the above-mentioned costs, and given that it was possible that his costs for a particular month or year might exceed his revenue for that month or year, he had a risk of loss. This factor points toward independent contract.

(6) Responsibility for Investment and Management

[120] This factor was not raised during the direct examination or the cross-examination of Titus. This is an inapplicable factor.

(7) Opportunity for Profit

[121] Although Titus did not advertise through print or digital media, he worked hard to develop his clientele. He found his clients primarily through personal contact and maintaining good relationships with his relatives, friends, church congregants, and other persons with whom he had a connection. Titus regularly participated in three church congregations in Toronto and a fourth congregation in Niagara. He made friends with the people whom he met, then arranged travel for them, and they spread the news of his travel services to their acquaintances.¹⁰⁹ Titus generated his customer contact leads himself, and not through Skylight.¹¹⁰ Titus maintained a manual client list (actually a book in which he kept track of his clients),¹¹¹ which he could have taken with him if he were to have left Skylight.¹¹²

[122] Titus explained that in other contractor relationships of which he was aware, some travel agencies shared commissions with their contractors on a 50%/50% basis or a 60%/40% (in favour of the contractor) basis.¹¹³ However in his situation, Titus appreciated that he was entitled to 70% of his earned commissions, while Skylight received 30%.¹¹⁴ The fact that the commission-sharing ratio applicable to Titus was more favourable to him than the ratio used in many other situations, and the fact that the amount of commissions earned was a function of the time and effort that he

¹⁰⁸ Transcript, vol. 1, p. 199, line 2 to p. 201, line 4.

¹⁰⁹ Transcript, vol. 1, p. 192, line 25 to p. 193, line 25.

¹¹⁰ Transcript, vol. 1, p. 217, lines 14-20.

¹¹¹ Transcript, vol. 1, p. 215, lines 1-15.

¹¹² Transcript, vol. 1, p. 170, line 17 to p. 171, line 7.

¹¹³ Transcript, vol. 1, p. 210, lines 2-9.

¹¹⁴ Transcript, vol. 1, p. 192, lines 3-8.

devoted to client development and other aspects of his work, indicate that he had an opportunity for profit.

[123] This factor points strongly toward contractor status.

(8) Weighing, Balancing and Resolving

[124] To summarize, the *control* factor, the *risk of loss* factor and the *opportunity for profit* factor point strongly toward an independent-contractor relationship between Skylight and Titus. The *hiring of helpers* factor points toward an employer-employee relationship between Skylight and Titus. Although the *tools and equipment* factor points in both directions, it tilts toward contractor status. The *responsibility for investment and management* factor is not applicable in this situation.

[125] Based on my review of the above factors, I have concluded that, overall, those factors support the position of Skylight and Titus, i.e., those factors are consistent with the mutual understanding that Titus worked for Skylight as an independent contractor, and not as an employee. Furthermore, even if there was a lack of clarity concerning Titus' understanding of his relationship with Skylight, on balance, the *Sagaz* and *Wiebe Door* factors point toward contractor status. Accordingly, during the Relevant Period, Titus was not engaged in either insurable employment or pensionable employment with Skylight.

VI. CONCLUSION

[126] The Appeals are allowed, the Assessments in respect of Suresh (which are the subject of Appeals No. 2019-443(EI) and No. 2019-441(CPP)) are vacated, the Assessments in respect of Titus (which are the subject of Appeals No. 2019-450(EI) and No. 2019-451(CPP)) are vacated, and the Assessments in respect of Skylight (which are the subject of Appeals No. 2019-454(EI) and No. 2019-456(CPP)) are referred back to the Minister for reconsideration and reassessment on the basis that, during the Relevant Period:

- (a) neither Suresh nor Titus was engaged in insurable employment or pensionable employment with Skylight;
- (b) Selvy was engaged in pensionable employment, but not insurable employment, with Skylight; and

(c) Sheela and Akhill were engaged in both insurable employment and pensionable employment with Skylight.

[127] As neither the *Tax Court of Canada Rules of Procedure Respecting the Employment Insurance Act* nor the *Tax Court of Canada Rules of Procedure Respecting the Canada Pension Plan* provide for costs, I am not making any ruling or award in respect of the costs of these Appeals.

[128] There were six Notices of Appeal that were the subject of the trial, i.e., an EI Notice of Appeal and a CPP Notice of Appeal for each of Skylight, Suresh and Titus. Those Notices of Appeal were drafted by an agent, on behalf of the Appellants, at a time before the Appellants had retained counsel.

[129] In describing the relief sought, each of the six Notices of Appeal alleged that the particular Appellant's rights were violated by the conduct of a named employee of the CRA, and then went on to request that this Court award damages against the Minister for the unreasonable conduct of that employee. The granting of such relief is beyond the jurisdiction of this Court; therefore, I have ignored this particular claim for relief. Although this type of relief is beyond my jurisdiction, and notwithstanding the shortcomings in the various Reports prepared by the Officers (as indicated above), I will note that I found the Rulings Officer and the Appeals Officer to be courteous and polite, as well as sincere, respectful and moderate in the manner in which they approached the duties of their employment. These comments are intended only to provide my impression of the Rulings Officer and the Appeals Officer in respect of their appearance as witnesses in the trial of these Appeals. If the Appellants decide to pursue their claim for damages in a court that does have jurisdiction to grant such relief, my comments in this paragraph should not be construed as in any way addressing the evidence or the issues that may come before that court.

Signed at Ottawa, Canada, this 28th day of February 2024.

“Don R. Sommerfeldt”

Sommerfeldt J.

CITATION: 2024 TCC 26

COURT FILE NO.: 2019-454(EI); 2019-456(CPP); 2019-443(EI); 2019-441(CPP); 2019-450(EI); and 2019-451(CPP)

STYLES OF CAUSE: SKYLIGHT TRAVEL & TOURS INC. v. THE MINISTER OF NATIONAL REVENUE

SURESH KUMAR ARAVINDAKSHAN v. THE MINISTER OF NATIONAL REVENUE

TITUS GEORGE v. THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Ottawa, Canada

DATES OF HEARING: October 20, 2021 and April 26-27, 2022

REASONS FOR JUDGMENT BY: The Honourable Justice Don R. Sommerfeldt

DATE OF JUDGMENT: February 28, 2024

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