Docket: 2014-923(CPP)

BETWEEN:

3193099 MANITOBA LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 7, 2014, at Winnipeg, Manitoba

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Jeff D. Pniowsky
Agent for the Respondent:	Haley Hrymak

AMENDED JUDGMENT

This Judgment is issued in substitution for the Judgment dated October 20, 2014

IN ACCORDANCE with the reasons for judgment attached, the appeal from the assessment made under the ***Canada Pension Plan*** for the taxation year 2012 is hereby allowed on the basis that the Appellant, Jan Eissner, was not engaged in pensionable **employment** within the meaning of the *Canada Pension Plan* for the period from January 1 to December 31, 2012.

FURTHER, based upon the request of Appellant's counsel during the hearing of the matter and prior to the completion of evidence and submissions, the Appellant's, Thomas Eissner, appeal was withdrawn and, accordingly, the Minister's assessment that the worker, Thomas Eissner, was an employee with pensionable earnings remains.

Signed at **Vancouver**, **British Columbia**, this 5th day of November 2014.

"R.S. Bocock"

Bocock J

Docket: 2014-924(CPP)

BETWEEN:

JAN EISSNER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 7, 2014, at Winnipeg, Manitoba

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Jeff D. Pniowsky
Agent for the Respondent:	Haley Hrymak

AMENDED JUDGMENT

This Judgment is issued in substitution for the

Judgment dated October 20, 2014

IN ACCORDANCE with the reasons for judgment attached, the appeal from the **Minister's decision** made under the ***Canada Pension Plan*** for the period of January 1 to December 31, 2012, is hereby allowed on the basis that the Appellant was not engaged in pensionable **employment** within the meaning of the *Canada Pension Plan* for the period from January 1 to December 31, 2012 only, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment.

Signed at **Vancouver**, **British Columbia**, this 5th **day of** **November** 2014.

"R.S. Bocock"

Bocock J.

Docket: 2014-925(CPP)

BETWEEN:

THOMAS EISSNER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 7, 2014, at Winnipeg, Manitoba

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Jeff D. Pniowsky
Agent for the Respondent:	Haley Hrymak

AMENDED JUDGMENT

This Judgment is issued in substitution for the

Judgment dated October 20, 2014

IN ACCORDANCE with respect to the request of Appellant's counsel at the hearing of the matter and prior to the completion of evidence and submissions, the Appellant's appeal was withdrawn and the Minister's **decision** **that** the Appellant **w**as an employee with pensionable earnings remains.

Signed at **Vancouver**, **British Columbia**, this **5th day of** **November** 2014.

"R.S. Bocock"

Bocock J.

Citation: 2014 TCC 310
Date: **20141105**
Docket: 2014-923(CPP)

BETWEEN:

3193099 MANITOBA LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2014-924(CPP)

AND BETWEEN:

JAN EISSNER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2014-925(CPP)

AND BETWEEN:

THOMAS EISSNER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

AMENDED REASONS FOR JUDGMENT

Heard on Common Evidence

These Reasons for Judgment are issued in substitution for the Reasons for Judgment dated October 20, 2014

Bocock J.

I. Introduction

[1] The Minister determined and assessed the Appellant corporation which carries on business as Falcon Enterprises ("Falcon") as an employer and the two Appellant Eissner brothers, Jan and Thomas, as employees, concerning two consecutive periods: January 1 to December 31, 2011 (the "2011 Period") and January 1 to December 31, 2012 (the "2012 Period").

[2] At the hearing of the matter, Appellant's counsel withdrew the appeals relating to the assessments with respect to the 2011 Period for all Appellants and the 2012 Period in respect of the Appellant, Thomas Eissner, and the coincident impact of such an appeal for the 2012 Period on the Appellant, Falcon.

[3] Therefore, the sole matter and issue for this court to determine is whether Jan Eissner was an employee or independent contractor in respect of Falcon for the 2012 Period.

[4] Such a question of pensionable employment is frequently heard before this Court in respect of the *Canada Pension Plan*, (R.S.C., 1985, c. C-8) ("*CPP*") specifically within the definition of employment within the *CPP* subsection 2(1) and the reference to pensionable earnings in paragraph 6(1)(*a*) of the legislation which provides as follows:

> **2.** (1) "employment" means the state of being employed 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;

II. Facts related to Jan Eissner for the 2012 Period

[5] Falcon operated within the oil and gas industry in southwest Manitoba. The company provided servicing, maintenance and repairs to oil wells through its service rig equipment.

[6] Jan was effectively the chief operating officer of Falcon and in common parlance “ran the show”. The Respondent recognized such situation when it admitted the following facts in the reply: the Appellant (Jan) did not report to anyone, was not supervised, controlled his own schedule and vacations and provided management service and managed the day-to-day business operations of Falcon.

[7] Further, the Respondent in assessing Jan and Falcon for the 2012 Period made certain factual assumptions that Jan worked exclusively for Falcon, could not subcontract work or hire replacements, did not invoice Falcon for his services and was hired pursuant to a verbal agreement.

[8] At the hearing, the Court heard testimony on behalf of the remaining Appellants from Jan and his brother, Thomas. An appeals officer of the Canada Revenue Agency (“CRA”) was cross-examined briefly in relation to the filing history of the Appellants and the CRA internal report on an appeal (“CPT110 Report”).

[9] Aside from the CPT110 Report, certain relevant documents were tendered into evidence by the Appellants: invoices for the 2012 Period reflecting Jan’s personal contracting relationship with another oil drilling company (“Tundra”), a services agreement between Falcon and Jan dated as of January 1, 2012, management fee invoices rendered by Jan to Falcon for a period subsequent to the 2012 Period, Jan’s T1 tax return for the 2012 Period reflecting no employment income and only business income, GST information of the CRA confirming Jan’s sales revenue and GST paid on same and , lastly, Falcon’s T2 corporate tax returns reflecting Jan as an independent contractor.

[10] The agreement, entitled “services agreement”, provided for the usual declaratory and narrative statements concerning the parties’ intentions to be independent contractors and indemnifications for income taxes, CPP contributions and EI premiums. It also required Jan to collect and remit GST, which he did during the 2012 Period. The services agreement also made clear no relationship would be created between Jan’s employees (although factually there were none) and Falcon.

[11] During the 2012 Period, Jan provided services to several other companies. In those instances, the sole service provided by Jan was his industry knowledge, management and skill. There was uncontroverted evidence that all equipment, supplies and service rigs were provided by the other oil companies when Jan worked for them, the example of which was Tundra, to which Jan provided such services directly and in respect of which he was reimbursed for his expenses. As a worker for Falcon, the situation to this extent was substantially similar for Jan.

[12] As to remuneration paid by Falcon, Jan was paid $3,500 by bi-weekly and was not paid vacation pay. Although no actual invoices for the 2012 Period were adduced into evidence, Jan testified they were submitted during the 2012 Period in a similar fashion to those for which a sample was adduced into evidence for a subsequent period. Further, Jan through his services agreement, was insured for extended health benefits, but was responsible for reporting his own worker compensation status.

III. The Law

[13] The leading case of *10392644 Ontario Inc. o/a Connor Homes v the Minister of National Revenue*, 2013 FCA 85 has established the present cumulative authority concerning the general test and methodology to be employed by the trier of fact when grappling with the described "deceivingly simple" question of whether an individual is "performing the services as his own business on his own account": *1671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2011 SCC 59 at paragraph 47. In *Connor Homes supra,* the Federal Court of Appeal identifies the two step process of inquiry to be undertaken in order to address the question and then proceeds to state at paragraphs 39 and 40 the following:

> [39] Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.
>
> [40] The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in TBT Personnel Services Inc. v. Canada, 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the Wiebe Door factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties intent as well as the terms of the contract may also be taken into account since they colors the relationship.

> As noted in Royal Winnipeg Ballet at para. 64, the relevant factors must be considered “in the light of” the parties’ intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in Wiebe Door and Sagaz has been in fact met, i.e whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.

[14] In summary, *TBT Personnel Services Inc. v Canada*, 2011 FCA 256 and the subsequent *Connor Homes* cement the two step process for the determination of whether a worker is a person in business on her or his own account. Firstly, was the subjective intention of the parties established or reflected in writing and/or by action? Secondly, does the objective reality, based upon an analysis of the *Wiebe Door* factors, sustain or deny the subjective intention of the parties.

[15] The context in *Connor Homes* and, almost without exception, in all of the other authorities considered and reconciled within that leading authority are those of distant, arm’s length workers. The matter before the Court is not so concerned. It is uncontroverted evidence before the Court that Jan was inextricably linked with the overarching business undertaking of Falcon: they self dealt with respect to his own agreement, he construed his own obligations, responsibilities and salary and he was in control of Falcon’s profits and accountable for its business decisions and losses.

[16] In a recent “post-Connor Homes” case before this Court, Campbell J. outlined in *AnMar Management Inc. v Minister of Natural Revenue*, 2012 TCC 15, the dilemma of closely held corporations where the principal is invariably also a worker in the context of the longstanding employment versus contractor debate when she states the following:

> [18] The whole concept of the shareholder/director of a corporation, which he or she owns and controls, also being an employee is a difficult, although not impossible, reality that may exist. The question is: Who is controlling things in those circumstances?

[17] Campbell J. further references Bowman J., as he then was, who stated:

> [19] Justice Bowman in the case of Zupet, which I referenced above, put it succinctly at paragraphs 11 and 12 where he stated, and I quote from that case:
>
> > [11] I should think that even lawyers who are accustomed to juggling in their heads a variety of inconsistent legal fictions that bear no resemblance to reality might have some philosophical difficulty with the idea that an

> artificial person of which the only mind is the mind of an individual that owns it exercises a degree of control over that individual sufficient to establish a master-servant relationship.
>
> [12] Yet that is exactly what the Courts have done.

> [20] Justice Bowman again, at paragraph 13 of Zupet, went on to point out the inherent difficulties with this concept, and I quote:
>
> > [13] … This is an accepted fact of commercial reality (or, if you will, commercial unreality). One can sell to one's company, buy from one's company, and lease to or from one's company. And one can be an employee of one's own company. I understand it to be generally accepted that a meeting of the minds is an essential ingredient in a contract. One might wonder how there can be a meeting of the minds when we have only one mind - in essence, an identity or fusion of minds. This seems, however, to bother no one."
>
> [21] … Again, Justice Bowman in Zupet, at paragraph 17, stated that the other questions to be answered are: Whether the stated legal relationships are genuine and binding and not a sham. Secondly, what in fact did the parties do? With what type of relationship is their behaviour more consistent? Thirdly and finally, what type of relationships did the parties intend? All of these questions merge and overlap and must, in the majority of cases, be considered and answered together against the backdrop of all of the facts of the case. In most cases, it is important to step back and look at the "big picture".

[18] In keeping with the two step approach in *Connor Homes*, the Court now turns its attention to the services agreement: it is a clear expression of the intention of the parties. The question is to be asked however is, should the intention reflected in that services agreement be diminished or count for less because of the close relationship between the parties?

[19] The Respondent certainly assessed the Appellant on that basis and constantly submitted before this Court an argument along those lines. Respondent's counsel's primary arguments were that:

a. although the services agreement references the continuing obligations of Jan in respect of employees he may hire, he did not hire any;

b. the respondent contends that the services agreement is inconsistent with the objective reality because Jan's profit is so closely and inextricably linked with Falcon's;

c. under the services agreement, invoicing was required, but no documentary evidence for the 2012 Period was produced;

d. the services agreement was not produced at the ruling stage and an adverse inference should be drawn from that;

e. no invoices for expenses where ever submitted;

f. the services agreement merely formalized an existing relationship which did not alter dramatically, if at all, during the 2012 Period from previous periods; and

g. the GST account utilized by Jan to remit his charged GST on service fees was originally opened with a third party (Jan's wife) and in respect of initial business purpose of which was farming.

IV. Analysis

[20] The written services agreement that exists was executed by both parties, Falcon and Jan. Jan also contracted with other oil and drilling companies in the 2012 Period. The evidence regarding those other service recipients was fulsome and uncontroverted: Jan likely had no written agreement with them, but equally important, the structures, operations and dealings as between Jan and Falcon were all bona fide, manifest and not a sham.

[21] The actions of Jan and Falcon do not contradict their subjective intention. The inconsistencies maintained by Respondent's counsel with respect to the services agreement are either immaterial or are not contradicted by the evidence in terms of the ultimate parties' relationships. While Falcon supplied the tools of the trade, this was factually and anecdotally confirmed by Jan to be consistent and common-place throughout the oil drilling industry in southwest Manitoba and was consistent with his relationship with Tundra. It is also noted that Jan did provide his computer and occasionally a motor vehicle to Falcon. As to profit, not only was Jan's profit linked to his effort and knowledge, but he was free to, and did, contract directly with other businesses on very similar terms and conditions to those present in the Falcon relationship.

[22] As to control, as mentioned, the Respondent admitted Jan retained control, and in any event, evidence at the hearing was clear and obvious on this point: Jan was in control of his agreed to services.

[23] In summary, the intention was clear at the outset and has not been revealed as unrealistic by an examination of the *Wiebe Door* factors. At worst, the examination of those factors is indeterminate as to an employer/employee versus independent contractor relationship and, at best, indicates that a separate business of Jan's existed. Therefore, based upon an examination of the "real world" conduct of Jan and Falcon during the 2012 Period, there is nothing which otherwise demonstrates that the services agreement did not generally reflect the objective reality that Jan and Flacon were independent contractors.

[24] For these reasons, the appeal is allowed on the basis that Jan and Falcon were engaged as independent contractors during the 2012 Period. As specified in paragraph 2 of these reasons for judgment, the balance of the appeals were withdrawn.

Signed at **Vancouver**, **British Columbia**, this **5th** day of **November** 2014.

"R.S. Bocock"

Bocock J.

CITATION:	2014 TCC 310
COURT FILE NO.:	2014-923(CPP) 2014-924(CPP) 2014-925(CPP)
STYLE OF CAUSE:	3193099 MANITOBA LTD. JAN EISSNER THOMAS EISSNER AND **THE MINISTER OF NATIONAL REVENUE**
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	October 7, 2014
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF **AMENDED** JUDGMENT:	November 5, 2014

APPEARANCES:

Counsel for the Appellant:	Jeff D. Pniowsky
Agent for the Respondent:	Haley Hrymak

COUNSEL OF RECORD:

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