Docket: 2001-1934(EI)

BETWEEN:

CHARLES W. DOERING,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of *Charles W. Doering* (2001- 1937(CPP)) at Calgary, Alberta, on February 27, 2003.

Before: The Honourable Judge D.W. Beaubier

Appearances:

Agent for the Appellant: Caroline A. Doering

Counsel for the Respondent: Brooke Sittler

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JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Toronto, Canada, this 12th day of March 2003

"D.W. Beaubier"

J.T.C.C.

Citation: 2003TCC100
Docket: 2001-1934(EI)
2001-1937(CPP)

BETWEEN:

CHARLES W. DOERING,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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## REASONS FOR JUDGMENT

**Beaubier, J.T.C.C.**

[1] These appeals were heard together on common evidence by consent of the parties at Calgary, Alberta on February 27, 2003. The Appellant and his wife, Caroline, both testified for the Appellant. The Respondent called Barry Urbani, Director of Employee Relations for Trimac Transportation Services Inc., ("Trimac"), which owns the alleged employer Bulk Systems (Alberta) Ltd. ("BSAL"). Mr. Urbani dealt with BSAL's collective agreements and with the severance of the Appellant.

[2] The Appellant alleges that he was an employee of BSAL during the Employment Insurance period in issue (January 28, 1998 to February 7, 2000) and during the Canada Pension Plan period in issue (January 1, 2000 to February 7, 2000). He has appealed rulings to the contrary. The Employment Insurance period includes the Canada Pension Plan period. Therefore the Employment Insurance pleadings will be used as a reference.

[3] The particulars in dispute are set out in paragraphs 5 to 9 inclusive of the Reply to the Notice of Appeal in 2001-1934(EI). They read:

> 5. In response to the appeal, the Minister decided that the Appellant was not employed under a contract of service with the Payor for the period January 28, 1998 to February 7, 2000.
>
> 6. In so deciding as he did the Minister relied on the following assumptions of fact:
>
> (a) the Payor owns and operates a business which transports woodchips from sawmills to pulp mills;
>
> (b) the Worker was hired as a driver and his duties included loading, hauling, and unloading;
>
> (c) the Appellant and the Payor signed an independent contractor agreement;
>
> (d) the Payor's business operates 24 hours a day, 7 days a week;
>
> (e) the Payor's office hours are from 8:00AM to 5:00PM;
>
> (f) the Appellant earned a flat rate per trip, the Appellant was only paid for work completed;
>
> (g) the Appellant was paid weekly;
>
> (h) the Appellant was not entitled to vacation pay or paid sick leave;
>
> (i) the Appellant worked a maximum of 15 hours per day and a maximum of 75 hours per week;
>
> (j) the Appellant did not have any set starting or finishing times;
>
> (k) the work hours were set by the Payor's clients;
>
> (l) a record of the Appellant's trips was maintained by an onboard computer in the truck;
>
> (m) the Appellant was not supervised;

(n) the Appellant performed his services in the field and he worked on his own;

(o) the appellant had the freedom to work for others;

(p) the Appellant provided the tools and equipment required including the truck and onboard computer;

(q) the Payor provided the trailer;

(r) the Appellant had a risk of loss;

(s) the Appellant incurred expenses in the performance of his duties including fuel, repairs, maintenance, licenses, insurance and any fines;

(t) the Appellant had the power to hire his own helpers and replace himself, and

(u) the Appellant was responsible to pay any replacement.

**B. ISSUES TO BE DECIDED**

7. The issue to be decided is whether the Appellant was employed under a contract of service with the Payor during the period January 28, 1998 to February 7, 2000.

**C. STATUTORY PROVISIONS, GROUNDS RELIED ON AND RELIEF SOUGHT**

8. He relies on, *inter alia*, paragraph 5(1)(a) and section 2 of the *Employment Insurance Act*.

9. He submits that the Appellant was not engaged in insurable employment within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act* as he was not engaged under a contract of service with the Payor for the period January 28, 1998 to February 7, 2000.

[4] Assumptions 6 (b), (n) and (o) are in dispute. The remaining assumptions were not refuted by the evidence. Respecting the assumptions in dispute and assumption 6 (t), the Court finds:

6 (b)

The Appellant was hired along with his tractor (truck).

6 (n)

The Appellant was told when to appear to pull his trailer. The number of loads depended on the hauling distance required from the sawmill supplying chips to the pulp mill (which was BSAL's customer) to which BSAL's trailer was pulled for unloading purposes upon the pulp mill's order for service. However the Appellant could haul down any road or route he chose. His actual work day or week hours were only restricted by the hourly restrictions of the Alberta or Canada Labour Code that applied to the week.

6 (o)

The Appellant could not put his tractor to work for others because it was insured by Trimac. Within the Codes' hourly restrictions per day or week, he could personally work for others.

6 (t)

Any substitute driver was subject to BSAL's approval. BSAL did not approve of the Appellant's brother-in-law as a substitute driver for the Appellants.

[5] The Appellant and BSAL had a formal written contract for the work (Exhibits A-1 and A-2). It is, in form and intent, not a contract of employment. The Appellant takes serious exception to it and testified that in his view, BSAL broke the contract two months after it began when it insisted on painting his tractor in Trimac colours and not Weldwood (the pulp company) colours. However subparagraph 1(n) permits BSAL to specify the colours for the truck and does not require that they be the pulp company's or anyone else's particular colours. Contrary to Mr. Doering's view, that is for BSAL alone to decide. Therefore, the Court finds that Exhibits A-1 and A-2 constituted a contract between the Appellant and BSAL at all material times for the period.

[6] In the foregoing context, a review follows of the four initial tests respecting employment contained in *Wiebe Door Services Ltd. v. The Minister of National Revenue*, (F.C.A.) 87 DTC 5025;

1. The Control Test

Mr. Doering could refuse a call for work. He testified that he did not. But at the same time he testified that others under the same kind of contract did refuse at times. He could also choose his driving routes and, within BSAL set speed limits, choose his speed of work. Thus Mr. Doering exercised control as to how and when he worked.

2. Tools

Mr. Doering owned his own tractor and any accessory tools. That ownership was a condition of his contract with BSAL. Pay was based on tractor service, not on Mr. Doering's personal service.

3. Chance of Profit or Risk of Loss

This was entirely Mr. Doering's. Both he and Mrs. Doering testified that he lost money on the contract. They are believed. All of the trailer's ownership and operating expenses were borne by him. He bore the entire risk of profit or loss.

4. Integration

BSAL had a large number of other tractor operators under contract. It could operate easily without the Appellant. Similarly, the Appellant could contract his tractor operation with someone else and has since done so. Each was merely an accessory to the other.

[7] On the basis of the foregoing tests, Mr. Doering was not an employee of BSAL.

[8] More important however, is the evidence that during both periods, Mr. Doering was a businessman who was in business for himself and that was the way that he contracted with BSAL. It is also the way that each of them dealt with the other under that contract.

[9] The appeals are dismissed.

Signed at Toronto, Canada, this 12th day of March 2003.

"D.W. Beaubier"

J.T.C.C.

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| CITATION: | 2003TCC100 |
| COURT FILE NO.: | 2001-1934(EI)<br>2001-1937(CPP) |
| STYLE OF CAUSE: | Charles W. Doering v. MNR |
| PLACE OF HEARING: | Calgary, Alberta |
| DATE OF HEARING: | February 27, 2003 |
| REASONS FOR JUDGMENT BY: | The Honourable Judge Beaubier |
| DATE OF JUDGMENT: | March 12, 2003 |

APPEARANCES:

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| Agent for the Appellant: | Caroline A. Doering |
| Counsel for the Respondent: | Brooke Sittler |

COUNSEL OF RECORD:

Agent for the Appellant:

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| Name: | Caroline A. Doering |
| Firm: | |

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| For the Respondent: | Morris Rosenberg<br>Deputy Attorney General of Canada<br>Ottawa, Canada |