Docket: 2009-1626(EI)

BETWEEN:

RONALD S. CRAIGMYLE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *Ronald S. Craigmyle* (2009-1627(CPP)) on August 18, 2010 in Prince George, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Amandeep K. Sandhu

AMENDED JUDGMENT

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

Signed at **Vancouver**, British Columbia, this **4th** day of **May** 2011.

"L.M. Little"

Little J.

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Citation: 2011 TCC 128
Date: 2011**0504**
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RONALD S. CRAIGMYLE,

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AMENDED REASONS FOR JUDGMENT

Little J.

A. FACTS

[1] The period under review is from February 16, 2008 to November 5, 2008 (the "Period").

[2] In the Period under review, the Appellant operated a driving school in the Quesnel area of British Columbia under the name of Ron's Driving School (the "Business").

[3] The Appellant operated the Business as a sole proprietorship.

[4] The Appellant's Business offered classroom driving instructions and in-car driving training.

[5] The Appellant's Business was regulated by the Provincial Government.

[6] The Appellant operated his Business from his personal residence at 3102 Gook Road in Quesnel.

[7] The worker, Tessa Murray (the "Worker"), provided her services as a driving instructor to the Business.

[8] The Worker was certified as a driving instructor.

[9] The Appellant maintains that the Worker was offered the option of being an employee or a contractor in the Appellant's Business. However, the Appellant stated that the Worker agreed to be an independent contractor. The Appellant and the Worker signed a contract (Employment Contract, Exhibit A-1, Tab 1). The contract clearly stated that the Worker was a "Contractor".

[10] The Appellant maintains that the Worker performed additional duties, including booking driving lessons, providing information on prices for lessons and available times for lessons, road tests, and assisting clients in preparing for the driver's examination process.

[11] The Worker provided her services to the Business for approximately fifteen hours per week.

[12] The Appellant agrees that the majority of the duties of the Worker were performed in the specialized vehicle provided by the Appellant.

[13] The Worker was required to invoice the Appellant on the 15th and 30th of each month.

[14] The Appellant was responsible for repairs and maintenance of the specialized vehicle.

[15] The Appellant provided the Worker with a gas card to enable her to purchase gasoline for the specialized vehicle.

[16] The Appellant provided the Worker with business cards and stationery.

[17] The Appellant was responsible for resolving customer complaints.

[18] The Worker provided her own computer, telephone and internet, plus an office in her home.

[19] The Appellant maintains that he was responsible for advertising the Business. However, the Worker testified that she also did some personal advertising at the Williams Lake rodeo.

[20] The Appellant supplied the Worker with the specialized vehicle in order to offer the in-car driving experience.

[21] The Worker was not allowed to use the Appellant's specialized vehicle for personal use.

[22] The Appellant paid the Worker at the rate of $20.00 per hour.

[23] The Appellant maintains that the Worker was covered under the Appellant's Workmen's Compensation Plan and the Appellant's insurance bond.

[24] The written contract (Employment Contract, Exhibit A-1, Tab 1) contained restrictive covenants which had the effect of limiting who the Worker could work for, including restricting her employment for up to one year after she was terminated with the Appellant. However, it was specified in the contract that the Appellant could waive these restrictions.

[25] By letter dated October 15, 2008, the Appellant terminated the Worker's contract effective November 15, 2008 (Exhibit R-1). The Appellant stated in his letter to the Worker that the termination was made because there was insufficient work to continue the contract.

[26] In November or December 2008, the Worker approached officials of Canada Revenue Agency ("CRA") and indicated that she was an employee of the Appellant for the Period.

[27] By letter dated December 4, 2008, officials of the CRA advised the Appellant that they had ruled that Tessa Murray was an employee of the Appellant from February 16, 2008 to November 5, 2008 (Exhibit A-1, Tab 3).

B. ISSUES

[28] The issues are:

a) The issue under the *Canada Pension Plan* (the "*Plan*") is whether the Worker was employed in pensionable employment as defined by the *Plan* during the Period; and

b) The issue under the *Employment Insurance Act* (the "*EI Act*") is whether the Worker was employed in insurable employment with the Appellant as defined by the *EI Act* during the Period.

C. ANALYSIS AND DECISION

[29] During the hearing, the Appellant filed a document which is headed "Employment Contract" (the "Contract") (Exhibit A-1, Tab 1). The Contract was dated February 18, 2008 and was signed by the Appellant and by the Worker.

[30] The Contract states at the top of the page:

> THIS CONTRACT IS BETWEEN RON'S DRIVING SCHOOL, HEREINAFTER CALLED THE COMPANY AND TESSA MURRAY, HEREINAFTER CALLED THE CONTRACTOR.

[31] Paragraph 1 of the Contract provides as follows:

> 1. The relationship between the Contractor and the Company is one of contractor / sub contractor and the Contractor is responsible for all his / her Costs, Pension Plan Contributions, Income Tax, Medical Plan, Payroll Deductions etc.

[32] It is noted that the word "Contractor" (referring to Tessa Murray the Worker) is found 17 times in the Contract. There is no reference to the word "employee", i.e., the Worker was always referred to as "the Contractor".

[33] It should also be noted that the Company agreed to lend money to the Worker. The Company Loan Agreement Contract (the "Loan Agreement") (Exhibit A-1, Tab 2) reads, in part, as follows:

> THIS CONTRACT IS BETWEEN RON'S DRIVING SCHOOL, HEREINAFTER CALLED THE COMPANY AND TESSA MURRAY, HEREINAFTER CALLED THE CONTRACTOR.

[34] The Loan Agreement also states:

> IT IS AGREED THAT:
>
> 1. The Company will pay the Contractor the sum of $2,000.00 (TWO THOUSAND DOLLARS) as an interest free loan, …

[35] The Loan Agreement was signed by the Appellant and the Worker. The Worker signed the Loan Agreement as the Contractor.

[36] During the hearing, the Appellant filed a copy of a letter from himself to officials of the CRA (Exhibit A-1, Tab 3). In this letter, the Appellant made the following comments:

> Ms Murray as a contractor for our company was responsible for: -
>
> - Having an option of being an employee or contractor and ultimately agreeing to be a contractor and signing a contract with our company indicating this.
> - Planning all the work to be done and co coordinating this with all the students.
> - Time frames of completing the work within the ICBC guidelines.
> - Scheduling her hours of work.
> - The work location.
> - She was not supervised and had complete freedom in how the work was being carried out.
> - Volumes of work were decided entirely by her with the number of students requiring training. She could work any amount of hours she wished and she flexed these hours accordingly to suit her own needs and scheduling. Ms Murray also took other employment during this contract that restricted her availability for the driver training and was something we had no control over.
> - When students did not show up for her scheduled appointments Ms Murray was not paid and this clearly indicates there was a risk of loss, which was hers. It was clearly explained to her on a number of occasions that the company could not pay for hours that were not worked.
> - Any upgrading of training was to be paid for by Ms Murray who incidentally paid for all of her own driver training courses and she kept all the records of her expenses incurred during her training to be presented later as legitimate business expenses as a self employed contractor.
> - The area covered was clearly Quesnel but in discussions with Ms Murray Williams Lake and Prince George were discussed as additional areas and it was mentioned she would require her own vehicle prior to working in these other communities.

- Ms Murray kept all records for the students, which were handed over to the company after completion. The company did not have instant access to these records, which were kept at Ms Murray's home address and entirely in her possession and not at our driving school offices. Our school had no means of verifying any training with students or their parents without first consulting with Ms Murray to obtain her records.
- Ms Murray could have hired a person to assist her with any part of this work i.e. reception, telephone, booking appointments etc and could have hired a driving instructor within the guidelines set by ICBC. The company cannot just hire a driving instructor, as there are specific rules and guidelines applicable i.e. the school must physically hold the instructors licence in their head office and ICBC must be notified for insurance purposes in advance of the instructors working for the company. Ms Murray well knows this as she went through this upon her appointment as an instructor and she could not get clearance to work until ICBC signed off on her and sent a formal written confirmation that she was accepted.
- Ms Murray had her own office, home and cell phone, computer and other miscellaneous expenses, which the company did not provide her with and she was claiming as business expenses required by her to fulfil the terms of work in the contract. The company did support her with some paper work forms and occasional internet access as she had difficulties in getting her email and internet but again this was nothing more tha[n] being supportive to her due to her financial difficulties. Ms Murray was known to drive around in order to find other businesses['] unsecured internet access to complete her work and emails.

Was there a contract of service between the Appellant and the Worker?

[37] The first issue to be decided is whether the Worker was employed "under any express or implied contract of service". Only if the Worker was employed under a contract of service will she qualify for "insurable employment" and "pensionable employment" (as defined by the *EI Act* and the *Plan*).

[38] What constitutes a "contract of service" has been considered by the Courts many times, often in the context of distinguishing the relationship from a "contract for service". In other words, the Court must determine if the Worker was an employee of the Appellant or an independent contractor.

[39] An examination of what the Courts have held to constitute a contract of service is required. The Courts have developed a series of tests focusing on the total relationship of the parties with the analysis centered around four elements:

(a) degree of control and supervision;

(b) ownership of tools;

(c) chance of profit; and

(d) risk of loss.

[40] These tests were propounded by the Federal Court of Appeal in *Wiebe Door Services Ltd. v M.N.R.* (1986), 87 D.T.C. 5025 (F.C.A.) [*Wiebe Door*], and accepted and expanded by subsequent cases. The Supreme Court of Canada reviewed this issue in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] S.C.J. No. 61 [*Sagaz*]. Speaking for the Court, Major J. stated, at paragraph 47:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[41] Accordingly, Major J. considered the central question to be determined is "whether the person who has been engaged to perform the services is performing them as a person in business on his own account" or is performing them in the capacity of an employee.

[42] The requirement to take a holistic approach in examining the tests has been emphasized by the Federal Court of Appeal on past occasions:

> ... we view the tests as being useful subordinates in weighing all of the facts relating to the operations of the Applicant. That is now the preferable and proper approach for the very good reason that in a given case, and this may well be one of them, one or more of the tests can have little or no applicability. To formulate a decision then, the overall evidence must be considered taking into account those of the tests which may be applicable and giving to all the evidence the weight which the circumstances may dictate.

> (*Moose Jaw Kinsmen Flying Fins Inc. v M.N.R.*, [1988] 2 C.T.C. 2377 (F.C.A.), 88 D.T.C. 6099 at 6100)

Similarly, Major J. stated in *Sagaz*, at paragraph 48:

> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[43] Before applying the facts of the present case to the principles as set out above, it should be noted that the Minister's determination that the Worker's employment was pursuant to a contract of service is subject to independent review by the Tax Court. No deference to the Minister's determination is required (*Jencan Ltd. v M.N.R.*, [1997] F.C.J. No. 876 (F.C.A.) at para 24; cited with approval in *Candor Enterprises Ltd. v M.N.R*, [2000] F.C.J. No. 2110 (F.C.A.).

[44] As stated above, the *Wiebe Door* test can be divided into four categories:

Control

[45] MacGuigan J. said in *Wiebe Door*, at 5027:

> The traditional common-law criterion of the employment relationship has been the control test, as set down by Baron Bramwell in *R. v. Walker* (1858), 27 L.J.M.C. 207, 208:
>
> It seems to me that the difference between the relations of master and servant and of principal and agent is this: A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.

[46] In other words, the key aspect of "control" is the employer's ability to control the *manner* in which the employee carries out his or her work; thus, the focus is not on the control that the employer, in fact, exercised over the employee. Examples of this ability include the power to determine the working hours, defining the services to be provided and deciding what work is to be done on a given day (*Caron v M.N.R.*, [1987] F.C.J. No. 270 (F.C.A.)).

[47] In his closing argument, the Appellant said:

> … Control of work to be done. Again, entirely was at her control. She had control of the students. I don't have access to her diary, her scheduling. It would be impossible for me to even attempt to try and book an appointment for her, because I don't know

> when she's working, when she's not working, what her schedule was. And there was nothing in the evidence to say that I was controlling.
>
> (Transcript of closing argument, page 8, lines 1-8)

[48] The Appellant also said:

> So the control of work certainly was -- nothing in the testimony, I don't believe, insinuates that I've been controlling her work in any form or fashion, as an employer. And clearly it was only guided information when it was being sought, general conversations at the beginning and end of the day.
>
> (Transcript of closing argument, page 9, lines 18-23)

[49] I have concluded that the evidence in this case is that the amount of control exercised by the Appellant over the Worker is not the type of control that an employer would exercise over an employee. In my opinion, the extent of control exercised by the Appellant is the type of control that may be found in an independent contractor status.

Ownership of Tools of the Trade

[50] In this situation, the main tool that was used was the specialized driving vehicle that was owned by the Appellant. However, the Worker had her own computer, office, home and cell phone.

[51] I do not believe that this test is that significant in this situation.

Chance for Profit and Risk of Loss

[52] The Appellant said:

> … The chance of profit or risk of loss certainly was there. That component was a factor in her job, with the students not showing up with time travelling and stuff. She took that on entirely. …
>
> (Transcript of closing argument, page 10, lines 21-24)

[53] While it is not a major factor in this situation, I believe that this test is more in favour of the fact that the Worker was an independent contractor rather than an employee.

Contractual Intention

[54] Recent decisions of the Federal Court of Appeal have placed importance on the intention of the parties. I refer to the following Court decisions:

(a) *Royal Winnipeg Ballet v Minister of National Revenue*, 2006 FCA 87, [2007] 1 F.C.R. 35;

(b) *Combined Insurance Company of America v M.N.R.*, 2007 FCA 60, [2007] F.C.J. No. 124; and

(c) *City Water International Inc. v M.N.R.*, 2006 FCA 350, [2006] F.C.J. No. 1653.

[55] In this situation, it will be noted that the Contract clearly specifies 17 different times that the Worker agreed to be recognized and treated as a Contractor. In addition, it should be noted that, after the Worker was terminated by the Appellant, she claimed that she was an employee of the Appellant and not a Contractor. In recognition of the fact that she considered herself to be an employee of the Appellant, she filed a Notice of Intervention with the Court Registry on July 13, 2009. By letter addressed to the Department of Justice, dated July 21, 2010, the Worker said:

> To whom it may concern,
>
> I am withdrawing as Intervener in the above mentioned matter.

[56] In connection with the Worker's decision to withdraw her Notice of Intervention, Counsel for the Respondent said:

> MS. SANDHU: I can refer to my notes, but it was my understanding that she decided that she'd have to drive down, and it simply wasn't something that she was willing to do, just on principle.
>
> JUSTICE: She made that decision before she got the subpoena.
>
> MS. SANDHU: Sorry?
>
> JUSTICE: She made that decision before she got your subpoena.
>
> MS. SANDHU: That's correct.
>
> (Transcript of closing argument, page 49, lines 14-23)

[57] In other words, the Worker had apparently lost interest in pursuing her position that she was an employee of the Appellant and she only appeared in Court as a witness for the appeal after she was served with a subpoena by the Respondent.

[58] I accept the Appellant's testimony that he and the Worker intended their relationship to be that of a Contractor in the Period in question and that she was not an employee of the Appellant.

[59] I find as follows:

A. The Worker was not employed in pensionable employment as defined by the *Plan.*

B. The Worker was not employed in insurable employment as defined by the *EI Act*.

[60] The appeals are allowed.

Signed at **Vancouver**, British Columbia this **4th** day of **May** 2011.

"L.M. Little"

Little J.

CITATION:	2011 TCC 128
COURT FILE NOS.:	2009-1626(EI) and 200-1627(CPP)
STYLE OF CAUSE:	Ronald S. Craigmyle and The Minister of National Revenue
PLACE OF HEARING:	Prince George, British Columbia
DATE OF HEARING:	August 18, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	February 28, 2011
DATE OF AMENDED JUDGMENT:	**May 4, 2011**

APPEARANCES:

For the Appellant:	The Appellant Himself
Counsel for the Respondent:	Amandeep K. Sandhu

COUNSEL OF RECORD:

For the Appellant:

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