Docket: 2011-2961(CPP)

BETWEEN:

SURINDER HAYER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 7, 2012 and October 24, 2012 and Judgment rendered orally on October 26, 2012 at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Agent for the Appellant:	Praveen K. Vohora
Counsel for the Respondent:	Devi Ramachandran

JUDGMENT

The appeal is dismissed, without costs, and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of November 2012.

"Diane Campbell"

Campbell J.

Citation: 2012 TCC 392
Date: 20121108
Docket: 2011-2961(CPP)

BETWEEN:

SURINDER HAYER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant has appealed from the decision of the Minister of National Revenue (the "Minister") pursuant to a Notice of Assessment dated April 14, 2011 which assessed the Appellant with respect to *Canada Pension Plan* contributions for the 2009, 2010 and 2011 taxation years. The Minister determined that these *Canada Pension Plan* contributions were payable in connection with services provided to the Appellant by a number of workers who were taxi cab drivers.

The Issue

[2] The issue is whether these workers were employed by the Appellant in pensionable employment for the purposes of the *Canada Pension Plan* during these taxation years. The underlying question for my determination is whether the workers were engaged by the Appellant as employees or as independent contractors.

[3] I have only the pensionable contributions before me in this appeal, as the insurable earnings are covered under the special provisions of paragraph 6(e) of the *Employment Insurance Regulations* relating to taxi cab drivers and were not appealed. There are no similar provisions contained in the *Canada Pension Plan*.

[4] I heard evidence from the Appellant to the effect that she operated a proprietorship under her name but that, in actual fact, she knew very little about the business operations as the day-to-day activities were handled by her husband, Kewal S. Hayer. Consequently, the husband provided most of the evidence respecting the business activities.

[5] Mr. Hayer testified that he operated a taxi cab business since 2000 but that, in 2007, he merged with Kelowna Cabs. He pays Kelowna Cabs a monthly amount for dues and insurance and, in return, Kelowna Cabs provides the dispatch services to its fifty-eight shareholders, of which the Appellant is one such shareholder. Shareholders have a varying number of cabs but the Appellant operates two. Kelowna Cabs screens the drivers and ensures that they have the necessary chauffeur permits and city licenses required by the City of Kelowna to operate taxi cabs.

[6] Each driver is identified by a specific identification number and Mr. Hayer explained that Kelowna Cabs, through its computer system, can track each driver's route, how much money they are making and how fast they are travelling. The Appellant could compare the information kept on the Kelowna Cabs' dispatch system to the trip sheets provided by the drivers.

[7] The Appellant generally engaged six drivers and the shifts were for ten hours. Each driver completed trip sheets, which tracked the details of the passengers in that cab. These sheets were supplied by the Appellant and kept in the cab, together with envelopes, pens, calculator and staples. The drivers were also responsible to include the fares owed to the Appellant in respect to the cash or credit card receipts in these envelopes with the trip sheets, which were delivered to the Appellant at the end of each shift. The total fares were split on a forty/sixty per cent basis with forty per cent being retained by the drivers, which included HST.

[8] The Appellant supplied the vehicles which the workers drove. These vehicles were equipped with GPS systems and credit card machines. Mr. Hayer testified that the drivers were not told where to locate the cabs within the City of Kelowna during their shift, except to the extent that he ensured that special events were covered and the scheduling of drivers to cover the airport. The Appellant paid the required yearly airport fee which entitled its cabs to use the airport taxi stand.

[9] The Appellant had the drivers sign a two-page contract entitled "Driver Operator Agreement" (the "Agreement") in which the drivers agreed to observe the rules of Kelowna Cabs and to pay the Appellant at a rate of sixty per cent of all gross

earnings. The Agreement contained a clause that the drivers would be responsible for CPP contributions in respect to their earnings.

[10] The Respondent relied on the evidence of a former driver, Gilles Laferriere, who had worked for a two-year period for the Appellant, together with the Appeals Officer and the Trust Examiner. The former cab driver testified that, although the Appellant kept referring to him as an independent contractor, he was treated as an employee and believed himself to be an employee. He stated that Mr. Hayer provided him with his shift schedule without an opportunity of his input on availability. Although Mr. Hayer did not direct him to any particular location in Kelowna during his schedule, he was told when he had to cover the airport. He also stated that, if the cab had to be in a garage for repairs during his shift, Mr. Hayer paid him $10 an hour while waiting for the vehicle to be repaired. Vehicle maintenance and repair were the responsibility of Mr. Hayer, as well as fuel costs. He stated that Mr. Hayer provided him with a gas card to a specific station that he used during his shifts. He did supply one item and that was a cell phone. The business cards that were kept in the cab were supplied by Kelowna Cabs and contained their logo. These business cards were used as the customer receipts.

The Law

[11] The leading case in this area is the Supreme Court decision in *Sagaz Industries* (more accurately known as *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59). Justice Majors stated that there is no one conclusive test that can be applied to easily determine whether a worker is an employee or an independent contractor. As he suggested at paragraph 46 of those Reasons, the totality of the parties' relationship must be reviewed. At paragraph 47, Justice Majors confirmed the continued use of the *Wiebe Door* factors of control, tools, profit and loss and, in addition, he formulated the central question to be asked as follows: whether a person who has been engaged to perform the services is performing them as a person in business or on his own account (see *Wiebe Door Services v. Minister of National Revenue* (1986), 87 D.T.C. 5025 (F.C.A.)). The weight to be given to each of the *Wiebe Door* factors will depend on the facts and evidence in each particular appeal and one or more factors in the end may have a neutral impact.

[12] In more recent decisions, courts have also looked at the intention of the parties. Intention will be a factor that should be considered in the total work relationship, provided the parties have a meeting of minds and a shared and common view of their relationship. If this is not present, intent will not be a factor to consider. In this appeal, the parties did not share a common intention. The driver viewed himself as an

employee, while the Appellant believed the drivers to be independent contractors. Therefore, intention is not a factor. Even the Agreements did not contain a clause that specifically referred to the drivers as either employees or independent contractors. Instead, the party heading to the Agreement referred to the Appellant as the "owner" and the worker as the "driver".

[13] I heard testimony from only one worker, although a number had been engaged throughout the years under appeal. According to the Trust Examiner, the identity of many of the workers was difficult to ascertain because they were identified in some cases only by a first name and not all of them had Social Insurance Number information attached. Where the examiner had addresses or SIN information, she attempted to match names through the Canada Revenue Agency computer system.

[14] The Appeals Officer testified that she spoke to a driver who is since deceased. According to her testimony and the contemporaneous notes that she took, that deceased worker confirmed to her much of the evidence given by the driver called by the Respondent. This deceased worker confirmed to the Appeals Officer that Mr. Hayer provided the vehicles and trip sheets, a percentage of the fare money had to be submitted to the Appellant, that he was subject to the Appellant's shift schedule, that he received forty per cent of the gross fares, that he was responsible for remitting GST/HST on this percentage and that he was directed to the locations in Kelowna where he would complete his shift. I believe this type of evidence, although secondhand, meets the test of reliability and necessity. Its impact is dependent on the relative weight which I may ultimately decide to give it. However, although it supports the evidence of the one driver, I have concluded that I have sufficient and reliable evidence from the witnesses before me to conclude that these drivers were, in fact, employees and not independent contractors.

Control

[15] The evidence of both the Appellant's husband and the driver was that the shifts were scheduled by the Appellant and those shifts dictated the hours and time of day that the driver would be available and working. In fact, Mr. Hayer testified that a driver had to work the full ten hour shift and had no choice to work fewer hours on that shift. Although the drivers had some control over the areas within Kelowna where they would spend their shift, the evidence was that the Appellant did schedule drivers on an alternate basis to cover the airport and to cover special events. According to the driver, if he was scheduled to be in the Westbank area, he was prohibited from being within the City of Kelowna itself.

[16] According to Mr. Hayer, he viewed the drivers as having complete autonomy over their shifts because they decided their pick ups and drop offs and, ultimately, how much money they would make. However, he also testified that he had the ability to track their movements throughout a shift by comparing their trip sheets with the computer-generated tracking system of driver identification numbers which Kelowna Cabs performed. This could be done to ascertain why one driver was bringing in fewer fares than the others. Even though Mr. Hayer stated that he did this comparison only once when there was a complaint, it clearly demonstrates that the Appellant had the ultimate "right" to control the drivers using this method. It is the "right to control" those drivers, as opposed to the actual control that was exerted, that is of significance. While a dress code was implemented by Kelowna Cabs, the Appellant required the drivers to adhere to it. Mr. Hayer and the worker both agreed that the drivers were prohibited from working for rival companies while engaged by the Appellant. Finally, the driver, if unavailable, could not hire his replacement, as that was solely the Appellant's decision. This factor supports the relationship as being one of employer/employee.

Tools

[17] The main asset is the vehicle. The Appellant supplied the vehicle equipped with the GPS system, the trip sheets, calculator and so forth. The drivers did not rent or lease the use of the vehicles. According to the driver, he used his personal cell phone to contact customers and the Appellant, but the driver supplied nothing else except for his personal licensing to drive a cab. In addition, the Appellant paid for maintenance, repairs and insurance. Even the fuel was supplied by the Appellant through a gas card for specific gas stations, chosen by the Appellant. Clearly, this factor points strongly to an employer/employee relationship.

Profit/Loss

[18] The drivers had very little opportunity to earn additional profit. The split of sixty/forty per cent was established by the Appellant. The evidence did not disclose any negotiation in this regard and, in fact, Mr. Hayer testified that all of the drivers earned roughly the same. I agree with the Respondent's submission that working on a commission basis is not the ultimate test. Because the shifts were pre-established and, on some occasions, the location, the drivers' opportunity to profit was minimal. The evidence, viewed as a whole in this respect, points again, on a balance of probabilities, to an employer/employee relationship, particularly in light of the fact that the drivers were required to provide their services exclusively to the Appellant. As well, the drivers had minimal, if in fact any, potential for loss as even any fuel

price increases were borne solely by the Appellant. The drivers had no investment and were not responsible for any of the expenses. Even when the vehicle was in a garage for repairs, if it was during a driver's shift, the Appellant paid $10 hourly to cover lost fares during that shift due to down time of the cab. Again, this factor supports my conclusion that the parties' relationship was one of employer/employee.

[19] The Respondent submitted a number of cases in her Book of Authorities and the Appellant relied, to a large extent, on the Reasons of Justice Boyle in *Labrash v. M.N.R.*, 2010 TCC 399, [2010] T.C.J. No. 309. Although the Appellant argued that the facts before me were on point with *Labrash*, there are some important differences that must be noted. Firstly, Justice Boyle concluded that the parties in *Labrash* had a common understanding of their relationship. Consequently, he accorded considerable weight to this factor. In the present appeal, there was no common understanding and, therefore, I viewed this factor as neutral. In addition, and most importantly, the drivers in the *Labrash* case were not prohibited from driving for other companies whereas, in the present appeal, they were required to drive exclusively for the Appellant. Finally, it appears from the *Labrash* Reasons that the drivers exercised greater flexibility in their shifts as they could decide to work later or on a scheduled night shift and could sign up in advance for particular shifts.

[20] The decision of Justice Woods in *1022239 Ontario v. M.N.R.*, 2004 TCC 615, [2004] T.C.J. No. 455, where she concluded that the cab drivers were independent contractors in respect to pensionable earnings, can also be distinguished on the basis that the drivers exercised much greater control over their shifts and were not instructed where to drive.

Summary

[21] In summary, applying the factors approved by the Supreme Court of Canada in *Sagaz Industries*, I conclude that all of the factors, to a greater or lesser extent, support that the drivers were engaged as employees and not as independent contractors. Although the Appellant seemed to be asserting that it was Kelowna Cabs that implemented rules and regulations regarding the drivers, the Appellant was a shareholder of Kelowna Cabs. The Agreements were between the Appellant and the drivers and the drivers were engaged to perform certain services under the umbrella of the existing and established regulations of Kelowna Cabs.

[22] When I ask the central question posed by Justice Major in *Sagaz Industries*, "Whose business is this?" I must conclude that it is the business of the Appellant. The drivers had little control, supplied no tools, had no investment and very little

opportunity for profit or risk of loss. From the perspective of a driver, the business belongs to the Appellant and ultimately, when a driver left or was terminated, he took nothing with him, including any portion of the goodwill.

[23] For these reasons, the appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 8th day of November 2012.

"Diane Campbell"

Campbell J.

CITATION:	2012 TCC 392
COURT FILE NO.:	2011-2961(CPP)
STYLE OF CAUSE:	SURINDER HAYER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
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REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	November 8, 2012

APPEARANCES:

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Counsel for the Respondent:	Devi Ramachandran

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