Dockets: 2017-3177(EI)
2017-3178(CPP)

BETWEEN:

1065438 ALBERTA LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on August 20, 2018, at Edmonton, Alberta

By: The Honourable Justice Campbell J. Miller

Appearances:

Agent for the Appellant:	Dan R. Mason
Counsel for the Respondent:	Allan Mason

JUDGMENT

The Appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are allowed and the decisions are referred back to the Minister of National Revenue on the basis the worker, Mr. Salendran, was not an employee of the Appellant but was an independent contractor.

Signed at Ottawa, Canada, this 19th day of September 2018.

"Campbell J. Miller"

C. Miller J.

Citation: 2018 TCC 191
Date: 20180919
Dockets: 2017-3177(EI)
2017-3178(CPP)

BETWEEN:

1065438 ALBERTA LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] 1065438 Alberta Ltd. (the "Company") appeals the decisions of The Minister of National Revenue (the "Minister") pursuant to both the *Employment Insurance Act* (the "*Act*") and the *Canada Pensions Plan* (the "*CPP*") that the worker, Salendran Salendran, was an employee of the company for the period from January 1, 2015 to April 30, 2016. The Appellant maintains that Mr. Salendran was an independent contractor. Both Ms. Neema Jani, a 50% owner of the Company, and Mr. Salendran gave evidence of Mr. Salendran's work as a courier driver for the Company. The Company had contracts with Dynamax for certain delivery services.

[2] There is considerable case law as to the test to be applied in determining whether a worker is an employee or an independent contractor. As guided by the Federal Court of Appeal decision in *1392644 Ontario Inc. o/a Connor Homes* ("*Connor Homes*"),[1] the starting point is seeing if the payor and worker shared the same intention as to whether the status was that of employee (a contract of service) or independent contractor (contract for services). Once that is established, then one

[1] 2013 FCA 85.

turns to the traditional *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*[2] ("*Wiebe Door*") factors of:

- Control
- Ownership of tools
- Change of profit
- Risk of loss

[3] According to *Connor Homes* these factors are to be viewed in light of the relationship that the Parties believe they were in. Are the factors compatible with this relationship or do they fly in the face of that understanding? Or, as the Federal Court of Appeal expressed it in somewhat more technical terms, whether an objective reality sustains the subjective intent. With respect, it has always struck me that reviewing the factors at step 2 through the "prism" of intent as put by the Federal Court of Appeal, is a tricky analysis. If, for example, on the balance of probabilities the traditional factors examined at step 2 determines there is an employment relationship, is this so coloured by intent, that it can be rejected in favour of independent contractor? I would prefer saying intent is simply another factor in a one-step approach, or, as I believe was suggested by the Federal Court of Appeal in the *Wolf v The Queen*[3] ("*Wolf*") decision, as a tiebreaker. However, that is not how the law appears to have evolved: a prism is required.

[4] Ultimately, the question in the analysis remains as stated by the Supreme Court of Canada in the *1671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[4] ("*Sagaz*") decision, whether or not the individual is performing the services as his own business on his own account.

[5] Turning first then to the Parties' intention, often the payor and worker are at odds over their status and it is therefore not possible to find a common intention. Here, however, although neither the representative of the Appellant, Ms. Jani and the guiding light of Appellant, nor Mr. Salendran, the worker, could provide the written contract between Mr. Salendran and the Company, I am satisfied from their testimony that it stipulated an independent contractor relationship. More

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2 [1986] 3 F.C. 553.
3 2002 D.T.C. 6053 (F.C.A.).
4 2011 SCC 59.

importantly, the questionnaire from the Canada Revenue Agency (the "CRA") which they both completed separately, as well as their oral testimony, was to that effect.

[6] Mr. Salendran seemed somewhat unsure of the legal distinction between employee and independent contractor claiming simply that being an independent contractor allowed him to make more money. It was clear, though, that he did not believe he had entered an employment arrangement.

[7] Ms. Jani was clearer in her view of what she believed an employee was compared to an independent contractor, as she acknowledged that the Company had hired some workers as employees, when the nature of the work justified such, such as regular hours during the day with an ongoing daily commitment. She distinguished this from Mr. Salendran's role which was intermittent hours, not paid by the hour but only paid where the jobs were completed on a job-by-job basis.

[8] These views suggest that parties' intention to be employee or independent contractor is not necessarily grounded in those factors that have traditionally legally been determinative. Putting great weight on the parties' intention on this legal issue should be approached cautiously. Yes, it is up to parties to make their own contract. It is one thing though to agree on the concrete terms and conditions of time, remuneration, job responsibilities, etc. but to agree on the legal concept of employment or independent contractor, without fully appreciating what is entailed in that legal concept (other than the need, or not, to make source deductions: which is not a definer but a result) continues to be a concern of mine. As I soon depart this stage, I respectfully suggest that Courts do not see the evolution of the employee versus independent contractor issue as well settled as first thought.

[9] I turn now to the traditional *Wiebe Door* factors identified earlier to determine if the Appellant's and Mr. Salendran's casting of the relationship is supported in an objective look at those factors.

CONTROL

[10] Mr. Salendran entered a contract with the Company on December 10, 2015 to work as a courier driver, which he did until April 30, 2016 (the "Period") and continues to do. The Company had a contract with Dynamax for two services, for which Mr. Salendran was contracted: first, to pick up and deliver newspapers around midnight for drop off at several locations, work that would take two to three hours, and second, to pick up banking bags that had been delivered to a depot

in Edmonton for delivery at various banks, work that required from approximately 6:00 to 8:00 each morning, and then later picking up the banking bags from the various banks for delivery to the depot that required from approximately 4:30 to 6:30 in the late afternoon.

[11] The Respondent raised the following points in arguing that the Company exerted sufficient control over Mr. Salendran to find an employment arrangement:

1. There was a set schedule for Mr. Salendran. Yet, this schedule was not set by the Company, or even by Dynamax: it was driven by the requirements of the ultimate customers being the newspaper and the banks. Whether a driver was an employee or an independent contractor the schedule would have been the same. I do not find this is an indication of control.

2. The Company trained Mr. Salendran. The training consisted of two days of delivery driving with Ms. Jani. She drove the first day and Mr. Salendran drove the second, being paid for both days. After that, he was on his own: he knew where to drive and when and had little contact with Ms. Jani thereafter. This favours neither employment nor independent contractor.

3. The Respondent argued that Mr. Salendran would report to the Company after deliveries. Frankly, I did not hear the evidence quite that way. Mr. Salendran was supplied with a mobile device from Dynamax that he would have to use to input when deliveries were completed. Again, this is not control exerted by the Company, or actions that would be any different if Mr. Salendran was an employee or an independent contractor. Dynamax needed to know if the job was done.

4. Complaints would be reported to Dynamax who would contact the Company, who would then have the worker address the complaint. The fact is that there were no complaints against Mr. Salendran, but had there been it would have ultimately been up to him to rectify the problem. The major complaint, if there had been one, would most naturally have been the lack of delivery. Had there been no delivery it would have been for Mr. Salendran to take the time to go back and make it. Hand in hand with this was the Respondent's suggestion that Mr. Salendran could be disciplined by the Appellant, yet both Mr. Salendran and Ms. Jani appeared to be on the same wave length that if he consistently did not make deliveries that would be the end of the contract. The hypothetical handling of complaints is not evidence

one way or the other of any control that reflects the difference between an employee and an independent contractor.

5. Mr. Salendran could not easily hire replacements if he could not perform the driving. If Mr. Salendran was ill or wanted holiday time, he could contact another driver to make arrangements for that driver to take his place. He would have to use a driver, however, who had security clearance for the bank delivery purposes. The Company and Dynamax had a list of such drivers. If Mr. Salendran did not make the necessary arrangement, Ms. Jani would do so or she or her husband would fill in personally. Mr. Salendran did not pay the replacement, but the Company did. The fact Mr. Salendran would initially have to get the replacement suggests no control by the Company, yet the Company having to do so if Mr. Salendran could not get a replacement, plus the fact the Company, not Mr. Salendran would have to pay the replacement is an indication of some employment-like control.

6. The Appellant set the rates. Mr. Salendran was not paid by the hour but by the job: $50 for the late night paper delivery and $70 for the two bank runs, or $90 if Mr. Salendran used his own vehicle. There was no negotiation, as one might expect in negotiating a contract for services.

7. Mr. Salendran wore a Dynamax uniform. Although Mr. Salendran had no direct contract with Dynamax, this requirement is more reflective of employment.

[12] The factors that suggest little or no control by the Appellant are as follows:

1. Mr. Salendran was not supervised: there was no ongoing direction as to how to do his work. It was up to Mr. Salendran what route he took, how he drove and the time he took to drive. But, as was pointed out in the Federal Court of Appeal decision in *TBT Personnel Services Inc. v HMTQ*[5] professional drivers of either ilk would require little supervision apart from the necessary instructions for obtaining assignments, though in this case Mr. Salendran did not even require that once he knew the routine.

2. Mr. Salendran could refuse work. Apart from the newspaper and banking deliveries there would be other extra deliveries Mr. Salendran could get from the Appellant, a delivery for Staples was given as an example. The

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[5] 2011 FCA 256.

Respondent suggested the evidence was that Mr. Salendran could refuse only those jobs. I disagree. Mr. Salendran was clear he could arrange a replacement if he was sick for example, but I also was left with the impression that he believed he could likewise take time off for whatever reason, holiday or otherwise, if he was so inclined. This is not readily available to an employee.

3. Although he did not work elsewhere during the Period (though he does now), Mr. Salendran could have done so if he wished. During the Period, given the way the day was split up, he felt he needed time to rest. But he was clear he was not prohibited from other jobs during those breaks.

[13] On balance, there is some level of control but it is not significant to the point that it flies in the face of an understanding there was an independent contractor arrangement. Specifically, the ability for Mr. Salendran to refuse work or seek his own replacement as well as being able to work elsewhere is in accordance with their understanding. Had there been no consensus on the type of arrangement this factor would have tipped slightly more towards employment.

OWNERSHIP OF TOOLS

[14] In a similar case of a driver, *J.J. Smith Cartage Co. Ltd. v M.N.R.*,[6] Justice Lyons found that ownership by the payor of the vehicle is a factor that weighs heavily in the direction of employer/employee relationship. She relied on comments by the Federal Court of Appeal in *Livreur Plus Inc. v M.N.R.*,[7] in which the Federal Court of Appeal noted that "the most important, the most significant and the most costly" work tool was a crucial factor.

[15] The distinction between the *J.J. Smith* case and the case before me is that the fee paid by Mr. Salendran clearly took into account the cost of owning and running the van, as Mr. Salendran would receive $90 per job if he used his own vehicle and $70 if used the Company's vehicle. Granted, he did not use his own vehicle often as it had limited capacity, but he did use it on occasion. Yet, this just makes common commercial sense. In any courier arrangement the payor would pay more to drivers if they were supplying their own vehicle. It is more apparent in the arrangement between the Company and Mr. Salendran, as he was given that option.

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6 2015 TCC 108.

7 2004 FCA 68.

[16] The Appellant's agent referred me to the case of *Sara Consulting & Promotions Inc. v MNR*[8] a case which dealt with whether individuals who demonstrated products at retail outlets were employees or independent contractors. In particular, he relied on Justice Bell's comment that a gardener using an owner's lawnmower and implements may well be an independent contractor. Yes, I can envision a situation where that might be the case, but equally can see where the supply of a lawnmower to the gardener may be a factor evidencing employment. It simply cannot be viewed in isolation but must be put in context. Here, the context is that the worker could use either the Company's vehicle or his own.

[17] The only other major equipment was a mobile device provided by Dynamax, who charged the Company $25 every two weeks, which Ms. Jani testified was factored into the amount ultimately paid to Mr. Salendran.

[18] Mr. Salendran testified that the only equipment he supplied was a pair of scissors for dealing with the newspaper bundles.

[19] With respect to the Dynamax uniform, there was some differing views as to who likely paid for it, but I conclude that it was a factor that Ms. Jani worked into the overall calculation of the fee paid to Mr. Salendran.

[20] Overall, this factor does support more of an employment arrangement than the independent contractor arrangement the Parties intended on creating, though not overwhelmingly so. I find the provision of the vehicle is not as weighty as it wold be if Mr. Salendran could only drive that vehicle and not his own.

CHANCE OF PROFIT AND RISK OF LOSS

[21] Before addressing Mr. Salendran's chance of profit or risk of loss, it is helpful to summarize the arrangement, which I will do from the perspective of the Company addressing the worker.

[22] You are hired as an independent contractor to drive deliveries for our client, Dynamax, with freedom to perform the work as you see fit and:

1. You get paid a set amount per job, set by the Company.

2. You have one day to be shown the routine.

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[8] 2001 CarswellNat 2595.

3. You must wear a Dynamax uniform.

4. You will drive the Company's van, unless it is in for repair or there are small deliveries for which you can use your own vehicle and for which you will be paid more.

5. If you are unable to do a job for any reason, you can get a replacement from a list of drivers who have security clearance, and if you do not get that replacement the Company will, and in either event the Company will pay the replacement directly.

6. If you miss a delivery it is up to you to redo it.

7. You may be offered special deliveries which you can refuse.

8. You are free to work for others.

[23] With that arrangement, how does Mr. Salendran increase his profit, and on the flip side, what exposure does he have to loss?

[24] Mr. Salendran could increase his daily income by simply accepting any special delivery jobs offered to him, though he had no control over whether any such deliveries would be offered. He could also increase his profit by driving for others in his downtime. There was no opportunity for more profit by simply operating the Appellant's van more efficiently, other than to free up time to take on other jobs. There was, though, the option of using his own vehicle more often, though recognizing there was a limited capacity in doing so. On balance there was some opportunity but it was not substantial.

[25] The risk of loss would likewise be limited, as it would arise primarily if Mr. Salendran did use his own vehicle on occasion. He had few, if any, other expenses although Ms. Jani suggested he likely had a home office, which would involve certain expense. Mr. Salendran testified that he did not have a home office. He was not responsible for repairs on the Appellant's van, though he was on his own, nor for any other expenses connected to the corporate vehicle. If he missed a delivery, which he claimed he never did, then according to Ms. Jani he would be responsible for replacing the undelivered papers. Again, the risk of loss is minimal, though not non-existent.

[26] This may well be a case where a two-step analysis, the prism approach if you will, notwithstanding my concerns, can lead to a different result than limiting the analysis to just the traditional *Wiebe Door* test. Based on the *Wiebe Door* test, if there was no common intention as to the nature of the arrangement, I would have found on balance an employment relationship, though it would be a close call. So, if the first step is to have any influence at all on the overall analysis, then the fact that I would find employment based solely on the *Wiebe Door* test should not be determinative. I must cast that analysis within the framework of two arm's length persons agreeing otherwise. Looking at the arrangement then through the payor's and worker's eyes, given their mutual understanding, while there are many indices of employment, they are not sufficiently strong to find the two sides got it wrong in devising an independent contractor arrangement.

[27] The Appeals are allowed and referred back to the Minister for reconsideration on the basis that Mr. Salendran was not an employee of the Appellant but was an independent contractor.

Signed at Ottawa, Canada, this 19th day of September 2018.

"Campbell J. Miller"

C. Miller J.

CITATION:	2018 TCC 191
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APPEARANCES:

Agent for the Appellant:	Dan R. Mason
Counsel for the Respondent:	Allan Mason

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada