Docket: 2019-2421(CPP)
2019-2422(EI)

BETWEEN:

0808498 BC LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

NATHAN DAHLEN,

Intervener.

Appeals heard on August 24 & 26, 2020 and May 25, 2022,
at Vancouver, British Columbia

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Agent for the Appellant:	Peter Skov
Counsel for the Respondent:	Katherine Shelley
Agent for the Intervener:	D. Elizabeth (Liz) Dahlen

JUDGMENT

In accordance with the attached Reasons for Judgment, the Appeals are allowed, and the Decision dated April 5, 2019 and issued by the Canada Revenue Agency, on behalf of the Minister of National Revenue, under the *Canada Pension Plan* and the *Employment Insurance Act*, is set aside. No costs are awarded.

Signed at Ottawa, Canada, this 4th day of May 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2023 TCC 53
Date: May 4, 2023
Docket: 2019-2421(CPP)
2019-2422(EI)

BETWEEN:

0808498 BC LTD.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent,

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NATHAN DAHLEN

Intervener.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals by 0808498 BC Ltd. (the "Corporation") in respect of a decision (the "Decision") issued on April 5, 2019, by the Canada Revenue Agency (the "CRA"), on behalf of the Minister of National Revenue (the "Minister"), under the *Canada Pension Plan* (the "CPP") and the *Employment Insurance Act* (the "EIA"). The Decision held that the Intervener, Nathan Dahlen, had been hired by the Corporation as an employee, and not as an independent contractor (as the Corporation had intended and understood).

II. FACTS

A. Particulars of Work

[2] The Corporation is owned by holding companies owned by three cousins, Peter Skov, Jens Skov and Rolly Skov, who are also the three directors of the Corporation. The Corporation is a real estate developer, which, in 2016, commenced the development of a 23-unit townhouse project in Ladner, British Columbia. Being a small developer, the Corporation contracted with UPA Construction Group Canada Limited ("UPA") to construct the townhouse complex.

[3] UPA was the general contractor. Its project coordinator was Richard Nasadyck. UPA's site superintendent for the townhouse project was Dan Chilton.[1] The directors of the Corporation usually communicated with Mr. Nasadyck, rather than Mr. Chilton. The Corporation did not provide directions to Mr. Chilton.[2]

[4] The various trades (for example, plumbing, electrical and drywall) which worked on the project were sourced by the general contractor (i.e., UPA) and approved by the developer (i.e., the Corporation). All of the trades were subcontracted by UPA; none of them were employed by the Corporation.

[5] After graduating from high school, Mr. Dahlen embarked on a heavy duty mechanic apprenticeship program. Due to a lack of work, in November 2016 Mr. Dahlen was laid off by the operator of the truck stop where he had been working. Anxious to find work, Mr. Dahlen posted on Facebook a message indicating that he was looking for work. Mr. Dahlen knew the daughter of Jens Skov and spoke with her about his search for work. She spoke with her father, who spoke with Peter and Rolly, and a decision was made by them for the Corporation to extend a work opportunity to Mr. Dahlen.

[6] Jens Skov spoke with Mr. Dahlen and explained that the Corporation was looking to hire a construction safety officer (a "CSO") and first-aid attendant. Jens told Mr. Dahlen that, if he successfully completed a one-week Occupational First Aid Level 2 course, the Corporation would reimburse the cost of the course ($640) and would then hire him as a CSO at the townhouse jobsite. Mr. Dahlen paid the

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1 These were the job titles used by Jens Skov; Transcript, vol. 1, p. 26, line 25 to p. 27, line 4. During his testimony, Peter Skov referred to Richard Nasadyck as the overall site superintendent and to Dan Chilton as the foreman; Transcript, vol. 1, p. 70, lines 13-15; and p. 74, line 18.

2 Transcript, vol. 1, p. 40, line 28 to p. 41, line 4.

$640 fee for the course on December 1, 2016, and was reimbursed for that amount by the Corporation on December 2, 2016.[3] Mr. Dahlen attended the course from December 5 to December 9, 2016.

[7] During their initial conversation, Jens told Mr. Dahlen that the Corporation would not employ him, but rather, would put him on a contract, such that he would be responsible for his own taxes, employment insurance ("EI") premiums and CPP contributions.[4]

[8] Mr. Dahlen commenced work for the Corporation on December 13, 2016. On December 20, 2016, Peter Skov wrote a cheque, drawn on the Corporation's account at a credit union, in the amount of $480, to cover the compensation for Mr. Dahlen's work from December 13 through 16 inclusive. Jens Skov delivered the cheque to Mr. Dahlen's residence and there spoke with both Mr. Dahlen and his mother, D. Elizabeth (Liz) Dahlen. During that conversation, Jens reminded Mr. Dahlen that he should set aside money from each cheque to pay his taxes when he filed his income tax return.[5]

[9] After that meeting, Ms. Dahlen assisted Mr. Dahlen in arranging for a significant portion of his compensation cheques to be deposited into a joint bank account which they had, to ensure that there would be sufficient funds to pay the tax liability.[6]

[10] One of Mr. Dahlen's responsibilities at the jobsite was to ensure that the regulations and rules of the Workers Compensation Board (the "WCB") were followed on the site. For instance, he was required to ensure that no one was allowed on the site unless that person was wearing steel-toed boots, a safety vest and a hard hat. Mr. Dahlen also needed to ensure that there were never more than 50 workers on the site (as that would result in a different classification for WCB purposes).[7] In this role, Mr. Dahlen regularly checked with the subcontractors (such as framers, roofers, electricians, plumbers and the like) to inquire as to how many workers each subtrade would have on site at a particular time. As well, Mr.

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3 Exhibit I-2. It appears that, notwithstanding what Jens had told Mr. Dahlen, the $640 reimbursement was not actually conditional on Mr. Dahlen passing the course.

4 Transcript, vol. 1, p. 45, lines 6-8; and vol. 2, p. 184, line 26 to p. 185, line 2; p. 186, lines 12-23; p. 208, line 25 to p. 209, line 3; p. 211, line 28 to p. 212, line 10; and p. 218, lines 2-5 & 9-11.

5 Transcript, vol. 2, p. 228, lines 15-25.

6 Transcript, vol. 2, p. 229, line 18 to p. 230, line 3.

7 Exhibit A-6.

Dahlen regularly walked or patrolled the jobsite to observe the work that was being done and to ensure that proper safety standards were being followed. For instance, if he noticed a roofer who was not wearing fall-restraint gear, Mr. Dahlen would bring that to the attention of the roofer.

[11] For the first week or so of Mr. Dahlen's work at the jobsite, Mr. Chilton, on behalf of UPA, showed Mr. Dahlen what to do and often accompanied him as he learned and performed his duties. Mr. Chilton provided Mr. Dahlen with a clipboard and the WCB forms that were to be completed on a regular basis.[8]

[12] If a worker was injured on the jobsite, Mr. Dahlen administered first aid. There were relatively few injuries, so Mr. Dahlen did not spend a great deal of time administering first aid. The most serious incident that he faced occurred near the end of the construction project, when a tow truck driver came to remove the trailer that had been used as a construction office and first-aid station. The tow truck driver needed to reseat the beads on the tires.[9] To carry out the procedure, the driver wrapped a ratchet strap around the circumference of the particular tire and tightened the strap so as to compress the tire and press the tire's sidewalls against the rim to create a seal. As the driver was working on the second tire, the teeth on the ratchet strap kicked back and made a large gash in the driver's arm. Mr. Dahlen treated that wound and directed the driver to the hospital to obtain stitches.[10]

[13] As the safety officer, Mr. Dahlen was needed on the jobsite throughout the working day. However, his actual safety and first-aid duties did not occupy the entirety of the working day. Therefore, he was often asked by Mr. Chilton or various subtrades to assist with projects that needed "an extra set of hands."

[14] Four other young men were also hired by the Corporation to work at the jobsite. One was Peter's son, one was Jens' son and the other two were friends of Jens' son. They were still in school, so they did not work at the jobsite to the same extent as Mr. Dahlen. Those four young men were similarly advised by Jens and/or Peter that they would be working on a contract basis, rather than an employment

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8 Transcript, vol. 2, p. 131, lines 14-15; p. 175, lines 13-19; and p. 178, lines 10-14.

9 While it was not mentioned in Mr. Dahlen's recounting of the experience, these were presumably the tires on the trailer.

10 Transcript, vol. 2, p. 174, line 11 to p. 175, line 10.

basis. Peter's son was hired as a CSO.[11] The other three young men were hired as labourers.

[15] Peter Skov explained that, in 2017, there was a shortage of workers in the construction industry, such that general contractors and subcontractors were having difficulty hiring workers. As well, some of the workers who were hired would quit partway through the job, and move to some other job. From time to time, UPA hired workers through Workforce Staffing Solution Ltd. ("Workforce"), but those workers were often unreliable, sometimes coming to the jobsite in the morning but leaving before the work day had concluded. This was troubling because Workforce charged a fee to UPA for the entire day's work, even though the particular worker may have been there only part of the day. That was one of the reasons for which the Corporation hired the three young men who were not safety officers. Those young men were available on the jobsite to assist the general contractor and subcontractors, as needed.[12]

[16] Mr. Dahlen had a dream to become a Red Seal heavy-duty mechanic in a longshoreman position. While working for the Corporation, he applied for, and obtained, a longshoreman position with BC Maritime Employers Association. In anticipation of commencing work at the new position, and before terminating his work at the townhouse project, it was necessary for Mr. Dahlen to go for training and other functions related to the new position. On those days when Mr. Dahlen attended the longshoreman training and related functions, rather than going to work at the townhouse project, he notified Mr. Chilton, who (if necessary) arranged for another safety officer, provided under a contract with Workforce, to attend and be present at the jobsite.[13] During his cross-examination, Jens Skov referred to that hiring agency as "Manpower". He stated that UPA made the arrangements for, and paid, Manpower (i.e., Workforce) to provide temporary occupational health and safety officers, as well as general labourers. UPA then billed the Corporation, whereupon the Corporation paid to UPA the amount of the fee charged by Workforce.[14]

[17] By the summer of 2017 the construction of the townhouses was nearing completion, which meant that there was reduced construction activity on the site. The few remaining workers were primarily doing finishing work.

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11 Transcript, vol. 1, p. 34, line 5-11.
12 Transcript, vol. 1, p. 88, line 22 to p. 90, line 23.
13 Transcript, vol. 2, p. 206, line 23 to p. 207, line 5. See paragraph 50 below.
14 Transcript, vol. 1, p. 36, line 6 to p. 37, line 1; and p. 47, line 17 to p. 48, line 8.

[18] In or about August 2017, Jens Skov advised Mr. Dahlen that the construction of the townhouses was complete, such that his services would no longer be required. Mr. Dahlen's last day of work for the Corporation was August 15, 2017.[15]

B. Income Tax Reporting

[19] Sometime in early 2017, the Corporation issued to Mr. Dahlen a Statement of Pension, Retirement, Annuity, and Other Income (Form T4A) (the "2016 T4A slip"), showing the amount of the compensation that had been paid to him by the Corporation in 2016.[16] As Mr. Dahlen had worked for the Corporation for only a portion of December 2016, the amount shown on the 2016 T4A slip was relatively modest, namely $1,290.

[20] Ms. Dahlen attempted to prepare Mr. Dahlen's 2016 income tax return, but encountered difficulty because she did not know how to deal with the 2016 T4A slip. Up until then, she had had experience only with T4 slips. After considerable frustration with her tax-preparation software, she asked Mr. Dahlen to speak to Jens Skov, who spoke to Peter Skov, who is a chartered accountant in private practice. Peter Skov advised that he would complete the 2016 income tax return for Mr. Dahlen, which he did.[17] The 2016 income tax return prepared by Peter Skov and filed by Mr. Dahlen with the CRA showed his employment income from his previous jobs in 2016 on line 101 of that return, and showed his compensation, in the amount of $1,290, from the Corporation, on lines 162 and 135, where it was described as "Self-employment income -- Business Income." The gross amount and the net amount were the same, i.e., $1,290.[18] Mr. Dahlen testified that he did not review his 2016 income tax return before he filed it.[19]

[21] In February 2018, the Corporation issued to Mr. Dahlen a Statement of Pension, Retirement, Annuity, and Other Income (Form T4A) for 2017 (the "2017 T4A slip"), showing "Fees for services" in the amount of $21,439.[20]

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15 Exhibit I-1, ¶8.

16 Although a copy of the 2017 T4A slip was put into evidence, I was not provided with a copy of the 2016 T4A slip.

17 Peter Skov did not charge a fee to Mr. Dahlen for the preparation of the 2016 income tax return. See Transcript, vol. 2, p. 231, lines 9-12.

18 Exhibit I-11, fifth page.

19 Transcript, vol. 2, p. 203, lines 20-22.

20 Exhibit A-5, second page; and Exhibit I-12, twelfth page.

[22] Ms. Dahlen prepared Mr. Dahlen's 2017 income tax return, without consulting, or requesting the services of, Peter Skov. The copy of Mr. Dahlen's 2017 income tax return put into evidence was not signed or dated.[21] It is my understanding that Mr. Dahlen reported his 2017 compensation from the Corporation as employment income on line 101 of the return, rather than as self-employment income -- business income on lines 162 and 135 of the return.

[23] In or about September 2018, having determined that Mr. Dahlen had been an employee of the Corporation, rather than an independent contractor, the CRA prepared a T4 slip showing his compensation as employment income, rather than self-employment or business income. The CRA provided a copy of that T4 slip to the Corporation, after which the Corporation sent a copy thereof to Mr. Dahlen, accompanied by a letter dated September 10, 2018.[22] On or about September 14, 2018, Ms. Dahlen sent a T1 Adjustment Request to the CRA, together with a copy of the T4 slip that the CRA had prepared.[23]

C. Employment Insurance Proceedings

[24] In early 2018, Mr. Dahlen attended the British Columbia Institute of Technology to continue his heavy mechanical trades apprenticeship.[24] At that time he applied for EI benefits, and learned that his period of work with the Corporation was not considered to have been insurable employment.[25] On March 19, 2018, he requested a ruling from the CPP/EI Rulings Division of the CRA, to determine whether his work with the Corporation was insurable employment.[26]

[25] By letters dated June 25, 2018, the Rulings Division issued a ruling (the "Ruling"), informing Mr. Dahlen and the Corporation that it had been determined that Mr. Dahlen was an employee of the Corporation and that his employment was insurable.[27] On August 16, 2018, the Corporation appealed to the Minister from the Ruling.[28] By letters dated April 5, 2019, the Minister issued the Decision to Mr. Dahlen and the Corporation, stating that Mr. Dahlen's employment with the

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21 Exhibit I-12.
22 Exhibit I-14.
23 Exhibit I-15.
24 Exhibit I-8.
25 Transcript, vol. 2, p. 213, line 8 to p. 214, line 28.
26 Reply to the Notice of Appeal, filed by the Minister on September 3, 2019, ¶13.
27 *Ibid*, ¶14.
28 *Ibid*, ¶15.

Corporation was insurable.[29] The Corporation appealed from the Decision to this Court.

III. ISSUE

[26] The issue in these Appeals is whether Mr. Dahlen was hired by, and worked for, the Corporation as an employee.

IV. ANALYSIS

A. Reliability of Evidence

[27] Apart from the question of the intention of the parties concerning Mr. Dahlen's status, the evidence given by Jens Skov, Peter Skov and Ms. Dahlen contained a couple of other inconsistencies, as follows:

a) According to Ms. Dahlen, when Jens Skov delivered Mr. Dahlen's initial compensation cheque to the Dahlen home, Jens told Mr. Dahlen and Ms. Dahlen that the Corporation was not set up with a payroll account, such that the Corporation would not withhold income tax, so Mr. Dahlen "needed to pay his own income tax."[30] However, when discussing the hiring of his son, Jens' son and the two other young men, Peter Skov stated that not wanting to deal with the responsibility of payroll was not the reason for which those four young men were hired as independent contractors.[31]

b) Jens stated that, from the perspective of the Corporation, it was not part of Mr. Dahlen's duties to meet and unload deliveries to the jobsite.[32] However, in discussing the work performed by the four young men who were hired (in addition to Mr. Dahlen), Peter Skov stated that one of their functions was to unload appliances and other items that were delivered to the jobsite.[33] Nevertheless, this might not be a discrepancy, given that the work responsibilities of Mr. Dahlen and the other four young men, while similar, were not necessarily identical.

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29 *Ibid*, ¶18.
30 Transcript, vol. 2, p. 199, lines 18-20; and p. 228, lines 15-25.
31 Transcript, vol. 1, p. 83, lines 23-27.
32 Transcript, vol. 1, p. 40, lines 21-23.
33 Transcript, vol. 1, p. 72, lines 2-23.

[28] A number of circumstances raised questions in my mind concerning the reliability of some of the evidence given by Mr. Dahlen:

a) During the direct examination of Mr. Dahlen, he was asked by his agent, Ms. Dahlen, whether he had had a conversation with someone before he began to work at the construction site. Mr. Dahlen said that he did not know, even after a follow-up question from Ms. Dahlen. Eventually, however, Mr. Dahlen acknowledged that he had had a conversation about first-aid training.[34]

b) In giving his account of the meeting with Jens Skov, where the nature of the work arrangement was discussed, Mr. Dahlen stated that his understanding of the meeting was that he would need to set aside money to pay any "extra taxes" (his phrase) that might arise. He went on to indicate that he did not think that he would have to pay any taxes on the compensation paid to him by the Corporation, but that something might arise that could result in extra taxes. Mr. Dahlen acknowledged that he did not remember whether in his initial meeting with Jens Skov, Jens used the term "extra taxes" or whether he simply said that Mr. Dahlen would be responsible for his taxes.[35]

c) Although Mr. Dahlen's 2016 income tax return reported that the compensation paid by the Corporation was income from self-employment or business income, Mr. Dahlen said that he was not aware of the manner in which such compensation had been reported, that he did not have any knowledge that Peter Skov had prepared the 2016 income tax return in that manner, and that he had not reviewed his income tax return before it was filed with the CRA.[36] In fact, he wasn't even sure if he had signed his 2016 income tax return.[37]

d) While discussing the preparation and contents of his 2016 income tax return, Mr. Dahlen stated that he did not know anything about taxes and that he outsourced all of his tax matters.[38] Only later did Mr. Dahlen state that, apart from the tax return prepared by Peter Skov, it

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34 Transcript, vol. 2, p. 129, lines 2-27.
35 Transcript, vol. 2, p. 199, line 13 to p. 201, line 3.
36 Transcript, vol. 2, p. 203, lines 20-22.
37 Transcript, vol. 2, p. 202, lines 22-24.
38 Transcript, vol. 2, p. 203, lines 23-24.

was actually Mr. Dahlen's mother who had prepared his tax returns.[39] While that likely constitutes outsourcing, I was left wondering whether Mr. Dahlen was trying to hold something back from me, rather than giving his evidence openly and forthrightly.

e) When asked if Peter Skov had prepared Mr. Dahlen's 2017 income tax return, Mr. Dahlen initially said that Peter had done so, whereupon Ms. Dahlen interjected to state that she was the one who had prepared and filed Mr. Dahlen's tax returns, except for the 2016 return, which Peter had prepared and filed.[40] Mr. Dahlen's initial, but incorrect, statement that his 2017 tax return had been prepared by Peter Skov raises questions about the reliability of Mr. Dahlen's recollection of events in 2016, 2017 and 2018.

[29] There were certain circumstances that caused me to wonder about the evidence given by Ms. Dahlen:

a) Throughout the hearing, it was apparent that Ms. Dahlen was harbouring ill will and possibly animosity toward the Corporation and its directors.[41] While this is not impermissible and is perhaps understandable, it also raises the question as to whether such feelings may have coloured her recollection of events, or whether her evidence and Mr. Dahlen's evidence may have been orchestrated.

b) Ms. Dahlen stated that, after the meeting in December 2016, when Jens Skov had brought Mr. Dahlen's first compensation cheque to his home and had met with Mr. Dahlen and Ms. Dahlen, she did not want Mr. Dahlen to work for the Corporation, and she felt that Mr. Dahlen should terminate his work with the Corporation.[42] However, she acknowledged that Mr. Dahlen liked working on the townhouse project because the jobsite was close to the Dahlen residence and because Mr. Dahlen had a sense of responsibility and importance as the safety officer on the site.[43]

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39 Transcript, vol. 2, p. 205, lines 10-13.
40 Transcript, vol. 2, p. 204, line 2 to p. 205, line 9.
41 For instance, see Transcript, vol. 2, p. 229, lines 4-8; p. 231, lines 2-3; and p. 232, lines 1-18.
42 Transcript, vol. 2, p. 218, lines 6-18, p. 219, lines 11-12; and p. 229, lines 4-8.
43 Transcript, vol. 2, p. 219, lines 4-5 & 12-19.

c) The impression I received is that Ms. Dahlen felt that the Corporation was trying to cheat her son or to take advantage of him. For instance, in her cross-examination of Peter Skov, she insinuated that the Corporation had hired the four additional young men so as to ensure that Mr. Dahlen's compensation would not exceed the $30,000 small-supplier threshold under the *Excise Tax Act*, such that Mr. Dahlen would not need to register under that legislation, nor would he need to collect the goods and services tax (the "GST") from the Corporation in respect of the compensation paid by the Corporation to him.[44] This insinuation is unfounded, as the total compensation paid in 2017 to all five of the young men hired by the Corporation was $28,894.[45] As well, Ms. Dahlen suggested to Jens Skov that the Corporation was underpaying her son.[46] When cross-examining Peter Skov, Ms. Dahlen implied that not all of the five young men (i.e., Mr. Dahlen and the four others) were treated the same, and suggested that some were awarded more hours than others, which Peter denied.[47] My sense during the hearing was that Ms. Dahlen was trying to redress what she perceived to be a wrong done by the Corporation to her son.

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44 Transcript, vol. 1, p. 83, line 28 to p. 84, line 2.

45 Exhibit A-5, Summary of Pension, Retirement, Annuity, and Other Income (Form T4A Summary), first page.

46 While cross-examining Jens Skov, Ms. Dahlen stated that she had done some research and had learned that Workforce charged $40 an hour plus GST for a safety officer with Occupational First Aid Level 2, and elicited from Jens that the Corporation paid Mr. Dahlen approximately $14 or $15 an hour; see Transcript, vol. 1, p. 40, lines 5-12. Peter Skov seemed to indicate that the Corporation paid $17.95 per hour inclusive of GST for the workers obtained by UFA through Workforce; see Transcript, vol. 1, p. 55, lines 11–17.

47 Transcript, vol. 1, p. 85, lines 16-26.

B. Statutory Provisions

[30] From a statutory perspective, one of the questions to be resolved in these Appeals is whether, from December 13, 2016 to August 15, 2017, Mr. Dahlen was employed in insurable employment. For the purposes of these Appeals, the relevant provision of the statutory definition of *insurable employment* is found in paragraph 5(1)(a) of the EIA, which reads as follows:

> 5(1) Subject to subsection (2) [which is not relevant here], insurable employment is
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> (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise; …

[31] Another relevant question is whether Mr. Dahlen was employed by the Corporation in pensionable employment. In 2016 and 2017, subsections 2(1) and 6(1) of the CPP (when read together) defined *pensionable employment* as follows:

> 2(1) In this Act, …
>
> *pensionable employment* means employment specified in subsection 6(1); …
>
> 6(1) Pensionable employment is
>
> (a) employment in Canada that is not excepted employment;
>
> (b) employment in Canada under Her Majesty in right of Canada that is not excepted employment; or
>
> (c) employment included in pensionable employment by a regulation made under section 7.

Subsection 6(2) of the CPP defines the term *excepted employment*. None of the provisions of that definition is applicable here.

[32] As is abundantly clear from the above statutory definitions, for there to be insurable employment or pensionable employment, there must first be employment.

C. Jurisprudence: Employee or Independent Contractor?

[33] Although there is no universal test for determining whether a worker is an employee or an independent contractor, 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."[48] In making such determination, the following factors should generally be considered:

a) Does the hirer control the worker's activities?

b) Does the hirer provide the tools and equipment required by the worker, or is the worker required to provide his or her own tools and equipment?

c) Does the worker hire his or her own helpers?

d) What is the degree of financial risk taken by the worker? In other words, does the worker have a risk of loss?

e) What is the degree of responsibility for investment and management held by the worker?

f) Does the worker have an opportunity for profit in the performance of his or her tasks?[49]

There is no set formula concerning the application of the above factors, which is a non-exhaustive list.[50]

[34] In recent times, the courts have noted the importance of considering the stated intention of the parties (i.e., the hirer and the worker) in determining whether the worker is an employee or an independent contractor. The role of intention was explained by the Federal Court of Appeal in *Connor Homes* in this manner:

> 30 Alongside the test as set out in *Weibe Door* and *Sagaz*, in the past few years another jurisprudential trend has emerged which affords substantial weight

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48 *Sagaz Industries Canada Inc. et al. v. 671122 Ontario Limited*, [2001] 2 SCR 983, 2001 SCC 59, ¶47. See also *Wiebe Door Services Ltd. v. MNR*, [1986] 3 FC 553, [1986] 2 CTC 200, 87 DTC 5025 (FCA), ¶17, quoting *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All ER 732 (QBD), at 737.

49 See *Sagaz, ibid*, ¶47.

50 *Sagaz, supra* note 48, ¶48.

to the stated intention of the parties: *Wolf v. The Queen*, 2002 D.T.C. 6053 (F.C.A.) …; *Royal Winnipeg Ballet v. Canada* (*Minister of National Revenue*) 2006 FCA 87….

33 As a result, *Royal Winnipeg Ballet* stands for the proposition that what must first be considered is whether there is a mutual understanding or common intention between the parties regarding their relationship. Where such a common intention is found, be it as independent contractor or employee, the test set out in *Wiebe Door* is then to be applied by considering the relevant factors in light of that mutual intent for the purpose of determining if, on balance, the relevant facts support and are consistent with the common intent….

38 Consequently, *Wolf* and *Royal Winnipeg Ballet* set out a two step process of inquiry that is used to assist in addressing the central question, as established in *Sagaz* and *Wiebe Door*, which is to determine whether the individual is performing or not the services as his own business on his own account.

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, … 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 [*sic*] 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.

41 The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides

> his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks….
>
> 42 … The first step of the analysis should always be to determine at the outset the intent of the parties and then, using the prism of that intent, determining in a second step whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of independent contractor.[51]

[35] In *Insurance Institute of Ontario*, while considering the application of the two steps in the analysis set out in *Connor Homes*, Justice Graham focused specifically on whether the result of the first step affects the application of the test in the second step. He concluded "that intention must be relevant when the *Wiebe Door* and *Sagaz* factors indicate that the relationship is one thing but the parties intended it to be another thing and their relationship is similar to what they intended."[52] Concerning the application of the second step, Justice Graham stated:

> 26. Based on all of the foregoing, I conclude that the second step of the *Connor Homes* test should be applied as follows:
>
> a) Where the payor and the worker do not share a common intention, their relationship will be the relationship indicated by the *Wiebe Door* and *Sagaz* factors.
>
> b) Where the payor and the worker share a common intention:
>
> i. if the *Wiebe Door* and *Sagaz* factors are consistent with that common intention, then their relationship will be the relationship that they intended;
>
> ii. if the *Wiebe Door* and *Sagaz* factors are completely inconsistent with that common intention, then their relationship will be the relationship indicated by those factors; and
>
> iii. if the *Wiebe Door* and *Sagaz* factors are inconsistent with that common intention but the parties nonetheless act and carry on their relationship in a manner that is similar to what one would expect from their intentions, then their relationship will be the relationship that they intended.[53]

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51 *1392644 Ontario Inc. o/a Connor Homes v. MNR*, 2013 FCA 85, ¶30, 33 & 38-42. See also *AE Hospitality Ltd. v. MNR*, 2019 TCC 116, ¶72.

52 *Insurance Institute of Ontario v. MNR*, 2020 TCC 69, ¶23.

53 *Ibid*, ¶26.

D. Two-Step Analysis

[36] Following the guidance set out in *Connor Homes*, I will first consider whether there was a mutual understanding or common intention between the Corporation and Mr. Dahlen regarding their relationship. I will then consider the factors identified in *Sagaz* and *Wiebe Door* in light of such mutual intent (if any) for the purpose of:

a) determining if, on balance, the relevant facts sustain and are consistent with such intent, or

b) if there is not a mutual intent, determining whether those factors point to employment or independent contract.

E. Intention

[37] It is clear that Peter Skov and Jens Skov, as directors of the Corporation, intended and understood that the Corporation was hiring Mr. Dahlen as an independent contractor, and not as an employee. For instance, they indicated that the Corporation did not have any employees, and Jens may have said to Mr. Dahlen and Ms. Dahlen that the Corporation was not set up to operate a payroll system for employees.

[38] Peter Skov and Jens Skov were of the understanding that all five young men had been hired on a similar basis. It seems that the four other young men did not question their status as independent contractors.[54]

[39] It is more difficult to ascertain the intention or understanding of Mr. Dahlen about the relationship that he had with the Corporation. During his testimony, he stated adamantly that he had been an employee, that he had not been self-employed, and that he did not have a business. When confronted with the entries on lines 162 and 135 of his 2016 income tax return, he disavowed those entries, and said that they had been made without his knowledge or instruction.

[40] Both Mr. Dahlen and Ms. Dahlen were of the understanding that Jens Skov had said to them that the Corporation was not set up to operate a payroll system,

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[54] The actions or inaction of the other four young men are not applicable to Mr. Dahlen, and are not indicative of, or evidence of, the relationship between Mr. Dahlen and the Corporation.

and that Mr. Dahlen would be responsible for his taxes. As advised by Jens, Mr. Dahlen set aside money to pay income tax.[55]

[41] According to Jens Skov, Mr. Dahlen was hired to provide first aid and to perform other duties as he saw fit. Mr. Dahlen had discretion in organizing his work, and he was free to work for other subcontractors who were on the jobsite, without communicating with the Corporation.[56] He did not report directly to the Corporation.[57] In fact, according to Jens Skov, Mr. Dahlen "did not communicate [regularly] with … 0808498,"[58] and "[h]e didn't report to anybody other than himself,"[59] not even to Mr. Chilton.[60]

[42] Jens Skov stated that, in the summer of 2017, when Mr. Dahlen was being trained for a longshoreman position, he would sometimes be absent from the jobsite for days at a time, without having to check in with the Corporation and without having to ask permission to leave the jobsite.[61]

[43] In any event, it was evident that, at the time of the hearing, there was a difference of opinion between Mr. Dahlen and the Corporation as to the nature of his past relationship with the Corporation. During his testimony, Mr. Dahlen said that he believed that he first realized in April 2017 (when it was time to prepare his 2016 income tax return) that he and the Corporation had different views of the nature of their relationship. However, he did not engage in any conversation with either Peter Skov or Jens Skov to discuss such misunderstanding.[62]

[44] It is possible that Mr. Dahlen's intention and understanding of his relationship with the Corporation in April 2017 may not have been the same as his understanding and intention in December 2016, when he began to work for the Corporation. It is also possible that, although he might not have intended to be an independent contractor, his actual intention may have corresponded to a relationship somewhere on the continuum between employment and independent contractor status (which will be discussed below).

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55 Transcript, vol. 2, p. 197, line 27 to p. 198, line 2; p. 199, line 13 to p. 200, line 9; p. 218, lines 6-12; and p. 228, lines 15-25.
56 Transcript, vol. 1, p. 22, lines 15-27.
57 Transcript, vol. 1, p. 20, lines 1-4.
58 Transcript, vol. 1, p. 22, lines 19-22.
59 Transcript, vol. 1, p. 31, lines 18-19.
60 Transcript, vol. 1, p. 32, lines 25-27.
61 Transcript, vol. 1, p. 20, lines 13-18.
62 Transcript, vol. 2, p. 210, lines 2-17.

[45] While it is abundantly clear that, at the time of the hearing, Mr. Dahlen was firmly of the view that his intention and understanding were that he had been an employee of the Corporation, I cannot determine whether that was also his intention and understanding in December 2016, when he began to work for the Corporation, or whether his intention and understanding in December 2016 might actually have been otherwise. Given my inability to ascertain Mr. Dahlen's intention and understanding in December 2016, I will conduct the remainder of my analysis on the basis that the Corporation and Mr. Dahlen did not share a common intention, with the result that we are within subparagraph 26(a), rather than 26(b), of Justice Graham's analysis in *Insurance Institute*.[63]

F. Other Factors

[46] As indicated in *Wiebe Door*, *Sagaz* and the other cases discussed above, there are several additional factors to be considered in determining whether a worker is an employee or an independent contractor, as listed in paragraph 33 above.

1. Control

[47] The evidence established that the Corporation did not control the performance by Mr. Dahlen of his work-related duties. To the extent that Mr. Dahlen was subject to any control, that control came from Mr. Chilton (who was UPA's site superintendent),[64] and not from the Corporation. This is consistent with the fact that, as the general contractor, UPA was in charge of the construction site and all the people on that site.[65]

[48] Mr. Dahlen stated that he had been told by Jens Skov, apparently when Mr. Dahlen commenced to work at the jobsite, that the person to whom he was to report was Mr. Chilton.[66] However Peter Skov indicated that Mr. Dahlen was not referred to UPA for supervision and direction on the jobsite. Rather, he could assist any of the workers on the site.[67]

[49] Mr. Dahlen indicated that, if he didn't know what to do, or how to do it, he asked Mr. Chilton. If Mr. Chilton did not know, Mr. Dahlen sought guidance from

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63 See paragraph 35 and footnotes 52 and 53 above.
64 Transcript, vol. 2, p. 131, line 20 to p. 132, line 16; and p. 193, line 5 to p. 194, line 1.
65 Transcript, vol. 1, p. 71, lines 6-12.
66 Transcript, vol. 2, p. 138, lines 4-7.
67 Transcript, vol. 1, p. 79, lines 14-25.

one of the finishing carpenters or another worker.[68] Sometimes, when Mr. Chilton knew that he would not be at the jobsite the next day, he gave Mr. Dahlen a list of jobs to be done. After he finished those jobs, he "could walk around the site, [to] make sure everyone's doing their job safely."[69] On other days when Mr. Chilton did not come to the jobsite, and when he had not left a list of jobs for Mr. Dahlen to do, Mr. Dahlen walked around to make sure everyone was working safely, and to administer first aid, if needed.[70]

[50] Mr. Dahlen had control over the days that he worked on the townhouse project, particularly when he was participating in training for his anticipated longshoreman position. Mr. Dahlen merely notified Mr. Chilton and perhaps Jens Skov that he (Mr. Dahlen) would not be at the jobsite, whereupon, if needed (i.e., if Peter Skov's son, who was also a safety officer, was not available), Mr. Chilton arranged for a safety officer to be provided by Workforce.[71]

[51] Jens Skov stated that, when Mr. Dahlen began to work at the jobsite, he worked full-time hours for a while, and then eventually he "started scaling his hours back a bit,"[72] to the point where he would sometimes be away "for days at a time."[73] Peter Skov said that Mr. Dahlen had considerable freedom on the jobsite, and that he could leave the site for job interviews.[74] Thus, it is my understanding that, at least to some extent, Mr. Dahlen was able to determine the days and hours that he worked on the jobsite.

[52] As Mr. Dahlen had a pickup truck, which he drove to the jobsite, he was sometimes asked by Mr. Chilton or one of the subcontractors to pick up materials for them. Mr. Dahlen typically did so, without first contacting a representative of the Corporation to obtain permission to do so or to advise the Corporation that he was leaving the jobsite to pick up materials.[75]

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68 Transcript, vol, 2, p. 137, line 23 to p. 138, line 3.

69 Transcript, vol. 2, p. 138, lines 8-17.

70 Transcript, vol. 2, p. 138, lines 18-22.

71 Mr. Dahlen stated that he notified both Mr. Chilton and Jens Skov; see Transcript, vol. 2, p. 130, line 26 to p. 131, line 3. Jens Skov disagreed; see Transcript, vol. 1, p. 20, lines 13-18; p. 33, line 23 to p. 34, line 27.

72 Transcript, vol. 1, p. 45, lines 9-12.

73 Transcript, vol. 1, p. 20, lines 13-18.

74 Transcript, vol. 1, p. 80, lines 21-26.

75 Transcript, vol. 1, p. 80, line 27 to p. 81, line 7.

[53] When asked whether he understood that the five young men were each running a separate business as they worked for the Corporation, Peter Skov responded affirmatively, because they could come and go, and they did not work every single day. Some days they would be at the jobsite, other days they would not be there.[76]

[54] During his direct examination, Mr. Dahlen stated that he was required to complete regular safety checklists provided to him by Mr. Chilton.[77] During his cross-examination, he stated that the safety checklists had been provided to him by UPA and that he was to fill them out and submit them to Mr. Chilton.[78]

[55] It was during his cross-examination by Peter Skov that Mr. Dahlen recounted the experience of the tow truck driver who injured his forearm while reseating the beads on the tires. After Mr. Dahlen had recounted the experience, the following exchange occurred:

> Q. When an accident such like that happens[,] there's a WCB incident report?
> A. Yes, and I filled that out.
> Q. I never received one.
> A. Well, that would be from Dan [Chilton] and UPA because they were the ones that supplied me with those forms.
> Q. So you were working for UPA at that moment in time?
> A. At that moment in time, yes.[79]

[56] The above exchange indicates that the incident-reporting documents used by Mr. Dahlen came from UPA, and not from the Corporation, that Mr. Dahlen reported the accident to UPA, but not to the Corporation, and that Mr. Dahlen considered himself, at least on that occasion, to be working for UPA.

[57] Mr. Dahlen indicated that one of his responsibilities was to provide "an extra pair of hands when [he was] doing labour work…."[80] During cross-examination, the following exchange took place:

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76 Transcript, vol. 1, p. 91, lines 15-20. When discussing the work routines of the five young men working at the jobsite, and observing that they were not at the jobsite every single day, Peter Skov stated, "some would be there, some wouldn't, who knows where they would be"; see Transcript, vol. 1, p. 91, lines 20-22. This implies to me that he was not always advised of the comings and goings of those five young men, nor of their absences from the jobsite.

77 Transcript, vol. 2, p. 131, lines 6-15.

78 Transcript, vol. 2, p. 178, lines 10-14.

79 Transcript, vol. 2, p. 175, lines 13-22.

> Q. You indicated that a lot of your job duties were to assist, for example, carpenters, finishing carpenters perhaps, plumbers, electricians, drywall individuals?
>
> A. Yes, I was directed by Dan [Chilton] to be helping those guys primarily and taking my first aid and my CSO duties secondary to that.[81]

Hence, it appears that Mr. Chilton directed Mr. Dahlen to subordinate his construction safety officer duties to the needs of the subtrades who were working on the jobsite.

[58] When asked whether he had the status of a designated first-aid attendant when he worked at the jobsite, Mr. Dahlen responded:

> A. I was supposed to be a designated first aid and CSO [construction safety officer], but Dan [Chilton] had his own way of things, so he turned it around as me being primarily general labour and CSO/first aid secondary to that.[82]

[59] Mr. Dahlen stated that approximately 70 percent of his time at the jobsite was spent doing general labour and 30 percent was spent doing safety and first aid.[83]

[60] As mentioned above, from time to time, while Mr. Dahlen worked at the jobsite, he was asked by Mr. Chilton, or perhaps by some of the subtrades, to drive his own pickup truck to Dunbar Lumber to pick up materials needed at the jobsite. This was done without the knowledge of the directors of the Corporation. Mr. Dahlen explained that he was trying to repay a favour extended to him by the Corporation. In other words, he said, the Corporation had done him a favour by providing him with work when he needed it, and he could return the favour by using his truck to pick up supplies from the lumberyard.[84] Mr. Dahlen explained that an employee of Dunbar Lumber had told him that it charged a flat rate of $100 for each delivery made to a jobsite. Therefore, each time that Mr. Dahlen used his truck to pick up supplies from the lumberyard, he was saving the Corporation $100,[85] although there was no evidence as to whether the delivery fees would have been charged to the Corporation or to UPA, and if the latter, whether they would

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80 Transcript, vol. 2, p. 131, line 16 to p. 132, line 3.
81 Transcript, vol. 2, p. 178, lines 18-24.
82 Transcript, vol. 2, p. 208, lines 13-16.
83 Transcript, vol. 2, p. 194, lines 2-7.
84 Transcript, vol. 2, p. 190, lines 5-17.
85 Transcript, vol. 2, p. 139, lines 2-8; and p. 178, line 25 to p. 179, line 15.

have been charged back to the Corporation or would have been absorbed into the overall contract price.

[61] During cross-examination, Mr. Dahlen explained the arrangement this way:

> Q. Now, you made a statement that you were the only one with a pickup truck?
>
> A. The only one with a pickup truck able at the time to go and pick up supplies. Obviously it's an understatement to assume that I was the only one on the site with a pickup truck. Right? Of course the carpenters and the plumbers and all of them, being tradesmen themselves, they would have a pickup, right? But Dan [Chilton] saw it easiest to send me to go and pick up the supplies, so then it doesn't interrupt their work throughout the day so the project is completed on time.
>
> Q. But this was directed by Dan?
>
> A. Yes, it was.[86]

The above comment is another example of the control exercised by UPA, and not the Corporation, over Mr. Dahlen.

[62] Apparently Mr. Chilton gave Mr. Dahlen a set of keys to open and close the jobsite. If this was done, it was without the knowledge or consent of the Corporation, and, based on the nature and tone of Peter Skov's response during his cross-examination by Ms. Dahlen, without the approval or authorization of the Corporation.[87] Thus, to the extent that the Corporation may have delegated control over Mr. Dahlen to Mr. Chilton, such delegation was not open-ended or unrestricted. In other words, the impact of the control factor may be diminished.

[63] As the above analysis has illustrated, the Corporation did not exercise control directly over Mr. Dahlen. Rather, it was Mr Chilton, UPA's site superintendent, who seemed to control Mr. Dahlen's activities. Given my understanding of the contractual relationship between the Corporation (i.e., the developer) and UPA (i.e., the general contractor),[88] and given that Jens Skov instructed Mr. Dahlen to report to Mr. Chilton,[89] I view this as a delegation of

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86 Transcript, vol. 2, p. 184, lines 4-16.
87 Transcript, vol. 1, p. 81, lines 20-27.
88 The agreement between the Corporation and UPA was not put into evidence.
89 Transcript, vol. 2, p. 138, lines 4-7.

control, such that the control over Mr. Dahlen exercised by UPA's site superintendent, Mr. Chilton, also constituted control by the Corporation.[90]

[64] While there was a limited delegation of control over Mr. Dahlen by the Corporation to Mr. Chilton, which points to employment, four other circumstances point the other direction. First, without conferring with the Corporation, Mr. Chilton changed the priority and focus of Mr. Dahlen's activities from being a construction safety officer, and, if time permitted, a "second set of hands," to being primarily a general labourer, and only secondarily a safety officer. Second, Mr. Dahlen had considerable freedom on the jobsite, such that he could determine the days and hours that he worked and he could leave the site for job interviews and longshoreman training. Third, the Corporation did not authorize Mr. Chilton to give jobsite keys to Mr. Dahlen. Fourth, given the potential vicarious liability of an employer that may arise if an employee has a motor vehicle accident while working, the use by Mr. Dahlen of his truck to pick up materials from the lumberyard did not come within any delegation of control by the Corporation to Mr. Chilton.[91] Thus, in my view, the control factor points in both directions.

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90 *Dean v. MNR*, 2012 TCC 370, ¶23; *Loving Home Care Services Ltd. v. MNR*, 2014 TCC 71, ¶46; and *Wholistic Child and Family Services Inc. v. MNR*, 2016 TCC 34, ¶24.

91 Transcript, vol. 1, p. 80, line 27 to p. 81, line 7.

2. Ownership of Tools

[65] When the townhouse project began, the Corporation rented a construction trailer and had it towed to the jobsite. Most of the space in the trailer was occupied by the foreman's/site superintendent's office.[92] However, there was also a small first-aid station in the trailer.[93] According to Peter Skov, the only thing in the first-aid station was a first-aid kit. Mr. Dahlen stated that there was also a cot and an oxygen tank.[94] There was no evidence as to whether the Corporation owned the first-aid kit, cot and oxygen tank, or whether it rented them from a third party. Jens Skov stated that the Corporation provided the first-aid kit for the entire jobsite, and not specifically for Mr. Dahlen.[95]

[66] The provision by the Corporation of a first-aid kit, a cot and an oxygen tank may be somewhat analogous to a hospital making an x-ray machine available to a radiologist. In some cases, a radiologist may be an employee of the hospital, but, in other cases, a radiologist may be an independent contractor working at the hospital. Thus, the provision by the Corporation of the first-aid kit, cot and oxygen tank are not necessarily indicative of an employment relationship.

[67] UPA's site superintendent, Mr. Chilton, provided Mr. Dahlen with the clipboard and WCB forms that he used on a daily basis while monitoring workers on the jobsite and while patrolling the jobsite to ensure compliance with WCB rules and regulations. There was no evidence as to whether the clipboard belonged to Mr. Chilton personally or to UPA.

[68] The tasks performed at the jobsite by Mr. Dahlen when he was not engaged in his safety-officer activities included sweeping and shoveling. The Corporation did not provide the brooms and shovels used by Mr. Dahlen. There was no specific evidence as to who provided the brooms and shovels, although there was a suggestion that it may have been UPA or one of the subcontractors.[96]

[69] Mr. Dahlen owned the hard hat, safety vest and steel-toed boots that he wore while working at the jobsite. As mentioned elsewhere in these Reasons, Mr.

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92 Transcript, vol. 2, p. 105, lines 11-17. In describing the trailer, Peter Skov indicated that the office was used by the construction foreman, presumably Dan Chilton. Elsewhere, Mr. Chilton was sometimes referred to as the site superintendent.

93 Transcript, vol. 1, p. 42, lines 20-21; and vol. 2, p. 105, lines 17-19.

94 Transcript, vol. 2, p. 137, lines 16-20.

95 Transcript, vol. 1, p. 42, lines 18-26; and p. 43, line 26 to p. 44, line 1.

96 Transcript, vol. 1, p. 43, lines 2-25.

Dahlen owned the pickup truck that he used from time to time to pick up materials from Dunbar Lumber. In my view, the truck was a significant asset, which tends to balance the scale.

[70] This factor seems to be divided somewhat evenly between employment and independent contract.

3. Hiring of Helpers

[71] When Jens Skov was cross-examined by Ms. Dahlen, he stated that, as far as he knew, Mr. Dahlen had the ability to have somebody else work for him if he was not coming to work. However, Mr. Skov stated that he did not speak with Mr. Dahlen about subcontracting out to another contractor.[97]

[72] Regardless of whether Mr. Dahlen had, or did not have, authority to hire a replacement worker, Mr. Dahlen did not attempt to do so. Rather, on those occasions when he did not go to the jobsite, particularly when he was participating in training for his longshoreman position, and when another CSO, such as Peter Skov's son, was not working at the jobsite,[98] Mr. Dahlen notified Mr. Chilton, and Mr. Chilton then hired a replacement CSO from Workforce. Not only does this indicate that it was relatively straightforward for Mr. Dahlen to have Mr. Chilton arrange for a replacement CSO, but it also shows that the position of CSO could readily be filled by someone who was not an employee of UPA or of the Corporation.

[73] I do not view this factor as clearly pointing in either direction.

4. Risk of Loss

[74] For income tax purposes, Mr. Dahlen did not claim any expenses as deductions against the compensation that he was paid by the Corporation.

[75] As noted above, Mr. Dahlen sometimes used his truck to pick up materials from Dunbar Lumber. By reason of this unique arrangement, which Mr. Dahlen undertook of his own volition (although he may have been persuaded by Mr. Chilton, who represented UPA, and not the Corporation), there would have been some modest expenses incurred by Mr. Dahlen (for instance, for gasoline),

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97 Transcript, vol. 1, p. 42, lines 2-6.

98 Transcript, vol. 1, p. 42, lines 8-10.

together with additional wear and tear on his truck. There was also the risk of getting in an accident while driving to or from the lumberyard or having his truck damaged as materials were loaded into it or unloaded from it.

[76] When a worker provides his own vehicle for his work, it has been recognized that there is a risk of loss:

> The contract also carried with it the risk for [the appellant] of significant loss. Traffic fines, damage to his vehicle and the potential for liability to others for damage caused in the course of the work were all potential sources of loss. Some of these risks were significant, and some he could insure against. Indeed, he was required to insure against liability to third parties. But the potential for unforeseen losses is always a hazard in those cases where the worker provides the vehicle at his own expense.[99]

[77] While there was not a substantial risk of loss, this factor is suggestive of an independent contract, rather than employment.

5. Responsibility for Investment and Management

[78] There was no evidence that related specifically to this particular factor. However, Mr. Dahlen had invested in the truck that he drove to the jobsite and sometimes used to pick up materials. In *City Water*, the Federal Court of Appeal acknowledged that providing a vehicle is a major investment, which may favor a finding that a worker is an independent contractor.[100]

[79] This factor is indicative of an independent contract.

6. Opportunity for Profit

[80] Jens Skov stated that Mr. Dahlen was at liberty to set his own hours each work day. In response to a question asked during cross-examination as to whether Mr. Dahlen could have come to the jobsite at 3:00 p.m., Jens stated that Mr. Dahlen could have done so if he had wanted to get paid for only two hours of work

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99 *Dynamex Canada Corp. v. MNR*, 2008 TCC 71, ¶18. In *City Water International Inc. v. The Queen*, 2006 FCA 350, ¶26, the Federal Court of Appeal took a narrower view, as it seemed to consider only the operating costs in respect of an automobile.

100 *City Water*, *ibid*, ¶22.

that day. In other words, if Mr. Dahlen arrived at the jobsite later in the day, he would simply be paid for less work.[101]

[81] It might be argued that, as Mr. Dahlen was at liberty to set his own hours each work day, he could have earned more, and he could have made a profit, by working longer hours. However, this argument is not supported by the jurisprudence. Rather, the case law supports the proposition that generally "a worker who is paid by the hour does not have a chance of profit simply by having the ability to earn more by working more."[102]

[82] This factor points toward Mr. Dahlen having had the status of an employee, rather than an independent contractor.

7. Weighing and Balancing

[83] This is a situation where the analysis of the *Wiebe Door* and *Sagaz* factors does not provide a clear result. In some situations, this could suggest that perhaps greater emphasis should be placed on the intention of the parties, as was done in *City Water*.[103] However, in these Appeals, the parties do not acknowledge that they shared a common intention.

[84] For the purposes of weighing and balancing the above factors, this situation is a close call.[104] While, overall, many of the factors point in both directions, or in neither direction, and some factors balance out other factors, I think that Mr. Dahlen's freedom to set his own days and hours of work and to be absent from the jobsite, in his quest for other work,[105] and his having taken it upon himself to use his truck to pick up and deliver materials, without telling the Corporation,[106] tip the scale in favor of an independent-contractor relationship, rather than an employment relationship.

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101 Transcript, vol. 1, p. 34, line 21 to p. 35, line 6; and p. 37 lines 8-10.

102 *Quinte Children's Homes Inc. v. MNR*, 2015 TCC 250, ¶26 & 28. See also *City Water*, *supra* note 99, ¶14 & 24; and *Hennick v. MNR*, (1995) 179 NR 315, 53 ACWS (3d) 1134 (FCA), ¶10 & 14. For a different view, see *Co-operative Hail Insurance Company Limited v. MNR*, 2023 TCC 40, ¶38.

103 *City Water*, *supra* note 99, ¶31.

104 See *DHL Express (Canada) v. MNR*, 2005 TCC 178, ¶33.

105 Transcript, vol. 1, p. 20, lines 13-18; vol. 1, p. 45, lines 9-12; and vol. 1, p. 80, lines 21-26.

106 Transcript, vol. 1, p. 80, line 27 to p. 81, line 7; vol. 2, p. 178, line 25 to p. 179, line 15; and vol. 2, p. 190, lines 5-17.

[85] The close-call nature of this situation may also suggest that the relationship between Mr. Dahlen and the Corporation was somewhere on the continuum between an employment relationship and an independent-contractor relationship, which I will now consider.

G. Continuum between Employment and Independent Contract

[86] In recent years, several courts have noted that there is not a stark dichotomy between an employment contract (traditionally called a contract of service) and an independent contract (traditionally called a contract for services). Rather, there is a continuum between the two, with the employer-employee relationship at one end, the independent-contractor relationship at the other end, and a hybrid, intermediate or dependent-contractor relationship "somewhere in the middle."[107] Many of those cases dealt with the question of whether a hirer was required to give reasonable notice to a worker before terminating the contract between them. This concept was described in *Marbry Distributors* in these terms:

> All relationships in the workplace setting can perhaps be thought of as existing on a continuum. At one end of the continuum lies the employer/employee relationship where reasonable notice is required to terminate. At the other extremity are independent contracting or strict agency relationships where notice is not required. The difficulty obviously lies in determining where upon that continuum one is located. Does the relationship bear more resemblance to the employer/employee or the independent contractor status?[108]

[87] From an employment-law perspective, the status of a dependent contractor has been described as follows:

> As a general proposition, a person on an employer's payroll and for whom the employer makes conventional statutory deductions from his pay will be considered to be an employee…. An independent contractor… is not an employee. Between those two states lies a construct of the common law: the dependent contractor. The dependent contractor is not on payroll, but in most other ways operates and is treated as an employee.[109]

[88] Although a dependent contractor generally operates and is treated as an employee, the jurisprudence has recognized that a hybrid, intermediate or

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107 *DHL Express*, *supra* note 104, ¶32. See also *Dynamex*, *supra* note 99, ¶19; and *Med Express Inc. v. MNR*, 2021 TCC 8, ¶13-14.

108 *Marbry Distributors Limited v. Avrecan International Inc.*, 1999 BCCA 172, ¶9.

109 *Glimhagen v. GWR Resources Inc.*, 2017 BCSC 761, ¶44.

dependent-contractor relationship is akin to, but not the same as, an employer-employee relationship.[110]

[89] The common law's evolutionary process, leading to a recognition of relationships that are neither employer-employee relationships nor independent-contractor relationships, has been described as follows:

> The jurisprudence of employment law has, in relatively recent times, evolved to recognize the realities of the modern workplace and the fact that the relationship between workers and those to whom they provide their services are not simply binary—either employee-employer or independent contractor. In a number of decisions, the courts have come to acknowledge that there are a variety of different arrangements that the parties may have. The approach to be taken is to examine the situation from a functional perspective.
>
> The result has been the recognition of relationships that fall within an area between the two traditional models. Dealing with a similar issue in *Kahn v. All-Can Express Ltd.*, 2014 BCSC 1429, I made the following comments, which I feel are pertinent to the matter at hand:
>
> > … Based upon a number of authorities to which I have been referred, I am satisfied that the common law with respect to this issue has evolved into a more nuanced state, one that reflects the reality of an economy where many workers perform services for others in arrangements that are specifically structured such that they are neither employer-employee relationships nor are they properly characterizable as independent contractor relationships.
> >
> > … In effect, the courts have recognized that these sorts of relationships, depending upon their particular features, can fall at different points along a continuum, ranging from pure employer-employee situations to classic independent contractor arrangements….[111]

[90] The Ontario Court of Appeal has provided guidance as to the manner in which the existence of a dependent-contractor relationship is to be determined, as

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110 *Marbry Distributors*, *supra* note 108, ¶19 & 46; *Jacks v. Victoria Amateur Swimming Club*, 2005 BCSC 778, ¶12; *TCF Ventures Corp. v. The Cambie Malone's Corporation*, 2016 BCSC 1521, ¶53; affirmed in part, 2017 BCCA 129, ¶1-2 & 10; *Pasche v. MDE Enterprises Ltd. et al*., 2018 BCSC 701, ¶104, 106-107 & 110; and *Anderson v. MNR*, 2021 TCC 28, ¶53-54 & 56.

111 *TCF Ventures* (BCSC), *ibid*, ¶48-49.

well as some of the policy reasons for, and the consequences of, that determination, as follows:

> [30] I conclude that an intermediate category exists, which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as "dependent contractors" and they are owed reasonable notice upon termination….
>
> [32] Having concluded that there is an intermediate category between independent contractor and employee, namely "dependent contractor", I also conclude that the legal principles applicable to distinguishing between employee[s] and independent contractors apply equally to the distinction between employees and dependent contractors. In this way, the dependent contractor category arises as a "carve-out" from the non-employment category and does not affect the range of the employment category....
>
> [34] In this way, the proper initial step is to determine whether a worker is a contractor or an employee, for which the *Sagaz/Belton* analysis, described in the next section, controls. Under that analysis, the exclusivity of the worker is listed as a factor weighing in favour of the employee category (*Belton*'s first principle). The next step, required only if the first step results in a contractor conclusion, determines whether the contractor is independent or dependent, for which a worker's exclusivity is *determinative*, as it demonstrates economic dependence. Therefore, exclusivity might be a "hallmark" of the dependent contractor category vis-à-vis the broader category of contractors. However, it continues also as a factor in determining whether the worker is not a contractor at all, but rather an employee, in the first-step analysis.
>
> [35] This process of analysis serves the policy purposes that underlie the jurisprudence. In summarizing the caselaw, Geoffrey England, Roderick Wood & Innis Christie, *Employment Law in Canada*, 4th ed. (Markham, Ont.: LexisNexis Canada) vol. 1, at s. 2.33, describes [*sic*] the frequently stated policy reasons for recognizing an intermediate category:
>
> > These decisions have frequently acknowledged the policy justification for using the "intermediate" status doctrine in order to extend the safeguards of the employment contract to self-employed workers who are subject to relatively high levels of subordination and/or economic dependency, but who, technically, do not qualify as "employees" *strict sensu*.
>
> [36] Given this concern to safeguard workers who are formally "contractors" but who are in a position of economic vulnerability, it only makes sense to carve the dependent contractor category out of the broader existing contractor category and leave the range of the employee category intact. Therefore the appropriate

> analysis for distinguishing employees from "contractors" generally is the existing analysis for distinguishing employees from independent contractors.[112]

[91] Hence, the concept of a dependent contract or an intermediate relationship does not diminish the space occupied by employment. Rather, it simply recognizes that between the employment space and the independent-contract space there is an intermediate space that is neither employment nor independent contract, although it has some similarities to both of them.

[92] Given the judicial recognition of an intermediate or hybrid category of worker, sometimes called a dependent contractor, "the test today for determining whether a worker is an employee or an independent contractor is more nuanced than in the past."[113]

[93] As indicated in *McKee*,[114] an analysis based on the *Wiebe Door/Sagaz/Belton* factors is typically used to distinguish between an employee and a dependent contractor, similar to the approach taken to distinguish between an employee and an independent contractor. Based on the analysis undertaken

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112 *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916, ¶30, 32 & 34-36. The reference to *Belton* in paragraph 34 of the above quotation refers to *Belton v. Liberty Insurance Co. of Canada*, (2004) 72 OR (3d) 81 (Ont. CA), in which the Court identified five principles, modelled in part on the *Sagaz* factors, which the *McKee* case, at ¶39, summarized as follows:

> 1. Whether or not the agent was limited exclusively to the service of the principal;
>
> 2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;
>
> 3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service;
>
> 4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;
>
> 5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

113 *Pasche, supra* note 110, ¶73-74 & 88.

114 *McKee, supra* note 112, ¶34 & 36.

above,[115] I conclude that, if Mr. Dahlen was not an independent contractor, he was in a hybrid, intermediate or dependent-contractor relationship with the Corporation.

H. Requirement of Employment

[94] Subsection 5(1) of the EIA makes it clear that, apart from service in the Canadian Forces or a police force, the term *insurable employment* requires that there be employment in one of four specified categories.[116] Similarly, the definition of the term *pensionable employment* in subsections 2(1) and 6(1) of the CPP (when read together) makes it clear that *pensionable employment* requires that there be employment.

[95] While a hirer-worker relationship in the intermediate category may, in some respects, be akin to employment, as noted above, the cases have indicated that such an intermediate relationship is not actually employment.[117]

[96] In *Marbry*, Chief Justice McEachern, in dissent, made the following statement, albeit in a slightly different context:

> With respect to the analysis undertaken in so many similar cases regarding near-employment relationships, I only wish to say that except in the game of horseshoes, "near" is not usually enough for the establishment of legal relations. Just because a commercial relationship is close to an employment relationship does not permit judges to imply a term into an agreement which the parties themselves chose not to agree upon.[118]

I am of the view that a similar principle applies here. In other words, the proximity or nearness of a contractor relationship to an employment relationship does not permit a judge to categorize the relationship as employment for the purposes of the EIA and the CPP. The EIA and the CPP impose significant obligations on hirers and workers (to pay premiums and contributions) and on the federal government (to pay benefits and pensions). Those obligations should be imposed only where there is clearly (and not nearly) an employment relationship. In my view, an intermediate, hybrid or dependent-contractor relationship does not qualify as either insurable employment or pensionable employment.

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115 In particular, see paragraphs 47-84 above.
116 Paragraphs 5(1)(a), (b), (d) & (e) of the EIA.
117 See paragraph 88 and footnote 110 above.
118 *Marbry*, *supra* note 110, ¶59.

I. Summary and Resolution

[97] For the reasons set out above, I have concluded that, for the purposes of the CPP and the EIA, Mr. Dahlen was not an employee of the Corporation.

V. CONCLUSION

[98] The Appeals are allowed, and the Decision is set aside.

[99] As neither the Tax Court of Canada Rules of Procedure Respecting the Canada Pension Plan nor the Tax Court of Canada Rules of Procedure Respecting the Employment Insurance Act provide for costs, I am not making any ruling in respect of the costs of these Appeals.

Signed at Ottawa, Canada, this 4th day of May 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

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