Docket: 2007-4497(CPP)

BETWEEN:

DARYL J. BARTON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ROY A. FLOWERS,

Intervener.

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Appeal heard on April 2, 2008, at Fredericton, New Brunswick.
Before: The Honourable Justice Wyman W. Webb

Appearances:

| | |
|---|---|
| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Martin Hickey and Kendrick Douglas |
| For the Intervener | No one appeared |

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**JUDGMENT**

The appeal under the *Canada Pension Plan* ("*Plan*") is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and assessment on the basis that the Appellant was engaged in pensionable employment during the period from January 1, 2004 to December 31, 2004.

Signed at Halifax, Nova Scotia, this 11th day of April 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC210
Date: 20080411
Docket: 2007-4497(CPP)

BETWEEN:

DARYL J. BARTON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ROY A. FLOWERS,

Intervener.

## REASONS FOR JUDGMENT

Webb J.

[1] The issue in this case is whether the Appellant was an employee or an independent contractor in 2004 and hence whether he was engaged in pensionable employment for the purpose of the *Canada Pension Plan* (the "*Plan*") in 2004.

[2] In paragraphs 4 and 5 of the Reply the Respondent stated that:

> 4. In conjunction with an Employer Compliance Audit assessment of Connie Webster (the "Payor"), a ruling was requested and it was determined that the Appellant had been engaged by the Payor pursuant to a contract of service for the period from January 1, 2004 to December 31, 2004 (the "period under appeal") within the meaning of the *Canada Pension Plan* (the "*Plan*").
>
> 5. The Payor appealed to the Respondent from that assessment and by letter dated August 22, 2007, the Respondent advised the Appellant that, during the period under appeal, he had not been engaged pursuant to a contract of service with the Payor within the meaning of paragraph 6(1)(a) of the *Plan* and therefore, he had not been engaged in

pensionable employment.

[3] The issue was identified in paragraph 8 of the Reply as:

> 8. He submits that the Appellant was not engaged by the Payor in pensionable employment within the meaning of paragraph 6(1)(a) of the *Plan* for the period under appeal as there was no contract of service but rather a contract for service between the Appellant and the Payor.

[4] Therefore the issue in this case is whether the Appellant was engaged in a contract of service in 2004, or whether the Appellant was an independent contractor. The Appellant had been driving a taxi for some years prior to 2004. His preference was to always drive the same vehicle. The Appellant did not own the vehicle that he was driving as a taxi. Beginning in 2002 the vehicles that he would be using would more often than not be owned by one of three different persons -- Connie Webster (the "Payor"), Don Webster, or a numbered company. In the spring of 2004 the Appellant had a meeting with Don Webster during which Don Webster told the Appellant that the vehicle that the Appellant was then driving was owned by the numbered company and was being transferred to a new business. If the Appellant wished to continue to drive this vehicle he would have to switch and become a driver for the new business. Or, alternatively, the Appellant could remain with the existing business, and then be assigned whatever vehicle might be available. The Appellant chose to go with the new business and remain driving the same vehicle that be had been driving.

[5] At the time that the Appellant switched to the new business, his compensation arrangement changed. The arrangement with George's Taxi (which was the business before he switched to Skycab - the new business) was that the Appellant was entitled to retain 40% of the fares collected during a shift and the balance would be split between the dispatcher and the owner of the vehicle. With the new business, the amount of the fares that he could retain increased to 50% with a guaranteed minimum of $6.25 per hour. Therefore, if 50% of the amount collected during a shift was less than $6.25 times the number of hours that he worked during a shift, then he had the right to be paid $6.25 per hour times the number of hours that he worked. All of the costs related to the maintenance of the vehicles and all of the costs of fuel were borne by the owners of the vehicles and not by the Appellant. The Appellant only worked day shifts and during these shifts approximately 80% of the fares that he would receive would be as a result of calls to the taxi company followed by a notification to the Appellant by the dispatcher.

[6] In the Reply the Respondent assumed that the Payor was a sole proprietor who operated a taxi business that provided taxi stands and taxi dispatch services to various vehicle owners. The Respondent also assumed that the Appellant was engaged to provide services as a taxi driver and that the Payor maintained a pool of qualified, licensed and approved taxi drivers. Although it is not clearly stated in the assumptions, it seems obvious from paragraphs 4, 5 and 8 of the Reply and these assumptions that the Respondent was making the assumption that the Payor engaged the Appellant and therefore that there was a contract between the Payor and the Appellant.

[7] The question of whether an individual is an employee or an independent contractor has been the subject of several cases. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. 61, 2001 S.C.C. 59, Justice Major of the Supreme Court of Canada stated as follows:

> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, supra, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of

> responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[8] In recent decisions of the Federal Court of Appeal the issue of the intent of the parties has been addressed. In the recent decision of the Federal Court of Appeal in *Combined Insurance Co. of America v. M.N.R.*, 2007 FCA 60, Nadon J.A. of the Federal Court of Appeal stated as follows:

> 35. In my view, the following principles emerge from these decisions:
>
> 1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door, supra,* and in the light of any factor which may prove to be relevant in the particular circumstances of the case;
>
> 2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.
>
> Although as a general rule the control test is of special importance, the tests developed in *Wiebe Door* and *Sagaz, supra*, will nevertheless be useful in determining the real nature of his contract.

[9] In *Lang v. the Minister of National Revenue* 2007 TCC 547, Chief Justice Bowman made the following comments:

> 33 With respect to the factor of intent I would make a couple more observations. The first is that the Supreme Court of Canada has not expressed a view on the role of intent. In *Sagaz,* it was not mentioned as a factor. The second is that if the intent of the parties is a factor it must be an intent that is shared by both parties. If there is no meeting of the minds and the parties are not ad idem, intent can not be a factor.

[10] The Payor did not testify in this case. The only witness was the Appellant. In this case it is obvious that there is no common intent between the Payor and the Appellant with respect to the issue of whether the Appellant was an employee or an independent contractor and therefore intent is not a factor in this case.

**Level of Control**

[11] The assumptions in the Reply included the following:

> (i) the Payor, in cooperation with the Owners and the drivers, assigned each of the drivers their individual shift schedule;
>
> (j) the Payor, in conjunction with Owners and drivers, assigned drivers to vehicles during each shift;
>
> …
>
> (z) the Appellant was required to follow the Payor's procedures and rules;

[12] The Appellant only worked day shifts. He would receive directions from the dispatcher to pick up passengers. His hours of work were determined by the Payor, although he would have some input. As noted he only worked day shifts, which was his choice. The level of control would suggest an employer/employee relationship.

**Ownership of Equipment**

[13] The Appellant did not own or have any interest in the vehicle that he was driving as a taxi. He indicated that for all but a few days in 2004 he was driving a vehicle that was owned by the Payor, Don Webster or a numbered company. The factor as stated by the Supreme Court of Canada is "whether the worker provides his or her own equipment". If the worker does not provide his or her own equipment and the equipment is provided directly or indirectly by another person (regardless of whether that other person actually owns the equipment or has some other contractual arrangement that allows that person to provide the equipment), this would suggest that the worker is an employee of that person. Whether the vehicle was owned by the Payor, Don Webster or the numbered company is irrelevant. The Appellant was not a shareholder, a director or an officer of the numbered company. The vehicle was provided to the Appellant by the person who engaged the Appellant either as the owner of the vehicle or as a result of some agreement between that person and the owner of the vehicle. It is clear that the Appellant did not provide any of his own equipment and therefore this factor suggests that the Appellant was an employee rather than an independent contractor.

**Hiring of Helpers**

[14] In the Reply the Respondent assumed that "the Appellant was not permitted to

hire another driver to drive the vehicle for him". The Appellant confirmed this and this suggests that the Appellant was an employee.

**Degree of Financial Risk Taken by the Appellant**

[15] At the beginning of 2004, the Appellant was entitled to 40% of the fares that he collected. When he started driving for Skycab in 2004, the Appellant received a guaranteed minimum of $6.25 per hour. The Appellant did not incur any costs in relation to the ownership, operation or maintenance of the vehicles. As a result the Appellant had very little financial risk and even less financial risk after he started driving for Skycab. This suggests that the Appellant was an employee.

**Degree of Responsibility for Investment and Management**

[16] The Appellant did not have any responsibility for investment and management of the business and therefore this factor suggests that the Appellant was an employee.

**Opportunity for Profit**

[17] The Appellant worked only during the day shifts when approximately 80% of the fares that he received were as a result of calls to the dispatcher. For several of the days he received the minimum hourly rate amount. While there would be some opportunity for profit as the Appellant could search for additional passengers when he did not have a passenger, he only had the vehicle for a fixed period of time. As a result this factor does not strongly indicate that he was an independent contractor and in my opinion does not overcome the other factors which suggest that the Appellant was an employee.

**Conclusion**

[18] As a result, the application of the factors as set out by the Supreme Court of Canada in *Sagaz*, in my opinion, leads to a conclusion that the Appellant was an employee.

[19] Counsel for the Respondent argued that the taxi business and taxi drivers are treated differently from other groups. In particular, he referred to the case of *Yellow Cab Company v. M.N.R.*, 2002 FCA 294, 215 D.L.R. (4th) 413. However that case dealt with the provisions of subsection 6(e) of the *Employment Insurance Regulations* (the "*EI Regulations*") and whether that paragraph applied to the lease-operators and the owner-operator. That paragraph provides that:

> 6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment: ...
>
> (e) employment of a person as a driver of a taxi, commercial bus, school bus or any other vehicle that is used by a business or public authority for carrying passengers, where the person is not the owner of more than 50 per cent of the vehicle or the owner or operator of the business or operator of the public authority;

[20] In *Canada (Attorney General) v. Skyline Cabs (1982) Ltd.*, [1986] F.C.J. No. 335, the Federal Court of Appeal dealt with the interpretation of subsection 12(e) of the *Unemployment Insurance Regulations*. This subsection provided that:

> 12. Employment in any of the following employments, unless it is excepted employment under section 3(2) of the Act or excepted from insurable employment by any other provision of these Regulations is included in insurable employment:
>
> (e) Employment of a person as a driver of the taxi, commercial bus, school bus or any other vehicle that is used by a business or public authority for carrying passengers where that person is not the owner of the vehicle or the proprietor or operator of the business or public authority....

[21] Justice MacGuigan on behalf of the Federal Court of Appeal stated, in relation to subsection 12(e) of the *Unemployment Insurance Regulations* that:

> The sole issue before the Tax Court was as to the application of subsection 12(e) of the Regulations, and in the light of the Supreme Court of Canada decisions in *The Queen v. Scheer Ltd* , [1974] S.C.R. 1046 and *Martin Service Station v. Minister of National Revenue*, [1977] 2 S.C.R. 996, in my view it must be taken as settled law that the word "employment" in that subsection is not to be understood in the narrower sense of a contract of service, the sense in which it was interpreted by the Tax Court, but in the broader sense of 'activity' or 'occupation'.

[22] As a result a taxi driver who does not meet the criteria set out in the second half of paragraph 6(e) of the *EI Regulations* but who might otherwise be an independent contractor is still deemed to be in insurable employment for the purposes of the *EI Regulations* and the *Employment Insurance Act*. However this provision is only applicable for the purposes of the *EI Regulations* and the *Employment Insurance Act.* It is not applicable for the purposes of the *Plan* and the *Yellow Cab Company* case dealt with this provision.

[23] As well it should be noted that the *Yellow Cab Company* case dealt with the issue of whether the lease-operators and owner-operator were owners or operators of their own business. The Appellant is neither a lease-operator nor an owner-operator. He is a driver. The Federal Court of Appeal applied the decision of the Supreme Court of Canada in *Sagaz.* This confirms that this decision of the Supreme Court of Canada applies to individuals involved in the taxi business.

[24] The Federal Court of Appeal in the *Yellow Cab Company* case also stated that:

> 29. More importantly, however, I note that the lease-operators actually did delegate some their driving duties and, when they did, the lease-operators remitted CPP income tax, and CPP and Employment Insurance premiums on behalf of the drivers. The Respondent does not dispute that the lease-operators were the employers of the hired drivers as evidenced by the fact that the Respondent did not assess Yellow Cab for the revenues generated when the lease operators employed drivers.

[25] Therefore clearly taxi drivers can be employees. There is no reason to suggest that the principles as set out by the Supreme Court of Canada in *Sagaz* should not be applied in this case.

[26] The issue of whether the Appellant was an employee or an independent contractor of a previous taxi business was the subject of a decision of the New Brunswick labor and employment board. E. McGinley, Q.C., Chairperson of the Board noted that the Appellant was employee and not an independent contractor. The arrangement between the Appellant and Trius Taxi (F'ton) Ltd., as summarized in the reasons for decision of the Board, were substantially similar to the current arrangements with respect to the Appellant.

[27] Counsel for the Respondent, in his argument, suggested that the issue was whether the correct person had been identified as the "employer". However there is nothing in the Reply to suggest that this is the issue and, as noted above, the Payor was identified as the person who was carrying on the business as a sole proprietor. It is too late for counsel for the Respondent to raise this issue during argument after all of the evidence has been presented.

[28] In *Pollock v. The Queen*, [1994] 1 C.T.C. 3, 94 DTC 6050, Hugessen J.A., on behalf of the Federal Court of Appeal, made the following comments:

> Where, however, the Minister has pleaded no assumptions, or where some or all of the pleaded assumptions have been successfully rebutted, it remains open to the Minister, as defendant, to establish the correctness of his assessment if he can. In

> undertaking this task, the Minister bears the ordinary burden of any party to a lawsuit, namely to prove the facts which support his position unless those facts have already been put in evidence by his opponent. This is settled law.

[29] In *Loewen* 2004 FCA 146, Sharlow J.A., on behalf of the Federal Court of Appeal, made the following comments:

> 11 The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. **If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown.** This is well explained in Schultz v. R. (1995), [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (Fed. C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4 (S.C.C.)).
>
> (emphasis added)

[30] Leave to appeal the decision of the Federal Court of Appeal in *Loewen* to the Supreme Court of Canada was refused (338 N.R. 195 (note)).

[31] The Respondent did not lead any evidence with respect to the issue of whether the Payor was the correct employer or whether there was no contract between the Payor and the Appellant. Since the issue as stated in the Reply clearly states that the Respondent is taking the position that there was a contract for service between the Payor and the Appellant, the Respondent cannot, at the conclusion of the hearing, take the position that there was no such contract when no evidence on this point was introduced and no request to amend the Reply had been made.

[32] The Appellant stated that his arrangement changed in 2004 when he switched from driving for George's Taxi to driving for Skycab. Presumably this resulted in a change in the Appellant's employer. However the only parties to this appeal are the Appellant and the Respondent. Roy A. Flowers filed a Notice of Intervention but he did not appear at the hearing nor was there any explanation of his connection to this matter. The only issue is whether the Appellant was engaged in pensionable employment in 2004. The issue of the amount of the employer's contribution that would be payable by the Payor in respect of the Appellant pursuant to section 9 of the *Plan* is not the issue in this case. The Payor is not a party to this appeal. The amount of the contribution payable by each employer of the Appellant in 2004 will have to be the subject of a separate proceeding.

[33] The appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and assessment on the basis that the Appellant was engaged in pensionable employment for the purposes of the *Plan* during the period under appeal.

Signed at Halifax, Nova Scotia, this 11th day of April 2008.

"Wyman W. Webb"

Webb J.

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| CITATION: | 2008TCC210 |
| COURT FILE NO.: | 2007-4497(CPP) |
| STYLE OF CAUSE: | DARYL J. BARTON AND M.N.R. AND ROY A. FLOWERS |
| PLACE OF HEARING: | Fredericton, New Brunswick |
| DATE OF HEARING: | April 2, 2008 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Wyman W. Webb |
| DATE OF JUDGMENT: | April 11, 2008 |

APPEARANCES:

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| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Martin Hickey and Kendrick Douglas |
| For the Intervener: | No on appeared |

COUNSEL OF RECORD:

For the Appellant:

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| Name: | |
| Firm: | |

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| For the Respondent: | John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Canada |