Docket: 2009-3950(EI)

BETWEEN:

PRO-PHARMA CONTRACT SELLING SERVICES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DHEKRA CHABBOUTH,

Intervenor.

Appeal heard on common evidence with the appeals of *Pro-Pharma Contract Selling Services Inc.* (2009-3951(CPP)), *Patrick Gonsalves* (2009-3475(EI)) and *Patrick Gonsalves* (2009-3476(CPP)) on December 5, 2011, at Toronto, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Counsel for the Appellant:	Ryder Gilliland Adam Lazier
Counsel for the Respondent:	Thang Trieu Stephen Oakey
For the Intervenor:	No Appearance

JUDGMENT

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

Signed at Toronto, Ontario, this 23rd day of February 2012.

"N. Weisman"

Weisman D.J.

Docket: 2009-3951(CPP)

BETWEEN:

PRO-PHARMA CONTRACT SELLING SERVICES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DHEKRA CHABBOUTH,

Intervenor.

Appeal heard on common evidence with the appeals of *Pro-Pharma Contract Selling Services Inc.* (2009-3950(EI)), *Patrick Gonsalves* (2009-3475(EI)) and *Patrick Gonsalves* (2009-3476(CPP)) on December 5, 2011, at Toronto, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Counsel for the Appellant:	Ryder Gilliland Adam Lazier
Counsel for the Respondent:	Thang Trieu Stephen Oakey
For the Intervenor:	No Appearance

JUDGMENT

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

Signed at Toronto, Ontario, this 23rd day of February 2012.

"N. Weisman"

Weisman D.J.

Docket: 2009-3475(EI)

BETWEEN:

PATRICK GONSALVES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DHEKRA CHABBOUTH,

Intervenor.

Appeal heard on common evidence with the appeals of *Patrick Gonsalves* (2009-3476(CPP)), *Pro-Pharma Contract Selling Services Inc.* (2009-3951(CPP)) and *Pro-Pharma Contract Selling Services Inc.* (2009-3950(EI)) on December 5, 2011, at Toronto, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Counsel for the Appellant:	Ryder Gilliland Adam Lazier
Counsel for the Respondent:	Thang Trieu Stephen Oakey
For the Intervenor:	No Appearance

JUDGMENT

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

Signed at Toronto, Ontario, this 23rd day of February 2012.

"N. Weisman"

Weisman D.J.

Docket: 2009-3476(CPP)

BETWEEN:

PATRICK GONSALVES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DHEKRA CHABBOUTH,

Intervenor.

Appeal heard on common evidence with the appeals of *Patrick Gonsalves* (2009-3475(EI)), *Pro-Pharma Contract Selling Services Inc.* (2009-3951(CPP)) and *Pro-Pharma Contract Selling Services Inc.* (2009-3950(EI)) on December 5, 2011, at Toronto, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Counsel for the Appellant:	Ryder Gilliland Adam Lazier
Counsel for the Respondent:	Thang Trieu Stephen Oakey
For the Intervenor:	No Appearance

JUDGMENT

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

Signed at Toronto, Ontario, this 23rd day of February 2012.

"N. Weisman"

Weisman D.J

Citation: 2012 TCC 60
Date: 20120223
Dockets: 2009-3950(EI)
2009-3951(CPP)

BETWEEN:

PRO-PHARMA CONTRACT SELLING SERVICES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DHEKRA CHABBOUTH,

Intervenor.

Dockets: 2009-3475(EI)
2009-3476(CPP)

AND BETWEEN:

PATRICK GONSALVES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DHEKRA CHABBOUTH,

Intervenor.

REASONS FOR JUDGMENT

Weisman D.J.

[1] Pro-Pharma Contract Selling Services Inc. ("the Company"), and one of its sales representatives, Patrick Gonsalves ("Gonsalves") appeal against determinations by the Minister of National Revenue ("the Minister") that the 287 sales representatives that were in a working relationship with the Company during 2006 and 2007, were then in insurable and pensionable employment within the meaning of the *Employment Insurance Act*[1] ("the *Act*") and the *Canada Pension Plan*[2] ("the *Plan*"). On consent of the parties, these four appeals were heard together on common evidence.

[2] The Minister has assessed the Company approximately one million dollars for unpaid premiums and contributions, in addition to penalties and interest for the two year period under review. The Appellants contend that all 287 sales representatives[3] were independent contractors whose terms or conditions of employment or service do not constitute a contract of service, nor were they analogous thereto; that the Company was not a placement agency within the meaning of Regulation 6.(g) under the *Act*, and Regulations 34.(1) and (2) under the *Plan*; and that the subject representatives were not placed by the Company under the direction and control of its clients.

[3] The three Regulations provide as follows:

> **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:
>
> …
>
> (g) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.
>
> **34.** (1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the

[1] S.C. 1996, c. 23
[2] R.S.C. 1985, c. C-8 as amended
[3] The sales representatives are identified in exhibit R-6.

> terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual.
>
> (2) For the purposes of subsection (1), "placement or employment agency" includes any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

[4] These reasons will examine the nature of the working relationship between the Company and its sales representatives, the legal issues raised by this fact situation, and the analysis involved in the conclusions that I have reached.

The Working Relationship Between the Company and its Sales Representatives:

[5] The main witness in these proceedings was Ian Fraser ("Fraser") who founded the Company in 1984, and was its President and Chief Operating Officer during the period under review. He was knowledgeable about the industry itself, and the Company and its working relationships with its sales representatives and clients.

[6] The Company provides medical sales representatives to its clients, which are all multinational pharmaceutical companies. These representatives visit doctors to introduce and explain, or "detail" the clients' pharmaceutical and other products, using research data, brochures, and samples provided by the client, in order to encourage or convince the physicians to prescribe those products appropriate to their patients. They also call upon pharmacies to ascertain and compare the prescriptions physicians are writing for the products they are promoting, as opposed to those of their clients' competitors. While the representatives agreed with the Company to conform to the call frequencies directed by the client or clients, they were free to schedule those calls and their working days as they saw fit.

[7] The Company's clients are able to obtain lists of high-prescribing doctors which they use to define what they call their "target audience". The clients then assign the sales representatives to geographical territories which are configured by the Company in conjunction with the clients, to contain a high concentration of such physicians.

[8] What is unusual about the workers involved in these appeals is that in the vast majority of instances, they were previously employed as sales representatives for the same pharmaceutical companies that entered into Client Services Agreements with the Company. These companies were downsizing or acquiring others, and were anxious to have their representatives enter into working relationships with the Company, so that continuity could be maintained. The target audience in any territory would continue to be canvassed on the clients' behalf by the same sales representatives the doctors had come to know, and who were experienced and expert in the various pharmaceutical products the physician's particular speciality required. From the workers' point of view, it was business as usual, except that whereas they were formerly employees of the pharmaceutical companies, they would now be independent contractors engaged by the Company. This gave them the promise of greater net income because of the ability to deduct allowable business expenses from gross income. In addition, they were freed of various time-consuming administrative responsibilities that went along with employment by a large, multinational pharmaceutical company.

[9] The Company paid its sales representatives either monthly, or per call. It then invoiced its clients for the amounts it paid out plus a 40% mark-up, which was the Company's only source of revenue. During the period under review this amounted to some twelve million dollars per annum.

[10] Sales representatives could be "dedicated", "syndicated" or "dedicated/ syndicated". Dedicated representatives acted for just one client, and detailed no more that two of that client's products per call upon a physician. Syndicated representatives could represent more than one client at each call upon a doctor. During the period under review, most of the Company's sales representatives were dedicated to one client.

[11] It was fundamental to the financial viability of the Company from its inception that the medical sales representatives be independent contractors so that the Company would not have to bear the expense of employment insurance premiums and Canada Pension Plan contributions; and the representatives could achieve greater net remuneration than comparable employees, as aforesaid. Accordingly, the Company entered into Representative Agreements with the workers which all express a clear mutual intent that the sales representatives be independent contractors responsible for their own source deductions, for income taxes, employment insurance premiums, and Canada Pension Plan contributions.

[12] Most dedicated representatives were paid $30.00 per meeting with a physician to detail one product for a client, and $33.00 if they detailed two. Others were paid a flat monthly fee for their services. The monthly fee was subject to negotiation between the Company and the sales representative involved. All syndicated representatives were paid a fee per call, regardless of how many clients' products they detailed during a meeting, which fee was not negotiable. Representatives that were remunerated per call were paid only if they succeeded in having a face-to-face interview with the targeted physician. This was problematic since frequently, despite having secured a pre-arranged appointment, the sales representatives had to make several abortive visits to busy doctors' offices before the physician could be interviewed. The representatives were not paid for this wasted time and expense.

[13] Both dedicated and syndicated representatives had the right to refuse assignments if they disliked a particular client or product. Upon such refusal, the Company would put that representative's name back on its data base of those available for assignment.

[14] None of the Representative Agreements were exclusive, requiring the representative to perform his or her services solely for the Company or any of its clients. In this regard, the only contractual restriction was as follows: "During the term of the Agreement, the Representative shall not carry out any work for any competitor of the Client and shall at all times devote that proportion of their entire working time and attention necessary to complete such duties as shall be required of them".

[15] The Representative Agreements were all for a limited term of 12 months or less, with no provision for renewal. The sales representatives accordingly had no job security in their working relationship with the Company.

[16] Some sales representatives hired others to perform some aspects of their responsibilities. While the actual presentation and detailing of products to their target doctors had to be done by the representatives personally in face-to-face meetings, time-consuming administrative portions of their duties were sometimes delegated to others. It took time and effort to schedule and reschedule regular appointments with busy physicians as aforesaid, and to arrange working lunches and seminars with individual, or groups of doctors; prepare the required work sheets, reports and invoices and do the related bookkeeping. Those sales representatives who were paid per call and were freed of these administrative duties could increase the number of their daily calls, and their revenues, accordingly.

[17] Gonsalves, who was a syndicated paid-per-call sales representative, expert in pharmaceutical cardiology, retained his wife to perform the above functions out of their home office. Being enterprising by nature, and confronted by the aforementioned absence of job security with the Company, he also formed plans to accumulate a roster of physicians to which he could present products made by companies that did not compete with those of his assigned client, Sinofi-Aventis Pharma Inc.

Were the Sales Representatives Independent Contractors in Their Working Relationship with the Company:

[18] To determine this issue, one must subject the established facts to the four-in-one guidelines formulated in *Wiebe Door Services Ltd. v. M.N.R.*[4] The four criteria are the payer's right to control the worker; who owns the tools required to perform the worker's function; the worker's chance of profit by sound management; and his or her risk of loss in the working relationship.

As to the Right to Control:

[19] This factor requires one to distinguish a payer's right to control the worker, from simply monitoring the quality of the worker's performance. The former indicates a contract of service, the latter a contract for services[5]. In this regard, virtually all the Representative Agreements provide as follows:

> 5. The obligations of the company with respect to the provision of continuing quality of services to be provided by the Representative hereunder are that (a) a Company Sales Manager and/or a Client Sales Manager may work with the Representative (provided the client agrees) and (b) the Company\Client may provide a selling skills seminar at some time.

[20] Notwithstanding the above provision, the evidence adduced at trial establishes that with few exceptions the sales representatives were left on their own in their designated territories, and were free to set their own hours, so long as the frequency of calls upon their target audience as required by the client, was maintained. Since the sales representatives already possessed extensive knowledge of the client's needs and products, the assigned territory, and the high-prescribing doctors therein, through their previous employment with the same client, there was no need for the Company

[4] (1986), 87 D.T.C. 5025 (FCA) ("*Wiebe Door*"). Note that there is an error in the transcript. The word "If" should appear before the word "Counsel" on page 196, line 7.
[5] *Charbonneau v. M.N.R.*, [1996] F.C.J. No. 1337 (FCA) at par. 10

to direct them as to what to do or the manner in which it had to be done. The sales managers would accompany the representatives on their calls on a monthly basis, on what was known in the industry as a "work with". According to Fraser, the purpose of this procedure was not to supervise the representative, but to "coach" him or her. Accordingly, the manager would quietly observe the interaction between the representative and the targeted physician, and suggest improvements in the presentation over lunch thereafter.

[21] Questions have been raised at trial as to the consequences if a sales representative failed to appear for scheduled appointments with doctors, arrived in an inebriated condition, or otherwise misbehaved. The evidence indicates that the doctor's office would complain to the sales manager, or the client, or the company, and the representative in question would be given a 30-day period in which to rectify the impugned behaviour, as required by the Representative Agreements, in default of which he or she would be terminated by the Company. It is clear law that independent contractors are subject to reasonable controls.[6] As the Court says in *Livreur Plus*[7]: "A subcontractor is not a person who is free from all restraint, working as he likes, doing as he pleases, without the slightest concern for his fellow contractors and third parties".

[22] While the Company had the *de jure* right to terminate the sales representatives for cause, it did not in fact supervise, direct or control them. It merely monitored the quality of their performance on behalf of their clients. There is no evidence that the sales representatives were in a subordinate relationship with the Company, whether they were dedicated, syndicated, or a combination of both. The control factor accordingly indicates that the sales representatives were independent contractors in their working relationship with the Company.

As to the Ownership of Tools:

[23] The workers provided their own vehicles, which were the main tool required to cover their territories, and transport the various samples, brochures, and clinical data, all of which were supplied by the client. Storage space, in the workers' homes or elsewhere, was also required to accommodate the aforementioned supplies and samples. There is no evidence that the Company provided the sales representatives with any equipment whatsoever. The ownership of tools factor also points to the representatives being independent contractors.

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[6] *Vulcain Alarme Inc. v. M.N.R.*, [1999] F.C.J. No.749 (FCA); *Poulin v. Canada*, [2003] F.C.J. No. 141 (FCA); *Livreur Plus v. M.N.R.*, [2004] F.C.J. No. 267 (FCA) ("*Livreur Plus*"); *Rejean Tremblay v. M.N.R.*, [2004] F.C.J. No.802 (FCA)

[7] *Livreur Plus*, above, at par. 21

As to the Chance of Profit by Sound Management:

[24] The evidence established that the monthly dedicated sales representatives had the ability to negotiate their remuneration depending on their experience and number of years in the industry. This is significant because Sexton J.A. says in *Precision Gutters Ltd. v. M.N.R.*[8] ("Precision Gutters"): "In my view, the ability to negotiate the terms of a contract entails a chance of profit and a risk of loss in the same way that allowing an individual the right to accept or decline to take a job, entails a chance of profit and risk of loss".

[25] In this regard, all sales representative had the right to refuse assignments, if they didn't want to represent a particular client or product. As Fraser says: "And they had the right. And that was their decision". If so, they would not get that arrangement or contract. The Appellants would then keep the representative's name on its database for a subsequent opportunity.

[26] As aforesaid, the only contractual provision restricting the representatives from accessing sources of income, other than that from the Company, was the aforementioned standard proviso in the Representative Agreements prohibiting the representatives from working for any of their client's competitors. Accordingly, if sales representatives who were paid per call were expeditious and efficient in their meetings with their assigned physicians, they were able to accomplish more calls per day, and enhance their profits accordingly.[9] All sales representatives were free to engage in other opportunities in the pharmaceutical, or indeed in any other field. They could detail products, pharmaceutical or otherwise, to their assigned doctors, or to any doctors whether or not they were within their given territory, so long as those products were not sold by their client's competitors. Gonsalves was planning just such a business venture.

[27] Christian Knabel testified on behalf of the Company. He is the President and Managing Director of Pharmexx Canada which bought the Company in 2006. He took over from Fraser in 2010, when the Company was in a difficult position. It had lost significant market share to competitors whose sales representatives were employees. He therefore discontinued the independent contractor, fee-per-call model, because the quality of the presentations to doctors had deteriorated in the hands of

[8] [2002] F.C.J. No. 771 at par. 27

[9] This scenario differs from that in *Hennick v. M.N.R.*, [1995] F.C.J. No. 294, (FCA), at pars. 9-10, where the Court found that working longer hours, or producing more pieces of product, increased the workers' income but did not constitute profit, which belonged to the payer.

enterprising sales representatives who were anxious to maximize the number of their daily calls, and therefore their profits. Some would simply leave a sample of the client's product with the physician, and depart.

[28] Gonsalves hired his wife to work in their home office to accomplish the required administrative functions associated with his responsibilities as aforesaid. She made the appointments with the physicians, arranged the working lunches, paid all invoices, and completed all necessary expense and other reports. Justice McKenna, in *Ready Mixed Concrete v. Minister of Pensions*[10] says: "A servant must be obliged to provide his own work and skill. Freedom to do a job by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be". This raises the question whether Gonsalves' ability to hire his wife to take over his administrative duties, solidifies his status as an independent contractor. While I have been referred to no authority that deals with this point, I would think that the phrase "a job" in the quotation from Justice McKenna refers to the worker's principal task. An electrician or plumber can do his job by his own hands or by another's. Gonsalves was obliged to personally call upon his assigned physicians. To put it another way, I doubt whether one in Gonsalves' position can fortify their claim to independent contractor status by the simple expedient of paying a family member to perform office functions. This does not detract from the conclusion that the sales representatives had a chance to profit by sound management which indicates that they were independent contractors during the period under review.

As to the Risk of Loss:

[29] *Precision Gutters*, quoted above, established that the representatives' ability to decline job offers, and the ability of the dedicated monthly sales representatives to negotiate their rate of remuneration inherently constitute a risk of loss. In addition, those representatives who were remunerated on a fee-per-call basis, lost income and incurred travelling expenses every time a visit to a physician's office failed to produce a face-to-face meeting, due to the doctor's unavailability or otherwise. The representatives all bore the cost of storage space, as well as motor vehicle expenses although the latter were defrayed somewhat by a mileage allowance paid by the clients.[11]

[10] [1968] 1 All E.R. 433 (Q.B.) at p. 40

[11] The Minister incorrectly assumes in par. 13(i) of its Reply to the Appellant's Notice of Appeal that the Appellant provided the mileage allowances.

[30] In addition, the Representative Agreements all contain the following unusual clause: "the Representative undertakes to indemnify and hold harmless the Company against all losses, claims, injuries, including loss of life, which may be occasioned as the result of the provision of services hereunder". This provision resonates with the oft-quoted[12] dictum of Cooke J. in *Market Investigations Ltd. v. Minister of Social Security*[13] in attempting to list some indicia that might characterize an independent contractor:

> … whether the man performing the services provides his own equipment, whether he hire his own helpers, what degree of financial risk be taken, what degree of responsibility for investment and management he has and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

This indemnity clause clearly subjects the representatives to financial risk.

[31] Further, all the Representative Agreements were for terms of 12 months or less with no assurance of renewal. The absence of job security has also been recognized as a risk factor in the jurisprudence.[14] The risk of loss guideline therefore indicates that the sales representatives were independent contractors.

<u>As to the Parties Mutual Intention</u>:

[32] The Company and all of its sales representatives have contractually expressed a clear mutual intention that the workers be independent contractors in their working relationship with the Company. Application of the four *Wiebe Door* guidelines to the evidence adduced at trial indicates that their intention was fulfilled.[15]

<u>Was the Company a Placement or Employment Agency</u>:

[33] The Company's Notice of Appeal contains the following assertion:

> 15. The Appellant operates as a Contract Sales Organization and not as a placement agency. As a result, the Appellant provides many services to its clients. These services can include performing promotion and marketing services, national and regional field sales management, payroll and expense management and

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[12] See *Wiebe Door* above at par. 17; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61 (S.C.C.) at pars. 48 and 48; *Royal Winnipeg Ballet v. Canada*, [2006] F.C.J. No.339 (FCA) at pars. 37 and 44 ("*Royal Winnipeg Ballet*")

[13] [1968] 1 All E.R. 732 (Q.B.D.) at p. 738

[14] *Wolf v. Canada*, [2002] F.C.J. No. 375 (FCA) at pars. 26 and 87; *Royal Winnipeg Ballet*, above at par. 65

[15] *Royal Winnipeg Ballet*, above at par. 81

> administration, product and sales training, the creation of customized sales reports, the management of promotional materials and sample allotments and the provision of infrastructure support. The Appellant does not match requests for work with requests for workers.

[34] This pleading reflects the Company's reliance on the case of *Supreme Tractor Services v. M.N.R.*[16] ("Supreme Tractor") a decision of Porter D.J. There, the Appellant contracted with a client that sought grading services, to supply a grader of certain specifications together with fuel oil, repairs, maintenance, and ground engaging tools, and a skilled and experienced grader operator. For these, the Appellant was paid $68.00 per hour. The Court holds:[17] "The simple question to ask is whether entity A is under any obligation to provide a service to entity B other than simply provide personnel. If the answer is yes, it clearly has business of its own as does any general contractor on a building site and the worker is not covered by the Regulations under either statute". In the result, since the contractor was providing a grading service requiring both a grader and an experienced operator, and not just placing personnel, it was found not to be liable pursuant to the Regulations under either the *Act* or the *Plan*.

[35] The Federal Court of Appeal considered this decision in *OLTCPI Inc. v. M.N.R.*[18] ("OLTCPI"). The Court rephrases Porter D.J.'s test as follows: "The question in this regard is whether the person concerned is merely supplying workers or is doing so in the course of providing a distinct service".[19]

[36] The Court found that the Appellant provided dieticians to its client Leisureworld which operated long-term care facilities for senior citizens. The client, however, in the course of its direction and control of the workers, required the dieticians to perform services above and beyond the requirements of the Ministry of Health. The Court holds:[20]

> The picture which emerges from the evidence is that beyond ensuring compliance with the requirements of the Ministry of Health, the dieticians were assigned by the appellant to Leisureworld in order to answer Leisureworld's specific needs and provide the specific services which they were called upon to provide by the Leisureworld staff. As such it was open to the Tax Court Judge to hold that the appellant's situation was not analogous to that of a contractor providing personnel in the performance of a distinct service.

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[16] [2001] T.C.J. No. 580 (T.C.C.)
[17] At par. 12
[18] [2010] F.C.J. No. 379
[19] At par. 30
[20] At par. 33

[37] In the result, the Court found that the appellant was a placement or employment agency that placed workers under the direction and control of its clients, and dismissed the appeals.

[38] There are several problems with resorting to *Supreme Tractor* as a guide to resolving the placement or employment agency issue before me. In *Supreme Tractor*, the appellant-contractor provided both a grader and an operator to perform a distinct grading service. It charged its client $17.00 per hour for the operator, and $51.00 per hour for the supply and maintenance of the grader. On these facts it was found that a distinct service was being provided over and above the provision of personnel.

[39] In contrast, when Mr. Fraser was asked how the Company's revenues were derived, he testified that all of its revenues came from the 40% mark-up it charged its clients on the remuneration the Company paid to the sales representatives. When specifically queried if the Company charged its clients for any of the other services enumerated in paragraph 15 of its Notice of Appeal, he candidly replied "No". In *OLTCPI* the Appellant also claimed that it was providing a range of services for its client, but the evidence revealed that these were in fact provided on a complementary basis as in the matter before me.

[40] Further, none of the Client Services Agreements which have been put into evidence require the Company to provide its clients with any paid services other than the provision of qualified and approved sales representatives. For example, the Company's agreement with Johnson and Johnson Medical Products, which is exhibit A-9 in these proceedings, typically provides only that: "5. A Company sales manager may work with the Representatives and the Company may provide a sales refresher seminar to such Representatives".

[41] The only statutory definition of a placement or employment agency is to be found in Regulation 34.(2) under the *Plan*, set out above. The Company was engaged in the business of placing individuals in employment or for performance of services for a fee. I accordingly find that it was an employment or placement agency during the period under review.

<u>Did the Company Place the Sales Representatives Under the Direction and Control of Its Clients</u>:

[42] Regulation 6.(g) under the *Act*, expressly requires that a placement or employment agency place workers under the direction and control of its clients. It

does not require that there be a contractual relationship between the worker and the client. This differs from Regulation 34.(1) under the *Plan*, which does require that there be a contract of service between the worker and the client, or something analogous thereto.

[43] As far as Regulation 6.(g) under the *Act* is concerned, the Sales Representative Agreements all contain the following clauses which are relevant to the issue of direction and control:

> 3. The reporting and accountability by the Representative to the Client for the services to be provided by him [or her] pursuant hereto shall be as reasonably required by the Client.
>
> 6. The obligations of the Client are to provide product training and/or direction as to reporting requirements, including the Client's guidelines/policy for field representatives as well as to provide all promotional literature, product samples and the like, and generally to provide such other information and/or direction as may be reasonably necessary to give effect to the purposes of this agreement.
>
> 7. The services of the Representative to the Client shall be provided in a manner, and the Representative shall report and be accountable to the Client, as reasonably required by the Client.

[44] On the other end of the spectrum, the following are typical examples of provisions, culled from the diverse Client Services Agreements, regarding the clients' ostensible right to direct and control the representatives:

> Roche has a Business Practices Manual (the "Manual"), which has been provided to Pro-Pharma, that provides various policies, procedures and statements as to how business should be conducted on behalf of Roche. Pro-Pharma agrees that it and all its personnel, including the representatives shall comply with all the provisions of the manual when providing the Services.[21]
>
> The obligations of the Client with respect to each Representative are to provide product training and/or direction as to the reporting requirements, including the Client's guidelines/policies for sales representatives, as well as to provide all promotional literature, product samples and the like, and generally such other information and/or direction as may be reasonably necessary to give effect to the purpose of this Agreement".[22]

[21] Paragraph 4(b) of Client Services Agreement between the Company and Hoffmann-La Roche Limited, exhibit R-1, tab 4

[22] Paragraph 5 of Client Services Agreement Between the Company and Bristol-Myers Squibb Canada Co., exhibit A-6

> As for the Representatives, PRO-PHARMA shall have sole responsibility for their direction and control and PRO-PHARMA shall be fully accountable for the acts and omissions of the Representatives. PRO-PHARMA agrees that the Representatives and other PRO-PHARMA personnel will cooperate fully with the Client and its district managers and their monitoring of the program and will accept sales and marketing direction from Client.[23]
>
> The Representatives shall be responsible for the detailing of AXERT and TOPOMAX to GP/FMs as identified by the Client. A third product detail as assigned by the Company is strictly prohibited. All communication of product information by the Representatives to customers shall be consistent with the direction provided by the Client. The Representatives shall strictly adhere to all procedures and processes for communication as requested by the Client. This includes all communication from the Client's sales, marketing, medical information and regulatory departments and consistent with requirements as outlined in Rx & D standards".[24]
>
> The Client may at any time advise the Company in writing if the Services conducted by a Representative are not satisfactory to the client. The Company shall upon receipt of such notice, if for just cause, immediately replace such Representative with a suitable Representative (subject to a 30 day notice period for the Representative to rehabilitate him or herself).[25]

[45] The sales representatives were not parties to these Client Services Agreements.[26] *De jure* control over the representatives therefore remained with the Company. The question is whether any of these contractual provisions ceded to the clients *de facto* control over the sales representatives.

[46] The evidence adduced at trial establishes that they did not. Fraser testified that the sales managers, whether in the employ of the Company or the clients, simply coached the sales representatives, and did not supervise them, as aforesaid. Melissa Bryan-Pulham, a witness for the M.N.R., was a dedicated monthly representative who worked with a sales manager in the employ of Janssen-Ortho. While she referred to her manager as her "boss" because he was the one she "reported" to, she described her relationship with him as "one of give and take", and added that if his suggestions did not fit her selling style, "he would understand". She also said that she was "out on her own" for the most part and set a lot of her own hours of work.

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[23] Subparagraph 2(C)(iv) of Client Services Agreement between the Company and King Pharma Canada Ltd. ("King Pharma"), exhibit A-11

[24] Paragraph 4 of Client Services Agreement between the Company and Janssen-Ortho Inc, ("Janssen-Ortho"), exhibit A-8

[25] Paragraph 1(b) of Client Services Agreement between the Company and Johnson & Johnson Inc, exhibit A-9

[26] There is a schedule attached to the Janssen-Ortho agreement that apparently calls for the representative's signature, but it has not been executed.

This witness was unusual in that while she had prior sales experience, she was new to the field of pharmaceutical sales, and required an intensive week of in-class training by the client. Nonetheless, her performance was subject to the same degree of monitoring as was that of her more experienced counterparts.

[47] Kathryn Clarke, a second witness for the Respondent, also a dedicated monthly representative, promoted products for diabetics on behalf of Lifescan Canada Ltd. Ms. Clarke testified that her hours of work were flexible; that while her sales manager, who was employed by Lifescan, held conference calls every Friday, he simply came up with ideas about how to do the job better. While it was strongly recommended that she follow through with his suggestions, her job was not in jeopardy if she did not.

[48] Gonsalves' evidence was that his sales manager was employed by Pro-Pharma. This manager "worked-with" him once per month, and at the end of the day would evaluate his performance, and write up a work-with report for the Company. They would discuss what kind of points could have been made more forcefully, or how a certain objection could have been handled differently. Since the manager worked with, and observed ten or more sales representatives at a time, he was able to see and suggest ways of doing things that were different and effective. In Gonsalves' view, it was in this area of information-sharing that his manager played an important role. When asked what would happen if he declined to follow his manager's suggestions, he said: "I had a choice. I was on contract". Gonsalves also advised that his required sample, expense, and weekly activity reports were all on Pro-Pharma letterhead, and were given to the Company, not the client.

[49] In my view, all four witnesses establish that the sales managers' role, whether they were in the employ of the Company or the client, was more commensurate with coaching as Fraser described it above, than supervision, direction, or control.

[50] Further, any reporting requirements that did involve the clients, were either required by the Ministry of Health, or were necessary to track the number of calls made, both for purposes of remuneration, and to monitor call frequency. The disciplinary procedures in effect were no more than would apply to any independent contractor, and are an example of the Company and client monitoring the quality of the sales representatives' work, rather than controlling them. The King Pharma Agreement is of interest because it seems to contemplate that the client's role is indeed restricted to monitoring.

[51] Finally, there is strong evidence from Christian Knabel that the contractual fee-per-call structure and its monitoring provisions did not afford the Company or its clients sufficient control over the sales representatives to prevent the quality of the calls upon physicians to deteriorate as aforesaid, costing the Company significant loss of market share. The Company found that the quality of presentation to doctors improved once it hired sales representatives as salaried employees that could be controlled. I accordingly find that the 287 sales representatives were not under the *de facto* direction and control of the Company's clients, or their sales representatives, nor were they in a subordinate position to either of them. On this point, the facts before me are distinguishable from those in *OLTCPI* where the Court reached the opposite conclusion.

The Minister's Assumptions:

[52] The burden lies upon the Appellants to refute or demolish the assumptions contained in the Minister's Replies to their Notices of Appeal.[27] Those not so demolished are to be taken as true.[28] The pivotal finding in these proceedings is that the sales representatives were not placed by the Company under the direction and control of its clients. The relevant assumptions in regard to this issue, and the evidence related thereto, are as follows:

[53] 13(f) "the workers were required to complete and submit a "Weekly Activity Report" prior to being compensated". Mr. Fraser explained that these reports recorded what doctors were called upon and which products were detailed. They were like invoices, and were necessary only for those sales representatives who were remunerated on a fee-per-call basis. They were submitted to the company and not to the client in any event.

[54] 13(q) "the Clients dictated the Sales Workers' territory, the customer list and call frequency". Mr. Fraser clarified that it was the Company that recommended the geographical territories. The clients' input was needed as to their location and number so that they could budget accordingly. The evidence is that the Sales Representatives were sufficiently familiar with the target physicians in their territory that they knew which were recently retired, no longer in practice, or new to the area. They were therefore permitted to adjust the customer list as much as 20% to bring it up to date if need be. The balance of the assumption was admitted.

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[27] *Johnston v. M.N.R.*, [1948] S.C.R. 486
[28] *Elia v. Canada*, [1998] F.C.J. No. 316 (FCA)

[55] 13(t) “the clients had full right of approval of the Sales Workers”. While this provision appears in some Clients Services Agreements, this is the exception rather than the rule. Mr. Fraser clarified that the client would provide the Company with the ideal profile of the representative they were looking for. The Company then worked to find the right worker in that piece of geography, who had the required therapeutic category experience.[29]

[56] 13(u) “the Sales Workers had to provide their services to the Clients in a manner, and the Workers were required to report and be accountable to the clients, as reasonably required by the Clients”. This is a standard provision in the Client Services Agreements. The assumption was admitted by Mr. Fraser.

[57] 13(w) “the Sales Workers’ pay was determined by the Appellant and its Client Agreements”. Fraser denied that the clients had any input into the representatives’ remuneration.

[58] 13(y) “the Sales Workers’ performances were measured by territory objectives or contract objectives on a quarterly basis by the Appellant’s Sales Managers or the Clients’ managers”. Mr. Fraser explained that this was occasionally done, but was not part of the service the Company provided unless it was specifically asked for.

[59] 13(ff) “the Sales Workers were not permitted to work for any of the Client’s competitors”. This assumption was admitted.

[60] 13(gg) “the Sales Workers had to provide their services exclusively for the Clients”. This assumption was clearly demolished, not only by the express provisions of the Clients’ Services Agreements but by the contrary evidence of Fraser and Gonsalves.

[61] 13(mm) the clients’ managers generally supervised the Dedicated Workers by:

(i) setting out the Dedicated Workers objectives and targets;
(ii) coaching the Dedicated Workers;
(iii) monitoring the Dedicated Workers progress;
(iv) periodically accompanying the Dedicated Workers on calls;
(v) completing reports on the Dedicated Workers’ performance, to be forwarded to higher management.

[29] This evidence seems to contradict the assertion to the contrary contained in paragraph 15 of the Company’s Notice of Appeal, above.

Fraser agreed with this assumption even though it contained the contentious word "supervised". Notwithstanding this, all five constituent elements of this assumption are more consistent with monitoring the quality of the work than controlling the worker, which is in accord with the evidence adduced at trial as aforesaid.

[62] 13(nn) "the Dedicated Workers submitted qualitative reports to the Clients". Fraser's evidence was that this only occurred "sometimes".

[63] 13(oo) "the Clients required the Dedicated Workers to submit 'Client Reports' which detailed the customer feedback with respect to the product, such as product side effects or adverse reactions and/or physician questions regarding the product and disease states". Fraser denied that this was true in all cases.

[64] 13(pp) "the Clients directed and controlled the Dedicated Workers". This is one of the legal issues before the court. It was denied by Fraser in any event.

[65] 13(uu) This assumption is identical to assumption 13(mm) save that it refers to the Syndicated Workers. Again its five constituent elements are more consistent with monitoring the quality of the work than controlling the worker.

[66] Of the eleven Ministerial assumptions of fact relating to the direction and control issue, nine were demolished or refuted in whole or in part on the evidence. Only assumptions 13(u) and 13(ff) remain intact to support the Minister's determination. This is clearly insufficient in law.[30]

[67] I now turn to the assumptions pertaining to direction and control set out in the Minister's Reply to Gonsalves' Notice of Appeal. This can be briefly accomplished. The only relevant assumption is 8.(n): "the Appellant was required to report to, and was accountable to, the clients". In his evidence, Gonsalves made it clear that any reporting was done to the Company and not to the client. This lonely assumption was accordingly duly demolished.

Conclusions:

[68] I conclude from the foregoing that the sales representatives who are the subject of these proceedings were independent contractors in their working relationship with the Company, whether they were dedicated, syndicated or a combination of both; that

[30] *Canada v. Jencan Ltd.*, [1997] F.C.J. No. 876 (FCA)

the Company was a placement or employment agency that remunerated the workers involved; but that the Company did not place these workers under the *de facto* direction and control of its clients, as required by Regulation 6.(g) under the *Act*, nor was there a contract of service between the representatives and the clients or anything analogous thereto as required by Regulation 34.(1) under the *Plan*.

[69] In the result, having investigated all the facts with the parties and witnesses called on the parties behalf to testify under oath for the first time, I have found new facts, and indications that the facts inferred or relied upon by the Minister were unreal or incorrectly assessed or understood. The Minister's conclusions are objectively unreasonable. All four appeals will therefore be allowed and the Minister's determinations vacated.

Signed at Toronto, Ontario, this 23rd day of February 2012.

"N. Weisman"

Weisman D.J.

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