Docket: 2011-823(CPP)

BETWEEN:

PETER J. MALLEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DILEONARDO CONSTRUCTION LTD.,

Intervenor.

Appeal heard on common evidence with the appeal *Peter J. Malleau* (2011-824(EI)) on November 26, 2012, at Hamilton, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Gregory B. King
Agent for the Intervenor:	Luciano (Lou) DiLeonardo

JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is dismissed and the decision of the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

Signed at Montreal, Quebec, this 12th day of February 2013.

"Rommel G. Masse"

Masse J.

Docket: 2011-824(EI)

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PETER J. MALLEAU,

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Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Gregory B. King
Agent for the Intervenor:	Luciano (Lou) DiLeonardo

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

Signed at Montreal, Quebec, this 12th day of February 2013.

"Rommel G. Masse"

Masse J.

Citation: 2013 TCC 47
Date: 20130212
Dockets: 2011-823(CPP)
2011-824(EI)

BETWEEN:

PETER J. MALLEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DILEONARDO CONSTRUCTION LTD.,

Intervenor.

REASONS FOR JUDGMENT

Masse J.

[1] These appeals were heard together in Hamilton, Ontario on November 26, 2012.

[2] DiLeonardo Construction Ltd. (the "Intervenor" or "Payor") is a corporation that carries on the business of new home construction and renovations in the Hamilton area. Luciano DiLeonardo is the individual who controls the day-to-day operations of the business and who makes major decisions for that business. Peter J. Malleau (the "Appellant" or the "Worker") is a skilled carpenter who worked for the Payor up to the end of August 2010.

[3] After he stopped working for the Payor, the Appellant made an application for Employment Insurance benefits. Human Resources and Skills Development Canada

made a referral for a ruling on his employment with the Payor. Both the Appellant and the Payor were advised by letter dated December 1, 2010 that it had been determined that the Appellant was engaged in insurable employment, within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "*EIA*"), and pensionable employment within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan* (the "*CPP*"), while working for the Payor during the period from September 28, 2009 to August 26, 2010.

[4] The Payor disagreed with this ruling and filed an appeal to the Chief of Appeals on January 19, 2011. On March 14, 2011, the Minister of National Revenue (the "Minister") informed the Appellant and the Payor that the ruling decision had been reversed. The Minister determined that the Appellant was not engaged in insurable employment or pensionable employment, as he was not employed under a contract of service within the meaning of paragraph 5(1)(*a*) of the *EIA* and as he was not engaged in employment within the meaning of paragraph 6(1)(*a*) of the *CPP* during the period in question. The Appellant immediately appealed these rulings to the Tax Court of Canada and the Payor has filed a Notice of Intervention.

[5] The issue to be determined is whether the Appellant was an employee of the Payor during the relevant period or whether he was providing services to the Payor as an independent self-employed subcontractor.

Factual Context

[6] Only three witnesses testified at the hearing: the Appellant, Peter J. Malleau, his wife, Mary Radu and Luciano DiLeonardo. The Appellant is a carpenter who has worked hard and skillfully throughout his career in the construction industry. He first met Luciano DiLeonardo, who owns and operates DiLeonardo Construction Ltd., sometime in June 2005. At that time, Mr. Malleau was working on a job at the home of Mr. DiLeonardo's accountant. Mr. DiLeonardo happened to drop by and met Mr. Malleau. Mr. DiLeonardo liked what he saw of Mr. Malleau's work and so he asked him to do some work for DiLeonardo Construction Ltd., paying him at that time $15 per hour. Mr. Malleau agreed. Mr. Malleau kept track of his hours and would periodically prepare and submit an invoice and would get paid by way of cheque. Mr. Malleau freely agrees that at this time he was operating as a subcontractor. This went on for quite some time. During this period of time, Mr. Malleau did not work exclusively for the Payor; he would sometimes work for other contractors only to return to work for the Payor as a subcontractor. Even while the Appellant worked for others, he and Mr. DiLeonardo stayed in touch and they became friends.

[7] According to Mr. Malleau, Mr. DiLeonardo was contemplating setting up a business installing solar electrical panels and he was going to pay to have Mr. Malleau take courses in order to qualify to do this installation work. To that end, Mr. Malleau enrolled in and completed a Fall Arrest Certification course in the summer of 2009. It is admitted by Mr. DiLeonardo that Mr. Malleau would have been taken on as a full-time employee if this enterprise was successfully launched. However, the solar panel installation business did not come to be.

[8] In September 2009, the Payor had a lot of work to do in the east end of Hamilton as a result of serious flooding that had occurred. Mr. DiLeonardo came to Mr. Malleau and asked Mr. Malleau to do some of the jobs for him since the Payor was not able to keep up with the work. According to Mr. Malleau, he told Mr. DiLeonardo that he was not interested in working as a subcontractor anymore and so Mr. DiLeonardo hired him on as a full-time employee. Mr. DiLeonardo denies this. However, they did agree on an hourly rate of $25. Mr. Malleau filled out a TD1 form for purposes of at-source deductions and provided his Social Insurance Number. Mr. DiLeonardo denies this.

[9] The Appellant testified that from then on, he believed himself to be a full-time employee. Mr. Malleau was to keep track of hours worked at various job sites and to provide these to Mr. DiLeonardo for purposes of cost accounting. These hours worked were recorded on a calendar that Mr. Malleau kept and that has been provided to the Court. Every two weeks he was provided a cheque and things seemed okay, but he was never given a pay stub detailing deductions. It seemed to Mr. Malleau that the cheques approximated what he expected to take home for a forty-hour week at the rate of $25 per hour after deductions. This went on for about six to eight months and still the Appellant was never provided with a pay stub detailing the at-source deductions. Come income tax filing time, Mr. Malleau asked Mr. DiLeonardo when he could expect his T-4 statement and Mr. DiLeonardo simply told him that he was just too busy to get around to it.

[10] Things came to a head towards the end of August 2010. According to the Appellant, Mr. DiLeonardo was avoiding him and making excuses for not paying him. According to Mr. Malleau, there was a discrepancy of about $5,200 in what he had been paid and what he had expected to be paid. It became clear that he was only being paid for the hours that he had recorded on his calendar, i.e., hours that he had put in at various job sites and he was not being paid according to an eight hour work day as would a full-time employee. Mr. Malleau was getting behind on bills and he needed money. They had a meeting that resulted in a very heated discussion about

money that was supposedly owed and the hours worked at various job sites. Mr. Malleau felt that he had been taken advantage of by a person whom he believed had been his friend, and so he quit.

[11] In cross-examination, the Appellant testified that he always felt that he would retire as an employee of Mr. DiLeonardo and be his property manager. As a subcontractor, he submitted invoices for his services up to June 2009 but stopped after that since he believed himself to be an employee. Prior to June 2009, his practice was to take the information that was in his calendar regarding his hours worked, put that information in an invoice and submit it to Mr. DiLeonardo for payment. He had not submitted any invoices since then but he continued to track his hours on his calendars. He agrees that all the cheques he got during the relevant time period were in rounded numbers but he still thought there were at-source deductions being made. Most of these cheques were noted as being for "sub" on the "Re" line, but Mr. Malleau indicated that he did not notice this. He continued working under these arrangements, not receiving a detailed pay stub showing deductions from the end of September 2009 until the end of August 2010. He says he never did any jobs on the side. Mr. DiLeonardo disputes this. He agrees that sometimes his wife attended the job site to assist him; she would drive him around to pick up materials and help him to clean up at job sites. Mr. DiLeonardo would not pay his wife for this work.

[12] Mr. DiLeonardo testified that Mr. Malleau's work as a subcontractor carpenter was exceptional but there often were some breakdowns in the relationship. Mr. Malleau would then leave and work for other contractors. Prior to the period in question, whenever Mr. Malleau needed money, Mr. DiLeonardo would simply write a cheque and the invoice for work done would materialize sometimes afterwards. Mr. Malleau was frequently quite late in providing invoices. Mr. DiLeonardo agrees that Mr. Malleau never did produce any invoices for the period in question. According to Mr. DiLeonardo, the calendars kept by Mr. Malleau were simply a means of keeping track of the hours that Mr. Malleau worked at each job site and he was paid on that basis. At no time did Mr. DiLeonardo agree to pay him for eight hours a day as an employee. Mr. Malleau was never prevented from taking on other work with other general contractors. Mr. Malleau got to pick and choose the jobs that he would do. Mr. DiLeonardo never controlled how Mr. Malleau did his work and Mr. Malleau would do the work with minimal or no supervision or supervisory control. The dispute that put an end to their relationship was over accounting of time spent on a particular job; Mr. Malleau wanted to get paid and Mr. DiLeonardo wanted an accurate rendering of hours worked on the job. Mr. Malleau feels that he was underpaid and Mr. DiLeonardo feels that he has overpaid. There was no change

in the relationship that occurred in September 2009. Mr. DiLeonardo always considered Mr. Malleau to be an independent subcontractor and he was never at any time a full-time employee; however, he does admit that if his solar panel company got off the ground, then Mr. Malleau would likely have been hired on as a full-time employee. There was never any discussion of Mr. Malleau becoming a full-time employee of DiLeonardo Construction Ltd., just for the solar panel installation business.

Position of the Appellant

[13] Mr. Malleau takes the position that, throughout the period in question, he was not working as an independent subcontractor for DiLeonardo Construction Ltd. but, rather, was working as a full-time employee. The relationship of independent subcontractor ended in September 2009 and from that time until the end of August 2010, he was employed in pensionable and insurable employment as those terms are defined in the *CPP* and the *EIA*. He also makes serious allegations of dishonesty against Mr. DiLeonardo, accusing him of being a fraud and a thief and of having given false testimony regarding his employment. He alleges that Mr. DiLeonardo deducted money from his pay for income taxes, CPP and EI and failed to remit these sums to Revenue Canada.

Position of the Respondent and the Intervenor

[14] Mr. DiLeonardo takes the position that he did not deduct anything for income tax, CPP, and EI from the earnings that he paid to Mr. Malleau because Mr. Malleau was an independent subcontractor, not an employee. Consequently, there was nothing to remit to Revenue Canada. Mr. DiLeonardo has at all times maintained that Mr. Malleau worked for DiLeonardo Construction Ltd. only in his capacity as an independent subcontractor and not as a full-time employee. Mr. Malleau was never a full-time employee of the Payor. The Ministry takes the same position.

Legislation

[15] The pertinent legislative provisions are as follows:

> *The Canada Pension Plan*, R.S.C., 1985, c. C-8:
>
> s.6. (1) Pensionable employment is
>
> (*a*) employment in Canada that is not excepted employment;

The Employment Insurance Act, S.C. 1996, c. 23:

> s. 5. (1) Subject to subsection (2), insurable employment is
>
> > (*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;

Analysis

[16] The issue to be determined by this Court is whether Mr. Malleau was employed in pensionable employment or insurable employment with the Intervenor within the meaning of paragraph 6(1)(*a*) and paragraph 5(1)(*a*) of the *CPP* and *EIA*, respectively, during the period in question. In other words, was he an employee of DiLeonardo Construction Ltd., in which case he would have been employed in pensionable or insurable employment, or did he supply his services as an independent self-employed subcontractor, in which case he would not have been employed in pensionable or insurable employment.

[17] As pointed out by Mr. King, counsel for the Respondent, the legislation is not very helpful in determining what is pensionable employment and insurable employment. Obviously lacking is a definition of "contract of service" which is included in the definition of "insurable employment" in the *EIA*.

[18] The seminal decision that sets out the factors guiding a Court in determining whether an individual is an employee or a self-employed contractor is *Wiebe Door Services Ltd. v. Canada (M.N.R.)*, [1986] 3 F.C. 553 (FCA). Mr. Justice MacGuigan, speaking for the Court, set out the test for determining when a working individual is an employee or an independent contractor. This involves a consideration by the Court of a four-branch test:

> (1) control;
>
> (2) ownership of tools;
>
> (3) chance of profit; and
>
> (4) risk of loss.

[19] These factors ought to be considered in combination rather than in isolation. This is not an exhaustive list and other factors may also be important depending on the particular facts of a case.

[20] The Federal Court of Appeal succinctly summarized the principles to be applied in its decision of *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, [2011] F.C.J. No. 1340. In that decision, Justice Sharlow speaking for the Court observed, at paragraphs 8 and 9:

> [8] The leading case on the principles to be applied in distinguishing a contract of service from a contract for services is *Weibe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (C.A.). *Weibe Door* was approved by Justice Major, writing for the Supreme Court of Canada in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. He summarized the relevant principles as follows at paragraphs 47 – 48:
>
> > 47. […] 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.
>
> [9] In *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (C.A.), and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue-M.N.R.)*, 2006 FCA 87, [2007] 1 F.C.R. 35, this Court added that where there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but it is also necessary to consider the *Weibe Door* factors to determine whether the facts are consistent with the parties' expressed intention.

[21] Justice Boyle of this Court reviewed the applicable principles in his decision of *Wellbuilt General Contracting Ltd. v. Canada (M.N.R.)*, 2010 TCC 541, [2010] T.C.J. No. 418 ("*Wellbuilt*"). Justice Boyle stated that the test to be applied in determining whether a worker is an employee or self-employed has been distilled by

jurisprudence and is well settled. The question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines including: 1) the intent of the parties; 2) control of the work; 3) ownership of tools; 4) chance of profit or loss; and 5) what has been referred to as the business integration, association or entrepreneur criteria. Justice Boyle observes that the decision of the Federal Court of Appeal in *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, highlights the particular importance of the parties' intention and the control criteria in these determinations. The intention of the parties is a significant and material guideline or criteria to be considered along with all the other considerations. Indeed, intention may well be one of the prevalent considerations according to Justice Boyle.

[22] In summary, in deciding if a worker is an employee or a self-employed subcontractor, the Court will ask the following questions:

(1) What is the common intention of the parties?

(2) What is the degree of control exercised by the worker performing the services over the timing and manner of performance of the work? In order to exercise control, the employer does not need to have any expertise or knowledge concerning the work to be done by the employee.

(3) Whether the worker owns his own equipment?

(4) Whether the worker hires his own helpers?

(5) What degree of financial risk the worker has taken?

(6) What degree of responsibility for investment and management the worker has?

(7) Whether and how far the worker has an opportunity of profiting from sound management in the performance of his task?

[23] I will now go on to consider some of the factors that I feel are important to the appropriate disposition of this matter.

<u>The Intent of the Parties</u>

[24] Where both parties agree as to their common intention, then that is the end of the matter since there is no issue in dispute. However, it is not so clear when the two parties express a contrary point of view at the time that a dispute arises. The Court is then left to determine what the true intent of the parties was, based upon how they interacted with each other at the time the relationship was established.

[25] In the case at bar, Mr. Malleau worked for the Payor as an independent subcontractor for years before allegedly working as an employee after September 2009. He considered himself to be an employee after that date based on an agreement that he had struck with Mr. DiLeonardo. However, it must be noted that the outward manifestations of that relationship, after September 2009, was not in any way different in form or substance from what it was prior to that date. The only difference is that Mr. Malleau stopped providing invoices for the work that he performed, but this is consistent with his perception that he was as an employee rather than an independent subcontractor, even though he provided the same services as before. Nothing really has changed other than Mr. Malleau's perception of the relationship. I agree with Mr. King, counsel for the Respondent, that this factor is not of much assistance in determining if Mr. Malleau was an employee or a self-employed subcontractor, although it does tend to indicate that the relationship was that of general contractor and subcontractor rather than employer-employee.

Control

[26] It is clear that Mr. Malleau enjoyed a considerable amount of autonomy in performing his work. He worked on his own and I accept the testimony of Mr. DiLeonardo that Mr. Malleau was free to pick those jobs he wanted to do for him and he was free to refuse to do those that he did not want to do. He performed his work at various job sites and he would meet Mr. DiLeonardo who would tell him the nature of the job to be done. Mr. Malleau performed his work with little or no supervision, as did other subcontractors, although Mr. DiLeonardo was often on-site as well. It is clear that Mr. Malleau recorded his hours on his personal calendar as he always did when he was a subcontractor. Nothing in this regard has changed from the time that Mr. Malleau was a subcontractor. The "control" factor tends to indicate that Mr. Malleau was an independent subcontractor rather than an employee.

Ownership of tools

[27] Mr. Malleau, whether he was an employee or an independent subcontractor, was expected to provide his own personal tools such as safety boots, hardhat, hammer, other hand tools and tool pouch. This is common practice in the

construction industry. It is also common practice in the construction industry for the employer or general contractor to supply the more expensive and specialized tools to be used by the subcontractor. I am of the view that the ownership of tools in this case is not of much assistance in deciding if Mr. Malleau was an employee or a self-employed subcontractor. As observed by Justice Boyle of this Court in *Wellbuilt*, at paragraphs 25 and 26:

> [25] At the very least, it is not uncommon in some business sectors and trades, such as auto mechanics, some forestry workers, and some construction workers, to expect or require all workers, whether employees or independent contractors, to own and supply their own basic hand tools, blades and bits, etc., and in cases such as those, the ownership of tools consideration may tip in neither direction in particular.
>
> [26] Clearly, most of the substantial tools needed in Wellbuilt's construction business were owned by Wellbuilt and provided to the workers, whether employees or independent contractors. In this segment of the construction industry it does not appear that the ownership of tools is very telling or particularly helpful since it would not be inconsistent for an employee to be required to have a significant investment in basic tools nor would it be inconsistent for an independent contractor not to be required to provide all the tools needed to do his work. Each business sector in Canada is free to develop its own practices that make economic sense and work efficiently in that sector. In this case, a consideration of the ownership of tools leans slightly in favour of employee status but is certainly not inconsistent with the shared common intended status of independent contractors.

[28] In the case at bar, I am of the view that the ownership of tools criterion is of no assistance in deciding if Mr. Malleau was an employee or independent subcontractor.

Chance of Profit or Loss

[29] I accept that Mr. Malleau was free to perform work for other contractors if he chose to do so. I accept Mr. DiLeonardo's testimony that Mr. Malleau was not required to provide his services exclusively to the Payor. The fact that Mr. Malleau chose to do so is not determinative; it merely is indicative of his desire to work exclusively for the Intervenor. His rate of pay was negotiated. The ability to make profit and his risk of incurring a loss depended entirely on his ability to work quickly and efficiently and his willingness to accept other work from other contractors. Justice Boyle, in *Wellbuilt*, made some interesting observations with respect to the chance of profit and risk of loss criteria. In that case, as in the case at bar, the workers were paid on an hourly basis. They were responsible for getting themselves to and from their particular job sites. Justice Boyle observed that the financial risk of people earning an hourly wage, whether employees or independent contractors, is often

minimal especially in the context of independent contractors in businesses that do not require significant capital investments beyond vehicles and basic tools. Justice Boyle observed that this would include many construction trades. The only real financial risk to the workers is that the general contractor might not have enough work each week to keep them busy on a full-time basis. However, where full-time work is not available, the risk of loss can certainly be attenuated by finding other work during the off hours. Justice Boyle observed that on the facts of the case that was before him and also in the context of the construction business and subcontracted trades and workers, he did not find the chance of profit and risk of loss analysis pointing particularly in either direction.

[30] I share the view of Justice Boyle that in the construction industry, the chance of profit and the risk of loss is not a strong factor in deciding if a worker is an employee or a subcontractor.

Subcontracting Work and Hiring Assistants

[31] The Appellant provided his services personally. It is noteworthy that his wife would also assist him by driving him around to pick up materials and by helping out at the job site such as by cleaning up. This is a strong indicator that the Appellant was not an employee but rather was self-employed, since the Payor was not in any way responsible for paying for any work done by the Appellant's wife.

Method of Remuneration

[32] As a general rule, and I recognize that there may be some industry-specific exceptions, an employee is paid on a regular basis, usually weekly or bi-weekly, and deductions for income tax, CPP, EI, employee-funded benefits and other payroll deductions are taken from the gross pay. Payday would invariably fall on the same day of the week. A pay stub evidences these deductions as well as the gross pay. In the case at bar, there would have been about twenty-two bi-weekly pay periods from September 28, 2009, to the end of August 2010. According to Tab 3 of the Respondent's Book of Documents, there were fifteen cheques issued by the Payor to Mr. Malleau during that period for a total of $23,600 (assuming that these were all of the cheques that were issued to him). Of those fifteen cheques, eight of them indicated "sub" on the "Re" line, thus showing that it was payment for subcontracting work according to Mr. DiLeonardo. All of these cheques were in round figures: four for $2,000; three for $1,600; six for $1,500; one for $1,300; and one for $500. There is no set pattern as to when these cheques were issued; they were issued on just about every day of the week including Saturday and Sunday. These cheques were issued as little as two weeks apart and as long as eight weeks apart. Thus, Mr. Malleau was paid on an irregular and infrequent basis, not every two weeks, as an employee would expect to be paid. The amounts of the cheques were all in round numbers rather than in precise dollars and cents. That is not consistent with deductions having been made for income taxes, CPP, EI, employee-funded benefits or other payroll deductions. There never were any pay stubs produced or provided to Mr. Malleau. This went on for almost a whole year, in spite of the fact that Mr. Malleau claims he repeatedly asked Mr. DiLeonardo for an itemized pay stub. The manner in which Mr. Malleau was paid is a strong indicator that he was not an employee of the Payor but, rather, he was being paid as an independent subcontractor for specific jobs done.

Burden of Proof

[33] I have to instruct myself as to the appropriate burden of proof and who has the onus of discharging that burden.

[34] According to the Supreme Court of Canada decision of *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, the burden of proof is upon the Appellant to demonstrate, on a balance of probabilities, that the assumptions relied upon by the Minister to make its decision that the Appellant was not employed in pensionable or insurable employment are erroneous. This initial burden of proof is met where the Appellant makes out at least a *prima facie* case that demolishes the Minister's assumptions. Then, the onus shifts to the Minister to rebut the *prima facie* case made

out by the taxpayer and to prove the assumptions. As a general rule, a *prima facie* case is defined as one with evidence that establishes a fact until the contrary is proved. In *Stewart v. M.N.R.*, [2000] T.C.J. No. 53, Cain J. stated that:

> [23] A *prima facie* case is one supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. […]

Moreover, in *Orly Automobiles Inc. v. Canada*, 2005 FCA 425, at paragraph 20, the Federal Court of Appeal stated that:

> [20] […] the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted. […]

[35] In the case at bar, I am not satisfied that the Appellant has discharged the burden of proof that is incumbent upon him.

Conclusion

[36] A consideration of the entirety of the evidence as well as the applicable principles to be applied lead me to the conclusion that Mr. Malleau was indeed an independent self-employed subcontractor during the period under review. There is nothing that has changed in the relationship between Mr. Malleau and Mr. DiLeonardo from the time he originally started working for DiLeonardo Construction Ltd. in 2005 up until the time the relationship ended in 2010.

[37] Mr. Malleau has not satisfied me that the relationship evolved from that of subcontractor to that of employee.

[38] I therefore find that Mr. Malleau was not engaged in insurable employment or in pensionable employment with DiLeonardo Construction Ltd. during the period under review.

[39] In conclusion, the appeal is dismissed.

Signed at Montreal, Quebec, this 12th day of February 2013.

"Rommel G. Masse"

Masse J.

CITATION:	2013 TCC 47
COURT FILE NOS.:	2011-823(CPP) 2011-824(EI)
STYLE OF CAUSE:	PETER J. MALLEAU v. M.N.R. AND DILEONARDO CONSTRUCTION LTD
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	November 26, 2012
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	February 12, 2013

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Gregory B. King
Agent for the Intervenor:	Luciano (Lou) DiLeonardo

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
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