

Docket: 2021-126(CPP)

BETWEEN:

AFB JANITORIAL SERVICES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of  
*AFB Janitorial Services Inc. (2021-143(EI))*  
on March 23, 2023, at Vancouver, British Columbia.

Before: The Honourable Justice David E. Spiro

Appearances:

Agents for the Appellant: Marilyn Biralde and Antonio Biralde  
Counsel for the Respondent: Anna Walsh and Jean Murray

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**JUDGMENT**

The appeal of decisions of the Minister of National Revenue made under subsection 28(2) of the *Canada Pension Plan* on November 9, 2020, is allowed, without costs, and the decisions varied in accordance with the attached reasons.

Signed at Toronto, Ontario, this 4th day of July 2023.

“David E. Spiro”

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Spiro J.

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Appeal heard on common evidence with the appeal of  
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on March 23, 2023, at Vancouver, British Columbia.

Before: The Honourable Justice David E. Spiro

Appearances:

Agents for the Appellant: Marilyn Biralde and Antonio Biralde  
Counsel for the Respondent: Anna Walsh and Jean Murray

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**JUDGMENT**

The appeal of decisions of the Minister of National Revenue made under section 103 of the *Employment Insurance Act* on November 9, 2020, is allowed, without costs, and the decisions varied in accordance with the attached reasons.

Signed at Toronto, Ontario, this 4th day of July 2023.

“David E. Spiro”

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Spiro J.

Citation: 2023 TCC 94  
Date: 20230717  
Docket: 2021-126(CPP)  
2021-143(EI)

BETWEEN:

AFB JANITORIAL SERVICES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

**AMENDED REASONS FOR JUDGMENT**

Spiro J.

[1] The Appellant, AFB Janitorial Services Inc., appeals decisions of the Minister of National Revenue (the “Minister”) of November 9, 2020 confirming rulings by the CPP/EI Rulings Division of the Canada Revenue Agency (the “CRA”) under which the following workers (“cleaners”) were classified as employees of the Appellant for the following periods for purposes of the *Canada Pension Plan* (“CPP”) and *Employment Insurance Act* (“EI Act”):

<b>Worker</b>	<b>Period</b>
Rizaldy Camar	January 1, 2018 to December 31, 2018
Marlon Camposagrado	January 1, 2018 to October 30, 2019
Dhannica Cayanan	January 1, 2018 to October 30, 2019
Jesus Cayanan	January 1, 2018 to October 30, 2019
Redentor Domingo	January 1, 2018 to October 30, 2019

<b>Worker</b>	<b>Period</b>
John Paul Morales	January 1, 2018 to May 31, 2019
Benjie G. Elijay	January 1, 2018 to October 30, 2019
Robert Pagdilao	August 1, 2018 to October 25, 2018

I. Overview

[2] The Appellant contends that the cleaners were independent contractors during the relevant periods and, for that reason, it was not required to withhold and remit any amounts under the CPP and EI Act. The Crown disagrees, contending that the Appellant was required to withhold and remit amounts under the CPP and EI Act in respect of all eight of its employees.

[3] Evidence was given by one of the Appellant's two shareholders, Ms. Biralde, and from two of the cleaners. As the evidence did not disclose any meeting of the minds between the Appellant and the cleaners with respect to their status, I relied primarily on objective factors. On a balance of probabilities, those factors lead me to conclude that all eight cleaners were independent contractors rather than employees.

[4] The decisive factors are that the cleaners could come and go as they pleased and, more importantly, could enlist helpers and even provide replacements, all without the Appellant's approval. Training was rather perfunctory and supervision relatively light. The picture provided by the entirety of the evidence is more consistent with the cleaners as independent contractors than it is with the cleaners as employees.

II. Law

[5] As the Federal Court of Appeal explained in *1392644 Ontario Inc. (Connor Homes) v MNR*, the subjective intent of each party to the relationship is the first factor to be determined.<sup>1</sup> After that has been done, the objective factors are considered. In *Wiebe Door Services Ltd. v MNR*, the Federal Court of Appeal set out the following objective factors that help distinguish between independent contractors and employees:

- (1) control;
- (2) ownership of the tools;
- (3) chance of profit; and
- (4) risk of loss.<sup>2</sup>

[6] No single factor predominates and no mechanical formula is to be applied. In his recent decision in *0808498 BC Ltd. v MNR*, Justice Sommerfeldt offered a useful summary of the factors to be considered in making this determination:

- a) Does the hirer control the worker's activities?
- b) Does the hirer provide the tools and equipment required by the worker, or is the worker required to provide his or her own tools and equipment?
- c) Does the worker hire his or her own helpers?
- d) What is the degree of financial risk taken by the worker? In other words, does the worker have a risk of loss?
- e) What is the degree of responsibility for investment and management held by the worker?
- f) Does the worker have an opportunity for profit in the performance of his or her tasks?<sup>3</sup>

### III. Facts and Analysis

[7] Ms. Marilyn Biralde and her husband, Mr. Antonio Biralde, incorporated the Appellant as a British Columbia corporation in 2017 as its sole shareholders. The Appellant's business is providing janitorial services to hotels, movie theatres, and office buildings. The only sites referred to in the evidence were the Fairmont Hotel in downtown Vancouver (the "Fairmont Hotel") and the Cineplex Cinemas in Coquitlam (the "Cineplex Cinemas").

[8] The Appellant had no contractual relationship with the Fairmont Hotel or the Cineplex Cinemas. It did have an oral agreement, however, with Tricom Building Maintenance ("Tricom") to clean the Cineplex Cinemas and certain common areas of the Fairmont Hotel. All of the Appellant's cleaning took place at night after those areas were closed to the public and to staff.

[9] An employee of Tricom took Mr. and Ms. Biralde to each of the sites to show them the tasks the Appellant was to perform. Tricom paid the Appellant a flat fee to clean each work site. Under its oral agreement with Tricom, the Appellant was entitled to subcontract its work to others. Tricom did not require security clearance or any form of background check for the Appellant's cleaners. Tricom did not have any rules about who could or could not accompany the Appellant's cleaners to the work sites.

[10] If the Fairmont Hotel or the Cineplex Cinemas had any complaints about cleaning deficiencies, they would let Tricom know. If there were any such deficiencies, Tricom imposed no financial penalties on the Appellant. Similarly, the Appellant did not impose any financial penalty on the cleaners if there were any such deficiencies.

[11] The Appellant hired the cleaners through referrals and job postings. The Appellant had no written agreement with any of the cleaners. Each cleaner was hired to clean a specific location and each cleaner had a full-time day job.

[12] I will deal first with the six cleaners who did not testify. I will then turn to the two cleaners who gave evidence at the hearing.

### **Six cleaners who did not testify**

#### Subjective intention

[13] Ms. Biralde's testimony makes it clear that the Appellant intended that the cleaners be independent contractors. But in the absence of any written agreement, or evidence from the six cleaners who did not give evidence, no conclusions can be drawn about their subjective intention.

#### Objective factors

##### *Level of control*

[14] Although the Appellant required the cleaners to wear a uniform bearing the Tricom name, the preponderance of the other evidence suggests that the other six cleaners were independent contractors:

- The cleaners could decide when to begin their work each night following closing time of the Fairmont Hotel kitchens or the Cineplex Cinemas and they could return home as soon as they finished their work. Generally, they worked for as long as it took to complete their cleaning between 11:00 p.m. and 7:00 a.m. Their work would generally take anywhere from three to five hours. Neither Mr. Biralde nor Ms. Biralde had to be at any particular site in order to let the cleaners in as the cleaners had their own keys. The Appellant did not check how many hours the cleaners spent at the work sites and did not require them to submit timesheets.
- Although the Appellant explained to the cleaners which tasks were priorities, the Appellant provided them with virtually no training.
- The cleaners were not subject to any corporate policies (except for the Tricom uniform).

[15] Mr. Biralde and Ms. Biralde were often at the work sites doing their own cleaning. While they were there, they would check the work done by the cleaners. The Biraldes did not evaluate the work done by each cleaner at the end of each night using a checklist. If they were not satisfied with the work done, they did not ask the cleaner to redo the work. Presumably, they did whatever additional cleaning was necessary themselves.

[16] The effect of the Biraldes checking the work of the cleaners while on site doing their own cleaning should not be overstated. As Justice Pizzitelli noted in *3142774 Nova Scotia Limited v MNR*:

[26] In *City Water International Inc. v. Minister of National Revenue*, 2006 FCA 350... the Federal Court of Appeal, citing its earlier decision delivered by Létourneau J.A. in *Livreur Plus Inc. c. Ministre du Revenu national*, 2004 FCA 68... confirmed in paragraph 18 that "the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it" and that "Monitoring the result must not be confused with controlling the worker".<sup>4</sup>

[emphasis added]

[17] In *City Water International Inc. v MNR*, the Federal Court of Appeal held that “controlling the quality of work is not the same as controlling its performance by the worker hired to do it”.<sup>5</sup>

*Tools and supplies*

[18] Tricom would supply all tools, supplies, and equipment including mops, vacuums, and cleaning supplies. Tricom also provided uniforms bearing its name. Tricom was responsible for maintaining the equipment. Neither Tricom nor the Appellant charged the cleaners to use any of it. This is a neutral factor.<sup>6</sup>

*Chance of profit/risk of loss*

[19] The Appellant paid each cleaner a flat fee each month. The amount of the fee depended on the size of the area the cleaner was responsible for cleaning. The cleaners were free to bring helpers who were typically spouses, friends, or other family members. They could hire anyone they liked to assist them. They could even hire a replacement for their entire contract. All of this could be done without the Appellant’s approval.

[20] If a cleaner was unavailable on any particular night, they could send someone else to do the work. If a cleaner was sick, they were expected to find a replacement. The Appellant would not pay a fee to the replacement but would continue to pay the cleaner directly regardless of whether someone filled in for them. If the cleaner could not find a replacement, the Biraldes would find someone themselves and adjust the cleaner’s fee accordingly.

[21] In *Victoria’s Five Star Cleaning v MNR*, Justice Lafleur concluded that certain cleaners had the opportunity to make a profit as they were able to hire their own helpers:

[66] As argued by the Appellant, I agree that the Workers had the opportunity to make a profit because they could hire workers and find ways to make their work more efficient and risked loss if they could not complete the work themselves or could not secure performance of the task by someone else at a lower cost. The evidence showed that the Workers were paid a flat monthly rate for their services and the evidence also showed that the Workers were allowed to hire helpers and did not have to perform the services personally. ...<sup>7</sup>



[22] Similarly, in *Stanton v MNR*, Justice D’Arcy concluded that a worker who was paid a flat rate could increase their profit by completing the work more efficiently by using helpers.<sup>8</sup> As in *Victoria’s Five Star Cleaning* and *Stanton*, there was a chance of profit and a risk of loss.

[23] Most of the objective factors suggest that the other six cleaners were independent contractors.

### **Mr. John Paul Morales**

[24] Mr. Morales had a full-time day job as a school custodian. He also worked for the Appellant from August 2018 to October 2019. The Appellant decided to retain Mr. Morales after Mr. Biralde and Mr. Morales visited the Cineplex Cinemas together. During that visit, Mr. Biralde showed Mr. Morales what had to be done.

#### Subjective intention

[25] Ms. Biralde’s testimony makes it clear that the Appellant intended that the cleaners be independent contractors. Mr. Morales did not consider the question when he entered into his oral agreement with the Appellant to clean the Cineplex Cinemas. His understanding of his oral agreement with the Appellant was simply: “just to do the job”.<sup>9</sup>

#### Objective factors

##### *Level of control*

[26] Mr. Biralde gave Mr. Morales the key to the premises so he could clean the Cineplex Cinemas and come and go as he pleased. He received no training from the Appellant. On his first day of work, he was shown the areas to be cleaned and which areas to prioritize. Mr. Morales did not have set hours, but would generally start his work around 9:00 p.m. each night. He was free to leave as soon as he finished.

[27] Mr. Morales testified that Mr. Biralde would arrive at the Cineplex Cinemas toward the end of Mr. Morales’ shift to do his own cleaning and, while there, would check Mr. Morales’ work. When he was on site, Mr. Biralde might ask him to re-do some of it. Mr. Biralde did not check Mr. Morales’ work every night but

would check it about three times a week. As I have already noted, the effect of this type of checking should not be overstated.

[28] Mr. Morales was not required to keep a record of his hours or send the Appellant timesheets. He was not aware of any corporate policies of the Appellant in general or any disciplinary policies in particular.

*Tools and supplies*

[29] Mr. Morales used a backpack vacuum, an auto-scrubber machine, a mop and mop wringer, and a Walkman. Mr. Morales believed that the Appellant had provided the tools and supplies and was responsible for fixing them. Mr. Morales did not provide his own tools or cleaning supplies. The only expenses incurred by Mr. Morales related to the car he drove to work.

[30] But Ms. Biralde had testified that it was Tricom – and not the Appellant – that provided the equipment and that Tricom was responsible for its maintenance. As Mr. Morales interacted only with the Biralde, and not with Tricom, one can understand why he believed that the Appellant provided and maintained the tools and supplies. This factor is neutral.

*Chance of profit/risk of loss*

[31] Mr. Morales received a flat fee each month from the Appellant. Although he did not hire any helpers, he understood that he was free to do so. In addition, he understood that he was not required to do the work personally but could hire someone else to do it. If Mr. Morales was sick, he would call Mr. Biralde whom he assumed would find a replacement.

[32] Balancing each factor, and giving each its appropriate weight, I conclude that Mr. Morales was an independent contractor.

## **Mr. Marlon Camposagrado**

[33] Mr. Camposagrado's full-time day job was at a local airport. After being introduced to the Biralde by a co-worker, Mr. Camposagrado began working for the Appellant cleaning two kitchens at the Fairmont Hotel.

### Subjective intention

[34] Ms. Biralde's testimony makes it clear that the Appellant intended that the cleaners be independent contractors. Mr. Camposagrado testified that when he agreed to work for the Appellant, he did not believe he was running his own business. But when asked if he had ever run his own business before, Mr. Camposagrado replied "no, only this one".<sup>10</sup> Mr. Camposagrado obtained a business license from the City of Vancouver and named his business "GMC Cleaning".

### Objective factors

#### *Level of control*

[35] Mr. Camposagrado received no training from Mr. Biralde other than his first night cleaning the Fairmont Hotel kitchens. That first night training consisted of nothing more than Mr. Biralde showing him the basics and which tasks were priorities. He was asked to wear a black shirt and black pants while doing his work.

[36] Generally, Mr. Camposagrado would clean the kitchens from 11:00 p.m. until 4:00 a.m. He would leave as soon as his work was finished and was free to run errands or grab a bite whenever he wished, though he testified that he never took advantage of the opportunity. Mr. Camposagrado was not required to keep a record of his hours.

[37] Mr. Biralde was also at the Fairmont Hotel most nights doing his own cleaning. He would check Mr. Camposagrado's work when he was on site. Ms. Biralde was sometimes there too. Mr. Biralde would check to see whether the kitchens needed any additional cleaning. If the Fairmont Hotel had a complaint about the cleaning, it would tell Mr. Biralde who would pass it along to Mr. Camposagrado. Mr. Camposagrado would address the issue the following night. Mr. Camposagrado was not aware of any corporate policies of the Appellant in general or of any disciplinary policies in particular.

*Tools and supplies*

[38] Mr. Camposagrado believed that either the Appellant or Tricom provided the tools and supplies he used, including a degreaser and a mop. If anything needed repair, he would speak to Mr. Biralde. The only items Mr. Camposagrado purchased himself were the black shirt and black pants he was required to wear while working. He was also asked to wear a Tricom uniform from time to time. This factor is neutral.

*Chance of profit/risk of loss*

[39] Mr. Camposagrado was paid \$4,500 per month. He was free to hire his own helpers. He brought his wife to help him every once in a while when she had free time. He asked Mr. Biralde about this, and was told there was no problem. Mr. Camposagrado understood that his wife could clean in his stead. He did not pay his wife when she helped him. A friend of Mr. Camposagrado would also help him clean every so often. Mr. Camposagrado did not pay the friend because he provided the friend with free room and board. If Mr. Camposagrado was sick or away, he would let Mr. Biralde know and was not required to find his own replacement.

[40] Balancing each factor, and giving each its appropriate weight, I conclude that Mr. Camposagrado was an independent contractor.

IV. Conclusion

[41] The Appellant has demonstrated, on a balance of probabilities, that none of the cleaners was engaged in pensionable employment under the CPP or insurable employment under the EI Act during the relevant periods. The fact that the cleaners could come and go as they pleased and, most importantly, could use their own helpers or replacements without the Appellant's approval tilt the balance in favour of the conclusion that the cleaners were independent contractors.

[42] For all of these reasons the appeals will be allowed, without costs.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated July 4, 2023.

Signed at Ottawa, Canada, this 17th day of July 2023.

“David E. Spiro”

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Spiro J.

CITATION: 2023 TCC 94

COURT FILE NO.: 2021-126(CPP) AND 2021-143(EI)

STYLE OF CAUSE: AFB JANITORIAL SERVICES INC.  
AND M.N.R.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 23, 2023

AMENDED REASONS FOR JUDGMENT BY: The Honourable Justice David E. Spiro

DATE OF JUDGMENT: July 4, 2023

APPEARANCES:

Agents for the Appellant: Marilyn Biralde and Antonio Biralde  
Counsel for the Respondent: Anna Walsh and Jean Murray

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

For the Respondent: Shalene Curtis-Micallef  
Deputy Attorney General of Canada  
Ottawa, Canada

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<sup>1</sup> 2013 FCA 85 at para 39.

<sup>2</sup> [1986] 2 CTC 200, 87 DTC 5025 (FCA).

<sup>3</sup> 2023 TCC 53 at para 33.

<sup>4</sup> 2013 TCC 129 at para 26.

<sup>5</sup> 2006 FCA 350 at para 18.

<sup>6</sup> See *Victoria's Five Star Cleaning Ltd. v MNR*, 2019 TCC 73 at para 63 citing *Priority One Janitorial Services Inc. v MNR*, 2012 TCC 1.

<sup>7</sup> 2019 TCC 73 at para 66.

<sup>8</sup> 2012 TCC 169.

<sup>9</sup> Transcript, page 65, lines 17-26.

<sup>10</sup> Transcript, page 90, lines 12-14.