Docket: 2012-5126(CPP)

BETWEEN:

2177936 ONTARIO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on September 27, 2013, at Winnipeg, Manitoba

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Barbara M. Shields
Counsel for the Respondent:	Larissa Benham

JUDGMENT

The Appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is allowed and the Minister of National Revenue's decision that the Appellant was in pensionable employment is vacated.

Signed at Ottawa, Canada, this 4th day of October 2013.

"Campbell J. Miller"

C. Miller J.

Citation: 2013 TCC 317
Date: 20131004
Docket: 2012-5126(CPP)

BETWEEN:

2177936 ONTARIO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] 2177936 Ontario Ltd. ("217 Co.") appeals a decision of the Minister of National Revenue (the "Minister") dated September 27, 2012 that Mr. Terry Dickey was an employee of 217 Co., employed as a taxi driver for the period January 1, 2011 to October 1, 2011. 217 Co. appealed under both the *Employment Insurance Act* and the *Canada Pension Plan* ("*CPP*"), but at the commencement of the trial, it withdrew its appeal under the *Employment Insurance Act*. The sole issue therefore is whether Mr. Dickey was in pensionable employment: was he an employee or an independent contractor? There have been many taxi driver cases in this Court and, not surprisingly, given how fact-specific this issue is, the cases go both ways. A careful review of the facts is critical.

Facts

[2] Mr. Baldev Gill is the owner of 217 Co. Although he lives in Winnipeg, as an electronic technician, he had occasion to work in Kenora, Ontario in setting up taxi meters. This opportunity resulted in him acquiring a taxi from Mr. Greene in 2008. At that time, Mr. Greene had an arrangement with Mr. Dickey to drive the taxi. This was on a split-fare arrangement. There was some dispute whether it was 45–55 or 50–50 split. It is immaterial.

[3] Mr. Gill presumed that he would continue the same arrangement with Mr. Dickey that Mr. Dickey had with Mr. Greene. 217 Co. was responsible for insurance and maintenance of the vehicle. Indeed, Mr. Gill personally did the repairs on the vehicle, either bringing it to Winnipeg or going himself to Kenora to do the repairs. 217 Co. also acquired the necessary broker licence, while Mr. Dickey acquired the necessary taxi driver's licence from the Town of Kenora. Under the 50–50 arrangement, 217 Co. and Mr. Dickey shared the cost of fuel.

[4] 217 Co. acquired three more taxis between 2008 and 2011. Mr. Gill had Mr. Dickey hire drivers for the additional vehicles. Until 2011, 217 Co. paid Mr. Dickey $100 per month per car for managing the taxis. Apart from hiring drivers, it was not clear to me what else Mr. Dickey did in that regard. In 2011, due to health reasons, Mr. Dickey stopped providing this service to 217 Co. and simply remained a driver. Kathy Hall, who also owned taxis in Kenora that were handled by the same dispatcher, COOT Taxi (1999) Ltd. ("COOT"), picked up handling this service for 217 Co.

[5] Mr. Gill had no written agreement with Mr. Dickey. Mr. Gill would only get to Kenora occasionally, mainly when a vehicle needed repairs. Prior to 2011, Mr. Dickey would go to Winnipeg on a monthly basis to deliver 217 Co.'s share of the fares to Mr. Gill, along with a summary calculating the trips, fares and appropriate split. This was supported by daily cash sheets, a form that Mr. Dickey created that would list the day's fares, the totals and the appropriate split. He would complete this form manually during the day but computerize it in the evening.

[6] In June 2011, there was a change in the 50–50 arrangement. Mr. Gill testified this came about as Mr. Dickey had complained that drivers were not fully filling the tank at the end of a shift. This was resolved by changing the arrangement so that 217 Co. got 60% of the fare but would be responsible for the fuel. Mr. Dickey testified this change came from the dispatcher, COOT, and that all vehicle owners and drivers working with COOT had to make the change to 60-40. COOT, the dispatcher, was a company owned by the owners of the taxis, Mr. Gill, as owner of 217 Co., being one of them.

[7] Mr. Gill had no day-to-day contact with Mr. Dickey. If he did not see Mr. Dickey for a month, 217 Co. simply would not get its share of the fares from him. Mr. Gill would not know when or where Mr. Dickey was working. There was no tracking, no odometer readings and no requirement for Mr. Dickey to check in with Mr. Gill. The only information Mr. Gill had as to how much Mr. Dickey was

working would be from the daily cash sheets or summaries he received when being paid. 217 Co. paid no vacation pay or sick pay to Mr. Dickey.

[8] I will now turn to how the dispatch worked. As indicated, COOT was the dispatcher. Mr. Horban, who, like Mr. Gill, was one of the nine taxi owners who owned COOT, served as manager for COOT in 2011. Mr. Horban had had a similar *CPP* issue with the Canada Revenue Agency ("CRA") in 2011, and in 2011 received notification that the two drivers with whom there was the same issue, were not found to be employees.

[9] Mr. Horban described the arrangement between COOT and the drivers as loose. Owners, such as 217 Co., would pay a fee to COOT for its dispatching services. There was a handbook, "COOT Taxi (1999) Ltd Dispatcher and Driver and Handbook", but Mr. Horban said he was not sure all the drivers were even aware of the handbook. Mr. Dickey testified that he was. Mr. Gill, however, had never seen the handbook before this litigation. It was only about a dozen pages long and included a list of the cars handled by COOT (27 in all), who the owners were and what shifts each car had assigned to it. There were three shifts: the day 6:00 a.m. to 6:00 p.m., the night 6:00 p.m. to 6:00 a.m. and what was referred to as the "dog" shift, 3:00 p.m. to 3:00 a.m.

[10] According to Mr. Horban, and confirmed by Mr. Gill and Mr. Dickey, these shifts were the times within which a driver could work, but it was up to the driver how many hours during that period he or she actually worked. Mr. Dickey indicated that he would, as much as possible, work the full 12 hours, even starting half an hour early if he could. As Mr. Dickey put it, if it did not suit you, you did not work, but if you wanted to make money you had to be there. Similarly, a driver could eat lunch on the run or actually stop for the lunch – his call. It also appeared that the drivers could run the occasional personal errand.

[11] Mr. Horban did indicate that COOT could require drivers to stay beyond the shift if things got particularly busy.

[12] Mr. Horban also testified that drivers could get someone else to drive their shift, although they did not have to. Mr. Gill testified that he would not know if drivers switched. Mr. Dickey testified that if he had to get someone to cover for him, he would have to get approval from Mr. Gill or another COOT owner. A substitute driver would get the driver’s 40% share of the fares.

[13] A driver would keep the vehicle at his or her home while working consecutive shifts, but would arrange to get it to the next driver of consecutive shifts.

[14] Mr. Gill felt that Mr. Dickey could have driven taxi for anyone else, though Mr. Dickey felt he was limited to driving for COOT, albeit possibly for other vehicle owners.

[15] COOT would keep records of drivers' trips for three or four days, primarily for police purposes. Mr. Horban did acknowledge that if an owner believed a driver was making unauthorized trips, he might ask to see the records.

[16] The following is some of the items set out in the policy guide:

- cars must book on in the town zone;
- cars must sign off or can be fined (Mr. Horban testified fines were rare and indeed could only think of one instance of a fine);
- radio is for business only;
- no smoking;
- cars must be in proper zone to accept a trip;
- all trips must go through dispatch;
- a driver refusing an in-town charge would be sent home (there were some exceptions);
- a car can change drivers during a shift.

[17] The drivers are personally responsible for any tickets and for the deductible with respect to any accidents for which they were at fault.

[18] In October 2011, Mr. Gill sent a notice of termination of employment to his drivers stating:

> Please consider this notice of termination of employment effective October 31st, 2011. The company is changing its structure to a leasing company. If you are

> interested in leasing a vehicle and being your own boss, please contact myself or Kathy Hall.

Analysis

[19] Employee or independent contractor? The Respondent suggests that the Federal Court of Appeal in the recent decision of *1392644 Ontario Inc. O/A Connor Homes v Canada*[1] (the "Connor Homes") case has established a two step process of inquiry:

> 39. Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

[20] Here, notwithstanding Mr. Gill's letter of termination, I find the evidence supports opposing intents as to the relationship. In such a case, I believe I must rely on the objective reality as determined from the factors identified in the cases of *Wiebe Door Services Ltd. v M.N.R.*[2] and *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*[3] Interestingly, the Federal Court of Appeal lists intent and the terms of the contract as factors to consider in the second step, where courts are to determine the objective reality "using the prism of that intent". Two opposing prisms can only create a confusing kaleidoscope. Intent is not a factor in this case.

[21] Before addressing the other taxi driver cases relied upon by counsel, I will be clear that the main factor to distinguish employment from independent contractor in these types of cases are control, chance of profit and risk of loss. Other factors are not determinative, or can be argued in neutralizing ways. For example, one might think a huge factor in the taxi business is the ownership of the taxi – a strong indication the non-owner driver is just an employee. But, as has been pointed out in cases such as *Labrash v M.N.R.*[4] in addressing this issue of ownership of tools, the service provided by the driver is just that, driving:

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1 2013 FCA 85.

2 [1986] 2 C.T.C. 200.

3 2001 SCC 59.

4 2010 TCC 399.

> 28. I do not find this a particularly helpful consideration in a case such as this. The taxicab owners owned or controlled everything needed to run the overall taxi business except, of course, the drivers. On the other hand the taxicab drivers owned and paid for what they needed if they were in the business of driving taxicabs for others. That is, their city licence and their provincial driver's licence. This does not usefully lead in either direction in businesses such as these.

[22] Putting it another way, as Justice Bonner put it in *Pemberton Taxi Ltd. v M.N.R.*[5]:

> … the arrangement between the appellant and its drivers was essentially in the nature of a lease of the cabs in exchange for a share of the revenues earned from the operation of the vehicle by the driver who rented it.

Also as Justice Bowie indicated in *Algoma Taxicab Management Ltd. v M.N.R.*[6]:

> 13. Neither counsel placed much reliance on the ownership of the tools as an indicator of the nature of the contract. Nor do I think that it is a very significant factor. Certainly the drivers have no investment in the vehicles. It is not clear from the evidence to what degree the Appellant, or more accurately its subsidiary KCUB, has capital invested in the vehicles, as they are all either leased or financed at the time of acquisition. It must have some investment, however, and it certainly is at risk if the vehicles are lost or destroyed. However the cost of leasing or buying the vehicles, and the cost of insurance, is recovered from the drivers as it is factored into the computation of the rental rates that they pay, as is the cost of fuel, and all the other vehicle-related expenses incurred by the Appellant. I therefore do not consider this to be a factor that should be given significant weight in this case.

[23] Likewise, investment and capital of the business is not significant. Again, from the perspective of a driver offering a driving service, that factor is a nominal consideration not worthy of influencing the determination. I reiterate, the key three factors to distinguish between employment and independent contractor in this case are the control, the chance of profit and the risk of loss. Let us see how other cases have addressed these factors.

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5 2003 TCC 462.

6 2006 TCC 71.

Labrash

In *Labrash*, Perry Sound Taxi was owned by a group of taxicab owners who shared operating costs of dispatch, paying a fee to the dispatch operation. The owners and drivers split fares 60-40. Drivers could drive other taxis. Drivers could refuse fares. Drivers could take breaks when they please. Drivers could run personal errands during their shift. Justice Boyle found control, or lack thereof, favoured an independent contractor arrangement. He also found the profit depended in large measure on the driver and "while they had no risk of actual loss, they were at considerable risk of receiving little or no income and could undoubtedly have considerable influence and control over their earnings on any shift".

Finding: Independent contractor

Algoma

In *Algoma*, the drivers did not own the vehicles but had the necessary Sault Ste.Marie Police Board Taxi Driver's Licence. The drivers had a "rental agreement" with the appellant which stipulated several regulations, including penalties. As Justice Bowie described, "where it is necessary for the protection of the Appellant's business, there are some quite stringent controls on the drivers, and where it is not, they have considerable freedom as to the manner in which they do the work". The appellant paid for insurance, fuel and other supplies. The split fare ranged from 38% to 30% for the driver. A driver could go to work at any time and find a vehicle available. Drivers were not required to work any minimum period nor required to be available for a whole shift. They could cultivate their own customers who could call them directly.

Justice Bowie concluded the rental agreement did not demonstrate sufficient control to justify employment. Further, the drivers could increase profit by choosing busy shifts, strategically positioning their cabs and avoiding penalties. Justice Bowie also found significant risk of loss arising from accepting credit cards or cash plus the possibility of paying the deductible on an accident.

Finding: Independent contractor

City Cab (Brantford-Darling St.) Ltd. v M.N.R.[7]

[7] 2009 TCC 218.

In *City Cab*, the appellant owned 26 cabs in Brantford with 75 drivers operating them. The appellant was licensed by Brantford as a taxi broker, while drivers held the appropriate Brantford taxi driver's licence. The fares were split 60-40, with the company responsible for fuel and maintenance. The drivers were free to move to any part of city. Credit card losses and dishonoured cheques were at the drivers' expense. The drivers got a 69 page manual which the judge described as directed towards protecting the Appellant's economic interest, for example, defensive driving. The drivers could develop regular clientele and could refuse fares. The judge found that while the drivers did not own their taxis, part of the gross receipts (60%) they paid to the Appellant went to cover capital and operating costs. There were also independent drivers who owned their own taxis who used the same dispatch. Justice Bowie concluded:

> The drivers are indistinguishable from the independent owner-drivers in most respects. Both groups have the same call dispatch made available to them. Both have the same use of the company logos, signs and business cards. Both operate in the same way and in the same geographic area. The only significant difference is that the independent drivers own their vehicles and licenses, pay for their own fuel and other vehicle operating costs, and pay a fixed weekly fee to the appellant, while the company drivers do not own the vehicles or the taxi licenses, do not pay the fuel and other operating costs, but instead pay a percentage of their gross receipts to the appellant.

Finding: Independent contractor

1022239 Ontario Inc.

In *1022239 Ontario Inc.*, Justice Woods made it clear at the outset that "in my view an individual can carry on a business on his own account if the business consists only of driving a taxi". Justice Woods highlighted control as the most important consideration citing the following facts to demonstrate insufficient control for a finding of employment:

- drivers were free to determine when they work and could work less than a full shift;

- drivers were not instructed where to drive;

- drivers were encouraged to pick up passengers on their own;

- drivers could attend to personal business on a shift.

She found other factors not significant.

Finding: Independent contractor

Barton v M.N.R.[8]

In this case, it was the driver, Mr. Barton, who was the appellant. He did not own the taxi that he drove. He split the fare with the owner on a 50-50 basis though with a guaranteed minimum of $6.25 an hour. Maintenance and fuel were covered by the owner. The owner assigned shifts, though Mr. Barton always worked days. The owner assigned the vehicles. Justice Webb found that control favored an employment relationship. He also emphasized the vehicle was not owned by Mr. Barton, with little investment and no financial risk.

Finding: Employment

Hayer v R.[9]

In this case, the appellant owned and operated two taxis using Kelowna Cabs dispatch, an operation owned by the vehicle owners including Mr. Hayer. Kelowna Cabs, through its computer system, could track each driver's route, how much they were working and even how fast they were traveling. Mr. Hayer could ascertain why one driver was bringing in fewer fares than another. The appellant provided trip sheets to its driver tracking fares which were split on a 40-60 basis.

The driver signed a two-page "Driver Operator Agreement" agreeing to observe Kelowna Cab rules. The driver was given a shift schedule with no opportunity for input. The driver had to work the full shift, with no choice to work fewer hours. The

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[8] 2008 TCC 210.

[9] 2012 TCC 392.

driver was told when to cover the Kelowna airport and also told that if he was scheduled to work in one part of the city he could not work in another part.

Mr. Hayer was responsible for maintenance and fuel. The driver could not hire a replacement.

The judge found sufficient control to justify an employment arrangement. She factored in the car was a major asset of the business and was not owned by the driver. She also found the driver had little opportunity to maximize profit as the shifts were pre-established.

Finding: Employment

Control

[24] While there are similarities between the case before me and all of the above cases, I conclude that the level of control here is more in line with the first four cases of an independent contractor, rather than the latter two cases of employment. While there is not the degree of freedom given to drivers as found in the *Algoma* case, there is nothing near the level of control exercised by owners in *Hayer*. No, this case is in that grey area of control that brings these matters to court, but for the following reasons, I find the factor of control, similar to *Labrash*, *City Cab*, *Algoma*, and *1022239 Ontario Inc.*, favours an independent contractor arrangement:

- Mr. Dickey could drive for other owners;

- Neither Mr. Gill nor COOT had any means of monitoring Mr. Dickey while on the job;

- Mr. Gill had virtually no contact with Mr. Dickey in 2011;

- Mr. Dickey could drive the hours he pleased; he did not have to work a full shift;

- Mr. Dickey could take breaks when he pleased;

- Mr. Dickey kept control of the vehicle as long as he had consecutive shifts;

- Mr. Dickey created the trip sheets;

- Mr. Dickey could run personal errands while on a shift;

- While there was a Handbook it was not rigidly enforced and went more to the well being of the taxi operation generally than the control of the drivers;

- Mr. Dickey was not instructed where to drive;

- Mr. Dickey was not told where he could or could not work;

- Mr. Dickey could find someone to substitute for him on a shift.

Chance of profit

[25] Clearly there is a difference with the *Barton* case where the driver was provided with a guaranteed hourly rate. In *Hayer*, the ability to maximize profit was limited by the pre-assigned shifts. Mr. Dickey chose to work day shifts, but he could determine the hours within that shift that might be most productive. He chose, however, to work as many hours as possible four days a week. He could work more shifts or, indeed, work for others. He had a means to increase his profit from his driving business. This is not however as significant a factor as control, or of itself determinative.

Risk of loss

[26] Similarly, while there is some risk it is not as significant as those situations where the driver assumes risk of loss from credit cards or bounced cheques. The risk lies either in a car being unavailable due to repairs or from the cost of deductible if the driver caused an accident as well as the car being unavailable. Again, this factor is not strongly pro-independent contractor but more so than pro-employment.

[27] In evaluating the factors to distinguish employment from independent contractor, it will seldom be the case that all factors point overwhelmingly in one direction. There would be no need for a trial of the issue. It will more often be the situation where some factors might point one way and other factors another way. Some factors may be neutral. It is always necessary to bear in mind what the analysis is addressing – whose business is it? There is no magic formula. There is seldom a bright line. It is a matter of degree, and as that degree narrows, so too does the distinction: the expression "dependent contractor" comes to mind.

[28] What it really comes down to is whether a review of the factors supports Mr. Dickey being part of Mr. Gill's business or supports Mr. Dickey carrying on his own business of providing driving services. Based primarily on the elements reviewed in connection with control, I conclude that Mr. Dickey was carrying on his own business and was therefore not in pensionable employment. The Appeal is allowed and the Minister's decision that Mr. Dickey was in pensionable employment is vacated.

Signed at Ottawa, Canada, this 4th day of October 2013.

"Campbell J. Miller"

C. Miller J.

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COURT FILE NO.:	2012-5126(CPP)
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APPEARANCES:

Counsel for the Appellant:	Barbara M. Shields
Counsel for the Respondent:	Larissa Benham

COUNSEL OF RECORD:

For the Appellant:

Name:	Barbara M. Shields
Firm:	Aikins Law

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada