

Docket: 2013-2264(EI)

BETWEEN:

LOVING HOME CARE SERVICES LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LA-TOYA LANA BURT

Intervenor.

Appeal heard on common evidence with the appeal of
Loving Home Care Services Ltd. 2013-2263(CPP) on
February 25, 2014 at Vancouver, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Max Weder
Counsel for the Respondent:	Amandeep K. Sandhu
For the Intervenor:	The Intervenor herself

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Toronto, Ontario this 6th day of March 2014.

“Patrick Boyle”

Boyle J.

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Boyle J.

Citation: 2014 TCC 71
Date: 20140306
Dockets: 2013-2264(EI)
2013-2263(CPP)

BETWEEN:

LOVING HOME CARE SERVICES LTD.,
and
THE MINISTER OF NATIONAL REVENUE,
and
LA-TOYA LANA BURT

Appellant,
Respondent,
Intervenor.

REASONS FOR JUDGMENT

Boyle J.

[1] These are appeals from Rulings made by the Canada Revenue Agency (“CRA”) in 2012 which ruled that the Appellant, Loving Home Care Services Ltd. (“Loving Home Care”) and six of its workers, including the Intervenor, Ms. Burt, had an employer-employee relationship for purposes of the definitions of “insurable employment” in the *Employment Insurance Act* (“EIA”) and of “pensionable employment” in the *Canada Pension Plan* (“CPP”).

[2] The Appellant, Loving Home Care, disagrees with these Rulings and maintains that the workers were independent contractors. The Intervenor, Ms. Burt, agrees with the Rulings which determined that she was an employee of Loving Home Care.

Applicable Law

[3] The applicable law in appeals such as these is fully and clearly set out by the Federal Court of Appeal in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85. I will not reproduce all of paragraphs 23 and 33 through 41 of Justice Mainville's reasons.

[4] The legal issue to be decided is simply whether an individual worker is performing her personal care worker services as her own business on her own account.

[5] This requires me to first decide whether subjectively, based upon the facts, circumstances and evidence in the particular case, there was a mutual understanding or common intention between the parties regarding their relationship as either employment or independent contractor.

[6] At this stage, a Court can consider, among other things, the extent to which a worker understood the differences between an employment or independent contractor relationship, the relative bargaining position strengths and weaknesses, and the extent to which such evidence, which can typically be expected to be self-serving, is corroborated by and consistent with the other evidence placed before the Court.

[7] The answer to this question is not determinative. The parties can not agree to the correct legal characterization of their work relationship as if it were just another term or condition of their work relationship rights, obligations, duties and responsibilities. A declared and agreed intent to a particular characterization of the work relationship as employment or independent contractor must, in fact, be grounded in a verifiable objective reality.

[8] If the parties have a common agreed intended characterization of their relationship, this Court must determine if the overall objective reality of their working relationship sustains, and is consistent with, their subjective intent.

[9] This second step requires the Court to consider and weigh the traditional *Sagaz/Wiebe Door*¹ factors of control over the work and the worker (including the extent of subordination of the worker), the provision of tools, material, credentialing and equipment needed for the worker to do the work, and the extent of the worker's financial upside and downside risks regarding the services provided by her.

¹ *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.R. 983; *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553.

[10] In this second step, the Court may again consider the parties' intent, along with the actual behaviour of the parties and any written agreement between them. In *Royal Winnipeg Ballet v. M.N.R. (F.C.A.)*² the Federal Court of Appeal had similarly said the traditional *Sagaz/Wiebe Door* factors must be considered "in the light of the parties' intent."

[11] This second step is otherwise the same as how the Court would proceed in cases where there is no common shared intention regarding the characterization of the work relationship by the parties.

The Subcontract Agreements with the Workers

[12] The Subcontract Agreement between the Appellant, Loving Home Care and the Intervenor, Ms. Burt, provided, among other things, the following provisions:

- i) The Contractor agrees to provide the Subcontractor with on-call contracts, that she may accept;
- ii) The Subcontractor agrees to perform duties of an assigned contract in a responsible manner, as defined by the Contractor from time to time, which is customarily associated with the position as assigned.
- iii) During the term of the agreement, the Subcontractor undertakes to devote the whole of her time, attention, effort and ability as a Subcontractor and the Subcontractor shall at all times perform the duties and responsibilities associated with the Contract.
- iv) The Contractor agrees to pay the Subcontractor a fixed hourly or daily amount in regular instalments.
- v) No Unemployment Insurance, Canada Pension or income tax deductions will be made. Subcontractor is obliged to pay these as required by law. Loving Home Care will pay Workers Compensation Board ("WCB") assessments.
- vi) The duties and the responsibilities are described by the Contractor where they can be changed based on the job description.

² [2007] 1 F.C.R. 35, 2006.

- vii) The Subcontractor is responsible to update the Contractor with the patients' day-to-day events using the log book; including health status, household management, and other relevant information.
- viii) Any holidays and family events, the Contractor requires a minimum of two weeks notice in writing; and
- ix) Any misbehaviour that conflicts with the client and/or Contractor and/or the duties and responsibilities of this contract, the agency has the permission to dismiss the employee within 24 hours of the conflict.

[13] The Subcontract Agreements with each of the other five workers affected by the Ruling were put in evidence. With the exception of vii) and viii) above dealing with reporting and scheduling non-work days and the obligation to complete the Loving Home Care daily log book, each of the agreements is in all respects the same. Each purports to be a subcontract, but uses the term employee in the dismissal rights clause set out in ix) above.

[14] They are not all signed by either or both parties. They do not all have the blanks filled in for rate of pay nor all of the dates filled in.

[15] The dating of the agreements, whether signed or unsigned, is not clear or complete and remains questionable. The Court's concerns with the dating of the agreements in evidence was fully discussed by the Court with Appellant's counsel during the hearing. The pre-printed fill in the blank agreement forms bear a date of 2010. At least one suggested it was completed before that date. Some schedules' dates do not align with the dates of the agreements they are appended to. Workers did not all recall when they signed this agreement relative to when they started working for Loving Home Care. Workers could not all provide clear or satisfactory answers on the dating, signing and renewing of these agreements. One worker had to change her clear and unequivocal answer to this question when challenged in cross-examination. The agreements appear to have been "renewed" at the request of Loving Home Care in 2012, except for that of the Intervenor, Ms. Burt who had ceased working with Loving Home Care by that time. The Rulings process in respect of the status of these workers arose in 2012.

[16] The notable and significant difference between Ms. Burt's agreement and the "renewed" agreements of 2012 is that the provisions described above in vii) and viii) dealing with scheduling non-work, family and vacation days, and the daily reporting

to Loving Home Care via the detailed log book, are not present in the 2012 schedules. Considering all of the evidence relating to these agreements and their renewals, including my concerns below regarding witness credibility, and considering the apparent spacing gap in the 2012 renewal schedules, the Appellant has certainly not been able to satisfy the Court on a balance of probabilities with satisfactory credible evidence that the agreements as tendered to the Court were those in place in governing the relevant period. I find that such agreements were not generally signed by Loving Home Care and its workers prior to the commencement of work, were not necessarily completed or signed when they said they were or at all, and in the cases of these workers covered by the Rulings in issue, all included the same scheduled provisions as Ms. Burt's during the relevant periods in question.

[17] Loving Home Care had other workers doing similar personal care work who were treated as employees. It appears from the testimony that this may have been done primarily to permit the workers to qualify for employment insurance maternity leave benefits. In any event, the employment contracts of the employed personal care workers were not put in, nor described in evidence, none of them testified, and there was no evidence to suggest that their day-to-day working relationship with Loving Home Care or its clients differed from these workers.

[18] The clients who were cared for were those of Loving Home Care. The Court was not given a copy of any written contract with these clients, whether the patients or the families, nor was any clear evidence of the overall terms of any such oral or written contract between Loving Home Care and its clients tendered, even though it must have addressed the caregiving to be provided.

[19] While the Court heard often about the role of the families with respect to the daily care of the patient and communications with Loving Home Care and the care workers, no such client of Loving Home Care testified as to their understanding of their arrangements or agreement with Loving Home Care.

The Witnesses' Evidence

[20] The principal of Loving Home Care, Ms. Jolanta Purgal, testified on behalf of the Appellant. I have some reservations about her testimony. It was obviously self-serving and it proves somewhat difficult to corroborate with other evidence. I have already addressed my significant concerns with the written agreements tendered and Ms. Purgal's role in renewing them. More importantly, she was less than candid in her seemingly clear negative answer to the Crown's question in cross-examination as to whether she ever discussed with Ms. Burt the possibility of treating her as an employee. On cross-examination by the Intervenor, Ms. Burt herself, Ms. Purgal acknowledged readily in the back and forth exchange between them that she had indeed had such a conversation with Ms. Burt while Ms. Burt worked for Loving Home Care. Ms. Purgal then, on her own, went on to refer to also having that same conversation with Ms. Burt when Ms. Burt was considering returning to work after the birth of her child. The Court is therefore keenly interested in considering the extent to which Ms. Purgal's testimony is corroborated with other evidence. Similarly, in chief Ms. Purgal clearly maintained that all Loving Home Care workers were characterized as independent contractors since 1998. However, in cross-examination by the Respondent she had to acknowledge, when presented with an employee list prepared by her accountant, that there were exceptions, and that two or three of those who asked to be employees were in fact re-characterized as employees by Loving Home Care.

[21] Five of the workers covered by the Rulings also testified.

[22] The testimony of Ms. Burt, the Intervenor, was in several key respects materially at odds with Ms. Purgal's. Obviously, Ms. Burt's testimony was also self-serving in support of her interests as a party to the proceedings. However, self-serving is not necessarily pejorative, nor does it necessarily require full corroboration. I accept Ms. Burt's testimony as credible and, to the extent Ms. Burt's evidence is at odds with Ms. Purgal's, I prefer Ms. Burt's.

[23] Four of the other five workers also testified. They did not intervene in the proceedings and they were satisfied with and supported Loving Home Care's position that they were independent contractors and not employees. Overall, I accept that they answered honestly and earnestly to the best of their abilities. However, the Court sensed some of their answers on their status as independent contractors were rehearsed. They too were somewhat self-interested in supporting Ms. Purgal as they testified in front of her and she continues to provide them with Loving Home Care work. They may also have claimed related tax deductions against their Loving Home

Care income. One of them awkwardly stated clearly that she was an independent contractor in response to the first or second question asked in chief, even though the nature or characterization issue in her agreement had not yet been raised. As mentioned above, another had to revise her answer regarding the number and timing of her written agreements when confronted with the agreement. Another worker sat through the testimony of one of the other workers mouthing and gesturing the right answers, though I do not suggest that influenced the person testifying or was even noticed by her. One of the workers for whom English was not her first language, seemed troubled when asked questions which did not suggest an answer or could not be answered yes. Another had to significantly change her clear testimony on the timing of changes to the agreements, including her rate of pay, when reminded of the dates written on her written agreement/renewal. I do not impugn any of these four witnesses or their testimony. I accept their testimony as regards their day-to-day caregiving to Loving Home Care clients and their interactions with the patients and family members with respect to day-to-day information sharing and instruction. However, overall in these circumstances I place little weight or corroborating value on most of their views on the characterization of their work relationship as independent contractor and not employees of Loving Home Care, especially given that most of them testified that when they started working for Loving Home Care they did not fully appreciate the difference between independent contractor and employee status.

[24] Much was heard about the role of the family members of patients cared for by Loving Home Care and its care workers. It is not surprising that caring for the needs of aged, ill or disabled person involved Loving Home Care and Ms. Purgal, its care workers, the family members and/or the patient himself or herself, all working together as a team to ensure that the proper and needed care was best provided. Undoubtedly, the formal and informal communication, instruction, information sharing, assignment and delegations which such care needs, might be expected to be very much the same whether the particular care worker is an employee or independent contractor of Loving Home Care. In this case the evidence is clear that the patient's legal caregiving relationship is between the patient or a particular family member and Loving Home Care, whereas the primary day-to-day care involvement is between the patient, or the patient and one or more family members, and the Loving Home Care worker. It is also clear that the Loving Home Care daily caregiver's log book, along with the patients' Loving Home Care caregivers' information and emergency contact file, were maintained in the patient's home.

[25] However, no family member of any patient was called to corroborate the Appellant's version of instruction regarding, direction over, control or monitoring of

the Loving Home Care caregivers' work which, according to the contractual relationship and all of the witnesses' testimony, the families were heavily involved in. Loving Home Care had a sufficient number of patients and their families to keep thirty to sixty or more care workers on staff. While I do not draw any adverse inference whatsoever, it is unfortunate that such evidence is not present to help corroborate Ms. Purgal's testimony for the Appellant and assist the Appellant discharging its burden of proof on a balance of probabilities.

Intention of the Parties

[26] If I overlook the one reference to the workers being employees in the subcontract agreement, and my concerns about when, if ever, the contracts were actually executed, it is clear that i) the written agreement between Loving Home Care and its workers characterizes the relationship as one of independent contractor status, and (ii) the workers understood from early on in the relationship that they were to be in an independent contractor relationship with Loving Home Care.

[27] However, it is also clear on the evidence that all (except perhaps one) of the workers, including the Intervenor, did not understand what that meant beyond perhaps having been told that they could deduct their travel expenses and their cell phones. As a general principle, workers who are not informed and do not actually know or understand the differing possible characterizations of their work relationship can not make a very helpful self-characterization of the nature of the legal relationship they have taken on, and certainly not one that can much enlighten or inform the Court's objective consideration of the traditional *Sagaz/Wiebe* Door factors.

[28] In the circumstances of this case, the Court places little weight on the subjective intentions of the workers to characterize their work relationship as independent contractors.

Control

[29] The provisions of the written agreements relating to Loving Home Care's control over the work and the worker are set out above. These clearly gave Loving Home Care the right to require each worker to inform it in writing of each day's events. It also clearly gives Loving Home Care the right to dictate how the workers are to perform their duties and has not simply assigned duties to them. Duties clearly have to be performed in a responsible manner as defined by Loving Home Care from time to time.

[30] The care workers were required to maintain the Loving Home Care log when their shifts ended and to consult it again when their next shifts started. This is where they found out what might be needed, and recorded what they had done and/or thought was needed to be done. For the one worker who was the sole care worker for a particular client and worked hourly shifts at that client's and was not live-in, it is likely that as a practical matter she was not required or expected to consult her notes from the day before. But there is no reason to believe she did not maintain the log as required. One worker believed she was maintaining the Loving Home Care log book only for herself, though it appeared her patients only were provided companionship, laundry, meals and walks provided by her as the sole Loving Home Care worker.

[31] The log book is where workers found out what might be needed and recorded what they had done and/or thought was needed to be done. It was Loving Home Care's log book, required to be consulted and maintained at the insistence of Loving Home Care, and the entries were primarily those of Loving Home Care's workers caring for the particular patient. At times there might be notes or entries from the patient's family, and the log was available in the home for review by the family.

[32] Individual practices depended upon the individual care workers involved and the nature or extent of the patient's care needs. This is not surprising given that some patients' care involved only companionship, walks and errands, while others required medication assistance, catheterization and ostomy pouch monitoring and maintenance, oxygen and, in the case of the bedridden, lifting and turning, and that different families and different workers may approach things differently. The evidence suggests there may have been considerable variance in workers' and families' approaches to the Loving Home Care log but the Appellant did not put a representative log book, or Loving Home Care folder, in evidence for me to more clearly understand.

[33] When working a "live-in" 24 hour overnight shift, workers were required to report to Ms. Purgal if they were not provided three hours of relief by a family member so Loving Home Care could bill the family extra and pay the worker extra. According to Ms. Burt, if a patient rose more than twice during the night, she was to report to Ms. Purgal so the client could be charged for the extra care and the worker be paid extra for the time when it was anticipated by all she was to have been sleeping.

[34] According to another worker, she has a few Loving Home Care clients where she is required to report directly to Ms. Purgal on a daily basis in addition to maintaining the written log.

[35] Ms. Purgal would attend at clients with their families, while a worker was present and while a worker was not working. She did not often attend while a worker was there. The purpose of such visits is not clear except those which involved initial introductions and orientation-type training. I am not satisfied I know clearly how often her visits occurred while the worker was not on shift, or the purpose of such visits, nor what was discussed. Ms. Burt testified that at least one client reported having a visit from Ms. Purgal at which Ms. Burt's performance formed at least part of the discussion. Ms. Purgal's testimony was that she only visits clients when called. She said she was called once to a meeting with a family to which Ms. Burt provided care, but it was to discuss a power of attorney dispute between family members. Ms. Purgal's evidence in this regard, and in regards to her client/family visits was not corroborated.

[36] I was given very little information about ongoing communications in writing, in person, or by phone between Loving Home Care's Ms. Purgal and its clients by way of ongoing reporting, regular or routine client maintenance, client satisfaction queries, billing queries or collection matters. I do understand that Loving Home Care was a successful business with a significant staff of care workers and a corresponding number of clients. Ms. Purgal appeared to be a focused and driven business person who stayed completely on top of all aspects of her successful business. Also, for those clients that required workers report daily directly to Loving Home Care, I assume Ms. Purgal was in very regular if not daily contact with Loving Home Care's client and I was not told differently. Undoubtedly, all of this contributed to Loving Home Care's and Ms. Purgal's apparent success. I find from this that Loving Home Care was in at least somewhat regular contact with the client families on all key aspects of the Loving Home Care caregiver relationship, including their level of satisfaction with the individual caregivers and how they were doing their work.

[37] There was no evidence from the Appellant of the level of detail or the range of terms in Loving Home Care's agreements with its clients. I therefore do not know how generally or specifically they provide for what duties are taken on nor what, if any, detail is set out as to how those duties are to be performed. Nor do I know the required level of Loving Home Care monitoring of caregiver performance. I was not offered a standard form, an overview, or a family member's testimony. The Respondent did put into evidence screen shots of the Loving Home Care website which states, among other things, that Loving Home Care "works closely with the

families and clients to ensure total satisfaction in everything we do". It says its services can include a detailed care plan. It says that its personal caregivers are certified and twice that they are trained. It seems clear that Loving Home Care's workers are not certified and trained by anyone other than Loving Home Care (although at least one worker had earlier been trained and qualified as a registered nurse outside Canada). If the certified and trained statements are taken to be true, Loving Home Care must be providing a degree of monitoring and supervision to hold them out as certified by them and trained by them.

[38] Neither name tags nor uniforms were required of Loving Home Care's caregivers whether they were employed or independent contractors.

[39] I was not told by Ms. Purgal that Loving Home Care's control over its employed personal care workers and their work differed in any way from those characterized as independent contractors. Nor was I told of any changes in these levels of control over the care workers and their work when a worker's characterization transitioned from independent contractor to employee. The other witnesses not surprisingly could not be expected to attest to this. This leads me to a finding that there were not material or significant distinction between these workers other than employee withholdings and EI maternity benefits.

[40] Loving Home Care clearly did not exercise any right to direct that its care workers care for any particular client, nor work any particular shift, other than those that the workers had agreed to after it being offered. Workers would let Ms. Purgal know of their availability for work at the outset and update her. Workers were able to and did turn down patients and shifts. These decisions appeared to have been largely made dependant upon the worker's preferred time slots, and how much actual work was required. For many, if not most workers, this was part-time work and workers had other jobs, school and family commitments to juggle and work around. These workers appeared to get all the work hours that they wanted from Loving Home Care as they balanced school, other jobs and/or child rearing. Given that the pay rate was generally the same standard rate, workers tended to prefer the companionship, meal preparation and appointments and errand clients to those requiring lifting, medication administration and ostomy or catheterization maintenance (unless as described below they could negotiate a higher pay rate with Ms. Purgal for the greater needs patient).

[41] Once a particular client's particular recurring shift had been accepted by a worker to whom Ms. Purgal offered it, the worker was expected to carry on working that shift. Sick days, unexpected appointment days and vacations or extended absences were handled differently by different workers. The workers' contract with

Loving Home Care gave Loving Home Care the right to a minimum of two weeks written notice for vacations and family events. In practice, individual caregivers necessary absences were dealt with in a range of ways. Some families preferred to cover them off themselves, even over holiday periods, to avoid creating change for the patient. In that case workers would advise Ms. Purgal so billing and pay could be adjusted. Some workers would try to make arrangements with their Loving Home Care colleague who worked a different shift for the same client. These workers would simply inform Ms. Purgal through their invoices to Loving Home Care so each would be paid correctly. Still others would simply inform Ms. Purgal when they had to be or chose to be off for any reason, and it was Ms. Purgal who made arrangements for the replacement Loving Home Care worker.

[42] Loving Home Care's workers were not permitted to hire a replacement or an assistant or helper, nor were they allowed to subcontract their obligations. They could not subcontract their work to anyone on terms the worker would get paid the agreed Loving Home Care worker rate and pay her subcontractor less, not even with another Loving Home Care worker. The worker could not arrange directly for a replacement who was not already Loving Home Care staff, although on occasion some workers would alert Ms. Purgal of the availability of a care worker at another agency who was available to replace her for a particular requested time off.

[43] Workers were able to inform Loving Home Care that they were no longer available for certain shifts, for example when they returned to school, or that they no longer wished to continue to work for particular clients, and these requests were respected.

[44] Notwithstanding the wording of the Subcontract Agreements, workers were able to work for others, including being an employee of a competing caregiver agency. The only requirement was that the worker could not compete, directly or with another agency, and provide care to a Loving Home Care client until two years after stopping work at Loving Home Care.

[45] After considering and weighing the above factors as they relate to Loving Home Care's control over the workers and how the agreed work was to be performed, I find on balance that it leans towards an employment relationship in this particular case. Loving Home Care's over-arching right to dictate how the duties are performed as set out in the written agreement with the worker, the requirement for detailed daily log book reporting to Loving Home Care, the ongoing monitoring by Loving Home Care, the ongoing "certification" by Loving Home Care of the worker to its clients, all track very closely to what might be expected of an employment

relationship. This is confirmed by the fact that these are the same level and degrees of control that Loving Home Care has and exercises over its employed caregivers. On the other hand, the ability of the worker to turn down particular shifts or clients that are offered to her is not inconsistent with the employment of largely part-time shift workers, at locations anywhere in a major city, in a competitive market, and in a sector that appears from the evidence to not require exclusivity from its employees.

[46] With respect to the role of the families in having day-to-day communications about the care needed or provided, consistent with Justice Woods' decision in *Dean (Ana's Care & Home Support) v. Canada (National Revenue)*, 2012 TCC 370, it is the ability of Loving Home Care to control and direct how the duties are performed that is most significant, not how often it had to be or was exercised to such an extent. Also, I agree with Justice Woods' observation that in an in-home care giving context, since the workers contracted with Loving Home Care and not with Loving Home Care's clients, any directions given by Loving Home Care's clients which the workers were expected to comply with, amounted to control exercised over her by virtue of her obligations to Loving Home Care.

Tools, Credentialing, Materials and Equipment

[47] In this case I find the ownership of tools factor is not helpful one way or the other. According to the evidence, the only things needed to provide the care are protective surgical-type gloves. These were always provided for by the families along with anything else needed such as groceries, taxi fare, or other transportation costs, lifts and the supplies needed to attend to a client's personal needs. They are all always provided by the client or family and never by Loving Home Care or the worker. Further, this appears to be the case regardless of whether the care worker is an employee or an independent contractor. If a worker used her own vehicle for appointments, shopping or other client errands or travel, she would record the mileage and charge the client at a set rate. Some workers gave that form to the client directly and others to Loving Home Care, but the reimbursement always came from the family.

[48] A caregiver's training was all provided on the job by Loving Home Care, usually by another Loving Home Care worker. Training on things like lifting might be provided by a third party health care provider working with the client or family. The care workers are not required to obtain any outside training or certification, either at Loving Home Care's or their own expense.

[49] In the relatively rare instance when needed to accommodate clients' needs with worker availability, Loving Home Care would pay for a worker's travel by taxi between client shifts. Otherwise, workers were on their own for getting to and from the patients' homes using either public transit or their personal vehicle.

Financial Upside and Downside Risks

[50] The workers did not make any financial investment in tools, equipment, material, training or credentialing to be able to do the work for Loving Home Care. They did not advertise for clients, but responded to ads or referrals. Workers were paid fixed hourly or daily rates by Loving Home Care as set out in their contract at \$15 per hour, subsequently raised to \$16 per hour. The daily rate was 8 times the hourly. These rates could at times be negotiated modestly higher for certain patients to \$17 per hour, or in one instance to \$20 per hour, but these appear to have always been based upon the location of the work, or the particular nature of the care required given the client's particular state of physical or mental well-being.

[51] The workers were paid for their work by Loving Home Care every two weeks after reporting their hours to Loving Home Care normally on a printed Loving Home Care invoice form provided to them. The rate of pay was not dependant on the amount charged to Loving Home Care's clients. While the Notice of Appeal prepared by Appellant's counsel contends that the workers were not paid by Loving Home Care if its client did not pay Loving Home Care, there was not a hint of that in evidence.

[52] Loving Home Care workers were not entitled to paid holidays or sick days. When Ms. Burt was injured at a Loving Home Care client's home, Loving Home Care did offer her 2 paid days off to recuperate to encourage Ms. Burt to not make a WCB claim. Ms. Burt did not accept that but made a WCB claim.

Conclusion

[53] Given the limited extent and scope of the evidence, and the limitations on its quality as discussed above, the Appellant has not been able to establish with sufficient credible evidence that the Loving Home Care workers covered by the Rulings were, on a balance of probabilities, in a working relationship that would be characterized in law as an independent contractor and not as an employee.

[54] Given especially the extent of Loving Home Care's rights to direct the performance of the work duties and its actual monitoring and reporting requirement

practices, and given the very limited financial risks to the workers, the absence of any financial investment by the workers, and the relatively fixed financial rewards by which they can only generate more income by working additional hours or days, these particular facts and circumstances considered as a whole quite strongly give rise to insurable employment under the *EIA* and pensionable employment under the *CPP*.

[55] The appeals are dismissed.

Signed at Toronto, Ontario this 6th day of March 2014.

“Patrick Boyle”

Boyle J.

CITATION: 2014 TCC 71
COURT FILE NOS.: 2013-2264(EI); 2013-2263(CPP)
STYLE OF CAUSE: LOVING HOME CARE SERVICES INC.
AND M.N.R.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: February 25, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: March 6, 2014

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