

Docket: 2003-916(EI)

BETWEEN:

DeWINTER ENTERPRISES (1996) LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on November 19, 2003, at Prince George, British Columbia

Before: The Honourable Justice C.H. McArthur

Appearances:

Agent for the Appellant: Ron DeWinter  
Counsel for the Respondent: Raj Grewal

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JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue on the appeal made to him under section 92 of that *Act* is vacated on the basis that Brian Baker was not employed in insurable employment within the meaning of paragraph 5(1)(a) of the *Act* for the period November 16, 2001 to May 1, 2002.

Signed at Ottawa, Canada, this 25th day of November, 2003.

"C.H. McArthur"  
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McArthur J.

Docket: 2003-918(CPP)

BETWEEN:

DeWINTER ENTERPRISES (1996) LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

---

Appeal heard on November 19, 2003, at Prince George, British Columbia,

By: The Honourable Justice C.H. McArthur

Appearances:

Agent for the Appellant: Ron DeWinter  
Counsel for the Respondent: Raj Grewal

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JUDGMENT

The appeal pursuant to section 28 of the *Canada Pension Plan* is allowed and the determination of the Minister of National Revenue on the application made to him under section 27.1 of the *Plan* is vacated on the basis that Brian Baker was not engaged in pensionable employment within the meaning of paragraph 6(1)(a) of the *Plan* during the period November 16, 2001 to May 1, 2002.

Signed at Ottawa, Canada, this 25th day of November, 2003.

"C.H. McArthur"

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McArthur J.

Citation: 2003TCC856

Date: 20031125

Docket: 2003-916(EI) and 2003-918(CPP)

BETWEEN:

DeWINTER ENTERPRISES (1996) LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

#### **McArthur J.**

[1] This is an appeal from the decision of the Minister of National Revenue that Brian Baker was employed in insurable employment with the Appellant from November 16, 2001 to May 1, 2002. The position of the Appellant is that Brian Baker was operating his own business and was not an employee. The problem arises because the Appellant was assessed for employment insurance premiums in respect of Brian Baker who was driving a taxicab.

[2] The Respondent submits that Brian Baker was employed in insurable employment under a contract of service pursuant to paragraph 5(1)(a) of the *Employment Insurance Act*.

[3] The Appellant corporation is owned equally by Ron and Lynn DeWinter. Ron DeWinter was the only witness. The Appellant operates a taxi business in Dawson Creek, British Columbia, about 500 miles northeast of Prince George. The Appellant employed six dispatchers. Brian Baker leased and drove a taxi owned by the Appellant in 12-hour dayshifts, according to the Appellant's schedule and dispatcher's assigned calls. He did not miss work during the period. If he had, the Appellant would look for someone else to drive Mr. Baker's assigned car. He was

expected to advise the Appellant if and when he was not available so that the car could be leased to someone else. He could drive whenever he wanted to, but was expected to advise the Appellant when he was not leasing a car.

[4] He signed a waiver agreeing to be responsible for his own costs: *Canada Pension Plan* contributions, *Employment Insurance* premiums and to pay 50 per cent per working shift, for the rental of one of the Appellant's cars and for dispatching privileges. Brian Baker paid for his own gasoline. In the waiver contract, he acknowledged that he was self-employed. He had his own personal Class 4 license and a chauffeur's permit that allowed him to drive any legal taxi.

[5] At the end of each daily shift, Brian Baker paid out to the Appellant 50 per cent of his gross receipts for that day. This paid for the car lease, the dispatching services and charge slip collections. He was not present in Court.

[6] Mr. DeWinter described Mr. Baker as a "very sweet 70-year old man whom he liked very much". Mr. Baker injured himself lifting his house<sup>1</sup> and was unable to continue driving a taxi. The waiver contract referred to, reads as follows:

Date: November 16, 2001

WAIVER

As a lease/operator for DeWinter Enterprises (1996) Ltd. DBA/Yellow Cabs – AC Taxi, Dawson Creek, B.C., I fully understand and agree that I am self-employed and that I am responsible for the following costs:

- 1) To pay to the company 50% of my gross earnings per working shift for dispatch fees, vehicle rental fees.
- 2) To pay the fuel cost and car wash cost after every shift worked.
- 3) To register for GST number and to pay required GST taxes.
- 4) To register with Workers' Compensation Board and to pay required premiums, also, employment insurance Canada Pension costs.

I ACCEPT THE ABOVE TERMS

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<sup>1</sup> Mr. DeWinter explained that the house was a version of a mobile home which is common in Dawson Creek.

Print Name: Brian Baker  
Signature: "Brian Baker"

[7] Counsel for the Respondent referred to *671122 Ontario Ltd. v. Sagaz Industries*<sup>2</sup> and the four-in-one test set out in *Weibe Door Services Ltd. v. M.N.R.*<sup>3</sup> and *Montreal v. Montreal Locomotive Works Ltd.*<sup>4</sup> referred to with approval by the Supreme Court of Canada in *Sagaz*.

[8] There have been many taxi driver cases before this Court. Each stands on its own particular facts. *Sagaz* indicates that the tests of control, ownership of tools, risk of profit or loss be used in determining the important question: whose business was it?

[9] Counsel for the Respondent very fairly provided the decision of the Federal Court of Appeal in *Yellow Cab Company Ltd. v. M.N.R.*<sup>5</sup> While he attempted to distinguish the facts in *Yellow Cab*, I find it similar to the present facts and, for the following reasons, find that Brian Baker was closer to being an independent contractor than an employee. In *Yellow Cab* the issue was, as in the present case, whether a cab lease-operator was operator of his own business.

[10] Applying the tests to the present facts, I find the following:

(i) Control

Brian Baker was a lease-operator. He leased a car with a meter and sign from the Appellant on a daily basis. He also paid for dispatching services, which included the privilege of being assigned customers of the Appellant. He also had first right to his own clients who asked for him specifically. Theoretically, he could drive all day without the dispatcher. He had a chauffeur's driver permit, which assured provincial authorities that he had the driving skills necessary to operate a taxicab. His driving skills and demeanour were such that he was never monitored while driving throughout

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<sup>2</sup> [2001] 2 S.C.R. 983.

<sup>3</sup> [1986] 3 F.C. 553.

<sup>4</sup> [1947] 1 DLR 161.

<sup>5</sup> [2002] F.C.J. No. 1062.

the entire period. He had the freedom to drive on the days he felt like working. While Mr. Baker could not assign his driving duties to others without Mr. DeWinter's consent, he could have someone else drive the cab if he wanted to. In *Yellow Cab*, paragraph 25, Sexton J. stated the following:

25 For example, the lease-operators are obligated to comply with all orders or directions to the lease-operators with respect to dispatch services and the general operation of the taxicabs; the lease-operators are obligated to diligently operate the taxicab on a continuous basis; and the lease-operators are obligated to use Yellow Cab's bookkeeping and fuel provision services. Yellow Cab can order the suspension or discharge of drivers in breach of any rules or regulations of Yellow Cab or of any municipality or other regulatory body. The taxicab may only be driven by the lease-operator or by a driver approved by Yellow Cab. These facts tend to evidence such a degree of control by Yellow Cab as to favour indicating that the lease operators were employees.

These thoughts also apply to the present case but balanced with the preceding paragraph, I find this test inconclusive.

ii) Ownership of tools

Mr. Baker under the lease owned the daily right to operate a fully equipped taxicab. While he may have been assigned a different car daily, he had the exclusive use of it for the day on the terms and conditions stated. I find this test favours the Appellant. I do not see the distinction between a daily and a monthly lease.

(iii) Risk of loss and chance of profit

The daily financial obligation of Mr. Baker fluctuated with the business he undertook. The harder he worked the more he made. Mr. Baker had to pay for his own fuel. His revenues were variable dependent on his skill and efforts. This favours the conclusion that Mr. Baker operated his own business. Sexton J. continued at paragraphs 30 and 31.

30 As Major J. stated in *Sagaz*, "the relative weight of each [of the above factors] will depend on the particular facts and circumstances of the case". On our facts, I consider that the chance of profit, the relative degree of financial risk and the ability of the lease-operators to "operate their own business" to be the most important. These factors all militate against a finding that the lease-operators are employees of Yellow Cab.

31 Referring back to the central question articulated by Major J. in *Sagaz*, I conclude that the lease-operators are in business on their own account. I also find that Hamlyn J. erred in considering only the factor of control to the exclusion of other relevant factors. The lease-operators are in the business of providing taxicabs to the public and therefore are the operators of the taxicab business within the meaning of s. 6(e). Meanwhile, Yellow Cab is in the business of providing administrative services to the taxicab business including providing taxicab support services in the form of dispatching, bookkeeping, branding and marketing.

This applies equally to the present situation.

[11] I cannot ignore the clear language of the waiver. Mr. Baker acknowledged that he was self-employed and in effect leasing the car and paying for dispatching. I agree with the following comments of Judge Bell in *Sara Consulting and Promotions Inc. v. M.N.R.*<sup>6</sup> which applies equally to the present facts:

... in the absence of clear and credible evidence that the description of a relationship is other than as agreed between arm's length parties, the description agreed upon by those parties must stand. There is no such clear and credible evidence in this case.

Obviously, I draw an adverse inference from the fact that Mr. Baker did not give evidence. Mr. DeWinter expected to cross-examine him. His evidence may have been detrimental to the Respondent's position. I realize that Dawson Creek is a long expensive trip to Prince George. Mr. DeWinter had to make it and he did not make the determination that Mr. Baker was an employee which necessitated his appearance. Although it does not affect my decision, Mr. DeWinter indicated that having to pay employment insurance premiums and other employee benefits would put him and his wife and corporation into bankruptcy.

[12] For these reasons, I find that Mr. Baker was in business on his own account.

[13] The appeal is allowed on the basis that Brian Baker was not employed in insurable employment within the meaning of paragraph 5(1)(a) of the *Act*; and also was not employed in pensionable employment within the meaning of paragraph 6(1)(a) of the *Plan*.

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<sup>6</sup> 2001 CarswellNat 2595.

Signed at Ottawa, Canada, this 25th day of November, 2003.

"C.H. McArthur"

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McArthur J.



CITATION: 2003TCC856

COURT FILE NO.: 2003-916(EI) and 2003-918(CPP)

STYLE OF CAUSE: DeWinter Enterprises (1996) Ltd. and  
The Minister of National Revenue

PLACE OF HEARING: Prince George, British Columbia

DATE OF HEARING: November 19, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: November 25, 2003

APPEARANCES:

Agent for the Appellant: Ron DeWinter

Counsel for the Respondent: Raj Grewal

COUNSEL OF RECORD:

For the Appellant:

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Firm: N/A

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