Docket: 2006-1655(CPP)

BETWEEN:

CITY CAB (BRANTFORD-DARLING ST.) LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

THOMAS ARMSTRONG,

Intervenor.

Appeals heard on June 21, 2007, at London, Ontario
By: The Honourable Justice E.A. Bowie

Appearances:
Counsel for the Appellant: Rebecca L. Grima
Counsel for the Respondent: Andrew Miller

JUDGMENT

The appeals pursuant to section 28 of the *Canada Pension Plan*, from assessments dated December 6, 2005, for the 2002, 2003 and 2004 taxation years are allowed and the assessments are vacated.

Signed at Ottawa, Canada, this 23rd day of April, 2009.

"E.A. Bowie"

Bowie J.

Citation: 2009 TCC 218
Date: 20090423
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CITY CAB (BRANTFORD-DARLING ST.) LIMITED,

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THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Bowie J.

[1] These appeals are from assessments under section 22 of the *Canada Pension Plan*[1] (the *Plan*) on December 6, 2005 for the years 2002, 2003 and 2004, following unsuccessful appeals from those assessments to the Minister of National Revenue under section 27.1. It raises once again the issue whether taxi drivers are engaged in pensionable employment as that expression is used in the *Plan*. This court has decided three such cases[2] in the recent past, finding in each that the drivers were not engaged under an express or implied contract of service, and so did not fall within that which the *Plan* defines as pensionable employment. The respondent says that the facts of this case are distinguishable from the earlier cases, and that the appellant and

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1 R.S.C. 1985, c. C-8, as amended.

2 *Pemberton Taxi Ltd. v. M.N.R.*, 2003 TCC 462; *1022239 Ontario Inc. v. M.N.R.*, 2004 TCC 615; *Algoma Taxicab Management Ltd v. M.N.R.*, 2006 TCC 71.

its drivers should be treated differently under the *Plan.* For the reasons that follow, I do not agree.

[2] The intervenor, Thomas Armstrong, withdrew his intervention at the commencement of the trial. He did, however, give evidence for the respondent.

[3] The appellant operates a taxi service in the city of Brantford, Ontario. It owns 26 cabs, and 75 taxi drivers operate them. Seven independently owned cabs also operate as part of its fleet, paying a weekly fee for the right to use the company name and for the dispatch service. There is an office staff of 10 people whose functions do not include driving. Only the status of the drivers of the cars owned by the appellant is in issue here, and it is only the *Plan* with which we are concerned, as driving a taxi is specifically made "insurable employment" by paragraph 6(e) of the *Employment Insurance Regulations*.[3]

[4] Fred Sayle and his brother own the appellant company, and he has been managing it for the past 35 years. He described the company's operations in considerable detail. He was an impressive witness, and I accept his evidence in its entirety without hesitation. Much of the evidence of all the witnesses touched on matters concerning the relationship between the company's management and the drivers. To some extent the relationship is found in documents, but to a large extent it is not written down but consists of the tacit understanding between the parties. Where Mr. Sayle's evidence and that of another witness are at variance, I prefer the evidence of Mr. Sayle, both because of his 35 years at the heart of the company's operations, and because he was forthright and candid in his testimony.

[5] Like all cities, Brantford has a by-law governing the taxi industry. It covers such matters as licensing and the fares to be charged. It requires the appellant to be licensed as a taxi broker, each vehicle used as a taxi to be licensed as such, and each driver to hold a taxicab driver's license. The appellant pays for its broker license and the licenses for the cars that it owns. The drivers each must obtain and pay for their own taxi driver's license.

[6] The appellant owns the dispatch system, which consists of a central computer located at the company's office and individual terminals in each of the vehicles. Drivers who are on duty book in to make the computer aware that they are available to receive fares. For purposes of the system, the city is divided into 10 zones, and a

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[3] SOR/96 332, as amended.

driver who is booked in can see on his terminal in which zone each of the other drivers is located. He can also see the locations at which there are calls waiting for a cab. When a customer calls for a taxi the dispatcher enters the call in the system and the computer automatically assigns the fare to the first driver in that zone. There was some conflict in the evidence concerning the right of a driver to refuse a call assigned to him, probably because it would be a rare occurrence, so that the evidence was largely speculation on the part of the witnesses. Drivers are not directed as to where they are to be while on duty. They are free to move to any part of the city that they wish, and to wait in any location that they wish.

[7] The drivers collect fares from the passengers in amounts that are fixed by the by-law and determined by the meter in the cab. The meter, like the computer terminal and the vehicle in which they are installed, is owned by the appellant. The driver's remuneration consists of 40% of the fares collected; the other 60% is the appellant's share. From that 60% the appellant pays for the fuel, maintenance and repair for the vehicle, as well as minor items such as car washes and windshield washer fluid. It also pays goods and services tax on the gross fares collected, employment insurance premiums, Workplace Safety and Insurance Board ("WSIB") premiums, and vacation pay in respect of the drivers. At the end of each day, the drivers must turn in to the appellant's office staff their log for the day showing the fares they have collected, and along with it the cash and credit card vouchers making up the appellant's 60% of the fares, less the amount of any cash purchases that they have made of items that the appellant is liable to pay for.

[8] The computer terminals in the cars act as a credit card terminal, and the drivers are able to obtain an authorization number for fares that are paid by credit card. If they fail to do so and the credit card company does not honour the charge then the loss is borne by the driver. Similarly, any loss resulting from theft, carelessness or a passenger failing to pay the fare is that of the driver, not the appellant. Drivers can only take cheques at their own risk; if they do so and the cheque is not honoured then the driver is charged the loss. The appellant does not get any share of the tips collected by the drivers. The appellant does not withhold any amount for income tax or employment insurance. In fact it cannot withhold, as it does not make payments to the drivers.

[9] Much of the evidence and the argument was focused on Exhibit A-2, colloquially called the Red Book. This is a 69-page manual provided by the appellant to each of its drivers. It deals with most situations that could arise in the course of a day driving a taxi for the appellant, ranging from accidents ("drivers may be required to pay damages if they are involved in multiple (at fault) accidents") to winter driving

("if you become stuck and cannot get out by gently rocking the vehicle CALL FOR ASSISTANCE"). As one might expect with such a comprehensive document, it is to some extent imperative in tone, and to a large extent advisory. Some parts of it do no more than advise the drivers as to the impact on them of the by-law, such as the requirement that drivers record each trip on a trip sheet. Other parts are simply a codification of common sense:

> If the distance you would need to come to a complete stop exceeds the distance to which you can clearly see, you are over-driving your headlights.[4]

The last 25 pages are simply a user's manual for the computer dispatch system.

[10] Counsel for the respondent argued forcefully that the Red Book is compelling evidence that the appellant is entitled to exercise a relatively high degree of control over the drivers. In my view, the document is in its overall tenor oriented not to exercising control over the workers in the sense associated with control of a servant, but rather towards protection of the appellant's economic interests. Much of the document has to do with taking care to avoid damage or undue wear to the automobiles, and to protecting and enhancing the public image and the reputation of the appellant's business. For example, 11 of the 69 pages are devoted to the topic Defensive Driving, and would be a useful handbook for anyone who drives for a living. Its purpose is clearly to eliminate or minimize accidents, and the obvious costs to the appellant that would result from them, no matter who is at fault.

[11] The Supreme Court of Canada has recently revisited the common law test that is applicable to distinguish between an employee and an independent contractor in the *Sagaz*[5] case. It reaffirmed that the court must look carefully at all the evidence and "search for the total relationship of the parties."[6] Major J., writing for a unanimous Court, concluded his review of the law this way:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform

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4 Red Book, exhibit A-2, p. 35.

5 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983.

6 Ibid., para. 46.

> the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[12] In a very thorough written submission, counsel for the respondent sought to distinguish this case from the *Algoma* and *1022239 Ontario Inc*. cases, both of which were concerned with taxicab businesses operating in Sault Ste. Marie, Ontario. The general methods of operation of all these businesses are very similar, but the respondent argues that in the present case, there is more power in the company to control the manner in which the work is done, there is less responsibility for investment and management in the drivers, and that there is really no opportunity to make a profit in the true sense of that word, or to incur a loss. He says, too, that the drivers in the present case are fully integrated into the appellant's business. I shall discuss the various distinctions that counsel seeks to make, but first I should make some observations about the witnesses called by each party.

[13] In addition to Mr. Sayle, the appellant called Veronica Thrasher. She worked first as a driver for the appellant for about eight years. In 2003 she became a call taker, and in 2004 she became a dispatcher. Patricia Kish started as a driver with the appellant in 1980. She has also worked in the office taking calls, and has since become a trainer. She has worked both at training drivers on the road and also in the use of the computer system. Robert Hover has worked for 20 years as a taxi driver. For the first four years he worked for his father; for the last 16 years he has worked the 6:00 a.m. to 6:00 p.m. shift from Monday to Friday for the appellant. The respondent called four of the appellant's drivers. John Hume had driven for City Cab for 25 years. Thomas Armstrong, Randy Craig and William Denholm had all driven for City Cab for an undisclosed length of time. The latter four witnesses were not consistent in their evidence. For example, Mr. Craig said that he considered himself to be an employee, while Mr. Denholm understood himself to be in business on his own account. As it is a question of mixed fact and law their opinions carry little weight, but it is significant that they are diametrically opposed in their views of the matter. Much of the evidence that these witnesses gave concerned what they understood to be the terms of their employment and that of the other City Cab

drivers. In my view, Mr. Sayle was in the best position to testify as to this, for reasons I have already expressed. Of the other witnesses, Ms. Thrasher and Ms. Kish had the broadest experience by reason of the different jobs they had held. In particular, their experience as dispatcher and trainer respectively, in addition to having been drivers, made them more likely than the other witnesses to have a correct understanding of the unwritten relationship between the company and its drivers.

[14] Mr. Miller argues that the appellant in this case could and did exercise a greater degree of control over the drivers in the performance of their work than either of the Sault Ste. Marie taxi operators. He points to the Red Book as evidence of this. As I indicated at paragraph 8 above, my view of the Red Book is that, when viewed as a whole, it is intended to serve as a helpful reference for drivers, particularly inexperienced ones, that will provide them with good advice as to many different aspects of their occupation, and at the same time help them to avoid conduct that would be harmful to their own interests as well as those of the appellant. The same may be said of the training provided to drivers. It may be true that this appellant provides more training than the Sault Ste. Marie appellants, at least to some of its new drivers who require it more than others, but that training is oriented towards enabling them be better at what they do and to avoiding problems.

[15] There are differences in the way in which shifts are organized from the earlier cases, but I do not think they are significant for purposes of this litigation. I am satisfied that the City Cab drivers had a great deal of freedom to work the shifts that they wanted, to take vacations or casual time off when they wanted to, and to take breaks during their shifts when they wanted to. Their shifts were scheduled by Mr. Sayle, and they were of a regular fixed duration (although not all of the same duration), but the drivers who testified made it clear to me that they were regularly scheduled to work shifts that they had chosen, and that they believed that they could work different shifts if they so chose. They could take breaks simply by signing out on the computer system, but for operational reasons it was understood that they would ask the dispatcher before doing so. They were never forbidden to take a break, but sometimes they would be asked to defer it during a particularly busy period.

[16] The degree to which the drivers were allowed to make personal use of the vehicle is not, in my view a significant distinction either. Clearly, the City Cab drivers could make casual personal use of the appellant’s vehicles during their shifts to do personal errands within the city without obtaining permission, and without paying for the privilege. That they could not expect to do so outside their shifts should not surprise anyone. Freedom to do the job of driving a cab as they see fit is

not to be confused with having free access to that cab outside working hours for personal use. They could make personal use of the vehicles for trips out of the city as well, but if they did they were required to pay for such use.

[17] The appellant's drivers were free to develop their own regular clientele, and thereby increase their incomes. If a customer called and asked for a particular driver and that driver had a call they might be given the choice of taking another driver or waiting until the driver they had requested was free. The company dispatchers would honour requests for specific drivers, subject only to operational considerations of that kind. Drivers were free to refuse fares as well, provided they did not do so repeatedly without a reason. Again, operational considerations governed the policy, as the appellant had to provide service to the public if it was to succeed in its business.

[18] There is no reason to distinguish these appeals from those of the Sault Ste. Marie companies on the basis of the capability of the computerized dispatch system to monitor the location of each driver at any given moment, or the speed at which they are traveling, or the requirement that drivers sign on to the system and off at the beginning and end of their shifts. Mr. Sayle's evidence satisfies me that the dispatch system was purchased and used only to enable the appellant, through its fleet of cabs, to provide the best possible taxi service to the residents of Brantford. That drivers had to sign on and off, and that it could monitor the movement of the cars, was necessary for the appellant's operational requirements. Mr. Sayle testified that it was not used to monitor the speed at which vehicles traveled, and that he had no confidence that it did so accurately. That was a feature of the system that he did not want, but that came as part of the package. The mapping feature was required and was used to assist the drivers in complying with the by-law requirement to deliver fares by the shortest point to point route.

[19] Drivers are required to keep the cars clean, both inside and out. The by-law and common sense both require it. Cleaning is paid for by the company, and the drivers are required either to do the cleaning, in which case they are paid for doing it, or to take the car to a garage to have it done at the company's expense. They are also required to keep the inside of the car tidy and to clean up any spills that take place when they happen. Although the company pays for fuel, the drivers are required to attend to filling the tank when required, and at the end of their shift. These, too, are simply operational requirements; the by-law requires that taxi vehicles be "suitable for use as a taxicab". It is reasonable to assume that unless such duties are assigned and carried out in an organized way the appellant's business, and that of each driver, would suffer. The same is true of the direction that drivers be clean and neatly dressed when on duty. Similarly, the directions to drivers that they should park in

visible locations and not litter are not an exercise of control over the drivers, but sound advice intended to help maximize their earnings and the company's profit.

[20] The respondent argues that the drivers did not have the right to hire replacement workers. Mr. Sayle's evidence clearly establishes that the drivers had that right, subject to the requirement that the replacement driver must have a valid taxi driver's license, qualify to be covered by the appellant's insurance policy, and be entered in the computer system. Those three requirements, of course, are reasonable operational requirements. The appellant could not let unlicensed or uninsured drivers operate its vehicles, and they could not sign on to the dispatch system if they were not entered in the system with a sign on name and password. The financial arrangement between a driver and a replacement driver was of no interest to the appellant, so long as it received its 60% of the fares at the end of the shift.

[21] Drivers could be disciplined for violating the dress code, for smoking or drinking on the job, or for failing to turn in his 60% of receipts. The instances of discipline over the years have been few in number, and the same policy applies to independent drivers as to the drivers of company owned cars. Any such discipline, whether it took the form of suspension or dismissal, was applied infrequently and to discourage conduct that would be harmful to the business, whether committed by an independent driver or a company driver.

[22] The responsibility for investment and management is one of the specific heads of the four-in-one test that was formulated by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. Canada*.[7] In the present case the drivers have little or no investment. The major assets used by them are the vehicles and the computer system. The respondent does not assert that those drivers who own the cars they drive are in business on their own account, although vehicle ownership is the most significant distinguishing fact between the two groups of drivers. The thrust of this aspect of the analysis is to distinguish between wage earners and entrepreneurs. There are many entrepreneurs who do not own the assets that they use in their businesses, but rent them. In the present case the drivers do not own the cars they drive, but both the capital cost and the operating cost of those vehicles is paid for, by the appellant, from the 60% of gross receipts that the drivers turn in at the end of every shift. From an economic perspective, part of the drivers' gross receipts go to pay those costs.

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7 [1986] 3 F.C. 553.

[23] The chance of profit and risk of loss, as it was put first by W. O. Douglas,[8] and later by Lord Wright,[9] is an element of the fourfold test, but it is not necessarily to be applied, as the respondent would have it, in a technical way. Again, its purpose is to help distinguish the person working in someone else's business from the person who has a business of his own. It is this distinction that led Cooke J. to express the test in this way in the *Market Investigations*[10] case:

> … the fundamental test to be applied is this: "Is the person in business on is own account? If the answer to that question is "yes", then the contract is a contract for service. If the answer is "no" then the contract is a contract of service.

This formulation of the issue was specifically approved by the Federal Court of Appeal in *Wiebe Door*, and by the Supreme Court of Canada in *Sagaz*. Here the drivers are indistinguishable from the independent owner-drivers in most respects. Both groups have the same call and dispatch service 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. It is not disputed that the independent drivers are in business for themselves. I do not consider that paying for the use of the vehicle and its license as part of the percentage paid to the appellant rather than directly through ownership is a distinction that leads to the conclusion that the drivers of the company-owned cars are servants.

[24] There was evidence establishing that an experienced driver who used the computer system to good advantage could earn considerably more than one who did not. By being in the right place at the right time a driver could significantly increase his gross revenues, and therefore his income from a shift. The risk of loss is not great for either group. It consists largely of the possibility of losing cash, the potential cost of an at-fault accident, or a fare who does not pay. None of these are frequent

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8 "*Vicarious liability and Administration of Risk I*" (1928-9), 38 Yale L.J. 584.

9 *Montreal v. Montreal Locomotive Works Ltd*., [1947] 1 D.L.R. 161 @ 169.

10 *Market Investigations, Ltd v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.) @ 737-8.

occurrences, and both groups are susceptible to them. Although the independent drivers have an investment in their vehicle, insurance coverage would minimize the risk of loss for them.

[25] The respondent's counsel argues that the degree of integration of the company drivers into the appellant's business favours the conclusion that they are servants, not contractors. I do not agree, because there is little if any significant difference in the extent to which the two groups of drivers are integral to the City Cab business. A customer calling for a taxi, or hailing one on the street, would not be able to tell whether the driver was operating his own cab or one owned by the appellant. The integration test is not helpful in this case.

[26] This is not a case such as *Royal Winnipeg Ballet v. Canada*,[11] where there was some common understanding as to the relationship of the parties. Two of the drivers called by the respondent to give evidence were asked whether they considered themselves to be in business on their own account. Mr. Craig thought that he was an employee. Mr. Denholm understood that he was in business for himself. Mr. Sayle said that he had always considered the drivers to be self-employed. Counsel for the respondent also placed considerable emphasis on the fact that the appellant paid its drivers 5% vacation pay, paid WSIB premiums, and remitted the GST on the gross receipts of the drivers. Mr. Sayle explained that the provincial authorities had required him to pay vacation pay and that he chose to accept that rather than fight it for pragmatic reasons. The legal liability to make the WSIB premiums is far from clear, but it is understandable that the company would not be inclined to make a major issue of it. Mr. Sayle explained that if the drivers were left to account for GST on their own, it would be complicated for them if they were not registered. To ensure it was paid properly, the commission rate was adjusted to take it into account and the company assumed the liability. This may have been a mistaken view of the way in which Part IX of the *Excise Tax Act*[12] is supposed to apply, but it is not determinative of the issue that I have to decide.

[27] The evidence satisfies me that the correct answer to Cooke J.'s question is "yes, these drivers are in business for themselves". In *Pemberton Taxi Ltd. v. M.N.R.*,[13] a very similar factual context, Bonner J. said this:

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11 [2007] 1 F.C. 35.

12 R.S. 1985, c. E-15 as amended.

13 *Supra*, note 2.

> … 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.

He then went on to conclude that the driver was in business on his own account. The same is true of the present case. The appeals will therefore be allowed and the assessments vacated.

Signed at Ottawa, Canada, this 23rd day of April, 2009.

"E.A. Bowie"

Bowie J.

CITATION:	2009 TCC 218
COURT FILE NO.:	2006-1655(CPP)
STYLE OF CAUSE:	CITY CAB (BRANTFORD-DARLING ST.) LIMITED and MINISTER OF NATIONAL REVENUE and THOMAS ARMSTRONG
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DATE OF JUDGMENT:	April 23, 2009

APPEARANCES:

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