Docket: 2009-3137(EI)

BETWEEN:

VIPAN K. BANSAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ALBERTA MOTOR ASSOCIATION,

Intervener.

Appeal heard on common evidence with the appeal of
Vipan K. Bansal (2009-3135(CPP))
on May 18, 2010, at Edmonton, Alberta.

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Adam Gotfried
Counsel for the Intervener:	Angus K. Ng

JUDGMENT

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

Signed at Ottawa, Canada, this 21st day of June 2010.

"Paul Bédard"

Bédard J.

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Bédard J.

Citation: 2010 TCC 340
Date: 20100621
Dockets: 2009-3135(CPP),
2009-3137(EI)

BETWEEN:

VIPAN K. BANSAL,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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ALBERTA MOTOR ASSOCIATION,

Intervener.

REASONS FOR JUDGMENT

Bédard J.

[1] These appeals are from decisions by the Minister of National Revenue (the "Minister) under the *Canada Pension Plan* ("CPP") and the *Employment Insurance Act* (the "Act") that during the period from January 1, 2008 to October 21, 2008 (the "Relevant Period") the Appellant was not employed by the Alberta Motor Association (the "Payor") in pensionable and insurable employment.

[2] The Payor carried on, *inter alia*, a business of training and providing instruction to clients who wanted to obtain vehicle operator's licences. The Payor hired the Appellant as a driving instructor.

[3] The Appellant's position is that he was employed under a contract of service.

[4] Each case in which the question of whether a person is an employee or an independent contractor arises must be dealt with on its own facts. The four components of the composite test enunciated in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, must each be assigned its appropriate weight in the circumstances of the case. Moreover, the intention of the parties to the contract has in recent decisions of the Federal Court of Appeal become a factor whose weight seems to vary from case to case (*Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87; *Wolf v. Canada*, [2002] 4 F.C. 396; *City Water International Inc. v. Canada*, 2006 FCA 350; *National Capital Outaouais Ski Team v. M.N.R.*, 2008 FCA 132).

[5] The facts on which the Minister relied to render his decisions in the EI case (2009-3137(EI)) and in the CPP case (2009-3135(CPP)) are set out in paragraph 5 of each Reply to the Notice of Appeal as follows:

a. the Payor operated as a membership based association; **(admitted)**

b. the Payor had clients who wanted to obtain motor vehicle operator's licences; **(admitted)**

c. the Appellant was hired as a driving instructor; **(admitted)**

d. the Appellant's duties included accepting or rejecting students, contacting students, scheduling training, picking up students, providing instruction and record keeping; **(denied)**

e. the Appellant entered into a written contract with the Payor which stated that the Appellant was a contractor and not an employee; **(admitted)**

f. the Appellant performed his services in his vehicle; **(denied)**

g. the Appellant had been under contract with the Payor since 2006; **(admitted)**

h. the Appellant earned a set fee of $26.00 per hour; **(admitted)**

i. the Appellant's hourly fee was negotiable; **(denied)**

j. the Appellant also received fees for new bookings, student home pickups and a fuel subsidy; **(admitted)**

k. the Appellant invoiced the Payor; **(admitted)**

l. the Appellant did not receive any employee benefits such as health, dental or vacation pay; **(admitted)**

m. the Payor did not guarantee the Appellant a minimum amount of pay; **(admitted)**

n. the Payor's hours of operation were from 8:00AM to 5:00PM, Monday to Saturday; **(admitted)**

o. the Appellant did not have a set schedule of hours or days of work; **(denied)**

p. the Appellant set his own schedule of hours and days of work; **(admitted)**

q. the Appellant could work anytime between 8:00AM and 10:00PM, Monday to Sunday; **(admitted)**

r. the Appellant did not have a set minimum number of hours of work required; **(admitted)**

s. the Appellant kept a record of his hours worked; **(admitted)**

t. the Payor did not direct the Appellant: **(denied)**

u. the Payor did not supervise the Appellant; **(denied)**

v. the Appellant set his own priorities and deadlines; **(denied)**

w. the Payor provided the Appellant with the names of the students; **(admitted)**

x. the Appellant contacted the students and scheduled the road instruction; **(admitted)**

y. the Appellant had the right to refuse work; **(denied)**

z. the Appellant was not required to report to the Payor's premises; **(denied)**

aa. the Appellant did not provided [*sic*] services at the Payor's premises; **(denied)**

bb. the Payor provided the Appellant with an in-vehicle lesson guide; **(admitted)**

cc. the Appellant chose his own method of teaching; **(denied)**

dd. the Appellant chose the routes for the lessons; **(admitted)**

ee. the Appellant was able to hire his own helper for administrative tasks; **(admitted)**

ff. the Appellant did not require the Payor's approval for leave; **(denied)**

gg. the Appellant provided the major tool which was the vehicle; **(admitted)**

hh. the Payor provided vehicle signage, mirrors, traffic cones and an emergency brake; **(admitted)**

ii. the Appellant paid for the installation and removal of the emergency brake provided by the Payor; **(admitted)**

jj. the Appellant incurred operating expenses including vehicle expenses, liability insurance and a driver training endorsement; **(admitted)**

kk. the Appellant's vehicle expenses included insurance, maintenance and fuel; **(admitted)**

ll. the Appellant had a chance of profit and a risk of loss; **(denied)**

mm. the Payor's intention was that the Appellant was a contractor and not an employee; **(admitted)**

nn. the Appellant had a GST number; **(admitted)**

oo. the Appellant charged the Payor GST; **(admitted)**

pp. the Appellant had operated his own taxi business since 1990; **(admitted)**

qq. the Appellant maintained his own business books and records; **(admitted)**

rr. the Appellant declared business income and business expenses on his 2006, 2007 and 2008 income tax returns, and **(admitted)**

ss. the Appellant was in business for himself while performing services for the Payor. **(denied)**

[6] The Appellant and Mr. Richard James Lang, the Payor's manager, were the only two witnesses.

Appellant's testimony

[7] The Appellant first talked about the Payor's requirement that he works a minimum of 20 hours a week. He added that his relationship with the Payor was terminated because in 2007 he began having health problems that prevented him

from meeting the 20 hours requirement (the "20 hours requirement"). The Appellant went on to reaffirm that his chances of profit and risk of loss were nil.

[8] The Appellant added that he was required by the Payor to attend meetings on the Payor's premises and to pick up clients, likewise at those premises.

[9] The Appellant also explained that, since he was not in a position of equality in bargaining with the Payor, he signed the two contracts (Exhibits R-2 and R-3) without negotiating. In other words, he said that people who wanted to work for the Payor as driving instructors had to sign the Payor's contract as is and consequently had to accept the Payor's legal characterization of that contract. The Appellant added that he intended the relationship to be one of employment. Finally, he testified that he still did not understand the meaning of some of the provisions of the contracts.

[10] The Appellant explained as well that he was required by the Payor to attend a six-week training session before giving lessons to the Payor's clients. He added that he could not choose his own method of teaching since he had to comply with all of the instructions contained in the Payor's *In-Vehicle Instructor's Guide* (the "Guide") (Exhibit R-5). He also testified that four times a year the Payor's chief instructor rode along with him to verify that he was complying with all the instructions contained in the Guide.

Mr. Lang's testimony

[11] Mr. Lang, whose testimony seemed credible, first talked about the 20 hours requirement. He simply said that there was no such requirement but that he suggested to all the driving instructors (that were not employees) that they work at least 20 hours a week since their businesses could not be profitable if they were not doing so.

[12] Mr. Lang added that the training session, the supervision by the chief instructor and most of the instructions contained in the Guide were required under the Alberta transportation regulations.

[13] Mr. Lang also explained that the Payor had during the Relevant Period (and still has) a certain number of driving instructors having employee status. He said that the work performed by those employees was similar to that performed by the Appellant. However, he explained that, contrary to the Appellant, those employees bore no risk and had no chance of profit since they were performing their services in the Payor's cars and were not incurring operating expenses (including vehicle

expenses, liability insurance and a driver training endorsement). He added that, unlike the Appellant, those employees did have a set schedule of hours and days of work, could not refuse to work and were under constant supervision.

[14] Finally, Mr. Lang stated that the gross income of the Payor's driving instructors having independent contractor status varied during the Relevant Period from $10,000 to $100,000.

[15] The evidence also revealed that often, during the years 2006, 2007 and 2008, the Appellant did not work 20 hours a week (see Exhibit R-4). I would point out that the contracts (Exhibits R-2 and R-3) do not contain a requirement to work 20 hours.

Analysis and conclusion

[16] I wish to begin with a few observations concerning the intention factor. First of all, if the intent of the parties is to be a determinative factor or a tie-breaking factor, the intent must be shared by both parties. In other words, if there is no meeting of the minds and the parties are not *ad idem*, intent cannot be a factor. My second observation is that, where the intention of the parties cannot be ascertained (which is the case here), it is quite proper, indeed necessary, to look at all the facts to see what legal relationship they reflect. In that regard, the four components of the composite test enunciated in *Wiebe Door* are relevant and helpful in ascertaining the intent of the parties to the contract and the legal nature of the contract.

[17] Turning now to the facts, what factors suggest that the Appellant was in business on his own account?

Tools

i. He provided his own car.

Risk of loss

ii. He had liability exposing him to a risk of loss.

iii. The Appellant had vehicle expenses, including insurance, maintenance and fuel.

iv. The Appellant also incurred operating expenses such as liability insurance and a driver training endorsement.

v. The Appellant also paid for the installation and removal of the emergency brake provided by the Payor.

Chance of profit

vi. The more hours (over 20) the Appellant worked the greater were his chances of profit, which was not the case for the driving instructors having employee status since they were limited in the number of hours they could work.

Control

vii. The Appellant did not have a set schedule of hours or days of work. It seems to me that the Appellant's testimony regarding the 20 hours requirement was not very credible (see paragraphs 11 and 15 of these reasons). The Appellant's testimony that non-compliance with the 20 hours requirement would trigger the termination of the contract was not any more so since in the years 2006, 2007 and 2008 he often did not meet this requirement and yet the contract was not terminated.

viii. He could chose the routes for the lessons.

ix. He could work for anyone else (except as a driving instructor) during the Relevant Period.

Behaviour as an entrepreneur

x. He behaved like an independent contractor in that he invoiced the Payor, charged the Payor GST, maintained his own books and records, and reported business income and business expenses on his 2006, 2007 and 2008 income tax returns.

[18] Now let us look at the factors suggesting that the worker was an employee.

Tools

i. The Payor provided vehicle signage, mirrors, traffic cones and an emergency brake.

Control

ii. The Payor provided the Appellant with a guide and the Appellant had to comply with all the instructions therein regarding the method of teaching.

iii. The Appellant could not have someone replace him.

[19] Here we have an Appellant who, if I accept his testimony, was an employee (even though he behaved for a number of years like an independent contractor), and yet he performed his services in his own vehicle, paid for the installation and removal of the emergency brake provided by the Payor, incurred operating expenses,

including vehicle expenses (insurance, maintenance and fuel), paid for liability insurance and a driver training endorsement, effectively had exposure to all kinds of liability, did not have a set schedule of hours or days of work and could, in a way, set his own deadlines and priorities. I cannot find in these circumstances that the existence of some degree of control by the Payor over the Appellant outweighs the overall view that the Appellant was in business on his own account.

[20] For these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 21st day of June 2010.

"Paul Bédard"

Bédard J.

CITATION:	2010 TCC 340
COURT FILE NOS:	2009-3135(CPP), 2009-3137(EI)
STYLE OF CAUSE:	VIPAN K. BANSAL v. M.N.R. and ALBERTA MOTOR ASSOCIATION
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	May 18, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	June 21, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Adam Gotfried
Counsel for the Intervener:	Angus K. Ng

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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For the Intervener:	Angus K. Ng Alberta Motor Association Edmonton, Alberta