Docket: 2009-1078(CPP)

BETWEEN:

S K MANPOWER LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
S K Manpower Ltd., (2009-1079(EI))
on March 11, 2010 and continued on May 25, 2010
at Toronto, Ontario

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant:	Domenic Marciano
Counsel for the Respondent:	Iris Kingston

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the assessment dated March 7, 2008 and subsequently confirmed by the Minister of National Revenue is allowed and the assessment is vacated on the basis that the work performed by the Labourers during the Period was neither pensionable nor insurable employment.

Signed at Ottawa, Canada, this 10th day of November, 2010.

"G. A. Sheridan"

Sheridan J.

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Citation: 2010TCC584
Date: 20101110
Dockets: 2009-1078(CPP)
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REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, S K Manpower Ltd., is appealing the assessment of the Minister of National Revenue for unremitted *Canada Pension Plan* contributions and *Employment Insurance* premiums, together with penalties and interest, for the period January 1, 2004 to December 31, 2006 (the "Period") in respect of some 145 workers[1] (the "Labourers").

[2] The Minister's decision turned primarily on his assumption that the Appellant was a "placement or employment agency" within the meaning of subsections 34(1) of the *Canada Pension Plan Regulations* ("CPP Regulations") and 6(g) of the *Employment Insurance Regulations* ("*Employment Insurance Regulations*").

[3] In normal circumstances, for employment to be pensionable or insurable, it need only be shown that there is a contract of service between the worker and the payor pursuant to paragraphs 6(1)(*a*) of the *Canada Pension Plan Act* or

[1] Schedule A, Reply to the Notice of Appeal 2009-1078(CPP) and Schedule A, Reply to the Notice of Appeal 2009-1079(EI).

paragraph 5(1)(*a*) of the *Employment Insurance Act*, respectively. However, where the worker has been placed "in employment" by a "placement or employment agency" (referred to collectively herein as "Placement Agency") under the conditions contemplated by subsections 34(1) of the *CPP Regulations* and 6(g) of the *Employment Insurance Regulations* (referred to collectively herein as "*CPP/EI Regulations*") such employment is deemed to be insurable and pensionable employment:

> *Canada Pension Plan Regulations*, subsection 34(1):
>
> > 34. (1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual. [Emphasis added.]
>
> *Employment Insurance Regulations*, subsection 6(g):
>
> > 6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:
> >
> > > (g) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services. [Emphasis added.]

[4] The term Placement Agency is not defined in the *Employment Insurance Regulations* but is defined for the purposes of subsection 34(1) of the *CPP Regulations* in subsection 34(2) as including:

> … any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

Respondent's Position

[5] The Minister assessed on the basis that the Appellant was a Placement Agency as contemplated by the *CPP/EI Regulations*. That, argued counsel for the Respondent, is sufficient in itself to trigger the application of subsection 6(g) of the *Employment Insurance Regulations*. As for subsection 34(1) of the *CPP Regulations*, the Respondent's position is that the terms and conditions under which the Labourers performed their work and were remunerated were "analogous to a contract of service"; accordingly, their employment was insurable and pensionable.

[6] The Respondent argued alternatively that even if the Appellant was not a Placement Agency, the Labourers were employees and their work was pensionable and insurable under the *Canada Pension Plan* and the *Employment Insurance Act* in accordance with the case law.

Appellant's Position

[7] The Appellant's primary position is that it was not a Placement Agency because its business was broader than the simple placement of workers in employment with or for the performance of services for its clients. The Appellant was providing a distinct service of which the provision of labour was but a part.

[8] Alternatively, if the Appellant was a Placement Agency, counsel for the Appellant argued that the remaining criteria of the *CPP/EI Regulations* had not been satisfied: under subsection 34(1) of the *CPP Regulations*, the terms or conditions on which the employment or services were performed by the Labourers placed with the Appellant's clients and on which the remuneration was paid to them did not constitute a contract of service, nor were they "analogous to a contract of service". And under subsection 6(g) of the *Employment Insurance Regulations*, the Labourers placed with the Appellant's clients did not "perform services for and under [their] direction and control".

[9] Finally, if subsection 34(1) of the *CPP Regulations* and subsection 6(g) of the *Employment Insurance Regulations* do not apply, counsel for the Appellant further argued that even under the traditional common law tests, the work performed by the Labourers was not insurable or pensionable because they were independent contractors.

Facts

[10] The following facts are admitted and/or assumed to be true: the Appellant is a corporation which during the Period, was engaged in the business of contracting out Labourers to third parties, generally farmers, on an "as-needed" and often sporadic basis. The third parties for whom the services were rendered, the location where the work was performed and the duration of each contract changed regularly. The Labourers had no guarantee of work; nor did they have regular or even minimum hours of work. The Labourers were paid either on an hourly or on a piece-work basis. The Labourers were free to work for others; they could retain others to help with their work. They were not required to and did not report regularly to the Appellant's place of business. The Labourers had no job benefits or job security. If there was no demand for work, they did not report to work and had no right to be paid by the Appellant. The Appellant did not control the manner in which the Labourers performed their work and did not directly supervise the work they performed. The Appellant did not supply any tools other than work gloves to them. Instructions as to the specific work that needed to be performed by the Labourers generally came from the third parties.

Findings of Fact

[11] In addition to the above are the following findings of fact: the directing mind of the Appellant is Jaswant ('Jassie') Singh Kooner. I found Mr. Kooner to be a credible witness who explained in a clear and organized fashion the nature of the Appellant's business and the events leading up to the Minister's assessment. His evidence was corroborated by his accountant, Syed Taqiuddin and a former Labourer, Dalwinder Singh Sapran. Though not directly relevant to the assessments under appeal, the testimony of Mr. Kooner and Mr. Taqiuddin regarding an investigation conducted by Human Resources and Development Canada ("HRDC"), the department then responsible for unemployment insurance benefits, of the Appellant's employee practices in 1996 was unchallenged on cross-examination and lent credibility to their evidence as to the status of the Labourers during the Period. More will be said about this below. The Appellant's third witness, Mr. Sapran, testified in Punjabi; I found his evidence generally believable.

[12] From the inception of its business in 1996, the Appellant has been contracting with farmers and nursery owners within a 100-kilometer radius of Toronto (referred to collectively herein as "the Farmers") to pick and pack produce for shipping to large urban supermarket chains. The work under such contracts included picking and

packing corn, carrots, cabbage, onions, tomatoes, strawberries and flowers and in respect of nurseries, transplanting, weeding, and labeling flats of bedding plants.

[13] The Appellant calculated its cost of providing such services according to the kind of produce and the nature of the services required in any particular case. For example, Farmers might require enough carrots to be picked and packed in 50-pound bags for shipment to a supermarket the following day; on other occasions, it might be picking boxes of strawberries or transplanting bedding plants in a nursery. In all cases, the key elements were the quantity of product needed for any particular contract and the time within which the product had to be ready for market. Thus, in order to quote a price to Farmers requesting the Appellant's services, Mr. Kooner would first ask about the specifications of the work. He would also question the Farmers about any peculiarities in the physical surroundings in which the work would be performed; for example, if the conveyor belt used in the packing process on a particular farm could only accommodate a certain number of Labourers, that figure would be factored into the equation. The Farmers did not request any particular Labourer or number of Labourers; their only concern was to have the right quantity of clean, flawless produce ready for delivery. How that came about was left to Mr. Kooner's expertise. All of the contracts with the Farmers were oral; the Appellant invoiced[2] the Farmers biweekly for its services.

[14] The only contract not with Farmers during the years in question was with Natural Resources Canada ("NRC"). Unlike the oral agreements the Appellant made with the Farmers, the Appellant's contractual arrangements with NRC proceeded by government purchase orders[3]. Because the NRC project was outside Mr. Kooner's normal experience, he first visited the location with a departmental official to determine what needed to be done. As a result of their meeting, an agreement was reached pursuant to which the Appellant was "to provide 10 individuals to perform manual weeding services"[4] in preparation for growing experimental crops. The reason for specifying the number of Labourers had to do, not with NRC's determination of how the work was to be done, but rather with the secure nature of the property. Because of the experimental nature of the project, there were security guards on the NRC job site; they needed to know how many Labourers (but not which ones) were authorized to be on the premises.

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[2] Exhibit A-3.

[3] Exhibit A-2.

[4] Exhibit A-1.

[15] Apart from these differences, Mr. Kooner followed the same contracting procedure with NRC as he had done with the Farmers. Once he had the job specifications, he calculated the cost of providing such services and quoted a price to the Appellant's client. When an agreement was reached, Mr. Kooner would then set about finding Labourers interested in performing the work.

[16] For this, Mr. Kooner turned to a roster maintained by the Appellant. Mr. Kooner was very active in the Sikh community, particularly the Temple. Often, newly arrived immigrants looking for work would be referred to the Appellant by other members of the local community. The roster was constantly in a state of flux: the work was seasonal, people were always looking for better jobs or moving on to other locations across Canada; meanwhile, new people were constantly arriving. Of those on the roster at any given time, some would accept only certain kinds of work; for example, picking cabbage was more difficult than tomatoes because it required heavy lifting and bending. Some people would not accept contracts that required them to work on their knees; still others preferred to do work that paid by the piece rather than hourly. Factoring in all these criteria took time. Mr. Kooner said that to fulfill the Appellant's obligations under any particular contract he would normally have to make 30 to 35 phone calls to find 10 Labourers willing to take on the work. As to the rate the Labourers were paid, the price offered by the Appellant was a percentage of its cost of providing that particular service to the Farmer pursuant to their agreement. For example, if the cost of picking strawberries had been set at $4 per box, the rate the Labourers could expect to receive under their agreement with the Appellant would be not more than $3.00-$3.25 per box.

[17] Mr. Kooner was unequivocal in his testimony that whenever he was contacted by individuals looking for work, he was sure to make clear that they would be working as independent contractors and not as employees of the Appellant. I did not understand Mr. Kooner to say that he delivered a sophisticated legal analysis of the distinction between these terms but I am satisfied that he explained they would be considered self-employed which, in practical terms, meant that they would receive no employment or pension benefits and no tax would be deducted from their earnings.

[18] As mentioned above, I found Mr. Kooner particularly convincing on this point in no small part because of his experience with HRDC in 1996, the Appellant's first year of operation. Being unsure when setting up his business whether the Appellant should treat its workers as employees or independent contractors, Mr. Kooner consulted his accountant, Mr. Taqiuddin, who advised that this was a "grey area" and to be on the safe side, the Labourers should be paid as employees. Mr. Kooner took his advice and for the 1996 taxation year, the Appellant made all the necessary

deductions in respect of employment insurance, Canada Pension Plan and income tax and issued T-4's for its workers; at the end of the season, the Appellant also issued Records of Employment.

[19] Many of the workers subsequently applied for unemployment insurance benefits (as they were then called) thus triggering the interest of HRDC in the Appellant's file. Two investigators were dispatched to the Appellant's place of business to determine if the workers who had applied were, in fact, employees. The Appellant provided all of its records to the investigators who determined that none of the workers was eligible for unemployment insurance benefits and reassessed them for the amount of the benefit claimed and a penalty equal to 100% of that benefit. Needless to say, this caused an uproar among the workers, many of whom were without the means to pay the amounts assessed. Some suspected the Appellant of not having remitted the amounts deducted from their pay. The following passage from Mr. Kooner's testimony gives a flavour of the turmoil that ensued:

> Q. So HRDC was looking to get back the face value of the claim plus 100 percent penalty?
>
> A. Hundred percent penalty.
>
> Q. Okay.
>
> A. When I was interviewed, that was very uncomfortable.
>
> Q. Why is that?
>
> A. It's like I commit some kind of big crime or big fraud. I'm being investigated and I'm -- they ask me questions from the day I born, you know, what -- you just asked me two questions from India. They spend about an hour about looking at my Indian history, and every time I ask them, I said, Well, you know, what's going on? I give you everything. Did I do anything wrong?
>
> The answer, The minute we find you did anything wrong, you'll be talking to the RCMP.
>
> Q. Okay.
>
> A. And Linda Daniluk, time to time keeps insisting me, Mr. Kooner, according to my investigational experience, you're going to end up in jail.
>
> Q. She told you that?
>
> A. Many time, many times. You're going to end up in jail, and my question follows up, Why? Give me the reasons. Then answer, You will hear that reason from RCMP, not from us. But I never got any answer. There's no charges. There was nothing wrongdoing.
>
> But it's like sometime I watch those [TV] shows on *Criminal Minds* and when the people interview, it remind my time, those 22 hours, when I was sitting with those two investigators and they're asking me the questions, and I don't know. I was just going out of my -- what I did?

> I never expected that starting this business and laying off these people is going to end up this kind of nightmare, not only 22 hours interview. I got a number of phone calls on my cell which lasted for hours and hours asking me questions. Every time they interview –
>
> Q. From who? Who did you get –
>
> A. From HRDC, and particularly those two investigators, [Joe] Romano and Linda Daniluk.
>
> And every time they interview my workers -- as I said, I give the names of 45 to 50 workers. Every time they interview these workers, they call me, and for hours and hours I am on their call.[5]

[20] In any case, Mr. Kooner kept the workers abreast of events as they unfolded and ultimately advised them that the Appellant would challenge the Minister's determination. In 2003, some seven years and four lawyers[6] later, HRDC abandoned its plan to collect the amounts assessed. The Appellant was not, however, advised of any final ruling of the workers' status.

[21] The immediate problem facing the Appellant after the 1996 investigation, however, was how to treat the status of its workers in the up-coming growing season. Although HRDC had investigated on the basis that the workers were not employees, that determination had not, at that time, been confirmed (and, indeed, never would be). However, HRDC had identified some of the reasons for rejecting the workers' status as employees: they were able to hire others to help them do their work; they did not have to "punch in" to work each day; it was difficult to create a record of employment for individuals who worked such irregular hours, without any guarantee of work, and at numerous locations. As for the Farmers, they could not confirm the identity of any of the workers, how long or when they had worked and could do no better than to describe them globally as a "number of Sikhs". Armed with this information, Mr. Kooner consulted lawyers and accountants on how the workers ought to be characterized in future years but was advised that given the fact-driven nature of the question, there was no definitive answer as to whether the workers were, in law, employees or independent contractors. The upshot was that Mr. Kooner decided the safer course would be to conform with the position HRDC had taken during its investigation and to treat the workers as independent contractors.

[22] Thus it was that in 1997 the Appellant stopped deducting and remitting amounts for employment insurance, CPP and income tax and no longer issued Records of Employment at the end of the season. While the Appellant no longer

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[5] Transcript (March 11, 2010), page 58, lines 19-25 to page 60, lines 1-19.

[6] Exhibits A-4, A-5, A-7, A-8 and A-9.

reported amounts paid to the workers as “employment income”, it did report their earnings as “other income” on T-4A forms. He met with the workers and explained these changes; they accepted them. While Mr. Kooner did not contact HRDC, as it happened the investigating officials also became aware of the Appellant’s new arrangements:

> Q. Did you advise the Government of Canada about your decision to switch the workers to independent contractors?
>
> A. No, I didn't.
>
> Q. Did they know?
>
> A. Well, HRDC knew, and they knew in '97. Same gentleman, Joe Romano, called me in '97 and he said, Mr. Kooner, how many ROE you intend to issue this year? I said, Why are you asking me this question? He said, No, I'm just asking. You got so many last year and I want to -- just roughly idea, tell me how many you going to issue this year?
>
> I said, Well, zero, none. He said, How come? You are out of business? So how you doing? I said I'm treating everybody as subcontractor, so there's no deductions and nobody coming to apply for this UIC benefit.
>
> He said, You believe that's the right way to do it? I said, Yeah, I talked to some professionals. Yeah, I believe it's the right way to do it. He said, Okay, tomorrow I'm going to Revenue Canada -- it's called CRA, whatever he's calling. He said, I'm going to Revenue Canada and I going to talk to source deduction examiner, and I going to talk to them if you're doing right thing or not. I said, That's fine.
>
> So that was the last conversation with the HRDC in '97.[7]

[23] The final chapter in this saga occurred in 1999 when out of the blue, the Appellant was contacted by a Trust Examiner looking into a claim for employment insurance benefits made by one of the Appellant’s workers. Again, the official arrived at the Appellant’s place of business to review its records; Mr. Taqiuddin met with him to explain what had occurred in 1996 and why the workers had, since that time, been treated as independent contractors. Shortly after beginning his review of the Appellant’s records, the official left, advising that if there was a problem he would return. He did not. Nothing more was heard until the assessment in 2008 giving rise to these appeals.

[24] As mentioned above, none of Mr. Kooner’s or Mr. Taqiuddin’s testimony in respect of the HRDC investigation and follow-up was challenged on cross-examination. Whether the department made the correct ruling or was justified in its handling of the file is not the question before me. I recount the above only to illustrate why it strikes me as more likely than not that during the Period, Mr. Kooner

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[7] Transcript (March 11, 2010), page 83, lines 15-25 to page 84, lines 1-18.

went to some pains to ensure that individuals looking to perform services for the Appellant were advised that they would do so as independent contractors. Mr. Sapran (whose testimony was also unchallenged) corroborated Mr. Kooner's testimony by saying he had been made aware of his status; he explained that he understood that there was a difference between an employee and an independent contractor as, since his arrival in Canada and prior to his accepting work with the Appellant, he had both worked as an employee and been self-employed.

[25] The Crown's witnesses, Chander Prabha Sharma and Jasvir Kaur Bains, were also asked about their understanding of their status while working as Labourers. As with Mr. Sapran, their testimony was translated by a Punjabi interpreter. I regret to say I was unable to give their evidence much weight. Part of this had to do with the technical nature of the question (which as counsel for the Respondent reminded the Court, not even the Appellant's Bay Street lawyer could definitively answer) but was also partly a function of what was lost in translation. Ms. Bains, for example, struck me as being supremely annoyed at having to testify. She was impatient with the interpreter and often would refuse to listen to his translation of the question, interrupting him with some sort of an answer before he could complete the translation. After a long exchange in Punjabi between Ms. Bains and the interpreter, the answer would come then back in English, often unconvincingly brief. As for Ms. Sharma, she said at first that she did not know Mr. Kooner but then later admitted that she did. Similarly, she testified initially that she had never applied for employment insurance benefits, but later remembered she had, "once".

[26] On balance, I found Mr. Kooner's evidence more convincing than either of the Respondent's witnesses. I am satisfied that when the Labourers agreed to take on the work, they knew, at the very least, that they could not apply for any government benefits based on the work they agreed to perform at the Farmers' farms.

[27] Returning, then, to the conduct of the Appellant's business during the Period, once an agreement had been reached between the Appellant and the Labourers, on the day the work was to be performed, the Appellant would send a driver to pick up the Labourers to take them to the work location. The Labourers had no idea where the farms were or who owned them. They rarely had any contact with the Farmers and even if they had, would not likely have had any communication with them as most of the Labourers did not speak English. In any case, there would have been no reason for the Farmers to tell the Labourers what to do as they had already provided all of the necessary information to Mr. Kooner when negotiating their contracts; for example, having already agreed that carrots were to be packed in 50-pound bags for a specific price, the Farmer would be unlikely to intervene with the Labourers to

demand they use, for example, 2-pound bags. Apart from the sheer silliness of such a change, from a practical perspective, it would have altered the contract price because it would have taken far longer to pack the same number of carrots in 2-pound bags. Furthermore, in the unlikely event that additional instructions might be required, the Appellant's driver was on site to give direction in their native tongue. The driver was also responsible for quality control for the produce picked and/or packed. Using a carrot-packing contract again as an example, the Appellant was obliged under its agreement with the Farmer to ensure that none of the bags contained rotten or malformed carrots since the discovery of even a few of such carrots would result in the immediate rejection of the entire shipment by the Farmer's client, the supermarket. Mr. Kooner said that it rarely happened but when it did, the Farmer would look to the Appellant to redo the packing job at no additional cost; the Appellant's loss would, in turn, be passed on to the Labourer who had made the error to redo the job without any additional pay.

Analysis

1. Was the Appellant a Placement Agency?

[28] The starting point for the Respondent's position that the Appellant was a Placement Agency is paragraph 1 of the Notices of Appeal stating that "the Appellant is a corporation engaged in the business of contracting out labour/workers to third parties, generally farmers". This, submitted counsel for the Respondent, is essentially an admission of its status as a Placement Agency both as defined in the *CPP/EI Regulations* and according to the jurisprudence.

[29] I am not persuaded by these arguments. First of all, while perhaps paragraph 1 could have been drafted with a little more precision, it is clear from the Notices of Appeal as a whole that the Placement Agency issue was in dispute. As for the case law, based on the facts set out above, I am satisfied that the Appellant has met its onus of rebutting the Minister's assumption that it was a Placement Agency and of showing that the Appellant was in the business of providing a distinct service to its clients, rather than the mere placement of individuals or persons with them.

[30] Turning, then, to a consideration of the Respondent's arguments, counsel for the Respondent referred the Court to *Dataco Utility Services Ltd. v. M.N.R.*[8] and

[8] [2001] T.C.J. No. 372. (T.C.C.).

Supreme Tractor Services Ltd. v. The Minister of National Revenue[9] as the basis for the Crown's argument that because the Appellant's contracts with the Farmers were oral, there was insufficient evidence that the Appellant was supplying to them something more than labour. In each of those cases, the payor was challenging the Minister's determination that it was a Placement Agency. After examining the written agreements between the respective payors and their clients governing the provision of workers, Porter, D.J. concluded that the services provided were broader than those of a Placement Agency and accordingly, the *CPP/EI Regulations* did not apply.

[31] In *Dataco*, the contract stated that the workers were to provide "certain meter-reading and associated services"[10]. Given the fact-driven nature of these cases, it bears repeating the findings underlying the Court's decision that the payor was not a Placement Agency:

> It was not engaged in the business of placing individuals in employment or performance of services or of securing employment for individuals for a fee or reward or other remuneration. Its business was the provision of services themselves in the field of road building and maintenance. It sought out contracts for work. It had a responsibility to meet the terms of these contracts and provide the service for which it contracted. In doing so, it of times hired regular employees and at other times engaged independent contracts to carry on the work. But it was the work itself which it contracted to undertake, not simply to provide personnel to the MD for some fee or reward. <u>If the Worker in question became unavailable, it had an ongoing legal responsibility to continue to provide the service. That, it seems to me, is the essential difference</u>. [Emphasis added.][11]

[32] In *Supreme Tractor*, the broader service provided by the payor was "summer and winter maintenance of approximately 163 kilometers of gravel and asphaltic surfaced roads"[12]. Again, the Court rejected the Minister's argument that the payor was a Placement Agency on the following grounds:

> ... Clearly, the contract in each case is a contract for services with an independent contractor, the Appellant. Whether the Appellant was to use its own employees or

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[9] [2001] T.C.J. No. 580. (T.C.C.).

[10] Above, at paragraphs 19 and 22.

[11] Above, at paragraph 38.

[12] Above, at paragraph 20.

> further subcontract with other independent contractors by way of contracts for services, was clearly of no concern to the Utility Companies. Whilst the latter had certain policies, procedures and standards which it required the Appellant's personnel to adopt in the performance of their duties, that was by way of contract with the Appellant. That point should not be overlooked. The personnel used by the Appellant to provide the services were not required to report to the Utility Companies in order to take directions from them. Those personnel, whether they were employees or subcontractors with the Appellant, were required to follow the directions given to them by the Appellant to provide the services which they had contracted to provide for the Appellant, in accordance with the conditions that the Appellant had accepted in the master contracts with the Utility Companies. I do not see that they were in any way under the direction and control of the Utility Companies. The only right to control, held by the Utility Companies, came by virtue of their contract with the Appellant. The fact that the master contracts called for certain things to be done in certain ways, at certain times and allowed the Utility Companies a veto (so to speak) over any particular individual performing that service, did not transform the basic nature of the contract from a contract for services into a placement of personnel under the direction and control of the Utility Companies by a placement agency. The workers' commitment was very much established by their contracts with the Appellant (Exhibit A-3), not anything flowing to them directly from the Utility Companies. The Appellant in turn was obligated to meet its commitments to the Utility Companies. Thus, those requirements were part and parcel of the contracts themselves in both cases.[13] [Emphasis added.]

[33] Leaving aside for the moment the Respondent's argument regarding the lack of written agreements between the Appellant and the Farmers, it strikes me that the facts in *Dataco* and *Supreme Tractor* are very similar to the present matter. Like the payors in those cases, the Appellant was doing more than merely placing workers with its clients. It was up to Mr. Kooner to gather information from the Farmers regarding their specific needs, to assess the kind and number of Labourers required to meet such needs, to calculate the cost of doing so, and to get the Labourers to their farms. The Farmers relied on the Appellant to take care of such details. All they wanted from the Appellant was a labour force capable of properly performing the services according to their specifications within the time required. It made no difference to them who the Labourers were, what their individual qualifications might have been, how many there were or even, whether replacement workers or sub-workers performed the work. It was irrelevant because the specifications of the nature of the work to be done and its price had already been agreed with the Appellant under their contract.

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[13] Above, at paragraph 39.

[34] In the event that their contractual requirements for the performance of such services were not met, the Farmers looked to the Appellant to remedy the breach. I accept the evidence of Mr. Kooner and Mr. Sapran that if the supermarkets rejected the produce the Labourers had packed, it was up to the Appellant to redo the work at no cost to the Farmers and that he then looked to the Labourer at fault to absorb its loss. That the Appellant had the right to do so is inconsistent with the notion that the Labourers were employees; it is also indicative of a separate contractual relationship between the Appellant and the Labourers.

[35] Returning then to the Minister's concerns with the lack of written agreements, counsel for the Respondent cited *Big Sky (Lundle) Drilling Inc. v. Minister of National Revenue*[14]. In that case, Porter, D.J. rejected the appellant's contention that it was not a Placement Agency on the following basis:

> "… The contract between the oil companies and the drilling companies are also not a matter of evidence. Thus, who was required to do what, rests very much on the verbal evidence of Lundle. I did not glean from the evidence that the Appellants took on the responsibility for actually operating the drilling equipment, much as a general contractor might do. Whilst there was some general management services provided, these, it seemed to me, rested far more on the plane of personnel and accounting than the actual operation of the drilling rig. I do not see from the evidence before me any contractual liability on the part of the Appellants to perform any drilling services, as opposed to providing the personnel to the drilling companies to enable the latter to do the actual drilling..."[15]

[36] Even if the decision in *Big Sky Drilling* were binding on me, I do not read that case to say that nothing less than a written contract will suffice to establish that a payor was providing greater services than that of a Placement Agency; rather, Porter, D.J. was simply not convinced on the strength of the oral evidence in that particular case[16]. For the reasons mentioned above, I have no such concerns in the present matter.

[37] Counsel for the Respondent invited the Court to draw a negative inference from the fact that the Appellant had not called any of the Farmers to testify; Mr. Kooner's uncontradicted evidence was, however, that one of the reasons HRDC

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[14] [2002] T.C.J. No. 16. (T.C.C.).

[15] Above, at paragraph 39.

[16] Above, at paragraph 49.

had determined that the Labourers were not employees in 1996 was that the Farmers knew nothing about them and had no involvement with their work. In all the circumstances, including the facts admitted and assumed by the Minister in the Reply and the persuasiveness of Mr. Kooner's evidence, the Appellant cannot be faulted for not having called upon the Farmers to testify. And before leaving the subject of uncalled witnesses, I note that no departmental officials were called by the Respondent. While I am mindful of the fact that the onus is on the Appellant to make its case, I would have had a more complete picture of the facts had the Minister provided its perspective of the events underpinning this appeal.

[38] Counsel for the Respondent further submitted that the purchase orders[17] between the Appellant and NRC were clear proof of the Appellant's provision of manpower and nothing more. Again, I am not convinced. With respect, the bureaucratese that typifies such documents tends to diminish their usefulness as interpretive aids; to wit, the description therein of the land to be weeded as a "concentrated woody biomass"[18]. More importantly, however, I accept Mr. Kooner's evidence that the specification of "10 individuals" to perform weeding services had to do with security concerns rather than NRC's interest in or control over the actual performance of the work.

[39] Counsel for the Respondent sought to distinguish the Appellant's circumstances from the situation of a general contractor on a building site, for example, where other services than labour would need to be scheduled and provided. I can see little difference between the Appellant assembling a team of workers to provide picking, packing and weeding services for a short time at designated farms and an independent sub-contractor on a construction site who rolls in with a crew of drywallers to complete a specific portion of an overall building project. In *Vulcain Alarme Inc. v. The Minister of National Revenue*[19], cited by Porter, D.J. in both *Supreme Tractor* and *Big Sky Drilling*, Létourneau, J.A. summarized it this way:

> [4] ... A contractor who, for example, works on site on a subcontract does not serve his customers but those of the payer, that is the general contractor who has retained his services. The fact that Mr. Blouin had to report to the plaintiff's premises once a month to get his service sheets and so to learn the list of customers requiring service, and consequently the places where his

[17] Exhibits A-1 and A-2.

[18] Exhibit A-1.

[19] (1999) 249 N.R. 1. (F.C.A.).

> services would be provided, does not make him an employee. A contractor performing work for a business has to know the places where services are required and their frequency just as an employee does under a contract of employment. Priority in performance of the work required of a worker is not the apanage of a contract of employment. Contractors or subcontractors are also often approached by various influential customers who force them to set priorities in providing their services or to comply with the customers' requirements.

[40] Porter, D.J. relied on the *Vulcain* analysis to formulate the essence of the question to be addressed in the determination of what constitutes a Placement Agency under the CPP/EI Regulations:

> The question as I see it is not so much about who is the ultimate recipient of the work or services provided … but rather who is under obligation to provide the service. If the entity alleged to be the Placement Agency is under an obligation to provide a service over and above the provision of personnel, it is not placing people, but rather performing that service and is not covered by the Regulations.[20]

[41] This passage was cited in the recent Federal Court of Appeal decision, *Ontario Long Term Care Providers Inc. v. The Minister of National Revenue*[21] as "… addressing the difficulty in insuring that the placement agency provisions not apply to persons, such as a subcontractor, providing services which require that workers attend to the premises of the client and perform functions, sometimes at the direction of the client. The question in this regard is whether the person concerned is merely supplying workers or is doing so in the course of providing a distinct service."[22]

[42] The appellant, OLTCPI, was in the business of providing dieticians and social workers to its related company and sole client, Leisureworld Inc., Ontario's largest operator of long term care facilities for seniors. OLTCPI also provided certain bulk purchasing services for all of Leisureworld's nursing homes.

[43] Unlike the Labourers in the present case and like the toolpushers in *Big Sky Drilling*, the worker's individual expertise in *Ontario Long Term Care Providers Inc.* had been specifically matched with the needs of the payor's client. Further, the worker in *Ontario Long Term Care Providers Inc.* "… had to report and account for

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[20] In *Supreme Tractor*, at paragraph 13; in *Big Sky Drilling*, at paragraph 19.
[21] 2010 FCA 74. (F.C.A.).

[22] Above, at paragraph 30.

every minute of the day"[23] to Leisureworld and was "… assigned by [OLTCPI] to Leisureworld in order to answer to Leisureworld's specific needs and provide the particular services [she was] called upon to provide by the Leisureworld staff."[24] Other significant differences are that OLTCPI had only one client, its related company, Leisureworld, and when recruiting workers for it, OLTCPI advertised on the internet using Leisureworld's job description and Leisureworld's letterhead.

[44] In upholding Weisman, D.J.'s conclusion that OLTCPI was a Placement Agency within the meaning of the *CPP/EI Regulations*, the appellate Court noted the similarity between that case and *Big Sky Drilling*. In each case, the trial judge had found that the payor was providing two separate services, one of which was as a Placement Agency. Noël, J.A. cited with approval the trial judge's statement that "there is no requirement in the definition of a placement agency that the placing of workers be the sole function of the agency"[25].

[45] The case at bar is readily distinguishable from both *Big Sky Drilling* and *Ontario Long Term Care Providers Inc.* in that firstly, there is no suggestion that the Appellant was providing two separate services. The only question is to determine the true nature of the one service provided. Another difference is that in those cases, the essence of the payor's obligation to its client was to match an individual worker's skills with the position the client wished to have filled. Here, it is just the opposite: the Labourers themselves were incidental to the Appellant's overall obligation to the Farmers to provide a crew capable of "cultivating soil, planting weeds and harvesting crops"[26]. Even when the Labourers were on site, the Farmers did not involve themselves with the direction of their work. Unlike the workers in the above cases, the Labourers were readily interchangeable to the extent that, without the consent of or consultation with the Appellant or the Farmers, they could hire other individuals to assist them. Neither the Appellant nor the Farmers had the slightest concern with who such sub-workers were or how they might be remunerated for their services. Once hired by the Labourers, the cost under the Farmers' contract with the Appellant remained a function of the Labourers' overall output i.e., so many bags of carrots, so many boxes of strawberries, so many acres weeded.

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[23] Above, at paragraph 17.

[24] Above, at paragraph 33.

[25] Above, at paragraph 34.

[26] Assumption 12(e), Reply to the Notice of Appeal.

[46] For the reasons set out above, I am satisfied that the Appellant was not a Placement Agency within the meaning of the *CPP/EI Regulations*.

2. "Direction and Control" and "Analogous to a Contract of Service"

[47] Should I be in error regarding the Appellant's status as a Placement Agency, it remains to consider for the purposes of subsection 6(g) of the *Employment Insurance Regulations* whether the Labourers were under the "direction and control" of the Farmers; and for subsection 34(1) of the *CPP Regulations*, whether the performance of their services was "analogous to a contract of service".

Subsection 6(g) of the *Employment Insurance Regulations*

[48] For ease of reference, subsection 6(g) of the *Employment Insurance Regulations* is reproduced below:

> 6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:
>
> > (g) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services. [Emphasis added.]

[49] The Respondent's position is that the Labourers were "under the direction and control" of the Farmers is based partly on the admissions in the Notice of Appeal to the effect that the Appellant did not control or supervise the Labourers[27] and that the instructions for the work to be performed came from the Farmers[28].

[50] First of all, while it is literally true that the farmers were the source of the "instructions for the work to be performed", the Farmers furnished such information to Mr. Kooner in the course establishing the parameters of their agreement with the Appellant. The evidence shows that the purpose of providing such specifications was to permit Mr. Kooner to calculate the cost of that service and to assemble a work force capable of carrying it out. By the same token, the fact that the Appellant did not control the Labourers does not lead inexorably to the conclusion that the Farmers did.

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[27] Notice of Appeal at paragraph 3.

[28] Above, at paragraph 8.

While I agree with counsel for the Respondent that the work could not have been performed in a vacuum, i.e., the Labourers must have been under *someone's* control, the Respondent's position overlooks a third possibility; namely, that the Labourers were under their own control, providing their individual labour services to the Appellant as independent contractors under contracts completely separate from the agreements between the Appellant and the various Farmers. This is, in fact, what happened.

[51] Nor do I accept the Respondent's argument that the Farmers had the right to control the Labourers. As discussed above, what the Farmers had was the right to look to the Appellant for the proper performance of the services agreed to under their contracts. They did not involve themselves with the initial selection of the Labourers or their work on site; as a practical matter, the Farmers did not know the Labourers' names or addresses and were unable to communicate with them.

[52] Finally, counsel for the Respondent pointed to the fact that the Labourers used the Farmers' gardening tools, buckets, knives and so on while on the job as being indicative of the Farmers' control over them. I am not persuaded by this argument. Balanced against this is the fact that the Appellant supplied the Labourers with gloves. And even the Respondent's witnesses were not sure where the tools came from; all they knew was they were somehow available, either in the vans the Appellant used to transport them to the site or at the farms themselves. In any case, the tools are not a significant factor on the present facts: just as the significant 'tool' for highly skilled technical consultants is their analytical power, for the Labourers, it was their physical capacity to perform the work required.

[53] The two remaining factors under subsection 6(g), that the words "in employment" must be read as "work" and that the Appellant paid the Labourers are not in issue.

[54] I am satisfied on a balance of probabilities that the facts of the present case do not meet the other criteria of subsection 6(g) of the *Employment Insurance Regulations* and accordingly, it is without application.

Subsection 34(1) of the *CPP Regulations*

[55] For ease of reference, subsection 34(1) of the *CPP Regulations* is reproduced below:

> 34. (1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual. [Emphasis added.]

[56] The Minister's position is that the Labourers performed their work under conditions that were "analogous to a contract of service" because the Farmers, rather than the Appellant, had control over their work. Counsel for the Respondent correctly reviewed the elements of a contract of service[29] (control, ownership of tools, chance of profit and risk of loss, and integration) as well as the additional consideration of the intent of the parties.

[57] For the same reasons given above regarding control and the ownership of tools, I am not persuaded that the Labourers were working under conditions analogous to a contract of service.

[58] As for chance of profit and risk of loss, counsel for the Respondent submitted that because the Labourers were paid hourly or by the piece, they had no true chance of profit since they could only increase their earnings by working longer[30]. However, the evidence shows that the Labourers had the right to and, in fact, did hire their own sub-workers to assist in the performance of their work. Whether the Labourers had sub-workers or not, the calculation of the amounts owed to them under their agreements with the Appellant continued to be based solely on the individual Labourer's total output. The Appellant did not involve itself in any way with arrangements made between Labourers and their sub-workers and had no obligation to pay the sub-workers. For example, Mr. Sapran said that on occasion, he brought his elderly father along to help and would "buy him a bottle of liquor or get him something to eat"[31] in remuneration for his assistance.

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[29] *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 2 C.T.C. 200. (F.C.A.).

[30] *Industrial Ready-Mix v. The Minister of National* Revenue, [2008] T.C.J. No. 264 at paragraph 19.

[31] Transcript (March 11, 2010), page 159, lines 24-25.

[59] Counsel for the Respondent expressed doubt that anyone would work for a Labourer as a sub-worker when the sensible thing to do would be to work directly for the Appellant and get paid on an equal footing (See: *Thomson Canada Ltd. (c.o.b. Winnipeg Free Press v. The Minister of National Revenue*[32]). While I agree with counsel that that might have been the fiscally clever thing to do, the reality is that people are often motivated by many other considerations. The hardscrabble circumstances of the present case are a far cry from those in the case relied on by the Respondent, involving the subcontracting of paper routes. Nor am I convinced by counsel's argument that because there were always individuals on the roster looking for work, it is unlikely that sub-workers were actually hired by the Labourers. All in all, I have no reason to doubt the testimony that this occurred. Nor, apparently, did the Minister in 1996 when he based his rejection of the notion that the Labourers were employees, in part, on the fact that they could hire other workers. The point is that if a Labourer was able (and morally disposed) to find sub-workers willing to work with him at a reduced rate to increase his output, the Labourer stood to make a profit.

[60] As for the risk of loss, again the evidence is there to support the conclusion that the Labourers were vulnerable to loss since they were responsible under their agreement with the Appellant to redo faulty work without pay. That is far more significant than the fact that the Labourers had no business expenses: the same can be said of many highly paid professional consultants whose only expense is the use of their brain power and ability to dispense advice. Equally important was the complete lack of job security as envisioned by Décary. J.A. in *Wolf v. Canada*[33]:

> Taxpayers may arrange their affairs in such a lawful way as they wish. …
>
> In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterized as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.[34]

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[32] [2001] T.C.J. No. 374.

[33] [2002] F.C.J. No.375. (F.C.A.).

[34] Above, at paragraphs 119-120.

[61] On the question of integration into the Appellant's business, counsel for the Respondent argued that the Labourers could not have been in business on their own account. In my view, there is ample evidence to the contrary, almost all of which appears in the Minister's assumed and admitted facts. I am satisfied that the Labourers made their own agreements with the Appellant to provide the services they chose to provide when they chose to provide them. That they had no great influence in negotiating the price of their services had more to do with their personal circumstances and the marketplace than a conclusion that they were not in business for themselves.

[62] Finally, on the question of intent, I agree with counsel for the Respondent that there is not sufficient evidence of intent in this case for it to be a determinative factor.

3. Was the Work Pensionable and Insurable Employment under the Jurisprudence?

[63] Having concluded that the provisions of subsection 34(1) of the *CPP Regulations* and subsection 6(g) of the *Employment Insurance Regulations* do not apply, it remains to consider whether the work was pensionable and insurable employment under the jurisprudence following *Wiebe Door Services Ltd. v. Minister of National Revenue*[35] and applied by the Supreme Court of Canada in *671121 Ontario Ltd. v. Sagaz Industries Canada Inc.*[36] For the same reasons considered above, I am not persuaded that the Labourers were in an employee relationship with the Appellant and accordingly, their work during the Period was neither pensionable nor insurable.

[64] To conclude, I suggested earlier in these Reasons that there was probably more to the story than perhaps revealed itself in the evidence presented. At a certain point counsel for the Respondent mused that the Appellant could have saved itself some trouble had it simply requested a ruling from the Minister after the 1996 HRDC investigation. That may be true and indeed, making such a request might still be in the Appellant's best interest and even, that of the Labourers. But on the basis of the evidence presented of his experience with HRDC in 1996, I can understand why Mr. Kooner might have doubted that any good would come from taking that initiative. Counsel for the Respondent was quite right to say, however, that it is not the task of

[35] 87 DTC 5025.

[36] [2001] 2 S.C.R. 983.

this Court to cure whatever ills may plague the farm labour industry and I would add, still less, to use the Appellant's appeal for that purpose.

[65] Based on the evidence before me, I am satisfied that the work performed by the Labourers during the Period was neither pensionable nor insurable employment. Accordingly, the appeals are allowed and the assessments are vacated.

Signed at Ottawa, Canada, this 10th day of November, 2010.

"G. A. Sheridan"

Sheridan J.

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