Docket: 2010-2519(EI)

BETWEEN:

VITA STEINER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

PIZZA 73 INC. OP PIZZA 73,

Intervenor.

---

Appeal heard on common evidence with the appeal of *Vita Steiner* (2010-3026(CPP)) on February 10, 2011 at Edmonton, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | Michael A. Power |
| Counsel for the Respondent: | Mary Softley |
| Counsel for the Intervenor: | Dane Zobell |

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**JUDGMENT**

The appeal is allowed, without costs, and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 9th day of March 2011.

"Diane Campbell"

Campbell J.

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Citation: 2011 TCC 146
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BETWEEN:

VITA STEINER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

PIZZA 73 INC. OP PIZZA 73,

Intervenor.

**REASONS FOR JUDGMENT**

Campbell J.

[1] These appeals were heard together on common evidence and result from decisions made by the Minister of National Revenue (the "Minister") pursuant to the *Canada Pension Plan* ("*CPP*") and the *Employment Insurance Act* (the "*EI Act*"). Ms. Steiner is appealing the Minister's decision that she was not employed under a contract of service as an employee with the payor, Unit Nine 73 Inc. ("Unit Nine"), or with the Intervenor, Pizza 73 Inc., formerly Pizza Pizza Limited, for the period August 1, 2008 to August 21, 2009 (the "Period"). Pizza 73 Inc. and Manjit Pandher each own 50 per cent of the voting shares of Unit Nine. Contrary to the Minister's ruling, the Appellant is alleging that she was an employee of, and not an independent contractor with, Unit Nine during the relevant Period.

[2] Unit Nine is an incorporated company which operates a pickup and delivery pizza business as a franchise store of Pizza 73 Inc.. Pizza 73 Inc. is headquartered out of the Province of Ontario. The Appellant worked as a pizza delivery driver for Unit

Nine from 2003 until her termination date on August 21, 2009. When she was first hired, she was required to sign a "Carrier Agreement" (Exhibit A-1), which described the Appellant as an independent contractor and not as an employee of Unit Nine. Since this Carrier Agreement is short, I am reproducing it as part of my Reasons:

> PIZZA 73 CARRIER AGREEMENT
>
> BETWEEN
>
> UNIT: Vita Steiner_____ and Vita Steiner_____
> (Hereinafter referred to as "Pizza 73" of the first part) (Hereinafter referred to as "Carrier" of the second part)
>
> […]
>
> 1. The Carrier shall provide his/her own vehicle at his/her own expense.
>
> 2. The Carrier shall at all times carry a valid Driver's License.
>
> 3. The Carrier shall maintain automobile and general public liability and property damage insurance to an amount which is deemed reasonable (given the vehicle use) by his/her automobile insurance company and the Provincial Government.
>
> 4. The Carrier agrees to purchase pizza from Pizza 73 prior to delivery. It is the responsibility of the Carrier to receive reimbursement from the customer as well as to collect the applicable delivery charge. Pizza 73 does not pay the Carrier. Pizza 73, the customer and the Carrier (acting as the Customer's agent) will agree as to the delivery charges.
>
> 5. The [C]arrier is not an employee of Pizza 73, has no duties or responsibilities within any Pizza 73 operation and is therefore not eligible for any employee benefits. The Carrier shall not hold himself out to any party as being an employee of Pizza 73. As an independent contractor and proprietor of his/her own business, the Carrier shall be personally responsible for any and all Government remittances which may accrue from his/her income, i.e. C.P.P., U.I.C., income taxes, Worker's Compensation, etc. The Carrier shall deal directly with all governmental authorities. Notwithstanding the foregoing, the Carrier agrees that Pizza 73 shall collect and remit, on the Carrier's behalf, the Goods and Services Tax payable on the Carrier's delivery charge.
>
> 6. It is understood and agreed that Pizza 73 shall not be liable for damages to any third party for bodily injuries or property damage resulting from any accident involving the Carrier while delivering the orders of Pizza 73. The Carrier hereby covenants and agrees with Pizza 73 to indemnify and save

> harmless Pizza 73 of and from all claims and demands howsoever arising caused by any acts of negligence or otherwise by the Carrier.
>
> 7. It is agreed that this document embodies the entire agreement of the parties and there are no other understandings or agreements either verbal or written. Any alteration to this agreement shall be written. This agreement shall be kept in strict confidence by each party.
>
> […]

[3] According to the Appellant, she was told it was an application form for the position of driver and that "… it would take a while for it to go through…" (Transcript, page 16, lines 23 to 24), but if she signed it, she would be hired that same day. In response to questioning, under direct examination, respecting her knowledge that the contract considered her an independent contractor as opposed to an employee, she responded:

> A No, I did not understand that.
>
> Q Did Paul ever explain to you what you were going to be doing under this agreement?
>
> A No. He just said I'll be delivering pizzas for him and his Pizza 73 because he's the owner of the shop.
>
> (Transcript, page 19, lines 3 to 7).

[4] When the Appellant commenced working for Unit Nine, she was paid $2.80 per pizza delivery. This was increased to $3.50 per delivery in 2008, when she began questioning the rate the drivers were being paid. The Appellant used her own vehicle for deliveries and was responsible for vehicle expenses, including insurance and repairs. She also used her own cell phone. Unit Nine provided the following items: delivery bags which kept the pizza hot; the delivery box displaying the corporate logo and artwork which contained the pizza being delivered to the customer; and the debit and credit card machines for those customers preferring those methods of payment.

[5] The Appellant worked specific shifts for Unit Nine. During her shifts, she delivered pizzas exclusively for Unit Nine. She was required to be at the pizza shop at the commencement of her shift until it ended. The calls for pizza purchases were routed through a central call centre for Pizza 73 and then directed to the pizza shop situated closest to the customer's address for delivery. Rachhpal Pandher (also

referred to as “Paul” by the Appellant), whose spouse Manjit is one of the 50 per cent owners of Unit Nine, has been manager of the pizza shop for nineteen years. The orders were processed by Mr. Pandher when he received them. He decided which delivery drivers delivered a particular order. He testified that he followed the rule that the first driver present on a shift received the first delivery. However, according to the Appellant’s evidence, if Mr. Pandher was annoyed with her for some reason, he would reduce the number of delivery orders she received in each shift. The drivers’ schedule was always posted inside the pizza shop.

[6] Mr. Pandher oversaw the scheduling of the drivers’ shifts and stated that he would take into account the drivers’ availability. According to the Appellant, however, her requests for time off were not always granted and she was not able to easily book time off. She gave as examples her inability to obtain time for attending weddings and her daughter’s birthday. When Social Services apprehended her disabled daughter, she requested and obtained a decrease in her shifts in 2009.

[7] According to paragraph 4 of the Carrier Agreement, the carrier agreed to purchase the pizza from the pizza shop prior to delivery. However, in actual fact, the Appellant was simply given the pizzas to deliver and then went through a “cashing-out” process at the end of the shift. The cost of the pizza to the customer included the price of the product plus the delivery fee, as well as Goods and Services Tax (“GST”) on both charges. The barcode, contained on each pizza order invoice, was scanned into the store computer database. It contained the customer’s particulars and the name of the driver that had been assigned to deliver that order. When a driver cashed-out at the end of the shift, the cost of the product and the GST was paid to Unit Nine and the driver retained the delivery fee. When customers paid with debit or credit cards, they paid the shop, and the delivery fee was paid by the shop to the driver. Although the drivers generally provided their own monetary float, according to both the Appellant and Mr. Pandher, he occasionally loaned the Appellant enough money to cover her float when she requested it.

[8] The Appellant testified that the franchisor’s Pizza 73 - Driver Training Handbook (the “Handbook”) was always posted on a wall of the drivers’ room inside the pizza shop, but was not brought specifically to the drivers’ attention until 2007 or 2008 when Pizza 73 purchased the franchise. At that time, according to the Appellant, Mr. Pandher specifically brought the manual, together with a video, to the attention of the drivers. Mr. Pandher testified that the manual and video were always available in the drivers’ room and that he expected the drivers to follow those guidelines and procedures. It is clear, however, that he did not always enforce those guidelines. For example, the manual states that the drivers are required to wear Pizza

73 uniforms during their shifts. Mr. Pandher testified that uniforms, including hats and jackets with the corporate logo, were available at the shop but that the drivers never wore them. The Appellant, on cross-examination, stated that she always wore a lapel pin which identified her as a Pizza 73 delivery person even though the other drivers did not.

[9] The manual also contained a section on problem solving in which drivers were instructed on the particular steps to be taken in instances such as: when customers were not at home or when there was no answer; when customers were upset; when addresses could not be located; when part of an order was missing; or when appropriate monetary change could not be made. In some instances, the solution, suggested in the manual, was for the driver to contact the shop manager for direction and advice. The Appellant's evidence was that she attempted to resolve customer issues herself, but that she had to call the shop manager on some occasions. Mr. Pandher testified that drivers were always free to contact the shop or a customer service number provided in the Handbook in resolving delivery problems.

[10] To decide whether the Appellant is an employee of Unit Nine or conducting her own business as an independent contractor, the language used in the Carrier Agreement will not necessarily be determinative. The contractual term at paragraph 5 of the Carrier Agreement, stating that Ms. Steiner was an independent contractor and not an employee, will only prevail if all of the circumstances of their actual working relationship support the label given to the worker in the agreement. Such labelling in a contract can only be upheld where it truly reflects the intention, performance by and conduct of the parties as supported by the evidence. Otherwise, it is meaningless and may, in some circumstances, be the result of unequal bargaining positions in the workplace. It becomes even more important to closely scrutinize the evidence when the contracting parties testify as to very different perceptions of the nature of their working relationship, that is, where the evidence suggests there is no common intention respecting whether a worker is an employee or not. That was the case in these appeals, where the Appellant indicated that she thought the Carrier Agreement was an application form which she wanted to sign so that she could start work on the date she signed it. The Carrier Agreement was not explained to her and the evidence supports that she did not understand the nature or content of the standard form contract which she signed. It was always the Appellant's intention to be an employee and that was her understanding of the relationship. Although the Appellant's evidence was a little disjointed at times, I found her to be a credible witness. In her testimony, she alluded to instances where she requested that Mr. Pandher sign her delivery invoices so she could file income tax returns to prove she made deliveries. When asked if she had ever requested a T4 slip from Unit Nine, she stated that

Mr. Pandher "…doesn't believe in it." (Transcript, page 52, line 21). She also mentioned the need to obtain a reference from Mr. Pandher.

[11] At first blush, the initial three paragraphs of the Carrier Agreement seem indicative of an independent contractor relationship. The drivers had to provide their own vehicle for deliveries and pay all associated vehicle expenses. However, the evidence of both the Appellant and Mr. Pandher contradicts some of the content of paragraph 4 of the Carrier Agreement respecting the time of payment by the drivers for the pizza product. An analysis of the evidence surrounding the totality of their relationship must be reviewed in order to determine its true nature, and the issue of whether the Appellant is an employee or, as the Carrier Agreement states, an independent contractor.

[12] The two leading cases in this area of the law are *Wiebe Door Services Ltd. v M.N.R.* (1986), 87 D.T.C. 5025 (F.C.A.) ["*Wiebe Door*"] and *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] S.C.J. No. 61 ["*Sagaz*"]. *Wiebe Door* establishes the well-known "four-in-one test" to be considered in determining whether an individual is an employee or independent contractor. These factors are control, ownership of tools, risk of loss/chance of profit and integration. Each appeal dealing with this issue will have its own unique set of facts, with some of the variables pointing in the direction of employee and some in the opposite direction. The *Wiebe Door* factors are not an exhaustive list and the Supreme Court of Canada recognized that statement at paragraphs 46, 47 and 48 of *Sagaz*:

> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan, supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . ." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

> 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 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.

[13] There is no one conclusive test that can be easily applied in making such a determination. There is no magical formula. One does the best one can do by objectively reviewing all of the evidence within the four-in-one test, tempered with a common-sense approach to the economic realities of the parties' working relationship and their respective bargaining positions, in determining whether each set of facts is more consistent with a conclusion that a worker is an employee or an independent contractor. Even where the parties have a stated common intention, the Courts must still determine if the relevant circumstances respecting their working relationships are consistent with what those parties have labelled it.

[14] Nadon J.A. of the Federal Court of Appeal, in reviewing recent case law in this area, summarized the following principles at paragraph 35 of *Combined Insurance Company of America v M.N.R.*, 2007 FCA 60, [2007] F.C.J. No. 124:

> [35] In my view, the following principles emerge from these decisions:
>
> 1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door, supra*, and in the light of any factor which may prove to be relevant in the particular circumstances of the case;
>
> 2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.

> Although as a general rule the control test is of special importance, the tests developed in *Wiebe Door* and *Sagaz, supra*, will nevertheless be useful in determining the real nature of the contract.

[15] Generally, one associates employees with those who devote their full attention and apply their abilities in one work environment for one individual/corporation or possibly for several such entities where individuals are working several part-time jobs. That latter scenario is, in fact, the reality of many who hold several jobs as employees in today's market. Independent contractors, on the other hand, offer their expertise/services at all times to anyone in the general public that is interested in hiring them or paying them for those services. Although not necessarily the case, they often provide services to a number of different individuals or corporations for a specific time period. When they complete the services they were contracted to do, they move on, looking for their next contract. In most cases, such individuals will be identified by a business name and address separate from the individual that is paying them to complete the task.

[16] Employment relationships usually include a high degree of control by an employer over the worker, that is, control over the "where, when and how" of the performance of the work activities. The right to direct the worker in a manner that is dictated by the employer is one of the hallmarks of an employer/employee relationship.

[17] In these appeals, the facts support that Unit Nine controlled the Appellant in her delivery activities. Unit Nine established the hours and the shifts for the drivers and they were expected to adhere to those. While it is true that the Appellant could make a request for a day off, she testified as to several instances where her request was not granted. However, this is no different than any other employer/employee relationship where an employee is free to request time off and if it is granted, the schedule is established around that request. Although she was given a reduced number of shifts in 2009, as per her request, it was entirely at Unit Nine's discretion. She was also permitted to forego deliveries where the pizzas contained seafood, to which she testified that she could have a severe allergic reaction. She made this request to Mr. Pandher and he acquiesced. It was a request based on medical reasons and she stated she wore a MedicAlert bracelet. Common sense dictates that no employer will force a worker to handle a product which could have severe health consequences. The fact that she was not given seafood products to handle does not give weight to an independent contractor status. In respect to her deliveries to apartment buildings and hotels, the evidence was contradictory and inconclusive, with the Appellant stating that she did, in fact, make those deliveries and Mr. Pandher

testifying that she did not because she was often accompanied by her disabled daughter when she did deliveries.

[18] Other than to submit requests for time off to Mr. Pandher for his consideration, the Appellant had no control over her schedule and the hours she worked. The evidence does not support that she had any ability to accept or decline particular deliveries over others, except with Mr. Pandher's permission, as in the example of her shellfish allergy. She had no input into the amount of the delivery fee. This was established by Unit Nine and that fee was included as part of Unit Nine's total cost of their pizza product and passed on to the customer. In fact, the evidence of the Appellant was that she started deliveries in 2003 for $2.80 per pizza and had to request that Mr. Pandher consider an increase to those fees in 2007 or 2008. Independent contractors establish their own fees for their services and this fact, again, points strongly to the Appellant being an employee insofar as the control factor is concerned.

[19] This was not a case where the Appellant purchased the pizza at the commencement of each delivery, as paragraph 4 of the Carrier Agreement states. She was given the delivery and collected the price from the customer, returning the money collected in respect to all her deliveries at the end of her shift. She followed a prescribed "cashing-out" procedure, established by Unit Nine, where all of her deliveries were tracked on the computer database. Also contrary to paragraph 4 of this agreement, the evidence supports that the delivery fee was established solely by Unit Nine and not by agreement among "Pizza 73, the customer and the Carrier (acting as the customer's agent)." When customers paid for the product by debit or credit card, Unit Nine paid those delivery fees to her at the end of the Appellant's shift.

[20] When the Appellant worked her scheduled shift, she worked exclusively for Unit Nine. The Respondent argued that Unit Nine did not dictate to the Appellant that she could not work doing deliveries for another company when she was not working for the payor. In my opinion, this proposition establishes nothing in respect to control. Many employees hold down two or more jobs and as long as they are working exclusively for that employer when required to do so, it has a neutral influence on the control factor when a worker secures and works additional shifts for someone in his free time.

[21] The Appellant did not invoice Unit Nine as independent contractors would be expected to do to receive remuneration. She made deliveries to customers of Unit Nine. They were not her customers. She had to present herself at the premises of

Unit Nine at the commencement of each shift and had to remain there throughout her shift even when not delivering. A room for the delivery drivers was provided by Unit Nine and that room was located within the pizza shop. She worked consistently for Unit Nine from 2003 to 2009, as one would expect employees to do. The Appellant had to perform her services for Unit Nine personally. Mr. Pandher controlled who the shop's drivers would be on any given day and assigned them the sequence for deliveries. The Appellant was told when to arrive for her shift, given a delivery, told where to take that delivery, told what to charge for the delivery and the product and instructed to return to the shop premises after the delivery. The Appellant's evidence was that the number of deliveries she received per shift could, in fact, be reduced in favour of the other drivers if Mr. Pandher was so inclined. Although the Appellant testified that she attempted to deal with customer problems personally, she did contact Unit Nine on a number of occasions to receive direction and guidance. The Appellant could not accept cheques that had not been pre-authorized by Unit Nine. If customers were unhappy with the service, they complained to Unit Nine or the head office of the franchisor but not to the Appellant. The Appellant did not have a GST number. When it was charged and collected from the customer, it was Unit Nine that controlled this aspect of the arrangement.

[22] Case law has established that an important consideration in the control test is the "right to control" a worker, rather than the "actual control" that is exerted over that worker. Mr. Pandher testified, in direct examination, that the drivers' Handbook was always available to the Appellant and, at page 89 of the transcript, lines 15 to 23, the following exchange occurred:

> Q Now, with respect to the Pizza 73 driver's handbook, did you provide that handbook to Ms. Steiner?
>
> A It's always available in the drivers' room with a video there.
>
> Q All right. And did you ever require her to read it?
>
> A All the time.
>
> Q But did you require your drivers to follow the guidelines inside?
>
> A Yes.

[23] This Handbook is quite lengthy and detailed. It includes directives respecting dress code, delivery preparation, planning the delivery route, handling the product, how to deal with customers at the door, payment policies, problem solving and

professional driving suggestions. The aim of this Handbook was to control and direct the drivers in the performance and completion of their deliveries, that is, the "where, when and how" of their job. It even went so far as to provide direction on how to properly deal with and accept tips from customers.

[24] The "Dress Code" section in the Handbook, at pages 2 to 3, states the following:

> **Dress Code:**
>
> You will be expected to report to work in clean clothes and appropriately groomed. Our customers care about our appearance and so do we. You will be required to wear a Pizza 73 uniform during your shifts.
>
> **Why a Uniform?**
>
> About 90% of Pizza 73's orders are delivered. This means that 90% of our customers won't see our bright, clean units with all employees in uniform. Our drivers are our representatives at the door. Pizza 73 depends on delivery drivers to make a favourable impression on all customers.
>
> When you ring a customer's doorbell (sometimes late at night), the customer needs to be comfortable with opening the door. A uniform tells the customer it's the anticipated pizza delivery, not someone unexpected. A Pizza 73 hat, and shirt or jacket appropriate for the weather must be worn for each and every shift.
>
> (Emphasis added)

This section refers to delivery drivers as "our representatives at the door" and, giving directives on how drivers are to dress and act, is again supportive of the amount of control the company expected to exert over the drivers.

[25] Although Mr. Pandher provided uniforms, he did not enforce the dress code at his shop. Nevertheless, he did have "the right" to do so according to this Handbook. In addition, the Appellant's uncontradicted evidence was that she consistently wore a corporate lapel pin to identify herself to customers.

[26] The evidence, respecting scheduling, routing procedures and problem solving, closely followed the Handbook directives. Under the title "Schedule", the following directives were included:

> **Schedule:**

Scheduling is at the discretion of the store manager.

…

Be prepared to stay the entire length of your shift.

Your Shift Is YOUR Responsibility. Once the schedule is posted it's your responsibility to work the scheduled hours. Trading a shift may be allowed but you will be responsible for the shift if the substitute does not arrive as scheduled, so check with your manager.

…

Give schedule requests to the Manager at least one week before the schedule is posted. If you would like a certain day off in an upcoming week write down your request and give it to the Manager before he or she prepares the schedule.

[27] Under the heading "Planning Your Route", the following was stated:

… the store manager will sort orders to be efficiently delivered.

We will define:
The order you will deliver your pizzas in and why.
Why there may be a change in this delivery routine.
The four steps in planning the delivery route,
When you should know where you are going.

The first step is to check the information on the bill. Before we can plan the delivery we must know all the facts.

…

[28] Under the heading "Routing", the following was stated:

**Routing:**

Deciding which order goes first and what orders are grouped together is called routing. Smart routing requires knowledge of the delivery area along with awareness of traffic conditions. The Manager or designated router makes all final routing decisions. However, there will be times when the Manager asks Drivers to route their own orders. In those cases, follow these rules.

…

[29] In directing drivers respecting “Problem Solving”, the Handbook contains the following directive at page 29:

> …
>
> Be sure to report any rude, unsafe or strange situation to the shop manager (i.e., large dogs, etc.). A note can be made in our computer system so that you will get this special information for your next delivery.
>
> …

In addition to these examples, the Handbook contains detailed instructions on how to handle delivery problems, customer issues, and how to drive safely and prevent road accidents. At page 12, in respect to directions for making a good impression on customers, the following is stated:

> **Impress the Customer at the Door**
>
> … As a Pizza 73 delivery driver you are in a unique position to meet our

> customers in person.
>
> (Emphasis added)

[30] While Mr. Pandher did not strictly enforce the directives in the Handbook, he did have the right to direct the delivery drivers to follow those directives. The language in the Handbook clearly assumes that certain company policies, for example the wearing of uniforms, are mandatory.

[31] The Appellant was subject to considerable constraints in the performance of her work and how to do her job. The evidence supports that Unit Nine exercised a great deal of control by placing numerous restrictions over her daily activities during each shift. The degree of control over the Appellant appears to be a natural and necessary consequence of the desire of the pizza franchisor to influence its customers' perception of the company and its pizza products and services. Although the control test is only one of a number of factors to consider, it is nevertheless a critical one in classifying a working relationship. As a result, the control factor fully supports the Appellant being an employee.

[32] The next factor to be addressed is ownership of tools and equipment. This factor is not as clear-cut as the control factor. The Appellant owned the vehicle which she used to deliver the pizzas. While she was responsible for insuring and maintaining it, I see that as her obligation in any event as it was her vehicle. The other items necessary for transporting the pizza product were the bags which kept the product hot, the pizza boxes with the corporate logo and artwork and the debit and credit card machines and sales slips. Because the Appellant was providing her vehicle, she was making a substantial investment and this generally points to an independent contractor status. However, there are items supplied by Unit Nine which are also essential components to a successful delivery, including supplying the store premises and the drivers' room. Although the ownership of tools and equipment is not in itself conclusive of the Appellant's status, this factor does point in the direction of an independent contractor status.

[33] In reviewing the next factors of chance of profit and risk of loss, it is important to note that, because Unit Nine established the delivery fee that could be charged to its customers for each delivery, the Appellant was limited in the control she had for any type of profit. There was a possibility that she could increase her profit if she increased her deliveries, but the evidence does not support that she had control over that element either. The facts established that Unit Nine controlled the number of shifts she worked because it set the scheduling; it controlled the number of deliveries,

to a large extent, by assigning the rotational order of drivers on any one shift; and despite this allocation of work, it could further control the Appellant's profit, at Mr. Pandher's discretion, by withholding the number of deliveries which she could receive if she and Mr. Pandher had personal differences on that shift. The customers were those of Unit Nine. The Appellant had no customer base and no opportunity to establish one because she was not holding herself out as carrying on a business. The customers' goodwill belonged to Unit Nine. I see little opportunity for the Appellant to control or influence potential profit.

[34] In addition, there is very little risk of loss to the Appellant. At most, it is nominal. Her situation is entirely different than the situation where a driver would be required to "purchase" the product from the employer prior to each delivery. In those circumstances, if the product is lost en route or a customer refuses to pay or any other host of intervening factors occurs, then the driver is subjected to a potential substantial loss over the course of a number of shifts. However, the Appellant did not accept the responsibility for the product. That responsibility and all of the attendant costs remained with Unit Nine. If a customer refused to pay, then the product was returned to the store. The Appellant lost the delivery fee of $3.50 and a potential tip, but did not bear the larger cost of the pizza. In comparison to Unit Nine's loss, this was minimal even when the Appellant's vehicle is factored in.

[35] In reviewing the evidence, I must also conclude that the Appellant's activities were fully integrated with those of Unit Nine. The Appellant had no opportunity to develop her own clientele base. She worked the shifts which Unit Nine assigned to her. The delivery portion constitutes 60 per cent to 70 per cent of Unit Nine's business activities, at this location, according to Mr. Pandher. The Appellant was performing delivery activities which were at the core of Unit Nine's operations. When she worked her shifts, she was required to work exclusively for Unit Nine. She wore a lapel pin advertising Unit Nine's business and delivered the product in packaging containing logo and artwork belonging to Unit Nine. Even the delivery fees were part of the product price established and charged by Unit Nine to its customers. Customer goodwill belonged to Unit Nine. The overall effect of the Handbook supports that the drivers are fully integrated into the business of Unit Nine. The efficiency and manner of the deliveries were established by Unit Nine. It made a map available at its premises and implemented routing procedures. For approximately six years, the Appellant worked exclusively and generally full-time hours for Unit Nine. There was no evidence that she ever represented or marketed this as her delivery business.

[36] The handling of customer complaints also demonstrates that the Appellant was a fully-incorporated employee of Unit Nine and that customer complaints were dealt with by Unit Nine. When asked in cross-examination whether meetings were held with the drivers to discuss complaint issues, Mr. Pandher responded in the following manner:

> A I always. Whenever any complaint comes, it's printed on the printer within 10 minutes, and I just tell the driver that this thing has happened. If someone says that my driver has taken more money, then either I just sen[d] that driver to that person or myself go there and I apologize and return the money.
>
> (Transcript, page 135, lines 14 to 19)

[37] Even the Appellant's perception of herself as a fully-integrated employee of Unit Nine was evident throughout her testimony. For example, the following exchange occurred during her direct examination:

> Q Now, during the time that you worked, then, for Paul at Pizza 73, did you ever deliver pizzas for any other company?
>
> A No. Because he said I work for him and that's who I work for. And if I were to quit or leave the company, he would give me a good reference.
>
> (Emphasis added)
>
> (Transcript, page 40, line 25 to page 41, line 5)

[38] In summary, the Appellant was an employee of Unit Nine during the relevant Period. Unit Nine benefited from her service as a delivery driver. She was not engaged in a delivery business on her own account. Unit Nine had the right to exercise full control over her delivery activities during her shifts. Her opportunity for profit and her risk of loss were nominal, if not non-existent. She was fully incorporated into Unit Nine's business activities, of which the delivery aspect constituted 60 per cent to 70 per cent of its overall business. Although she owned the vehicle in which she delivered the product for Unit Nine, this on its own is not sufficient for me to conclude that she was an independent contractor. A review of all of the facts presented in these appeals leads to the inescapable conclusion that the Appellant was an employee, despite the contrary labelling of her position in the Carrier Agreement. The actual reality of the parties' relationship does not support that the Appellant was an independent contractor. The business was Unit Nine's

business in every sense and the Appellant was performing services on behalf of Unit Nine.

[39] The appeals are allowed, without costs.

Signed at Vancouver, British Columbia, this 9th day of March 2011.

"Diane Campbell"

Campbell J.

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| CITATION: | 2011 TCC 146 |
| COURT FILE NOS.: | 2010-2519(EI)<br>2010-3026(CPP) |
| STYLE OF CAUSE: | VITA STEINER AND THE MINISTER OF NATIONAL REVENUE AND<br>PIZZA 73 INC. OP PIZZA 73 |
| PLACE OF HEARING: | Edmonton, Ontario |
| DATE OF HEARING: | February 10, 2011 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Diane Campbell |
| DATE OF JUDGMENT: | March 9, 2011 |

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| Counsel for the Respondent: | Mary Softley |
| Counsel for the Intervenor: | Dane Zobell |

COUNSEL OF RECORD:

For the Appellant:

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