

Docket: 2017-4393(EI)

BETWEEN:

AL SAUNDERS CONTRACTING & CONSULTING INC.,  
Appellant,  
and

THE MINISTER OF NATIONAL REVENUE,  
Respondent.

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Appeal heard on common evidence with the appeal of *Al Saunders Contracting & Consulting Inc.* (2017-4381(CPP)) on November 22, 2018, at Calgary, Alberta

Before: The Honourable Justice Susan Wong

Appearances:

Counsel for the Appellant: Jason Stephan  
Counsel for the Respondent: Allan Mason

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**JUDGMENT**

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue dated August 22, 2017 is varied in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of April 2019.

“Susan Wong”

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Wong J.

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Before: The Honourable Justice Susan Wong

Appearances:

Counsel for the Appellant: Jason Stephan  
Counsel for the Respondent: Allan Mason

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**JUDGMENT**

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is allowed and the decision of the Minister of National Revenue dated August 22, 2017 is varied in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of April 2019.

“Susan Wong”

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Wong J.

Citation: 2019 TCC 86  
Date: 20190425  
Dockets: 2017-4393(EI)  
2017-4381(CPP)

BETWEEN:

AL SAUNDERS CONTRACTING & CONSULTING INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

Wong J.

#### **Introduction**

[1] The Appellant, Al Saunders Contracting & Consulting Inc., appeals the August 22, 2017 decisions of the Minister of National Revenue (the “Minister”) in which she confirmed assessments for premiums under the *Employment Insurance Act* with respect to 2014 and contributions under the *Canada Pension Plan* with respect to 2013 and 2014.

[2] The Minister determined that amounts paid by the Appellant to certain of its employees in 2013 and 2014 were insurable and pensionable earnings. As a result, she assessed the Appellant for EI premiums and CPP contributions not deducted and remitted with respect to those amounts.

[3] Kent Saunders, who is the Appellant’s owner and operations manager, testified on behalf of the Appellant. The Respondent called Hoa (Tianna) On, who is an employer compliance auditor, as a witness. None of the affected workers testified or intervened in these appeals.

## Issues

[4] The Appellant did not dispute that the subject workers were employees (as opposed to independent contractors) in 2013 and 2014.

[5] Therefore, to determine whether the Appellant should have deducted and remitted the EI premiums and CPP contributions in question, this Court must decide whether the allowances paid were taxable under the *Income Tax Act* (the “Act”). If the answer is yes, then the Appellant is liable for the unremitted amounts.

## Applicable legislation

[6] The legal starting point is that allowances paid by an employer to an employee are taxable as income and subject to the appropriate source deductions, unless a specific exception applies.

### *Employment insurance premiums*

[7] Paragraph 2(3)(a.1) of the *Insurable Earnings and Collection of Premiums Regulations*, SOR/97-33, provides that any amount excluded as income by virtue of paragraph 6(1)(a) or (b) or subsection 6(6) or (16) of the *Act* is excluded from insurable earnings.

[8] In the present case, the relevant provisions are paragraph 6(1)(b) and subsection 6(6) of the *Act*. In the Minister’s replies to the notices of appeal and during the Respondent’s closing argument, the Crown referred to the disputed amounts as “taxable benefits” while referencing paragraph 6(1)(b) of the *Act* in support. Taxable benefits from an office or employment are covered by paragraph 6(1)(a) which does not appear to be relevant to this appeal.

[9] Paragraph 6(1)(b) deals with allowances for personal or living expenses and the relevant subparagraphs are (vii), (vii.1), (x), and (xi). Together, they read as follows:

**6.(1) Amounts to be included as income from office or employment** - There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable:

...

**(b) personal or living expenses [allowances]** - all amounts received by the taxpayer in the year as an allowance for personal or living expenses or as an allowance for any other purpose, except

...

(vii) reasonable allowances for travel expenses (other than allowances for the use of a motor vehicle) received by an employee (other than an employee employed in connection with the selling of property or the negotiating of contracts for the employer) from the employer for travelling away from

(A) the municipality where the employer's establishment at which the employee ordinarily worked or to which the employee ordinarily reported was located, and

(B) the metropolitan area, if there is one, where that establishment was located,

in the performance of the duties of the employee's office or employment,

(vii.1) reasonable allowances for the use of a motor vehicle received by an employee (other than an employee employed in connection with the selling of property or the negotiating of contracts for the employer) from the employer for travelling in the performance of the duties of the office or employment,

...

and, for the purposes of subparagraphs (v), (vi), and (vii.1), an allowance received in a taxation year by a taxpayer for the use of a motor vehicle in connection with or in the course of the taxpayer's office or employment shall be deemed not to be a reasonable allowance

(x) where the measurement of the use of the vehicle for the purpose of the allowance is not based solely on the number of kilometres for which the vehicle is used in connection with or in the course of the office or employment, or

(xi) where the taxpayer both receives an allowance in respect of that use and is reimbursed in whole or in part for expenses in respect of that use (except where the reimbursement is in respect of supplementary business insurance or toll or ferry charges and the amount of the allowance was determined without reference to those reimbursed expenses);

[10] Therefore, subparagraphs 6(1)(b)(vii) and (vii.1) permit reasonable allowances for travel and the use of a motor vehicle, respectively, to be excluded from income. However, subparagraphs 6(1)(b)(x) and (xi) deem a motor vehicle allowance to not be reasonable if the allowance is either not based solely on the distance driven for work purposes [subparagraph (x)], or the employee receives both an allowance and reimbursement for the same use [subparagraph (xi)].

#### *Canada Pension Plan contributions*

[11] Section 12 of the *Canada Pension Plan* states that a person's contributory salary and wages for a year is his or her income from pensionable employment calculated in accordance with the *Income Tax Act*, including deductions. There are exceptions related to age, disability, and the clergy, none of which are applicable in the present case.

[12] The wording is less precise than the corresponding EI provision but the effect is the same.

#### **Factual background**

##### *The Appellant*

[13] The Appellant is a heavy equipment contracting company which specializes in petroleum lease building as well as in the construction and maintenance of roads and highways. Its office is located in Sundre, Alberta.

[14] Mr. Saunders testified that the majority of the Appellant's work is done for the Alberta Ministry of Transportation in highway services. He also stated that the Appellant performs work on dam structure all over Alberta to prevent breaches.

[15] He testified that in 2013 and 2014, the majority of the Appellant's work was performed in the area of Waterton Lakes National Park, partway through the Saskatchewan River Crossing at Highway 93 between Banff and Jasper National Parks, and along the Kananaskis Trail.

*The Workers*

[16] The ten workers who are the subject of these appeals are as follows:

Name	2013	2014	Flat rate/subsistence allowance	Truck allowance	Board and lodging/Trailer allowance	Other
Colin Averill	CPP	CPP	2013, 2014			
Rodney Bjorkman		CPP, EI	2014			
Tammy Borys (McKinnon)	CPP	CPP, EI	2013, 2014			
Aaron Bosch		CPP, EI		2014		
Ross French	CPP	CPP		2013, 2014	2013	
John Hague	CPP	CPP, EI				2013, 2014
Matthew Ingvaridsen	CPP	CPP, EI	2013, 2014			
Freddie Powder	CPP			2013		
Terrence Powder	CPP	CPP, EI		2013, 2014	2013	
Caitlin Rankin	CPP			2013		

[17] With respect to John Hague, the earnings in question are remuneration paid for cleaning the Appellant's trailers in both years.

**The Allowances**

[18] Mr. Saunders testified that in 2013 and 2014, the workers (excluding John Hague) did not go home at night for safety reasons. He stated that the work was performed using a 160-km radius and if the work location was too far away from their base, the workers were asked to stay where they were due to the travel time involved. He also stated that a work day was typically 12 hours long.

[19] He testified that the workers used personal funds to cover the cost of food, fuel, oil changes, and wear-and-tear on their personal vehicles. He stated that there

was not much regular road maintenance in the foothills region of Alberta, so they could be travelling through snow which was over one-foot deep.

[20] Mr. Saunders testified that, as a result, the workers' out-of-pocket expenses were significant. He also stated that while his employees were proficient in the use of heavy equipment, it was the nature of the industry that many were not well-educated.

Subsistence allowances

[21] Mr. Saunders stated that a subsistence allowance was paid to a worker if they were working in a remote location. He testified that if the worker used his or her own vehicle, it was expected to have a certain capacity for fuel and tools. He stated that as a result, some workers would use their own vehicles and some would not.

[22] Mr. Saunders testified that, as an example, Colin Averill resided in the municipal district of Bighorn and did a great deal of work on the Powderface Trail in Kananaskis in 2013 and 2014. He described Mr. Averill as a versatile labourer with a class 3 driver's licence. He stated that as a grading contractor, Mr. Averill had to travel to and from the location of the heavy machinery he was operating. In cross-examination, he said that the Appellant paid Mr. Averill a salary rather than require him to submit timesheets as the other workers did. Mr. Saunders testified that Mr. Averill's education level was not very high and doing so spared Mr. Averill some embarrassment.

[23] He testified that, as another example, Tammy Borys (McKinnon) was the Appellant's bookkeeper until her employment was terminated partway through 2014. He stated that all employees were expected to be able to work as flag people and that, in 2013, Ms. Borys likely worked as a flag person on the Waterton Lakes National Park project. He stated that she would have been expected to take her own vehicle and to pay for her own meals. In cross-examination, he testified that the Appellant declined Ms. Borys' request for a pay raise and paid her a subsistence allowance instead.

[24] He testified that, as another example, Matthew Ingvarlsen was from Leduc and responsible for remote safety. He stated that Mr. Ingvarlsen would pay for his own hotels and meals while on the road.



[25] He testified that the subsistence allowance was paid to employees for working on the road, while a truck allowance was paid to employees who used their own vehicles. He stated that the nature of the Appellant's work required its employees to step away from their families for days and that the subsistence allowance helped pay for things such as family holidays.

[26] He stated that, as an analogy, Ross French always used his own vehicle so the board-and-lodging allowance paid to him would have served the same purpose as a subsistence allowance, i.e., it was for hotels and meals.

[27] The auditor, Ms. On, testified that during her audit, Mr. Saunders told her that he had mistakenly believed subsistence allowances were not taxable. On page 4 of her audit report (Exhibit R-1), she stated that she "determined that the company paid flat rate daily allowance[sic] and per kilometre rate truck allowances to some employees for the same periods. Company coded the flat rate allowance as Subsistence Allowance, and the per kilometre rate allowance as Truck Allowance for the same period."

[28] She testified that during the course of her audit, she learned that the Appellant sometimes referred to the subsistence allowances as "truck allowances".

#### Truck allowances

[29] Mr. Saunders testified that the Appellant paid a truck allowance to workers who used their own vehicles to carry out their duties.

[30] He stated that, for example, Ross French always used his own vehicle and, therefore, received a truck allowance.

[31] Mr. Saunders testified that Mr. French was a bulldozer operator who worked on the Powderface Trail in Kananaskis and stayed in Cochrane quite a bit. Mr. Saunders stated that the project was a gas line expansion, and that Mr. French lived in his RV until winter while working on this project.

[32] As mentioned above, Ms. On testified that during the course of her audit, she learned that the Appellant sometimes referred to the subsistence allowances as "truck allowances".

[33] In her audit working paper (Exhibit R-2), she stated that the Appellant paid both a per-kilometre rate of \$0.44/km and a flat rate truck allowance to employees

who used their own vehicles for work. She explained in her working paper that “since the company paid the employees both the daily flat rate allowance and a per-kilometre rate allowance paid to the employees for the same day of work (same use), all amounts paid are considered unreasonable[sic] allowance and are taxable.”

Board and lodging/Trailer allowances

[34] The applicable audit working paper (Exhibit R-4) shows that amounts coded in the Appellant’s ledger as “Equipment Rentals” were paid to Terrence Powder and Ross French.

[35] Ms. On testified that the Appellant paid \$150 per night to Messrs. Powder and French for pulling their personal trailers to job sites and living in them. She stated that the amounts were intended to cover lodging but not meals.

[36] She testified that she researched the cost of campsites with sewer service and found that the going rate was \$60 at the time. She, therefore, found the \$150 board and lodging/trailer allowance to be unreasonable.

[37] As mentioned earlier, Mr. Saunders testified that Mr. French was a bulldozer operator who worked on the Powderface Trail in Kananaskis and stayed in Cochrane quite a bit. Mr. Saunders stated that the project was a gas line expansion, and that Mr. French lived in his RV until winter while working on this project.

Analysis

[38] While I have done my best to distinguish amongst the allowances, it is clear from the evidence that the distinctions were unclear from the outset.

[39] Both the *Income Tax Act* and the *Employment Insurance Act* contain specific provisions requiring the maintenance of books and records such that taxes and premiums can be determined in Canada’s self-assessing system. The *Canada Pension Plan* lacks a specific provision about books and records, but it still has an inspection provision which imposes an obligation to assist the Minister and to answer questions relating to administration or enforcement of the CPP.

[40] I found Mr. Saunders to be a very credible witness and well-intentioned with respect to his employees. However, the manner in which the Appellant’s records

were kept made it difficult to correlate his testimony with the available documentation.

[41] On the other hand, the Minister's decision to disallow all of the amounts in question (including those for which there is no deeming provision) is not factually supportable either.

*Special work site or remote location*

[42] Counsel for the Appellant has asked that the appeal be allowed in accordance with the amounts presented at Tab 5 of Exhibit A-1. There is reference to special work sites throughout the submission.

[43] Subsection 6(6) of the *Income Tax Act* states that:

**6(6) Employment at special work site or remote location** - Notwithstanding subsection (1), in computing the income of a taxpayer for a taxation year from an office or employment, there shall not be included any amount received or enjoyed by the taxpayer in respect of, in the course or by virtue of the office or employment that is the value of, or an allowance (not in excess of a reasonable amount) in respect of expenses the taxpayer has incurred for,

(a) the taxpayer's board and lodging for a period at

(i) a special work site, being a location at which the duties performed by the taxpayer were of a temporary nature, if the taxpayer maintained at another location a self-contained domestic establishment as the taxpayer's principal place of residence

(A) that was, throughout the period, available for the taxpayer's occupancy and not rented by the taxpayer to any other person, and

(B) to which, by reason of distance, the taxpayer could not reasonably be expected to have returned daily from the special work site, or

(ii) a location at which, by virtue of its remoteness from any established community, the taxpayer could not reasonably be expected to establish and maintain a self-contained domestic establishment,

if the period during which the taxpayer was required by the taxpayer's duties to be away from the taxpayer's principal place of residence, or to be at the special work site or location, was not less than 36 hours; or

(b) transportation between

(i) the principal place of residence and the special work site referred to in subparagraph (a)(i), or

(ii) the location referred to in subparagraph (a)(ii) and a location in Canada or a location in the country in which the taxpayer is employed,

in respect of a period described in paragraph (a) during which the taxpayer received board and lodging, or a reasonable allowance in respect of board and lodging, from the taxpayer's employer.

[44] An employer and employee who seek the exclusion under subsection 6(6) are required to jointly complete and submit Form TD4 ("Declaration of Exemption – Employment at a Special Work Site") to the Minister. That does not appear to have been done in the present case with respect to 2013 and 2014.

[45] In addition, the requirements of subsection 6(6) are comprehensive. The evidence presented at the hearing lacked the necessary degree of detail and specificity for this Court to be able to find that those requirements were met. Therefore, my findings cannot take subsection 6(6) into account.

#### *Subsistence allowances*

[46] As mentioned above, counsel for the Appellant provided a table of proposed amounts at Tab 5 of Exhibit A-1. With respect to the four workers whose subsistence allowances are at issue in these appeals, the proposed amounts are as follows:

Name	2013	Days worked out of town in 2013	2014	Days worked out of town in 2014
Colin Averill	\$10,000.00	108	\$2,700.00	Not provided
Rodney Bjorkman	N/A	N/A	\$1,800.00	Not provided
Tammy Borys (McKinnon)	\$7,300.00	100	Nil	Nil
Matthew Ingvarlsen	\$10,950.00	150	\$7,000.00	150

[47] Based on Mr. Saunders' testimony, I find that the subsistence allowances were travel allowances under subparagraph 6(1)(b)(vii). These amounts were paid to employees for working on the road and in remote locations, they covered meals and sometimes hotels, and could be used by the employees to pay for vacations with their families.

[48] Counsel for the Respondent raised an issue with respect to Mr. Saunders' testimony that the allowance could be used by employees to pay for family vacations. However, discretion to use the funds is the third requisite element of an "allowance" as discussed at paragraph 11 of *Adéquat Service Informatique v. The Minister of National Revenue*, 2005 TCC 32, [2005] TCJ No. 48. Therefore, there is no adverse finding to be made from the fact that the Appellant's employees could use the allowances any way they chose.

[49] It is clear from the evidence and not disputed by the Respondent, that the Appellant's employees were required to work out of town.

[50] Where the number of days worked out of town was provided in the table at Tab 5 of Exhibit A-1, the proposed allowances range from \$46.67 per day (Matthew Ingvarlsen in 2014) to \$92.59 per day (Colin Averill in 2013).

[51] There was no figure provided for out-of-town days worked by Mr. Averill in 2014. However, the calendar and invoices at Tab 3 of Exhibit A-1 show that he worked out of town for at least 90 days in 2014. Therefore, the proposed allowance for him in 2014 amounts to approximately \$30 per day.

[52] This range of daily amounts is less than or in line with the travel allowance paid by the Government of Canada to its employees in 2013 and 2014. Therefore, I find that the proposed amounts with respect to Mr. Averill, Ms. Borys (McKinnon), and Mr. Ingvarsen are reasonable. No evidence was presented to support the proposed amount with respect to Mr. Bjorkman, so I can only conclude that it is unreasonable.

*Truck allowances*

[53] The truck allowances were motor vehicle allowances under subparagraph 6(1)(b)(vii.1). The per-kilometre rate paid by the Appellant to its employees was also in itself either an allowance or a reimbursement. Since the Appellant paid its employees both a flat-rate truck allowance and a per-kilometre rate with respect to the same usage, one or both of subparagraphs 6(1)(b)(x) and (xi) apply to deem the truck allowances unreasonable.

[54] I believe that the Minister applied the deeming provision correctly to find the entire amount of the truck allowances to be unreasonable and, therefore, taxable.

[55] An employee who receives a taxable allowance is expected to then look to section 8 of the *Income Tax Act* for possible deductions, and the employer completes the corresponding Form T2200 (“Declaration of Conditions of Employment”).

*Board and lodging/Trailer allowances*

[56] Based again on Mr. Saunders’ testimony, I find that the trailer allowances were travel allowances under subparagraph 6(1)(b)(vii). These amounts were paid to Ross French and Terrence Powder for working on the road and in remote locations, where they stayed in their own trailers rather than in hotels.

[57] There was no evidence presented to support the reasonableness of a rate of \$150 per day, so I accept Ms. On’s evidence that \$60 per day is a reasonable rate.

[58] Based on the Appellant’s ledgers at Exhibit R-4, Mr. French received the trailer allowance for five days in 2013 while Mr. Powder received it for six days that year. Therefore, the allowance amounts to \$300 for Mr. French and \$360 for Mr. Powder in 2013.

Amounts paid to John Hague

[59] No evidence was led with respect to the amounts of \$2,550.00 and \$3,325.00 paid by the Appellant to John Hague in 2013 and 2014, respectively. Therefore, the Minister's assumptions in the replies to the notice of appeal stand and these amounts are taxable.

**Conclusion**

[60] The appeals are allowed without costs and the Minister of National Revenue's assessments as confirmed by her August 22, 2017 decisions are referred back to her for reconsideration and reassessment on the basis that:

With respect to the Employment Insurance appeal:

- (i) in 2014, Matthew Ingvarlsen received the amount of \$7,000.00 as a travel allowance which is excluded from income pursuant to subparagraph 6(1)(b)(vii) of the *Income Tax Act*;

With respect to the Canada Pension Plan appeal:

- (ii) in 2013 and 2014, Colin Averill received the amounts of \$10,000.00 and \$2,700.00, respectively, as travel allowances which are excluded from income pursuant to subparagraph 6(1)(b)(vii) of the *Income Tax Act*;
- (iii) in 2013, Tammy Borys (formerly McKinnon) received the amount of \$7,300.00 as a travel allowance which is excluded from income pursuant to subparagraph 6(1)(b)(vii) of the *Income Tax Act*;
- (iv) in 2013 and 2014, Matthew Ingvarlsen received the amounts of \$10,950.00 and \$7,000.00, respectively, as travel allowances which are excluded from income pursuant to subparagraph 6(1)(b)(vii) of the *Income Tax Act*;
- (v) in 2013, Ross French received the amount of \$300.00 as a travel allowance which is excluded from income pursuant to subparagraph 6(1)(b)(vii) of the *Income Tax Act*; and

(vi) in 2013, Terrence Powder received the amount of \$360.00 as a travel allowance which is excluded from income pursuant to subparagraph 6(1)(b)(vii) of the *Income Tax Act*.

Signed at Ottawa, Canada, this 25th day of April 2019.

“Susan Wong”

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Wong J.



CITATION: 2019 TCC 86

COURT FILE NOS.: 2017-4393(EI); 2017-4381(CPP)

STYLE OF CAUSE: AL SAUNDERS CONTRACTING &  
CONSULTING INC. and THE MINISTER  
OF NATIONAL REVENUE

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: November 22, 2018

REASONS FOR JUDGMENT BY: The Honourable Justice Susan Wong

DATE OF JUDGMENT: April 25, 2019

APPEARANCES:

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