Docket: 2012-4948(EI)

BETWEEN:

PETERBOROUGH YOUTH SERVICES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on July 8, 2013, at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	David W. Chodikoff
Counsel for the Respondent:	Ricky Y.M. Tang

JUDGMENT

The appeal is allowed, the decision of the Minister of National Revenue issued on September 4, 2012, is vacated, and the determination by the CPP/EI rulings officer dated February 15, 2012, is reversed on the basis that Melissa McLaughlin was not employed in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* while working for the appellant during the period from January 1, 2010 to December 8, 2011.

Signed at Ottawa, Canada, this 19th day of September 2013.

"Lucie Lamarre"

Lamarre J.

Docket: 2012-4949(CPP)

BETWEEN:

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Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appearances:

Counsel for the Appellant:	David W. Chodikoff
Counsel for the Respondent:	Ricky Y.M. Tang

JUDGMENT

The appeal is allowed, the decision of the Minister of National Revenue issued on September 4, 2012, is vacated, and the determination by the CPP/EI rulings officer dated February 15, 2012, is reversed on the basis that Melissa McLaughlin was not employed in pensionable employment within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan* while working for the appellant during the period from January 1, 2010 to December 8, 2011.

Signed at Ottawa, Canada, this 19th day of September 2013.

"Lucie Lamarre"

Lamarre J.

Citation: 2013 TCC 291
Date: 20130919
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Docket: 2012-4949(CPP)

BETWEEN:

PETERBOROUGH YOUTH SERVICES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from a decision of the Minister of National Revenue (**Minister**), issued on September 4, 2012, confirming a determination by the CPP/EI rulings officer dated February 15, 2012, that Ms. Melissa McLaughlin (**Melissa**) was employed in insurable and pensionable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (**EI Act**) and paragraph 6(1)(*a*) of the *Canada Pension Plan* (**CPP**) while working for the appellant during the period from January 1, 2010 to December 8, 2011.

MINISTER'S ASSUMPTIONS OF FACT

[2] The facts relied upon by the Minister are set out in paragraph 14 of each Reply to the Notice of Appeal (**Reply**), and are reproduced hereunder:

Assumptions

14. In determining the Worker was engaged in insurable ["pensionable" in the Reply in the CPP appeal] employment by the Appellant for the Period, the Minister relied on the following assumptions of fact:

The Appellant

(a) the Appellant operated a non-profit social service agency;

(b) the Appellant's business provided counselling and support service to youth and their families in the Northumberland County, which included Peterborough, Cobourg and Port Hope, Ontario;

(c) the Appellant received referrals from Probation Services for youth under the age of eighteen who have been convicted of an offence and received a court ordered disposition to participate in the program;

(d) the Appellant had a contract with the Four Counties Community Support Team (the "CST") to provide clinical support under the One-to-One Worker Program;

(e) Michele Laviolette (Coordinator of the CST Program) and Jamie Emerson (Executive Director of the Appellant) controlled the day-to-day operations of the Appellant;

The Worker

(f) during the relevant Period, the Worker performed her services under written agreements;

(g) the Worker was hired by the Appellant as a Youth Counsellor;

(h) the Worker performed the following duties:

(i) provided one-to-one support;

(ii) counselled youth;

(iii) drove the youth to and/or from doctor's appointments, probation appointments, school appointments, court dates and errands in the community; and

(iv) helped youth find employment, housing, orientation with the community, higher education and other support services as required;

(i) the Worker held a degree in criminology and had experience in the social service field;

(j) the Appellant required the Worker to have a Criminal Reference Check completed;

(k) the Worker performed the majority of her duties in the Northumberland County community and at the Appellant's youth centre location;

(l) the Worker provided her services continuously to the Appellant since October 2009;

(m) the Worker is no longer working for the Appellant;

(n) there were other workers performing similar services to the Appellant;

Control

(o) the Worker worked on a part-time basis;

(p) the Worker worked various times and days during the week;

(q) the Worker's schedule was flexible, depending on the clients' needs;

(r) the Worker was required to complete twenty hours per month, per client;

(s) the Worker was normally assigned three youths per month;

(t) the Appellant provided the Worker with timesheets and she was required to record her work times, activities and expenses;

(u) the Appellant provided the Worker with the client's criminal history, their circumstances, risks, goals and objectives;

(v) the Worker received direction from the clients' Probation Officers and Michele Laviolette in order to clarify the clients' goals and objectives to ensure that her services were coordinated with services provided by other members of the clients' service teams;

(w) initial meetings with the clients would include the Worker and her Supervisor, Michelle [*sic*] Laviolette, and would normally take place at a Probation Office or at a correctional facility;

(x) the Worker was required to comply with the Appellant's:

    (i) standards of conduct;

    (ii) policies and procedures;

    (iii) established objectives, which were reviewed and re-evaluated on an on-going basis;

    (iv) reporting requirements;

    (v) Supervision Plans; and

    (vi) Confidentiality Agreement;

(y) the Appellant provided the Worker with instructions and directions;

(z) the Worker was required to submit to the Appellant, monthly reports showing the progress that each client was making towards their goals and objectives;

(aa) the Worker was required to report the following to the Appellant:

(i) if she was going to be absent for a period of time;

(ii) incidents that happened, such as criminal charges or the status of a client's health; and

(iii) serious occurrences were to be reported immediately to the Appellant and the Probation Officer and a Serious Occurrence form was to be completed;

(bb) the Worker was required to obtain the Appellant's approval prior to taking certain actions, such as:

(i) spending money on clients, for activities, meals, entertainment and personal needs, etc.;

(ii) travel time to related activities with the clients; and

(iii) if she wanted to spend more than the twenty hour maximum with a client;

(cc) the Appellant determined, which client the Worker would be assigned to;

(dd) the Worker determined when and where she would work with the client, unless there were predetermined activities planned;

(ee) the Worker was required to be available upon the Appellant's or Probation Officer's request;

(ff) the Worker was supervised by Michele Laviolette;

(gg) the Appellant determined the Worker's priorities and deadlines;

(hh) both parties had the right to terminate the Worker's services by providing one week's notice;

Ownership of Tools and Equipment

(ii) the Appellant provided the Worker with a computer and mainframe system access for reports, at no cost to the Worker;

(jj) the Appellant provided the Worker with the electronic templates for timesheets and reports;

(kk) the Worker provided a computer, cell phone, vehicle and car insurance;

(ll) both parties were responsible for the maintenance and repairs of their own tools and equipment;

Subcontracting Work and Hiring Assistants

(mm) the Worker was required to provide her services personally;

(nn) the Worker could not and did not hire helpers or replacements;

(oo) the Appellant was responsible for hiring and paying replacements;

Chance of Profit and Risk of Loss

(pp) the Worker was paid $20.00 per hour;

(qq) the Appellant determined the Worker's rate of pay;

(rr) the Appellant determined the frequency and method of payment to the Worker;

(ss) the Worker was paid on a monthly basis;

(tt) the Appellant paid the Worker by cheque;

(uu) the Worker was paid in her personal name;

(vv) the Worker did not submit invoices in order to be paid;

(ww) the Worker was paid for time she spent reading the Appellant's Policy and Procedures Manual;

(xx) the Worker did not receive bonuses, benefits, vacation pay or paid vacation leave;

(yy) the Appellant put a cap on the maximum number of hours the Worker could spend on each client, unless she received authorization for additional hours;

(zz) the Appellant reimbursed the Worker for expenses that she incurred in obtaining her Criminal Reference Check for the Appellant's records, parking and meals and entertainment during periods that she was on outings with clients;

(aaa) the Appellant paid the Worker mileage at the rate of $0.30 per kilometre;

(bbb) the Appellant was ultimately responsible for resolving customer complaints which resulted from the Worker's performance;

(ccc) the Worker incurred minimal expenses in the performance of her work for her vehicle and computer;

Intention

(ddd) during the relevant Period, the Worker received T4 employment income from Cornerstone Family Violence Centre and Kingston Employment Services;

(eee) the Worker did not report business income or claim business expenses on her personal income tax returns for the 2009, 2010 and 2011 taxation years;

(fff) the Worker claimed her income from the Appellant as Other Employment Income on her 2009 and 2010 tax returns;

(ggg) the Worker did not have her own clients; the clients were those of the Appellant;

(hhh) the Worker did not manage her own staff;

(iii) the Worker did not have a business bank account;

(jjj) the Worker did not have a registered business name or trade name;

(kkk) during the relevant Period, the Worker did not have a registered business number or GST / HST number with the Canada Revenue Agency; and

(lll) the Worker did not charge the Appellant GST / HST.

[3] Counsel for the appellant did not go through those assumptions in order to admit or deny each of them, but presented evidence, as will be seen hereunder, that demolished a number of them.

EVIDENCE IN COURT

[4] The appellant called Mr. James Emerson, the executive director of the appellant, as well as Ms. Michele Laviolette, the coordinator of the appellant's youth justice program, to testify. In addition, Melissa was subpoenaed to testify by the appellant, but she also received a subpoena from the respondent and I therefore gave some leeway to counsel for the appellant in his questioning during Melissa's examination in chief.

[5] Mr. Emerson, who has a masters degree in Clinical Psychology, explained that the appellant is a not-for-profit organization which is funded by the Ministry of Children and Youth Services of the province for the most part, and through fundraising and United Way funding to a small degree. It coordinates two programs: one voluntary mental health program for children and one involuntary youth justice program for cases referred by the courts and by probation officers. The appellant employs 12 full-time employees (he and Ms. Laviolette among them) and 3 part-time employees. The appellant also contracts with outside workers, mainly for cases referred by Probation Services. These outside workers are people like Melissa, who was hired in the context of the involuntary youth justice program. Melissa graduated from college with a diploma in Legal Administration and subsequently obtained an honours degree in Criminology. Workers such as Melissa were not considered as employees by the appellant.

[6] Mr. Emerson explained that the employees are trained in clinical counselling and use very specific psychotherapy techniques. They work with children in weekly psychotherapy sessions. All employees work from the appellant's office in Peterborough. They have an office, a computer and a phone, and have access to secretarial and reception services, to the client information system, to two vehicles belonging to the appellant, to space for recreational activities, and to psychological support. They are under Mr. Emerson's supervision and he maintains regular contact with them. The employees present their cases to Mr. Emerson on a biweekly basis, give him their assessment of those cases and explain what they are doing with the cases and how they are working toward terminating each one. They also appear before a clinical team, of which Mr. Emerson is a member, to bring forward different issues they might have.

[7] By contrast, people like Melissa, who contract with the appellant, do not have access to a computer, a phone, clerical support, the two vehicles, staff training and development or psychological consultation.

[8] Ms. Laviolette is the coordinator of the Community Support Team (**CST**) program for the appellant. She is under the supervision of Mr. Emerson. She put in place the case management plan established by Probation Services for young people of less than 18 years of age who have been convicted of an offence and who have been ordered by a court to participate in such a program. The appellant provides that service in four counties, one of which is Northumberland, where Melissa worked.

[9] It was Ms. Laviolette who hired Melissa and had her sign the two Service Agreements for the periods from October 2009 to October 2010 and October 2011 to October 2012 (Exhibit A-1, Tabs 3 and 4) which were filed in evidence. By those Service Agreements, Melissa agreed to provide clinical support under the One-to-One Worker Program upon request from the probation officer or the CST coordinator (Ms. Laviolette), when the need arose. She agreed to provide a monthly written report in which she was to note the time spent with the client (the young person receiving the services) and summarize the activities and progress related to the established objectives. She was entitled to remuneration of $20 per hour for a total of 20 hours per month with the client. If she needed to work more hours with the young person, she had to obtain the prior approval of Ms. Laviolette. Melissa received as well a mileage allowance of $0.30 per kilometre. Ms. Laviolette said in court that Melissa also had an expense account of $25 per month, that is, she was reimbursed up to that amount on the presentation of invoices. If Melissa wanted to spend more for the young person, she needed to obtain Ms. Laviolette's approval before hand.

Ms. Laviolette said that such approval was in turn dependent on the approval of the bookkeeper and on the availability of funds. It is indicated in the agreements that Melissa was not considered an employee and that, accordingly, no deductions at source in respect of income tax, employment insurance or CPP would be made. Further, she was not entitled to any benefits, with the exception of travel and other pre-approved expenses. The contract could be terminated upon one week's notice by either party. As a matter of fact, Melissa ended the second contract five months into the contract, as she moved to Gananoque, which was outside the counties covered by the appellant.

[10] Melissa was also responsible for providing her own professional liability insurance and ensuring that her vehicle was in good operating condition and that she had sufficient and proper liability insurance coverage when transporting clients.

[11] Ms. Laviolette explained that, when she received a request from the probation officer, she studied the referral form, evaluated the risks and needs with the help of the risk assessment and psychological assessment provided by the probation officer, and decided who would be the proper match taking into account the location of the young person in need. She would then call the contractor she had chosen to find out whether he or she would be interested or available. Ms. Laviolette said that contractors like Melissa acted as role models or mentors for the young people and their task was to develop a therapeutic relationship with the young offender. Melissa described her work as providing guidance to the youth by attempting to connect them with services in the community. Specifically, she tried to achieve the goals outlined in the plan of care set out in the probation order. Any input from the appellant with regard to Melissa's work was based upon the probation order. If the client (the troubled young person) was not happy with the contractor assigned to him or her, Ms. Laviolette could assign the file to another contractor, but this did not in fact happen considering that the service was provided to youth on probation for the purpose of their rehabilitation, and they did not really have any choice but to comply with the court order. Ms. Laviolette said that once the contractor had agreed to work with a client, he or she would contact either the probation officer or her at his or her own discretion. She said there were no rules as such in this regard. No training was provided, as was acknowledged by Melissa. It was Melissa's impression that the appellant hired her on the basis of her education and existing skills.

[12] The contract workers determined their own schedule and they did not have to work 20 hours per month with a client. They would work with the case management plan developed by the probation officer, but had complete flexibility with respect to the manner chosen to do their supports work. Melissa testified that she would meet

the young people anywhere in the community (coffee shop, school, youth shelter). She confirmed that she herself determined, in conjunction with the young person, the schedule for her work with that person.

[13] Talking about Melissa, Ms. Laviolette said that she performed her work in Northumberland County (Melissa stated that she worked in Peterborough and in Cobourg, the latter being in that county and the former in the county of Peterborough) and was not required to report to the appellant in Peterborough. She herself met Melissa initially when she hired her, and twice more after that. She spoke to her on the phone perhaps once or twice a month (Melissa did not remember how many times she spoke to or met with Ms. Laviolette). She said that when Melissa signed the Service Agreement, she (Ms. Laviolette) verbally highlighted the key points such as the rate of pay (non-negotiable), the maximum number of hours for which she would get paid, the expense allowance, the mileage allowance, and finally the fact that she was not being hired as an employee and that no deductions for taxes, EI and CPP would be taken from her pay. Ms. Laviolette testified that Melissa did not ask her what the difference between an employee and a contractor was.

[14] Ms. Laviolette mentioned that she sometimes attended the second meeting with the probation officer, the worker and the young person. According to Melissa's recollection, the initial meeting took place at Probation Services, usually with the probation officer, Michele Laviolette and the young person.

[15] Ms. Laviolette said that Melissa worked with four young offenders in total, which was confirmed by Melissa. Ms. Laviolette testified that with high-risk youth the probation officer would be more involved and they would meet with the contract worker more often. The probation officer was the one in control. She would rarely meet Melissa without the probation officer. Although Melissa reported on her client's progress to the probation officer, she could call Ms. Laviolette informally. Melissa testified that she received instructions in respect of each young person from Ms. Laviolette in person or from the probation officer.

[16] Contract workers were required to invoice for the number of hours worked and they filled out timesheets in order to get paid. Melissa's invoices were filed as Exhibit R-1, Tab 5. It can be seen that sometimes she worked less than 20 hours per month and sometimes more. The number of hours varied from month to month. Like all the other workers, Melissa filed her monthly reports through Ms. Laviolette, who approved and initialled them before sending the invoices to the bookkeeper so that Melissa could paid.

[17] In the Questionnaire for a Payor (Exhibit A-1, Tab 1), Ms. Laviolette answered no to the question whether the worker was permitted to subcontract her work to another party, but she said in court that such a situation never presented itself. Ms. Laviolette also indicated on the same form that the worker was not permitted to send a substitute to perform her duties, but testified that if it happened that Melissa could not keep an appointment, Melissa would only reschedule it.

[18] Ms. Laviolette testified that, in the event of a complaint from the probation officer about a worker, she would probably call the worker to ask him or her to settle the matter, and possibly would set up a meeting between the parties concerned, if necessary. Melissa said that if there had been a complaint against her during an assignment with a young person, she would have spoken to Ms. Laviolette with a view to resolving that complaint. But she acknowledged that she did not know the procedure, and said there was in fact never any complaint against her.

[19] Melissa acknowledged that she also worked for another organization (Northumberland Services for Women) on a contract basis at some time during her second contract with the appellant. When she signed her contract with the appellant, her understanding was that she was not a permanent employee, that she was being hired on a contract basis, and that no deductions would be taken from her pay. She did not, however, consider herself to be self-employed as she did not have her own business as a consultant. She thought that she was an employee. She was aware that she had to provide her own car, and she paid for her gas, but although she had her own insurance, she did not get the insurance coverage required by her contract. She had read the contract very quickly and did not recall Ms. Laviolette having brought the matter of insurance specifically to her attention. She provided her own computer and was not assigned a computer by the appellant.

[20] Melissa testified that it was her understanding that Ms. Laviolette was her supervisor, as it was Ms. Laviolette who determined the number of hours she would work with a young person. She had 20 hours per month to work with each young person, and if there was a crisis situation, she would draw on the expertise of Ms. Laviolette. Larger purchases for a youth had to be pre-approved by Ms. Laviolette.

[21] Melissa said that for support she could contact either Ms. Laviolette or the probation officer, but stated that she would mainly ask Ms. Laviolette for guidance, depending on the young person she was working with. For example, if she needed to take a young person out of a specific community and the probation order restricted

moves, Melissa would talk to Ms. Laviolette first. She could not say, however, how frequently she contacted Ms. Laviolette.

[22] When she wanted to take an extended period of time off (a week or two or three) at a time when she was in contact with a young person on a weekly basis, Melissa would definitely inform Ms. Laviolette. Further, Melissa said that she was not the one deciding how many hours she would work with a young person. She did not recall ever refusing to take a young person assigned to her.

Appellant's Arguments

[23] The appellant briefly summarized the evolution of the case law and began its analysis of the question whether Melissa was employed under a contract of service (as an employee) or under a contract for services (as an independent contractor) with the fourfold test set out in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, [1986] 2 C.T.C. 200. While not exhaustive, the following are the four tests most commonly referred to in the case law: (a) the degree or absence of control exercised by the alleged employer; (b) ownership of tools; (c) chance of profit and risk of loss; and (d) integration of the alleged employee's work into the alleged employer's business (*Wiebe Door*, page 556 F.C.). The fourfold general test involves "examining the whole of the various elements which constitute the relationship between the parties" (*Wiebe Door*, page 560 F.C.).

[24] The appellant emphasized the fact that there were two types of workers in the organization. There were workers who were clearly employees working on premises owned by the appellant, who had their own offices and computers on those premises, who had access to the vehicles of the appellant, and who were invited to staff functions and meetings. There were also the fieldworkers, like Melissa, who contracted with the appellant.

[25] Analyzing the control component of the test, the appellant pointed out that this case involved a quadripartite relationship between the worker (Melissa), the troubled young person, the probation officer and Ms. Laviolette. The latter assigned the young person to Melissa, but it was Melissa who decided how to mentor the troubled young person within the parameters established by the probation officer. It was a one-on-one relationship between the mentor (Melissa) and the troubled young preson. Ms. Laviolette only served as a "buffer" between the probation officer, who had authority under the court order and had received direction from the court as to what to do, and the worker. The appellant being a non-profit organization serving many

people — the whole object being to get troubled youth back into society — explains why the worker had a limited number of hours with each young person.

[26] With respect to ownership of tools, the appellant argued that there is no real issue here as there were no tools really. In fact, Melissa used her own car, which she herself insured for her own needs, and she was compensated for mileage. The contract stipulated that she was responsible for obtaining additional liability coverage, but she did not have such coverage as she said she had not read that provision in the contract.

[27] As for the chance of profit and risk of loss, the appellant raised the fact that, in the context of a non-profit organization, those tests do not make much sense, as the whole organization, including the people working for it, is oriented towards providing social services and not making money. In fact, 90 per cent of the appellant's funding comes from the government and the balance from fundraising and the United Way.

[28] Finally, according to the appellant, the integration test can be looked at by asking whether Melissa's work, although done for the organization, was not integrated into it but only accessory to it (*Wiebe Door*, at page 560 F.C.). According to the appellant, the sole fact that she left her employment seven months before the end of the second contract with just a week's notice, without it causing any problems, shows that her work was not essential and not integral to the organization.

[29] The appellant concluded its analysis of the fourfold test by quoting the following comment of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, [2001] 4 C.T.C. 139 at paragraph 48: "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."

[30] The appellant then referred to the recent decision of the Federal Court of Appeal in *1392644 Ontario Inc. (c.o.b. Connor Homes) v. Canada (Minister of National Revenue)*, [2013] F.C.J. No. 327 (QL), 2013 FCA 85, and to the decision in *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396, [2002] F.C.J. No. 375 (QL), in asserting that it is now necessary to also determine what, in essence, was the intention of the parties. The appellant also referred to *TBT Personnel Services Inc. v. Canada*, [2011] F.C.J. No. 1340 (QL), 2011 FCA 256 at paragraph 35, where it is stated that "[t]he *Wiebe Door* factors must also be considered to determine whether the contractual intention suggested by the intention clauses is consistent with the

remaining contractual terms and the manner in which the contractual relationship operated in fact." Here, the appellant argues that while its intention was obviously to enter into a contract for services with Melissa, it was Melissa's intention to plead that she was nothing more than an employee. However, the appellant is of the view that Melissa — given her educational background and the fact that she could determine her own timetable, that she simply had to advise the appellant if she wished to take time off, that she did not receive any benefits, that she had no office, and that she had to provide her own car, computer and phone —knew that the true nature of her relationship with the appellant was such that she was employed as an independent contractor.

[31] Finally, the appellant drew a parallel between this case and the decision by Judge Rip (as he then was) of this Court in *Family Services Perth-Huron v. Canada (Minister of National Revenue)*, [2000] T.C.J. No. 2 (QL), 2000 CarswellNat 3714, which involved a non-profit charitable organization. In that case, the agency provided a whole series of social services on a voluntary basis and Judge Rip found that the special-service provider hired by the agency, who was also required to prepare reports on the progress of her clients and who had meetings with the co-ordinator in the course of performing her work, was not under the control of the agency. After analyzing all the other factors, Judge Rip held that the service provider was not an employee.

[32] The appellant concludes that the reality of the relationship between the parties, as ascertained through the objective facts in this case, points to its being one in which the worker was an independent contractor.

Respondent's Arguments

[33] The respondent referred to the *Connor Homes* decision and mentioned that that case also involved youth workers working with troubled youth. The respondent stated that the intention of the parties must be looked at, but said it is clear that intention should only be accorded weight if there was a common intention. It was clear for the appellant that the contract workers were independent contractors. As for Melissa, it was her first job, having just come out of school. She was presented with a service agreement but she testified that she did not know the difference between an employee and an independent contractor. It is clear, however, that she never meant to go into business on her own behalf. Her understanding was that she was a "contract employee", as indicated in her answer to a question in the questionnaire given to her by the CRA (Exhibit R-1, Tab 2, pages 7 of 8), meaning not a full-time employee. As

observed in *Connor Homes*, *supra*, at paragraphs 33 to 37, to simply state in the contract that the services are provided as an independent contractor is not sufficient to make it so. The intent must reflect the objective reality of the relationship.

[34] Looking at the different tests developed in the case law and relied upon by the appellant, as seen above, the respondent argued, with respect to control, that this factor should be considered as neutral here. The respondent compared the situation to that in *TBT Personnel Services*, *supra*, where it is stated, at paragraph 35, that the drivers were highly skilled professional drivers who would have needed little supervision whether they were employees or self-employed workers. In the present case, Melissa had just graduated with an honours degree in Criminology, and she was trusted by the appellant to do the work that she was paid to do. She received supporting guidance from Ms. Laviolette and had to make monthly reports on the young person's progress. However, it is not clear how many times per month they contacted each other. The goals and objectives were provided to her by either the appellant or Probation Services. This is very similar to the case in *Connor Homes*, where there were directions given to the workers.

[35] With respect to tools, the respondent agreed with the appellant that there were not really any tools required for Melissa's work. As did the workers in *Connor Homes*, the worker here provided her own vehicle, for which she had insurance, and she was reimbursed for mileage. Further, to paraphrase a comment of the Federal Court of Appeal in *Connor Homes* (at paragraph 49), it is not because a worker provides his or / her own phone and computer, which is today a common requirement for many employees, that the worker is an independent contractor.

[36] According to the respondent, Melissa did not have any chance of profit. Just as in *Connor Homes*, the appellant here imposed financial limits. An hourly rate was imposed and a maximum number of hours was set for each your person. Melissa needed the appellant's approval to work more hours. At paragraph 12 of *Connor Homes*, the Federal Court of Appeal stated that there was no chance for the workers to increase their income by reducing expenses or producing more. The respondent argues that the situation is the same here.

[37] As regards the risk of loss, the respondent referred to paragraph 49 of *Connor Homes*, where the Court said that "[t]he individuals were not required to take any financial risks, nor were they required to take out loans or make any investments in the form of capital assets, specialized equipment or working operating funds". Similarly, Melissa had no risk of loss. Further, Ms. Laviolette testified that, had Melissa been the subject of a complaint, she (Ms. Laviolette) would have had to call

everyone concerned. It was she who would have had to make sure that everything was straightened out.

[38] Finally, with respect to the integration test, Melissa testified that she never intended to operate and did not operate a business of her own. The respondent relied on paragraph 51 in *Connor Homes* to conclude "that the reality of this arrangement by which the [worker's] tasks were dictated by [the objectives set by Probation Services and/or the appellant] and carried out under the supervision of [Ms. Laviolette], where rates of pay were fixed and hours scheduled by the [appellant], and where no significant financial risks or investments were required of the [. . . worker], is not sufficient to qualify the legal relationship between the parties as that of an independent contractor arrangement."

Appellant's Rebuttal

[39] The appellant asked this Court to be careful in applying *Connor Homes* in the present case as the case before the Federal Court of Appeal involved a business and not a non-profit organization. Further, in the appellant's view, the facts in *Connor Homes* are fundamentally different from those here, and the factual analysis in that case should be looked at with that in mind. As an example, in *Connor Homes*, one worker was bound by a non-competition clause, which is not the case with the worker here. On the contrary, Melissa worked elsewhere during a certain period while she was working for the appellant. Further, in *Connor Homes*, for one worker 60 days' prior written notice was required in order for the worker to terminate the agreement. Here, the requirement was one week's notice, and the evidence is that Melissa left before the halfway point of the contract just by sending a written notice.

Analysis

[40] In *Connor Homes*, referred to abundantly in argument, the Federal Court of Appeal summarized the state of the law with regard to determining whether the legal status of a worker is that of independent contractor or employee. There is a two-step process of inquiry that is followed to assist in addressing the central question as stated in *Sagaz*, *supra*, and *Wiebe Door*, *supra*, which is to determine whether or not the individual is performing the services as a person in business on his or her own account. In the first step, the subjective intent of each party to the relationship must be ascertained. The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. In this second step, the parties' intent as well as

the terms of the contract may be taken into account. The factors to be considered will vary with the circumstances. The level of control over the worker's activities, whether the worker provides his or her own equipment, whether the worker hires his or her helpers, whether the worker manages and assumes financial risks, and whether the worker has an opportunity for profit in the performance of his or her tasks are specific factors discussed in *Wiebe Door* and *Sagaz* that will usually be relevant (*Connor Homes*, paragraphs 38 to 41). Other factors, such as the lack of job security, the absence of employee benefits, freedom of choice, and mobility may also be considered (*Wolf, supra*, at paragraph 120; *Lang v. Minister of National Revenue*, 2007 TCC 547, 2007 DTC 1754, 2007 CarswellNat 2998, paragraphs 24 and 38).

[41] Here, my perception of Melissa's testimony and attitude in court is that she surely understood that she was being hired on a contract basis to assist young at-risk people within the parameters indicated by the probation officer, as set out in the court order. She understood that she was going to be paid at the rate of $20 per hour to work for a maximum of 20 hours per month with a young person assigned to her by Ms. Laviolette. She understood that she needed to invoice for the exact number of hours she spent on the young person and that she needed Ms. Laviolette's approval to exceed 20 hours with the client. She knew that her expenses would be reimbursed. The invoices filed as Exhibit R-1, Tab 5, show that the hours she worked varied from one month to another. Melissa was also aware that she was not entitled to any benefits (with the exception of the travel allowance and the reimbursement of certain expenses) and that no deductions at source were taken from her remuneration. Still, in her tax returns, she declared her income from the appellant as other employment income. She said that she did not know the difference between an employee and an independent contractor. She had just finished university and she was attracted by the job and did not discuss the terms of the contract. On the other hand, it was clearly the intention of the appellant not to treat her as an employee. In those circumstances, it is difficult to say that there was a mutual understanding between the parties or a common intention regarding their relationship. In fact, it is my view that Melissa did not pay any attention to, or did not really understand, the subtleties of the Service Agreement that she signed.

[42] I will therefore analyze the different factors developed in the case law, and referred to by the parties in their arguments summarized above, to determine whether Melissa was in fact an employee or an independent contractor. The respondent conceded that the level of control should be considered as a neutral factor as Melissa was working according to her own schedule, did not contact Ms. Laviolette regularly and dealt with a young person according to the skills she possessed, although she abided by the rules laid down in the court order with respect to the young person. She

was not required to perform administrative tasks nor was mandatory attendance at staff meetings to discuss work procedures imposed on her. She did not work on the appellant's premises, unlike the appellant's employees.

[43] The respondent also conceded that the ownership of tools factor was not significant here as, apart from her cell phone and computer, the worker really only provided her car, for which she received a mileage allowance.

[44] With respect to the chance of profit and risk of loss, the respondent argued that there was none for Melissa, while the appellant argued that that test is difficult to apply in the context of a non-profit organization. Melissa was paid at a fixed rate for each hour she spent on a young person and any time in excess of 20 hours with the young person had to be pre-approved by the appellant. She had an expense allowance and was reimbursed for expenses beyond the amount of that allowance that were approved by Ms. Laviolette. The fact that Melissa was paid for each hour worked and that the appellant exercised a degree of control over the hours she could work with each young person may have prevented any chance of profit.

[45] Further, Melissa was not required to take any risks nor was she required to take out any loans or make any investments in capital assets or operating funds. Moreover, Melissa was not entitled to subcontract or to hire helpers. She had to perform the work herself and, if unavailable, she had only to reschedule her appointment with the young person. As in *Connor Homes*, *supra*, the fact that she provided her own phone and computer is not an indication that she was not an employee.

[46] However, the fact that she used her own car is a factor that may be considered as favouring independent contractor status, especially since, under her contract, Melissa was required to obtain extra liability coverage for transporting youth. The evidence showed that she did not do so as she misunderstood that part of the contract; but the requirement existed nonetheless. Furthermore, she was not entitled to employee benefits (except for the travel allowance and the reimbursement of her pre-approved expenses) or vacation pay. She had no job security as her contract could be terminated upon one week's notice, and she was free to accept other engagements. Moreover, she worked only when there was a need, and it is my understanding that she could accept or refuse any client, although she in fact refused none. Finally, it is not that clear what the procedure would have been in the event that a complaint was made against Melissa, as the case did not in fact arise. My understanding from both Ms. Laviolette and Melissa is that, if it had, the latter would have called Ms. Laviolette, whose approach would have been to call all the persons concerned. On

the whole, I find that the chance of profit and risk of loss factors do not necessarily point toward either employee or independent contractor status.

[47] As for the integration test, it is not a factor that the courts seem to consider by itself anymore. The central question of whether the person who has been engaged to perform the services is performing them as a person in business on his or her own account is to be determined by considering all of the other above-mentioned factors in applying the so-called four-in-one test (*Wiebe Door*, *supra*, *Sagaz*, *supra*, paragraph 47). The fact that the worker, on being engaged to perform the services in question, did not perform them in the course of an already established business of her own is not decisive, and she may well have been an independent contractor even though she did not enter into the contract in the course of an existing business carried on by her (*Wiebe Door*, *supra*, page 564, where reference is made to the observations of Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732).

[48] In *Family Services Perth-Huron*, *supra*, Judge Rip concluded that a special-service provider working for a non-profit organization under conditions similar to those in the present case was an independent contractor even though she was not carrying on an existing business. That organization provided support services at home to children who had developmental or physical handicaps or who required specific services. It referred to service providers people requiring or desiring services available under the Special Services at Home Program of the Ontario Ministry of Community and Social Services. When the family was matched with a provider, there was an initial meeting between the co-ordinator, the service provider and the family. The service provider then followed a program prepared by a psychologist or a social worker. Together the family and the service provider arranged how and when the services would be provided. The contract stipulated the number of hours per week that the services were to be provided and the rate per hour. The service provider kept time sheets and travel expense sheets, and her profit was determined by the number of hours worked with a client. She was entitled to a travelling allowance when using her own vehicle. She submitted progress reports, and the co-ordinator was responsible for supervising and monitoring the program followed and was to be informed immediately if any concerns or problems arose. The service provider could work with more than one client at a time.

[49] In *Connor Homes*, Connor Homes was licensed by the province of Ontario to operate foster homes through which it provided care for children with serious behavioural and developmental disorders. Connor Homes retained child and youth workers to provide those services. Two of the workers were remunerated on the basis

of an hourly rate upon submission of invoices, and they also received payments to cover transportation. The contract could be terminated on 14 days' notice by the worker. Another worker, working as an area supervisor, signed a five-year contract, which she could terminate on 60 days' prior written notice. She was remunerated at a per-diem rate for each child resident in a foster home who was under her supervision, payment being made upon presentation of invoices. The contract included, in her case, a non-competition clause. The three workers were not required to take any financial risks.

[50] The Federal Court of Appeal concluded that these individuals were acting as employees of Connor Homes. The Court found that there was a significant degree of control over the duties exercised by the workers and the manner in which these duties were carried out. Indeed, Connor Homes controlled the individuals' duties on a day-to-day basis. The performance of administrative tasks was dictated to the workers and mandatory attendance at staff meetings to discuss work procedures, work scheduling and day-to-day occurrences in the homes was imposed upon them. Connor Homes also provided guidance and instruction to them regarding how to manage difficult situations with clients, as well as with respect to marketing activities to be undertaken on Connor Homes'. It was even acknowledged that the duties performed by the workers concerned were, in fact, the same as those exercised by Connor Homes' employees.

[51] I am of the view that the present case bears greater similarity to the situation in *Family Services Perth-Huron*, *supra*, than to that in *Connor Homes*, since the control exercised by the payer in the former case and in the case before me was minimal in comparison to the control exercised over the workers in *Connor Homes*. Although the chance of profit here was minimal, I conclude, as judge Rip did with regard to the worker in *Family Services Perth-Huron*, that Melissa had skills which she could eventually use for profit even though she was not carrying on an existing business.

[52] On the whole, I find that it may be inferred from the evidence that the appellant and Melissa operated in a manner consistent with a client-independent contractor relationship.

[53] I therefore conclude that Melissa was not employed in insurable and pensionable employment within the meaning of paragraph 5(1)(*a*) of the EI Act and paragraph 6(1)(*a*) of the CPP while working for the appellant during the period from January 1, 2010 to December 8, 2011.

[54] The appeals are allowed and the decision of the Minister issued on September 4, 2012, is vacated and the determination by the CPP/EI rulings officer dated February 15, 2012, is reversed.

Signed at Ottawa, Canada, this 19th day of September 2013.

"Lucie Lamarre"

Lamarre J.

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APPEARANCES:

Counsel for the Appellant:	David W. Chodikoff
Counsel for the Respondent:	Ricky Y.M. Tang

COUNSEL OF RECORD:

For the Appellant:

Name:	David W. Chodikoff
Firm:	Miller Thomson LLP

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada