Docket: 2013-1977(CPP)

BETWEEN:

ONTARIO REAL ESTATE ASSOCIATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

STEPHEN PAUL ARMSTRONG,

Intervenor.

Appeal heard on common evidence with the Appeal
of (*Ontario Real Estate Association 2013-1976(EI)*)
on February 13, 2014, at Toronto, Ontario
By: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the Appellant:	John A. Sorensen
Counsel for the Respondent:	Christian Cheong
For the Intervenor:	The Intervenor himself

JUDGMENT

The Appeal pursuant to section 28(1) of the Canada Pension Plan is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Kingston, Ontario, this 20th day of June 2014.

"Rommel G. Masse"

Masse D.J.

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Appearances:

Counsel for the Appellant:	John A. Sorensen
Counsel for the Respondent:	Christian Cheong
For the Intervenor:	The Intervenor himself

JUDGMENT

The Appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Kingston, Ontario, this 20th day of June 2014.

"Rommel G. Masse"

Masse D.J.

Citation: 2014 TCC 190
Date: 20140620
Docket: 2013-1977(CPP)
2013-1976(EI)

BETWEEN:

ONTARIO REAL ESTATE ASSOCIATION,

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and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

STEPHEN PAUL ARMSTRONG,

Intervenor.

REASONS FOR JUDGMENT

Masse D.J.

[1] The Appellant, the Ontario Real Estate Association ("OREA"), appeals the decision of the Minister of National Revenue (the "Minister") dated February 27, 2013, upholding rulings made by the Canada Revenue Agency ("CRA") under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "*CPP*") and the *Employment Insurance Act*, S.C. 1996 c. 23 (the "*EI*"). In these rulings, involving a significant number of workers, the CRA held that certain workers engaged by OREA were engaged in pensionable employment with OREA on the basis that they were employed under a contract of service, within the meaning of paragraph 6(1)(*a*) of the *CPP* and paragraph 5(1)(*a*) of the *EI*.

[2] The issue in these appeals is whether the workers engaged by OREA were independent contractors or were they employed in pensionable employment with the Appellant under a contract for services for the purposes of the *CPP* and the *EI*. These matters come before the Court by way of two separate appeals. However, these two appeals were heard together on the basis of common evidence bearing upon common issues. These are my Reasons.

Factual Context

[3] OREA is a corporation with its head office in Don Mills Ontario. OREA provides all of the necessary and required registration courses for real estate professionals in Ontario on behalf of the Real Estate Council of Ontario ("RECO"). RECO is the province's real estate professional regulatory body. In order to become a real estate professional in Ontario, an individual must complete a program of study, pass examinations and be registered with RECO. OREA is registered under the *Ontario Private Colleges Act of 2005*, SO 2005, c 28, Sch L, as a private career college. OREA has been contracted by RECO to provide pre-registration, articling and broker education programmes and to administer qualifying exams. OREA runs test centres throughout Ontario. Exams are usually written on Saturdays. When a candidate is prepared to write an exam, he or she must select an examination date and location at a test centre located in Ontario.

[4] OREA engaged workers to operate the various test centres across the province. These workers were designated as Test Centre Operators ("TCOs"). The TCOs may obtain the services of Assistant Test Centre Operators ("ATCOs") to assist with operating the test centres.

[5] The TCOs, the ATCOs are engaged pursuant to an "Authorization" which they sign (see Exhibit A-3 for TCOs and Exhibit A-4 for ATCOs). Appended to the Authorization is a set of "Guidelines" for invigilating the OREA examinations. The Authorization confirms that the workers are to operate a "Test Centre". The appended Guidelines describe what was expected of the TCOs and ATCOs in terms of receiving exam forms, keeping the exam forms secure, reconciling the number and nature of the exams with the number of candidates, the ratio of ATCOs to the number of students writing exams, verifying the identity of the candidates, the instructions that are to be provided to the candidates prior to and after writing the exam, and other common sense guidelines that are necessary to ensure that a fair exam is administered.

[6] The duties of the TCOs and ATCOs included:

a) Verifying the identity of examination writers;
b) Ensuring the examinations begin and end on time;
c) Ensuring that latecomers are not allowed to enter and disrupt the examination;
d) Monitoring examinations to prevent cheating;
e) Prevent examination writers from creating disturbances; and

f) Preventing examination writers from removing questions, answers or notes regarding the examination from the test centre.

[7] The Authorization provided that; "THIS AUTHORIZATION MAY BE REVOKED BY THE ONTARIO REAL ESTATE ASSOCIATION AT ANY TIME".

[8] The foregoing background information is helpful in understanding the history of this matter. A *Canada Pension Plan* contributor program review was completed on Catherine Lautenschlager's 2008, 2009 and 2010 tax returns. Ms. Lautenschlager was a TCO worker authorized to operate a test centre for OREA in Kitchener Ontario. A referral was made for a ruling on the status of Ms. Lautenschlager's employment with OREA during the period from January 1, 2008 to December 31, 2010.

[9] By letters dated January 13, 2012, the *CPP*/*EI* Rulings Officer indicated that Catherine Lautenschlager was engaged in pensionable employment with OREA on the basis that she was engaged under a contract of service within the meaning of paragraph 6(1)(*a*) of the *CPP* during the period of January 1, 2008 through January 10, 2012. Following this, further referrals were made for rulings on the status of various workers engaged by OREA. There then followed fifteen letters, dated March 30 and April 4, 2012 (the "Letters") whereby the Minister took the position that a sample of instructors, TCOs and ACTOs were employees and not independent contractors for the period of January 1, 2008 to March 23, 2012. This led to Notices of Assessments being issued on April 10, 2012, assessing a total of 99 instructors TCOs, and ATCOs for the *CPP* and the *EI*, including interest and penalties against OREA, for the 2008 through the 2010 taxation years.

[10] These rulings and assessments were appealed to the Minister. By letters dated February 27, 2013, the Minister confirmed the rulings that TCOs and ATCOs were employees of OREA and thus engaged in pensionable earnings. However, the Minister held that the instructors and also five workers who were not initially part of the Minister's audit and for whom ruling letters were never issued were independent contractors. OREA is appealing the Minister's decision regarding TCOs and ATCOs to this Court.

[11] Even though only 10 TCOs and ATCOs were directly involved in the Ministry audit, I have been advised by counsel that it is estimated that these matters will have consequences for about 100 workers, and of course, the

consequences to OREA are significant as well. Consequently this matter is proceeding as a test case.

[12] OREA called three witnesses to testify.

[13] Susan Wilson-Celante is an accountant who has been retired for four years. She testified that she worked for OREA since 1988 in various capacities. At the present time, she is working as a TCO and she looks after the real estate exams every Saturday at specific locations. She described her duties. She testified that she is advised ahead of time, usually on a Tuesday, how many candidates are expected to write a particular exam for the following Saturday. It is up to her to find staff to assist in administering the exam. She calls upon a pool of ATCOs whom she herself has engaged in order to do this. She then picks up the exam forms, or receives them from OREA by way of Purolator. This is done on the Wednesday before the scheduled exam day. There are 10 different exams and there are usually 270 to 280 people writing different exams. Hence, she has to separate the candidates into exam groups and she has to find rooms for each group. She has to make sure that the number of different exams matches up with the number of candidates for those exams. This task is complicated enough to require the use of computer spreadsheets which she has devised in order to track this information. She sees to it that the exams are kept under very tight security until they are distributed to the candidates on exam day for obvious reasons. It is up to her to determine how this is done.

[14] On the morning of the exam day, she arrives early at the exam site, about 7:40 a.m., in order to set up the exam rooms. She and the ATCOs clean the exam rooms and put up signs directing the candidates to the correct room. She brings the exams, pens, pencils, calculators, erasers and a lot of other supplies that she provides herself at her own expense. Candidates are supposed to arrive at 8:30 a.m. She and the staff register the candidates in the hallway outside the exam room and verify the candidates' identity by way of some government issued photo ID. The candidates are assigned an examination room and a specific seat in that room. The candidates are then escorted into the exam room and the doors are shut. The exams are distributed and the exam starts at 9:00 am. The exam finishes at approximately 12:20 p.m. and then they have to get ready for the second batch of candidates who have to write their exam at 12:30 p.m. There is no lunch break for the TCO or the ATCOs. The whole process starts all over again for the afternoon exam. There is a short break at approximately 2:30 p.m. The exam ends at approximately 4:30 p.m. She then has to gather up the exams, reconcile the number of completed exams with the number of candidates who wrote and then she goes home. The next day,

she writes a report regarding any unusual event that might have taken place such as a candidate cheating, or being abusive, or candidates arriving late. She emails the report to OREA for follow-up. On Monday, the exams are either sent to or taken to OREA's head office.

[15] She gets paid only for the two three-hour exam sessions at the rate of $150 per session and she does not get paid for preparing the report or any other additional work that she may do.

[16] The foregoing is the procedure that Ms. Celante applies at the exam. No one from OREA tells her what to do and there is no one from OREA to supervise her or the ATCOs. OREA just sends her the exams and she is responsible for doing everything else and getting the completed exams back to OREA. She is responsible for maintaining exam integrity and she is the one who decides how that is done. When she became a TCO, she was not interviewed by anyone from OREA. She is the one who is responsible for finding her staff or ATCOs, not OREA. Being an ATCO is not a job according to her and there is a high turnover of ATCOs.

[17] Ms. Celante has always regarded herself as an independent contractor; she never thought of herself as an employee. Ms. Celante makes the following notable statements concerning her work with OREA:

a) Her contract can be ended at any time with no compensation and so there is no guarantee of work
b) She gets no statutory holiday pay
c) She only gets paid for the sessions she invigilates and not for any other work. If an exam is cancelled before 7:00 a.m. and she has not yet left home, she does not get paid
d) She does not get any benefits at all, such as: sick pay, bereavement leave, paid vacations, medical benefits, dental benefits, drug plan, disability insurance, and life insurance
e) She is not reimbursed if she wants to take any work related course

f) OREA does not withhold any income taxes or any other at source deductions
g) She is responsible for her own CPP contributions; she does not pay any EI premiums
h) OREA does not reimburse her for any mileage, automobile expenses or any other work related expenses
i) She makes her own signs to be posted at the exam sites on her own computer
j) She supplies pens, pencils, calculators, and signs at her own expense [although she admits that OREA has supplied some pens and pencils, just not enough]. She was not in the habit of writing off her expenses because they were minimal
k) OREA does not scrutinize the work that she does and no one representing OREA has ever come to oversee how she conducts the exam [except once to investigate an allegation of cheating by candidates – the rules that she has devised and instituted into the process have stopped the cheating]
l) She is free to work for any other organization or person in doing the same work, just not in the field of real estate since that would be a conflict of interest. She has done some proctoring or invigilating for other organizations in the past but this did not constitute much work – OREA had nothing to say about this
m) She has to recruit her own ATCOs or assistants
n) If she or any TCO or ATCO choose not to work, they are free to do so without reprisal; however, she is responsible for finding someone to replace her
o) There are no performance reviews
p) She does not have an office at OREA headquarters, she has no business cards and if she needs an office, she has to provide it herself in her own home. Members of the public cannot get a hold of her by contacting OREA's office
q) She did receive a T4A slip and reported this income as "other income" and not as income from employment
r) She does not have her own letterhead since it really is not necessary. She submits invoices on forms provided to her by OREA
s) She has not registered for GST/HST since her income from this work was not high enough.

[18] In cross-examination, she agreed that the Authorization that she signed many years ago, was drafted by OREA and she did not have any input into its terms. She

agrees that she does not need any specific training, license or certification to be a TCO. OREA chooses the location of the test centres and pays the expenses related thereto. The number of ATCOs required for a session varies according to the number of candidates. She indicates that the TCO decides how many are needed. Although she believes the Authorization may specify the ratio of ATCOs to candidates, she makes her own call on that and she has never been countermanded on her decision. She is the one who finds ATCOs to work with her, not OREA. She has established her own network of people that she relies on. She is the one responsible for finding and training the ATCOs. If a person who is engaged to work as an ATCO does not work out, she will not ask them back. An ATCO is obliged to sign the Authorization, however. The fees paid to TCOs and ATCOs are set by OREA. She estimates her expenses for supplies are around $30 per month. Sometimes the expenses can be much higher, for example if she has to buy ink cartridges for her computer. OREA determines the nature of the photo ID that is adequate to verify the identity of the candidates. OREA sets the length of time for the exam and the starting time but she retains some discretion as to the exact time that it starts within reason. Candidates are allowed to bring in food and drink (according to OREA Guidelines) but she retains the discretion to prohibit that if she wanted to. She has imposed a total ban on cell phones (although such would appear to be prohibited according to the Guidelines). If she experiences any kind of problem during the exam, she does not contact anyone from OREA in order to get guidance or direction; she makes a decision and acts on it, she reports on what she did and she lives with the consequences. She does not advertise her services as an exam proctor and invigilator; she has not needed to. She has not registered herself as a business in the past due to the low volume of work or income.

[19] Diane Barrett is a Registrar of Child Care Services. She works as an ATCO with Ms. Celante. She described her tasks on exam day very much along the same lines as did Ms. Celante. She makes sure that the candidates are given special instructions regarding purses, bookbags, cell phones – all these items cannot be on their persons and cell phones must be turned off. This direction is in derogation of the Guidelines – these items are prohibited according to the Guidelines. She then monitors the candidates as they write the exam, escorts them to the washroom when necessary and answers questions of the candidates.

[20] She never had to undergo an interview with OREA to become an ATCO and she has never met anyone other than Ms. Celante from OREA. She was not subject to any probationary period, there was no training and there was no performance review. She has provided services at various locations throughout the GTA. Exam

integrity is the most important aspect of the job and that is why she is continuously walking around the exam room monitoring the candidates.

[21] She did sign the Authorization that includes OREA Guidelines but she has not seen these Guidelines in a long time; in fact, she only glanced at them when she signed the Authorization. She is aware that the Authorization can be revoked at any time, there is no guarantee of work and she is free to refuse work when it is offered without any consequences. She is free to work for anyone else other than in the real estate field. She gets no benefits at all from OREA. In her opinion, she is an independent contractor and not an employee of OREA. In the past, she had deducted business expenses such as gas, parking and different other expenses for which she was not reimbursed by OREA. She only gets paid $60 per session no matter how much extra time she puts in and she does not get any bonuses. No one from OREA has ever come down to an examination centre to watch her work or to evaluate her work or to supervise her in any way. Other than the Guidelines appended to the Authorization, OREA has provided no other direction on how to do the work of an ATCO. The Guidelines do not tell her what time to arrive at the exam centre; only that the exam starts at 9:00 a.m. Once the exam is done, she is free to leave and need not stay until a specific time. She has provided some supplies, such as highlighters, at her own expense – she is not reimbursed. She did not receive any training from OREA other than on the job with Ms. Celante. She does not have business cards and she does not have an office or a work station at the OREA offices. If an exam is cancelled, she assumes she will not get paid since she did not work. She bills for her services using invoices designed by OREA. She is not an HST/GST registrant [it is clear the volume of work is too low to require registration].

[22] In cross examination, she stated that she works just about every weekend. She agreed that if she refused to sign the Authorization, she would not get any work. She agreed that she did not have any input into the terms of the Authorization. The engagement was for an indeterminate period of time. It is not OREA who calls her to offer her work; it is a TCO or perhaps another ATCO. If she cannot work, she does not have to find a replacement. She agrees that it is OREA who decides the location of the test centres. She has never held herself out to be in the business of an exam proctor or invigilator and she has never advertised.

[23] Shelley Koral is a director of the OREA Real Estate College. He briefly described the workings of OREA. OREA is a membership-based organization providing products and services to real estate sales people and brokers throughout Ontario. OREA provides advocacy services and government lobbyists to initiate

changes designed to help realtors in Ontario. RECO is a designated administrative authority appointed by the province to administer the *Real Estate and Business Brokers' Act, 2002*, SO 2002, c 30, Sch C. OREA is authorized by RECO to offer educational programmes required to be completed by individuals who want to become sales persons or brokers. Mr. Koral described to the Court the certification and licensing process to become a real estate sales person or broker. Mr. Koral indicated that examination integrity is crucial if the public is to have any confidence in the industry.

[24] There are 22 test centres across the province. OREA engages TCOs to administer the exams. TCOs must ensure that the candidates are who they purport to be by means of current government issued photo ID. The exam must be three hours long and there are instructions that have to be provided to the candidates. The TCOs must make sure that each student obtains the correct exam since there may be several different exams to be written on the same day. At the end of the session, they must reconcile the number of exams written with the number of candidates who were supposed to write the exams, and return them to OREA. The ATCOs are there to assist the TCOs.

[25] Each TCO and ATCO must sign an Authorization which is a one page document together with Guidelines that lists the duties required to be performed at a test centre. ATCOs are selected by the TCO, not by OREA; however, the ATCOs must also sign the Authorization. There is no guarantee of work, there is no probationary period, there is no training and there is no performance review. The Authorizations are revocable at any time, there is no compensation paid when an Authorization is revoked. The only remuneration is a fixed amount per exam session. There are no at source deductions for income taxes, *CPP* or *EI*. There are absolutely no benefits paid of any kind. OREA staff does not attend test centres in order to supervise the TCOs or ATCOs, there is simply no direct supervision at all. TCOs and ATCOs have complete discretion as to how the exams are administered within the framework of the Guidelines. OREA does not provide any tools other than the exams and the pouches or bags within which the exams are transported. TCOs and ATCOs are free to perform similar work for anyone else so long as it is not in the real estate industry. OREA has no priority over the worker's time. If the worker refuses work, there is no consequence.

[26] Mr. Koral testified that the Intervenor, Paul Armstrong, was a TCO who was engaged as such in January 2007, although he did work for OREA before that time as well. His Authorization was revoked sometime in 2009 by Mr. Koral following an incident that occurred at a test centre. It is clear that there is some bad blood

between Mr. Armstrong and OREA. Mr. Armstrong alleges that he was forced to sign the Authorization and he did so under duress, a position not shared by anyone else. He is now seeking a remedy from OREA for having dismissed him.

[27] Under cross-examination by the Intervenor, Mr. Koral agreed that had Mr. Armstrong not signed the Authorization, he would not have continued working with OREA.

[28] On being cross-examined by counsel for the Respondent, Mr. Koral testified that when an exam needs to be written, OREA contacts the TCO and sends the TCO the roster of candidates along with the requisite number of examinations. If a TCO is not available, then it is the responsibility of that TCO to find a replacement, usually among the ATCOs. The TCO has no input as to where the exam will be held, that is done by OREA. OREA Guidelines determines the ratio of TCOs and ATCOs to the number of exam candidates, OREA sets the times for the exams and OREA determines what constitutes adequate identification. Mr. Koral indicated that OREA does supply pens and pencils.

[29] The Intervenor, Paul Armstrong testified. It is his position that the Authorization that he signed was signed under duress – it was a take it or leave it situation. He testified that the Authorization materially changed the terms of employment under which he had been working previously. He had been working for OREA for about 10 years before that. He agreed that OREA previously called him on an as-needed basis. He said that staff from OREA came and supervised his work from time to time. This is contrary to what all other witnesses said and I reject his evidence in this regard.

[30] In cross-examination, he agreed that he was not initially interviewed before he was taken on. He agreed that he did work elsewhere while working for OREA and that there were no restrictions as to where or for whom he could work. He agreed that he received no training from OREA, just from the former TCO. He stated that he had no input into the terms of the Authorization. He felt he had no control and he was not independent and so he viewed himself as being an employee. If he could not be available for an exam, he had to find a replacement. OREA determined the locations of the test centres. He had no input into that decision. He could not deviate from any of the examination Guidelines without the permission of OREA. He did not charge OREA any GST/HST for his services. He agreed that he declared his income from OREA as “other income” in his income tax returns, not as employment income. He was not allowed to claim reimbursement for expenses such as travel expenses. He was not obliged to

purchase any supplies. He did not have any business presence as a TCO, nor did he advertise or otherwise hold himself out as an exam invigilator.

[31] On being cross-examined by counsel for OREA, he agreed that he never was given a T4 slip, which is issued by an employer for employment income. He also agreed that he never asked OREA for a T4 slip. He agreed that there were no at source deductions made for income taxes, *CPP* and *EI*. At the time of signing the Authorization, he agrees that there were no threats made if he refused to sign. He claimed that it was intimated that if he did not sign, he would not get paid by virtue of the fact that the new forms were packaged together with the pay sheets. He felt the duress or intimidation lasted from January 20 2007 until November 2009 when the Authorization was revoked; yet he never complained in any way to anyone about being intimidated. He did not seek legal advice about the Authorization and he did not commence any civil proceedings against OREA or make any complaints to any provincial agency or tribunal regarding his dismissal. He agreed that when he signed the Authorization, he was signing as an independent contractor and not as an employee but he did not agree with it since he believed himself to be an employee. He believed the contract to be void for duress yet he never once raised this issue with anyone. OREA did not pay him any benefits at all.

[32] The Respondent called Angela Rivest as a witness. She is from New Liskeard. She testified that she is a TCO but she has not administered an exam in about two years. She began working with OREA in 2008, but she had not been very busy since New Liskeard is a very small town. She stated that she may have supervised about six exams in all. She works full-time elsewhere. OREA does not impose any restrictions as to where else she might work. She was not trained by anyone. There was no supervision of her work by OREA. She does not recall if she signed an Authorization; she does not believe that she did. However, it is clear to me that she did. She acknowledged that she did get a copy of the Guidelines. She continued working as a TCO until 2011 when she decided to no longer work since she was on maternity leave. She never gave much thought to whether she was an employee or an independent contractor but she was of the view that an employee is someone who gets paid and has deductions taken from their pay whereas a contractor simply gets paid for the service. OREA decided when and where exams are conducted, as well as how many ATCOs are required, the times exams start, the length of time exams lasted. She was not paid if an exam was cancelled. OREA determined the rate of pay. She never charged GST/HST. OREA provided all supplies and she did not incur any expenses herself. She did not hold herself out as an exam invigilator. She received no benefits whatsoever unlike her other job.

[33] In cross-examination, she stated that knowing what she knows now, she would consider herself to be an independent contractor. She felt that OREA did not look over her shoulder to see how she was doing her job. She did not get reimbursed for any expenses such as for travel expenses.

[34] The Respondent also called Josie Romeo as a witness. She prepares income tax returns at home. She testified that she is an ATCO who began working with OREA in 1998. When she began with OREA, she was not interviewed and she did not receive any training other than with the TCO who took her on. There were no restrictions as to where else she could work. No one form OREA ever came to see how she was doing or to supervise the exams to make sure everything was being done properly. When she signed the Authorization, she was never given a time frame as to how long she would work for OREA. She also never thought much about whether she was an employee or a contractor but she indicated that an employee is under guidelines of the employer and is subject to payroll deductions whereas a contractor is pretty much on their own. She agreed that OREA determined the place, time and date of the exams, as well as the ratio of ATCOs to the number of candidates. She has never experienced a cancelled exam. If there was anything out of the norm during the course of an exam, it had to be reported to OREA. This is done by way of an incident report provided by OREA. Late comers were not allowed into the examination room. OREA supplied pens and pencils and such. She had no expenses other than a clock that she requested and OREA paid for. Any income earned from OREA was reported as other income on her income tax returns, not as employment income. OREA does not issue a T4, they issue a T4A. It is clear that since she prepares income tax returns, she knows what the difference is. She did not have a business presence and she did not hold herself out as an exam invigilator. She knew that the Authorization could be revoked at any time. She agreed that she was vested with a lot of discretion as to how her duties could be carried out.

Theory of the Parties

[35] The theory of the respective Parties can be simply stated. The Appellant submits that TCOs and ATCOs are not employees but rather are independent contractors. As such, they were not engaged in pensionable employment. The Appeal should therefore be allowed and the matter referred back to the Minister for reconsideration and reassessment on the basis that none of the TCOs or ATCOs were OREA employees during the period.

[36] The Respondent and the Intervenor have sided together and they are of the view that TCOs and ATCOs are not independent contractors but rather are employees of OREA and as such were engaged in pensionable earnings. The Appeal should therefore be dismissed.

Analysis

[37] It is not necessary to set out the relevant provisions of *CPP* or *EI* since it is clear that if the workers are employees, then they are engaged in pensionable employment and if they are independent contractors, then they are not engaged in pensionable employment.

[38] It has been held that the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out the work: see *Hôpital Notre-Dame de l'Espérance c. Laurent (1977)*, [1978] 1 S.C.R. 605 (S.C.C.) at p. 613. However, this test is too simply stated and can lead to independent contractors being classified as employees depending on the exact terms of the task to be accomplished. In the more complex conditions of modern industry, more complicated tests have to be applied and control of the worker is in itself not always conclusive.

[39] Any analysis of whether a worker is an employee or an independent contractor for purposes of the *CPP* and the *EI* must start with the landmark decision of the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 (F.C.A.). Mr. Justice MacGuigan, speaking for the court, adopted Lord Wright's four-in-one test as stated in *Montréal v. Montréal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161, describing it as "a general, indeed an overarching test, which involves 'examining the whole of the various elements which constitute the relationship between the parties'." This four-in-one test involves a consideration of (1) control; (2) ownership of tools; (3) chance of profit; and (4) risk of loss. Neither one of these factors is determinative in and of itself. The determination requires a trial court to combine and integrate the four factors in order to seek out the meaning of the whole transaction. Justice MacGuigan also stated that the "organization test" or the "integration test", that is the extent to which the worker is integral to the employer's business, may also be of assistance. The true question is whether or not the worker was engaged to perform services as a person in business on his or her own account.

[40] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (S.C.C.), was a case that dealt with vicarious liability. A payer is not vicariously

liable for the tortious acts of a worker who is an independent contractor whereas a payer may very well be liable for the acts of a worker who is an employee. Justice Major of the Supreme Court of Canada held that the difference between an employee and an independent contractor was the element of control that the employer has over the worker. However, control is not the only factor to consider in determining if a worker is an employee or an independent contractor. Justice Major was of the opinion that there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. He stated as follows at paragraphs 47 and 48:

> 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.

[41] *Wolf v. R.*, 2002 FCA 96, is a case that came out of Québec. Mr. Wolf was a citizen of the United States who was working as a consulting engineer in Québec. He sought to deduct lodging and travel expenses as business expenses which he could do if he was an independent contractor but he would not be allowed to do if he were an employee. At trial, the Tax Court of Canada held that he was not an independent contractor and the business expenses were properly disallowed. The taxpayer appealed to the Federal Court of Appeal. The appeal was allowed by the unanimous decision of all three Justices of Appeal but for slightly different reasons. Justice Desjardins applied the relevant provisions of the Civil Code of Québec as well as the common law tests set out in *Montreal Locomotive Works Ltd., supra* : *Hôpital Notre-Dame de l'Espérance*, *supra* and *Sagaz*, *supra*. Justice Desjardins examined the level of control the payer exercised over the worker's activities, the ownership of the equipment necessary to perform the work, whether the worker hired his own helpers, and the degree of financial risk and of profit as they relate to circumstances of an individual with specialized skills. Justice Noël

was of the view that this was a case where the characterization which the parties had placed on their relationship ought to be given great weight. He also acknowledged that the manner in which the parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. Justice Noël was of the view, however, that in a close case where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded. Justice Décary was also of the view that the contractual intent was an important factor that ought to be given much weight. He stated the following:

> 117. The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other. I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e. the intention of the parties. Article 1425 of the Civil Code of Québec establishes the principle that "[t]he common intention of the parties rather than the adherence to the literal meaning of the words shall be sought in interpreting a contract". Article 1426 C.C.Q. goes on to say that "[i]n interpreting a contract the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account".
>
> 118. We are dealing here with a type of worker who chooses to offer his services as an independent contractor rather than as an employee and with a type of enterprise that chooses to hire independent contractors rather than employees. The worker deliberately sacrifices security for freedom ("the pay was much better, the job security was not there, there were no benefits involved as an employee receives, such as medical benefits, pension, things of that nature…" Mr. Wolf's testimony, Appeal Book, vol. 2, p. 24). The hiring company deliberately uses independent contractors for a given work at a given time ("it involves better pay with less job security because consultants are used to fill in gaps when local employment or the workload is unusually high, or the company does not want to hire additional employees and then lay them off. They'll hire consultants because they can just terminate the contract at any time, and there's no liabilities involved", ibid., p.26). The hiring company does not, in its day-to-day operations, treat its consultants the same way it treats its employees (see para. 68 of Madam Justice Desjardins's reasons). The whole working relationship begins and continues on the basis that there is no control and no subordination.
>
> 119. … When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. …

> 120. In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards the worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterized as a contract for services. If specific factors have to be identified, I would name the lack of job security, disregard for employee type benefits, freedom of choice and mobility concerns.

Thus it is clear that the common intention of the parties, if it can be ascertained, is very important in determining if the relationship is that of employer-employee or independent contractor.

[42] In *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 492 (F.C.A.), the Federal Court of Appeal was again swayed by the common intention of the parties. The Court was of the view that dancers engaged by the Royal Winnipeg Ballet were independent contractors rather than employees. Justice Sharlow was of the view that the trial judge erred by not considering the intent of the parties. The parties did not intend an employment relationship to result from the contract. Justice Sharlow traced the jurisprudential history since *Wiebe Doors*:

> 60. … One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.
>
> 61. I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment in Wolf), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their shared intention will be disregarded.
>
> 62. It is common for a dispute to arise as to whether the contractual intention professed by one party is shared by the other. Particularly in appeals under the Canada Pension Plan and the Employment Insurance Act, the parties may present conflicting evidence as to what they intended their legal relationship to be. Such a dispute typically arises when an individual is engaged to provide services and signs a form of agreement presented by an employer, in which she is stated to be an independent contractor. The employer may have included that clause in the

> agreement in order to avoid creating an employment relationship. The individual may later assert that she was an employee. She may testify that she felt coerced into signifying her consent to the written form of the contract because of financial need or other circumstances. Or, she may testify that she believed, despite signing a contract containing such language, that she would be treated like others who were clearly employees. Although the court in such a case may conclude, based on the Wiebe Door factors, that the individual is an employee, that does not mean that the intention of the parties is irrelevant. Indeed, their common intention as to most of the terms of their contract is probably not in dispute. It means only that a stipulation in a contract as to the legal nature of the relationship created by the contract cannot be determinative.
>
> …
>
> 64. In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the Wiebe Door factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[43] In the case of *Connor Homes v. M.N.R.*, 2013 FCA 85, the payer was operating foster homes and group homes through which it provided care for children who have serious behavioural and development disorders. The workers worked as caregivers and in one case as an area supervisor. The Minister of National Revenue had determined that the workers were engaged in pensionable employment pursuant to the *CPP* and the *EI*. The workers appealed this determination to the Tax Court of Canada and the appeal was dismissed. A further appeal was taken by the workers to the Federal Court of Appeal. Justice Mainville discussed the test to determine whether a worker is an employee or an independent contractor:

> 23 The ultimate question to determine if a given individual is working as an employee or as an independent contractor is deceivingly simple. It is whether or not the individual is performing the services as his own business or on his own account: 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59, [2001] 2 S.C.R. 983 (S.C.C.) at para. 47 (“Sagaz Industries Inc.”).
>
> 24 Since the trend in the workforce for the past few years has been toward increased outsourcing and short term contracts, this question has taken on added importance, and has led to much litigation in the Tax Court of Canada. Moreover, employment status directly affects an individual’s entitlement to employment

insurance benefits under the Employment Insurance Act and has a considerable impact on how an individual is treated under the Canada Pension Plan, the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) and various other legislative provisions.

…

29. … The factors to consider may thus vary with the circumstances and should not be closed. Nevertheless, certain factors will usually be relevant, such as the level of control held by the employer over the worker's activities, and whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

…

33. As a result, Royal Winnipeg Ballet stands for the proposition that what must first be considered is whether there is a mutual understanding or common intention between the parties regarding their relationship. Where such a common intention is found, be it as independent contractor or employee, the test set out in Wiebe Door Services Ltd. is then to be applied by considering the relevant factors in light of that mutual intent for the purpose of determining if, on balance, the relevant factors support and are consistent with the common intent. …

...

38. Consequently, Wolf and Royal Winnipeg Ballet set out a two step process of inquiry that is used to assist in addressing the central question, as established in Sagaz Industries Canada Inc. and Wiebe Door Services Ltd., which is to determine whether the individual is performing or not the services as his own business on his own account.

39. Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

40. The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in TBT Personnel Services Inc. v. Minister of National Revenue, 2011 FCA 256, 422 N.R. 366 (F.C.A.) at para, 9, "it is also necessary to consider the Wiebe Door Services Ltd. factors to determine whether the facts are consistent with the parties expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties' intent as well as the terms of the contract may also be taken into account since they color the relationship. As noted in Royal Winnipeg Ballet at

> para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts with the purpose of determining whether the test set out in Wiebe Door Services Ltd. and Sagaz Industries Canada Inc. has been in fact met, i.e. whether the legal effect of the relationship the parties have established is one of independent contractor or one of employer-employee.
>
> 41. The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe* Door and Sagaz will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

Having set out this brief jurisprudential review, I now will go on to discuss the various factors.

(a) The Parties' common intention

[44] This is a very important factor. The TCOs and the ATCOs did not have any written or oral employment agreements with OREA. The Authorizations are the only written evidence of the engagement by OREA. The Authorizations do not speak of creating an employer/employee relationship but only authorizes the workers to operate a test centre for OREA, nothing else. Nothing in the Authorization guaranteed the worker any work at all. In fact, the Authorization could be revoked at any time. There was no probationary period, no performance reviews, no benefits, no at source deductions, no termination or severance pay, no vacation or holiday pay, no paid leaves of absence, no pension plan and no bonuses. All of this would contra-indicate any intention to establish an employer-employee relationship.

[45] Ms. Celante and Ms. Barrett always regarded themselves as being independent contractors and not employees. Mr. Koral who is a director of the OREA Real Estate College, never intended to hire TCOs or ATCOs as other than independent contractors. Ms. Romeo and Ms. Rivest never gave the matter of the nature of their work any thought originally but then on being questioned at trial and upon reflecting on their circumstances, Ms. Rivest agreed that her relationship with OREA was more in the nature of an independent contractor than it was that of

an employee and Ms. Romeo seemed to think so as well. It is only the Intervenor, Mr. Armstrong, who seemed to think that he was an employee and not an independent contractor. Mr. Armstrong testified that he signed the Authorization under duress; by this he meant that he believed that if he did not sign it, he would not get any work. Such a concern in itself, especially when not voiced until long after the fact, falls far short of proof of duress in the legal sense of the word; especially when there was no guarantee of work whatsoever even if he did sign and could be terminated at any time. I find that there was no duress exercised against Mr. Armstrong. In addition, I do not give his evidence much weight at all since he at no time raised any complaint about duress at all except after his termination.

[46] I find that OREA and the workers here under consideration mutually intended and understood that the workers were engaged as independent contractors and not as employees of OREA.

(b) Control and Subordination

[47] This factor is also very important. It is true that the workers had to sign an Authorization and that they really had no input into its terms. The workers worked on Saturdays during a time frame that was established by OREA. The workers were obliged to follow Guidelines. Although the workers submitted invoices, this was on a form prescribed by OREA. The workers were expected to report any unusual incidents to OREA on a form prescribed by OREA. The rate of remuneration was fixed by OREA.

[48] However, the workers were only paid for examination-related work and not for any other work performed. The workers were not limited as to whom they could work for and did not require permission from OREA to perform similar work, or any other work at all for anyone else. The only restriction was that the workers were not to work in any other capacity in the real estate industry due to the possibility of a conflict of interest – a reasonable restriction.

[49] The workers were not initially interviewed when recruited, they did not receive any training, they were not subject to a probationary period, they were not subject to performance reviews, they were free to refuse work without any ramifications and they were not obliged to prioritize OREA's work over any other work of the worker. Of great importance is the fact that no one from OREA ever exercised any control over the manner in which the worker performed his/her work at the test centre. No one form OREA attended the test centres in order to observe, supervise, oversee, direct, review or govern the way in which the work was

performed. The workers were simply left alone to do their work and they were vested with complete discretion as to how the exams were to be conducted within the framework of the Guidelines. Only Mr. Armstrong indicated that he was supervised during his invigilation of exams but that is contrary to the evidence of everyone else and I do not accept his evidence in this regard.

[50] While the Authorization includes Guidelines for operating a test center, these Guidelines are reasonably required to ensure the integrity of the examination process and to ensure that only qualified candidates are admitted to a licensed and regulated profession. This is certainly required if the public is to have any confidence in the integrity of the profession. The manner in which the worker implemented and followed examination Guidelines was entirely up to the worker and no one from the Appellant directed, oversaw, reviewed or governed the conduct of the worker in this regard. Working independently within a defined framework is an indicator that a worker is self-employed and does not, in and of itself, indicate an employer-employee relationship.

[51] I am of the view that the workers were always free to exercise their discretion regarding how they would perform the work for which they were contracted taking into account the necessary and reasonable Guidelines. This factor, in my opinion, establishes that OREA exercised little control over the workers so long as the integrity of the examination process was respected. A consideration of this factor indicates that the workers were independent contractors and contra-indicates an employer-employee relationship.

(c) Equipment and Tools

[52] This factor has little importance in the determination of this appeal. What was required of the worker was the invigilation of the examination process; this did not require much in the way of tools and equipment.

[53] It is true that OREA booked and paid for the facilities (classrooms) in which the examinations took place. A site to conduct the examinations is necessary but it is simply unrealistic to expect individual contractors to provide real property large enough to accommodate several hundred examinees; the cost is simply prohibitive for an individual who is in business on their own account. OREA provided the examination booklets and the pouches within which the booklets were to be transported. However, the completed examination booklets are the work product by which candidates are to be evaluated; they are not tools used by the workers to invigilate the examinations. The attendance sheets, invoice templates and incident

report templates, are provided by OREA. OREA did supply some pens, pencils and calculators. Although workers were not required to provide any tools or equipment, some workers such as Ms. Celante, did so at their own expense since what was provided by OREA was not enough. If a worker did provide such supplies, he/she was not reimbursed for such additional expenses. I note that there were a few exceptions such as the paying of parking expenses and the purchase of a clock but this certainly was not the norm.

[54] A consideration of the factor of equipment and tools really does not assist the Court one way or the other in determining if the workers were employees or independent contractors.

(d) The Hiring of Helpers

[55] TCOs had the full discretion to hire assistants to help in the invigilation of the exams from a pool of ATCOs without any interference from OREA. The only requirement was that the ATCO would have had to have signed an Authorization. OREA did not direct the TCO who to choose to assist in invigilating an exam and OREA did not assign any ATCO to work on any particular examination day. This was left entirely to the discretion of the TCO. It is true that OREA paid the ATCO and that OREA determined the rate of pay and established a guideline as to the ratio of ATCOs to examinees. Nonetheless, it was the TCO who offered work to the ATCO and the ATCO were free to either accept or reject any offers of work without any ramifications. OREA was not the one who offered work to the ATCO. It would seem that other than fixing the rate of pay and the ratio of ATCOs to students, OREA had little to say about when an ATCO would be working.

[56] A consideration of this factor tends to indicate that the workers were independent contractors and tends to contra-indicate an employer-employee relationship.

(e) Financial Risk

[57] This factor is best discussed under the chance of profit and risk of loss factor.

(f) Investment and Management

[58] The workers were not expected to invest anything at all into their work other than their time and effort. A consideration of this factor tends to indicate that the

relationship was that of an employer-employee and tends to contra-indicate that it was that of an independent contractor.

(g) Chance of Profit and Risk of Loss

[59] OREA did not guarantee any net income to the worker. The worker's ability to earn profit was variable and entirely within the worker's control. It depended on the extent to which the worker was willing and able to accept the work that was offered. Although a TCO who refused work had to find a replacement, the worker could decline OREA's offer of work with the consequent loss of opportunity to earn income. The opportunity to earn a profit was also diminished by the amount that the worker expended on supplies and traveling expenses.

[60] This factor is not very important within the circumstances of this case but if it is to be assigned any importance, it would tend to contra-indicate an employer-employee relationship.

(h) Integration into OREAs Operation

[61] The workers were not integrated into OREA's business operations in any meaningful way. They could be dismissed at any time and immediately replaced by others. The workers did not have an office at any premises operated by the Appellant. The workers did not have any business cards, were not assigned any telephone numbers in order to be contacted by students or other members of the public and the workers did not hold themselves out as representing OREA in any way.

[62] This is not a telling factor but to the extent that it must be considered, it would contra-indicate an employer-employee relationship.

Conclusion

[63] In conclusion, on considering all of the evidence and the applicable legal principles, I come to the conclusion on the balance of probabilities that the workers were independent contractors and were not employees of OREA.

[64] For all of the foregoing reasons, the Appeal is allowed and these matters are referred back to the Minister for reconsideration and reassessment on the basis that none of the TCOs or ATCOs were engaged in pensionable employment while engaged by OREA during the period under consideration.

Signed at Kingston, Ontario, this 20th day of June 2014.

"Rommel G. Masse"

Masse D.J.

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APPEARANCES:

Counsel for the Appellant:	John A. Sorensen
Counsel for the Respondent:	Christian Cheong
For the Intervenor:	The Intervenor himself

COUNSEL OF RECORD:

For the Appellant:

Name:	John A. Sorensen
Firm:	Gowling Lafleur Henderson

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