WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 598/12

BEFORE:	J. P. Moore: Vice-Chair
HEARING:	March 29, June 1, 13, 15, 2012 at Toronto Oral
DATE OF DECISION:	August 15, 2012
NEUTRAL CITATION:	2012 ONWSIAT 1831
APPLICATION:	**For an order removing the right to sue pursuant to section 31 of the *Workplace Safety and Insurance Act, 1977* ("WSIA") regarding an action filed in the Ontario Superior Court of Justice, at Toronto, Court File #CV-09-391936**
APPEARANCES:	
For the applicants:	D. Craig and B. Monteiro, Counsel for defendants in the court action, Bhela, Buffalo Group and Markel Insurance B. Bulger, Counsel for interested party Northbridge Insurance
For the respondents:	R. Laing, Counsel for the plaintiffs in the court action N. Rosenthall, Counsel for a defendant in the legal action, Unifund Assurance
Interpreter:	A. Gogia

REASONS

(i) Introduction

[1] This application concerns a lawsuit brought by the respondent Saini, and members of his family, against the applicants, Bhela and Buffalo Group. The lawsuit arises out of a motor vehicle accident that occurred on June 3, 2009 in the state of Ohio. Mr. Bhela was driving a truck owned by Mr. Saini who was a passenger in the vehicle when the accident happened. Mr. Saini suffered significant injuries in the accident.

[2] The truck owned by Mr. Saini was leased back to the defendant Buffalo Group. Mr. Saini and his truck were used by Buffalo Group to complete a contract that Buffalo Group had with an auto manufacturer to deliver automobile parts to the United States.

[3] The applicants bring this application pursuant to section 31 of the *Workplace Safety and Insurance Act, 1997* ("WSIA"). The applicants seek a declaration that the lawsuit brought by Mr. Saini is barred by section 28 of the WSIA. The applicants allege that Mr. Saini was a worker in the course of his employment for Buffalo Group, a Schedule I employer, when he was injured. The applicants further allege that the defendant, Mr. Bhela, was in the course of his employment when the accident occurred. On those facts, if proven, Mr. Saini's right of action would be taken away by section 28 of the Act.

[4] In response, Mr. Saini takes the position that he was, at all material times, an independent operator and not a worker of the Buffalo Group.

(ii) The issues

[5] The issue in this application is whether Mr. Saini's lawsuit is barred by subsection 28(1) of the WSIA. Resolving that issue requires determining the following:

1. whether the applicant, Buffalo Group, was a Schedule 1 employer at the time of the accident in issue;

2. whether, at the time of the accident, Mr. Bhela was a worker in the course of his employment for a Schedule 1 employer;

3. whether, at the time of the accident, Mr. Saini was a worker in the course of his employment for a Schedule 1 employer, or an independent operator.

(iii) The decision

[6] Mr. Saini was an independent operator when the accident occurred. His right to pursue legal action against the defendants/applicants is not barred by the WSIA.

(iv) Analysis

(a) The applicable legislation

[7] The application is brought pursuant to section 31 of the WSIA. The applicants seek a declaration that the legal action commenced by the respondents is barred by section 28 of the WSIA.

[8] The applicable portion of section 31 reads as follows:

> **31.** (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away. …

[9] Section 28 of the WSIA reads as follows:

> **Certain rights of action extinguished**
>
> **28. (1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
>
> 2. A director, executive officer or worker employed by any Schedule 1 employer.
>
> **Schedule 2 employer**
>
> **(2)** A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. The worker's Schedule 2 employer.
>
> 2. A director, executive officer or worker employed by the worker's Schedule 2 employer.
>
> **Restriction**
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> **(3)** If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.
>
> **Exception**
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> **(4)** Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment. 1997, c. 16, Sched. A, s. 28.

(b) Jurisprudence, case law and policy

[10] Section 2 of the WSIA defines a worker as "a person who has entered into or is employed under a contract of service." A contract of service is generally considered a contract under which a person agrees to perform tasks as directed by an employer. Conversely, an independent operator is a person who does not operate under a "contract of service." An independent operator is, in general, a person who enters into a "contract for services," a contract to provide services as specified by the terms of the contract.

[11] The test for deciding whether a person is a party to a contract of service or to a contract for services has been addressed in a number of Tribunal decisions that have considered the question of a person's status as a worker or an independent operator. Those decisions have relied on three sources for guidance in determining that question:

- Board policy (notably, *Operational Policy Manual* ("OPM") Document No. 12-02-01)
- Tribunal case law (notably, *Decision No. 921/89* [14 WCATR 207])

- jurisprudence (notably, *671122 Ontario Ltd. V. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983).

[12] The Board policy criteria are:

1. the stated intention of the parties;
2. capital investment;
3. market mobility;
4. control;
5. a governing collective agreement.

[13] The criteria often relied on by Tribunal case law, as initially proposed in *Decision No.921/89* are:

1. ownership of equipment used in the work or business;
2. the form of compensation paid to the worker or independent operator (i.e., whether a fixed rate is agreed to or a variable remuneration with an attendant prospect of profit or risk of loss);
3. business indicia;
4. evidence of coordinational control as to "where" and "when" the work is performed;
5. the intention of the parties often evidenced by an agency agreement, employment agreement, contract for service, contract of service or limited term contract;
6. business or government records which reflect upon the status of the parties;
7. the economic or business market;
8. the existence of the same or very similar services supplied to an "employer" by a person or persons who are classified as "workers" under the Act;
9. substitute service (i.e. the right to hire others);
10. size of the consideration or payments;
11. degree of integration.

[14] The criteria in Canadian jurisprudence, most recently summarized in the *Sagaz* decision are:

1. level of control;
2. provision of own equipment;

3. the ability to hire helpers;

4. the degree of financial risk;

5. the degree of responsibility for investment and management;

6. the opportunity for profit.

[15] While these criteria are quite similar, there are some variations in the emphasis given to certain factors. In my view, this implies that, ultimately, the determination of whether a person is a worker or an independent operator turns on the facts of each case.

[16] I also note that the criteria set out in the *Sagaz* judgement did not include the intention of the parties. However, a number of judgments of the Federal Court of Canada[1] have recognized that the common intention of the parties is an important factor to consider in determining the nature of the contract between the parties. This position is consistent with the view frequently expressed in Tribunal decisions, as summarized in the Tribunal's *Decision No. 1020/10* (June 15, 2010), at paragraph 45:

> The intent of the parties to that contract will always be given substantial weight when interpreting the nature of the contract. Tribunal decisions have generally supported this principle, finding that the intention of the parties will be given significant weight subject to the qualification that the stated intention must be consistent with and supported by objective factors.

[17] It should also be observed that a number of Tribunal decisions have emphasized that two parties can have an exclusive relationship with each other and still not have an employment relationship. Those cases have emphasized the distinction between the integration of one party into the operations of the other, in contrast to an "interdependent" relationship that mutually benefits both parties (see, for example, *Decision Nos. 773/89, 921/89, 381/91, 522/91* and *585/92*).

[18] In my view, the question of whether two parties have a contract of service or a contract for services is best determined by carefully assessing the stated intention of the parties and assessing that intention against the objective criteria set out in the *Sagaz* judgement.

(c) The status of the defendant Buffalo Group

[19] In their submissions on this issue, all parties agreed that Buffalo Group was a Schedule 1 employer at the time of the accident in issue. Documents contained in the record indicate that Buffalo Group is registered with the Workplace Safety and Insurance Board of Ontario as a Schedule 1 employer in the trucking industry. Testimony was given by an officer and co-owner of Buffalo Group who acknowledged that the company was registered with the Board as a Schedule 1 employer.

[20] I find, therefore, that the Buffalo Group was a Schedule 1 employer at the time of the accident giving rise to this application.

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[1] See, for example, *Royal Winnipeg Ballet e. Canada (N.N.R.)* [2007] 1 F.C.R. 35 (F.C.A.)

(d) The status of the defendant Bhela

[21] On this issue, the parties agreed that Mr. Bhela was a worker in the course of his employment for Buffalo Group. Although testimony provided by Buffalo Group's witness suggested that Mr. Bhela may have had an employment relationship with Mr. Saini's company, nothing in the documentary evidence establishes an employment contract between Mr. Bhela and Mr. Saini's company.

[22] Moreover, both Mr. Bhela and Mr. Saini were emphatic in asserting that there was no employment relationship between them. Both took the position that Mr. Bhela was hired by Buffalo Group as an employee and assigned by Buffalo Group to work with Mr. Saini as a relief driver. The preponderance of the evidence suggests that Mr. Bhela entered into an employment contract with Buffalo Group, received all his training and supervision from Buffalo Group, and was assigned by Buffalo Group to work with Mr. Saini's company. The evidence shows that Mr. Bhela's remuneration came from Mr. Saini's company. However, according to testimony from Mr. Bhela and Mr. Saini, Mr. Saini's company was reimbursed by Buffalo Group for those payments. The fact that Mr. Saini's company paid Mr. Bhela suggests no more than that Mr. Bhela was seconded by Buffalo Group to work for Mr. Saini's company. In that case, section 72 of the Act would apply:

> **72.** If an employer temporarily lends or hires out the services of a worker to another employer, the first employer shall be deemed to be the employer of the worker while he or she is working for the other employer.

[23] I find, therefore, that, at the time of the accident, Mr. Saini was a worker of Buffalo Group, a Schedule 1 employer. If his services were seconded to Mr. Saini's company, pursuant to section 72 Mr. Bhela continued to be a deemed worker of Buffalo Group for the purposes of the WSIA.

(e) The status of the plaintiff Saini

[24] The bulk of the testimony, evidence and submissions presented in this appeal pertained to the status of Mr. Saini at the time of the accident.

[25] In September 2002, Mr. Saini incorporated a company operating as B. P. & R. Transport Inc. ("BPR"). Mr. Saini obtained an AZ licence and began driving tractor trailers for a living. Initially he was a co-driver with an individual who owned a tractor trailer. In July 2003, Mr. Saini began working for Buffalo Group as a driver of trucks owned by Buffalo Group.

[26] In February 2008, Mr. Saini purchased a tractor trailer through BPR and leased it back to Buffalo Group. He entered into a contract with Buffalo Group as an "owner/operator." Mr. Saini drove his truck on behalf of Buffalo Group delivering automobile parts for Buffalo Group's principal customer, an automobile manufacturer. Mr. Saini worked with Buffalo Group until September 2008 when he entered into an owner/operator arrangement with another company. He returned to Buffalo Group in early 2009 and worked with the company until he was injured in June 2009.

[27] Prior to 2009, Mr. Saini had been the sole driver of his truck. When he returned to Buffalo Group in 2009, he and Buffalo Group agreed that Mr. Saini would take on a co-driver provided by Buffalo Group to enable Mr. Saini to operate his truck 24 hours a day.

[28] Both Mr. Saini and Buffalo Group's witness testified that, when Mr. Saini returned to Buffalo Group in early 2009, it was agreed that he would operate under the same contract he

entered into in early 2008. That contract described Mr. Saini's company as the "contractor" in the contract and described Mr. Saini as the "guarantor" of the contract. The contract stipulated that Mr. Saini's company was an independent contractor and would provide a vehicle and Mr. Saini's labour for the use of Buffalo Group. The contract stated, regarding the arrangement:

> It is understood and agreed that the relationship created herein is not one of principal and agent, master and servant, or employer and employee, between the company and the contractor.

[29] The contract required Mr. Saini's company to be responsible for all costs associated with the operation and maintenance of his vehicle. However, the contract required that Mr. Saini's vehicle be subject to maintenance oversight on the part of Buffalo Group. It also required Mr. Saini to participate in Buffalo Group's fleet insurance policy. The contract required Mr. Saini not to use his truck in the service of any other business. The contract further required Mr. Saini to provide WSIB coverage to any workers hired by Mr. Saini's company. Mr. Saini's truck operated under licences and permits held by Buffalo Group.

[30] In their submissions, Counsel for the applicants and the interested party argued, on the facts of this case, that the relationship between Mr. Saini and Buffalo Group, post-contract, was essentially the same as it was before the contract was entered into. Counsel argued that Mr. Saini was a worker before he purchased a truck and entered into that contract and continued to be a worker after he purchased his truck and entered into that contract. They argued that, other than the stated intention of the parties and ownership of the essential tool of the trade, all other relevant indicia pointed to a contract of service rather than a contract of services. Counsel for the applicants and the interested party argued that Mr. Saini was not truly "independent" of Buffalo Group and was so completely integrated into Buffalo Group's business that his true status was that of a worker and not an independent operator. Counsel argued that it would be unfair and an inappropriate interpretation of the law if the ownership of the principal tool of the trade was the primary determining factor of Mr. Saini's status when so many other factors militated against true business independence.

[31] Counsel for the respondents, supported by counsel for Unifund, argued that the true nature of Mr. Saini's arrangement with Buffalo Group, at the time of the accident, was that of an independent operator. They argued that, in early 2008, the parties changed their relationship, a change that was one of substance and not form. They argued that Mr. Saini and Buffalo Group devised a mutually beneficial business plan whereby Mr. Saini provided his labour and the essential tool of his trade to Buffalo Group to enable Buffalo Group to complete a contract with a customer. They argued that this was not an unusual arrangement within the trucking industry.

[32] Counsel on each side of this issue cited previous Tribunal decisions with similar facts where a Panel/Vice-Chair made findings consistent with the position taken by each Counsel. That these adjudicators came to differing conclusions based on similar facts underscores the point that each case must be determined on the facts and circumstances of the particular case. The ultimate test is "what is the true nature of the arrangement between the parties?"

[33] It is indisputable in this case that, in early 2008, Mr. Saini invested a substantial amount of money in a vehicle, and then entered into a contract with Buffalo Group that purported to create a new arrangement between Mr. Saini and Buffalo Group. It is also indisputable that, in that contract, Mr. Saini and Buffalo Group expressly stated that their relationship was one between independent contractors.

[34] However, Counsel for the applicants argued that, in all other respects, the characteristics of the arrangement were reflective of a worker/employer relationship and not a relationship between independent contractors. They noted the high degree of control and management exercised by Buffalo Group over Mr. Saini's day-to-day activities. This control included matters of conduct, the product delivered by Mr. Saini, the way in which the product was delivered, maintenance supervision, control of licenses and permits, and the absence of any market mobility. Counsel noted the extent to which the contract entered into by Mr. Saini and Buffalo Group expressly asserted that extensive degree of control. Counsel argued that Mr. Saini's "business" was so completely integrated into the business activities of Buffalo Group that Mr. Saini could not be seen as an independent operator.

[35] Before reviewing in detail the facts of this case in relation to the legal criteria I would make two comments.

[36] The first pertains to the argument that Mr. Saini's arrangement with Buffalo Group was the same pre-contract and post-contract; that he was in essence an employee at all material times. The implication of that argument is that the contract had no meaningful substance.

[37] However, in my view, the contract significantly changed the arrangement between Mr. Saini and Buffalo Group. Before entering into his contract with Buffalo Group, Mr. Saini provided labour to Buffalo Group. After the contract, he provided labour and the essential tool of the industry.

[38] Before the contract, Mr. Saini had no financial risks regarding care and maintenance and wear and tear of the truck he drove. Buffalo Group bore all that risk. After the contract, Buffalo Group shifted that risk to Mr. Saini, who then became responsible for ensuring that his vehicle was maintained in a way that would ensure maximum use and profitability. I note that, in his testimony, the witness from Buffalo Group stated that one of the motivations for creating this type of contract was that trucks driven by employees were mistreated whereas trucks driven by owner/operators were always well maintained and, hence, more reliable.

[39] Before Mr. Saini entered into his contract with Buffalo Group, there was no need to explicate Buffalo Group's control over Mr. Saini; it was implicit in the employer/worker relationship. However, once Mr. Saini became an independent operator, Buffalo Group had no implicit control over him but could only exercise the control it wished to exercise by way of a contract. It is not in dispute that Mr. Saini gave over to Buffalo Group a substantial degree of control over his vehicle and how Mr. Saini used that vehicle. However, the mere existence of those requirements in the contract underscores the fact that these elements of control only existed by virtue of the contract and not by virtue of the inherent relationship. Once Mr. Saini purchased his vehicle, all elements of Buffalo Group's relationship with Mr. Saini had to be governed by separate and independent contracts, such as the contract signed in early 2008. The lease back arrangement between Mr. Saini and Buffalo Group is further evidence of this fact. In order to maintain an element of control over Mr. Saini's vehicle, Buffalo Group had to enter into a distinct leasing arrangement.

[40] Similarly, with respect to the issue of market mobility, Buffalo Group could not ensure exclusive access to Mr. Saini's services unless it included such a stipulation in the contract. Once Mr. Saini had his own vehicle, he was free to provide his services to other companies, something that the facts demonstrated in this case. Mr. Saini worked for Buffalo Group for several months in 2008 but then took his truck and his labour to another company for several

months in late 2008, until his return to Buffalo Group in early 2009. This pattern suggested greater degree of mobility than one would expect to see in an employment arrangement.

[41] My second explanatory comment addresses a point made by Counsel regarding giving undue weight to ownership of the truck when so many other criteria pointed towards an employment relationship. Regarding that argument, I would state that ownership has implications and ramifications that go beyond that mere fact. Ownership of the principal tool of the industry brings subtle changes to some of the other criteria that are applied in adjudicating these cases. For example, ownership changes the assessment of integration and market mobility. When the putative employer does not own the principal tool of the trade, business integration is diminished and market mobility becomes more fluid.

[42] In his submissions on behalf of the interested party, Mr. Bulger acknowledged that, within the trucking industry, there was a high degree of integration and exclusivity because of the nature of the business and the manner in which the industry was regulated. He argued, however, that it was an industry in which evading WSIB premiums was "an active pursuit."

[43] While I agree with Mr. Bulger that it is important to ensure that true independence is established by the evidence, in many respects within the trucking industry ownership of the principal tool of the trade is the most valid measure of true independence. It requires a substantial investment. A driver who owns his own vehicle offers not just his labour but that substantial investment, thereby saving a contract partner the cost of owning and operating that vehicle. While exclusively is common in the industry, the fact of ownership allows a greater degree of market mobility because it provides an owner/operator with an opportunity to seek and obtain a better "deal" for the use of his vehicle.

[44] In the present case, it is clear that Mr. Saini left Buffalo Group in late 2008 because he believed he could get a better deal with another company. He then returned to Buffalo Group because they offered what appeared to Mr. Saini to be a better deal. In each of those instances, it was not Mr. Saini's labour that was sought by the companies with which he dealt but access to his truck without the expense of ownership and maintenance.

[45] I noted above, in reviewing the case law, jurisprudence, and policy on this issue, that there were some differences among the criteria in case law, jurisprudence, and policy. I concluded that the test should be: what is the intention of the parties and is that intention supported by certain objective criteria. In my view, the criteria set out by the Supreme Court in the *Sagaz* judgment are the best and most comprehensive criteria to use in making that assessment. Applying those criteria to the case before me I find the following:

1. Level of control

[46] While Buffalo Group appeared to exercise a great deal of control over Mr. Saini's activities, in my view, much of that control was a product either of statutory requirements or industry practice. I would also reiterate my comment above that most of the control exercised over Mr. Saini had to be explicated into binding contracts because Buffalo Group had no implicit control over Mr. Saini or, more importantly, his vehicle, in the absence of such contractual terms. Control that is an inherent part of a relationship is very different from control that is given over to one party by another party by way of an agreed contract. The control set out in the contract regarding exclusive use may have limited Mr. Saini's ability to make his truck available to other companies while engaged with Buffalo Group. However, it did not prevent Mr. Saini from

taking his truck to another company if he could get a better deal, something that apparently occurred in this case.

2. Ownership of equipment

[47] Mr. Saini made a substantial investment in the principal tool of his trade, a truck. Buffalo Group had no involvement in the financing of that purchase. Mr. Saini did purchase the truck from Buffalo Group but, in my opinion, the transaction was an arm's length transaction that imposed a significant financial burden on Mr. Saini.

3. Hiring of employees

[48] The evidence was ambiguous regarding Mr. Saini's power to hire workers. Mr. Saini's contract with Buffalo Group indicated that Mr. Saini's company was responsible for hiring other drivers and had full compensation responsibility for those drivers. On the other hand, the reality was that Mr. Saini relied on and used co-drivers provided and trained by Buffalo Group. I think the inference to be drawn from these facts is that Mr. Saini had the power and right to hire other drivers but, for mutual convenience, used co-drivers made available to him by Buffalo Group.

4. Degree of financial risk

[49] In assessing this factor, it is important to note not just the degree of financial risk taken on by the putative independent operator but the degree of financial risk offloaded by the other party to the contract.

[50] As the Buffalo Group witness indicated, one of the principal motivations for entering into contracts with independent operators was that workers tended to mistreat the vehicles that they drove, making the vehicles less reliable. There was a substantial benefit for Buffalo Group in using independent operators who owned and maintained their own vehicles, because such vehicles tended to be more reliable. By entering into these arrangements, Buffalo Group benefitted financially by offloading a substantial risk: ownership and maintenance of a fleet of vehicles. This offloaded financial risk was absorbed by Mr. Saini. If the truck he purchased from Buffalo Group turned out to be defective in any significant way, Mr. Saini bore the costs of such defects. He could not simply go to Buffalo Group and ask for a replacement vehicle. He might have recourse in law against Buffalo Group for selling a defective vehicle, but had to pursue that remedy to obtain redress. He purchased a vehicle and the risks of that purchase became his. Similarly, the costs of maintaining and operating the vehicle in a way that maximized its reliability and durability fell squarely on Mr. Saini's shoulders. Buffalo Group retained a right of maintenance supervision under the contract. However, all costs of maintenance of the vehicle were borne by Mr. Saini.

5. Degree of responsibility for investment and management

[51] Buffalo Group maintained a substantial degree of management of the driving activities of Mr. Saini. However, it did not participate in any significant way in the management of Mr. Saini's personal business. Mr. Saini was fully responsible for investment and management of the principal tool of the industry, and in the relationship between his business and external agencies, such as Canada Revenue Agency. Conversely, Mr. Saini had no say in the investment or management of Buffalo Group, not even as a worker.

6. Opportunity for profit and risk of loss

[52] After Mr. Saini changed his arrangement with Buffalo Group, his remuneration increased from 20 cents per mile to $1 per mile. This increase suggests that the labour component of Mr. Saini's work was worth 20 cents per mile and the use of the truck by Buffalo Group was worth 80 cents per mile. It is clear, therefore, that the bulk of the payment by Buffalo Group went to the costs of using Mr. Saini's vehicle. Mr. Saini's ability to profit from that difference depended on his ability to maintain his vehicle in a way that maximized its reliability and durability. In order to ensure continued receipt of 80 cents per mile, Mr. Saini had to ensure that he had a reliable and durable vehicle. He bore the costs of that responsibility. He suffered a risk of loss of profit if the costs of maintaining that vehicle exceeded the money he received for use of that vehicle. Conversely, he maximized his profit if he kept his costs down. How he used and maintained his vehicle was the principal way in which he made his business a success or a failure. Nothing that Buffalo Group did, in any way, enhanced Mr. Saini's ability to profit or reduced his risk of loss.

[53] I am persuaded, therefore, on the facts of this case and applying the criteria and tests outlined above, that Mr. Saini, the respondent in this application, was an independent operator at the time he suffered the accident that gave rise to this application. As an independent operator, Mr. Saini was a stranger to the WSIA and not barred from pursuing legal action by section 28 of that legislation.

DISPOSITION

[54] The application is denied.

DATED: August 15, 2012

SIGNED: J. P. Moore