

Date: 20071024

**Dockets: A-36-07
A-37-07
A-38-07
A-39-07
A-40-07
A-41-07
A-42-07
A-43-07**

Citation: 2007 FCA 334

**CORAM: SEXTON J.A.
SHARLOW J.A.
RYER J.A.**

BETWEEN:

Docket: A-36-07

1536378 ONTARIO LIMITED O/A B-PRO GROOMING

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

Docket: A-37-07

1536378 ONTARIO LIMITED O/A B-PRO GROOMING

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

Docket: A-38-07

1536378 ONTARIO LIMITED O/A B-PRO GROOMING

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

Docket: A-39-07

GINGER HODGKINSON

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

Docket: A-40-07

1536378 ONTARIO LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

Docket: A-41-07

KRISTA M. HUNTER O/A (KRISSEY'S PET GROOMING)

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

Docket: A-42-07

GINGER HODGKINSON

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

Docket: A-43-07

KRISTA M. HUNTER O/A KRISSEY'S PET GROOMING

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on October 24, 2007.

Judgment delivered from the Bench at Toronto, Ontario, on October 24, 2007.

REASONS FOR JUDGMENT OF THE COURT BY:

SEXTON J.A.

Date: 20071024

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 24, 2007)

SEXTON J.A.

[1] These are appeals by 1536378 Ontario Limited (operating as B-Pro Grooming) and Ginger Hodgkinson and Krista M. Hunter (the appellants) of the decision of MacLatchy, D.J. of the Tax Court of Canada, dated December 20th, 2006 relating to eight appeals (Court File Nos. A-36-07, A-37-07, A-38-07, A-39-07, A-40-07, A-41-07, A-42-07, and A-43-07). All eight of the proceedings before the Tax Court were heard on common evidence and culminated in one set of reasons. Similarly, these reasons will apply to all of the appeals.

[2] The common issue in respect of all eight appeals is whether certain groomers were employees or independent contractors of B-Pro Grooming.

[3] B-Pro Grooming is in the business of pet grooming. The groomers that were hired, at the insistence of Barbara Hodgkinson, the President and sole shareholder of B-Pro Grooming, were first required to register as a business. The groomers would then sign a contract with B-Pro Grooming, where the parties to the contract would be B-Pro Grooming and the groomer's business. The contracts stipulated that the groomers would be paid at a flat rate per day. In order to be paid, the groomers would have to submit invoices to B-Pro Grooming. Because the groomers were paid a flat fee per day, the number of dogs groomed had no bearing on how much they were paid.

[4] The appellants argue that the Tax Court Judge erred in concluding that the groomers were employees of B-Pro Grooming, and not independent contractors.

[5] The conclusion of whether someone is an employee or an independent contractor is a question of mixed fact and law, in that it involves the application of a legal test to a set of facts. As such, the standard of review is one of palpable and overriding error, unless an extricable error of law can be identified, in which case a standard of correctness is used (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paragraphs 27-28).

[6] The appellants argue that the Tax Court Judge failed to completely articulate a test to determine if a worker is an independent contractor or an employee. We would note that the Supreme Court of Canada has stated that there is no such conclusive test. As Major J. noted in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, at paragraphs 47-48:

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.

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.

[7] The Tax Court Judge examined the whole relationship that existed between the parties. He looked at the control over the workers by the employer. He also examined whether the workers provided their own equipment, the degree of investment involved and the financial risk taken by the workers, the responsibility for investment and management by the workers, and the opportunity for

profit or risk of loss in the performance of the tasks of the workers. He noted that the expressed intention of the parties is not determinative of their relationship. He concluded that the groomers were “clearly integrated” into B-Pro Grooming’s business, and that the groomers did not operate their own business.

[8] In looking at his reasons, as well as the evidence presented before him, we are unable to find any overriding and palpable error in the findings of the Tax Court Judge.

[9] In the alternative, the appellants argue that the Tax Court Judge should have found two of the three groomers – Ginger Hodgkinson and Krista M. Hunter – to be independent contractors. The supposed logic in the appellants’ argument is that the situation for Christine Ross, another groomer who intervened and maintained that the groomers were employees, may have been different than for Ginger and Krista, given their testimonies. It should be noted, however, that the Tax Court Judge found Christine Ross’ testimony to be “quite convincing concerning the question of control.” That is, Christine’s testimony applied not only to B-Pro Grooming’s control over herself, but also Ginger and Krista. Based on this finding of fact, and given that the other factors applied to all three groomers, we are unable to distinguish Ginger and Krista’s relationship with B-Pro Grooming from Christine’s.

[10] The appeals will be dismissed with costs.

[11] A copy of this decision will be placed in each file, and file A-36-07 will retain the original.

“J. Edgar Sexton”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-36-07, A-37-07, A-38-07, A-39-07, A-40-07,
A-41-07, A-42-07, A-43-07

**(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA, DATED
DECEMBER 20, 2006, HEREBY THE TAX COURT DETERMINED THAT THE
APPELLANT WAS AN EMPLOYEE. TAX COURT NUMBER: 2006-684-(EI) 685, 687, 688,
504, 505, 682, 683)**

STYLE OF CAUSE: 1536378 ONTARIO LIMITED O/A B-PRO
GROOMING v. THE MINISTER OF NATIONAL
REVENUE
AND BETWEEN
GINGER HODGKINSON v. THE MINISTER OF
NATIONAL REVENUE
AND BETWEEN
1536378 ONTARIO LIMITED v. THE MINISTER
OF NATIONAL REVENUE
AND BETWEEN
KRISTA M. HUNTER O/A (KRISSY'S PET
GROOMING) v. THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 24, 2007

**REASONS FOR JUDGMENT
OF THE COURT BY:** (SEXTON, SHARLOW & RYER J.J.A.)

DELIVERED FROM THE BENCH BY: SEXTON J.A.

APPEARANCES:

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