Docket: 2002-3040(EI)

BETWEEN:

VAL WALDBAUER
O/P VW INDUSTRY WORKPLACE DEVELOPMENT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *Val Waldbauer o/p VW Industry Workplace Development* (2002-3039(CPP)) on September 8, 9 and 10, 2003 at Winnipeg, Manitoba

Before: The Honourable Michael H. Porter, Deputy Judge

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Michael Van Dam

JUDGMENT

The appeal is dismissed and the decision and assessment of the Minister are confirmed in accordance with the attached Reasons for Judgment.

Signed at Calgary, Alberta, this 12th day of February 2004.

"Michael H. Porter"

Porter, D.J.

Citation: 2004TCC25
Date: 20040212
Dockets: 2002-3040(EI)
2002-3039(CPP)

BETWEEN:

VAL WALDBAUER
O/P INDUSTRY WORKPLACE DEVELOPMENT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Porter, D.J.

[1] These appeals were heard on common evidence by consent of the parties, over a period of 3 days, September 8, 9 and 10, 2003 at Winnipeg, Manitoba.

[2] The Appellant has appealed from the decisions of the Minister of National Revenue (hereinafter called the "Minister") dated July 11, 2002 that the following individuals (hereinafter called the "Workers") engaged by her for the periods specified were in both insurable and pensionable employment under the *Employment Insurance Act* (the "*EI Act*") and the *Canada Pension Plan* (the "*CPP*"), namely:

Margaret Cotie	January 1, 2000 to July 23, 2001
David Fitzsimmons	January 1, 2000 to February 18, 2000
Dianne Hamill	August 14, 2000 to June 15, 2001
Nikol Johnstone	January 10, 2000 to August 11, 2000

[3] The Appellant has also appealed from the decision of the Minister dated July 11, 2002 to confirm an assessment dated October 25, 2001 in the amount of $2,124.78 for CPP contributions and $1,523.18 for employment insurance premiums, plus applicable penalties and interest for the period January 1, 2001 to July 31, 2001 in respect of the employment of Margaret Cotie and Dianne Hamill.

[4] The reasons given for the decisions of the Minister were:

> [Workers] were employed under contracts of service and therefore they were employees of yours.

[5] All the decisions of the Minister were said to be issued in accordance with subsection 93(3) of the *EI Act* and subsection 27.2(3) of the *CPP* and were based on paragraph 5(1)(*a*) and 6(1)(*a*) thereof respectively.

[6] The evidence revealed that during the periods in question, the Appellant carried on, as a sole proprietor, a business under the name of Industry Workplace Development ("IWD"), in Winnipeg, Manitoba. Her business was to provide training to ex-offenders and current ones, by which I took it to mean people who had or were serving terms of imprisonment, to enable them to secure employment in the workplace. The project which she administered was funded from a number of different sources, one of which was Human Resources Development Canada ("HRDC"). The funding provided by HRDC is the only one that has relevance to these appeals. HRDC provided funding simply for the training itself, namely the cost of the training facilities, offsite facilities, equipment, furniture and fixtures, personnel, i.e. the trainers and operating expenses for the classroom delivery. HRDC did not pay the administration costs associated with the establishment of the program, e.g. the Appellant herself and a secretary. These were funded by the other agencies.

[7] Funds were paid by HRDC in accordance with comprehensive proposals submitted by the Appellant during each year of the operation. These in turn were approved and attached to formal contracts. Before payment, various forms confirming delivery of the programmes in accordance with the proposals and contracts had to be filed with HRDC. This was so with respect to the training personnel also, namely who they were and the hours they put in, had first to be confirmed in writing whereupon the agreed amounts would be forwarded to IWD to enable payment to be made to the training personnel.

[8] The Appellant set about to engage a number of trainers to deliver the training, the subject of the contracts with HRDC. In this respect, she engaged each of the Workers to do the training and deliver the programmes during the periods set out above. She maintains that each of them was engaged as an independent contractor under a contract ***for*** services. The Minister, on the other hand, has decided that in fact they were employees working under contracts of service. That is the issue in these appeals.

The Law
Contracts Of Service/For Services

[9] The manner in which the Court should go about deciding whether any particular working arrangement is a contract ***of*** service and thus an employer/employee relationship or a contract ***for*** services and thus an independent contractor relationship, has long been guided by the words of MacGuigan, J. of the Federal Court of Appeal in the case of *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025. The reasoning in that case was amplified and explained further in cases emanating from that Court, namely in the cases of *Moose Jaw Kinsmen Flying Fins Inc. v. M.N.R.*, 88 DTC 6099, *Charbonneau v. Canada (M.N.R.)*, [1996] F.C.J. No. 1337, and *Vulcain Alarme Inc. v. The Minister of National Revenue*, (1999) 249 N.R. 1, all of which provided useful guidance to a trial Court in deciding these matters.

[10] The Supreme Court of Canada has now revisited this issue in the case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61, 2001 SCC 59, 274 N.R. 366. The issue in that case arose in the context of a vicarious liability situation. However, the Court recognized that the same criteria applied in many other situations, including employment legislation. Mr. Justice Major speaking for the Court, approved the approach taken by MacGuigan J. in the *Weibe Door* case (above), where he had analyzed Canadian, English and American authorities, and, in particular, referred to the four tests, for making such a determination enunciated by Lord Wright in *City of Montreal v. Montreal Locomotive Works Ltd.*, [1974] 1 D.L.R. 161 at 169-70. MacGuigan J. concluded at page 5028 that:

> Taken thus in context, Lord Wright's fourfold test [control, ownership of tools, chance of profit, risk of loss] is a general, indeed an overarching test, which involves "examining the whole of the various elements which constitute the relationship between the parties". In his own use of the test to determine the character of the relationship in the *Montreal Locomotive Works* case itself, Lord Wright combines and integrates the four tests in order to seek out the meaning of the whole transaction.

At page 5029 he said:

> ... I interpret Lord Wright's test not as the fourfold one it is often described as being but rather as a four-in-one test, with emphasis always retained on what Lord Wright, *supra*, calls *"the combined force of the whole scheme of*

> *operations,"* even while the usefulness of the *four subordinate criteria is* acknowledged. (emphasis mine)

At page 5030 he had this to say:

> What must always remain of the essence is the search for the total relationship of the parties…

He also observed:

> There is no escape for the Trial Judge, when confronted with such a problem, from carefully weighing all of the relevant factors…

[11] Mr. Justice MacGuigan also said this:

> Perhaps the best synthesis found in the authorities is that of Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732, 738-9:
>
> > The observations of Lord Wright, of Denning L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk be taken, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person

> who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him.

[12] In the case of *Kinsmen Flying Fins Inc.* case, above, the Federal Court of Appeal said this:

> ... like MacGuigan J. we view the tests as being useful subordinates in weighing all of the facts relating to the operations of the Applicant. That is now the preferable and proper approach for the very good reason that in a given case, and this may well be one of them, one or more of the tests can have little or no applicability. To formulate a decision then, the overall evidence must be considered taking into account those of the tests which may be applicable and giving to all the evidence the weight which the circumstances may dictate.

[13] The nature of the tests referred to by the Federal Court of Appeal can be summarized as:

(a) The degree or absence of control exercised by the alleged employer;
(b) Ownership of tools;
(c) Chance of profit;
(d) Risk of loss;

In addition, the Court must consider the question of the integration, if any, of the alleged employee's work into the alleged employer's business.

[14] In the *Sagaz* decision (above) Major J. said this:

> …control is not the only factor to consider in determining if a worker is an employee or an independent contractor…

[15] He dealt with the inadequacy of the ‘control test’ by again approving the words of MacGuigan J. in the *Wiebe* Door case (above) as follows:

> A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is

> contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.

[16] He went on to say this:

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, …([1952] 1 The Times L.R. 101) that it may be impossible to give a precise definition of the distinction (p.111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations …" (p. 416). Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, … (Vicarious Liability in the Law of Torts. London: Butterworths, 1967), at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose…. The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> 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.

[17] I also find guidance in the words of Décary J.A. in the *Charbonneau* case (above) when speaking for the Federal Court of Appeal he said this:

> The tests laid down by this Court ... are not the ingredients of a magic formula. They are guidelines which it will generally be useful to consider, but not to the point of jeopardizing the ultimate objective of the exercise, which is to determine the overall relationship between the parties. The issue is always, once it has been determined that there is a genuine contract, whether there is a relationship of subordination between the parties such that there is a contract of employment ... or, whether there is ... such a degree of autonomy that there is a contract of enterprise or for services. ... In other words, we must not pay so much attention to the trees that we lose sight of the forest. ... The parts must give way to the whole. (emphasis mine)

[18] I also refer to the words of Létourneau J.A. in the *Vulcain Alarme* case (above), where he said this:

> … These tests derived from case law are important, but it should be remembered that they cannot be allowed to compromise the ultimate purpose of the exercise, to establish in general the relationship between the parties. This exercise involves determining whether a relationship of subordination exists between the parties such that the Court must conclude that there was a contract of employment within the meaning of art. 2085 of the *Civil Code of Quebec*, or whether instead there was between them the degree of independence which characterises a contract of enterprise or for services….

[19] I am further mindful that as a result of the recent decisions of the Federal Court of Appeal in *Wolf v. Canada*, [2002] F.C.J. No. 375, and *Precision Gutters Ltd. v. Canada (Minister of National Revenue-M.N.R.)*, [2002] F.C.J. No. 771, a considerable degree of latitude seems now to have been allowed to creep into the jurisprudence enabling consultants to be engaged in a manner in which they are not deemed to be employees as they might formerly been. I am particularly

mindful of the words of Mr. Justice Décary in the *Wolf* decision (above) where he said:

> 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 a 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 characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns. (my emphasis)

[20] Thus, it seems to this Court that the pendulum has started to swing, so as to enable parties to govern their affairs more easily in relation to consulting work and so that they may more readily be able to categorize themselves, without interference by the Courts or the Minister, as independent contractors rather than employees working under contracts of service.

[21] In conclusion, there is no set formula. All these factors bear consideration and as Major J. said in the *Sagaz* case (above), the weight of each will depend upon the particular facts and circumstances of the case. Many of the tests can be quite neutral and can apply equally to both types of situation. In such case, serious consideration has to be given to the intent of the parties. Thus is the task of the trial Judge.

The Facts

[22] The Minister in the Replies to the Notices of Appeal signed on his behalf, was said to have relied on the following assumptions of fact (I have set out whether the Appellant agreed or disagreed in parenthesis), namely:

(a) the Appellant was in the business of designing a project to reintegrate unemployed ex offenders into society through education and employment; (Agreed)

(b) the Appellant's business was federally and provincially funded; (Agreed)

(c) the Appellant controlled the day-to-day operation of the business and made all of the business decisions including obtaining clients, setting deadlines and schedules, hiring and firing staff, signing contracts and deciding the direction of the business; (Disagreed)

(d) the Workers were hired by the Appellant; (Agreed, subject to the word "hired" meaning no more than "engaged") (They were screened by another Worker)

(e) Fitzsimmons was hired as an instructor and his duties included classroom instruction, making employment and education contacts for clients, and interviewing clients; (Agreed) ("hired" meaning "engaged")

(f) Johnstone was hired as an instructor and her duties included classroom instruction and finding employment for the clients; (Agreed) ("hired" meaning "engaged")

(g) Hamill was hired as an employment counseling instructor and her duties inncluded interviewing clients, computer training, job research and providing job search assistance; (Agreed) ("hired" meaning "engaged")

(h) Cotie was hired as an education director and her duties included developing curriculum, researching and developing classroom materials, helping to recruit clients, facilitating, assessing, and counseling; (Agreed)

(i) Fitrzsimmons earned a set wage of $9.50 per hour; (The amount was agreed but the Appellant - it was a fee not a wage.)

(j) Johnstone earned a set wage of $2,350 per program delivery based on $18,800 for a total of 8 program deliveries; (Agreed. The amount was agreed but the Appellant maintains it was a fee not a wage. The Worker also left before completing 8-programme deliveries.)

(k) Hamill earned a set salary of $32,000 per year; (The amount was agreed. The Appellant maintains it was a fee not a salary and she in fact earned more than this.)

(l) Cotie earned a set salary of $44,000 per year; (The amount was agreed. The Appellant maintains it was a fee not a salary and she in fact earned more than this.)

(m) Cotie received vacation leave; (The Appellant agreed that Cotie took leave and other instructors filled in for her. I accept that.)

(n) the Appellant set the Workers' pay rates; (Disagreed. The Appellant advised that she negotiated the pay rates. I accept that.)

(o) the Workers were normally paid on a bi-weekly basis; (Agreed)

(p) the Appellant paid the Workers; (Agreed)

(q) the Appellant's office hours of operation were 8:00 a.m. to 4:00 p.m., Monday to Friday; (Agreed)

(r) the Workers normally worked from 8:00 a.m. to 4:00 p.m., Monday to Friday; (Disagreed)

(s) Fitzsimmons, Hamill and Cotie were required to worked at least 37.5 hours per week; (Agreed)

(t) the Appellant controlled the Workers' hours and days; (Disagreed)

(u) the Appellant kept track of the Workers' hours; (Agreed)

(v) the Appellant retained the right to control the Workers; (Agreed)

(w) the Workers reported to the Appellant on a daily basis; (Disagreed)

(x) the Appellant supervised the Workers; (Agreed) (The Appellant said her function was to ensure that the standards of each contract were met.)

(y) the Workers attended daily conferences and weekly staff meetings held by the Appellant; (Agreed) (usually)

(z) the Workers were required to notify the Appellant of any leave requirements; (Agreed)

(aa) the Workers were required to complete activity reports; (Agreed)

(bb) the Workers could not hire their own helpers or replace themselves; (Agreed)

(cc) the Workers performed their services at the Appellant's premises; (Agreed)

(dd) the Appellant provided the work location including an office and classroom; (Agreed)

(ee) the Appellant provided all of the tools and equipment required including furnishings and audio visual equipment; (Agreed)

(ff) the Appellant provided all of the supplies and materials required; (Agreed)

(gg) the Appellant provided liability insurance; (Agreed)

(hh) the Workers did not have a chance of profit or risk of loss; (Disagreed)

(ii) the Workers were not in business for themselves; (Disagreed)

(jj) wages paid by the Appellant to Hamill and Cotie, for the period January 1, 2001 to July 31, 2001, were as follows: (Agreed)

Hamill	$8 8,877.13
Cotie	$20,491.18

(kk) the Workers were employed under a contract of service by the Appellant.

[23] Evidence was given by the Appellant and by two of the Workers, namely Margaret Cotie Dianne Hamill. I found the Appellant to be very dedicated to her work and basically an honest person. However, with all due respect to her, her presentation was somewhat chaotic which could also be said about the manner in which she ran her business. She was handicapped in my view, by a little, but incomplete, knowledge of the law, which placed her in a dangerous situation from a business point of view, as she had not grasped the complete picture.

The Contracts with HRDC

[24] The Appellant entered into 2 contracts with HRDC during the relevant periods of time. The first contract dated April 18, 2000 funded a programme which ran from mid-April 2000 to March 31, 2001 and the second ran from May 7, 2001 to November 30, 2001.

[25] The first contract ("Contract #1") provided funds in the amount of $79,680.00, later enhanced to $86,680.00, to cover the additional cost of a personal development instructor for the period January 15, 2001 to March 31, 2001. The costs covered under the contract were:

Onsite facilities	$ 2,250.00
Offsite facilities	$ 5,000.00
Equipment usage	$ 1,280.00

Furniture and fixtures	$ 830.00
Personnel	$73,800.00
Operating expenses for classroom delivery	$ 3,520.00
Total	$86,680.00

[26] The objectives of this contract were "to provide young ex-offenders with the skills to become good employees. To provide access to employment opportunities intended to ensure participants are learning on the job and gaining work experience while developing employment history. The training is designed to move the participant into job readiness and to employment."

[27] The contract itself recited the fact that it was proposed by the Appellant to carry out the project (set out above) and that she had applied to HRDC for financial assistance towards the cost of the project, for which she was eligible under certain government initiatives and which HRDC was willing to make on certain conditions.

[28] The second contract ("Contract #2") dated May 7, 2001, was for all relevant purposes the same, although the dates and amounts were different, and the contract referred specifically to three positions being funded as follows:

Administrative wages		$73,181.81
1.	Executive Director (should be Educational Director	$27,500.00
2.	Employment Counselling Director	$20,000.00
2.	Personal Development Instructor	$23,375.00
	Total wages	$70,875.00

[29] The thrust of the evidence and submissions of the Appellant was that she was just a conduit of money and that basically she was just an intermediary between HRDC and the personnel involved in delivering the programme. From that, she went on to conclude that HRDC required the personnel to be independent contractors, as that is how they were funding them. That was a giant leap of logic for her to take and is probably at the root of her misapprehension of what went on in this matter.

[30] To some extent, her rationale has a measure of truth to it, as undoubtedly if (and I stress, if) she had built into her proposal the additional costs she might have incurred by reason of engaging her personnel as employees, HRDC would no doubt have included the same in the funding. It is after all HRDC who would have

made the initial ruling as to whether these people were employees or contractors if they had been asked and thus, there is an element of simply taking out of one government pocket to put into another. However, the situation does not end there as there is the question of benefits being available to the Workers in one scenario, but not in the other. Thus, there are third parties involved.

[31] The crux of the matter, however, is that HRDC had no relationship whatsoever with the Workers who were directly in a relationship with the Appellant. HRDC simply provided funding as proposed and requested by the Appellant, but that in itself had no affect on the actual relationship between the Appellant and the Workers and HRDC had no contractual relationship with the Workers, nor did it constitute the Appellant in any way as its agent.

[32] I am particularly fortified in my approach to this by Clause 15.4 in the agreements which reads as follows:

> 15.4 The management, supervision and control of the Project are the sole and absolute responsibility of the COORDINATOR. The COORDINATOR is not in any way authorized to make a promise, agreement or contract on behalf of the DEPARTMENT. The COORDINATOR shall be solely responsible for any and all payments and deductions required by law to be made including those required for Canada Pension Plan, employment insurance, workers' compensation and income tax and for adhering to the applicable Provincial Standards Act. The parties hereto declare that nothing in this agreement shall be construed as creating a legally binding partnership or agency relationship between them."

[33] It is clear from this clause that the obligation of HRDC was no more than to provide funds and that the management of the project was the sole responsibility of the Appellant. The Appellant was on notice that she would be responsible for any payments of Canada Pension Plan and employment insurance deductions and payments that might be due.

[34] Thus, there is nothing in these contracts which, in my view, play any part in the decision as to whether these Workers were employees or independent contractors. This decision must be made on the basis of the factual situation surrounding the relationships themselves.

The Contracts with the Workers

[35] The contracts entered into between the Appellant and each of the Workers were filed as Exhibits A-1 to A-5 respectively. Each is somewhat different although there are many similar clauses.

[36] The first contract in time was with David Fitzsimmons (Exhibit A-3) dated November 26, 1999. From the evidence, I understood that this ran for 3 months from November 1999 to February 2000. Thus, it was entered into somewhat before the two periods covered by the contracts with HRDC (Exhibits A-6 and A-7). The period in question in this appeal relating to Mr. Fitzsimmons is January 1, 2000 to February 18, 2000.

[37] It is clear from the very wording of this contract that this Worker was engaged as an employee. He is referenced to as such throughout and there is nothing in the evidence before me that would in any way detract from this designation.

[38] The second contract in time related to Margaret Cotie (Exhibit A-2) dated April 1, 2000. It appears to have been signed after the original proposal to HRDC was signed by the Appellant but before the contract with HRDC itself was signed on April 18, 2000. It corresponded to the moment in time when the Appellant was advised by HRDC that her funding was being approved. Nonetheless, the evidence revealed that Ms. Cotie worked for the Appellant prior to that time starting in November 1999.

[39] Ms. Cotie also entered into a second contract (Exhibit A-1) on the 7th of May 2001 which was the same date that HRDC signed the second contract with the Appellant, namely Exhibit A-7.

[40] Ms. Cotie herself gave evidence about her situation as did the Appellant.

[41] The first contract, Exhibit A2, set out the following relevant provisions:

> ...AND WHEREAS MARGARET COTIE is an Education Director contracted to provide services to the Project Manager.
>
> ...
>
> 1. The Education Director agrees **that he will faithfully, honestly and diligently serve the Project Manager in the business of the Project Manager.**

2. The Education Director and the Project Manager acknowledge and agree that the relationship between them is one of mutual trust and reliance.

3. The Education Director shall not at any time disclose to any person, firm or corporation any information concerning the business or affairs of the Project Manager and/or the project which he may have acquired in the course of or **incidental to his employment** with the Project Manager or otherwise whether for his own benefit or the detriment or intended or probable detriment of the Project Manager.

4. (a) The Education Director **agrees to perform all duties as assigned by the Project Manager** in a professional and diligent manner;

(b) The Education Director **shall report to the Project Manager and/or** their assigned representative;

(c) The Education Director shall be **responsible for duties as assigned within the following** parameters and which shall be further defined in discussion and review from time to time and shall comprise the following services for Education and Training to complete the specific delivery of eight (8) classroom segments consisting of:

- Development of curriculum on an on-going basis;
- Classroom Instruction consisting of four-week segments for each program delivery with first classroom date to be April 24, 2000 and eighth classroom ending March 23, 2001.
- Related administration and documentation;
- Responsible to the Project Manager and/or the Director;
- Total contracted services to be paid $44,000 comprising $40,000.00 for the eight (8) classroom and related administration deliveries and $4,000 for the eight (8) curriculum developments to include related upgrades and modifications.

5. The Education Director agrees that all records, files, documents, tapes, equipment and the like relating to the business of the Project Manager **and prepared, used or possessed by the Education Director shall be and remain the sole and exclusive**

> **property of the Project Manager and upon termination of the Education Director's employment** with the Project Manager the Education Director agrees to immediately thereafter return to the Project Manager every copy of all such records, files, documents, tapes, equipment and the like.
>
> 6. The Education Director shall **not on the termination for any cause whatsoever of his employment with the Project Manager directly or indirectly engage in a line of business the same as or similar to that now carried on by the Project Manager** or engage to work for any person, firm or corporation engaged in the same or similar type of business, in the City of Winnipeg, Manitoba, for a period of 2 years from the time his employment with the Project Manager ceased, except with the consent in writing of the Project Manager. (emphasis mine)

[42] Whilst the first recital is perhaps somewhat ambivalent, I note that the Worker had to "honestly and diligently serve the Project Manager", a clear reference to an employee situation. Independent contractors do not "serve", they provide a service.

[43] Clause 3 was a non-disclosure clause but included the words "**incidental to his employment**" as opposed to "in the course of providing her contract services".

[44] Clause 4 required the Worker to "**perform all duties as assigned by the Project Manager**", as opposed to a contract to provide a specific service in her own way. The Worker also had to "**report to the Project Manager" and "be responsible for all duties as assigned to her**". These again are all hallmarks of an employee not an independent contractor.

[45] Clause 6 is of great importance in my mind as it restricted the Worker from engaging in a similar line of work in the City of Winnipeg for a 2-year period "**from the time his employment with the Project Manager ceased**". It is very hard to imagine that an independent contractor engaged in his or her own business would be likely to enter into such a restriction, else they be out of business upon termination of the contract. Such a clause is much more consistent with an employee situation.

[46] The general thrust of the contract is that of a contract of service with an employee. I take it from reading it that it was not custom prepared but simply adapted from some other form available to the Appellant. Nonetheless, that is how it reads.

[47] The second contract with Mrs. Cotie (Exhibit A-1) dated the May 7, 2001 which endured in the end, only until July 23rd, is somewhat different.

[48] In the Heading, it refers to the Worker as being a "Service Provider" and in the second recital as being "**Self Employed**" (in capital letters) "to provide services to the Project Manager".

[49] Clauses 1, 2 and 3 are the same as in Exhibit A-2.

[50] Clauses 4 and 5 are virtually the same as clause 5 and 4 in Exhibit A-2 with simply the details of the duties being changed and the non-disclosure clause being amplified. They still referred to information "acquired as a result of his employment with the Project Manager" and required the Worker "**to perform all duties as assigned by the Project Manager**."

[51] The second clause 5 in the contract simply provided for "**all records, files, documents, tapes, equipment and the like relating to the business of the Project Manager and prepared, used or possessed by the Service Provider**" to remain as the sole and exclusive property of the Appellant. Thus, anything designed or produced by the Worker would belong to the Appellant. This again is a hallmark of employment.

[52] Clause 7 has a similar restriction on engagement in any similar line of business. Again this is not exactly consistent with in independent contractor being in business for herself.

[53] The third contract in order of date was the contract with Nikol Johnstone dated April 1st, 2000 (Exhibit A-4). It lasted from January 10, 2000 to August 11, 2000. It contained identical provisions to those found in the contract with Margaret Cotie of even date, except the services to be provided were somewhat different in Clause 4. Otherwise, they were identical.

[54] The last contract was with Diane Hamill dated August 14, 2000 (Exhibit A-5). She worked from August 14, 2000 until June 15, 2001.

[55] The wording in this contract was again somewhat different. The Worker is referred in the title to being "the Employee".

[56] The first recital reads:

> AND WHEREAS the "Employee" is a self-employed contracted employee of the Employer, and is registered in the Province of Manitoba.

A greater contradiction in terms might not be found. What this person was registered as in the Province of Manitoba could be anyone's guess.

[57] The contract refers to "the employee" throughout.

[58] The remaining clauses are to all intents and purposes the same as the other contracts, save again the services to be rendered are different.

[59] I can only say in summary that the general tenor of all these contracts is that of a relationship between an employer and an employee working under a contract ***of*** service rather than that of an independent contractor working under a contract ***for*** services. The very title put upon the Worker in all cases except one (Ms. Cotie's second contract) is that of an employee. Whilst the title put upon the relationship is not all encompassing, and the Court must look at the true working relationship, there is nothing which assists the Appellant in her appeals, in these written contracts. In fact, the evidence flowing from this is very much against her.

Evidence of the Witnesses

[60] I turn now to review the evidence of Ms. Waldbauer. Her evidence is replete with the suggestion that she simply channeled funds and worked on behalf of HRDC to engage workers and that HRDC was in control of everything. Again, I see this as a total misapprehension by her of the relationship between herself and HRDC and, in turn, between herself and the Workers.

[61] It is clear to me that this was her program and she could obtain funds from various government agencies to operate it, including HRDC. HRDC had a funding program available and in order to access those funds the Appellant had to meet certain criteria, including supplying details of the personnel, their contracts, the hours the programmes ran, course material. She also had to submit audits to verify how the funds were actually disbursed. This did not cause it to be an HRDC operational program. Their role was simply a funding one and in order to provide that funding, they needed to ensure that certain things were in place and actually happening. They had no part of the operation. They had no direct contact with either the Workers or the students. They simply needed to know that their criteria

were being met before they would advance funds to the Appellant for her operation.

[62] Thus, when the witness said HRDC approved two Workers as being independent contractors, she is mistaken as that was not in fact the case. They approved the form of contracts for funding purposes and the exact relationship between the Appellant and the Workers was not their concern.

[63] Accordingly, when assessing her evidence, I am disregarding any suggestion that HRDC had any role to play in establishing the nature of the contractual arrangements with the Workers. The Workers simply had to be acceptable to HRDC in the sense of fitting their criteria for funding.

[64] The Appellant disputed item 6(c) of the assumptions of fact relied upon by the Minister. However, I find the Minister was correct.

[65] With respect to items 6(r), (t), (u), (v), (w), and (x), it is clear to me from the evidence that again the Appellant was in control of all of these matters. It is true that the Workers set their own curriculum and courses but the Appellant had the right to alter or change any of it. She held regular meetings with the Workers, kept track of their hours (which she needed to do for classroom instruction in order to receive her funding from HRDC), and required them to sign in and out when teaching. Some of those matters are equivocal in their meaning, as they may have occurred regardless of whether the Workers were contactors or employees. Nonetheless, the Minister was correct in his assumptions.

[66] I also noted that the Workers, although they could trade off between themselves on course delivery, could not bring any outsiders in to replace themselves.

[67] I further noted that the Workers were paid every two weeks. Again, there is no absolute significance to that, but it was the manner in which they were paid. The Appellant called the payments "fees", but I find that somewhat contrived. It is clear that in April of 2000 she received some form of accountable advance from HRDC, upon their approving the funding, and she then paid the Workers out of these funds.

[68] The Appellant agreed, generally speaking, with the duties attributed to the Workers by the Minister.

[69] On the whole, with very little exception, I found the Minister's assumptions of fact to be correct. The interpretation to be placed on those facts is really the issue in this case.

[70] Margaret Cotie, in her evidence, said she started to work in the program in November 1999. The Program Director was John Hall, who originally hired her, left in January 2000. She then became the Education Director, which meant she still did 4 weeks of education delivery plus 2 weeks of program development between the 4-week cycles.

[71] She said in evidence, and I believe her, that she was presented with the contract by the Appellant and she signed it without any discussion at that time about it. That was Exhibit A-1, which came into being some considerable time after she started her duties.

[72] She agreed that in January 2000, she had had a discussion with the Appellant when the latter had told her that it would be better for her, the Worker, if she was self-employed rather than an employee as her cheque would be bigger and she would be able to claim her expenses, use of a vehicle, repairs and meals against her income, for tax purposes. She said Ms. Waldbauer also told her that she, the Appellant, would find it easier administratively to do it that way. She was asked to be registered as a small business proprietorship in Manitoba. Ms. Cotie told the Appellant she knew very little about it and was assured that she would receive some help from the Appellant.

[73] In the result, Ms. Cotie did claim some expenses on her income tax return filed for that year. However, she did not consider herself to be in business on her own account and did not think of herself as running a business, when working for the Appellant. She worked for nobody else during that time.

[74] In her work as Education Director, she assisted the Appellant in putting together the funding proposals and presenting them to HRDC. Her work was also subject to review by the Appellant and if the latter did not like it, she, the witness, had to change it. In fact, when it came to the education component, the witness made it clear that she was very much under the control of the Appellant.

[75] I gleaned from her evidence that sometimes she took work home to do but this was not her general practice.

[76] Finally in July 2001, when the witness wanted to take some time off, there

was an altercation between herself and the Appellant and Ms. Cotie left. They have had an ongoing dispute about money.

[77] I found the witness was very confused about her status while working for the Appellant; and that confusion remained after she left. I had the sense that the witness felt that the organization was in chaos from beginning to end. At the end of the day, I came firmly to the conclusion that there was no meeting of the minds between the Appellant and Ms. Cotie as to the exact nature of her working relationship.

[78] Dianne Hamill also gave evidence. She had seen an advertisement for a position and was interviewed by the Appellant and Ms. Cotie together. She signed a contract, Exhibit A-5, when she started. She said that the meaning of the contract to her was that "she was an employee and the Appellant was the boss".

[79] Her work was to do intake interviews with potential students. The forms she used were provided by the Appellant. She worked regular hours from 8:00 a.m. to 4:00 p.m., hours set by the Appellant. She met regularly with the Appellant to discuss students. She was shown what to do with students by the Appellant who also sat in and observed her in her work.

[80] When she did computer training for students, which was done offsite, she used space and equipment booked and arranged by the Appellant.

[81] In helping the students with job placements, she left me with the clearing understanding that the Appellant was very involved in overseeing her work.

[82] She said she was paid bi-weekly and curiously enough, she said, tax was deducted from her pay cheques.

[83] She said her hours were set by the Appellant and she was required to sign the log book when she came to and left work.

[84] She was shown some invoices which purported to be from her but said she never had seen them before and they were not hers. In fact, her name was spelled incorrectly, which tended to corroborate her evidence.

[85] She said she was told by the Appellant that she was self-employed because that would be easier, which meant she could set her own hours. She was also told

by the Appellant that it would have no bearing on her work and in fact was always told when and where she should be working. She did, at the Appellant's request, register the name "Hamill Consulting" as a proprietorship in Manitoba.

[86] I found that the whole idea of her being told that she was self-employed and registering a proprietorship was a complete fiction. Over and above that, there was nothing in the evidence of the witness to support the assertion that she was self-employed. She herself considered at all times that she was an employee working as such for the Appellant and taking direction from her. She had no sense of being in business for herself. On the whole, I found the witness to be quiet and impressive. I have not the slightest hesitation in accepting her evidence.

Application of the Various Factors to the Evidence

[87] Whilst the necessity of reviewing a number of the factors which, prior to the *Sagaz* case (above), were called the four-in-one test plus an integration test, is somewhat diminished by that case it is still perhaps a useful exercise to go through.

[88] **Title:** It must still be clearly understood that even where the parties choose to put a title on their relationship, if the true nature and substance of the arrangement does not accord with that title, it is the substance to which the Court must have regard. Having said that, it is also fair to say that where the parties truly choose a particular method of setting up their working arrangement, it is not for the Minister or this Court to disregard that choice. Due deference must be given to the method chosen by the parties and if on the evidence as a whole there is no substantial reason to derogate from the title chosen by the parties, then it should be left untouched. The *Wolf* and *Precision Gutters* cases (above) very much substantiate that proposition.

[89] In the case at bar, however, it is very clear that the Appellant and the Workers did not have any clear meeting of the minds on the true nature of their working relationship, let alone the titles to be put upon them. The written contracts only add to the confusion, but on balance tilt towards an interpretation of contracts ***of*** service not contracts with independent contractors. In my view, there is no deference to be accorded to the Appellant's own individual choice. What she set up with the Workers was very much a fiction.

[90] The contracts on the whole were very much contracts by the course, akin to payment by the piece. The Workers were, generally speaking, paid every 2 weeks although there is some evidence that the Appellant was late paying at times.

[91] Clearly, there was a conversation about no deductions. I am not at all confident that the Workers understood the implications of this. All too often an employer will say to a worker that no statutory deductions will be made and the worker will be called a contractor. That simply does not make such worker a contractor as opposed to an employee.

[92] The title put on the arrangement by the Appellant, as such, does not indicate to me at all that this was necessarily an independent contractor arrangement.

[93] **Control:** As this aspect of the test has been traditionally applied, it has been consistently pointed out that it is not the actual control so much as the right to control that is important for the Court to consider. The more professional and competent a person is or the more experience they have in their field, the less likely there is to be any actual control, which creates difficulty in applying this test. Indeed as Major J. pointed out in the *Sagaz* case (above), there may be less control exercised in the case of a competent professional employee than in the case of an independent contractor. Nonetheless, it is another factor to be weighed in the balance.

[94] In this case, I find that there was a great deal of control exercised by the Appellant over the Workers. I sensed from both the manner in which she presented her evidence and the evidence of the workers that her approach was very much hands-on and she left little to the Workers. They might devise a curriculum or do other planning, but she was always there to oversee it or change it if she did not agree with it. To be fair to her, much of this was no doubt driven by her desire to make sure the funding would keep coming from HRDC. Nonetheless, she exercised a considerable degree of control over the Workers. Her assertion that it was HRDC exercising their control is simply not factual as HRDC had no direct relationship with the Workers.

[95] This factor strongly favours an interpretation of contracts of service with these Workers working as employees, not independent contractors.

[96] **Tools and Equipment:** Although the odd bit of work was done at home, the facilities and equipment, classrooms and materials were all provided by the Appellant. The Workers had virtually no investment in equipment that they used. This factor also strongly favours an interpretation of employees working under contracts *of* service.

[97] **Profit and Loss:** I am of the view that there was absolutely no entrepreneurial element to the work undertaken by the Workers. They had no opportunity for making anything other than the payment contracted for each course, and they stood to lose nothing. They had no financial investment to lose. They were simply paid for their work.

[98] This factor also, in my view, strongly calls for an interpretation of employees working under contracts ***of*** service.

[99] **Integration:** This is the aspect of the test which has been most often criticized. The question to be asked is "whose business is it?" That must be asked from the point of view of the worker, not the employer as from the latter's point of view it will always look like its business. In other words, were there two businesses here or one?

[100] The Workers did nothing to indicate that they were in business for themselves. They were simply told by the Appellant that they would be treated as self-employed, so they could have bigger cheques and it would administratively be easier for her. None of them had any other contracts. They worked solely in the organization set up by the Appellant. There is not a shred of evidence in my view, to support the contention that they were in business for themselves. Indeed, their contracts restricted them from being in such business if they left the Appellant, which is hardly the mark of persons in business for themselves. Everything they did was clearly done in the course of the business of the Appellant.

Conclusion

[101] When I consider the words of Major J. in the *Sagaz* case (above), that the central question is whether the person, engaged to perform services, is performing them as a person in business on their own account, particularly when I look at the factors outlined above, I am overwhelmingly of the view that there was only one business here, namely that of the Appellant. Everything points to the Workers working in and for the business of the Appellant. Their services were fully integrated into it. To be told that they were self-employed and would have no statutory deductions was not sufficient to change that.

[102] When I look at the forest as a whole and not just at the individual trees, I am well satisfied on the evidence that the Workers were each working as an employee in insurable and pensionable employment under individual contracts ***of*** service.

[103] Accordingly, the appeals are dismissed and the decisions and assessments of the Minister are confirmed.

Signed at Calgary, Alberta, this 12th day of February 2004.

"Michael H. Porter"

Porter, D.J.

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APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Michael Van Dam

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada