Docket: 2002-1997(EI)

BETWEEN:

1003730 ONTARIO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SEAN A. SEMPLE,

Intervenor.

Appeal heard on common evidence with the appeal of *1003730 Ontario Ltd.* (2002-1998(CPP)) on December 10, 2003 at Toronto, Ontario

Before: The Honourable W.E. MacLatchy, Deputy Judge

Appearances:

Agent for the Appellant:	Robert B. Shortly
Counsel for the Respondent:	Brent Cuddy
For the Intervenor:	The Intervenor himself

JUDGMENT

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

Signed at Toronto, Ontario, this 30th day of January 2004.

"W.E. MacLatchy"

MacLatchy, D.J.

Citation: 2004TCC22
Date: 20040130
Docket: 2002-1997(EI)
2002-1998(CPP)

BETWEEN:

1003730 ONTARIO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SEAN A. SEMPLE,

Intervenor.

REASONS FOR JUDGMENT

MacLatchy, D.J.

[1] These appeals were heard on common evidence on December 10, 2003 at Toronto, Ontario.

[2] The Appellant appealed a ruling to the Respondent for the determination of the question of whether or not Sean A. Semple (the "Worker") was employed in insurable and pensionable employment while engaged by the Appellant during the period of November 19, 2000 to November 26, 2001 within the meaning of the *Employment Insurance Act* (the "*Act*") and *Canada Pension Plan* (the "*Plan*").

[3] By letter dated April 11, 2002, the Respondent informed the Worker and the Appellant that it had been determined that the Worker was not employed in insurable and pensionable employment during the period of November 19, 2000 to

February 28, 2001 pursuant to paragraph 5(1)(*a*) of the *Act* and paragraph 6(1)(*a*) of the *Plan*.

[4] Furthermore, it had been determined that the Worker was employed in insurable and pensionable employment during the period of March 1 to November 26, 2001 pursuant to paragraph 5(1)(*a*) of the *Act* and paragraph 6(1)(*a*) of the *Plan*.

[5] The Worker/Intervenor had worked for the Appellant since 1994 as a self-employed carpenter under a verbal contract. The Appellant operates a restorative service for various insurance companies to repair damage caused by fire and water. The Intervenor ran his own business as a sub-tradesman and over the years with the Appellant he began doing job coordination as well. He was in constant contact with the Payor in order to coordinate all the various sub-trades on a particular project. The Worker required little, if any, supervision as his expertise and skills were known by the Appellant. The Worker invoiced the Appellant for his time and effort on a job. He provided his own carpentry tools and used his own truck but was given an allowance for its use. He could employ whoever he needed in order to complete a project. He used his own cell phone to keep in contact with the office. An office was made available to him together with the use of office equipment. He was mostly at the job site but infrequently at the office. If he purchased material he was reimbursed by the Payor. This continued to approximately March 2001, when the Worker was required to be mostly in the office to act full time as a job coordinator.

[6] After March 2001, the Worker was provided with a truck owned by the Appellant and marked accordingly. He was provided with a cell phone, credit card for gasoline and was primarily doing job coordination work mostly out of the office of the Appellant. He would attend the job sites to keep track of the project but did little carpentry work.

[7] The arrangement between the Appellant and the Worker did not change; although the Appellant said he offered the Worker the chance to become an employee but the Worker refused. The Worker does not recall such an offer.

[8] It was argued on behalf of the Appellant that the previous conditions of the arrangement between itself and the Worker had not really changed except that the Worker, although he continued to provide invoices, was not paid by the hour, as previously, but by the week the exact amount of $1,440.

[9] After examining the case law to which this Court was directed, the four-in-one test still has validity and when applied to the circumstances that existed support the Minister's decision. Previous to March 1, 2001, it was agreed that the Worker was an independent contractor. The question of control exercised by the Appellant over the Worker was minimal, if at all. The Worker supplied his own tools and operated his own business and paid his own expenses. He could profit from his efforts and was careful not to let his expenses cause him any loss. The arrangement between the Appellant and the Worker was acknowledged by the Minister to be one of independence and the Worker was engaged pursuant to a contract for services.

[10] After March 1, 2001, however, things changed to the extent that the Worker was no longer carrying on his business as such. He was paid an equal weekly sum – even though still invoiced as previously – he was given a vehicle for his use together with a credit card for its maintenance and a cell phone. He was required to be a coordinator for the business of the Appellant and no longer a carpenter on the job. He operated mostly from the office of the Appellant using the Appellant's office equipment and supplies.

[11] The intention of the parties has now become recognized by the Courts to be very persuasive towards recognizing the real relationship existing between the parties. But it cannot be the most determining factor of that relationship. Where the circumstances may not be absolutely clear, it would seem that the intention of the parties could be the deciding factor that indicates their relationship. The Court cannot overlook all the other evidence presented of that relationship and make a decision on the parties' intention as they saw them.

[12] In these circumstances, it was somewhat fortuitous for the Worker that he was able to receive employment insurance benefits during that later period of his association with the Appellant. I do not find that he had any plan or scheme to qualify himself for benefits at the expense of the Appellant. It is unfortunate for the Appellant that a ruling at the time of the change in circumstances between the parties was not requested to clarify their relationship. It is always difficult to accept a decision made a year ago and be unable to change the circumstances that caused the adverse decision especially when it causes financial hardship.

[13] These appeals are dismissed and the decisions of the Minister are hereby confirmed.

Signed at Toronto, Ontario, this 30th day of January 2004.

"W.E. MacLatchy"

MacLatchy, D.J.

CITATION:	2004TCC22
COURT FILE NO.:	2002-1997(EI) and 2002-1998(CPP)
STYLE OF CAUSE:	1003730 Ontario Ltd. and M.N.R. and Sean A. Semple
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 10, 2003
REASONS FOR JUDGMENT BY:	The Honourable W.E. MacLatchy, Deputy Judge
DATE OF JUDGMENT:	January 30, 2004

APPEARANCES:

Agent for the Appellant:	Robert B. Shortly
Counsel for the Respondent:	Brent Cuddy
For the Intervenor:	The Intervenor himself

COUNSEL OF RECORD:

For the Appellant:
Name:
Firm:

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

For the Intervenor:
Name:
Firm: