

Docket: 2005-875(CPP)

BETWEEN:

BRENDA McCARTY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

FAMILY GUIDANCE GROUP INC.,

Intervenor.

Appeal heard together on common evidence with the appeal of
Brenda McCarty (2005-410(EI)) on November 20, 2006,
at Saskatoon, Saskatchewan

Before: The Honourable Justice D.W. Beaubier

Appearances:

For the Appellant:

The Appellant herself

Counsel for the Respondent:

Ainslie Schroeder

For the Intervenor:

Roy C. Filion

AMENDED JUDGMENT

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

This Amended Judgment and Amended Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment dated December 5, 2006.

Signed at Yorkton, Saskatchewan, this 18th day of December, 2006.

"D.W. Beaubier"

Beaubier, J.

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Citation: 2006TCC657
Date: **200612**____
Docket: 2005-875(CPP)
2005-410(EI)

BETWEEN:

BRENDA McCARTY,

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Intervenor.

REASONS FOR JUDGMENT

Beaubier, J.

[1] These appeals were heard together on common evidence at Saskatoon, Saskatchewan, on November 20, 2006. The Appellant testified. Counsel for the Intervenor called Randall Varga who was Family Guidance Group Inc.'s ("FGI") Supervisor of the Appellant during the Period.

[2] The "Period" respecting the appeals is from June 1, 2002 to August 21, 2003 in which the Appellant alleges that she was an employee of FGI and insurable under the *Employment Insurance Act* and pensionable under the *Canada Pension Plan*. It is not calendar 2003 as described in the Replies.

[3] The particulars in dispute are set out in paragraphs 2 to 6 of the Reply to the Notice of Appeal (File No. 2005-410(EI)). They read:

2. By Notice of Assessment dated April 20, 2004 the Payor was assessed for, among other things, employment insurance premiums in the amount of \$994.01 in respect of Appellant, for the 2003 year.
3. By letter received May 21, 2004, the Payor appealed to the Minister for a reconsideration of the 2003 year assessment.
4. In response to the Payor's appeal, the Minister decided to cancel the assessment with respect to the Appellant as the Appellant was not employed under a contract of service with the Payor.
5. In so deciding as the Minister did with respect to the Appellant, the Minister relied on the following assumptions of fact:
 - (a) the Payor operated a business which provided counselling services to corporate customers who offer employee assistance programs ("EAP");
 - (b) the Payor operated out of Thornhill Ontario;
 - (c) the Appellant was engaged as a counsellor and her duties included providing EAP counselling, case management, record keeping and reporting;
 - (d) the Appellant was engaged to service the Payor's Saskatchewan region clients;
 - (e) the Appellant and the Payor entered into a written contract which included the following:
 - (i) the Appellant is an independent contractor,
 - (ii) the Appellant will provide short-term counselling and case management,
 - (iii) the Payor acknowledges the Appellant's professional skills and clinical expertise,
 - (iv) the Appellant is contracted to close 210 credits per year,
 - (v) the Appellant's fee is \$2625 per month, on a retainer basis,
 - (vi) the Appellant shall accept full liability for the payment of income tax, EI, CPP, automobile and business expenses, office

- expenses, professional training, health coverage and professional insurance,
 - (vii) the Appellant agrees to maintain liability insurance,
 - (viii) the Appellant agrees to maintain professional certification, and
 - (ix) the Appellant must submit invoices on a monthly basis;
-
- (f) the Appellant performed her services at her private office and in her home office, which were both in Saskatoon;
 - (g) the Payor paid the Appellant \$2,808.75 per month based on a monthly fee of \$2,625.00 plus GST of \$183.75;
 - (h) the Appellant was required to submit invoices in order to get paid;
 - (i) the Payor did not withhold CPP contributions or EI premiums from the Appellant's fee;
 - (j) the Appellant's retainer would have been adjusted if targets were not met;
 - (k) the Appellant did not receive health benefits, insurance benefits, vacation pay or sick leave from the Payor;
 - (l) the Appellant determined her own hours and days of work;
 - (m) the Appellant contacted the clients directly and set up appointment times;
 - (n) the Payor did not control the Appellant;
 - (o) the Payor hired the Appellant for her professional skills, expertise and experience;
 - (p) the Appellant was not supervised on a day-to-day basis;

- (q) the Appellant used her own discretion and judgement in determining how to perform her services;
- (r) the Payor was only interested in the Appellant's final results;
- (s) the Appellant had the power to accept or refuse clients;
- (t) the Appellant had the freedom to, and did, work for others while performing services for the Payor;
- (u) the Appellant was required to provide her services personally as her expertise was required for the job;
- (v) the Payor did not provide a work location for the Appellant;
- (w) the Appellant provided her own offices;
- (x) the Payor provided the Appellant with forms, surveys and a counsellor handbook;
- (y) the Appellant provided her own training, books and vehicle;
- (z) the Appellant incurred expenses in the performance of her duties which included business licenses, membership fees and dues, telephone, utilities, insurance, postage, parking, travel costs, office supplies and office rent;
- (aa) the Appellant provided her own liability insurance;
- (bb) the Appellant had a chance of profit and a risk of loss;
- (cc) the Payor did not provide the Appellant with job security or a guarantee of ongoing work;
- (dd) the Appellant had her own business name, business license and GST account;

- (ee) the Appellant advertised for other clients;
- (ff) the Appellant charged the Payor GST;
- (gg) the Appellant has declared professional income and expenses on her 2000, 2001 and 2002 year tax returns;
- (hh) the Appellant was in business for herself, and
- (ii) the total amount paid by the Payor to the Appellant, in the 2003 year, was \$20,924.99.

B. ISSUES TO BE DECIDED

6. The issue to be decided is whether the Appellant was employed under a contract of service with the Payor during the period January 1, 2003 to December 31, 2003.

[4] All of the assumptions in paragraph 5 are correct. The Appellant stated respecting assumptions:

(a) Admitted.

(b) Admitted.

(c) Admitted.

(d) Admitted as to the area in and around Saskatoon.

(e) Admitted in testimony, but respecting (iv) and (v) the Appellant was paid on the basis of a scale of “credits” per case closed which were calculated at year end against the total retainer paid to the Appellant, the total of which was then adjusted to credit or debit the Appellant.

(f) The Appellant only met clients at her private business office in downtown Saskatoon or at another premises that they agreed on.

(g) The Appellant recalled these numbers – but does not recall billing GST. The Court finds her failure to recall GST to be incredible in view of the GST charging – remittance – and credit requirements for small businesses. This finding of a lack of

credibility on such an obvious and important fact is confirmed by the Appellant's failure in her evidence in chief to refer to either of two written contracts (Exhibit I-1, Tab 2 and Tab 3) she had with FGI detailing assumption (e).

(h) Admitted.

(i) Admitted.

(j) This happened and affected her gross income and, after her deduction of office and other expenses for her business (trade name "Health Plus Counselling" ("HPC")), affected her business profit and loss position.

(k) Admitted.

(l) Admitted.

(m) Admitted. FGI contracted with national corporations such as CNR or 7-Eleven to provide employees and their families with counselling of a non-medical nature respecting matters such as trauma from a hold-up or a family death or alcoholism. In a small centre such as Saskatoon it retained professional counsellors such as Ms. McCarty, M.A. Psychology (Counselling) and B.A. Social Work with approximately three years experience and a licensed Chartered Psychologist in Alberta since 2001. The work contracted for is called an Employee Assistance Program ("EAP"). FGI gets the employee's ("client's") name, telephone number, client number, and the nature of the problem and refers that, in the Saskatoon area, to the retained counsellor (the Appellant) who is to contact the client and arrange personal counselling. FGI provided the Appellant with a schedule of over 30 common situations with suggested solutions and a scheduled suggested number of counselling meetings with the client.

(n) FGI did not control the Appellant. Rather, the Appellant contracted with FGI like a franchisee. She operated her office under her trade name HPC in downtown Saskatoon as she had done for 2 previous years; she had her own clients (billing about \$800 per year) and advertised for more; she had to fill out reporting forms of FGI to report particularly on client cases closed, but she was contracted as an experienced professional person to deal with the clients FGI referred to her on a professional basis. She was paid by FGI on a credit basis which limited the number of credits per client and, in that way, suggested the time to be spent with each client. If the Appellant spent more time than that then she was losing for unpaid time. At first, the possible case load was estimated by FGI to warrant about 3 days per week;

later it was reduced to 2.5 days per week. The Appellant testified that it took all of her time, but this would happen if she failed to manage her time efficiently and beyond FGI's scheduled parameters. She quit her 30 day notice contract with FGI due to a pregnancy.

(o) Admitted.

(p) The Appellant had no EAP experience when she first contracted with FGI. She never met Mr. Varga, her FGI supervisor, in the time she was contracted to FGI. They dealt by telephone. Mr. Varga's testimony is believed respecting these contacts. At the beginning, they spoke weekly and later, monthly. There were also scheduled telephone conferences by Mr. Varga with groups of retained counsellors in which sample cases were reviewed.

(q) If the Appellant felt that a specific client warranted extra counselling, she could review that with Mr. Varga, who might authorize it or not for FGI credits.

(r) Correct, but not admitted.

(s) Correct and admitted in testimony.

(t) The Appellant could work for FGI competitors in the EAP field with FGI's permission and received it, but did not get any such work. She was free to do any other counselling work in her own discretion.

(u) Admitted.

(v) and (w) The Appellant had operated her business, HPC, out of a downtown office in Saskatoon for two years before her first contract with FGI. She continued to operate that business and office during the entire Period.

(x) Admitted.

(y) Is correct, but FGI also sent her its manual, schedule and forms.

(z) Is correct and in 2000, 2001 and 2002, the Appellant reported her income tax on a business basis. She was reassessed for 2002 by Canada Revenue Agency after claiming she was employed. There is no evidence about her 2003 income tax position.

(aa) Admitted.

(bb) and (cc) Are correct, based on the foregoing findings of fact. The Appellant had her business expenses, her own consulting practice and her references from FGI contracted for at \$165 per credit. Depending on her professional work and income each year, she incurred a profit or a loss.

(dd) Admitted, subject to her claim not to remember billing for GST. She admitted to having a GST account number. She did not renew her business licence in 2003.

(ee) Is correct, but the Appellant did not renew her Yellow Pages advertisement at a date that she could not remember.

(ff) Is correct.

(gg) is correct.

(hh) Is correct and was admitted by the Appellant.

(ii) Was not refuted by the Appellant.

[5] As a result of these findings of fact, the Court finds that upon the signing of both contracts with FGI, the Appellant had been in business for two years or more and the parties both intended that the Appellant should remain in business for herself. In particular, using the criteria set out in *Wiebe Door Services Ltd. v. Minister of National Revenue* [1986] 3 F.C. 553:

1. Control: The Appellant had complete control over the operation of her business and the delivering of its services.
2. Tools: The Appellant owned her business equipment and the lease of her office premises (which she shared with a third party).
3. Choice of Profit or Loss: The Appellant could take FGI's referred clients or not and service them as much as she liked, but FGI's credits and payments to the Appellant were limited and based on closed files. She could also accept business from other clients and did so. She was in business and could make a profit or a loss from her professional services like any other self-employed professional person.

4. Integration: The Appellant's business was not integrated into FGI's. FGI could and did refer business in the Saskatoon area to other consultants whom it paid on an hourly basis.

[6] The contracts signed between the Appellant and FGI established that at the time they were signed, and throughout the Period, the Appellant and FGI both intended that the Appellant was to be in business for herself and they both conducted themselves that way throughout the Period.

[7] The Court finds that the Appellant was in business for herself during the Period.

[8] The appeals are dismissed.

This Amended Judgment and Amended Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment dated December 5, 2006.

Signed at Yorkton, Saskatchewan, this 18th day of December, 2006.

"D.W. Beaubier"

Beaubier, J.

CITATION: 2006TCC657

COURT FILE NO.: 2005-875(CPP) and 2005-410(EI)

STYLE OF CAUSE: Brenda McCarty v. M.N.R.

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: November 20, 2006

**AMENDED REASONS
FOR JUDGMENT BY:** The Honourable Justice D.W. Beaubier

**DATE OF AMENDED
JUDGMENT:** December 18, 2006

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Ainslie Schroeder
Counsel for the Intervenor:	Roy C. Filion

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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