

Docket: 2003-1169(EI)

BETWEEN:

EL-CHEM CORROSION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on September 17, 2003 at Hamilton, Ontario

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

Appearances:

Agent for the Appellant: Terry Carter

Counsel for the Respondent: P. Michael Appavoo

JUDGMENT

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

Signed at Toronto, Ontario, this 26th day of November 2003.

"W.E. MacLatchy"
MacLatchy, D.J.

Citation: 2003TCC820
Date: 20031126
Docket: 2003-1169(EI)

BETWEEN:

EL-CHEM CORROSION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

MacLatchy, D.J.

[1] This appeal was heard at Hamilton, Ontario, on September 17, 2003.

[2] Rose M. Purcell, the Worker, appealed a ruling to the Minister of National Revenue (the "Minister") for the determination of the question of whether or not she was employed in insurable employment while engaged by the Appellant for the period in question, from January 1 to August 30, 2002, within the meaning of the *Employment Insurance Act* (the "Act").

[3] By letter dated February 17, 2003, the Minister informed the Worker and the Appellant that it had been determined that the Worker's engagement with the Appellant, during the period in question, was insurable for the reason that the Worker was employed pursuant to a contract of service.

[4] Evidence for the Appellant was given by Terrance Michael Carter in a clear and concise manner with refreshing candour. Reviewing the assumptions upon which the Minister relied in making his decision, the witness, Mr. Carter, essentially agreed that, with a few exceptions, such assumptions were correct. The major divergence concerned the amount of control or supervision exercised over the Worker.

[5] The Worker had previously been an employee of the Appellant during the years 1995 to 1998 but quit because she found the work too stressful and wanted to work with others and have more time to herself. As an employee, she was required to answer the telephones and be the first contact for customers of the Appellant as well as do the bookkeeping for the company. The Appellant was a smallish company and the Worker was required to pitch in where needed, which could include running errands and dealing directly with customers and clients of the Appellant.

[6] In 1999, the Appellant approached the Worker and asked if it could become one of her clients as she was carrying on her own business in the bookkeeping field. The rate of remuneration was agreed to at \$20 per hour which was more than the Worker was paid when she was an employee. The hours were to be flexible and be set by the Worker.

[7] The Appellant and the Worker agreed that their relationship would be that of an independent contractor and that there would be no source deductions from the monies the Worker received for billing the Appellant for the hours worked. The Worker would pay her own income tax and would not receive a T4 slip from the Appellant. The Worker would bill the Appellant for her hours. No G.S.T. was charged, at that time, because her income was not sufficient to warrant the need to pay G.S.T.

[8] The accounting system used by the Appellant was one familiar to the Worker and she required little, if any, direction by the Appellant. It was a system peculiar to the Appellant and had to be used at the offices of the Appellant. The Appellant required the services of the Worker to be performed at its offices because it had a policy that would not allow their materials to be taken "off site". The Worker no longer performs any service for the Appellant as she wanted wealthier clients.

[9] The question to be answered by this Court is whether there existed a contract of service or a contract for services between the Appellant and the Worker : was the Worker an employee of the Appellant or an independent contractor?

[10] The direction given by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, has established certain criteria to assist this Court to determine the relationship existing between the Appellant and the Worker. The question of control, ownership of tools, chance of profit and risk of loss aspects together with the question of integration or "whose business is it?" have all been

suggested as a method of determination of the relationship. As Major, J. of the Supreme Court of Canada stated in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, in giving judgment at paragraphs 46 through 48 inclusive, there is no one test or no set formula that can be used to determine the relationship existing. Weight to be given to the various tests will depend on the particular facts and circumstances in each case.

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.

[11] The Worker, in these circumstances, set her own hours when she wished to work and how long she wished to remain with the Appellant. She required her expertise and no other equipment to perform her services. She was prepared to perform her services at the offices of the Appellant because of the accounting package used by the Appellant. The Worker knew what had to be done for the Appellant and how long it would take to keep the bookkeeping up to date. Her work was supervised to the degree that others in the Appellant's offices looked at the results of her work and could know what services she had performed and if they had been performed correctly. If the Worker was not going to appear at the offices of the Appellant as she had previously stated, she would advise the company and they would delay the need for her services until she was available or if the matter was required immediately, it would be performed by Mr. Carter.

The question of profit expectations was entirely up to the Worker. She had the ability to decide whether to work or not and how much to charge for her time as well as what expenses to pay and to determine for whom she wished to work. She had her own business to operate and could suffer loss in her own business. If the Appellant suffered losses, it would impact on the Worker in that she would have to look for another client. The question of integration is hard to apply as the Appellant needed bookkeeping services as part of its business. In a like fashion, the Worker needed a client in order to perform her services. Neither was dependent for its whole operation on the other.

[12] What must the Appellant and the Worker, in naming their relationship, do to indicate what their intention is to each other. The fact that the parties may characterize their relationship as one of independence is not necessarily determinative of that relationship. The courts should look carefully at what the parties intended and be prepared to respect that intention if it is supported by the particular facts and circumstances in each case.

[13] In this matter, it would appear to this Court that the classical tests support that there existed a contract for services between the Appellant and the Worker and that the relationship intended by the parties should be respected. The Worker was

an independent contractor and operated her own business separate and apart from the Appellant.

[14] The appeal is allowed and the decision of the Minister is vacated.

Signed at Toronto, Ontario, this 26th day of November 2003.

"W.E. MacLatchy"

MacLatchy, D.J.

CITATION: 2003TCC820

COURT FILE NO.: 2003-1169(EI)

STYLE OF CAUSE: El-Chem Corrosion Inc. and M.N.R.

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: September 17, 2003

REASONS FOR JUDGMENT BY: The Honourable W.E. MacLatchy,
Deputy Judge

DATE OF JUDGMENT: November 26, 2003

APPEARANCES:

Agent for the Appellant: Terry Carter

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COUNSEL OF RECORD:

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