

Docket: 2006-1187(EI)

BETWEEN:

PLAINS WELDING SUPPLIES LTD.
O/A BOYCHUK SALES AND SERVICE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of Plains Welding Supplies Ltd.
o/a Boychuk Sales and Service (2006-1188(CPP)) on April 26, 2007
at Saskatoon, Saskatchewan

Before: The Honourable Justice L.M. Little

Appearances:

Agent for the Appellant: Samuel Boychuk

Counsel for the Respondent: Ainslie Schroeder and
Melissa Danish (Student-at-Law)

JUDGMENT

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

Signed at Vancouver, British Columbia, this 10th day of May 2007.

"L.M. Little"

Little J.

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Citation: 2007TCC269
Date: 20070510
Dockets: 2006-1187(EI)
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THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Little J.

A. FACTS:

[1] The business was formed in 1964 by Mr. Boychuk Senior.

[2] In 1975, Mr. Samuel Boychuk and his brother began to work with their father in the operation of the business.

[3] Samuel Boychuk provided testimony for the Appellant.

[4] Samuel Boychuk said that his brother left the family business and moved to Calgary.

[5] The Appellant company was incorporated in 1986 and it carries on business in Kindersley, Saskatchewan.

[6] Mr. Boychuk said that the Appellant's business may be summarized as follows:

- (a) selling, repairing and servicing recreational trailers, industrial and cargo trailers;
- (b) selling truck and trailer parts;
- (c) carrying on a welding business and selling welding supplies;
- (d) selling and installing overhead doors in garages and other buildings.

[7] Julie Boychuk, Samuel's wife, owns 100% of the shares of the Appellant. Julie Boychuk is the President of the Appellant and Samuel Boychuk is the General Manager.

[8] Mr. Bryon Mock (the "Worker") was hired by the Appellant in 1993. The Worker was hired by the Appellant as a "Handyman" to carry out servicing and repairs on recreational trailers.

[9] Mr. Samuel Boychuk explained that the Worker would work for the Appellant for a period of time and then quit. Mr. Boychuk further explained that the Worker left the Appellant on several occasions from 1993 to 2003 and then returned to work. During this period the Worker was treated by the Appellant as an employee.

[10] In December - January 2004 the Worker told Mr. Boychuk that he again wanted to work for the Appellant.

[11] Mr. Boychuk testified that the Worker was hired by the Appellant on the understanding that he would be an independent contractor and not an employee for the period commencing January 1, 2004. The Worker worked for the Appellant under this arrangement from January 1, 2004 to July 21, 2005 (the "Period").

[12] Mr. Boychuk testified that the Appellant currently has seven employees and that the Appellant also hires approximately 20 independent contractors.

[13] The Worker requested a ruling from the Canada Revenue Agency (the "CRA") regarding his employment status with the Appellant for the Period.

[14] By letters dated July 21, 2005, the Saskatoon Office of the CRA issued a Ruling which stated that the Worker was in insurable employment with the

Appellant for the Period for the purposes of the *Employment Insurance Act* (the “Act”) and that the Worker was pensionable for the purposes of the *Canada Pension Plan* (the “Plan”).

[15] The Appellant filed an appeal to the Court with respect to the position as determined by the CRA.

B. ISSUE:

[16] The issues are whether the Worker was employed by the Appellant in insurable employment during the Period for the purposes of the *Act* and whether the Worker was employed in pensionable employment for the purposes of the *Plan*.

C. ANALYSIS:

[17] In order to determine if the Worker was an employee of the Appellant, I have referred to a number of Court decisions.

[18] In *Precision Gutters Ltd. v. Canada (Minister of National Revenue)*, [2002] F.C.J. No. 771, Mr. Justice Sexton, speaking for the Federal Court of Appeal said at paragraphs 15 to 19:

15. ... The four criteria of the four-in-one test are (1) the degree or absence of control exercised by the employer; (2) ownership of the tools; (3) chance of profit; (4) risk of loss (see *Mirichandani v. Canada (Minister of National Revenue)* [2001] F.C.J. 269 and *Wiebe Door Services*, *supra* at p. 5028).

16. The issue has been dealt with more recently by the Supreme Court of Canada in *Sagaz Industries Canada v. 67112 Ontario Limited*, [2001] S.C.J. No. 61. In that case Mr. Justice Major, speaking for the Court, reviewed the various tests for determining whether a person is an employee or an independent contractor. He agreed with MacGuigan J.A.'s statement of a four-in-one test as set out in *Wiebe Door*, *supra*. Major J. said:

47. 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.

17. The passage relied upon by Major J. in *Market Investigations, Ltd. v. Minister of Social Security*, 9 [1968] 3 All E.R. 732 is as follows:

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 he takes, 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. [Emphasis added]

18. Thus Major J. has indicated that the central question to be decided in cases such as these is whether the person who has been engaged to perform the services is performing them as a person in business on his own account or is performing them in the capacity

of an employee. In order to make this determination the four criteria set out in *Wiebe Door* are factors to be considered.

19. While neither Major J. in *Sagaz* nor MacGuigan J.A. in *Wiebe Door* completely rejected the "integration test", they did find that it could be difficult to apply.

[19] I will comment upon the four factors set out by Mr. Justice MacGuigan in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025.

Control

[20] The evidence before me established the following facts:

- (a) Samuel Boychuk would provide quotes for repairs or service work on trailers with input from the Worker.
- (b) Samuel Boychuk assigned the work to the Worker.
- (c) The Worker was asked to be at the Appellant's place of business for eight hours during business hours.
- (d) The Worker was required to maintain time sheets.
- (e) The Worker received instructions from Samuel Boychuk so there was no misunderstanding as to the work to be performed.
- (f) Samuel Boychuk set time frames for the Worker to complete a job assigned to him.
- (g) Samuel Boychuk inspected the work that the Worker performed.
- (h) The Appellant's customers would speak to Samuel Boychuk if they had any concerns about work that the Worker performed.
- (i) The Worker did not deal directly with the Appellant's clients.
- (j) The Worker did not have a trade name, business license or Goods and Service Tax Registration Number.

[21] Based on the evidence presented to me, I have concluded that the Worker was effectively controlled by Samuel Boychuk during the Period.

Ownership of Tools

[22] The evidence established that the Worker owned small hand tools but the Appellant provided larger tools, specialty tools, equipment and a workshop.

[23] In my opinion, the evidence regarding the ownership of tools indicates that the Appellant was supplying the shop and the majority of the tools. This “test” indicates an employer-employee relationship.

Chance of Profit or Risk of Loss

[24] The Worker was paid by the hour. The Worker did not incur any expenses in the performance of his duties. In my opinion, the evidence establishes that the Worker did not have the opportunity for profit nor the risk of loss in the performance of his duties for the Appellant.

[25] This “test” also indicates an employer-employee relationship.

Intent of the Parties

[26] Mr. Boychuk stated that there was no written agreement between the Appellant and the Worker that dealt with their relationship. Mr. Boychuk said that he understood that the Worker was an independent contractor but the Worker did not agree that he was an independent contractor. In support of this statement it is noted that the Worker asked the CRA to advise him if he was self-employed.

[27] I have concluded that the comments made by Justice Sharlow in the *Royal Winnipeg Ballet v. Canada*, [2006] FCA 87, do not apply to this case because there was no common understanding as to the nature of the relationship between the Appellant and the Worker.

D. CONCLUSION:

[28] In order to deal with the points noted above, I believe that it is very useful to refer to the comments made by Justice Major in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61, where he indicated that the central

question to be decided in cases such as these is whether the person who has been engaged to perform the services is performing them as a person in business on his own account or is performing them in the capacity of an employee. (underlining added)

[29] Based on the evidence before me I have concluded that it cannot be said that the Worker was performing his duties as a person in business. It is my opinion that the Worker was performing his duties as an employee of the Appellant.

[30] The appeals are dismissed, without costs.

Signed at Vancouver, British Columbia, this 10th day of May 2007.

"L.M. Little"

Little J.

CITATION: 2007TCC269

COURT FILE NOS.: 2006-1187(EI) and
2006-1188(CPP)

STYLE OF CAUSE: Plains Welding Supplies Ltd. o/a
Boychuk Sales and Service and
The Minister of National Revenue

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: April 26, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: May 10, 2007

APPEARANCES:

Agent for the Appellant: Samuel Boychuk

Counsel for the Respondent: Ainslie Schroeder and
Melissa Danish (Student-at-Law)

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