

Docket: 2007-682(EI)

BETWEEN:

BRUCE YUN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the Appeals of
Bruce Yun (2007-683(CPP)), *Christina Yun* (2007-684(EI)), and
Christina Yun (2007-685(CPP))
on July 26, 2007 at Vancouver, British Columbia

Before: The Honourable Justice T. O'Connor

Appearances:

| | |
|-----------------------------|--|
| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Sara Fairbridge and Shannon Walsh, Student-at-Law |

JUDGMENT

The appeal is dismissed and the decisions of the Minister dated November 7, 2006 are confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 20th day of August, 2007.

"T. O'Connor"

O'Connor, J.

Docket: 2007-683(CPP)

BETWEEN:

BRUCE YUN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the Appeals of
Bruce Yun (2007-682(EI)), *Christina Yun* (2007-684(EI)), and
Christina Yun (2007-685(CPP))
on July 26, 2007 at Vancouver, British Columbia

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| For the Appellant: | The Appellant himself |
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"T. O'Connor"

O'Connor, J.

Docket: 2007-684(EI)

BETWEEN:

CHRISTINA YUN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the Appeals of
Bruce Yun (2007-682(EI)), *Bruce Yun* (2007-683(CPP)), and
Christina Yun (2007-685(CPP))
on July 26, 2007 at Vancouver, British Columbia

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| For the Appellant: | Bruce Yun |
| Counsel for the Respondent: | Sara Fairbridge and Shannon Walsh, Student-at-Law |

JUDGMENT

The appeal is dismissed and the decisions of the Minister dated November 7, 2006 are confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 20th day of August, 2007.

"T. O'Connor"

O'Connor, J.

Docket: 2007-685(CPP)

BETWEEN:

CHRISTINA YUN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the Appeals of
Bruce Yun (2007-682(EI)), *Bruce Yun* (2007-683(CPP)), and
Christina Yun (2007-684(EI))
on July 26, 2007 at Vancouver, British Columbia

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| For the Appellant: | Bruce Yun |
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JUDGMENT

The appeal is dismissed and the decisions of the Minister dated November 7, 2006 are confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 20th day of August, 2007.

"T. O'Connor"

O'Connor, J.

Citation: 2007TCC491
Date: 20070820
Docket: 2007-682(EI)

BETWEEN:

BRUCE YUN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND BETWEEN:

Docket: 2007-683(CPP)

BRUCE YUN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND BETWEEN:

Docket: 2007-684(EI)

CHRISTINA YUN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND BETWEEN:

Docket: 2007-685(CPP)

CHRISTINA YUN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

O'Connor, J.

[1] The issue in these appeals is whether, in the period from June 23, 2004 to November 3, 2005 (the “Period”), the Appellants, Bruce Yun (“Bruce”) and Christina Yun (“Christina”) were engaged in insurable employment pursuant to paragraph 5(1)(a) of the *Employment Insurance Act* and in pensionable employment pursuant to subsection 6(1) of the *Canada Pension Plan* in their relationships with Southbay College of Traditional Oriental Medicine Ltd. (“Payor”) or (“Southbay”).

[2] This type of issue comes before the Courts frequently and, as is well known, the issue has generally been resolved on the basis of a four-fold test. The tests are:

- (1) control;
- (2) ownership of tools;
- (3) chance of profit and risk of loss; and
- (4) the integration test.

[3] Also, more recently, the Courts have considered the intention of the parties as to their relationship and, in certain cases, have decided that intention can be important, especially when some tests point to a contract of service and other tests do not.

[4] Before analyzing these tests, the following general comments are relevant.

[5] In deciding the issue, I am not simply to substitute my opinion for that of the Minister but I am to give some deference to the decision of the Minister. These

principles have been developed by the Federal Court of Appeal in the following cases. In *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 878 the Court had occasion to review the issue. Paragraph 4 of that decision by Marceau, Desjardins and Noël, J.J. stated as follows:

The *Act* requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the *Act* confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[6] In my opinion, the following are the most important facts in the determination of the issue in question.

[7] Southbay was a secondary career training institute focusing on Chinese medicine. It was incorporated in June of 2004. Its shares were owned 90% by a Mr. Hong Chae Choi ("Choi") and 10% by Christina.

[8] Christina is Bruce's wife.

[9] Choi was a resident of Korea during the Period.

[10] Testimony was given by Bruce and Christina but not by Choi, who was not present, presumably because he was out of Canada. It is clear that Choi, with 90% of the shares, was the governing mind of Southbay, and the absence of his testimony has made it very difficult to determine the relationship between the parties.

[11] Prior to his involvement with Southbay, Bruce had operated a similar institute named Lotte Enterprises Ltd. o/a Pacific Northwest International College ("Northwest") for 8 years.

[12] Northwest's assets were seized by a bailiff in August 2004 for non-payment of rent and subsequently, the students of Northwest transferred to Southbay after Northwest shut down.

[13] Both Bruce and Christina had signing authority on the bank accounts of Southbay for a time. Bruce's signing authority was removed in August 2005, when relations between Choi and Bruce had become strained.

[14] Bruce was responsible for essentially all campus matters, all day-to-day operations until October 2004. His duties included negotiating the lease for Southbay, operating the bank account, obtaining the necessary licenses and permits, opening Telus and hydro accounts, dealing with enrolment, tuition fees, bookkeeping and marketing.

[15] Christina, to use her expression, was a "girl Friday", assisting Bruce, cleaning tables, installing a database, doing computer work, tracking tuition fees and general bookkeeping.

[16] Bruce's hours in these duties were from approximately 8:30 a.m. to 6:30 p.m. Monday to Friday and in some cases longer. The hours of Christina were practically the same. Bruce and/or Christina determined their own hours of work. They received no training, Bruce having run Northwest, a similar school, for eight years. Neither Bruce nor Christina was supervised by Choi or anyone else.

[17] Choi had promised to inject funds into Southbay in some fashion, described as an infusion of capital. In fact, the only amounts Choi remitted were amounts to cover the first and last month's rent for Southbay's lease and the remuneration mentioned below.

[18] Choi agreed that Christina's remuneration would be \$31. per hour but the only amount she received over a three month period in 2005 was \$12,000. Bruce made many attempts to be paid by Choi and to have Choi inject capital into the business so that it could continue. The only remuneration Bruce received was \$3,000 in 2005.

[19] Relations between Choi and Bruce deteriorated due essentially to a lack of trust on both parts. According to Bruce's Notice of Appeal, one Sang-hoon Na ("Na") was sent by Choi to Canada from Korea to take over Bruce's position on October 28, 2004 and gradually control of Southbay shifted to Na and another appointee of Choi, Mr. Kim.

[20] Considerable shortages of money developed and Exhibit A-1, being the bank statements of Southbay, shows numerous negative balances. These statements also show deposits of monies from UiDuke University, sponsor of some of the students, of amounts of \$36,431.50 on September 6, 2005 and \$36,000 on September 14, 2005. Bruce testified he used some of those funds to pay bank loans and to reimburse “petty cash”. Choi accused Bruce of appropriating funds to himself. Those events and others caused relations to further deteriorate. Exhibit A-2 comprises two letters from Southbay to Bruce, signed on behalf of Southbay by Choi. They read as follows:

November 2, 2005

VIA HAND

Bruce Yun
744 East 38th Avenue
Vancouver BC V5W 1J1

RE: Southbay College of Traditional Oriental Medicine Ltd. (the
“Company”)

On behalf of the Company, in my capacity as director and majority shareholder, I hereby demand that you account for the following withdrawals from the Company’s bank account:

| | | <u>Date</u> | <u>Amount</u> |
|---------------|----|--------------------|---------------|
| Exhibit 6 | #1 | September 02, 2005 | C\$1,228.85 |
| Exhibit 7 | #2 | September 21, 2005 | 3,017.20 |
| Exhibit 8 | #3 | September 26, 2005 | 18,445.00 |
| Exhibit 9 | #4 | October 07, 2005 | 7,000.00 |
| Exhibit 9, 10 | #5 | October 07, 2005 | 3,000.00 |
| Exhibit 11 | #6 | October 13, 2005 | 7,000.00 |
| Exhibit 12 | #7 | October 13, 2005 | 4,500.00 |
| Exhibit 13 | #8 | October 13, 2005 | 7,500.00 |
| | | Total | 51,691.05 |

Based on the records of the Company’s bank accounts, it would appear that all of these amounts were withdrawn by way of internet banking. You and/or your wife, Christina Yun are the only people capable of carrying out internet transactions on this account.

You have until noon on Thursday, November 3, 2005 to prove that these funds were used for proper Company purposes. In the event you cannot comply with the foregoing, we demand that you return

these funds to the Company forthwith. Furthermore, if you cannot comply with this request your employment with the Company will terminate immediately.

In the meantime, we hereby demand that you turn over all assets of the Company, including keys, records and passwords, school domain (www.southbaycollege.ca) to Sanghoon Na immediately and that you vacate the premises of the Company's school forthwith and cease all contact with the Company, the school and it's staff and students until this matter is resolved.

...

November 3, 2005

VIA HAND

Bruce Yun
744 East 38th Avenue
Vancouver BC V5W 1J1

RE: Southbay College of Traditional Oriental Medicine Ltd. (the "Company")

Further to my letter of November 2, 2005 sent on behalf of the Company which was hand delivered to you, you have not replied to our request concerning the whereabouts of approximately \$51,691.05 of the Company's funds that have been withdrawn from the Company's bank account without authorization or explanation.

Accordingly, your employment and involvement with the Company and its school are hereby terminated effective immediately. You are demanded to vacate the school premises immediately. You are to cease all contact with any party having any involvement with the Company and its school. Furthermore, the Company demands that you return all property of the Company forthwith including, without limitation, all keys, passwords, files, records and financial information. Failure to comply with these demands will [sic] pursued to the full extent of the law and the Company's rights.

Submissions

[21] Bruce submits that he and Christina were employees during the Period, employed under oral contracts in pensionable and insurable employment and that they are entitled to payments under those plans. Bruce argues that he and Christina had oral contracts of employment and were entitled to be paid salaries. Bruce questions how he and Christina can be fired if they were not employees. He points to some of the Exhibits in which Choi appears to indicate an employee relationship and others which indicate the relationship might be a partnership or a joint venture. He argues that these inconsistencies in Choi show Choi is not credible. In particular, he points to Exhibit A-2, the letter of November 3, 2005 from Southbay (signed by Choi) where the words used are:

... your employment and involvement with the Company and its school are hereby terminated.

[22] Bruce also argues that his *Charter* rights have not been respected. Bruce's Notice of Appeal refers to s. 15 of the *Canadian Charter of Rights and Freedoms* and to the *Employment Standards Act* and states as follows:

...

In my opinion, on all wage related laws, such as the Employment Standards Act and Employment Insurance Act must be applied effectively to a person integrally without discrepancy.

With the greatest respect, in terms of the result of my ruling, it appears I have no right to equal protection.

First of all, I must be protected under the Employment Standard Act, if I am protected by that Act, and my employer paid me on time and then I could have paid CPP and UI premium on time. I am a victim of an employer who is not law abiding.

There is no reason why my case has to be denied based on the Insurance Act.

It is a total disregard for principle of the matter and my fundamental human rights and protection of my wage has been exploited. I am not being treated proportionately, and the department's ruling is irrational.

...

[23] Counsel for the Respondent submits that there was no employee relationship and that the relationship should be characterized as a joint venture or some other arrangement, but clearly not an employee relationship. She points to the lack of control and supervision, the peculiar relationship between Choi and the Appellants and the inability to clearly determine Choi's version of the relationship.

Analysis and Decision

[24] As to the element of control, the evidence is extensive and not entirely conclusive but considering all factors, I conclude that the test of control in this appeal points to contracts which are not contracts of service, i.e., not an employee relationship. My principal reasons for this conclusion are as follows:

The Appellants were not supervised;

The Appellants chose their own hours and were not obliged to report to Choi;

The Appellants received no medical coverage, no vacation or sick leave nor overtime;

The Appellants received hardly any wages although they worked long hours as indicated; and

Bruce had run the prior school in a similar fashion. In other words, he had all the skills required to run a school and essentially was running it as if he was the owner thereof.

[25] The ownership of tools, in my view, is not an important consideration. The main tool was the premises and the school supplies and other school furniture etc. The ownership presumably was with Southbay. Some of the supplies etc. were paid for by Bruce but it appears that he was reimbursed for same. The exact question of ownership of the tools is difficult to determine but, as stated, in my view, the ownership of tools is not that important in this appeal.

[26] With respect to chance of profit and risk of loss, again, the evidence is not clear. Bruce had expected to receive either an infusion of capital which would cover costs of the school presumably including his wages. This money, however, was never forthcoming except the amounts mentioned above and eventually the lack of funds lead to the collapse of Southbay. Again, the evidence is not clear as to what exactly was the intention of Bruce as to how he was to receive remuneration. It appears,

primarily, that he wished to receive wages but it is also clear that this did not happen. There is also evidence that the 10% of the shares allotted to Christina represented a kind of remuneration for her services. On balance, I believe the evidence discloses that the 10% shares were put in Christina's name, at Choi's demand, because Bruce was heavily in debt.

[27] With respect to the integration test, reference is made to *Precision Gutters Ltd. v. Canada*, [2002] F.C.J. No. 771 (F.C.A.), where Sexton J.A., said the question to be answered with respect to this test is "is the person who has engaged himself to perform the services performing them as a person in business on his own account". It does appear clear that Bruce and Christina were performing services essentially on their own account. Mr. Choi was never present and the Appellants ran the school business essentially as their own. This certainly does not point to a contract of service or an employee relationship.

[28] In my opinion, considering that there was no control and that Bruce essentially ran the business, and had the previous experience (8 years experience with Northwest), considering further that Bruce and Christina received very little pay (would any person in an employee relationship continue without being paid?), considering further that the students from the former school transferred to the new school thus indicating a continuation of the previous business run by Bruce, considering also that the Appellants have the burden of proof and have not succeeded in refuting or demolishing the assumptions of fact raised by the Minister in the Reply, I find, on a balance of probabilities, that the Appellants were not engaged in contracts of service, i.e., not an employee relationship.

[29] The second issue in these appeals is whether there has been any infringement of the *Canadian Charter of Rights and Freedoms* or similar laws.

[30] It is common, in cases heard in the Informal Procedures of this Court, to have *Charter* arguments raised. In these cases, the Court will ordinarily hear the argument and if, upon consideration, it finds merit in it, will adjourn the case to permit the Appellant to give any notices to the Provincial Attorneys General and/or to the Attorney General of Canada that may be required. In the present cases, notices would have to be given to the Provincial Attorneys General under section 57 of the *Federal Court Act* R.S. 1985 c.F-7, as amended as well as under section 19.2 of the *Tax Court of Canada Act*, R.S. 1985, c.T-2 and to the Attorney General of Canada under the *British Columbia Constitutional Question Act*, R.S.B.C., 1996, c.68.

[31] I am not satisfied that the Appellants have established that their rights to equality under section 15 of the *Charter* have been impinged. In *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), the Supreme Court of Canada set out the following guidelines for determining whether subsection 15(1) of the Charter has been infringed:

1. Does the law in question, impose differential treatment on the Appellant on the basis of the Appellant's personal characteristics or fail to take into account the Appellant's disadvantaged position in society, resulting in differential treatment on the basis of personal characteristics?
2. Is the Appellant subject to the differential treatment based on the prohibitive grounds enumerated in the Charter (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability), or grounds which are analogous to those?
3. Does the differential treatment discriminate by imposing a burden or withholding a benefit which promotes (through stereotypes or otherwise) the view that the Appellant is an individual less capable or worthy of recognition or value as a human being ... equally deserving of concern, respect and consideration?

[32] Although not clearly stated, the Appellants' position appears to be that, as employees, they have been discriminated against in being denied employment insurance benefits and *Canada Pension Plan* benefits.

[33] I refer to the following quote of Mogan, J. of this Court in *Walsh v. Canada*, [1993] T.C.J. No 316, which deals with employees and entrepreneurs as follows:

... I refer to the decision of the Ontario Court of Appeal in *Ontario Public Service Employees Union et al. v. National Citizens Coalition et al.* (1990), 69 D.L.R. (4th) 550 in which Blair J.A., delivering the Judgment of the Court, stated at page 555:

In my opinion, Canadian taxpayers earning income from employment, who constitute the great majority of the working population, do not constitute a group suffering discrimination on grounds analogous to those enumerated in s. 15(1) of the Charter. This huge group of taxpayers is not a "discrete and insular minority". It is a large segment of the population which we described in *Mirhadizadeh*, supra, at p. 601 as "not linked by any personal

characteristics relating to them as individuals or to members of a group". They are what we called in *Mirhadizadeh, supra*, as "a disparate and heterogeneous group", linked together only by the fact that they are taxed on their employment income. They are incapable of being discriminated against on grounds analogous to those enumerated in s. 15(1). The appellants' claim that the I.T.A. infringes the equality rights of taxpayers earning income from employment must fail.

To me, that passage clinches the argument against the Appellant's claim to be under section 15 because, if the Ontario Court of Appeal can conclude in such straightforward language that Canadian taxpayers earning income from employment cannot constitute a group suffering discrimination on grounds analogous to those of section 15 of the Charter, I would turn the coin and ask: how can those Canadian taxpayers earning income from some source other than employment constitute such a group? I adopt the specific words of Blair J.A.: they are "not a discrete and insular minority"; they are "not linked by any personal characteristics relating to them as individuals or to members of a group". They are, as entrepreneurs, a disparate and heterogeneous group of which the Appellant is only one.

[34] Based on this authority and many others the Charter argument cannot succeed and there is no reason to adjourn these appeals.

[35] Consequently, the appeals are dismissed and the decisions of the Minister dated November 7, 2006 are confirmed.

Signed at Ottawa, Canada this 20th day of August, 2007.

"T. O'Connor"

O'Connor, J.

CITATION: 2007TCC491

COURT FILE NO.: 2007-682(EI); 2007-683(CPP);
2007-684(EI) and 2007-685(CPP)

STYLE OF CAUSE: Bruce Yun v. MNR

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: July 26, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice T. O'Connor

DATE OF JUDGMENT: August 20, 2007

APPEARANCES:

| | |
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| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Sara Fairbridge and Shannon Walsh, Student-at-Law |

COUNSEL OF RECORD:

| | |
|---------------------|---|
| For the Appellant: | |
| Name: | |
| Firm: | |
| For the Respondent: | John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada |