Docket: 2003-2739(EI)

BETWEEN:

JOHN TODMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 7, 2004 at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:	The Appellant himself
Agent for the Respondent:	Johnathan Shapiro (Student-at-Law)

AMENDED JUDGMENT

The appeal is dismissed, without costs, and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 15th day of January 2004.

Little, J.

Docket: 2003-2738(CPP)

BETWEEN:

JOHN TODMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 7, 2004 at Vancouver, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:	The Appellant himself
Agent for the Respondent:	Johnathan Shapiro (Student-at-Law)

AMENDED JUDGMENT

The appeal is dismissed, without costs, and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Vancouver, British Columbia, this 13th day of January 2004.

Little, J.

Citation: 2004TCC30
Date: 20040113
Docket: 2003-2739(EI)
2003-2738(CPP)

BETWEEN:

JOHN TODMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

AMENDED REASONS FOR JUDGMENT

Little, J.

A. FACTS:

[1] The Appellant has been a house painter for approximately 16 years. The Appellant operates his business under the name of Todman's Decorating.

[2] During the period March 22, 2001 to September 10, 2002 (the "Period") the Appellant retained Christopher Timms ("Timms") as a painter.

[3] The Appellant testified that when he retained Timms as a painter at the beginning of the Period he told Timms that he was retained as a sub-contractor and not as an employee. The Appellant said that Timms had agreed to this arrangement.

[4] Christopher Timms was called as a witness by the Respondent. Timms said that he recalls being told by the Appellant that he was retained as a sub-contractor. However, Timms said that when he applied for benefits under the *Employment Insurance Act* (the "*EI Act*") he was told by officials of Human Resources Development Canada that **in their opinion** he was an employee of the Appellant **during the Period**.

[5] The Appellant also testified that since Timms was acting as a sub-contractor the Appellant made no deduction from the payments that he made to Timms for Income Tax, Employment Insurance or Canada Pension Plan.

[6] During the hearing of the appeals the Appellant agreed that during the Period he was personally responsible for the following:

(a) the Appellant obtained house painting contracts primarily from E & S Developments Ltd., Benchmark Homes Ltd. and other house builders;

(b) the Appellant personally worked as a painter and he obtained the services of one or two painters to assist him to carry out the painting that was required;

(c) the Appellant determined the rate of pay received by Timms. Initially Timms was paid $15.00 per hour. During the Period this rate was gradually increased to $16.00 per hour, later $17.00 per hour and finally $18.00 per hour. Timms said that he was paid by cheque every two weeks;

(d) the Appellant provided Timms with the paint brushes, rollers and the other painting equipment and supplies that were required. The Appellant said that Timms supplied his own clothing;

(e) the Appellant arranged the approximate start date for the painting contracts. The Appellant said that the work hours were 8:00 a.m.-4:30 p.m. in the winter months and 7:00 a.m.-3:30 p.m. in the summer months. The Appellant said that the starting times were somewhat flexible but that Timms was expected to work eight hours per day from Monday to Friday. The Appellant said and Timms agreed that sometimes Timms worked overtime, if required;

(f) the Appellant was responsible to the client to repaint any unacceptable painting and Timms assisted when required to do so;

(g) the Appellant was generally responsible for organizing which house was to be painted on a particular day;

(h) the Appellant stated that he did not have to monitor Timms in the carrying out of his duties as a painter since Timms was a qualified tradesman;

(i) the Appellant kept a record on a calendar of the number of hours that Timms worked during each day;

(j) the Appellant said that he is not aware of any expenses incurred by Timms in connection with his work as a painter;

(k) the Appellant agreed that Timms did not have any chance of profit or risk of loss in the carrying out of his duties as a painter. However the Appellant said that under the arrangement that he had negotiated with Timms, the rate of pay received by Timms as a sub-contractor was more than he would have received if he were an employee.

[7] The Appellant said that Timms left the worksite on September 10, 2002 and never returned.

[8] Timms applied for employment insurance benefits under the *EI Act*.

[9] On the 30th day of January, 2003 the Canada Customs and Revenue Agency (the "CCRA") issued a Ruling that Timms was employed by the Appellant from March 22, 2001 to September 10, 2002 under a contract of service within the meaning of paragraph 5(1)(*a*) of the *EI Act*.

[10] On the 30th day of January, 2003 the CCRA issued a decision in which it was stated that the Appellant employed Timms in pensionable employment for the period March 22, 2001 to September 10, 2002 under a contract of service within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan* (the "*CPP*").

B. <u>ISSUES</u>:

[11] A. Did the Appellant employ Timms during the Period within the meaning of paragraph 5(1)(*a*) of the *EI Act*?

B. Did the Appellant employ Timms in pensionable employment during the Period within the meaning of paragraph 6(1)(*a*) of the *CPP*?

C. <u>ANALYSIS</u>:

[12] The relevant portions of the *Employment Insurance Act* read as follows:

5. (1) Subject to subsection (2), insurable employment is

(*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise.

. . .

(2) Insurable employment does not include

(*a*) employment of a casual nature other than for the purpose of the employer's trade or business;

[13] The relevant portions of the *Canada Pension Plan* read as follows:

6. (1) Pensionable employment is

(*a*) employment in Canada that is not excepted employment;

. . .

(2) Excepted employment is

. . .

(*b*) employment of a casual nature otherwise than for the purpose of the employer's trade or business;

Was There a Contract of Service Between the Appellant and Timms?

[14] **We must decide** whether Timms was employed "under any express or implied contract of service". Only if the worker was employed under a contract of service will he qualify for "insurable employment" and "pensionable employment".

[15] What constitutes a "contract of service" has been considered by the Courts many times, often in the context of distinguishing the relationship from a "contract

for service". In other words, the Court must determine if Timms was an employee of the Appellant or an independent contractor.

[16] **Canadian courts have developed a test focusing on the total relationship of the parties with the analysis centred around four elements:**

- degree of control and supervision;
- ownership of tools;
- chance of profit; and
- risk of loss.

[17] This test was propounded by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*[1] and accepted and expanded by subsequent cases. The Supreme Court of Canada recently had a chance to revisit the issue in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[2] Speaking for the Court, Major, J. stated:

> 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.[3]

[18] Accordingly, Major, J. considered the central question to be determined 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".

[19] Major, J. also stated in *Sagaz*:

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[1] [1986] 3 F.C. 553, 70 N.R. 214, [1968] 2 C.T.C. 200, 87 DTC 5025 (F.C.A.).

[2] [2001] 2 S.C.R. 983, 204 D.L.R. (4th) 542.

[3] *Sagaz supra*.

> 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. . . .[4]

[20] Before applying the facts of the present case to the principles set out above, it should be noted that the Minister's determination that Timms' relationship was pursuant to a contract of service is subject to independent review by the Tax Court.[5] No reference to the Minister's determination is required.

[21] As stated above, the *Wiebe Door* test can be divided into four categories:

Control:

[22] Mr. Justice MacGuigan said in *Wiebe Door*:

> The traditional common-law criterion of the employment relationship has been the control test, as set down by Baron Bramwell in *R. v. Walker* (1858), 27 L.J.M.C. 207, 208:
>
>> It seems to me that the difference between the relations of master and servant and of principal and agent is this: A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.[6]

[23] In other words, the key aspect of "control" is the employer's ability to control the *manner* in which the employee carries out his or her work; thus the focus is not on the control that the employer in fact exercised over the employee. Examples of this ability include the power to determine the working hours, defining the services to be provided and deciding what work is to be done on a given day.[7]

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[4] *Sagaz* at para. 48.

[5] *M.N.R. v. Jencan* (1997), 215 N.R. 352, 2 Admin. L.R. (2d) 152 (F.C.A.) at para. 24. Cited with approval in *Candor Enterprises Ltd. v. Canada (M.N.R.)* (2000), 264 N.R. 149 (F.C.A.).

[6] *Wiebe Door*, at 5027, cited to DTC.

[7] See *Caron v. M.N.R.* (1987), 78 N.R. 13 (F.C.A.).

[24] In this situation it is very clear that the Appellant controlled the manner in which Timms carried out his work. The Appellant determined the working hours, the services to be provided and decided what work was to be done on a given day.

Ownership of Tools:

[25] As noted above, the Appellant supplied all of the tools required to do the house painting.

Chance for Profit or Risk of Loss:

[26] In an employee/employer relationship it is the employer who bears the burden of profit or loss; the employee does not assume a financial risk as he receives the same wage no matter what the employer's financial situation.

[27] In this situation Timms received an hourly wage and did not stand to profit or suffer a loss with respect to the painting contracts.

[28] During the hearing the Appellant stressed that he had told Timms that Timms would be a sub-contractor and not an employee and he understood that Timms had accepted that arrangement.

[29] The question of whether an individual was an employee was also present in the case of *Standing v. M.N.R.*[8] In the *Standing* case the parties agreed that Mrs. Standing was an employee. In dealing with this issue Mr. Justice Stone of the Federal Court of Appeal said:

> There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the Wiebe Door test.

[30] A similar question was before the Federal Court of Appeal in *Nametco Holdings Ltd. v. M.N.R.*[9] In *Nametco* Mr. Justice Strayer said:

> First, it is long recognized by this Court that how the parties label their relationship is not determinative.

[8] [1992] F.C.J. No. 890.

[9] [2002] F.C.J. No. 1680.

CONCLUSION:

[31] Based on the above tests I have concluded that Timms was an employee of the Appellant during the Period for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*.

[32] The appeals are dismissed, without costs.

Signed at Vancouver, British Columbia, this 15th day of January 2004.

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Little, J.

CITATION:	2004TCC30
COURT FILE NO.:	2003-2739(EI) 2003-2738(CPP)
STYLE OF CAUSE:	John Todman and The Minister of National Revenue
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 7, 2004
AMENDED REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	January 13, 2004
APPEARANCES:	
For the Appellant:	The Appellant himself
Agent for the Respondent:	Johnathan Shapiro (Student-at-Law)
COUNSEL OF RECORD:	
For the Appellant:	
Name:	
Firm:	
For the Respondent:	Morris Rosenberg Deputy Attorney General of Canada Ottawa, Canada