

Citation: 2007TCC631

Docket: 2006-3300(CPP)

BETWEEN:

BENTWATER CREATIVE SERVICES INC.,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

CERTIFICATION OF TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Toronto, Ontario, on September 27, 2007, be filed.

“N. Weisman”

Weisman D.J.

Signed in Toronto, Ontario, this 3rd day of November, 2007.

TAX COURT OF CANADA

IN RE: the Canada Pension Plan

BETWEEN:

BENTWATER CREATIVE SERVICES INC.

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent

**HEARD BEFORE MR. JUSTICE WEISMAN
in the Courts Administration Service,
Federal Judicial Centre, 180 Queen Street West,
Toronto, Ontario
on Thursday, September 27, 2007 at 4:05 p.m.**

APPEARANCES:

Mr. Laurent Bartleman
Ms Kathy Hollett

for the Appellant
for the Respondent

Also Present:

Ms. Roberta Colombo

Court Registrar

A.S.A.P. Reporting Services Inc. 8 2007

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1 Toronto, Ontario
2 --- Upon commencing the Oral Reasons on Thursday,
3 September 27, 2007 at 4:05 p.m.

4 JUSTICE WEISMAN: This afternoon I
5 have entertained an appeal by Bentwater Creative
6 Services Incorporated against a decision by the
7 respondent that the worker, Ms. Kate Hollett, was
8 engaged as an employee under a contract of service
9 during the years 2002 and 2003; and that, therefore,
10 the appellant is responsible for Canada Pension
11 contributions during that period. The appellant
12 appeals on the grounds that Ms. Hollett is not an
13 employee but was an independent contractor in her
14 capacity as the manager of Bentwater's business.

15 In order to resolve the issue before
16 the Court, I am obligated to look at the entire
17 relationship between the parties, and there are
18 guidelines as to how I go about doing that. There is
19 a series of cases called *Wiebe Door Services, Sagaz*
20 *Industries* and *Precision Gutters*. And basically they
21 set out a series of guidelines wherein I am assisted
22 in solving the puzzle. The nature of the exercise is
23 to try to understand that if, indeed, Ms. Hollett was
24 an independent contractor, what business was she in.
25 There are four guidelines namely: Control, ownership
26 of tools, chance of profit and risk of loss.

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1 Before I embark upon the evidence
2 with respect to those four, I might say that these
3 proceedings are under the *Canada Pension Plan*. Were
4 they under the *Employment Insurance Act*, there are
5 provisions in the *Employment Insurance Act* that people
6 who are not dealing with their payers at arm's length
7 are not in insurable employment and, therefore, are
8 not entitled to Employment Insurance Benefits. That
9 is surely, Ms. Hollett's position, being the sole
10 shareholder and director of the appellant, but there
11 is no comparable provision in the *Canada Pension Plan*.

12 There is a provision defining
13 "officer". And the Plan says that officers include
14 directors, and officers are employees. Now, that
15 could have presented a problem for the appellant. But
16 as Mr. Bartleman candidly acknowledged, that was not
17 pleaded by the Minister, has not been relied upon to
18 this date by the Minister, and the law is that the
19 Minister is not allowed to surprise people by pleading
20 arguments at the eleventh hour at trial. And so that
21 will not be taken into consideration in this
22 reasoning.

23 So far as control is concerned, we
24 get into this corporate veil issue, which is trite
25 law. For instance, in Income Tax matters there is a
26 clear distinction between the company and its

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1 shareholders. But in this case we are talking about
2 control, and the question is: Could Bentwater control
3 Ms. Hollett. It is very difficult to say how the
4 conclusion can be otherwise than it certainly had the
5 right to control her, particularly since she was its
6 sole shareholder and director.

7 So we are looking at a situation
8 where the question is: Could Ms. Hollett control
9 herself, or could Ms. Hollett in her capacity as the
10 sole shareholder and director of Bentwater control
11 herself? And Ms. Hollett did not use the word, but
12 her argument was that it was almost like she had a
13 personality such that she did not always do what she
14 thought she should do. She was not always able to
15 control herself or her emotions. I think in law it is
16 very hard to argue that one does not have the right to
17 control themselves. I think the control factor really
18 has to indicate that Ms. Hollett was an employee.

19 Ownership of tools: There was
20 evidence going both ways. The evidence was that the
21 owner of the one premises on Dundas Street was
22 Ms Hollett; that Bentwater leased it from her, and it
23 was then was given rent free to Ms. Hollett for her
24 graphic design work; on the other hand, she had both
25 at home and on Dundas Street her own computer and the
26 software and the printer and the paper. The Minister

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1 has pointed out that in her Income Tax returns she did
2 not claim those as expenses, but I do not draw an
3 inference against her. I accept her sworn testimony
4 that she provided those necessary tools of the graphic
5 designer trade.

6 I do see a problem though because it
7 became clear after a while that she was not claiming
8 to be an independent graphic designer, but an
9 independent manager. The income paid to her in 2002
10 in the amount of \$21,000.00, and \$25,000.00 paid to
11 her in 2003, were management revenues. Again, I draw
12 no adverse inference that the statements refer to them
13 as "salaries". It is up to me as to whether they were
14 salaries or payment to an independent contractor. But
15 nevertheless, they were for management services, not
16 graphic design services, not artistic services. And
17 so the focus of my inquiry is the tools relative to
18 the management enterprise.

19 As I understand it, the computer with
20 specialized software was for graphic design purposes.
21 I am left with the conclusion that in her capacity as
22 manager that Ms. Hollett really did not need to supply
23 any materials. The main thing she needed was the
24 office premises, which were given to her free of
25 charge by Bentwater; and therefore, the tools factor
26 also indicates that she was an employee.

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1 I have to canvass whether there was a
2 chance of profit in her dealings with Bentwater, and I
3 can not say that there was. She was paid whatever the
4 corporation could afford to pay her, but in order for
5 her to profit by being a manager, her business income
6 would have to exceed her business expenses. I can not
7 see that there was any business income. She was paid
8 annually by the corporation or in some periods of time
9 that the corporation could afford to pay her, but so
10 far as that being a profit is concerned, you would
11 have to compare it with any number of independent
12 contractors who have a financial investment in their
13 trade.

14 I understand that Ms. Hollett had
15 financial investment in Bentwater, but the question
16 is: Did she have financial investment in being a
17 manager? She was not hiring employees as a manager.
18 She did not invest monies as a manager. Those people
19 who take risks and hope that the rewards, namely the
20 profits, will exceed the risks, those are
21 entrepreneurs. I can not see that there is any chance
22 of profit in the relationship that Ms. Hollett had
23 with the appellant, Bentwater.

24 The risk of loss is even clearer
25 because her evidence was that she did expend monies on
26 behalf of Bentwater, but she was reimbursed for those

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1 expenditures; therefore, I can not see any risk of
2 loss. So both the chance of profit and the risk of
3 loss factors indicate that she was an employee.

4 All these guidelines are only in
5 service of trying to understand the total relationship
6 between the parties. If Ms. Hollett could establish
7 that she managed not only Bentwater's business but
8 several other businesses and was paid in each case,
9 then I could see that she was possibly in the business
10 of being a manager. But when one is managing only for
11 one client and that client is your own company, it is
12 difficult to find that you were in the business of
13 managing.

14 Ms. Hollett put her finger on the
15 problem here. She said, "I do my best to make
16 Bentwater work, and that's not the job of an
17 employee". Well, that is exactly right. That is the
18 job of an owner.

19 We have to segregate what
20 Ms. Hollett, and I hear this in many cases, what
21 people do because they are shareholders and owners of
22 the company and what they do because they are workers
23 for the company -- the most common example are
24 seasonal businesses -- and you will find that the
25 owners of the company for no pay, off- season, will
26 perform services for the company because they own it.

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1 The question is: Are they doing that qua
2 shareholder/director or qua employee? That is a
3 differentiation you must make.

4 The differentiation I am drawing in
5 this case is that when someone says, as Ms. Hollett
6 has said, that she does whatever it takes to make
7 Bentwater work, that is qua owner/director not as qua
8 employee. The question is: Does she do everything
9 that she can to make her business as a manager work,
10 and I do not see that there was any business as a
11 manager. That is what the law obligates me to do.

12 I must ask what, if any, business do
13 I find that this person is in, and I can not see that
14 Ms. Hollett was in business on her own account at all.

15 There is a burden upon her to rebut
16 -- or "demolish" is the technical word -- the
17 assumptions set out in paragraph 8 of the Minister's
18 Reply to the Notice of Appeal, and she did not
19 demolish any of them except that when we got down to
20 e) and f), the one says that she provided graphic
21 designing services. But it was not as a graphic
22 designer that she was claiming this income but as an
23 independent contractor, it was as a manager. When we
24 get to f), the worker also provided consulting and
25 management services to the appellant, upon closer
26 inquiry, it turned out that it was not so much

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1 management services that she was providing.

2 She was the jack of all trades
3 because it was her company. When the company could
4 not afford to hire anybody to do anything, she did it,
5 including the plumbing. That was the new evidence
6 that came out with reference to f). It was not so
7 much management services she was providing as whatever
8 was necessary to help the company.

9 There also was an allegation in sub
10 paragraph g) that she got her rent free, but there was
11 this computer and software and printer. And the only
12 evidence I heard is that the computer and the software
13 and the printer were required for the graphic design
14 business. I am sure that there was times when the
15 computer and the printer were used for Bentwater's
16 business, but the evidence is pretty clear from
17 Ms. Hollett that that was not why she bought them.
18 That was not the main thrust of them, and they
19 certainly were not necessary for a jack of all trades
20 especially in the plumbing end. It is true that g) is
21 basically established, that the work was provided free
22 of charge and the place of work and that ownership of
23 the tools factor tends to indicate also that she was
24 an employee. She agreed with each.

25 And i), where the Minister pointed to
26 the two income tax returns saying that she got

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1 management salaries -- it was her position that they
2 were not salaries but payments to an independent
3 contractor -- and she acknowledged that j) was indeed
4 true because she was reimbursed her expenses. That
5 was done by including it in the \$21,000.00 she got in
6 2002 and the \$24,000.00 she got in 2003.

7 Basically, I find that the appellant
8 has not demolished the assumptions set out in the
9 Minister's Reply and, to the extent that she was the
10 main witness for Bentwater, she failed to cast doubt
11 on the remaining assumptions which were more than
12 sufficient to support the Minister's determination.

13 I do not find that there was any new
14 evidence that would cast doubt upon the Minister's
15 decision or that the Minister misconstrued any of the
16 evidence; and therefore, I find the Minister's
17 determination objectively reasonable. That being my
18 conclusion, I have no alternative but to conclude that
19 I can see no business that Ms. Hollett was in on her
20 own behalf; and therefore, the appeal has to be
21 dismissed and the decision of the Minister confirmed.

22 I am sorry.

23 MS. HOLLETT: Is there anything that
24 I can do about this, or is that it?

25 JUSTICE WEISMAN: I'm sorry, I can't
26 hear you.

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1 MS. HOLLETT: Sorry, is there
2 anything else that I can do about this?

3 JUSTICE WEISMAN: Yes, you can appeal
4 my decision.

5 MS. HOLLETT: Okay.

6 JUSTICE WEISMAN: By all means. If
7 you go down to the third floor, there is a person who
8 will tell you how to go about doing that.

9 MS. HOLLETT: Okay. Thank you.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately recorded
by shorthand and transcribed therefrom the foregoing
proceeding.

Alex Walker

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CITATION: 2007TCC631

COURT FILE NOS.: 2006-3300(CPP)

STYLE OF CAUSE: Bentwater Creative Services Inc.
and The Minister of National Revenue

PLACE OF HEARING Toronto, Ontario

DATE OF HEARING September 27, 2007

REASONS FOR JUDGMENT BY: The Honourable
N. Weisman, Deputy Judge

DATE OF ORAL JUDGMENT November 3, 2007

APPEARANCES:

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Counsel for the Respondent: Laurent Bartleman

COUNSEL OF RECORD:

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Firm:

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