Docket: 2006-2453(EI)

BETWEEN:

NATIONAL CAPITAL OUTAOUAIS SKI TEAM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JEAN BELANGER,

Intervenor.

Appeal heard together with the appeal of
National Capital Outaouais Ski Team (2006-2454(CPP))
on February 8, 2007 at Ottawa, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Catherine Coulter
Counsel for the Respondent:	Amy Kendell
For the Intervenor:	The Intervenor himself

JUDGMENT

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

Signed at Ottawa, Canada, this 19th day of March 2007.

"Diane Campbell"

Campbell J.

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Citation: 2007TCC123
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REASONS FOR JUDGMENT

Campbell J.

[1] The Appellant has appealed a ruling made by the Minister of National Revenue (the "Minister") in which it was determined that Jean Belanger, the "Intervenor", (the "Worker") was employed in insurable employment by the Appellant under a contract of service during the period September 1, 2004 to December 13, 2005 pursuant to paragraph 5(1)(a) of the *Employment Insurance Act*. The Appellant also appealed the Minister's ruling that the Worker was employed in pensionable employment by the Appellant for the same period pursuant to paragraph 6(1)(a) of the *Canada Pension Plan*. These appeals were heard together on common evidence.

[2] The issue is whether the Worker is an employee or an independent contractor.

[3] The Minister relied on the following assumptions:

(a) the Appellant is a non-profit organization that provides a high performance athlete ski program;

(b) the regular ski season is from August to April;

(c) the Appellant's committee controls the day-to-day operations;

(d) Paul Cook is the president and chairperson of the Appellant's board;

(e) the Worker was hired under a written agreement, which was never signed;

(f) the Worker's duties included the following:

- prepare gates on daily basis
- prepare batteries for drills, video, timing system etc.
- set up of training courses and timing system
- prepare equipment for travel
- maintain equipment
- monitoring off snow training
- teach ski racing to athletes
- drive team van and care for athletes on trips
- all other duties related to support head coach

(g) the Worker performed his duties at different ski areas;

(h) the Worker was paid $3,400.00 per month;

(i) the Worker was paid by cheque to his personal name;

(j) the Worker was reimbursed for expenses incurred in the performance of his duties;

(k) the Worker did not receive paid vacation nor vacation pay or any benefits;

(l) the Worker's hours of work stated to be as long as athletes were in his care and as determined by the competition schedule;

(m) the Worker's hours of work were not recorded;

(n) the Worker was reported to the Appellant's Head Coach as deemed necessary;

(o) the Head Coach kept the Appellant's Board apprised of their work at the monthly meeting;

(p) the Head Coach supervised the Worker on and off the hill;

(q) the Head Coach determined the training program and the competition schedules;

(r) the manuals for coaching are provided by the Coach's federation and the coaches obtain the manual and other materials to coach, on their own;

(s) the Worker was required to obtain approval from the Appellant's Board prior to taking actions if it was an instance that money was required of the actions were not defined in the program;

(t) the Worker was subject to the coaching requirement of being a fully certified Level III and in good standing with the Canadian Ski Coaches Federation (the "CSCF");

(u) the Worker had to pay his annual CSCF membership dues;

(v) the Worker was also required to hold a valid driver's license that permitted the driving of a 15 passenger van;

(w) the Worker had third party liability insurance coverage that was included in his annual CSCF membership fees.

(x) the coaches are responsible for their own training and upgrades;

(y) the Worker was provided with an uniform with the sponsor logo on it;

(z) the Worker was provided his ski equipment by the sponsor but had to return it at the end of the season;

(aa) the parent/coach complaints were resolved by the parties or the management committee;

(bb) the Worker had to provide his services personally but an alternate could be hired if necessary with the Appellant's approval;

(cc) the Worker was performing services exclusively for the Appellant;

(dd) the Appellant had the right to terminate the Worker's services;

(ee) other workers were performing similar duties.

Facts

[4] The Appellant relied on the evidence of two witnesses, Allistar Scott (a former Head Coach for the Appellant) and Lisa Bailey (the treasurer for the Appellant). The Respondent relied on the evidence of the Worker, Jean Belanger.

Allistar Scott

[5] The Appellant is a non-profit organization with a mandate to develop competitive ski racers in Canada. The Appellant has two tiers of athletes, the Juvenile Team (13 and 14 year olds) and the FIS Team (15 years and older).

[6] The Appellant is governed by provincial rules for ski organizations and Alpine Canada, which oversees all ski racing in Canada. Alpine Canada is responsible for the technical and ethical training of coaches, which it carries out through contracts with the Canadian Ski Coaches Federation ("CSCF"), and for the scheduling of national level competitions, around which provincial organizations develop their athletic programs.

[7] The Appellant's members are volunteer parents, some of whom sit on a management committee (the "Committee") that meets at and operates from the members' homes. The Committee approves all contracts and generally seeks to hire coaches that are level III certified with the CSCF.

[8] Allistar Scott is a former FIS Head Coach and is currently a member of the Committee.

[9] Mr. Scott explained that the Worker was the Juvenile Head Coach during the 2004-2005 season. During that time, the Worker was loosely supervised by the FIS Head Coach. His duties included developing a program of activities for the athletes that aligned with the Alpine Canada competition schedule and prepared the junior athletes for their eventual transition to the FIS Team. Mr. Scott admitted that he may have provided the Worker with a previous year's training schedule for him to use as a template for designing that season's program. The Worker also arranged all of the Juvenile Team's training on ski hills, both within and outside the region, and all travel arrangements including hotels and lift tickets.

[10] When the Worker became the Assistant to the FIS Head Coach in the fall of 2005 his duties changed dramatically, according to Mr. Scott, because of the FIS Team's greater athletic proficiency. In this new role, the Worker merely assisted and was directly supervised by the FIS Head Coach, who had sole responsibility for developing the FIS Team athletic programs. The Worker had no ability to decide where to train, which days to train, the hours or any other portions of the scheduling.

[11] Because the outside organizations set the racing schedules, the athletes had to be "on snow in summer". For this reason they traveled to Chile to ski in August and to Switzerland in the fall. Mr. Scott recalled that the Worker was required to take part in the Switzerland trip.

Lisa Bailey

[12] Lisa Bailey confirmed Mr. Scott's evidence that the Appellant's organization is composed of parents, some of whom sit on the Committee, and that its activities are overseen by the provincial organizations. She added that funding is derived from various programs such as sponsorship, provincial sports organizations, program fees, as well as charity auctions and bingos.

[13] Ms. Bailey looks after the budget in consultation with Paul Cook, the President and Chairperson of the Committee, and with the FIS Head Coach. While the Worker was the Assistant to the FIS Head Coach, the evidence seemed to indicate that he had no budget related responsibilities. However, she stated that when the Worker was the Juvenile Head Coach, he was advised of his team's budget and was requested to plan his programs and travel arrangements for the athletes within those parameters. Any budget over-runs required the Committee's approval. Responsibility for such over-runs remained with the Appellant and not the Worker.

[14] She stated that the Appellant provided rental vans and trailers to the coaches for transporting the athletes to the various training sites. The coaches were required to be licensed to drive these vehicles. The Appellant also provided some stock, such as gates and timers. The coaches were required to wear team uniforms, with sponsorship logos, so that they could be identified as a team on the ski hills. The coaches provided their own ski equipment, cell phones for communication and computers. Ms. Bailey suspected that the Worker was supervised both on and off the ski hill.

[15] She stated that coaches could hire substitute coaches and that the Worker actually did so on one occasion, when some of his team qualified for events in Ontario and some others, in Quebec. He accompanied part of his team to Quebec and arranged for another coach to accompany the remainder of the team to Ontario. She testified that although the Worker did not obtain the Committee's approval for this second coach, it is quite likely that he did obtain the parents' permission. The Worker submitted the expenses incurred by this additional coach to Ms. Bailey for reimbursement by the Appellant.

[16] Ms. Bailey also stated that the Worker was required to execute an agreement, which outlined his duties and the duration of the contract, and which stated that he would be an independent contractor. Ms. Bailey confirmed that all coaches, including the Worker, were paid by cheque but that no deductions were taken. She also stated that there would be nothing that would prevent the coaches from working for other organizations and in fact some of them had other businesses and jobs.

Jean Belanger

[17] The Worker testified that he applied for employment with the Appellant and began in the position of Juvenile Head Coach in September 2004. He stated that he was offered $18,000.00 (Exhibit R-1, Tab 1) and that the amount of pay was not dependent upon the number of athletes that he might be coaching, but rather was a pre-determined amount for the entire season. He was required to have level III certification and to be a member of CSCF, which provides liability insurance to its members. He was asked to sign an agreement that stated he would be an independent contractor.

[18] When he was hired he was provided with program criteria (Exhibit A-1, Tab 1) and a previous season's home training schedule, which he was to follow when developing his athletic program to ensure that the Appellant maintained a consistent training philosophy. When he was first hired, he attended a meeting, along with other coaches, where he was shown videos pointing out ski tactics and techniques that the coaches should strive to achieve. As the season progressed, he attended monthly Committee meetings to report on team progress.

[19] He was provided with an Assistant Coach, but he had no part in hiring or paying him. He was allocated a budget and was in regular communication with the treasurer, Lisa Bailey, to ensure that he stayed within this budget. He was reimbursed for all expenses he incurred in carrying out his duties, including fuel

for the van, hotel, meals, training space on the hills and long distance cellular charges. He completed and submitted, along with his receipts, expense report forms that had been provided to him by the Appellant. Any unforeseen expenses required approval.

[20] He did use some of his own personal items, such as his own skis and poles, computer, cellular phone and video camera. However, he was required to wear the team uniform (winter jacket and ski pants, plus spring jacket), which the Appellant provided. He was also provided with a rental van with trailer and ski equipment, gates, tools, drills, drill bits, flags, brush gates and radios. If the equipment was broken, the Appellant paid the expenses. In the Worker's opinion, without the race equipment provided by the Appellant, he would be teaching skiing but not race skiing.

[21] He regularly traveled within the region with the athletes for provincial and national championships, though he did not determine the location or timing of these trips. During his position as Juvenile Head Coach he recalled one occasion where some members of his team qualified for the provincial championships in Ontario and others, in Quebec. While he and his Assistant Coach accompanied some of the athletes to the Quebec competitions, another coach was hired to accompany the one athlete that qualified in Ontario. He obtained approval for this coach from the parents and funding approval from Lisa Bailey, the treasurer. He eventually submitted an expense report to Lisa Bailey on this individual's behalf, which the Appellant paid.

[22] When he coached the Juvenile Team he said that he could not assume any other coaching positions, as he had a full time schedule. He also stated that training others would be frowned upon by the Committee, as it would be assisting the competition.

[23] In August 2005 the Worker became the Assistant to the FIS Head Coach. He remained in this position until December 2005. His agreement stipulated that he was to be paid $22,000.00. Again this rate of pay was not dependent on the number of athletes he coached or the number of hours he worked. His duties in this position included driving a second van, moving equipment on the hills, maintaining training schedules and assisting in training the athletes. Unlike his position as Juvenile Head Coach, he had no input into the training schedules or the travel arrangements. Rather, his duties were carried out pursuant to the instructions of the FIS Head Coach, who also determined the training schedule for the season.

He was required to attend all training sessions, including three weeks in Chile, three weeks in Switzerland and two weeks in British Columbia.

[24] The same equipment was provided again by the Worker and the Appellant, as in the position of Juvenile Head Coach. His computer was used primarily to show his team video footage that he had recorded on his camera, but it was not one of his main pieces of equipment required to complete his duties. As before, he was reimbursed for all his expenses.

Appellant's Position

[25] Appellant counsel argues that, as a result of recent case law since *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.,* [2001] 2 S.C.R. 983, the most important consideration, when evaluating a work relationship, is the parties' intent. Counsel suggests that *Wolf v. The Queen*, 2002 DTC 6853 and *The Royal Winnipeg Ballet v. M.N.R.*, [2006] F.C.A. 87 state that if the intent is clear, there is no need to look at any other facets of the relationship. It is only where intent is unclear from the outset that other facets should have any bearing.

[26] Counsel submits that the Appellant always intended that the Worker would be an independent contractor. The Worker, on the other hand, never disputed that he was an independent contractor until he tried to collect employment insurance. In addition, the written agreement clearly outlines that the parties intended that the Worker would be an independent contractor. Counsel argues that given this intent was clear at the outset, no other factors need to be considered.

[27] Counsel also submitted that the case of *The Royal Winnipeg Ballet* was strikingly similar to the present appeal and that even the additional *Wiebe Door Services Ltd. v. M.N.R.,* [1986] 3 F.C. 553 factors clearly show that the Worker was an independent contractor.

Respondent's Position

[28] Respondent counsel argued that despite recent developments, *Sagaz Industries* is still the appropriate authority. *Wolf and The Royal Winnipeg Ballet* merely clarified that to determine the parties' relationship, the Court must consider all of the factors in *Wiebe Door*, as well as the parties' intent. Counsel suggests that reviewing the factors of control, tools, risk of loss and chance of profit, as well as the parties' intent, clearly demonstrates that the Worker was an employee of the Appellant.

Analysis

[29] Although *Sagaz Industries* dealt with the issue of vicarious liability, as part of his reasons, Major J. reviewed the differences between an employee and an independent contractor. After referring to the *Wiebe Door* factors he stated at paragraphs 46, 47 and 48:

> [46] 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, supra*, 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, *supra*, 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.
>
> [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.
>
> [48] 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.

[30] This issue was subsequently considered in 2002, by the Federal Court of Appeal in *Wolf*. Although the Court's analysis was based on the articles of the *Civil Code of Quebec*, it included references to past case law including *Sagaz Industries*. Desjardins J.A. at paragraph 93 stated:

> [93] Both Canadair's work and the appellant's work were integrated in the sense that they were directed to the same operation and pursued the same goal, namely the certification of the aircraft. Considering, however, the fact that the integration factor is to be considered from the perspective of the employee, it is clear that this integration was an incomplete one. The appellant was at Canadair to provide a temporary helping hand in a limited field of expertise, namely his own. In answering the question "whose business is it?" from that angle, the appellant's business stands independently.

[31] In concurring reasons at paragraphs 117 and 119, Décary J.A. stated:

> [117] The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other. I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e. the intention of the parties. Article 1425 of the *Civil Code of Quebec* establishes the principle that "[t]he common intention of the parties rather than the adherence to the literal meaning of the words shall be sought in interpreting a contract". Article 1426 C.C.Q. goes on to say that "[i]n interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account".
>
> …
>
> [119] Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. Should that not be enough, suffice it to add, in the case at bar, that the circumstances in which the contract was formed, the interpretation already given to it by the parties and usage in the aeronautic industry all lead to the conclusion that Mr. Wolf is in no position of subordination and that Canadair is in no position of control. The "central question" was defined by Major J. in *Sagaz* as being "whether the person who has been engaged to perform the services is performing them as a person in business on his own account". Clearly, in my view, Mr. Wolf is performing his professional services as a person in business on his own account.

[32] Also concurring, Noël J.A. stated the following at paragraph 122:

> [122] I too would allow the appeal. In my view, this is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.

[33] I think what can be distilled from these statements is that, in every case, one must return to the basic principles laid down by the Supreme Court in *Sagaz Industries.* More specifically, statements of intent in an agreement are not determinative unless they reflect the parties' actual legal relationship. Therefore, courts must evaluate all of the relevant facts and circumstances to determine if these reflect the intention that the parties originally stated. There may be many cases where the intent is found to be exactly as the parties say it is, but there may equally be those cases where an investigation of the underlying character of the relationship does not reflect what either one or both claim it to be. Simply because I refer to my dog as a purebred pedigree does not make that so, unless certain characteristics are determined to exist.

[34] Sharlow J.A. in *The Royal Winnipeg Ballet* stated at paragraphs 60 and 61:

> [60] Décary J.A. was not saying that the legal nature of a particular relationship is always what the parties say it is. He was referring particularly to Articles 1425 and 1426 of the Civil Code of Quebec, which state principles of the law of contract that are also present in the common law. One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.
>
> [61] I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties

> profess to have intended, then their stated intention will be disregarded. (emphasis added)

[35] Sharlow J.A. then went on at paragraph 64 to state:

> [64] In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[36] In concurring reasons, Desjardins J.A. stated at paragraphs 71 and 72:

> [71] The determination of whether or not the parties have entered into a contract of employment for the purpose of the EI or the CPP has proven over the years to be a difficult and somewhat perilous exercise as the jurisprudence of our Court demonstrates. I would not deprive the common law judge of the possibility of being made apprised of the intention of the parties so as to test such intention against objective factors and the surrounding circumstances of the case when he makes the final determination.
>
> [72] As demonstrated by Sharlow J.A., if the intention of the parties is uncontested, save by third parties, as in the case at bar, the common law judge has nevertheless the responsibility to "look to see" if the terms used and the surrounding circumstances are compatible with what the parties say their contract is. The common law judge must make sure that what the parties say they have agreed upon is in fact what is contained in the contract they have signed.

[37] Again the above passages of both Sharlow J.A. and Desjardins J.A. make it clear that when the nature of a legal relationship is questioned, a court must "look and see" if the circumstances at the very heart of the relationship reflect the parties' stated intentions. It is only through a consideration of the particular facts and circumstances (which may vary from case to case) that one can actually determine whether the parties' stated intentions are consistent with the reality of their relationship. If they accomplished that in light of objective evidence, then their intention should prevail, as it represents their free will to contract in the market place.

[38] In the most recent decision of the Federal Court of Appeal, *Combined Insurance Company of America v. M.N.R. and Mélanie Drapeau*, citation number

2007 F.C.A. 60, unreported, Nadon J.A., after reviewing recent case law, stated at paragraph 35:

> [35] In my view, the following principles emerge from these decisions:
>
> 1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door, supra*, and in the light of any factor which may prove to be relevant in the particular circumstances of the case;
>
> 2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.
>
> Although as a general rule the control test is of special importance, the tests developed in *Wiebe Door* and *Sagaz, supra*, will nevertheless be useful in determining the real nature of the contract.

[39] For these reasons, I must reject the Appellant's characterization of the "intent" argument and its application. Although counsel is correct that there has been a shift in focus, it is not, as she suggests, a simple matter of ascertaining intent without objectively weighing the factors and circumstances of the parties' legal relationship. Rather, the Court must look at all relevant facts, including the *Wiebe Door* factors and any others that may be pertinent, against the backdrop of the parties' stated intentions. The importance and relevance of these factors will vary from case to case, although the control factor will often play the more dominant role. In the end, each analysis is truly an individual endeavour which must be played out in the particular arena of that case.

[40] Being mindful that the Worker and the Appellant have conflicting opinions of the nature of their relationship, I will examine the evidence in relation to the following factors:

Control

[41] In considering all of the evidence before me, I conclude that the degree of control in the Worker and the Appellant's relationship tends more to an employee status, although there are some elements which point in the opposite direction and some elements which I consider neutral.

[42] First of all, the Appellant argued that the facts in these appeals can be distinguished from others because training philosophies and directives were

determined by ski organizations, rather than by the Appellant. The evidence supports that the Appellant adopted its training requirements and duties from Alpine Canada and its code of ethics from CSCF. However, many organizations adopt training guidelines and requirements from other organizations. In fact, in the present case, this compliance was particularly important since the athletes were obliged to acquire competitive skills within certain timetables in order to participate in provincial competitions. I also believe the evidence suggested that following these requirements enabled the Appellant to qualify for funding. The Worker did have some latitude to work with the athletes within these adopted training requirements and schedules. However, it was the Appellant that adopted those policies as its own, provided them to the Worker when he started as Juvenile Head Coach and expected him to work within those guidelines so that Juvenile Team members could be groomed to graduate to the FIS Team. In my view, the requirement to follow consistent philosophies is much more reflective of the type of control one would see in an employment relationship.

[43] Looking next at the Worker's role as Juvenile Head Coach, he was offered a salary and the evidence did not suggest that this was in any way negotiable. He reported to the FIS Head Coach, who provided him with the training schedules that had been used in prior years. The Appellant provided him with an Assistant Coach, but the evidence does not suggest that he had any input into the hiring of this individual, even though they would be working closely together. He attended monthly Committee meetings to report on the progress of the Juvenile Team. He was provided a template for expense reporting, advised of the budget, and required to obtain approval for additional or unexpected expenses. He travelled with his team to other regions in search of snow but those destinations and the timelines were not his choices. He had no specified work hours and conducted some administrative duties, such as travel arrangements, from his home, but the majority of his work took place on the ski hills. While these last factors may be indicative of an independent contractor, they are overshadowed by the many more points that suggest an employment relationship.

[44] Considerable evidence was adduced concerning the so-called "substitute", who accompanied one or two members of the Juvenile Team to Ontario to compete, while the Worker took the rest of his team to Quebec. First of all, I do not consider this individual to be *a substitute* for the Worker in the true meaning of the word. Rather, he was hired *in addition to* the Worker when that need arose. The Worker said that he obtained the parents' approval and the evidence of Lisa Bailey was that he probably discussed this with the parents but not the Committee. Her evidence contradicted the Payor's Questionnaire (Exhibit R-2) which indicated that

the Worker required not only the approval of the parents in hiring substitutes but also the FIS Head Coach and the Committee. This “substitute”, who provided additional help with the Juvenile Team, was paid by the Appellant when an expense claim was submitted to Lisa Bailey. This clearly points to an employment relationship.

[45] I turn now to his role as Assistant to the FIS Head Coach. When asked about his duties, the Worker listed a number of activities that the FIS Head Coach delegated to him, but in the end, he summed up by saying that “I know there was more, but I was just doing what he needed”. I conclude from the evidence that the Appellant’s degree of control and direction over the Worker in this position increased substantially. He was simply being delegated tasks by the FIS Head Coach, which, in my view, clearly suggests an employment relationship.

[46] It is also interesting to note that the Agreement contained a clause in which the Appellant was permitted to terminate the Worker for various reasons, one of which was “insubordination”. This is reflective of the Appellant’s position of authority in the work relationship and its attempt to control the Worker in the performance of his work.

[47] Although a few of the elements that must be considered under the control factor do lend some support to the Appellant’s argument, on the whole, the majority of the evidence supports the Respondent’s position that there was considerable control placed on the Worker’s activities, and therefore the Worker is an employee.

Ownership of Tools

[48] Similarly, when considering this factor, there is some evidence to support either argument. However in viewing the totality of the evidence, it is clear that the major items of equipment, essential for performance of the coaching job, were provided by the Appellant. The Worker was required to wear a team uniform provided by the Appellant, so that the team would be identified. The vans and trailers used for travel, the gates, drills, flags and so forth were supplied to assist the coaches in training the racers on the various ski hills. While the Worker did use some personal items such as a computer, his own ski equipment and his cell phone, the Appellant reimbursed him for any long distance work-related charges incurred on his cell phone. I am satisfied that the factor of equipment is primarily reflective of an employee situation.

Chance of Profit/Risk of Loss

[49] The evidence related to this factor clearly supports that the Worker is an employee. He was paid a set salary no matter how many skiers he was coaching, and he was reimbursed for all expenses and budget over-runs. He had absolutely no opportunity to profit and had zero monetary risk exposure.

Integration

[50] The Worker's activities were fully integrated with those of the Appellant, which suggests an employment relationship. When he left his position in December 2005 there was no question that the athletes were staying with the Appellant organization and awaiting a new Assistant to the FIS Head Coach. The Worker had no opportunity to develop his own clientele, as he was simply paid to coach the Appellant's clientele. Furthermore, the evidence I had before me concerning some other coaches who had outside jobs was not persuasive. Some of this work is seasonal and I had no evidence of timeframes when these coaches could be working elsewhere, or whether it may have simply been an individual juggling two jobs.

Conclusion

[51] Although the parties signed an agreement which designated the Worker as an independent contractor, the actual reality of their legal relationship does not reflect this characterization. I believe the case law is clear that simple statements of intent, whether written or oral, will not necessarily transform a relationship into something which the circumstances and facts of the case do not support. After a careful review of all the evidence of the witnesses in light of their stated intentions and the circumstances of their relationship, including the *Wiebe Door* factors, I must conclude that the Worker's relationship was one of subordination to the Appellant. Although the facts and evidence in another relationship involving coaches for racing skiers may point to the coaches being independent contractors, that is not the case here.

[52] I believe at the end of the day it is still important to ask myself the central question, as the Supreme Court directed in *Sagaz*, "Whose business is it?". When I consider the totality of all of the evidence before me, there is only one conclusion: it was the Appellant's business and the Worker was hired as an employee of that business.

[53] For these reasons, I am dismissing both of the appeals.

Signed at Ottawa, Canada, this 19th day of March 2007.

"Diane Campbell"

Campbell J.

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