

Docket: 2008-1877(EI)

BETWEEN:

MARK VANDERVELDE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JULIEN BRANCH,

Intervener.

Appeal heard on common evidence with the appeal of *Mark Vandervelde*
(2008-2583(CPP)) on March 25, 2009 in Nanaimo, British Columbia

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Whitney Dunn
For the Intervener:	No one appeared

JUDGMENT

The appeal is allowed, without costs, and the decision of the Minister is vacated in accordance with the attached Oral Reasons for Judgment.

Signed at Vancouver, British Columbia, this 22nd day of April 2009.

"L.M. Little"

Little J.

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Citation: 2009 TCC 200
Date: 20090422
Dockets: 2008-1877(EI)
2008-2583(CPP)

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REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on March 25, 2009 in Nanaimo, British Columbia)

Little J.

A. **FACTS:**

[1] For several years, the Appellant and his former wife provided cleaning services to branches of the Royal Bank of Canada (“Royal Bank”) in Parksville, B.C. and Qualicum, B.C. The cleaning services were provided by the Appellant and his former spouse on an independent contractor basis. That is, the Appellant and his former spouse were not employees of the Royal Bank.

[2] A company by the name of Bee Clean Limited (hereinafter referred to as “Bee Clean”) entered into an agreement to provide cleaning services to branch offices operated by the Royal Bank of Canada across Canada. The Appellant and his former spouse agreed to be subcontractors for Bee Clean, and to provide the cleaning services for the Royal Bank branch offices in Parksville and Qualicum.

[3] The Appellant and his former spouse separated in November 2003. In mid-2004, the Appellant started to do the cleaning himself as a subcontractor for Bee Clean.

[4] In 2006, the Appellant purchased a house in Port Alberni, B.C., however he continued to commute to Parksville, for his regular day job, plus the cleaning jobs in Parksville and Qualicum.

[5] The Appellant stated that he was “burnt out” with all of the work, commuting, *et cetera*, and he needed help. The Appellant posted an advertisement for help at Services Canada. Mr. Julien Branch responded to the advertisement (Mr. Branch is referred to as the “Worker”).

[6] The Appellant stated that he met the Worker while he was cleaning one of the bank offices and explained the cleaning situation to him.

[7] The Appellant testified that he hired the Worker to provide cleaning services to the two Bank facilities for four days per week. The Worker was to do the cleaning services for Tuesday, Wednesday, Thursday and Friday. The Appellant also testified that he told the Worker that he would be working as a subcontractor at \$500.00 per month. The Appellant said that he also told the Worker that he would receive cash of \$500.00 per month, and there would be no deductions for Employment Insurance, Canada Pension Plan or Income Tax.

[8] The Appellant testified that the Worker accepted this arrangement, and that the Worker commenced to work as a subcontractor for the period February 1, 2006 to February 27, 2007 (a period of approximately 13 months (the “Period”)).

[9] The Appellant said that he continued to do cleaning work for Bee Clean every Monday and the Appellant also did “extras” for Bee Clean such as removing graffiti from bank walls, cleaning snow and for additional safety work as specified by Bee Clean. The Appellant said that he received \$1,010.00 per month from Bee Clean during the Period and additional payments for additional work specified as “extras”.

[10] As noted above, the Appellant paid \$500.00 per month to the Worker during the Period, pursuant to the subcontractor arrangement. The Appellant said that during the Period, the Worker also continued to provide cleaning services to two branches of the Canadian Imperial Bank of Commerce, one in Parksville and one in Qualicum.

[11] The Appellant also said that Bee Clean provided, at the bank offices, the cleaning supplies and equipment required by the Worker or the Appellant to perform the services. The Appellant also testified that the Worker was an experienced cleaner, and that he did not require any supervision. The Appellant also said that he did not know when the Worker provided “cleaning services” i.e. at what time.

[12] On November 22, 2007 the Minister of National Revenue issued a Ruling in which it was stated that the Worker was employed in insurable employment with the Appellant during the Period – February 1, 2006 to February 27, 2007.

B. ISSUE:

[13] The issue is whether the Worker was employed in insurable employment by the Appellant during the Period.

C. ANALYSIS AND DECISION:

[14] In resolving cases of this nature, the Courts have provided a number of tests. For example, in the case of *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025 (FCA), MacGuigan, J. outlined the following tests:

- (a) control;
- (b) ownership of tools;
- (c) chance of profit; and
- (d) risk of loss

In terms of control, in this situation, as I have indicated, the Appellant did not exercise any control over the Worker. The Worker knew what to do because he was an experienced cleaner. The Worker could also clean the bank offices whenever he wished. The Worker was also able to work at other cleaning jobs during the same period.

[15] Now in this regard, I would like to refer briefly to a portion of the Notice of Appeal filed by the Appellant. The Appellant said:

There are many other points as well, including that Julien (i.e. the “Worker”) was free to work for whoever else he wanted and provide his services to different payer’s at the same time. He was already doing that when I met him.

In point form:

- no supervision
- no set hours to do the work
- do the work anyway you want
- bring your own equipment, if preferable or use Bee Clean's
- no control over daily activities
- work independently
- take 2 or 10 hours – doesn't matter, payment is the same
- come and go as you please, as long as the job gets done
- work for as many others as you want
- do the work in whatever order or methods you like
- have others do the work for you if you want.

[16] Obviously there was no control in the classic sense that the word Control is used.

[17] The ownership of tools - as indicated above, Bee Clean provided the tools. This test is inconclusive.

[18] Chance of profits – the Worker could not make any more money unless he renegotiated the deal with the Appellant.

[19] Intention – The Appellant testified that the Intention was very clear that the Worker was to be an independent contractor. No evidence was produced to refute this testimony.

[20] When one considers this situation, it is apparent I believe, that the Worker was running his own business and he was not an employee of the Appellant.

[21] I have also referred to a number of Court decisions including *Wiebe Door* (see paragraph 14), *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61, in Supreme Court of Canada, and *Lang et al. v. M.N.R.*, 2007 DTC 1754, of the former Chief Justice Bowman. I also accept the uncontradicted sworn testimony of the Appellant, and I have concluded that the appeals filed under the *Employment Insurance Act* and the *Canada Pension Plan* should be allowed without costs.

Signed at Vancouver, British Columbia this 22nd day of April 2009.

"L.M. Little"

Little J.

CITATION: 2009 TCC 200

COURT FILE NOS.: 2008-1877(EI) and
2008-2583(CPP)

STYLE OF CAUSE: Mark Vandervelde and
The Minister of National Revenue and
Julien Branch

PLACE OF HEARING: Nanaimo, British Columbia

DATE OF HEARING: March 25, 2009

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

DATE OF ORAL JUDGMENT: April 22, 2009

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Whitney Dunn

For the Intervener: No one appeared

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada