

Citation: 2009 TCC 594

Dockets: 2007-4979(EI)
2007-4980(CPP)

BETWEEN:

ESAN INCE-MERCER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ALLAN S. BLOTT,

Intervener.

AND BETWEEN:

Dockets: 2007-4981(EI)
2007-4982(CPP)

ALLAN S. BLOTT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ESAN INCE-MERCER,

Intervener.

**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 August 25, 2009, be filed.

“N. Weisman”

Weisman D.J.

Signed in Toronto, Ontario, this 26th day of November 2009.

Court File Nos. 2007-4979(EI);
2007-4980(CPP).

TAX COURT OF CANADA

IN RE: the Employment Insurance Act and the Canada Pension Plan

BETWEEN:

ESAN INCE-MERCER

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent

- and -

ALLAN S. BLOTT

Intervener

Court File Nos. 2007-4981(EI);
2007-4982(CPP).

ALLAN S. BLOTT

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent

- and -

ESAN INCE-MERCER

Intervener

ORAL REASONS OF MR. JUSTICE WEISMAN
in the Courts Administration Service, Courtroom 6C,
Federal Judicial Centre, 180 Queen Street West,
Toronto, Ontario
on Tuesday, August 25, 2009 at 4:28 p.m.

APPEARANCES:

Mr. John D. Buote for the Appellants and the Interveners

Mr. Hong Ky (Eric) Luu for the Respondent

Also Present:

Ms Roberto Colombo Court Registrar

Mr. Robert Lee Court Reporter

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1 Toronto, Ontario
2 --- Upon commencing the Oral Reasons on Tuesday,
3 August 25, 2009 at 4:28 p.m.

4 THE REGISTRAR: The Court is now
5 resumed.

6 JUSTICE WEISMAN: I have heard four
7 appeals, two by Mr. Esan Ince-Mercer and two by
8 Counsel, Mr. Allan Blott, against determinations by
9 the Respondent Minister of National Revenue that the
10 Appellant-Intervener, Esan Ince-Mercer, was employed
11 under a contract of service while engaged by or in
12 Mr. Blott's law office during the period under
13 review, which is January 1, 2006 to May 16, 2007 and
14 that, accordingly, Mr. Blott was liable for
15 Employment Insurance premiums and Canada Pension Plan
16 contributions with reference to that employment.

17 Each Appellant has intervened in the
18 other Appellant's proceedings. They mutually agree
19 that the Minister was wrong because, in their view,
20 Mr. Esan Ince-Mercer was a subcontractor or
21 independent contractor of Mr. Blott's during the
22 period under review.

23 In order to resolve this question,
24 which has been variously characterized in the
25 jurisprudence as 'fundamental', 'central' and 'key',

1 the total relationship of the parties and the
2 combined force of the whole scheme of operations must
3 be considered. To this end, the evidence in this
4 matter is to be subjected to the four-in-one test
5 laid down as guidelines by Lord Wright in *Montreal*
6 *(City) v. Montreal Locomotive Works Ltd.*,
7 [1947] 1 Dominion Law Reports 161, which was adopted
8 by Justice MacGuigan in *Wiebe Door Services Ltd. v.*
9 *The Minister of National Revenue*, [1986] 87 Dominion
10 Tax Cases 5025.

11 The four guidelines are: the payer's
12 control over the worker; whether the worker or the
13 payer owns the tools required to fulfill the worker's
14 function; the worker's chance of profit; and finally,
15 the worker's risk of loss in his or her dealings with
16 the payer.

17 While there are four guidelines
18 involved in the four-in-one *Wiebe Door* test, I ran
19 into a complication because, upon reading the
20 Minister's Reply to the Notice of Appeal, I had a
21 question as to whether the assumptions therein set
22 out in paragraph 7 were sufficiently clear so that
23 the Appellants were aware of the case that they had
24 to meet.

25 There are cases saying that the day

1 of trial by ambush and surprise are long over and
2 that the Appellant or the taxpayer has the right to
3 know the case that he has to meet. That was an issue
4 that concerned me in this case to which I will
5 subsequently allude.

6 Specifically, as I put it to Counsel
7 for the Minister, the simple statements in paragraph
8 or assumption 7(e) and 7(m), the former being that
9 there was a fixed salary earned by Mr. Ince-Mercer
10 and the latter being that he had expenses, raised the
11 question in my mind as to their sufficiency.

12 I drew Counsel's attention to
13 Justice L'Heureux-Dubé's decision in *Hickman Motors*
14 *Ltd. v. The Queen*, [1997] 2 S.C.R. 336, that the
15 burden was upon the Appellant to rebut the
16 assumptions contained in the Appellants' Notices of
17 Appeal, but no more.

18 Adverting first to the element of
19 control, Counsel for the Appellants, who is obviously
20 well aware of the law in this area on his own, talked
21 about subordination, which I thought was excellent
22 because, personally, I find the concept of
23 subordination a useful tool that we in the common-law
24 jurisdictions have started to import from the
25 Quebec Civil Code, specifically Article 2099, which

1 defines independent contractors as those who have no
2 subordinate relationship with their payers.

3 The converse of that proposition is
4 that, if one is to be an employee, then there must be
5 a relationship of subordination between the payer and
6 worker.

7 I have found it useful in all cases
8 that I have heard, including today's, to think not
9 only in terms of control but in terms of
10 subordination. I do appreciate Counsel's raising of
11 that concept.

12 The evidence is that during the
13 period under review, January 1, 2006 to May 16, 2007,
14 Mr. Ince-Mercer was a person who was freshly called
15 to the Bar after completing his articles with
16 Mr. Blott's firm. There, he decided to specialize in
17 personal injury matters. The evidence is that he did
18 that work primarily in Mr. Blott's office but also at
19 home, where he had an office and would work late at
20 night.

21 Sometimes he would come in to
22 Mr. Blott's office at noon, which satisfies me that
23 Mr. Blott did not have Mr. Ince-Mercer punching a
24 clock and he did not have strict control over his
25 comings and goings. This particular factor tends to

1 indicate that he did not have strict control over
2 Mr. Ince-Mercer.

3 As I understand it, Mr. Blott's
4 clients would see Mr. Blott. He would sign the
5 retainer and then the file would be turned over to
6 Mr. Ince-Mercer to do the paperwork such as the
7 issuing of process and preparation of pleadings. I
8 accept that Mr. Ince-Mercer's work on the file would
9 constitute 80 per cent of the time and effort
10 required.

11 On the other hand, it was
12 Mr. Blott's firm and Mr. Blott's clients that
13 Mr. Ince-Mercer was working on. The big decisions
14 were deferred to Mr. Blott as well as the
15 all-important procedures at the end of a lawsuit or
16 potential lawsuit, such as mediation and settlement
17 conferences and, in the rare case, an actual trial.

18 It is the Appellants' position that
19 Mr. Blott subcontracted 80 per cent of the work to
20 Mr. Ince-Mercer under a contract for services, as
21 distinct from a contract of service.

22 There was evidence that the two of
23 them talked about an ultimate plan, which was not
24 reduced to writing, but that the ultimate plan was
25 that Mr. Blott, with some 30 years' experience, was

1 looking to retire, actually for a second time, and
2 that Mr. Ince-Mercer would take over the practice.

3 I was interested in that particular
4 piece of evidence because of a case called *Woodland*
5 *Insurance Ltd. v. The Minister of National Revenue*,
6 [2005] T.C.J. No. 276, a decision of my Brother
7 Justice Bowie. That was a very interesting case
8 because it was a case of a salesperson who was
9 working very hard to build up the clientele and the
10 business of the person for whom he worked. Because he
11 was building up a business, the issue was whether he
12 was or was not an independent contractor.

13 Justice Bowie said something that I
14 find very sensible. He said if someone is building up
15 a business and is therefore to be held as an
16 independent contractor, he has to be building up his
17 own business, not somebody else's. Of course, it is
18 obvious why that would be of interest to me in this
19 case, because Mr. Ince-Mercer was clearly building up
20 Mr. Blott's clientele and his business. There is no
21 evidence that he had any clients of his own. As a
22 matter of fact, he said in the witness box that these
23 were Mr. Blott's clients, and it was his office and
24 he had the ultimate authority over the big decisions.

25 That detracts, I would say, from the

1 argument that Mr. Ince-Mercer was an independent
2 contractor but, in these cases, there is always
3 evidence going both ways. As we all recognize, it is
4 a matter of deciding on which side the matter falls
5 on the balance of probabilities.

6 I did have trouble giving a great
7 deal of credibility to the argument that a neophyte
8 in the practice of law, working for a man with
9 30 years' experience, was not in a subordinate
10 relationship with him, but an independent one.

11 While I was impressed by Counsel for
12 the Appellants, there was one area in which my view
13 of the law differed from his. The argument of Counsel
14 was that Mr. Blott did not have *de facto* control over
15 80 per cent of the work done on the files. But the
16 law is not that *de facto* control is what is
17 important. The law is, it is the right to control
18 that is important; *de jure* rather than *de facto*.

19 You will find that in a number of
20 cases. If you want to read a summary of those cases,
21 you can consult *Logitek Technology Ltd. v. The*
22 *Minister of National Revenue*, 2008 TCC 331. It is a
23 decision of my own on May 6, 2008, Court Docket
24 2006-2748(CPP).

25 I was interested in Mr. Blott's

1 right to control Mr. Ince-Mercer. We have a situation
2 where it is Mr. Blott's firm, Mr. Blott's clients,
3 where he has the whole financial investment, where
4 his reputation is at stake and he has responsibility
5 and risk. Surely in those circumstances he has a
6 right to control. In fact, when asked, he admitted
7 that he had the right to control and to dictate to
8 Mr. Ince-Mercer not only what he did but how he did
9 it.

10 I might interject parenthetically
11 that the law is so technical and deals with such
12 subtle distinctions that there are cases where it
13 makes a difference whether the payer has the right to
14 dictate what to do but not how to do it. But, in this
15 case, once it is established that Mr. Blott had the
16 right to dictate to Mr. Ince-Mercer both what to do
17 and how to do it, that clearly points to a great deal
18 of the right to control, which indicates that the
19 worker is an employee.

20 Adverting to Counsel's interest in
21 subordination, again, I would find it very difficult
22 to believe that Mr. Ince-Mercer, fresh out of school,
23 would not be subordinate to a man of 30 years'
24 experience, and is working in his firm with all the
25 aforementioned responsibilities. It being his

1 investment and his clientele, I really was not
2 satisfied they are in any way dealing as equals or on
3 an even plane. It is clearly a situation of a
4 subordinate dealing with a principal.

5 The control factor indicates that,
6 during the period under review, Mr. Ince-Mercer was
7 an employee.

8 Adverting to tools, the conclusion
9 in my view is equally clear in the same direction.
10 Employees have home offices and home computers and do
11 some work at home. They have vehicles in order to get
12 to work, they have computers. But in this case, there
13 were so many of the tools required by Mr. Ince-Mercer
14 to do his job and that were provided by Mr. Blott
15 that the tools factor, it was very clear that it
16 indicates that the tools were supplied by the payer,
17 indicating that the worker was an employee.

18 In case you are interested, the
19 reason the law has developed an interest in ownership
20 of tools, according to the American Re-statement, is
21 that he who owns the tools, controls how those tools
22 are used.

23 In case I have not been sufficiently
24 particular in the sort of things that were supplied
25 by Mr. Blott, we have everything from an office,

1 paralegals, law clerks, students, a library,
2 receptionist, forms; the list is quite long.

3 The four-in-one guidelines set out
4 in *Montreal Locomotive* and in *Wiebe Door* were only in
5 service of ascertaining the total relationship
6 between the parties in law. The evidence that there
7 was a plan that someday Mr. Ince-Mercer would be
8 owner was vague. It might be a hope, but it was not
9 reduced to writing and it was not something that I
10 could take as a serious piece of evidence that
11 Mr. Ince-Mercer had really in any way any proprietary
12 ownership in this business of Mr. Blott's, even in
13 the near future. Again, I have referred to
14 Justice Bowie's decision as to why that was relevant.

15 Again, we have Mr. Ince-Mercer
16 telling us very clearly that these were Mr. Blott's
17 clients. It really was not his own clientele he was
18 building up; he was working on Mr. Blott's clients.

19 The evidence led me to a very clear
20 picture of an actuality that what we have here when
21 one looks at it objectively, which is my role, is a
22 person whose job and whose specialty is to work on
23 pleadings in the area of personal injury. He is a
24 neophyte, fresh out of law school. While he might
25 have done 80 per cent of the work on the file or

1 consumed 80 per cent of the time - I am really not
2 clear, which are necessary to close a file - but it
3 was Mr. Blott who was seized of the client and of the
4 retainer and came into the picture when it came to
5 settlement, mediation and carriage of the trial.

6 I found myself wondering if it could
7 be argued that a certain percent of the file was
8 subcontracted to the paralegal. You do get to a point
9 where the argument that is really the one that the
10 Appellants are relying upon, begins to lose some
11 force and effect.

12 The indications so far as tools and
13 control are concerned are clear; they both indicate
14 that Mr. Ince-Mercer was an employee in the period
15 under review.

16 I have saved profit and loss for the
17 last, and really I am talking about them out of order
18 because the evidence is clear that, with a fixed
19 salary of a thousand dollars a month, Mr. Ince-Mercer
20 had no chance of profit. Again, it was not his
21 business he was building, it was Mr. Blott's.

22 Similarly, with expenses, I accept
23 that he did have Law Society dues and errors and
24 omissions insurance, and his home office and his home
25 computer and his vehicle, but there is no evidence

1 that constitutes a risk of loss in the sense of
2 business expenses exceeding business income.

3 I get back to this issue as to
4 whether those two *Wiebe Door* factors, chance of
5 profit and risk of loss, were sufficiently clearly
6 pleaded in the assumptions so that both Appellants
7 knew the cases they had to meet.

8 I decided that, yes, they were
9 sufficiently clearly pleaded in the assumptions for a
10 number of reasons; the first of which is that both
11 Appellants were represented by very able Counsel who
12 knew quite well the law in this area and that there
13 was no complaint that they did not know the case they
14 had to meet so far as chance of profit and risk of
15 loss is concerned. As a matter of fact, it was me who
16 raised the issue and nobody else.

17 At the risk of being redundant,
18 there was no argument that the Appellants were not
19 prepared to face those issues.

20 The total relationship between the
21 parties is clear; it points to Mr. Ince-Mercer being
22 an employee under a contract of service. All four
23 *Wiebe Door* factors point in that direction.

24 Counsel has raised the *Royal*
25 *Winnipeg Ballet v. The Minister of National Revenue*

1 case, 2004 TCC 390, which does stress the importance
2 of the mutual intention of the parties, which I am
3 prepared to accept for argument purposes that it was
4 mutually intended that Mr. Ince-Mercer would be an
5 independent contractor. But if you read *Wolf v. The*
6 *Minister of National Revenue*, 92 D.T.C. 1858,
7 together with *Royal Winnipeg Ballet*, it becomes clear
8 that, although there are various statements by
9 various judges, the intent of the parties as
10 articulated in *Royal Winnipeg Ballet* is only relevant
11 if the *Wiebe Door* four criteria produce inconclusive
12 results. The results are so conclusive in this case
13 that the mutual intent does not carry the day.

14 It is trite law that the burden is
15 upon the Appellants to rebut the presumptions
16 contained in the Minister's Reply to their Notices of
17 Appeal, which are to be found in paragraphs 7.
18 Counsel, very fairly, agreed with most of them, with
19 the exception of 7(b), (c), (k), (n), (o), (q), (r),
20 (s) and (v).

21 Starting with 7(b), I have found
22 that the worker was indeed hired. Under 7(c), I
23 acknowledge that the evidence indicates that both
24 worked on the personal injury files. But of
25 importance is that the 20 per cent worked on by

1 Mr. Blott was what I would call the key 20 per cent
2 because it involved the major responsibility areas
3 such as settlements, mediations and trials. I would
4 say that Mr. Ince-Mercer, who did the paperwork, had
5 a subordinate role in those areas of responsibility.

6 Paragraph 7(k) was true, but as I
7 have already said, this factor of the worker having
8 his own home office and expenses is not unusual among
9 employees.

10 Paragraph 7(n), I accept the
11 position of the Appellant that the files were not
12 assigned, and that the worker, Mr. Ince-Mercer, had
13 the right to refuse. That is quite interesting
14 because there are a number of cases, one of which is
15 *Precision Gutters Ltd. v. The Minister of National*
16 *Revenue*, which is cited at [2002] Federal Court
17 Judgments No. 771, at paragraph 27. They say, and I
18 will quote:

19 "... In my view, the ability to
20 negotiate the terms of a contract
21 entails a chance of profit and
22 risk of loss in the same way that
23 allowing an individual the right
24 to accept or decline to take a
25 job entails a chance of profit

1 and risk of loss."

2 I was, of course, very interested
3 when I heard that Mr. Ince-Mercer had the right to
4 decline to take on files. I was even more interested
5 to hear the reason. His reasons, without exception,
6 had really nothing to do with independence as opposed
7 to subordination. It is not a case of - you can pick
8 any trade - a plumber, saying, "I refuse to work on
9 this house." That is independence. But in
10 Mr. Ince-Mercer's case, I found that, congruent with
11 the highest standards of the legal profession, his
12 reasons were that, "I already have so much on my
13 plate that I can't really do the best possible job,"
14 or, "This is not in my area of expertise, and
15 therefore I decline to take it." I found a
16 distinction between Mr. Ince-Mercer's right of
17 refusal and the sort of right of refusal to be found
18 in cases such as *Precision Gutters*, and it did not
19 lead to the inference that he was an independent
20 contractor.

21 Assumption 7(o) was clearly
22 demolished. The things that motivated Mr. Ince-Mercer
23 were legal limitation periods, the rules and
24 regulations of the Law Society of Upper Canada, the
25 client's needs, and the exigencies of each case.

1 Those are what determined his priorities and his
2 deadlines, not the payer.

3 Paragraph 7(q) is true, and I accept
4 that the form that Mr. Blott put his name on was *pro*
5 *forma*. But the form that that form was attached to,
6 namely the pleadings, certainly was not. I am quite
7 satisfied that anyone with 30 years' experience would
8 very carefully peruse any document of importance
9 going out of his office, particularly one that he had
10 to certify for court purposes, just as a matter of
11 the caution of good counsel, and also being the
12 person who owns the business and values the client.

13 Paragraph 7(r), as to who is
14 responsible for resolving customer complaints, we are
15 getting into things that really do not pertain to the
16 legal industry; we are not talking about someone who
17 is manufacturing door handles. As Mr. Blott said, he
18 had trouble identifying with it in his context, and
19 so I put no real weight on it.

20 The same is with 7(s), talking about
21 work having to be redone. I know why it is there; it
22 is there because if somebody is painting a wall and
23 they do a bad job and they have to repaint the wall,
24 if they are an independent contractor they have to do
25 it on their own time and at their own expense. If

1 they are an employee, their salary goes right on
2 while they are repainting the wall. That is not
3 pertinent to the topic before us, and I do not really
4 know why it is in these assumptions.

5 This brings me to 7(v), personal
6 services. I also found this one not probative. It is
7 there because of cases like *Ready Mixed Concrete v.*
8 *the Minister of Pensions*, 1968 1 All-England Reports
9 443 in the Queen's Bench Division. The Court says
10 that:

11 "Freedom to do a job either by
12 one's own hands or by another's
13 is inconsistent with a contract
14 of service ..."

15 That is usually quite helpful in
16 deciding who is an employee and who is an independent
17 contractor. Unfortunately, nothing in law is entirely
18 simple because, if I quote the example of a
19 physician, surely you want your physician to be the
20 one to do the operation on you and yet he is still
21 clearly an independent contractor. I would equate
22 someone with the expertise of Mr. Ince-Mercer to a
23 physician in that, even though you would like him to
24 do his work personally, that does not detract from
25 the fact that he could be an independent contractor.

1 But in this case, it was not
2 probative because it is accepted by anybody who
3 resorts to legal services that there are paralegals,
4 there are title searchers, there are other people who
5 will be involved in managing your file. The evidence
6 does not substantiate that Mr. Ince-Mercer had to
7 perform his services personally and, even if it did,
8 it is not necessarily probative.

9 The burden, as I have said, is upon
10 the Appellant to rebut the assumptions contained in
11 the Minister's Reply to the Appellants' Notices of
12 Appeal, and there were some assumptions successfully
13 rebutted. But the law according to the Federal Court
14 of Appeal in *Jencan Ltd. v. The Minister of National*
15 *Revenue*, [1997] Federal Court Judgments No. 876, is
16 that if the remaining assumptions that have not been
17 rebutted are sufficient to support the Minister's
18 determination, that suffices. They do not have to
19 rebut all the assumptions.

20 In this case, it is quite clear that
21 there are sufficient assumptions remaining to support
22 the Minister's determinations.

23 I have investigated all the facts
24 with the parties and the witnesses called on both
25 Appellants' behalf, none being called by the

1 Minister, to testify under oath for the first time.
2 I found no new facts and nothing to indicate that the
3 facts inferred or relied upon by the Minister were
4 unreal or incorrectly assessed or misunderstood. I
5 can find no business that Mr. Ince-Mercer was in on
6 his own account.

7 The Minister's conclusions are
8 objectively reasonable. In the result, the appeals,
9 all four, will be dismissed and all four
10 determinations of the Minister will be confirmed.

11 Gentlemen, I thank you both for your
12 assistance. I shall appear again at 9:30 tomorrow
13 morning.

14 THE REGISTRAR: Thank you, sir.
15 Court is closed for the day.

16 --- Whereupon the excerpt concluded at 5:09 p.m.

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

Robert Lee, Certified Court Reporter

CITATION: 2009 TCC 594

COURT FILE NOS.: 2007-4979(EI); 2007-4980(CPP)
2007-4981(EI); 2007-4982(CPP)

STYLES OF CAUSE: Esan Ince-Mercer
and The Minister of National Revenue
and Allan S. Blott
AND
Allan S. Blott
and The Minister of National Revenue
and Esan Ince-Mercer

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 25, 2009

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

DATE OF ORAL JUDGMENT: August 25, 2009

APPEARANCES:

Counsel for the Appellants: John David Buote

Counsel for the Respondent: Hong Ky (Eric) Luu

COUNSEL OF RECORD:

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