Docket: 2007-3696(EI)
2007-3697(CPP)

BETWEEN:

1327939 ONTARIO INC.
o/a GEMINI COMMERCIAL SIGN & LIGHTING,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on July 15, 2008, at Toronto, Ontario

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Agent for the Appellant:	Iain Taylor
Counsel for the Respondent:	Amit Ummat

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and subsection 28(1) of the *Canada Pension Plan* are dismissed and the decisions made by the Minister of National Revenue dated August 22, 2006 for the period from January 1, 2003 to December 31, 2004 are confirmed.

Signed at Toronto, Canada, this 5th day of August 2008.

"Gerald J. Rip"

Rip C.J.

Citation: 2008 TCC 449
Date: 20080805
Docket: 2007-3696(EI)
2007-3697(CPP)

BETWEEN:

1327939 ONTARIO INC.
o/a GEMINI COMMERCIAL SIGN & LIGHTING,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rip, C.J.

[1] 1327939 Ontario Inc. operating as Gemini Commercial Sign and Lighting ("Gemini") has appealed decisions of the Minister of National Revenue ("Minister") made in accordance with the *Canada Pension Plan* ("CPP") and the *Employment Insurance Act* ("*EIA*") that Daniel Mark was employed by Gemini under a contract of service during the period January 1, 2003 to December 31, 2004. As a result of the Minister's decisions, he assessed Gemini on the basis that Mr. Mark was engaged during the said period in pensionable employment pursuant to paragraph 6(1)(*a*) of the CPP and insurable employment pursuant to paragraph 5(1)(*a*) of the *EIA*.

[2] Gemini is of the view that Mr. Mark was an independent contractor. The appellant was represented by its President and sole shareholder, Iain Taylor, who said Gemini is in the business of sign maintenance, sign installation, parking lot lighting maintenance and some commercial electrical work, graphic design and application of vinyl graphics.

[3] Mr. Taylor recalled that one day Mr. Mark, who had just finished high school and whose father did some work for Gemini, asked him for a job. Gemini had other employees but there was no more room for another full-time employee and

Mr. Taylor did not want to be in a position where he would have to lay-off Mr. Mark. Mr. Mark told Mr. Taylor, the latter stated, that he did some work for his father but his father was late in paying him even though his father charges clients for his labour. Mr. Taylor testified that after thinking it over for a few days, he hired Mr. Mark as a subcontractor to do work when he was busy. He insists that Mr. Mark agreed to work as a subcontractor and would work when work was available, i.e., on an "as needed basis". Gemini had purchased a plotter cutter, "a machine that cuts graphics based on what the computer tells it to cut". Mr. Mark would work with this machine as well as others.

[4] Unfortunately, Mr. Taylor stated, once he hired Mr. Mark, Mr. Mark was "too busy doing personal things or something else". Mr. Taylor testified he constantly telephoned Mr. Mark to come to work but he did not show up. Mr. Mark's father did show up also expecting his son to be at work, said Mr. Taylor.

[5] One afternoon, Mr. Taylor recalled, he had a "long chat" with Mr. Mark. Some days Mr. Mark would appear and other days he did not. Mr. Taylor said he told him this was the reason he did not want Mr. Mark as an employee. At the end of 2004, they parted company.

[6] Mr. Mark's weekly hours of work were erratic. Some weeks, Mr. Taylor said, he worked 25 hours, some weeks 60 hours and some weeks 40 hours. "It depended on what he wanted". Some days, according to Mr. Taylor, Mr. Mark did not work 10 to 12 days at a time.

[7] Mr. Taylor reviewed the Minister's assumptions of fact when he made his decisions under appeal. Mr. Taylor agreed with the following:

(a) the Appellant operates a business which make signs, refurbish signs, maintain signs and lighting maintenance and installations;

(b) the Appellant's sole shareholder is Iain Taylor;

(c) the Appellant's shareholder is also the President of the corporation;

(d) the Appellant's shareholder controlled the day to day operations of the business and made the major business decisions for the business;

(e) the Worker was hired under a verbal agreement;

(f) the Worker's duties included design artwork and graphic layouts on computer and other related duties;

(x) the Appellant was responsible for resolving clients' complaints.

[8] He agreed with the following assumptions with qualifications (in italics):

(g) the Worker performed his duties at the Appellant's place of business and at the Appellant's clients' place of business; *and at his home.*

(i) the Appellant also provided trucks to be used to get to and from the work sites, at no charge to the Worker; *He also used his own vehicle for* [*other*] *work he chose to do.*

(k) the Worker received directions from the Appellant's shareholder; *He also received directions from own clients and father who he was subcontracted to.*

(l) the Appellant's shareholder assigned all the tasks and the priorities and deadlines; *For any work I had asked him to do, of course. Mr. Taylor said he had no control over other work done by Mr. Mark.*

(m) the Worker was paid an hourly rate on a weekly basis, by cheque to his personal name; *He did not work every day of the week.*

(o) the Worker was not paid vacation pay or paid vacation; *He was not an employee.*

(p) the Appellant covered the Worker with WSIB; *Mr. Taylor says he was told by "people at WSIB" that it would be in my business favour to cover anyone whether they were an employee or subcontractor . . . from a liability standpoint.*

(t) the Worker's hours of work were recorded on timesheet; *However, some hours were on Mr. Mark's timesheet, which was basically a piece of paper torn out of a notebook. Mr. Taylor told him to keep time on a "generic timesheet", that would have his name, hours and job performed, for example.*

(z) the Worker had to perform his services personally; *Agrees as to design, denies as to application.*

[9] Mr. Taylor denied the following assumptions (explanations in italics):

(h) the Worker was provided with an office and the required equipment by the Appellant, at no cost to the Worker; *Gemini never gave Mr. Mark an office, but did provide him with a computer when he worked at its premises.*

(j) the Worker reported to the Appellant's shareholder on a daily basis;

(n) the Worker's rate of pay was determined by the Appellant's shareholder; *Rate of pay was agreed by both Mr. Taylor and Mr. Mark.*

(q) the Appellant's business hours were Monday to Friday, 8:00 am to 5:00 pm; *Mr. Mark showed up when he felt like it. . . . There was no eight to five, Monday to Friday contract.*

(r) the Worker's hours of work were the same as the business hours and sometimes the week end; *Working on weekends was Mr. Mark's decision.*

(s) the Worker's hours of work were determined by the Appellant's shareholder; *See paragraphs (q) and (r). Hours of work were always an issue.*

(u) the Worker was reimbursed by the Appellant for any expenses that he had to pay in performing his services; *Mr. Mark never incurred expenses requiring reimbursement. If Mr. Mark required tools, he used his father's tools.*

(v) the Worker did not incur any expenses in performing his services for the Appellant; *Mr. Mark never incurred expenses requiring reimbursement. If Mr. Mark required tools, he used his father's tools.*

(w) the Appellant's shareholder would decide if work had to be redone and would cover the related costs; *This was not always true. Some work had to be redone. Gemini would "eat" costs incurred on Mr. Mark's mistakes but as he gained experience cost was taken off his pay cheque.*

(y) the Worker wore a company shirt and coat; *Would wear his father's coat. There was no uniform. Gemini had distributed souvenir "T" shirts and hats to customers and employees.*

(aa) the Worker performed his services solely for the Appellant; *Mr. Taylor believes Mr. Mark worked for others as well: father, friends.*

[10] With respect to assumption at subparagraph (bb), that "the Appellant had the right to terminate the Worker's services", this is a conclusion of law, not a fact. The respondent ought not to include conclusions of law in assumptions of fact relied on in assessing.

[11] In cross-examination, Mr. Taylor said it was up to Mr. Mark to decide if he wanted to perform any job assigned to him and he could accept or reject the assignment. He acknowledged that in a questionnaire sent to him by the Canada Revenue Agency, he replied that Mark could have hired a third person to do his work. At Gemini's office, Mr. Mark would be provided with all the tools, including a

computer, required to do his job. Sometimes Mr. Mark used his own vehicle "to go and score out a job, take photographs . . .". Perhaps only once or twice did he work for Gemini at home, Mr. Mark declared. He usually worked at Gemini's office, he said.

[12] All invoices for work performed by Mr. Mark were sent to clients by Gemini.

[13] According to Mr. Mark, when he first discussed working for Mr. Taylor's company he had just completed high school and had no idea of the difference between an independent contractor and an employee and did not know the difference between a tax T4 form or T5 form. He insisted that he never discussed any such relationship with Mr. Taylor. He was never previously employed and "just wanted the money".

[14] Mr. Mark had worked with his father since he was 12 years old. His father carried on a business similar to that of Gemini and to whom Gemini subcontracted work. Mr. Mark said his father rarely paid him. However, his father would charge Gemini for the hours Mr. Mark worked under contracts his father had with Gemini. According to Mr. Mark, Mr. Taylor would deduct Mark's billing time and rate, which exceeded $8 an hour, from his father's invoice and adjust the invoice on the basis of Mr. Mark being paid at $8 an hour. I assume that Mr. Mark worked for his father at the same time as he worked for Gemini. Mr. Mark did say that in 2004 he worked only for Gemini.

[15] When Mr. Mark started to work for Gemini he was paid $8 an hour, the same rate his father was to pay him. After a year he was paid $9 an hour. He had to do the work himself; he could not hire a substitute, in his view.

[16] Mr. Mark agreed that he was to start work at 7:00 a.m. but did not show up at work at that hour. He said he was young and after a year at work, got depressed; he did not like the job. Mr. Mark acknowledged that at the time he was not responsible.

[17] According to Mr. Mark, he never used his own vehicle for work. He did pay for gasoline once or twice when he used a Gemini vehicle and he was reimbursed by Gemini. He did not work for pay for anyone else, only for Gemini, he said. He did admit that he did work for a friend, receiving material as consideration.

[18] In Mr. Mark's view he could not make any major decisions with respect to his work without Mr. Taylor's approval nor could he turn down any job assigned to him unless it was dangerous. He testified that he did not use his own tools when working for Gemini although he did acknowledge that he used his father's tools such as

screwdrivers, voltage meters and "minor" tools. The bulk of the equipment was provided by Gemini. However, Mr. Taylor was pressing Mr. Mark to purchase his own tools because he "didn't want me wrecking his". In the meantime he was spending his money on stereo equipment and car parts rather than on tools he required at work

[19] I have little doubt that Mr. Taylor believed that Mr. Mark was not an employee of Gemini. After all, Mr. Mark worked when he wanted, notwithstanding pleas to report to work by Mr. Taylor. He acted as if he were his own boss. Mr. Taylor did not, or could not, control Mr. Mark's hours of work. Also, Mr. Taylor was under the impression that Mr. Mark was working for others as well as for Gemini. He suggested, for example, that Mr. Mark did work for friends, on a barter basis, and for his father.

[20] However, it was Gemini who owned the bulk of the tools used by Mr. Mark in his work. Mr. Mark did have access to his father's equipment, including the family's computer, but his use of this equipment appears to be minor. And the clients were Gemini's clients. Also, it was Mr. Taylor who assigned him the work. At the start of his work at Gemini, it was Gemini who suffered the cost of having Mr. Mark's work redone as result of defects in his work. Only in the second year of work was the cost of "redoing" his work absorbed by Mr. Mark.

[21] Mr. Mark's chance for profit from his work at Gemini was slim. He worked — when he worked — for an hourly wage, like any employee. He had no risk of loss; he had no investment in the work he performed. That he may have worked for others, as well as for Gemini, does not itself mean he was carrying on a business. It is not uncommon for a person to be employed by more than one employer.

[22] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,[1] Major J. approved the reasons of MacGuigan J. in the Federal Court of Appeal judgment of *Wiebe Door Services Ltd. v. M.N.R.*.[2] Major J. referred to the decision of *Laurent v. Hôpital Notre-Dame de l'Espérance*,[3] where the Supreme Court expressed the employer-employee relationship as follows: "the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work".

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1 [2001] 2 S.C.R. 983, para. 37; 2001 SCC 59.
2 [1986] 3 F.C. 553.
3 [1978] 1 S.C.R. 605, 613.

[23] While Prof. Atiyah criticized this criterion as wearing "an air of deceptive simplicity",[4] it does apply to the appeals at bar. There is no written contract between Gemini and Mr. Mark to permit me to review the precise terms of their relationship, if there were precise terms, and, in particular, to examine the intention of each at the beginning of the relationship. The *viva voce* evidence of the parties is contradictory. Mr. Taylor says that when they got together, Gemini and Mr. Mark entered into a contract whereby Mr. Mark was engaged as a subcontractor, an independent contractor. Mr. Mark says he had no idea at the time what the term independent contractor meant, even though Gemini had engaged his father as such. This is probably true.

[24] The evidence is that Mr. Mark had just left high school and was looking for a job. He had done work for his father who carried on the same type of business as Gemini. When he first started working for Gemini, he said, he worked in maintenance, as he did for his father. Later, he worked as a designer. Mr. Mark was not at the time he was engaged by Gemini a worker who possessed skills beyond the ability of Mr. Taylor to direct;[5] his ability was not at a level where he could work without supervision.

[25] The fact that Mr. Mark may have been lazy and irresponsible and reported to work when he wanted — and may have done what he wanted — does not make him an independent contractor. He was not in business on his own account. His work, such as it may have been, was integral to Gemini's business. Mr. Taylor oversaw Mr. Mark as his worker and tolerated Mr. Mark's lack of discipline. The balance of evidence suggests that Mr. Mark was an employee of Gemini during the period in issue.

[26] The appeals are dismissed.

Signed at Toronto, Canada, this 5th day of August 2008.

"Gerald J. Rip"

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4 Atiyah, P.S. *Vicarious Liability in the Law of Torts*. London: Butterworths, 1967, at p. 41, cited by Major J. in *Sagaz* at para. 38.

5 *Wiebe Door*, *supra*, at p. 559.

Rip C.J.

CITATION:	2008 TCC 449
COURT FILE NO.:	2007-3696(EI) 2007-3697(CPP)
STYLE OF CAUSE:	1327939 ONTARIO INC. o/a GEMINI COMMERCIAL SIGN & LIGHTING, v. M.N.R.
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Gerald J. Rip, Chief Justice
DATE OF JUDGMENT:	August 5, 2008

APPEARANCES:

Agent for the Appellant:	Iain Taylor
Counsel for the Respondent:	Amit Ummat

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