Docket: 2009-758(EI)

BETWEEN:

TOM HUMPHRIES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 25, 2010, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Christian Cheong

JUDGMENT

The appeal from the decision made under the *Employment Insurance Act* for the period from April 30, 2007 to December 15, 2007 is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 4th day of November 2010.

"V.A. Miller"

V.A. Miller J.

Citation: 2010TCC569
Date: 20101104
Docket: 2009-758(EI)

BETWEEN:

TOM HUMPHRIES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue in this appeal is whether the Appellant was employed in insurable employment by Stoneridge Inc. (the "Company") for the period April 30, 2007 to December 15, 2007.

[2] The Minister of National Revenue (the "Minister") decided that the Appellant was not engaged by the Company pursuant to a contract of services in accordance with paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "*Act*"); and, in the alternative, if a contract of services existed, then the Appellant's employment was excluded employment as he and the Company were not dealing with each other at arm's length in accordance with paragraph 5(2)(*i*) of the *Act.*

[3] In support of his decision, the Minister made the following assumptions of fact:

(a) the Payor was incorporated in 1994;

(b) the Appellant and his spouse each held 39% of the Payor's shares and the Appellant's brother held the remaining 22% of the shares;

(c) the Payor's primary business activity was pavement marking;

(d) the Payor's business was seasonal, generally from May to December;

(e) the Payor's business activities were conducted in Newfoundland and in Ontario;

(f) the Appellant was responsible for the Payor's day-to-day operations;

(g) the Appellant made all the Payor's important decisions;

(h) the Appellant established his hours of work;

(i) the Appellant was not supervised and was not accountable to anyone for his time;

(j) the Appellant's stated rate of pay was $825 per week;

(k) for the period under appeal, the Appellant was issued a Record of Employment (the "ROE"), serial number E06866188, indicating 1240 hours of work and total earnings of $21,450.00;

(l) during the period under appeal, the Appellant was not paid;

(m) in addition to his participation in the Payor's business activities, the Appellant was also the sole proprietor of a business operating under the name Quality Line Marking ("QLM");

(n) QLM's primary business activity was also pavement marking;

(o) QLM operated in Newfoundland and in Ontario;

(p) QLM's operations were seasonal, generally from May to December;

(q) The Payor and QLM had the same telephone number, both in Newfoundland and in Ontario;

(r) The Appellant's spouse was the only person on the QLM payroll; and

(s) QLM and not the Payor owned the line marking equipment used by the Payor and QLM in their respective business activities.

11. In concluding that the Appellant and the Payor were not dealing with each other at arm's length, the Respondent relied on the following assumptions of fact:

(a) the facts stated in paragraph 10 above;

(b) for the last several years, the Payor has had no other workers;

(c) for the fiscal periods ending April 30, 2006 and April 30, 2007 the Payor had no other material expenses other than the expenses claimed in respect of the Appellant's wages; and

(d) the Appellant and the Payor did not provide sufficient information to allow the Respondent to review and analyze the circumstances of the Appellant's engagement with the Payor.

[4] The Appellant had an appeal before this Court with the same issue for the period May 16, 1994 to September 30, 1994. The Reasons for Judgment in that appeal disclosed that the Appellant had a diploma in civil engineering technology. He had worked with a major Ontario firm as project manager, site manager, estimator, and employee supervisor.

[5] In 1994, the Appellant caused the Company to be incorporated in Newfoundland. Prior to 1997, the Company performed work in both Newfoundland and Ontario. However, after 1997, it worked only in Ontario and its business was the cleaning and removing of paint from structures by soda blasting. The Appellant candidly explained that the Company's business was seasonal; and, on the advice of his accountant and lawyer, he set up the shareholder structure so that employment insurance benefits (the Benefits) would be available. He and his spouse, Wanda, each owned 39% of the Company's shares and his brother owned 22% of the shares.

[6] It was his evidence that he and his spouse lived in Deer Lake, Newfoundland where they had built a house. They worked in Ontario from April to November or December and then they returned to Newfoundland for the winter where they drew Benefits.

[7] During the period and for several years prior to 2007, the Appellant was the only worker for the Company. He was responsible for the Company's day-to-day operations. He did not have to report to anyone and he supervised himself. His hours of work depended on the jobs that had to be done and he was responsible for getting those jobs for the Company. He stated that he worked Monday to Friday from 8 A.M. to 8 P.M. He earned $825 weekly for the period.

[8] The Appellant explained that it was his intention to have the Company operate in St. John's, Newfoundland; and, in 2007, he trained his brother to perform soda blasting. However, when the Appellant's application for the Benefits was refused, his brother's financial situation would not allow him to work for the Company as he needed the Benefits to be available to him.

[9] During this same period, the Appellant operated a business called Quality Line Marking ("QLM") as a sole proprietor. Its business was that of pavement marking and it operated only in Ontario after 1997. He explained how he and his spouse, Wanda, performed their duties for QLM. During the period June to December 2007, Wanda was the line painter assistant and the Appellant operated the line painter machine. I gathered that they were the only workers for QLM in 2007. However, Wanda was the only person on the QLM payroll. According to the Record of Employment (ROE) filed with Services Canada, Wanda worked 746 hours during the period June 4, 2007 to December 1, 2007 and she received insurable earnings of $12,606. The ROE was signed by the Appellant.

[10] The ROE filed with Services Canada on behalf of the Appellant was signed by Wanda and it stated that the Appellant's occupation was "Construction Project Co-ordinator"; his insurable earnings were $21,450; his insurable hours were 1240 and the employer was the Company.

[11] The question that I must decide is whether the Appellant was engaged by the Company as an employee. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[1], Major J. described the analysis that should be used when making that decision. He wrote:

> 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. (emphasis added)

[12] These factors described by Major J. were those given in *Wiebe Door*. In *Combined Insurance Company of America v. M.N.R.*[2], Nadon, J.A. reviewed the case law and stated the principles to be applied as follows:

> [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.

[13] It was the intent of the Appellant that he be engaged by the Company as an employee. In fact, the Company was structured to accomplish this goal. However, when I consider all of the evidence presented in this appeal and the assumptions made by the Minister, which were not rebutted by the Appellant, I have concluded that a contract of service did not exist between the Appellant and the Company.

[14] I have not considered whether the relationship between the Appellant and the Company was a sham as it was not assumed by the Minister. However, the ROE filed with Services Canada on behalf of the Appellant has raised several questions. One question is why are the duties listed in the ROE different than those described by the Appellant at the hearing?

[15] The Appellant was responsible for all aspects of the Payor's business. He sought and obtained the clients for the Company; he was the only worker for the Company and he determined his hours of work. He stated that if he had more work than he could complete, he would have subcontracted the work. Neither the Company nor by extension, its shareholders, had any control over the Appellant or the work he performed. The Appellant was the directing mind of the Company.

[16] I have also considered the fact that the Appellant's spouse and brother, who owned 39% and 22% of the Company's shares, respectively, did not testify. The evidence showed that they were not involved in any manner in the operation of the Company.

[17] The tools used by the Appellant to perform his duties were either rented by him or were owned by him. He stated that he was told not to hold the equipment in the Company and therefore QLM held the equipment and rented it to the Company. However, QLM is the Appellant. He had no documents to support that the Company paid rent for the equipment it used.

[18] The Minister assumed that the Appellant was not paid by the Company. Aside from his testimony, the Appellant did not rebut this assumption. He did not submit any cheques or bank statements to support his testimony. One would have expected that if the assumption was not correct, the Appellant would have come to this hearing prepared to give documentary evidence to support his testimony. His former appeal

before this Court was dismissed on the basis that he did not cash the pay cheques he received from the Company until after the period of employment.

[19] The fact that the Appellant was not paid by the Company is in itself sufficient reason to find that a contract of services did not exist between the Appellant and the Company. As stated by Tardiff J. in *Laverdière v. Canada (Minister of National Revenue)*[3]*:*

> **51** The Act insures only genuine contracts of service; a contract of employment under which remuneration is not based on the period during which work is performed cannot be defined as a genuine contract of service. It is an agreement or arrangement that is inconsistent with the existence of a genuine contract of service since it includes elements foreign to the contractual reality required by the Act.

[20] The Appellant did not give any evidence with respect to the Company's clients. I do not know if the Company had clients in 2007; who the clients were; how much the Company earned; how the Appellant's wages were determined; if the Company had any books and records. There was a definite paucity of documentary evidence in this appeal.

[21] In his appeal for the 1994 period, Bell J. found that a contract of services existed between the Appellant and the Company. However, he dismissed the appeal because he found that the Appellant and the Company did not operate at arm's length.

[22] When I considered all of the evidence that was presented at the hearing of the present appeal, I have concluded that the Appellant was not employed by the Company, during the period, pursuant to a contract of services. The facts presented to me were very different than those presented to Bell J. In the former appeal, the Company was engaged in the business of pavement marking; all shareholders were employed by the Company and had knowledge of the Company's business. The Company operated in Newfoundland and Ontario.

[23] I do not have to consider whether the Appellant was employed in excluded employment because I have concluded that the Appellant was not engaged by the Company pursuant to a contract of services. For all of the above reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 4th day of November 2010.

"V.A. Miller"

V.A. Miller J.

[1] 2001 SCC 59
[2] [2007] F.C.J. No. 124 at paragraph 35
[3] [1999] T.C.J. No. 124 at paragraph 51

CITATION:	2010TCC569
COURT FILE NO.:	2009-758(EI)
STYLE OF CAUSE:	TOM HUMPHRIES AND HER MAJESTY THE QUEEN
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DATE OF HEARING:	October 25, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
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APPEARANCES:

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Counsel for the Respondent:	Christian Cheong

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