Citation: 2011 TCC 77
Date: 20110224
Docket: 2010-960(EI)
2010-961(CPP)

BETWEEN:

AQUAZITION 2007 LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ANDREA CARDWELL,

Intervener.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on December 1, 2010 in Toronto, Ontario)

Weisman D.J.

[1] I have heard two appeals by Aquazition 2007 Ltd. against decisions by the Respondent, The Minister of National Revenue (the "Minister"), that the worker Andrea Cardwell was employed under a contract of service while engaged by the Appellant as an Operator in Training during the period under review which has been agreed to be January 1, 2008 to April 8, 2009.

[2] The Appellant's appeal is based on its contention that during the period under review, the worker was an independent contractor carrying on business on her own account, and, therefore, the Appellant is not liable for unpaid Canada Pension Plan contributions and Employment Insurance premiums as assessed by the Minister.

[3] In order to resolve the question before the Court, the total relationship of the parties and the combined force of the whole scheme of operations must be

considered. To this end, the evidence in this matter is to be subjected to the four-in-one test laid down as guidelines by Lord Wright in *Montreal City v Montreal Locomotive Works* [*Montreal Locomotive Works*], the citation of which is [1947] 1 Dominion Law Reports, page 161 in the Privy Council in England, which guidelines were adopted by Justice of Appeal MacGuigan in *Wiebe Door Services v Minister of National Revenue*, [*Wiebe Door Services*], which is cited at (1986), 87 Dominion Tax Cases, page 5025 in our Federal Court of Appeal. The four guidelines are the payer's right to control the worker, whether the worker or the payer owns the tools required to fulfil a worker's function, and the worker's chance of profit and risk of loss in his or her dealings with the payer.

[4] Before I canvass the evidence that I have heard relating to the four guidelines, I would like to say that I found both Mr. Cargill and Ms. Cardwell to be nice, honest, and well-meaning people. It was a pleasure to have them in my Court. Where there was a difference in the various versions given by them, I attributed that difference to a difference in their ability to recollect events and dates and also whether or not they had other complications in their life during the relevant period that might affect the accuracy of their recollection of events.

[5] Adverting to the first guideline, the right to control, as the Minister has recognized in the jurisprudence, what is important is not the actual supervision and control exercised by the payer, in this case the Appellant, but it is the right, whether or not there was such a right, vested in the payer. What we look for is that right whether or not it exists, and also whether there is a relationship of subordination between the worker and the payer. Obviously, independent contractors are not in a subordinate position to the person that contracts with them, whereas employees are.

[6] Here, of importance, is the document found in Exhibit R-2, tab 5, pages 9 and 10 which is guideline No. 5.1 issued by the Minister of Environment. It makes it very clear that OITs, Operators in Training, such as Ms. Cardwell must be supervised by an OIC, an Operator in Control, and which person typically makes the day-to-day operating decisions and instructs other operators on system procedures. On the following page of that guideline, under "Operator in Training", it says that an Operator in Training cannot be designated "ORO", which is Overall Responsible Operator, and also an Operator in Training cannot be designated as an "OIC", Operator in Charge.

[7] By law, as an Operator in Training during the entire period under review, it was not possible by law for the Intervener, Ms. Cardwell, to be in the water testing

business on her own account because she had to be working under the supervision of an Operator in Charge, namely Mr. Cargill.

[8] As a matter of the way the working relationship actually worked, I accept her evidence that she was required to be at work at seven in the morning. She had to give 24-hours' notice of absences, and she did testify to one telling incident where a representative of the Ministry of Environment inspected a job site and required her to forthwith beckon Mr. Cargill who had to come without delay to the job site. To me, this is a clear example of her not being in a position other than a subordinate position with reference to the Appellant. I note that it was required that she do her work personally and as we all know, independent contractors, such as your electrician or your plumber, don't always show up personally, but they have someone they can hire, but Ms. Cardwell is not in that position. I accept her version of events that her various remunerations were not negotiated, but they were fixed by Mr. Cargill, and they went up as her experience and her expertise as a result of her experience and her taking various training courses warranted.

[9] I find that by law and in actual fact, the Appellant had the right to control the worker; that she was in a subordinate position; and that the control factor accordingly indicates that during the period under review, she was an employee.

[10] Passing on to the ownership of tools, the Minister's reply to the Appellant's Notice of Appeal in paragraph 7(t) says:

> The Appellant provided the back-flow preventer, fittings, water tanks, generators, pumps, copper pipes, gauges, wrenches, screwdrivers, swabs, flanges, hoses, hydrant keys, tapping machines, chlorine residual machines, lithium paper, safety jacket, gloves, hat, glasses and company vehicle. [As Read]

[11] Mr. Cargill was helpful in clarifying that there was no safety jacket. While she was provided with a company vehicle, she had to have her own vehicle because after the 24-hour waiting period, she would go to the job site in her own vehicle in order to do the necessary testing for submission to the Ministry of the Environment.

[12] It is clear that the bulk vast majority of the tools required for her to do her job were provided by the Appellant. There was an exhibit offered by the Intervener, Exhibit I-1, which showed that the Appellant actually paid $577.50 for repairs to her car. There is no evidence that they ever recovered the money or, as Mr. Cargill thought, deducted from her final invoice, because this repair occurred on March 19,

2009, which was just weeks before their relationship ended. I was unable to conclude from that anything different than I already arrived at, that the tools factor indicates that she was an employee.

[13] As to chance to profit and risk of loss, as I drew to the attention of Counsel for the Minister, if the remuneration was negotiated, there would be a chance of profit and risk of loss, but I have found that there was no such negotiation. As far as her manner of remuneration was concerned, she was paid by the hour. We have the authority of the case of *Hennick v Minister of National Revenue* [*Hennick*] which says if one works by the hour or on piece work, then they can make more money by working longer hours or by putting out more pieces, but that is not profit by sound management. The citation for *Hennick* is [1995] Federal Court Judgments No. 294.

[14] As far as risk of loss is concerned, the evidence is that the Appellant reimbursed the worker for all her out-of-pocket expenses which she invoiced them for, including gas for her personal vehicle. Contrary to what Mr. Cargill thought, she carried no liability insurance, and the Appellant also paid for various courses that she took towards attaining her Operator in Charge licence, which is something one does for an employee, but not an independent contractor. The only expense she had was the normal upkeep of her own personal vehicle, which everybody has. Therefore, I found that the chance of profit and risk of loss factors both indicated that she was an employee.

[15] In this appeal, Mr. Cargill relied on three things. The first thing he relied upon was the agreement, Exhibit R-1, that was executed by the parties back on June 21, 2007, in which Andrea Cardwell specifically agrees to be a subcontractor and to pay all her own source deductions and that the Appellant, Aquazition 2007 Ltd., will not be held responsible for any such payments. The question arises in the face of that document: How can one claim the benefits of the *Employment Insurance Act* and appear here in this Court of law and maintain that she was an employee?

[16] I can well understand why Mr. Cargill would rely on this document, but it has been held many, many times that these agreements setting out the intent of the parties are not determinative of a relationship between the parties because that relationship is a matter of law. It is not a matter of private agreement. At the risk of boring you, I won't list all the cases. There must be at least 15 of them, but we go all the way from early days, *Ready-Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance*, [1968] 1 All England Report 433, to *Wiebe Door Services* itself -- I have already cited that case -- to modern times and with authority as high as the Supreme Court of Canada, *671122 Ontario Ltd. v*

Sagaz Industries Canada Inc., [2001] S.C.C. 59 [*Sagaz Industries*]. Finally, to get to more modern times, we have the Federal Court of Appeal Decision in the *Royal Winnipeg Ballet v Minister of National Revenue,* [2006] Federal Court Judgments No. 339.

[17] The Supreme Court of Canada in *Sagaz Industries* explains why the status of a worker is a matter of law and not of private agreement. The reason is that third parties are affected by that status. It doesn't just affect the parties to the documents, such as Exhibit I-1. The law is -- and I will use a term that may be confusing -- the best example is the law of vicarious liability. What that means is: When is one responsible for the negligence of their worker? The law is that you are responsible for the negligence of your worker but not of an independent contractor. That's where third parties become involved. It is one of the ways; there are others. That's the one that makes most sense to most people to help understand why these agreements or the status of a worker is a matter of law rather than agreement. Third parties have an interest.

[18] The second thing that Mr. Cargill relies upon is the GST number that Ms. Cardwell had. There is nowhere in the law that says that merely having a GST number makes your working relationship one of an independent contractor. The final thing is the invoicing. I can understand Mr. Cargill's reasoning that independent contractors invoice and employees don't, but, again, there is no law that says that the mere submission of an invoice can convert someone who is an employee into an independent contractor. That would be too easy, too simple and expedient to establish that someone is an independent contractor. What governs is the actual working relationship between the parties as governed by the four-in-one test set out in *Wiebe Door Services* as I have previously indicated, as well as in *Montreal Locomotive Works*.

[19] Having raised the topic of agreements between parties, I would like to say that I have read the Revenue Canada bulletin that governs employees and independent contractors. I find that it is deficient when it addresses itself to the topic of agreements. The fact that we are here today is some proof of that -- not in this case, but in cases past, I have had Appellants bring the bulletin and the agreement, and they think once they have the agreement signed that the person is an independent contractor, and they don't understand why they are assessed. I am pretty clear that this bulletin is not as lucid a document as it might be when it comes to the relevance of agreements between parties as to their status and working relationship. Were someone to consider revising and improving it, I would think it would be important to point out, which I have already done, that someone's status is a matter of law and

not a private agreement. I would go on and say that's because third parties are affected, and I would even use the vicarious liability example.

[20] I think the public should be very clear that agreements are not totally irrelevant because if the intention of the parties is not clear after applying the facts to the four-in-one test as I have done, if the results are inconclusive, then the intention of the parties takes on great weight. I would even go on to say that agreements will only take on weight if they reflect the actual working relationship between the parties.

[21] In these matters, the burden lies upon the Appellant to rebut or demolish the assumptions set out in the Minister's Reply to its Notice of Appeal. In this case, the Minister's assumptions are found in paragraph 7, and I took Mr. Cargill through, and he agreed with all of them as being true until we got down to (l), "the Appellant supervised the Worker." It was his evidence that this woman, after a short time, was sufficiently competent that she could just go out on the job and knew what to do and how to do it. To use his words, he said, "How she did it was up to her." Her evidence was that if there was supervision, it was by phone and that Mr. Cargill was not on the job site.

[22] I accept that there was no on-site supervision, but I have already said that the Ministry guidelines are very clear that he had that obligation to control and supervise her, and, therefore, that's what I find when it comes to (l).

[23] He also objected to (m), "the Worker had to work the scheduled hours set by the Appellant." His view was, no, it was just a matter that there had to be daylight and after 24 hours of doing the cleansing -- if I can use that word -- of the pipes, she had to go back after the flushing and take a water sample to the Ministry. That doesn't agree with her evidence that she had to be at work at seven in the morning, and some days she put in 16-hour days as a result.

[24] I find that the evidence indicates that the truth is somewhere between the two, that she was usually free to go to jobs which were, indeed, assigned to her either by Mr. Cargill or by Mr. Enzo Sorrentino, but once on the assigned job, she was there to do the job as she was trained to do it.

[25] He objected to (o), "the Worker was instructed by the Appellant on how to swab, tap a water main, and how much chlorine to use." His evidence is that those things were determined by the length of the pipe. It was something she had to work out herself. He elaborated that the water quality results tell how proficient you are, which would necessitate whether or not further work had to be done to get the water

quality up to standard. I find that he has, in part, demolished the assumption 7(o), and that she might have been trained on how to do the job and how much chlorine to use at the beginning, but very quickly, she could judge by herself, particularly when she saw the results of the water quality tests.

[26] Then (q) came under question by Mr. Cargill: "the Worker had to receive approval from the Appellant for making appointments." I didn't find that that was established on the evidence, because the only example that Ms. Cardwell was able to give was this one occasion where she wanted to go back to rectify a job and made an appointment to do so, but that was overruled by the previous mentioned two gentlemen because they had made an appointment for her elsewhere. On one hand, I don't find that she had to receive approval from the Appellant, but this incident certainly shows she was in the subordinate position and was not independent.

[27] (r) says: "the Appellant approved appointments made by the Worker." That has been refuted.

[28] And (v), "the Appellant provided a uniform for the Worker." I find that there was no uniform. What there was was: When Shell Oil was involved, they provided a fireproof set of clothing of some sort.

[29] In (y), "the Worker had to receive an approval from the Appellant for purchases," I didn't find that the evidence supported that assumption. She could put gas in the truck, and whatever expenditures she deemed necessary, she was reimbursed for.

[30] According to Mr. Cargill, all these assumptions – (z), (aa), (bb), (cc) -- were negotiated, but on the evidence, I didn't find that he was able to establish that.

[31] In (ff), he said that he did not determine the rate of pay. The evidence is that he did.

[32] Then there was (kk): "the Appellant covered the costs of the Worker redoing work." Mr. Cargill very fairly said that in some cases it wasn't necessarily her fault if the water quality wasn't up to standard because in some cases dirt or soil or whatever would just continue to come down the pipe. Sometimes it took more than one application of chlorine or whatever in order to get things up to standard, and, therefore, she would be paid for going back and redoing work.

[33] Then we have (ll): "the Appellant covered the costs of the goods/materials lost or damaged by the Worker." It was Ms. Cardwell's view if she damaged the truck, she would be held responsible. That never, in fact, happened, so we don't know, and he very fairly admitted that if it was screwdrivers or something that she lost, she wouldn't be required to pay for those. I didn't see evidence of anything that she was required to pay for. I'm left to think that that assumption has not been demolished.

[34] Then there came (oo): "the Worker wore the Appellant's uniform at the customer's location." That has been demolished.

[35] Then there were the final assumptions, (tt), (uu), (vv), and (ww), that the Appellant would have no knowledge of and, therefore, couldn't rebut, and his failure to rebut those should not be held against him.

[36] While there was the odd assumption that was successfully rebutted by the Appellant, the vast majority he agreed with. The law is that even though some of the assumptions are demolished, if the remaining assumptions are sufficient to support the Minister's determinations, the Minister's determinations must stand.

[37] I have investigated all the facts of the parties and the witnesses called -- one on behalf of the Appellant and one on behalf of the Intervener -- to testify under oath for the first time. I found some new facts, but I found no new facts that would indicate that the facts inferred or relied upon by the Minister were unreal or incorrectly assessed or misunderstood. I can find no business that Ms. Cardwell was in on her own account. Therefore, the Minister's conclusions are objectively reasonable.

[38] Unless I am remiss in neglecting to say, before I conclude, I thought that Ms. Turvey did quite a credible job for her client today. So in the result, the Minister's determinations have to be confirmed. The two appeals are dismissed. I thank you all for your assistance.

Signed at Toronto, Ontario, this 24th day of February 2011.

"N. Weisman"

Weisman D.J.

CITATION:	2011 TCC 77
COURT FILE NOS.:	2010-960(EI) 2010-961(CPP)
STYLE OF CAUSE:	AQUAZITION 2007 LTD. AND THE MINISTER OF NATIONAL REVENUE AND ANDREA CARDWELL
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 1, 2010
REASONS FOR JUDGMENT BY:	The Honourable N. Weisman, Deputy Judge
DATE OF JUDGMENT:	January 5, 2011

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