Citation: 2011 TCC 300
Date: 20110614
Dockets: 2010-2412(EI)
2010-2413(CPP)

BETWEEN:

177398 CANADA LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on May 13, 2011 in Vancouver, British Columbia)

Campbell J.

[1] Let the record show that I am delivering oral reasons in the matter of two appeals which I heard yesterday. The Appellant is a numbered company, 177398 Canada Limited.

[2] The Appellant corporation provides general residential plumbing services. It operates under the name of Advantage Plumbing and Drainage, and for the purposes of my oral reasons, I will refer to the Appellant by its operating name, Advantage Plumbing, instead of the numbered corporate name. The Appellant is appealing two rulings of the Minister which determined that the worker, Bruce Larry Harder, was employed in insurable and pensionable employment during the period December 1, 2007, through to December the 31st, 2008, pursuant to Section 5(1)(a) of the *Employment Insurance Act* and Section 6(1)(a) of the *Canada Pension Plan*, respectively.

[3] The issue is whether the worker, Mr. Harder, was employed by the Appellant during this period as an employee or an independent contractor.

[4] On the Appellant's behalf, I heard evidence from its president and CEO, Fred Van Hunenstijn. The Respondent relied on the evidence of the worker and another plumber, Brian Rossiter, who had also worked for Advantage Plumbing between late 2003 and May, 2010. According to the evidence of the president and CEO of Advantage Plumbing, the company employed both employees and independent contractors during the period under appeal. The company has about 25 workers in total. The employees, as opposed to the independent contractors, were generally less skilled, more junior, and were given smaller jobs of up to one day's duration.

[5] According to the president and CEO's evidence, Mr. Harder was employed in 2002 as an independent contractor because of his considerable knowledge, skill and experience. A contract was executed and the parties' work relationship operated pursuant to this contract for five years.

[6] In August 2007, the parties executed another agreement which referenced the first agreement of 2002. The intent was to amend the terms of that agreement. This second agreement stated again the parties' intention that the worker be an independent contractor and not an employee of the Appellant. The compensation to the worker was listed at paragraph 3.1 as equivalent to 45 percent of the gross aggregate price for the plumbing services, less the cost of the parts and materials provided by the Appellant, together with the cost, if any, of the rental by the worker of specialty tools and equipment possessed by the Appellant.

[7] In December of 2007, there were changes implemented to these work arrangements. According to the Appellant's evidence, although Mr. Harder was an excellent plumber, his personal issues and challenges impacted upon his work. Those problems, according to the Appellant, were numerous, and included the worker disappearing for several days, not meeting with customers at scheduled times, and not invoicing on some jobs. Consequently, to address these issues and particularly the accounting problems, the work relationship changed in several key areas. The worker became a technical field supervisor for the Appellant, based on a daily rate of up to a maximum of $350. This rate was inclusive of the use of the Appellant's truck, heavy tools and equipment such as excavators and Bobcat. Previously, the tools had been rented when the Appellant required their use on a job. The worker always supplied his own hand tools valued at

approximately several thousand dollars, which were the tools normally used in the plumbing trade.

[8] As the Appellant's technical field supervisor, the worker was primarily a trouble-shooter, and I quote the description by the Appellant: "A trouble-shooter on jobs that went sideways." The worker's responsibility was to get that job back on track or to finish the job. As a senior plumber, he was also used to provide his expertise in some training of plumbing technicians. On average, he worked three to four days per week.

[9] The Appellant provided Mr. Harder with both a cell phone and a pager, and communicated with him via these tools respecting jobs where he was requested to go.

[10] According to the Appellant, the worker could refuse to take a job. However, this was contrary to the evidence of the worker, who stated that he did not feel he could refuse work if called upon, and that if he could not attend, he would be required to inform the Appellant's office through the dispatcher. The Appellant paid Workers' Compensation premiums on the worker's behalf, provided liability insurance for the worker and provided a medical and dental plan for him. The Appellant stated that the worker, as an independent contractor during the period, could opt in or out of the medical and dental plan, but employees could not. The worker's evidence was that the plan was offered to him and he accepted, but he did not view it as an option of opting in or out of the plan.

[11] The truck which the Appellant supplied to the worker during the period under appeal was described by the Appellant as a marketing tool because the vehicle contained the Appellant's corporate name. The Appellant also paid expenses relating to the fuel costs, insurance, repair and maintenance concerning the truck. The vehicle also contained a GPS system which the Appellant explained was used as a method of monitoring the whereabouts of the worker, or as the president and CEO put it, and I quote, "We reconstructed where he'd been" in order to determine if he'd been to a particular job site. The worker viewed the purpose of the GPS system as a means for the Appellant to know the location of the vehicle and to monitor his hours of work.

[12] The worker carried a supply of the Appellant's business cards, which contained the Appellant's name and logo together with the name and title of

the worker. The worker testified that when he attended a job site, he identified himself as being from and representing Advantage Plumbing. For payment respecting a job, he emailed the Appellant or phoned in his hours of work. He testified that he could not take other work because he was on call each day for the Appellant. He was never registered for GST and never charged GST to the Appellant.

[13] If he did require assistants or helpers on a job, he could not hire those individuals himself, but instead contacted the Appellant's office, and it was the Appellant that would arrange additional helpers if required. If damage occurred on a job site, it was the Appellant's responsibility to rectify the problems.

[14] The third witness, Brian Rossiter, confirmed the worker's testimony respecting the use of the Appellant's business cards with customers, and the availability of the medical and dental plan to workers without the opt-in/opt-out option that the Appellant testified to. He also corroborated the worker's evidence that he was not free to turn down work when it was offered. He also testified that he never prepared his own invoices. He stated that every job had been priced by the Appellant and that, when he completed the work, the customer signed off and this was submitted to the Appellant. Eventually, according to a similar commission formula that the worker had in place prior to changed arrangements, Mr. Rossiter received a cheque for payment.

[15] I am going to turn now to the law in this area. Both the Appellant and Respondent counsel agree that the appropriate test concerning these appeals is laid down in the Supreme Court of Canada decision in *Sagaz Industries*, more accurately known as *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001] S.C.C. 59. Although this decision did not involve Employment Insurance, but involved the issue of vicarious liability, it did adopt the four-in-one test laid out in *Wiebe Door Services v. Minister of National Revenue* (1986), 87 D.T.C. 5025 (F.C.A.).

[16] At paragraphs 46 to 48 of that decision, Justice Major stated that there did not exist one conclusive test to determine if an individual was an employee or an independent contractor but, rather, an examination must be conducted of all of the factors bearing on the total nature of the parties' relationship. Depending on the facts of each case, some of those factors will have more relevance than others, and some may in fact be of neutral weight. Although there is no magical formula available in deciding such an issue, the factors

outlined in *Wiebe Door* provide a useful, although not an exhaustive list. As per Justice Major, the central question to be asked is, and I quote:

> "…whether the person who has been engaged to perform the services is performing them as a person in business on his own account."

[17] To answer this question, Justice Major relied on the factors in *Wiebe Door*, those being control, tools, chance of profit, and risk of loss. Added to the *Wiebe Door* factors is a consideration of the intention of the parties as to the nature of their work relationship (per the decision in *Royal Winnipeg Ballet v. Minister of National Revenue*, [2006] F.C.J. No. 339). However, as that decision clearly emphasizes, the parties' labelling of their relationship will not necessarily be determinative. If, after a review of all of the facts in evidence relating to the *Wiebe Door* factors, the contractual terms do not support the label attached, then the parties' intention must be assigned little weight. The decision in *Wolf v The Queen*, 2002 D.T.C. 6853 (F.C.A.) supports this statement. Justice Décary, in *Wolf*, stated at paragraph 119, and I quote:

> "… When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. …"

He went on to state, at paragraph 122, and I quote:

> "… [T]his is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case … where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded."

[18] With this background of the law, I want to turn now to an application of these legal principles to the facts in the present appeal.

[19] In this appeal, the parties clearly do not share a common intention or mutual understanding of the nature of their relationship. They have attached different labels, despite any supposed agreement. The Appellant testified that the worker was initially employed as an independent contractor and remained so throughout the period of employment with Advantage Plumbing, as supported by the documentary evidence and his oral testimony. He contended

that the worker remained an independent contractor in December, 2007, despite the changes in the work relationship.

[20] The worker testified that he considered himself to be an employee during the period under appeal after those changes were initiated. Although returns for the worker may have been helpful, those have not been filed since 2002.

[21] I do not accept the Appellant's position that this Court cannot ignore the written agreement evidencing the parties' intention. It must be ignored where clearly the facts do not support a common intention. In addition, it appears that the Appellant is relying to some extent on the December 2002 agreement and, particularly, the August 2007 agreement, which were subsequently and substantially altered.

[22] Reliance in submissions was placed on the fact that the 2007 agreement of August was for a five-year term and had never been terminated, that the parties simply modified it, as per paragraph 1.2. Although the 2007 agreement was not formally terminated in December, 2007, the parties embarked on a complete re-make of their working relationship and in so doing repudiated the 2007 agreement. The method of remuneration was altered, the worker's duties were changed, the provision for rental of the Appellant's equipment changed, methods were utilized to track his locations and financial interaction with the customers was reduced substantially. All of these terms are substantial in respect to the working relationship.

[23] I do not accept the Appellant's submission that paragraph 1.2 committed the parties to consensually modify all of those terms. Paragraph 1.2 allows the parties to modify the services the worker was providing, but the changes implemented went far beyond the wording and intention of paragraph 1.2.

[24] Although the Respondent did not directly address this argument, I believe the parties entered into a new working relationship different from that described in either of the former agreements. However, the evidence does not support that both parties had a common intention concerning this new relationship. Even if I am incorrect in this conclusion, and the 2007 agreement remained in effect, subject to the modifications, there is nevertheless still no common intention between the parties concerning their relationship even if that 2007 agreement is still to govern. Intention must be sufficiently clear to be determinative, and it must be supported independently by the factors and the

evidence in the case. This is not the situation here, and consequently I turn to an analysis of the *Wiebe Door* factors.

[25] The first is control. The important distinction here in this factor is not in the “actual control” that was exercised over the worker, but the Appellant's “right to control” the worker. As stated in *Livreur Plus Inc. v Minister of National Revenue*, [2004] F.C.J. No. 267 (F.C.A.) at paragraph 19, and I quote:

> "… Monitoring the result must not be confused with controlling the worker."

Even where an independent contractor is hired, there is an expectation that the work product will be in accordance with specific requirements and conditions. However, in an independent contractor situation, there is no right to control the logistics of the independent contractor in attaining his specific work product.

[26] In this appeal, commencing in December, 2007, the Appellant employed several methods to gain control over a worker whose expertise it wanted to retain, while limiting the personal issues which impacted his work. The Appellant installed a GPS system in the truck which the worker used at the job sites so that his hours and location could be tracked and monitored on a daily basis. The Appellant also limited the financial interaction which the worker could have with customers. The Appellant stated that this was in line with the attempt to limit the worker's ability to issue invoices.

[27] The worker had no input in respect to the job or which workers were at any particular site. He was primarily called upon to trouble-shoot or resolve a problem that had arisen during a job. According to the worker, he was restricted in his duties at each site. As he stated, he would have to contact the Appellant's office and obtain its consent if, for example, a customer's bill was to be reduced because of a problem that had arisen.

[28] I conclude that the control factor is supportive of the worker being an employee and not an independent contractor. He was in a subservient position. He was on call each day. He was told where to go. His hours and location throughout the day were monitored. Although the worker did not require supervision in the completion of his actual on-the-job duties, the evidence supports that the Appellant retained the right to control that worker.

[29] The next factor is tools. Again, this factor supports the worker being an employee. The worker supplied the normal hand tools used by plumbers whether they were employees or contractors for the Appellant. Those tools were worth several thousand dollars. The Appellant supplied any necessary materials and also any of the larger items, such as an excavator. The 2002 and 2007 agreements called for the worker to pay for the rental of the Appellant's tools and equipment. These were supplied without charge, according to the later December 2007 arrangement, however. In addition, the Appellant supplied the cell phone and the pager to the worker, together with the truck, and paid for all fuel and other expenses related to this vehicle. It is also telling that the worker possessed and handed out the Appellant's business cards to the customers. This is contrary to what independent contractors would be doing in promoting their own business. Mr. Rossiter also corroborated the evidence of the worker in this regard, and stated that he introduced himself to a customer by handing them the Appellant's business card.

[30] Finally, the worker testified that he was supposed to wear the Appellant's uniform, being a shirt and hat, but that he seldom abided by this dress code. Mr. Rossiter stated he always wore the uniform.

[31] The next factors -- and I'm going to deal with them together -- the two factors are chance of profit and risk of loss. The December 2007 arrangement witnessed a major remuneration change. Prior to December 2007, the Appellant was paid a percentage commission basis on work completed so that the quicker he could complete assigned work, his potential for profit increased. However, in December 2007, he was paid a maximum daily rate of $350. The worker testified that he was on call and had to be available to the Appellant, and could not take on work for other persons. This also greatly impacted upon any opportunity he may have had for profit earning. At the end of the day, no matter how many jobs he could trouble-shoot, he was limited to a maximum of $350 daily.

[32] The December 2007 arrangement also limited any potential he previously had for losses as it limited his responsibility for any of the expenses. All expenses were now those of the Appellant. In addition, the worker was not permitted to hire helpers and, if they were required, the Appellant retained the right to provide them.

[33] As with most employee/employer relationships, the Appellant provided liability insurance, paid Workers' Compensation premiums, and provided a

medical and dental plan. The evidence of Mr. Rossiter corroborates the worker's evidence that they were not given an opportunity to opt in or out of this plan.

[34] Lastly, if damages occurred at the work site, it was again the Appellant that incurred the cost of rectifying those problems.

[35] In reviewing all of the evidence as it relates to a proper characterization of the total relationship of the parties, I conclude in answering the pertinent question posed by Justice Major in *Sagaz* that the worker was performing these services during the period on behalf of the Appellant, and not as a person conducting business on his own account. The customers, at the end of the day, were customers of the Appellant and not the worker, and it was the business of the Appellant. Even if I set aside all of the *Wiebe Door* factors and the intention factor, and applied only common sense here, the worker had all of the trappings of an employee and not an independent contractor.

[36] Accordingly, for these reasons, the appeals are dismissed without costs.

Signed at Ottawa, Canada, this 14th day of June 2011.

"Diane Campbell"

Campbell J.

CITATION:	2011 TCC 300
COURT FILE NO.'S:	2010-2412(EI) 2010-2413(CPP)
STYLE OF CAUSE:	177398 Canada Ltd. v The Minister of National Revenue
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 12, 2011
REASONS FOR JUDGMENT BY:	The Honourable Judge Campbell
DATE OF ORAL JUDGMENT:	May 14, 2011

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