Docket: 2011-1452(EI)

BETWEEN:

SIP DISTRIBUTION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together with the appeal of
SIP Distribution Inc. (2011-1453(CPP))
on August 25, 2011 at Vancouver, British Columbia

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Peter McGee
Counsel for the Respondent:	Kristian DeJong

JUDGMENT

The appeal under the *Employment Insurance Act* with respect to the decision of the Minister of National Revenue, dated April 8, 2011, is allowed, without costs, and the decision of the Minister is varied to provide that Erin Hrushowy was not engaged by the Appellant in insurable employment as determined for the purposes of the *Employment Insurance Act* at any time during the period from March 17, 2008 to December 17, 2008.

Signed at Ottawa, Canada, this 13th day of September 2011.

"Wyman W. Webb"

Webb, J.

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JUDGMENT

The appeal under the *Canada Pension Plan* with respect to the decision of the Minister of National Revenue, dated April 8, 2011, is allowed, without costs, and the decision of the Minister is varied to provide that Erin Hrushowy was not engaged by the Appellant in pensionable employment as determined for the purposes of the *Canada Pension Plan* at any time during the period from March 17, 2008 to December 17, 2008.

Signed at Ottawa, Canada, this 13th day of September 2011.

"Wyman W. Webb"

Webb, J.

Citation: 2011TCC423
Date: 20110913
Dockets: 2011-1452(EI)
2011-1453(CPP)

BETWEEN:

SIP DISTRIBUTION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant has appealed the determination made by the Minister of National Revenue that, for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*, Erin Hrushowy was an employee of the Appellant during the period from March 17, 2008 to December 17, 2008.

[2] The Appellant is a wholly owned subsidiary of GreenWorks Building Supply Inc. The Appellant was formed as a distributor to import large quantities of building materials and then sell these to GreenWorks Building Supply Inc. and other retailers. The initials "SIP" stand for "Sustainable Innovative Products". At the time that Erin Hrushowy was retained, the Appellant wanted to let the architectural and design community in Canada know that the products that the Appellant was distributing were available.

[3] Erin Hrushowy's duties were initially marketing tasks and projects but over time she did more administrative tasks. The office of the Appellant was small. Only Peter McGee and Erin Hrushowy worked in the office and Peter McGee was out of the office travelling at least twenty-five percent of the time. The Appellant did not deal with the general public.

[4] The question of whether an individual is an employee or an independent contractor has been the subject of several cases. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. 61, 2001 S.C.C. 59 ("*Sagaz*"), Justice Major of the Supreme Court of Canada stated as follows:

> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, supra, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing *Atiyah*, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> 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.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[5] In *Royal Winnipeg Ballet* v. *Minister of National Revenue*, 2006 FCA 87, 2006 DTC 6323, the dancers and the ballet company had a common intention that the dancers would be hired as independent contractors. The Federal Court of Appeal reviewed the relevant facts of that case as determined by the factors outlined in

Wiebe Door Services Ltd. v. *Minister of National Revenue*, [1986] 2 C.T.C. 200, 87 DTC 5025 ("*Wiebe Door*"). A majority of the Justices of the Federal Court of Appeal concluded that the relevant facts in that case did not change the intended relationship between the dancers and the Royal Winnipeg Ballet and that the dancers were independent contractors. Justice Sharlow of the Federal Court of Appeal made the following comments in the *Royal Winnipeg Ballet* case in writing for the majority of the Justices of the Federal Court of Appeal:

> 65. The judge chose the following factors as relevant to the *Wiebe Door* analysis (it is not suggested that he chose the wrong factors or that there are any relevant factors that he failed to consider):
>
> · The indispensable element of individual artistic expression necessarily rests with the dancers. The RWB chooses what works will be performed, chooses the time and location of the performances, determines where and when rehearsals will be held, assigns the roles, provides the choreography, and directs each performance.
>
> · The dancers have no management or investment responsibilities with respect to their work with the RWB.
>
> · The dancers bear little financial risk for the work they do for the RWB for the particular season for which they are engaged. However, their engagements with the RWB are for a single season and they have no assurance of being engaged in the next season.
>
> · The dancers have some chance of profit, even within their engagement with the RWB, in that they may negotiate for remuneration in addition to what is provided by the Canadian Ballet Agreement. However, for the most part remuneration from the RWB is based on seniority and there is little movement from that scale.
>
> · The career of a dancer is susceptible to being managed, particularly as the dancer gains experience. Dancers engaged by the RWB have considerable freedom to accept outside engagements, although there are significant contractual restrictions (the need for the consent of the RWB, and the obligation to hold themselves out as being engaged by the RWB).
>
> · Although the dancers bear many costs related to their engagement with the RWB and their dancing careers generally, the RWB is obliged to provide dance shoes, costumes, tights, wigs and certain other necessary items.
>
> · The dancers are responsible for keeping themselves physically fit for the roles they are assigned. However, the RWB is obliged by contract to provide certain health related benefits and warm-up classes.

> 66. The control factor in this case, as in most cases, requires particular attention. It seems to me that while the degree of control exercised by the RWB over the work of the dancers is extensive, it is no more than is needed to stage a series of ballets over a well planned season of performances. If the RWB were to stage a ballet using guest artists in all principal roles, the RWB's control over the guest artists would be the same as if each role were performed by a dancer engaged for the season. If it is accepted (as it must be), that a guest artist may accept a role with the RWB without becoming its employee, then the element of control must be consistent with the guest artist being an independent contractor. Therefore, the elements of control in this case cannot reasonably be considered to be inconsistent with the parties' understanding that the dancers were independent contractors.
>
> 67. The same can be said of all of the factors, considered in their entirety, in the context of the nature of the activities of the RWB and the work of the dancers engaged by the RWB. In my view, this is a case where the common understanding of the parties as to the nature of their legal relationship is borne out by the contractual terms and the other relevant facts.

[6] In *D.W. Thomas Holdings Inc.* v. *Minister of National Revenue*, 2009 FCA 371, Justice Layden-Stevenson, stated, on behalf of the Federal Court of Appeal, that:

> 5 Contrary to the appellant's assertion, Miller J. did consider the issue of intention. In keeping with the approach set out in *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, [2007] 1 F.C.R. 35 (FCA), she examined the evidence to ascertain whether it supported that intention and concluded that it did not.

[7] It is the position of the Appellant that the Appellant and Erin Hrushowy had agreed that she would be retained as an independent contractor. The following is an excerpt from the testimony of Erin Hrushowy when she was being questioned by Peter McGee:

> Q Okay. In section 3(a) of the questionnaire, you state the relationship was payor/employee. When you were hired, did you agree to be hired as a contractor?
>
> A Yes. We had a conversation about having your own business and working on contract. I don't think you called it independent contractor at the time. And we discussed it. Quite a few discussions leading up to the agreement that I would be hired on at SIP. And -- yes, I would say that when I was hired, that was the agreement.
>
> Q So, why in 3(a) did you say it was a payor/employee agreement? Sorry, I'm just curious. I'm asking why, in 3(a), on the questionnaire, she wrote that the working relationship was a payor/employee. When you've just said that you were hired on

contract.

A We also agreed that, in three months' time, we would review how things were going. Being the start-up business that it was, I recall you saying you weren't sure how it was going to go and so we'd go from there. And as time went on, it turned into something else, is how I felt. So, at the end of the experience, working at SIP, it was much different than what we had agreed on originally.

Q But you do agree there was a portion of time there that was, without doubt, on a contract basis?

A A portion of time. I mean, if -- I'm not sure. It was not -- there was no end to when that time could have been because we did not sit down in three months' time to discuss how things were going. So, perhaps there was a portion. But at the same time --

Q But did you not agree, at the time of hiring, that you were working on contract?

A At the time of hiring? Yes.

Q So, did that last a minute in your mind, or did it last a week, or three months, or six months? Or the term? I'm just -- I'm trying to clarify where and when what you agreed to stopped and where and when your relationship became the employer -- or, sorry, the payor/employee relationship you referred to in 3(a).

A Well, I can't -- I don't know if I can give it a definitive answer on that. It's not that cut and dried for me to be able to answer.

[8] The following is an excerpt from the examination of Erin Hrushowy by counsel for the Respondent:

Q You stated in your direct, that you agreed that you were an independent contractor when you were hired. What was your intention when you were hired? What did you think you were?

A Initially when we had that conversation, the term "independent contractor" I was more familiar with "self-employed" or "have your own business". And I had never worked in that capacity before. So, and Pete and I had in passing talked about his experience in doing that, that it is a great thing to do, and so the idea that I was -- I went in with a poor understanding of what "work on contract" meant. I had just come from working on contract with a previous job, but I was paid, I had a contract that I signed, taxes were taken off, EI, CPP all that was taken off. So, in working with contract, I understood -- with SIP, I would be responsible for paying that initially. And as time went on, everything just began to speed up, and the pace of the day and communication with regards to -- everything changed it seemed. And then -- okay, I'll stop there. I am rambling.

> Q So you mentioned in your previous -- you had a previous contract but then you mentioned that you had paid CPP and EI? Could you tell us a bit more about that?
>
> A It was -- I was working for Granville Island CMHC and it was a temporary contract where we were launching a new event and so I worked for maybe three months, and it was extended by two weeks, but it was all -- like, it was more like a temporary job. I was an employee during that time. Put it that way. An employee of CMHC. Or treated as an employee.

[9] Later Erin Hrushowy stated that:

> A It's a very interesting -- it's difficult to convey all that happened. To sort of capsulate -- encapsulate the whole dynamics and how things sort of metamorphosed into something else.
>
> There were great intentions at the beginning, and it seemed to just turn into something else completely, and so that is why -- you know, people remember things differently. I remember things differently than Pete. *But at the end of the day, after talking to an accountant -- I mean, I didn't know how to claim when it came tax time. I talked to an accountant, which started things moving in this direction*. Because I was confused. I didn't have any write-offs, and so he asked me why I was claiming as a contractor. And I said, "Well, I don't know. This is what we talked about." And so that's when I underwent these tests.
>
> (emphasis added)

[10] Erin Hrushowy would have talked to her accountant about the preparation of her tax return for 2008 in 2009. This would have been after the period in question in this appeal. I find that it was more likely than not that Erin Hrushowy did agree, when she was retained, that she would be an independent contractor. Therefore there was a mutual intention that she would be an independent contractor. I also find that this agreement continued throughout the period under appeal. When she filed her income tax return for 2008 (which would have been in 2009 after the period in question and after she had met with her accountant), she would have reported her income in a manner that would have reflected the position she was then taking in relation to whether she was an employee. It would not necessarily reflect the agreement that she had reached with the Appellant in March 2008 when she was retained. Therefore, it does not seem to me that her income tax return (which was not introduced) would have assisted in determining the issue before me.

[11] In the *Royal Winnipeg Ballet* case, the facts related to the dancers and the circumstances of their work were not sufficient to alter the arrangement from that

which was intended by the parties. Therefore it seems to me that "in keeping with the approach set out in *Royal Winnipeg Ballet*", the relevant facts in this case, as determined by the factors as set out in *Wiebe Door* and *Sagaz*, would have to more strongly indicate an employer-employee relationship than did the facts in the case of the *Royal Winnipeg Ballet* in order for Erin Hrushowy to be considered to be an employee. In both the *Royal Winnipeg Ballet* case and in this case, there was an intention to create an independent contractor relationship and not an employer-employee relationship.

[12] With respect to the control factor, the evidence in this particular case was that the amount of control that the Appellant had over Erin Hrushowy would have been less than the amount of control that the Royal Winnipeg Ballet had over the ballet dancers. In the *Royal Winnipeg Ballet* case, Justice Sharlow described the degree of control that the Royal Winnipeg Ballet had over the dancers as "extensive". As noted by Justice Sharlow in the above decision:

> The RWB chooses what works will be performed, chooses the time and location of the performances, determines where and when rehearsals will be held, assigns the roles, provides the choreography, and directs each performance.

[13] It does not seem to me that the level of control in this case would more strongly indicate that Erin Hrushowy was an employee than the level of control that the Royal Winnipeg Ballet had over the dancers would have indicated that the dancers were employees. During questioning by Peter McGee, Erin Hrushowy agreed with Peter McGee that he was out of the office at least 25% of the time. During questioning by counsel for the Respondent she stated as follows:

> Q And who else worked in the office on a regular basis beside yourself?
>
> A Besides myself, there was -- I was mostly by myself. Pete would come in. Maybe throughout the day he might be in for a couple of hours in the morning or in the afternoon. But for the most part, it was just myself.

[14] It seems to me that more often than not that Erin Hrushowy would be the only person in the office. In *City Water International Inc.* v. *Minister of National Revenue*, 2006 FCA 350, Justice Malone writing on behalf of the Federal Court of Appeal stated that:

> 18 A contract of employment requires the existence of a relationship of subordination between the employer and the employee. The concept of control is the key determinant used to characterize that relationship (see *D&J Driveway Inc. v.*

> *Canada (Minister of National Revenue)*, [2003] F.C.J. No. 1784, 2003 FCA 453). City Water also referred the panel to *Livreur Plus Inc. v. Canada (Minister of National Revenue)*, [2004] F.C.J. No. 267, 2004 FCA 68, where this Court applied the *Wiebe Door* test to determine whether the employment of two workers was insurable under the *EIA*. In considering the control component of the test, Létourneau J.A. stated at paragraph 19:
>
> > ... the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it ... As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, ... , [1996] F.C.J. No. 1337, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker."
>
> In other words, controlling the quality of work is not the same as controlling its performance by the worker hired to do it.
>
> 19 In my analysis, the simplicity of the task can have no bearing on control and should not be considered in determining whether a degree of subordination exists. As such, the Judge made a legal error in concluding that the control factor should bear little weight because of the simplicity of the tasks conducted by the Service Workers. In the present case, City Water attracted the customers but left the actual performance of the service function to the Service Workers without any supervision. Accordingly, control here clearly points to a contract for services.

[15] In this case, there was very little if any supervision of Erin Hrushowy by the Appellant. Therefore there would be very little control exercised by the Appellant over Erin Hrushowy. The amount of control exercised by the Appellant over Erin Hrushowy was less than the amount of control exercised by the Royal Winnipeg Ballet over the dancers. Also the control that was exercised in this case was related to the quality of the work. The example that was provided was a situation where Peter McGee would request that Erin Hrushowy, after she had received a quote for freight costs, try to find another company that could transport the goods at a lower cost.

[16] Erin Hrushowy also stated that she was required to be at the office from 9:00 a.m. to 5:00 p.m. each day to answer the phone. However there was no indication of the number of phone calls that the Appellant would receive on a daily or weekly basis. As well, the only access to the office was through the premises of GreenWorks Building Supply Inc. which operated a retail store. It appears that the retail store did not open until 10:00 a.m. and that Erin Hrushowy did not have a key. Since there were only two individuals who could be in the office of the Appellant (Peter McGee or Erin Hrushowy), it does not seem to me that Erin Hrushowy was required to be at the office every day from 9:00 a.m. to 5:00 p.m. since it appears that she could not

access the office until 10:00 am if Peter McGee was not there (which happened frequently).

[17] It also seems to me that Erin Hrushowy was retained to perform certain tasks. Peter McGee stated during his testimony as follows:

> … And she was hired to effectively market these products in Canada for SIP Distribution and that involved coordinating a CRM program with the reps, coordinating a direct mail-out to architects and designers with Tugboat Media and in some cases doing graphic work.

[18] She was retained to perform certain tasks. In the case of *Direct Care In-Home Health Services Inc.* v. *Minister of National Revenue*, 2005 TCC 173, Justice Hershfield made the following comments in relation to control:

> 11 Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship.* **However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task -- you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship.*** Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.*
>
> 12 In the case at bar, the Worker was free to decline an engagement for any reason, or indeed, for no reason at all. …
>
> (emphasis added)
>
> (* denotes a footnote reference that was in the original text but which has not been included.)

[19] Over time the tasks changed but it seems clear that it was a task oriented engagement and that it was not intended to continue indefinitely. The following is an excerpt from the testimony of Erin Hrushowy when she was being examined by Peter McGee:

> Q Did you view your position as a long-term position?
>
> A No. I don't -- no, there was nothing saying that it was, and there was nothing

> saying that it wasn't. It was almost going day by day.

[20] Therefore it seems to me that retaining Erin Hrushowy to perform certain tasks when she was not being supervised for most of the time in an arrangement that was described by Erin Hrushowy as being “day by day”, suggests that the arrangement was an independent contractor relationship and not an employer / employee relationship.

[21] With respect to the ownership of equipment, there appears to have been very little equipment that Erin Hrushowy needed to complete the tasks that were assigned to her. Because there was very little equipment required, this test is of little assistance in this appeal.

[22] It does not appear that Erin Hrushowy would have been able to hire other workers to perform the tasks that were assigned to her. In the *Royal Winnipeg Ballet* case, there was no discussion with respect to whether or not the dancers could hire any helpers but it would seem illogical to suggest that the dancers could hire any person to replace them in the production.

[23] With respect to the degree of financial risk/opportunity for profit, Erin Hrushowy had little financial risk. In the *Royal Winnipeg Ballet* case, the dancers, as acknowledged by the Federal Court of Appeal, had little financial risk.

[24] With respect to the opportunity for profit, the dancers with the Royal Winnipeg Ballet could negotiate for additional remuneration, although most were paid in accordance with a predetermined scale. In this case the hourly rate that would was paid to Erin Hrushowy was determined on the basis that she was an independent contractor. In the *Royal Winnipeg Ballet* case the dancers were allowed to accept outside engagements provided that they had the consent of the Royal Winnipeg Ballet and provided that they held themselves out as being engaged by the Royal Winnipeg Ballet. In this case, there were no such restrictions imposed on Erin Hrushowy in accepting outside engagements.

[25] In the *Royal Winnipeg Ballet* case, the dancers did not have any management or investment responsibilities with respect to their work with the Royal Winnipeg Ballet. In this case Erin Hrushowy did not have any management or investment responsibilities with respect to her work with the Appellant.

[26] Counsel for the Respondent argued that the integration test should be applied. He referred to the following comments of then Chief Justice Bowman in *3868478 Canada Inc.* v. *Minister of National Revenue*, 2006 TCC 444:

> 17 If the integration test has any meaning, it would seem that the hygienists' function is an integral and essential part of the dental practice. They are not extraneous or incidental to it. The bill that the patient gets from the dentist has, as part of the total, an amount for the hygienist's services. The cleaning and scaling of teeth as well as instructing patients in proper methods of oral hygiene is as much a part of a dental practice as drilling and extracting. The problem with the integration test is that an independent contractor can be as integral a part of a business organization as an employee.

[27] However, in a subsequent decision of then Chief Justice Bowman in *Lang* v. *Minister of National Revenue*, 2007 TCC 547, 2007 DTC 1754, stated that:

> **34** Where then does this series of cases leave us? A few general conclusions can be drawn:
>
> …
>
> (c) Integration as a test is for all practical purposes dead. Judges who try to apply it do so at their peril.

[28] As a result I will not apply the integration test, which in any event in this case would not be conclusive.

[29] As a result, I find that the relevant facts related to the engagement of Erin Hrushowy by the Appellant as determined by the factors as set out in *Wiebe Door* and *Sagaz* do not suggest more strongly an employer / employee relationship than did the facts in the *Royal Winnipeg Ballet* case. In this case the relevant facts related to the engagement of Erin Hrushowy by the Appellant more strongly indicate an independent contractor relationship than they do an employer / employee relationship. As a result Erin Hrushowy was an independent contractor and not an employee of the Appellant during the period under appeal.

[30] The appeal under the *Employment Insurance Act* with respect to the decision of the Minister of National Revenue, dated April 8, 2011, is allowed, without costs, and the decision of the Minister is varied to provide that Erin Hrushowy was not engaged by the Appellant in insurable employment as determined for the purposes of the *Employment Insurance Act* at any time during the period from March 17, 2008 to December 17, 2008.

[31] The appeal under the *Canada Pension Plan* with respect to the decision of the Minister of National Revenue, dated April 8, 2011, is allowed, without costs, and the decision of the Minister is varied to provide that Erin Hrushowy was not engaged by the Appellant in pensionable employment as determined for the purposes of the *Canada Pension Plan* at any time during the period from March 17, 2008 to December 17, 2008.

Signed at Ottawa, Canada, this 13th day of September 2011.

"Wyman W. Webb"

Webb, J.

CITATION:	2011TCC423
COURT FILE NOS.:	2011-1452(EI); 2011-1453(CPP)
STYLE OF CAUSE:	SIP DISTRIBUTION INC. AND THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 25, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	September 13, 2011

APPEARANCES:

Agent for the Appellant:	Peter McGee
Counsel for the Respondent:	Kristian DeJong

COUNSEL OF RECORD:

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