

Docket: 2017-2128(EI)

BETWEEN:

A.A.I. Contracting Services Ltd.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on September 16, 2019, at Windsor, Ontario

Before: The Honourable Justice B. Russell

Appearances:

For the Appellant:

Straun Costie

Counsel for the Respondent:

Dominik Longchamps

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JUDGMENT

This appeal pursuant to subsection 103(1) of the *Employment Insurance Act* (EIA) of the decision of the Minister of National Revenue is dismissed, without costs, in accordance with the attached reasons for judgment, which reflect that the worker was employed in insurable employment with the Appellant within the meaning of paragraph 5(1)(d) of the EIA throughout the period July 20, 2015 to January 8, 2016.

Signed at Toronto, Ontario, this 24<sup>th</sup> day of October 2019.

“B.Russell”

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Russell J.

Docket: 2017-2133(CPP)

BETWEEN:

A.A.I. Contracting Services Ltd.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on September 16, 2019, at Windsor, Ontario

Before: The Honourable Justice B. Russell

Appearances:

For the Appellant:

Straun Costie

Counsel for the Respondent:

Dominik Longchamps

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**JUDGMENT**

This appeal pursuant to section 28 of the *Canadian Pension Plan* (CPP) of the decision of the Minister of National Revenue is dismissed, without costs, in accordance with the attached reasons for judgment, which reflect that throughout the period July 20, 2015 to January 8, 2016 the worker was employed in pensionable employment with the Appellant within the meaning of paragraph 6(1)(a) of the CPP.

Signed at Toronto, Ontario, this 24<sup>th</sup> day of October 2019.

“B.Russell”

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Russell J.

Citation: 2019TCC233

Date: 20191021

Docket: 2017-2128(EI)

BETWEEN:

A.A.I. Contracting Services Ltd.,

Appellant,

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Docket: 2017-2133(CPP)

BETWEEN:

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### **REASONS FOR JUDGMENT**

Russell J.

[1] These two appeals under two federal statutes - the *Employment Insurance Act* (EIA) and the *Canada Pension Plan* (CPP) - concern the worker status of a person who did work for the corporate Appellant, A.A.I. Contracting Supplies Ltd. (AAI). That person was Mr. Ghislain LeDuc (GL). The principal of AAI is Mr. Straun Costie (SC) and he testified for AAI. I advised SC at the commencement of the hearing that the assumptions set out in the Respondent's Reply for each of these appeals would, in accordance with applicable law, be taken as correct in the absence of evidence *prima facie* proving otherwise.

[2] Both appeals turn on the question of whether GL did work for AAI during the below specified period as an employee of AAI or as an independent contractor engaged by AAI.

[3] SC testified that AAI was a construction subcontracting company focusing on drywalling and acoustics. He said that as AAI's owner he had hired GL to work for AAI as a dry-waller commencing July 20, 2015. GL worked as such with AAI until January 8, 2016. SC said GL wanted a "straight cheque", which is industry slang for payment of his contract rate (\$30 per hour) without deductions, the same as did several other persons doing dry-wall work for AAI. As well, two further persons who also did work for AAI including a foreman, Mr. Jenson, instead wished to have employment deductions made by AAI. AAI obliged, paying them net of payroll deductions, as employees typically are paid. A worker's preference as to remuneration payments with or alternatively without payroll deductions seemed, from SC's testimony, to be the primary if not sole criteria for AAI considering the worker to be an employee or alternatively a contractor.

[4] With due respect it did not appear that SC, and accordingly also AAI, were aware of the well-established legal tests for ascertaining whether a worker was an employee or alternatively an independent contractor. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, para 47, the Supreme Court of Canada wrote:

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 own tasks.

[5] I now address these factors identified in *Sagaz*, in determining whether GL was engaged in business on his own account, and thus was an independent contractor and not an employee of AAI, in which instance both of these CPP and EIA appeals would be allowed.

[6] The first factor for consideration is the level of AAI control over GL's activities. The evidence was clear that AAI (through SC) exercised, and retained full authority to exercise control over GL regarding his work-related actions. SC would attend daily at AAI's several job-sites, including whichever one GL would be working at, to ensure all was going well. These job-sites would be locations

whereat in each instance AAI was working as a subcontractor pursuant to contract with a general contractor.

[7] AAI had accorded GL the title “Superintendent” of AAI, as shown on business cards AAI gave GL. SC explained in cross-examination that that meant GL typically would be the senior AAI person regularly present at whatever job-site he was assigned to. Should the general contractor wish to communicate with AAI on the job-site that would be done via GL. But SC expected GL to then contact him as to any such communications, for SC to decide as to any necessary actions. GL did not have authority to “boss” other AAI workers at the job-site. However, none of that is of particular pertinence to the question of control specifically as between AAI (through SC) and GL.

[8] In summary as to the control factor, GL was, fully subject to control exercised by AAI though its owner SC. SC would daily inspect the work being done to ensure its quality so that AAI would not have issues with the general relevant contractor. Also, all workers, no less including GL, were subject to AAI’s written policies including its “Alcohol and Drug Policy”, its “Harassment Policy” and its “Employee Code on Conduct”. Thus the control factor per *Sagaz* strongly favours GL having been an AAI employee.

[9] The second factor referenced in *Sagaz* is whether the worker provides his/her own equipment. The answer is, per testimony of SC, that trades-persons in the construction industry typically do own and accordingly come to work with their own hand-tools and tool belt. That was the case here too. Indeed, SC said AAI would not have engaged GL had he not had his own hand-tools to bring to his dry-wall work at the AAI job-sites. SC said also, however, that AAI would provide “Hilti guns”, which is a more expensive type of fastening tool usable in dry-walling. It would seem that the ownership of tools factor basically favours GL being an independent contractor.

[10] The next factor mentioned in *Sagaz* is whether the worker would hire his or her own helpers. There was no evidence given by SC that GL could do so. I infer from the evidence and observing SC that SC exercised no-nonsense control and would not wish a worker that SC had not himself approved doing AAI work at a job-site. Further, the Minister of National Revenue as pleaded at paragraph 7(q) of each of the EIA and CPP Replies, made the assumption that, “[GL] could not hire substitute workers or helpers without [AAI’s] consent”. Thus, this factor of

whether the worker could hire his or her own helpers, favours GL having been an employee and not an independent contractor.

[11] The final factors noted in *Sagaz* can be discussed as a group. They are “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 own tasks”. At the hearing there was no evidence indicating any degree of financial risk taken by GL, or that he had any responsibility whatsoever for investment or management of the business his work served, or that he had any opportunity to profit in the performance of his own tasks. To the contrary, he was simply hired as a worker for \$30 per hour, until his eventual discharge for ongoing issues with other AAI workers. These three financial factors clearly signal that GL worked on behalf of AAI as an employee and not as an independent contractor

[12] As well it is noted that GL did not invoice for his work, apart from the fact that all AAI workers were expected to report hours worked. Additionally, GL never charged GST/HST for any of his services, as an independent contractor (but not employee) would be obliged to do.

[13] Accordingly, the answer to the question *Sagaz* requires be posed - whose business is it? - is that the business was that of AAI, and not at all that of GL. I thus find that GL was an employee of AAI and was not an independent contractor.

[14] Therefore, the CPP appeal will be dismissed, without costs, on the basis that as GL was an employee of AAI during the period July 20 2015 to January 8, 2016, his work service during that period was pensionable employment pursuant to paragraph 6(1)(a) of the CPP. And likewise, the EIA appeal will be dismissed, without costs, on the basis that as GL was an employee of AAI during that period, his work service for AAI during that period was insurable employment within the meaning of paragraph 5(1)(a) of the EIA.

Signed at Toronto, Ontario this 21<sup>st</sup> day of October 2019.

“B.Russell”

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Russell J.



CITATION: 2019TCC233

COURT FILE NO.: 2017-2133(CPP)  
2017-2128(EI)

STYLE OF CAUSE: A.A.I. Contracting Services Ltd. AND HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: September 16, 2019

REASONS FOR JUDGMENT BY: The Honourable Justice B. Russell

DATE OF JUDGMENT: October 24, 2019

APPEARANCES:

For the Appellant: Straun Costie  
Counsel for the Respondent: Dominik Longchamps

COUNSEL OF RECORD:

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