

Docket: 2012-3442(EI)

BETWEEN:

DONALD ERIC SANDBERG,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

THE FRONTIER CENTRE FOR PUBLIC POLICY INC.,

Intervener.

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Appeal heard on August 26, 2013 at Winnipeg, Manitoba

By: The Honourable Justice Judith M. Woods

Appearances:

For the Appellant:                      The Appellant himself

Counsel for the Respondent:        Neil Goodridge

For the Intervener:                    No one appeared

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**JUDGMENT**

It is ordered that the appeal with respect to a decision of the Minister of National Revenue made under the *Employment Insurance Act* is allowed, and the decision is varied on the basis that Donald Sandberg was engaged in insurable employment with The Frontier Centre for Public Policy Inc. for the period from January 1, 2007 to December 31, 2008. The parties shall bear their own costs.

Signed at Ottawa, Ontario this 24th day of September 2013.

“J. M. Woods”

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Woods J.

Citation: 2013 TCC 301  
Date: 20130924  
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### **REASONS FOR JUDGMENT**

Woods J.

[1] The issue in this appeal is whether Donald Sandberg was engaged as an employee or independent contractor by The Frontier Centre for Public Policy Inc. (“Frontier”) during a two-year period from January 1, 2007 to December 31, 2008 (the “Period”).

[2] The appeal relates to a decision made by the Minister of National Revenue under the *Employment Insurance Act* that Mr. Sandberg was an independent contractor. Mr. Sandberg appeals from that decision.

[3] Frontier has filed a notice of intervention and its counsel has informed the Court that it relies on the Minister to represent its interests at the hearing.

[4] As a preliminary matter, I note that this is not the first time that this issue has been adjudicated. For purposes of employment standards legislation in Manitoba, Mr. Sandberg has previously been determined to be engaged as an independent contractor by Frontier. Neither party provided any detail regarding this decision and for this reason I have not given any deference to it.

[5] Three witnesses provided evidence at the hearing. Mr. Sandberg testified on his own behalf and called Dennis Owens, who is a friend and former colleague. The Minister called Peter Holle who was, and continues to be, the president of Frontier.

### Factual background

[6] Mr. Sandberg is a status Indian who lives in The Pas, Manitoba. He is a freelance writer who has had a long-term interest in aboriginal affairs, and in particular in advocating for more accountability by band leadership.

[7] Frontier is a charitable organization that undertakes research on a wide variety of public policy issues. Mr. Holle described Frontier as a think tank.

[8] Around 2004, Mr. Holle became aware of Mr. Sandberg's expertise on aboriginal policy issues and made an arrangement with him to provide services to Frontier on a part-time basis for a modest fee. The services generally involved writing a column twice a month and making appearances at events.

[9] Approximately two years after this initial retainer, Frontier embarked on a project to study governance issues on reserves. The project involved obtaining the views of residents of reserves by having a team of persons conduct surveys on the reserves. The initiative was known as the Aboriginal Governance Index (AGI).

[10] Mr. Sandberg's expertise was essential to conducting the surveys because he had the trust of band leaders and was able to obtain their consent to the surveys. Accordingly, he was in charge of this aspect of the project.

[11] The AGI project commenced around 2005 with the design phase, and Mr. Sandberg assisted in creating the survey questions.

[12] Subsequently, Mr. Sandberg led the survey operation which took place annually for about 6 months. It was clear from the evidence that Mr. Sandberg had the connections and skills necessary to conduct this work, especially in convincing the band leadership to cooperate.

[13] After the annual survey work was completed, Frontier arranged for a statistical analysis of the data and then Frontier staff produced a report. Mr. Sandberg was not directly involved in this process.

[14] Initially, Mr. Sandberg was given free rein with respect to the conduct of the

surveys. In particular, he selected the reserves to visit and was instrumental in choosing the team members. The surveyors were generally young people, and many were acquaintances or relatives of Mr. Sandberg.

[15] Over time, disagreements developed between Frontier staff and Mr. Sandberg. One of the main concerns from Frontier's perspective was high travel costs associated with the survey work.

[16] Eventually, Frontier imposed more control over the travel undertaken by Mr. Sandberg and the survey team, including the selection of the reserves to be visited.

[17] The arrangement between Mr. Sandberg and Frontier was documented by written contracts dated January 13, 2004, September 1, 2005 and October 1, 2006.

[18] Frontier terminated the relationship with Mr. Sandberg in 2010.

#### Applicable legal principles

[19] The meaning of the term "employment" is central to this appeal. As the term is not defined in legislation, it is necessary to apply the meaning developed in various court decisions.

[20] Some of the relevant principles are summarized below, based on a recent decision of the Federal Court of Appeal which is commonly referred to as *Connor Homes (1392644 Ontario Inc v MNR*, 2013 FCA 85).

- (a) The ultimate question is whether the worker is performing services as his own business (para 23).
- (b) The following factors are usually relevant: level of control held by the payor, whether the worker provides his own equipment, hires own helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks (para 29). These factors are not exhaustive and no one factor is determinative.
- (c) The intention of the parties is also relevant and should be considered first. However, the parties' intent cannot trump the objective reality, which must govern if it is inconsistent with intent (para 39, 40).

Application to facts

[21] I now turn to an application of the legal principles to the facts of this case.

*Evaluation of evidence*

[22] I would comment first about the reliability of the testimony.

[23] With respect to Mr. Sandberg's testimony, I do have significant concerns. The testimony was evasive at times, some of it was inconsistent with other evidence, and at other times the testimony was improbable.

[24] For example, at first Mr. Sandberg acknowledged that he worked for Frontier in 2004. However, he backtracked from this when he was shown a statement that he signed in connection with bankruptcy proceedings in September 2005 which did not list any income from Frontier.

[25] In addition, Mr. Sandberg denied knowledge of two letters involving the termination of his contract in February 2010. Both letters appear to be signed by Mr. Sandberg but he denied that one of the signatures was his. It is unlikely that the signature would have been forged. I did not find this testimony to be believable.

[26] It is difficult in these circumstances to have confidence in the reliability of Mr. Sandberg's testimony generally, and especially Mr. Sandberg's testimony to the effect that he signed the contracts with Frontier under duress.

[27] As for the testimony of Mr. Owens and Mr. Holle, I found their testimony to be generally reliable. I would note, however, that Mr. Holle's testimony was self-interested and I did take that into account.

[28] I would also comment that some of Mr. Holle's testimony had limited usefulness because the questions by counsel for the Minister were not detailed enough to be persuasive.

[29] As an example, Mr. Sandberg testified that the contracts were generally signed much later than the date on the contracts. Counsel for the Minister asked Mr. Holle when the contracts were signed and he appeared to simply adopt the date at the top of the written agreement. No evidence was led as to why Mr. Holle believed that this was the date of signing and I was not persuaded that Mr. Holle had a personal recollection of the signing date.

*What is the intent of the parties?*

[30] The written agreement that governs the Period is dated October 1, 2006. As with the previous agreements, it provides that Mr. Sandberg is engaged as an independent contractor and not as an employee.

[31] Mr. Sandberg testified that he thought he was an employee notwithstanding the wording of the contract, and he submits that he signed the contracts under duress and was not allowed to consult with a lawyer. Mr. Holle disputed this testimony.

[32] I find Mr. Holle's version to be more likely and I accept it.

[33] Mr. Sandberg also submits that the agreements were generally signed much later than their effective date. Mr. Sandberg had been working under similar contracts since 2004. I do not think the signing date of the 2006 contract has a bearing on the parties' stated intention that Mr. Sandberg be an independent contractor.

[34] Mr. Sandberg also submits that no one had explained to him what independent contractor status meant. This does not assist Mr. Sandberg. The written agreement governs the relationship. By signing the agreement, Mr. Sandberg agreed to be bound, even if he was under a mistaken impression as to its meaning.

[35] I conclude that the clear intent of the parties is an independent contractor relationship.

*Does the intent reflect objective reality?*

[36] The second step in the analysis is to consider whether the reality is consistent with the expressed intent. The factors noted above will each be considered.

(a) Ability to control

[37] Mr. Sandberg testified that he was subject to micromanagement in his AGI role.

[38] Mr. Holle testified that at the beginning of the relationship Frontier was a fledgling enterprise with few processes and procedures. At first, Mr. Sandberg was given free rein in his role with the AGI project. Over time, serious financial problems developed and at the end of the relationship there was tight control over the financial

aspects of Mr. Sandberg's AGI work, such as which reserves to visit.

[39] Mr. Holle described that the restrictions that Frontier placed on Mr. Sandberg over time were limited to high level issues such as financial and libel matters.

[40] The difficulty with the evidence as a whole is that it focuses on the actual control exerted by Frontier. The test is not actual control, but the ability to control (*Meredith v The Queen*, 2002 FCA 258).

[41] In this case, the 2006 agreement contains a provision dealing with control that was not in the prior agreements with Mr. Sandberg. It states:

[...] The Independent Consultant will work under the direction of the President of [Frontier] and the Senior Policy Analyst, or as otherwise directed.

[42] The wording of this clause is very broad, and it does not provide any limit to the type of direction that Frontier may give. I would conclude that if Mr. Sandberg refused to follow a particular direction, Frontier could exert its legal right to give the direction under this provision.

[43] Mr. Holle testified that Mr. Sandberg needed only high level direction since he was the expert on aboriginal matters.

[44] I accept Mr. Holle's testimony in this regard, but the written agreement does not limit the nature of the control that Frontier could exert if it wished to. It is the ability to control that is the relevant consideration, and I find that Frontier had considerable power under the agreement.

[45] The control factor points heavily towards an employment relationship.

(b) Whether worker provides own equipment

[46] The relevant facts are that Frontier agreed to reimburse Mr. Sandberg's travel expenses, and provided him with the use of an apartment in Winnipeg. Mr. Sandberg was also provided with a laptop and blackberry. These factors point towards an employment relationship.

[47] The evidence also reveals that Mr. Sandberg was approached by Mr. Holle about purchasing vehicles that could be used by the survey team when traveling to reserves. Mr. Sandberg would be paid a per kilometer rate for providing the vehicles.



Mr. Sandberg agreed to this since the rate was generous. After a period of time, Frontier terminated this arrangement because of the cost and began to employ rental cars from Enterprise.

[48] The arrangement with the vehicles shows entrepreneurial initiative on the part of Mr. Sandberg. However, I would characterize it as a commercial arrangement separate from the provision of services under the written agreements. I do not view this as a significant factor in determining the nature of the services provided by Mr. Sandberg.

[49] The submission by the Minister regarding equipment focused on the expertise that Mr. Sandberg brought to the arrangement. No authority was provided on this point, and I do not accept that the supply of equipment is meant to encompass expertise.

[50] Further, I consider that Mr. Sandberg's expertise is a neutral factor in considering whether he is an employee or independent contractor. Expertise is a valuable attribute that is sought after in both types of relationships.

[51] Overall, I consider equipment to be a factor that slightly favours an employment relationship.

(c) Whether worker hires own helpers

[52] There was conflicting evidence as to whether Mr. Sandberg selected the surveying team. Mr. Holle suggested that he did, whereas Mr. Sandberg testified that he only selected some of the team.

[53] I do not think that anything turns on this. Mr. Sandberg may have chosen his team, but the team was engaged by Frontier who paid their expenses. The evidence by Mr. Holle suggested that the motivation for this was administrative. I do not think that motivation has much relevance. The evidence as a whole suggests that the team members were not hired by Mr. Sandberg.

[54] I consider that this factor is neutral.

(d) Whether worker manages and assumes financial risk

[55] In general, Mr. Sandberg did not assume financial risk with the arrangement because Frontier agreed to pay his expenses.

[56] Two special circumstances need to be considered. The first concerns the vehicles supplied by Mr. Sandberg on which I have already commented. In my view, this is a neutral factor because it was a separate commercial arrangement.

[57] The second circumstance is that Mr. Sandberg sometimes advanced money to his team, and paid for his own travel expenses, because there were problems obtaining payment from Frontier.

[58] It is not clear from the evidence whether the problems were only due to administrative issues at Frontier or whether Mr. Sandberg and/or the survey team were partly at fault in these disputes.

[59] I do not view this as a significant factor. It would not be unusual for a person leading a group of young surveyors to have advanced funds as necessary regardless of whether the leader was an employee or independent contractor. The important point is that the arrangement contemplated that travel expenses of Mr. Sandberg and the team would be paid for and/or reimbursed by Frontier.

(e) Whether worker has opportunity for profit

[60] The fee schedule provided for in the contract contemplates a fixed monthly fee of \$3,120 plus disbursements, \$50 for each radio commentary and a possible bonus of up to 10 percent for meeting individual and corporate performance targets in accordance with Frontier's policies and performance targets. The fee structure is slightly in favour of employment status, because it is based partly on corporate performance which may have little to do with Mr. Sandberg's contribution.

[61] There was some opportunity for profit from the vehicles purchased by Mr. Sandberg. As noted above, I have concluded that this is a separate arrangement which does not affect the nature of the services provided.

[62] On balance, I find that the opportunity for profit factor tilts slightly towards an employment relationship.

Conclusion

[63] In weighing the above factors, I would conclude that the objective reality is not consistent with an independent contractor relationship. In reaching this conclusion, I find that the control that could be exerted by Frontier is a dominant factor in this

case.

[64] The objective reality must trump the parties' intention. Accordingly, the decision of the Minister will be varied on the basis that Mr. Sandberg was engaged as an employee of Frontier during the Period.

[65] Finally, I would comment that it is unsettling to find in favour of a litigant whose testimony I find to be untruthful. However, since it is the duty of the Court to apply the applicable legal principles to the evidence as a whole, I find that Mr. Sandberg succeeds in this appeal.

[66] The appeal will be allowed. Each party shall each bear their own costs.

Signed at Ottawa, Ontario this 24th day of September 2013.

“J. M. Woods”

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Woods J.

CITATION: 2013 TCC 301

COURT FILE NO.: 2012-3442(EI)

STYLE OF CAUSE: DONALD ERIC SANDBERG and  
THE MINISTER OF NATIONAL  
REVENUE and THE FRONTIER CENTRE  
FOR PUBLIC POLICY INC.

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: August 26, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: September 24, 2013

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Neil Goodridge
For the Intervener:	No one appeared

COUNSEL OF RECORD:

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