Federal Court of Appeal | Cour d'appel fédérale

Date: 20130320

Citation: 2013 FCA 85

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

Dockets: A-117-12
A-118-12
A-122-12
A-125-12
A-126-12
A-127-12

BETWEEN:

1392644 ONTARIO INC. O/A CONNOR HOMES

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Dockets: A-120-12
A-128-12

BETWEEN:

1324455 ONTARIO INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on January 31, 2013.

Judgment delivered at Vancouver, British Columbia, on March 20, 2013.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This concerns eight appeals heard together on a common record from eight judgments issued by Justice D'Arcy of the Tax Court of Canada (the "Tax Court Judge"). The Tax Court Judge rendered one set of reasons for the eight judgments, which were delivered orally by teleconference call on March 20, 2012. These reasons have not been reported.

[2] The Tax Court Judge dismissed the appellants' respective appeals from decisions of the Minister of National Revenue (the "Minister") determining that certain individuals were employed by them in pensionable employment within the meaning of the *Canada Pension Plan*. R.S.C. 1985, c. C-8 and in insurable employment within the meaning of the *Employment Insurance Act*, S.C. 1996, c. 23.

BACKGROUND AND CONTEXT

[3] The appellant 1392644 Ontario Inc. o/a Connor Homes ("Connor Homes") is licensed by the province of Ontario to operate foster homes and group homes through which it provides care for children who have serious behavioural and development disorders. These services are delivered by numerous individuals retained by Connor Homes, including child and youth workers, social workers, certified therapists and psychologists.

[4] Among the individuals retained by Connor Homes are Ms. Rollie Allaire, Ms. Jodi Greer and Ms. Zoe Fulton.

[5] During the periods at issue, Ms. Allaire provided services in the foster homes as an area supervisor as well as a child and youth worker. When she began working with Connor Homes, she signed a contract dated July 7, 2008. The contract specified that she would be working as a child care worker and acting as an independent contractor remunerated on the basis of an hourly rate of $14 paid upon submission of invoices. She was also paid a flat rate of $150 for overnight relief services and $300 for weekend relief services. Certain transportation payments were also provided under the contract. The contract was for an indeterminate period of time, but could be terminated by Ms. Allaire upon a 14 day notice and by Connor Homes at any time "for cause". The contract also stipulated that, as an independent contractor, Ms. Allaire "shall not be entitled to any benefits and shall be responsible for payment of all necessary remittances, including Canada Pension Plan, Employment Insurance and Provincial and Federal Taxes". It also stipulated that "nothing in this agreement shall be construed so as to restrict in any way the freedom of the Independent Contractor(s) to conduct any other business or activity for his/her individual profit."

[6] Ms. Allaire also acted as an area supervisor for Connor Homes. Her remuneration as supervisor was based on a *per diem* rate for each child resident within a home under her supervision. Payment was effected upon presentation of monthly invoices. She was deemed by Connor Homes to be an independent contractor when acting as a supervisor.

[7] Ms. Greer and Ms. Fulton also worked for Connor Homes and each signed a contract as a child and youth worker dated January 5, 2007 and May 15, 2008 respectively. These contracts were very similar (but not identical) to the one signed between Connor Homes and Ms. Allaire. The duties of Ms. Greer as a child and youth worker mainly involved providing relief services and tutoring the children in her care. These duties were performed in addition to her principal functions (which are more fully described below) as an area supervisor. Ms. Fulton worked as a child and youth worker in foster homes and was involved in supervising children in the morning and evenings, assisting in homework, monitoring youth activities, cooking meals, assisting the children in her care with their hygiene, and carrying out various activities with the children.

[8] Connor Homes is owned by Robert and Elaine Connor. Their son Sean Connor operates the appellant 1324455 Ontario Inc. ("Connor Group Homes") as a service provider to Connor Homes. Connor Group Homes also signed a contract with Ms. Jodi Greer, referred to above, in order for her to act as an area supervisor for foster homes operated by Connor Homes. In that capacity, she "developed plans of care, reviewed requests for funds, attended Children's Aid meetings and hired foster parents and child and youth workers. She was also a crisis manager": Reasons of the Tax Court Judge at para. 20. Her contract with Connor Group Homes dated February 1, 2007 stipulated that she was retained as an independent contractor with a 5 year appointment ending February 1, 2012. She could however terminate the agreement through a 60 day prior written notice, while Connor Group Homes could end the agreement at any time "for cause". Her remuneration under the contract was based on a *per diem* rate for each child resident within a group home or foster home under her supervision. Payment was effected upon presentation of monthly invoices. The contract

included a non-competition clause. It also stipulated that as independent contractor, she was "responsible for expenses incurred during the operation of this service unless otherwise negotiated in advance with Connor Group Homes."

[9] The Canada Revenue Agency ruled that Ms. Allaire, Greer and Fulton were employed in insurable and pensionable employment with Connor Homes for the periods of July 15, 2008 to October 25, 2009, February 8, 2009 to February 12, 2010 and January 1, 2009 to May 22, 2009 respectively. The Canada Revenue Agency also determined that Ms. Greer was also employed with Connor Group Homes in insurable and pensionable employment for the periods of February 8, 2009 to February 12, 2010. All these rulings were confirmed by the Minister.

[10] The appellants appealed to the Tax Court of Canada.

THE REASONS OF THE TAX COURT JUDGE

[11] After setting out the facts, the Tax Court Judge noted that three prior decisions of the Tax Court of Canada had dealt with similar issues involving child care workers employed by Connor Homes: *1392644 Ontario Inc. O/A Connor Homes v. M.N.R.*, 2003 TCC 816; *1392644 Ontario Inc. v. Canada (Minister of National Revenue)*, [2004] T.C.J. No. 214 (QL); *1392644 Ontario Inc. o/a Connor Homes v. M.N.R.*, 2006 TCC 521. In all these decisions, the judges had concluded that the child care workers were employees of Connor Homes and not independent contractors. The Tax Court Judge then concluded that there was no evidence before him that the operations of Connor Homes had changed since these decisions were reached.

[12] Reviewing the evidence before him in light of the factors set out in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue)*, [1986] 3 F.C. 553 ("*Wiebe Door*"), the Tax Court Judge concluded that both Connor Homes and Connor Group Homes exercised significant control over the workers, that there was no chance for the workers to increase their income by reducing expenses or producing more, and that only few tools were required from the workers, mainly a cell phone and access to a computer.

[13] He further dismissed the appellants' submissions based on the intent of the parties. He found that the contracts' provisions qualifying the workers as independent contractors were not consistent with how the contractual relationship operated in fact.

[14] He consequently found that the three concerned workers were employed in insurable and pensionable employment, and thus dismissed the appeals.

THE ISSUES RAISED IN THIS APPEAL

[15] The appellants submit that the Tax Court Judge erred by: (1) placing weight on findings of fact made in other judgments of the Tax Court of Canada; and (2) by not considering and misapplying the test to determine whether a worker is an employee or an independent contractor, particularly by not giving proper weight to the intention of the parties as expressed in the contracts they signed.

THE STANDARD OF REVIEW

[16] It is well established that in appeals from the Tax Court of Canada, the applicable standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The first issue identified above raises questions of law and of procedural fairness, and should thus be reviewed on a standard of correctness. The second issue raises both questions of law reviewed on a standard of correctness (*i.e.* the identification of the proper test), and questions of fact and of mixed fact and law (*i.e.* the application of the facts to the proper test), reviewed on a standard of palpable and overriding error.

THE LEGISLATIVE FRAMEWORK

[17] The pertinent definition of insurable employment under the *Employment Insurance Act* for the purposes of this appeal is set out in paragraph 5(1)(*a*) of that legislation, which reads as follows:

5. (1) Subject to subsection (2), insurable employment is	**5.** (1) Sous réserve du paragraphe (2), est un emploi assurable :
(*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;	*a*) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière;

[18] The *Canada Pension Plan* provides in its paragraph 6(1)(*a*) that pensionable employment is employment in Canada that is not excepted employment. The term "employment" is defined in

subsection 2(1) thereof, while the list of excepted employment is set out in paragraph 6(2), which is not pertinent for the purposes of this appeal:

2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
"employment" means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office;	« emploi » L'état d'employé prévu par un contrat de louage de services ou d'apprentissage, exprès ou tacite, y compris la période d'occupation d'une fonction.
6. (1) Pensionable employment is	**6.** (1) Ouvrent droit à pension les emplois suivants :
(*a*) employment in Canada that is not excepted employment;	*a*) l'emploi au Canada qui n'est pas un emploi excepté;

ANALYSIS

Placing weight on findings of fact in other judgments

[19] The appellants submits that the Tax Court Judge erred by placing weight on the factual findings made in previous appeals concerning the employment status of other childcare workers of Connor Homes since (a) these factual findings could not possibly apply to Connor Group Homes and (b) the applicable test must be examined in light of the particular factual circumstances of each case.

[20] I agree that one trial judge is not bound by the conclusions of fact of another trial judge since each case must be decided on the evidence submitted. That being said however, when similar facts are submitted repeatedly by the same party to different judges, and where the same conclusions are being drawn from these facts by all judges, it is certainly not inappropriate for a trial judge to note

this. Obviously, the trial judge is not bound by the findings of the other judges, but the party which is relying on the same or similar facts to draw another conclusion should provide some explanation as to why the findings of the other judges are distinguishable from the case at hand or inappropriate in the circumstances.

[21] In these proceedings, the Tax Court Judge properly noted that the facts surrounding the operations of Connor Homes were essentially the same as those considered previously by three other judges of the Tax Court of Canada: see para. 42 of his reasons. He also noted that there was no major factual distinction between the operations of Connor Homes and of Connor Group Homes, the latter's operations being integrated into the operations of the former: see paras. 11, 20, 22 of his reasons.

[22] Connor Homes provided no evidence that the facts in issue were now different, nor did it provide explanations as to why the findings of these other judges, based on essentially identical facts, were somehow distinguishable for the purposes of the proceedings before the Tax Court Judge. The Tax Court Judge nevertheless reviewed the evidence before him, weighed it, and reached his own conclusions based on it. His conclusions were the same as the three other Tax Court of Canada judges who reviewed the employment practices of Connor Homes. These conclusions can certainly not be vitiated on the simple ground that all four judges reached the same consistent conclusions.

The test to determine whether a worker is an employee or an independent contractor

[23] The ultimate question to determine if a given individual is working as an employee or as an independant contractor is deceivingly simple. It is whether or not the individual is performing the services as his own business on his own account: *1671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2011 SCC 59, [2001] 2 S.C.R. 983 at para. 47 ("*Sagaz*").

[24] Since the trend in the workforce for the past few years has been toward increased out-sourcing and short-term contracts, this question has taken on added importance, and has lead to much litigation in the Tax Court of Canada. Moreover, employment status directly affects an individual's entitlement to employment insurance benefits under the *Employment Insurance Act* and has a considerable impact on how an individual is treated under the *Canada Pension Plan*, the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and various other legislative provisions.

[25] Yet both judges and commentators alike who have written on the subject have noted that the test, though simple in theory, is often very difficult to apply with any degree of certainty, in part due to the fact specific nature of the question and the variability of the ever changing workplace: *Sagaz* at para. 46; Joanne Magee, "*Whose Business Is It?*" 45(3) *Canadian Tax Journal* 584 (1997); Lara Friedlander, "*What has Tort Law Got to Do with It? Distinguishing Between Employees and Independent Contractors*", 51(4) *Canadian Tax Journal* 1467 (2003); Kurt Wintermute, "*A Worker's Status as Employee or Independent Contractor*", 2007 Canadian Tax Foundation conference report 34; Alain Gaucher, "*A Worker's Status as Employee or Independent Contractor*", 1999 Canadian Tax Foundation conference report, 33.

[26] The leading decisions on the question are that of our Court in *Wiebe Door* and of the Supreme Court of Canada in *Sagaz*.

[27] In *Wiebe Door*, MacGuigan J.A. carried out a thorough examination of the relevant precedents. He referred to the fourfold test set out by Lord Wright in *Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.); [1946] 3 W.W.R. 748 dealing with control, ownership of tools, chance of profit and risk of loss, as well as with the so-called integration test set out by Lord Denning in *Stevenson Jordan and Harrison, Ltd. v. Macdonald*, [1952] 1 *The Times* L.R. (C.A.).

[28] MacGuigan J.A. redefined the integration test by providing that it applied only from the worker's perspective, and he considerably limited its use. Significantly, however, MacGuigan J.A. established the principle that there are no specific and determinative criteria that can be used, but rather "[w]hat must always remain the essence is the search for the total relationship of the parties": *Wiebe Door* at p. 563. He concluded that there is only one test: "I interpret Lord Wright's test not as the fourfold one it is often described as being but rather as a four-in-one test, with emphasis always retained on what Lord Wright, *supra*, calls 'the combined force of the whole scheme of operations', even while the usefulness of the four subordinate criteria is acknowledged": *ibid* at p. 562. In essence, the question to be addressed is "[w]hose business is it?": *ibid* at p. 563.

[29] Major J., writing for the Supreme Court of Canada in *Sagaz*, approved the approach of MacGuigan J.A. in *Wiebe Door*, and added that 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.": *Sagaz* at para. 47. In making this determination, no particular factor is dominant and there is no set formula. The factors to consider may thus vary with the circumstances and should not be closed. Nevertheless, certain factors will usually be relevant, such as the level of control held by the employer over the worker's activities, and whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

[30] Alongside the test as set out in *Weibe Door* and *Sagaz*, in the past few years another jurisprudential trend has emerged which affords substantial weight to the stated intention of the parties: *Wolf v. The Queen*, 2002 D.T.C. 6053 (F.C.A.) ("*Wolf*"); *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)* 2006 FCA 87, [2007] 1 F.C.R. 35 ("*Royal Winnipeg Ballet*"). This trend has not gone without criticism: see *Dean Lang and Sharon Lang v. M.N.R.*, 2007 TCC 547, 2007 D.T.C. 1754 where Bowman C.J. appears to express his frustration with the lack of clarity and consistency in this Court's jurisprudence on the matter.

[31] Thus in *Wolf*, Décary J.A. placed significant weight on the fact that the parties had entered into a contract for services on the basis that the worker was as an independent contractor. He held that absent any unambiguous evidence to the contrary, the express intent of the parties should prevail in ascertaining whether the relationship is one of employer-employee or of independent contractor, commenting that in "our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability

towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterized as a contract for services": *Wolf* at para. 120.

[32] The idea set out by Décary J.A. in *Wolf* that the intent of the parties should be given substantial weight was revisited and clarified in *Royal Winnipeg Ballet*. That case involved an appeal by the Royal Winnipeg Ballet from a decision of the Tax Court of Canada which found that the dancers engaged by it were employees. There was no written contract specifying that the dancers were independent contractors, but it was abundantly clear from the evidence that all parties intended that the dancers be contractors, and they all acted accordingly, such as registering the dancers for GST purposes. The Tax Court Judge however deemed irrelevant the parties intent since he was of the view that intent only became relevant when the appropriate test yielded no definitive result. After reviewing *Wiebe Door*, *Sagaz* and *Wolf*, Sharlow J.A. held that the parties understanding of their relationship must always be considered, and that "[t]he judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees.": *Royal Winnipeg Ballet* at para. 64. Desjardins J.A concurred in this approach, while Evans J.A. dissented.

[33] As a result, *Royal Winnipeg Ballet* stands for the proposition that what must first be considered is whether there is a mutual understanding or common intention between the parties

regarding their relationship. Where such a common intention is found, be it as independent contractor or employee, the test set out in *Wiebe Door* is then to be applied by considering the relevant factors in light of that mutual intent for the purpose of determining if, on balance, the relevant facts support and are consistent with the common intent. As noted however by Sharlow J.A in *Royal Winnipeg Ballet* at para. 61:

> I emphasize again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded. (emphasis added)

[34] There appears to have been some trouble in the application of the approach set out in *Royal Winnipeg Ballet*: see *City Water International Inc. v. Canada*, 2006 FCA 350, 355 N.R. 77; *Combined Insurance Company of America v. Canada (National Revenue)*, 2007 FCA 60, 359 N.R. 60; *Kilbride v. Canada*, 2008 FCA 335, [2009] 4 C.T.C. 114, 2009 D.T.C. 5002; and the criticism of Bowman C.J. in *Dean Lang and Sharon Lang v. M.N.R.*, above.

[35] In the case of Ontario youth residential facilities workers, at least one Tax Court of Canada judge has found, based on *Wolf*, that the intent of the parties as set out in their contract should prevail: *Woodcock Youth Centre Limited v. M.N.R.*, 2007 TCC 443; *Unison Treatment Homes for Youth v. M.N.R.*, 2007 TCC 447. Nevertheless, as Evans J.A. aptly noted in his dissenting opinion in *Royal Winnipeg Ballet*, the parties' view of the legal nature of their contract is inevitably self-serving, the parties to the contract are often not in equal bargaining positions, and the legal

characterization of a contract by the parties should not impact on third-parties relying on vicarious liability theories.

[36] However, properly understood, the approach set out in *Royal Winnipeg Ballet* simply emphasises the well-know principle that persons are entitled to organize their affairs and relationships as they best deem fit. The relationship of parties who enter into a contract is generally governed by that contract. Thus the parties may set out in a contract their respective duties and responsibilities, the financial terms of the services provided, and a large variety of other matters governing their relationship. However, the legal effect that results from that relationship, *i.e.* the legal effect of the contract, as creating an employer-employee or an independent contactor relationship, is not a matter which the parties can simply stipulate in the contract. In other words, it is insufficient to simply state in a contract that the services are provided as an independent contractor to make it so.

[37] Because the employee-employer relationship has important and far reaching legal and practical ramifications extending to tort law (vicarious liability), to social programs (eligibility and financial contributions thereto), to labour relations (union status) and to taxation (GST registration and status under the *Income Tax Act*), etc., the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole subjective discretion of the parties. Consequently, the legal status of independent contractor or of employee is not determined solely on the basis of the parties declaration as to their intent. That determination must also be grounded in a verifiable objective reality.

[38] Consequently, *Wolf* and *Royal Winnipeg Ballet* set out a two step process of inquiry that is used to assist in addressing the central question, as established in *Sagaz* and *Wiebe Door*, which is to determine whether the individual is performing or not the services as his own business on his own account.

[39] Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

[40] The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties intent as well as the terms of the contract may also be taken into account since they colors the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, *i.e* whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.

[41] The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

The application of the test

[42] In this case, the Tax Court Judge appears to have proceeded in an inverse order, dealing with the parties' intent as set out in their mutual contracts at the end of his analysis. The first step of the analysis should always be to determine at the outset the intent of the parties and then, using the prism of that intent, determining in a second step whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of independent contractor. However, in the circumstances of this case, the inverse order of analysis followed by the Tax Court Judge is not in itself sufficient to vitiate the decision since the evidence, taken as a whole, supports the conclusions reached by the judge.

[43] In all these appeals, the appellants drafted contracts stipulating that the mutual understanding of the parties was that they would be providing their services as independent

contractors, which each of the three concerned workers signed. Ms. Allaire reported her income from the contract for income tax purposes as income earned as an independent contractor, and though the evidence is not clear for the other two workers, they presumably did the same. In light of this evidence, and in the absence of any claim of duress or of trickery, the intent of all the parties was to have the workers act as independent contractors for Connor Homes and Connor Group Homes. The issue before the Tax Court Judge was therefore whether this contractual intent was reflected in reality, *i.e.* whether the contract's legal effect was in fact one of an independent contractor or of an employer-employee relationship.

[44] Despite the stated intent of the parties to characterize their relationship as that of independent contractors, the facts of this case suggest otherwise. Based on a review of these facts, I cannot conclude that the Tax Court Judge erred in finding that the concerned individuals were not providing their services to the appellants as their own business on their own account. Rather, as a result of the significant degree of control the appellants exerted over the three individuals in the execution of their tasks, the limits on their ability to profit, and the absence of any significant financial risks or investments, in essence, these individuals were acting as employees of the appellants.

[45] First, it is clear from the record that the appellants exercised a significant degree of control over the duties exercised by the individuals and the manner in which these duties were carried out. Connor Homes drafted and issued its own Policies and Procedures Manual, based on the requirements of the provincial legislation relating to child and family services. This manual defined

and dictated the procedures to be followed with respect to the provision of services within the homes. The manual was provided to the individuals, both area supervisors and child and youth workers alike. As part of their contracts, the individuals were required to abide at all times by the manual and the policies and rules of conduct it contained (Testimony of Robert Connor AB vol 2 page 175, lines 18 to 24, pages 191-192, lines 20 to 25; 1 to 20).

[46] Beyond the manual, the appellants also controlled the individuals' duties on a day-to-day basis. The appellants dictated administrative tasks and imposed mandatory attendance at staff meetings to discuss work procedures, work scheduling and day-to-day occurrences in the homes. The appellants also provided guidance and instruction to the individuals regarding how to manage difficult situations with clients, as well as marketing activities to be undertaken on their behalf (Testimony of Rollie Allaire AB vol 2 page 414 line 15 to page 416; line 19; Zoe Fulton page 509 lines 10-16; Jodi Greer pages 463 and 464 lines 6 to 25 and 1 to 17).

[47] The degree of control that the appellants exercised over the work of the individuals resembled that of an employer. Indeed, it was acknowledged at trial that the duties exercised by the concerned workers were, in fact, the same as those exercised by the appellants' employees (Testimony of Robert Connor AB vol 2 page 207, lines 9-17).

[48] Furthermore, the appellants also imposed a number of financial limits on the individuals. Remuneration for the workers was set either at a fixed hourly rate determined as a function of the Minister's allotment for child and youth workers, or at a rate *per diem* per child for area supervisors

(Testimony of Robert Connor AB page 224, lines 14-23 and page 227, lines 10-12; page 247, lines 15-20). While in theory the individuals retained the ability to adjust their pay through their hours of work, the degree of control exercised by the appellants over their schedules effectively prevented the individuals from realizing this benefit. Indeed, the appellants determined the type of hours the individuals could work, as well as scheduled the actual hours of work, which could amount to a standard 40 hour work week (Testimony of Ms Rollie Allaire, AB vol 2 page 394, lines 3-12; page 409, lines 17-25; Testimony of Ms. Zoe Fulton page 516, lines 18-25). Though the workers could refuse certain schedules which were offered to them, this arrangement closely resembled that of employees employed in the service industry who retain a limited ability to adjust their work schedules to their personal schedules.

[49] The individuals were not required to take any financial risks, nor were they required to take out loans or make any investments in the form of capital assets, specialized equipment or working operating funds. The only requirement was that each worker be available to take calls on a portable telephone and have access to a computer, a requirement which is today commonly expected from many employees, and which cannot alone be an indication that the relationship is one of contracted services.

[50] In this appeal, the appellants emphasized that the workers were expected to use their motor vehicles to access the sites where their work was performed and to occasionally see to the transportation of some of the children. This, the appellants argue, is a factor which should have been considered in determining the workers status as independent contractors. The extensive use of the

workers' vehicles for work related activities was certainly a factor which the Tax Court Judge should have considered in his analysis. However, the analysis cannot rest on this factor alone. Rather, as noted above, it is the combined force of the whole scheme of operation which must be considered.

[51] Taken together, the reality of this arrangement by which the workers' tasks were dictated by manuals and carried out under the supervision of the appellants, where rates of pay were fixed and hours scheduled by the appellants, and where no significant financial risks or investments were required of the concerned workers, is not sufficient to qualify the legal relationship between the parties as that of an independent contractor arrangement.

[52] When considered as a whole, the evidence clearly suggests that the legal relationship between the appellants and the concerned individuals operated in a manner consistent with that of employer-employee rather than that of an independent contractor. The evidence abundantly shows that irrespective of the terms set out in their respective contracts, the individual workers in this case were not each operating an independent business for their own account. Rather, they were working as employees in the appellants' businesses and for the appellants' benefit.

[53] The appellants have consequently failed to convince me that the Tax Court Judge made a palpable and overriding error in assessing the evidence and drawing the conclusion that these individuals were employees employed in insurable and pensionable employment. I would therefore

dismiss the appeals with one set of costs to be shared equally between Connor Homes and Connor Group Homes.

"Robert M. Mainville"

J.A.

“I agree
J.D. Denis Pelletier”

“I agree
Johanne Gauthier”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-117-12 A-118-12 A-122-12 A-125-12 A-126-12 A-127-12 A-120-12 A-128-12

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA, DATED MARCH 21, 2012, DOCKET NO's: 2010-950, 2010-951, 2011-237, 2010-949, 2010-948, 2011-239, 2011-242, 2011-241.

STYLE OF CAUSE:	Connor Homes v. M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 31, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	PELLETIER J.A. GAUTHIER J.A.
DATED:	March 20, 2013

APPEARANCES:

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