Docket: 2005-3869(EI)
2005-3870(CPP)

BETWEEN:

KWIKER TRUCK AND TRAILER SERVICES LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on August 29, 2006, at Toronto, Ontario,

By: The Honourable Justice A.A. Sarchuk

Appearances:

Agent for the Appellant:	Joel Hoffman
Agent for the Respondent:	Kelly Foote (Student-at-law)

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are dismissed and the decisions of the Minister of National Revenue on the appeals made to him under section 91 of the *Act* and under section 27 of the *Plan* are confirmed.

Signed at Toronto, Ontario, this 20th day of November, 2006.

"A.A. Sarchuk"

Sarchuk D.J.

Citation: 2006TCC636
Date: 20061120
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2005-3870(CPP)

BETWEEN:

KWIKER TRUCK AND TRAILER SERVICES LTD.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Sarchuk J.

[1] On August 3, 2005, the Minister of National Revenue informed the Appellant that it had been determined that Ronald Steeves was (i) employed by it in insurable employment during the period January 1, 2004 to October 8, 2004, pursuant to paragraph 5(1) (*a*) of the *Employment Insurance Act*; and (ii) was employed in pensionable employment during the period in question pursuant to paragraph 6(1) (*a*) of the *Canada Pension Plan*. The Appellant disagreed with the Minister's decisions and filed appeals to this Court on October 31, 2005.

[2] The Appellant's business is primarily the provision of mobile mechanical repairs to trucks and trailers. James Dinner is its sole shareholder, president and director. His wife, Haling Dinner, was vice-president and during the relevant period of time, managed the Appellant's office.

[3] Dinner testified that he held three certificates of qualification as motor vehicle mechanic, automotive service technician and truck and coach technician. In 1998, he was attending the University of Toronto "to become a teacher" and now holds a certificate of qualification, Ontario College of Teachers, Transportation

Technology. In order to cover his absence during the time he was in school,[1] it became necessary to hire a "subcontractor" who was licensed to do general mechanical repairs, fuel and air brake problems and other "simple breakdowns". For this purpose, the Appellant hired A-1 Truck and Trailer Service (A-1), which, Dinner said, was owned by Steeves who had a certificate of qualification as a trailer mechanic. Although there was no written contract outlining the service to be provided, he alleged that there was an understanding that A-1 would be called to "perform jobs I could not handle". Furthermore, he said the arrangement included the provision of a truck since Steeves did not own one, and since the Appellant had a "spare", it was leased to A-1 at a cost of $700 per week. In addition, a substantial number of bolted-in fixtures were provided with the truck, as well as some small equipment, a two-way radio, a cell phone unit and a "gas card". The estimated value of this equipment and truck was approximately $80,000. In addition to the foregoing, the Appellant also bore the liability insurance costs with respect to the services being provided.

[4] Dinner further testified that the rate of pay for A-1's services was based on the going rate for other subcontractors in the market, i.e. $40 per hour. This amount, he said, was reduced by the fact that the Appellant provided the truck and paid for the fuel costs. In his words, it was necessary "to add in the costs of the vehicle rental and the fuel on top of his hourly rate to come up with a dollar figure of around the going rate for other subcontractors in the market". He maintained that this calculation was formulated and agreed upon in the course of their negotiation in 1998, and led to the acceptance by Steeves of an hourly rate of $25. According to Dinner, pursuant to this arrangement, Steeves provided his own tools. He was not required to report every morning for assignments, nor was there any control or supervision with respect to the manner in which the required truck repairs were performed by Steeves. Dinner further observed that at all times, Steeves was entitled to "take on his own clientele".

[5] Steeves' recollection of the agreement was somewhat different. He said that when he began working for the Appellant in 1998, he was paid at the rate of $20 an hour, which was increased a few years later to $25 an hour. He denied that there were any deductions incorporated into the arrangement and when asked whether he was required to pay $700 per week for the rental of the truck and tools, his

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[1] Although the evidence is not entirely clear, it would appear that during the year in issue, Dinner was no longer a student, but was in fact teaching from 8:00 a.m. to 2:00 p.m., five days a week.

response was “I never paid anything”. Steeves did not dispute that the cheques were made payable to A-1, nor does he dispute that Dinner suggested that he should open a company account. In fact, he said that as a result of their initial discussion, “I was under the impression from Jim that I was going to start my own business and that I would have lots of write-offs and I would make lots of money. I made money, but there was no write-offs to consider it a business”. Asked by counsel for the Respondent:

> Q. Whose idea was it to set up this business?
>
> A. Jim Dinner.
>
> Q. Dinner testified that you paid rental for the truck and some tools of about $700 per week.
>
> A. That is incorrect.
>
> Q. Were there any tax deductions that you could claim for the $700 a week.
>
> A. I didn’t even know there was $700 a week taken off me.

[6] In the course of cross-examination, Steeves was asked:

> Q. Earlier evidence was given that, at that meeting, it was discussed, the method remuneration being a gross dollar with deductions because of the use of the company’s truck, which you were going to pay for, would equal a net dollar. Is that correct? Do you recall that?
>
> A. No, that is not correct.
>
> Q. What is correct?
>
> A. We discussed a $20 wage, that I would be using his van in the driveway to do the roadwork and that was, more or less, it.

[7] According to Steeves, he was required to do both “road repairs and yard repairs” and “most mornings I would stop by the house which was their office and then I would go from there and that wherever there was work to be done, his wife would tell me where I needed to go”. As well, he said, he would receive service calls while on the road or if necessary, would return to the yard and do work. When he completed a repair job, his practice was to “write my daily work down on a piece of paper and then at the end of the day, I would turn my work into Jim at

his house or leave it in his mailbox. He would invoice it and send it off". It is not disputed that the amounts charged to the clients was determined solely by the Appellant.

Appellant's submission

[8] The Appellant's representative submitted that Steeves worked independently within the defined framework. More specifically, he was not supervised, was free to work for others, was entitled to refuse work or to complete a job, and at all relevant times provided his own tools and had a significant investment in them. Furthermore, Steeves was not required to perform the work personally and had the right to engage a qualified person to do the work if necessary. As well, there was no control by the Appellant since "A-1 Truck and Trailer Service had its own discretion and powers to either show up to work or not show up to work". The Appellant's representative also noted that "there were no benefits whatsoever nor or any type of protection – none was provided" to A-1 or Steeves.

[9] With respect to the arrangement between the Appellant and Steeves, reference was made to a series of documents described by the representative as "invoice summaries with supporting material submitted by Steeves for five periods in 2004".[2] The first page of each exhibit reflected Dinner's "internal accounting from my accountant". Photocopies of cheques issued by the Appellant to A-1 for the services rendered for that period were on the second page, and the remaining pages were Steeves' daily records with respect to the calls responded to, the services rendered and the time it took to perform the necessary repairs.

[10] Reference was made by the Appellant's representative to the calculation on the first page of each "invoice summary" which, he submitted, confirmed the fact that "my client was paying a gross amount of salary and deducting operating costs", thereby reducing the agreed $40 per hour to $25 per hour and that A-1 was "just receiving a net cheque". These invoices were described by him as "an internal document prepared by my client that he rationalized in his own mind as to what those specific costs would accumulate to in any given period" and that "in those numbers, it is the recovery that is made from the Appellant. In other words, my client was paying a gross amount and deducting operating costs. My client was always just receiving a net cheque. I mean A-1 was just receiving a net cheque".

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[2] Exhibits A-2 to A-6.

[11] The Appellant contends that A-1 was an independent contractor in which Steeves had a capital investment of approximately $9,000 reflecting the tools he required to perform the necessary repairs. Furthermore, A-1 had "established a business presence by continually keeping open his business account and never advised my client of any kind of status, change of status". Accordingly, given the facts before the Court and applying the criteria set out in *Wiebe Door Services Ltd. v. M.N.R.*[3] and *Blues Trucking Inc. v. M.N.R.*,[4] no conclusion can be reached other than "at all times that Ron was tendering service, was rendering a contract for service".

Respondent's submission

[12] Counsel for the Respondent contends that at all relevant times, Steeves was an employee of Kwiker, the payor, and not an independent contractor. He submitted that applying the tests set out in *Wiebe Door* and by the Supreme Court in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,[5] it is apparent that despite Dinner's characterization of the working relationship between Steeves and Kwiker, the evidence establishes that Steeves was retained to perform specific duties as an employee. More to the point, Steeves had little control over his hours, and the nature of the services provided by him were at the core of Kwiker`s business, i.e. the repair of "trucks and trailers as they broke down, on an emergency basis". This, counsel argued, establishes the existence of a substantial integration in the Kwiker organization.

[13] In the course of his submissions, counsel also made reference to a letter from the Appellant "to whom it may concern", dated July 15, 2004, signed by Halina Dinner, office manager.[6] This letter stated:

> This is to confirm that Ron Steeves is an employee of this company and has been since June 1998.

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3 87 DTC 5025 (F.C.A.).

4 98-898(UI), 98-899(UI), 98-135(CPP) and 98-136(CPP).

5 [2001] 2 S.C.R. 983.

6 Exhibit R-2.

> Mr. Steeves requested that we confirm that his hourly rate is $25 per hour and is paid for a minimum of 40 hours per week. He does, on a regular basis, put in for several hours of overtime.
>
> Should you require any further confirmation you may contact me at 416-684-1048.

Counsel noted that Steeves identified the letter and testified that he received it for the purpose of applying for a bank loan.

[14] Given the above facts, counsel submitted that the Appellant failed to demonstrate that the Respondent erred in making its decision that Steeves was at all relevant times an employee of the Appellant.

Conclusion

[15] The issue before the Court is whether Steeves was an "employee or independent contractor". This question has been dealt with on a number of occasions during the past few years and there has been a substantial change with respect to the appropriate tests and how they are to be applied. This development was most thoroughly analyzed by Major J. in *Sagaz*, in the course of which he made particular reference to comments by MacGuigan J.A. in *Wiebe Door*, and stated:

> 46 In my opinion, there is no universal 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.

[16] The issue in this appeal is whether the services provided to Kwiker by Steeves during the period January 2004 to October 2004 were performed by him as a person in business on his own account. Although there was evidence that at the commencement of their relationship in 1998 consideration was given by both to the incorporation of A-1 for the purpose of carrying on business. It is not disputed that Steeves initially showed interest in Dinner's suggestion that it would be practical for him to incorporate A-1. This decision was predicated in good measure on Dinner's offer to assist him. The evidence is clear that Steeves had no more than a marginal understanding of the requirements for incorporation, and demonstrated that he did not comprehend what that involved and what had to be done. By way of example, in the course of cross-examination, the following exchange took place::

> Q. Did you have your own client base?
>
> A. No.
>
> Q. Did you do any work on the side?
>
> A. No.

Q. Initially, when you gave evidence, you stated that the unincorporated business was really what you consider a sham due to the fact you didn't operate it as a business. Is that correct?[7]

A. What do you mean?

Q. In terms of it was a non-operating business, why go through the expenditure of registering it?

A. I was asked to open a business account.

Q. But you didn't treat it as a business account, is that correct?

A. I was under the understanding I was going to be shown how to run a business, and to start a business and run a business and that never happened.

Q. My client earlier made the statement that he did approach you on that very subject.

A. On which was that?

Q. In attempting to assist you in establishing your own business.

A. Yes.

He described his view of his relationship with Dinner as follows:

> I didn't speak to him; he requested that I open a business so that I would have tax write-offs. He was to show me how to start my business, do paperwork, what I needed, how to do billing. None of that came about.

Steeves does not dispute that initially, he believed that he began the business, stating:

A. I started it when I started working for Jim. – I started it as a business, but it didn't end up as a business.

Q. If it didn't end up as a business, what changed? If it started as a business and it didn't end that way, what changed?

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[7] At no time did Steeves describe the business as a sham.

A. I became an employee of Jim's.

and the relationship in his words, became:

> … an everyday job, going to an everyday job, it became.

[17] The testimony of Steeves' mother is also informative. Although not an accountant, she has been "doing taxes for people" for a number of years. After Steeves was hired by the Appellant, she suggested that he seek the services of an accountant because it was her "understanding that he was going to have a business". However, the accountant advised him that there was "nothing for him to deduct" and as a result, she agreed to do his returns. In so doing, she said that in 1998 and 1999, the amount received from Kwiker was entered as a "gross amount as if it was a business or self-employed" and added that "the amount was the same on both, for the gross and the net, because he didn't have any deductions to make". When asked why there were no deductions to be claimed, she responded:

A. Because all the write-offs were Jim's.

Q, Are you saying that all the expenses incurred were Jim's?

A. Everything.

Q. Your son didn't have any expenses of his own?

A. No.

She testified that after the first two years, further consideration was given with respect to the manner in which his income was being reported and subsequently, in all of the following years, income from Kwiker was reported as earned income.

[18] There are a number of factors that have led me to conclude that the Appellant's submission that Steeves was an independent contractor must be rejected. First, there is no evidence that at any time during the more than six years Steeves worked for the Appellant, he ever entered into a contract with any competitors nor did he place himself on the market as an independent contractor engaged in the same business as Kwiker. As well, there is no evidence to support the Appellant's proposition that there was a degree of financial risk on the part of Steeves arising out of his employment with Kwiker. In fact, as Dinner conceded, Kwiker was required to "have double liability insurance in case of an accident. If a person was coming in, that liability insurance also covered subcontractors and any

employees that I had at the time. It was a requirement for me to do work on certain types of vehicles; it only makes sense that it is my liability insurance". On the other hand, Steeves did not carry professional indemnity insurance which he clearly would have required if he was carrying on his own business.

[19] Much was made by the Appellant's representative regarding the arrangement alleged to have been reached with respect to the vehicle. There is no question that it was a specialized unit designed for the services required by Kwiker's clientele. In this particular case, it is difficult to understand the Appellant's rationale regarding the "rental of equipment". Aside from the fact that Steeves denied such an arrangement existed, it is also a fact that he was never provided with a statement of account with respect to the alleged rental fees, nor did he ever claim that amount as a business expense.

[20] Furthermore, Steeves did not arrange the order in which he serviced the Appellant's customers, and Kwiker knew at all times where the Appellant was and what customers he was providing service to at any given time. That indicates a degree of control that is more likely found in employment than in respect of an independent contractor. The issue of ownership of tools is also in favour of employment and not of an independent contractor. The only relevant tools that the Appellant owned related to hand tools. On the other hand, without the specialized equipment provided by the Appellant, the tasks could not have been carried out. Finally, on the issue of profit and risk of loss, there is no evidence whatsoever before the Court that can lead to a conclusion other than there was virtually no risk of loss on the part of Steeves in the course of his employment.

[21] It is not possible, given the facts before the Court, to conclude that Steeves was in business on his own account. There was no financial risk taken by Steeves, he had no responsibility for investment and management, and had no opportunity for profit in the performance of his duties. The Appellant's insistence that Steeves was being charged $700 a week for the truck rental is questionable. If that had been the case, it would have been logical for Steeves or A-1 to have insisted on an invoice to establish the existence of a cost of doing business. The failure to do so is consistent with his testimony that the promised assistance with respect to the commencement of a business was never acted upon.

[22] For the foregoing reasons, I have concluded that Steeves was an employee and not an independent contractor. Accordingly, the appeals are dismissed.

Signed at Toronto, Ontario, this 20th day of November, 2006.

"A.A. Sarchuk"

Sarchuk J.

CITATION:	2006TCC636
COURT FILE NO.:	2005-3869(EI) and 2005-3870(CPP)
STYLE OF CAUSE:	KWIKER TRUCK AND TRAILER SERVICES LTD. AND M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 29, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice A.A. Sarchuk
DATE OF JUDGMENT:	November 20, 2006

APPEARANCES:

Agent for the Appellant:	Joel Hoffman
Agent for the Respondent:	Kelly Foote (Student-at-law)

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Firm:	N/A
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