Docket: 2006-1123(CPP)

BETWEEN:

QUANTUM FITNESS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Quantum Fitness Inc. (2006-1124(EI)) on April 26, 2007
at Saskatoon, Saskatchewan

Before: The Honourable Justice L.M. Little

Appearances:

Agent for the Appellant:	John Pearce
Counsel for the Respondent:	Ainslie Schroeder and Melissa Danish (Student-at-Law)

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Calgary, Alberta, this 14th day of June 2007.

"L.M. Little"

Little J.

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Little J.

Citation: 2007TCC280
Date: 20070614
Dockets: 2006-1123(CPP)
2006-1124(EI)

BETWEEN:

QUANTUM FITNESS INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Little J.

A. FACTS:

[1] The Appellant was incorporated under the laws of the Province of Saskatchewan.

[2] The shares of the Appellant were owned by John Pearce and his wife Catherine Pearce. Catherine Pearce was the Manager of the Appellant.

[3] The Appellant owned and operated two fitness centres in the City of Saskatoon.

[4] The Appellant entered into a license agreement with "Body Training System" ("B.T.S."). Body Training System, an organization based in the United States, granted license agreements to various fitness facilities in the United States and Canada.

[5] The Appellant was the only licensed facility in Saskatoon that used the B.T.S. system.

[6] The Appellant solicited and obtained the customers for the fitness facilities.

[7] The customers were members of the Appellant's fitness facilities.

[8] The Appellant hired individuals to teach various fitness programs (the "Workers").

[9] Each of the Workers was qualified as a B.T.S. fitness instructor.

[10] The Workers were hired as B.T.S. instructors, fitness instructors, aerobic instructors, personal fitness trainers and group fitness instructors.

[11] Several of the Workers also performed administrative duties such as scheduling, monitoring classes, and working at the front desk at the Appellant's facilities.

[12] The Workers were restricted by the terms of the Agreement with B.T.S. The B.T.S. Agreement provided that the Workers could only provide B.T.S. instruction at the Appellant's two facilities in Saskatoon.

[13] The Workers were paid a set amount per class taught on the following basis:

- One Worker received $14.00 per class;
- 15 Workers received $15.00 per class;
- Three Workers received $20.00 per class;
- Two Workers received $22.00 per class.

[14] Several Workers provided personal trainer services. These Workers received a percentage of the fees charged for personal training.

[15] The Appellant arranged the classes and prepared the class schedules for the clients and the Workers.

[16] The Workers kept a record of the number of classes that they taught.

[17] The Appellant paid the Workers based on the Appellant's records.

[18] The Workers could be replaced by another Worker. If there was a replacement, the Appellant paid the replacement Worker. However, the replacement Worker had to be someone who worked for the Appellant.

[19] The Appellant provided a furnished work location, gym and training equipment, a dance studio, a stereo, a microphone, mats and chorography.

[20] The Workers provided their own shoes, fitness apparel and frequently their own music.

B. ISSUES

[21] The issues to be decided are whether the Workers were employed by the Appellant for the purposes of the *Employment Insurance Act* (the "*Act*") and whether the Workers were pensionable for the purposes of the *Canada Pension Plan* (the "*Plan"*) for the period January 1, 2003 to April 30, 2005 (the "Period").

C. ANALYSIS AND DECISION

[22] Approximately 25 Workers provided fitness training services at the Appellant's two locations. Each of the 25 Workers has been treated by the Canada Revenue Agency (the "CRA") as employees for the purposes of the *Act* and the *Plan*.

[23] The appeals were heard in Saskatoon, Saskatchewan. During the hearing, Counsel for the Respondent called three of the Workers to give evidence. (Sharon Courtney, Angeline Crozier and Kim Tam)

[24] In order to determine if the Workers were employees of the Appellant, I have referred to a number of Court decisions.

[25] In *671122 Ontario Limited* v. *Sagaz Industries Canada*, ("*Sagaz*") [2001] S.C.J. No. 61, the Supreme Court of Canada dealt with the issue.

[26] Justice Major, speaking for the Court, reviewed the various tests for determining whether a person is an employee or an independent contractor. Justice Major said that he agreed with the statement by MacGuigan J.A. of a four-in-one test as set out in *Wiebe Door Services Ltd,* v. *M.N.R.*, 87 DTC 5025.

[27] In *Sagaz,* Justice Major said at paragraphs 44, 46, 47 and 48:

> 44. According to MacGuigan J.A., the best synthesis found in the authorities is that of Cooke J. in *Market Investigations Ltd* v. *Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pp. 737-38 (followed by the Privy Council in

Lee Ting Sang v. *Chung Chi-Keung*, [1990] 2 A.C. 374, per Lord Griffiths, at p. 382):

> The observations of LORD WRIGHT, of DENNING L.J. and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. [Emphasis added]

…

46. In my opinion, there is 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 or 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.

[28] It should be noted that Justice Major has indicated that the central question to be decided in cases such as these is whether the person who has been engaged to perform the services is performing them as a person in business on his own account or is performing them in the capacity of an employee. In order to make this determination the four criteria set out in *Wiebe Door (supra)* are factors to be considered.

[29] I will comment upon the four factors set out by Mr. Justice MacGuigan in *Wiebe Door (supra)*.

1. Control

[30] The evidence that was before me indicated as follows:

(a) The Workers were subject to the general supervision of Catherine Pearce, the Manager of the Appellant and one of the shareholders of the Appellant.

(b) The Appellant arranged the classes and prepared the class schedules for the Workers.

(c) The Appellant paid the Workers based on the Appellant's records.

(d) The evidence also indicated that the Workers could be replaced by another Worker but the Worker had to be certified by B.T.S.

(e) If there was a replacement Worker, the Appellant paid the replacement Worker i.e. the Workers did not pay for their replacement.

(f) The Workers worked at the Appellant's premises on the fitness and gym equipment owned by the Appellant.

(g) The three Workers who testified said they were required to attend staff meetings without any payment for the time involved in attending the meetings.

(h) The three Workers who testified understood that if they worked for the Appellant they could not work in any other fitness facility. (In other words the Appellant dictated what the Workers could do when they were not working for the Appellant.)

(i) Two business cards were filed by Counsel for the Respondent. (See Exhibits R-2 for Nanette Kowalski and Exhibit R-3 for Sharon Courtney) These business cards indicate that the individuals mentioned were associated with the Appellant. The business cards did not show that the two Workers were independent contractors.

[31] Based on the evidence presented to me, I have concluded that the Workers were effectively controlled by the Appellant in the same manner that employees are controlled by an employer.

2. Ownership of Tools

[32] As noted above the Appellant provided a furnished work location, gym and training equipment, a dance studio, a stereo, a microphone, mats and choreography. The only items provided by the Workers were their shoes, their gym apparel and their music.

3. Chance of Profit and Risk of Loss

[33] As indicated above the Workers were paid based upon the classes that they taught. The evidence indicates the Workers did not have any of the "day-to-day" costs of running a business. For example, the Workers did not have to sign a lease with a landlord or deal with bad debts from customers. The Workers did not have to collect money from the customers who used the facilities. In my opinion, the evidence established that the Workers did not have an opportunity to share in the profits of the Appellant nor did the Workers have the risk of suffering a loss.

4. Intent of the Parties

[34] Mr. Pearce, the agent of the Appellant and one of the Appellant's shareholders said that each of the Workers signed agreements which indicated that the Workers were independent contractors. However, no copy of the agreement was produced and the three Workers who testified as witnesses were somewhat vague as to the nature of the agreement between them and the Appellant. In this connection, one of the witnesses, Ms. Crozier, said that she accepted the agreement but that she did not understand very much about it. Another witness appeared to be vague with respect to the existence of the agreement.

[35] In *Royal Winnipeg Ballet* v. *M.N.R.*, 264 D.L.R. (4th) 634, 2006 DTC 6323, Madam Justice Sharlow of the Federal Court of Appeal quoted from the decision of Décary J.A. in *Wolf* v. *M.N.R.*, 2002 DTC 6853 at paragraph 60:

> 60. … One principle is that in interpreting a contract what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties understanding of their contract must always be examined and given appropriate weight.

[36] Madam Justice Sharlow said at paragraph 61:

> 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' statement 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 statement will be disregarded

[37] I have concluded that the comments made by Madam Justice Sharlow in the *Royal Winnipeg Ballet* case *(supra)* are very important. However, I do not believe that the comments contained in the *Royal Winnipeg Ballet* case (*supra*) would apply to this case because, in my opinion, there was no clear, common understanding as to the nature of the relationship between the Appellant and the Workers. In the *Royal Winnipeg Ballet* case there was what might be described as "informed intent". That is not the case here. Furthermore, as noted, a copy of the agreement could not be located. In summary, it comes down to a question of credibility. I do not accept the statements made with respect to the agreement.

[38] I have also reviewed the decision of Justice McArthur of this Court in *557755 BC Ltd* v. *M.N.R.*, 2005 TCC 663. In that case Justice McArthur reviewed the *Wiebe Door* case (*supra*) and the *Sagaz Industries* case (*supra*) and held that a fitness instructor was an employee not an independent contractor. I agree with the conclusion of Justice McArthur.

[39] In order to deal with the various points noted above, I believe that it is useful to again refer to the comments made by Justice Major in *Sagaz Industries* case (*supra*) where he indicated that the central question to be decided in cases such as these is whether the person who has been engaged to perform the services is performing them as a person in business on his own account or is performing them in the capacity of an employee. (underlining added) (See also *Nametco Holdings Ltd* v. *Minister of National Revenue* 2002 FCA 474 where Justice Strayer relied on the same quotation from Justice Major)

[40] In deciding whether the Workers were carrying on their own business I note the following points:

(a) None of the Workers were registered for G.S.T. purposes.

(b) None of the Workers carried their own insurance.

(c) None of the Workers had their own personal business card i.e. the two business cards presented indicated that the Workers were "connected with" the Appellant.

(d) The Workers did not have to locate their own customers.

(e) The Workers did not pay for any advertising on the radio, on the television or in newspapers.

D. CONCLUSION:

[41] On the evidence before me I have concluded that it cannot be said that the Workers were performing their services as a person carrying on their own business.

[42] Based on the evidence before me and based upon an analysis of the various court decisions I have concluded that the Workers were performing their services as employees of the Appellant.

[43] The appeals are dismissed, without costs.

Signed at Calgary, Alberta, this 14th day of June 2007.

"L.M. Little"

Little J.

CITATION:	2007TCC280
COURT FILE NOS.:	2006-1123(CPP) and 2006-1124(EI)
STYLE OF CAUSE:	Quantum Fitness Inc. and The Minister of National Revenue
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	April 26, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice L.M. Little
DATE OF JUDGMENT:	June 14, 2007

APPEARANCES:

Agent for the Appellant:	John Pearce
Counsel for the Respondent:	Ainslie Schroeder and Melissa Danish (Student-at-Law)

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

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