

Docket: 2004-2583(EI)/2004-2585(CPP)
2004-2586(EI)/2004-2588(CPP)

BETWEEN:

CHERYL WEGENER and LARRY EMMERSON
O/A DIRECTOR'S CHOICE,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on March 14 and 15, 2005 at Calgary, Alberta

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellants: Larry Emmerson

Counsel for the Respondent: Carla Lamash and Elena Sacluti

JUDGMENT

The appeals in respect of assessments made under the *Employment Insurance Act* and the *Canada Pension Plan* are allowed, without costs, and the assessments are vacated.

Signed at Ottawa, Canada, this 25th day of May, 2005.

“J. Woods”

Woods J.

Citation: 2005TCC362

Date: 20050525

Docket: 2004-2583(EI)/2004-2585(CPP)

2004-2586(EI)/2004-2588(CPP)

BETWEEN:

CHERYL WEGENER and LARRY EMMERSON
O/A DIRECTOR'S CHOICE,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] These are appeals by Cheryl Wegener and Larry Emmerson in respect of assessments under the *Employment Insurance Act* and the *Canada Pension Plan* for 2000 and 2001. The appellants carried on business in partnership under the name Director's Choice in Calgary. The Minister of National Revenue issued the assessments for failure to pay, deduct and remit employment insurance and Canada pension plan contributions in respect of a number of persons who had contracted with Director's Choice to be their agent in locating work as extras on movie sets. In these reasons, I will use the term "Director's Choice" to refer to the appellants jointly.

[2] At the hearing, the Minister abandoned his argument that the workers were employees of Director's Choice within the common law meaning of that term. Instead, the Crown relied solely on regulations that extend coverage under the *Employment Insurance Act* and the *Canada Pension Plan* to persons who obtain work through placement agencies. The only question in this appeal is whether Director's Choice is subject to these regulations.

[3] The following are the relevant provisions.

Paragraph 6(g) of the Employment Insurance Regulations made under the *Employment Insurance Act*:

6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:
[...]
- (g) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.

Section 7 of the Insurable Earnings and Collection of Premiums Regulations made under the *Employment Insurance Act*:

7. Where a person is placed in insurable employment by a placement or employment agency under an arrangement whereby the earnings of the person are paid by the agency, the agency shall, for the purposes of maintaining records, calculating the person's insurable earnings and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the person.

Section 34 of the Calculation of Contribution Rates Regulations made under the *Canada Pension Plan*:

- 34.(1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual.
- (2) For the purposes of subsection (1), "placement or employment agency" includes any person or organization

that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

Facts

[4] During the years in question, Director's Choice operated an agency for persons looking for work as extras or, using the terminology in the industry, "background performers." Apparently, Calgary had several agencies doing this type of work at the relevant time.

[5] Mr. Emmerson, who represented both appellants at a two-day hearing, stated at the outset that he thought the assessments were most unfair. First, he strongly objected to the categorization of Director's Choice as a placement agency. He also stated that there was no need to impose the statutory obligations on agencies such as Director's Choice because the production companies who hired the performers took care of all payroll matters. Finally, Mr. Emmerson stated that as far as he knew Director's Choice was the only agency in Calgary that had been assessed.

[6] In addition to their own testimony, the appellants called a person who operates a similar agency, James Sinclair, and two individuals who had contracted with Director's Choice to be their agent, Sherrie Francis and Lana Timmermans. The Crown called two other individuals who had entered into contracts with Director's Choice, Jason Newman and Lou Ann Robson. The four witnesses who had contracted with Director's Choice provided very similar testimony.

[7] I will now describe the roles performed by the various players who are relevant to the appeals.

[8] *Director's Choice* - Persons who are interested in doing background work can register with Director's Choice by paying a small fee, providing basic personal information and allowing a photo to be taken for the agency's directory. Production companies filming in Calgary that need background performers contact Director's Choice and from its directory choose performers suitable for their particular needs. Occasionally, the production companies do not need to select specific people and they simply ask Director's Choice to arrange for a number of people to attend on the set on a particular day.

[9] Director's Choice telephones the persons selected and asks them if they are available to work on the appointed day. If a person agrees to do the job, Director's Choice informs them where to report for work and tells them of any particular clothing requirements. If a performer agrees to a job but at the last minute cannot attend, the person usually calls Director's Choice who tries to find a replacement. Otherwise, the performer is expected to be present on the movie set on the appointed day.

[10] A person who registers with Director's Choice enters into a written contract (Exhibit A-3) that obligates Director's Choice to attempt to place them in the role of an extra or principal. Although the contract refers to principal roles, it appears that this was not part of Director's Choice's business. In order to meet the requirements of the production companies, performers agree to contact only Director's Choice and specifically agree not to contact the production companies directly about roles or call times.

[11] The contract authorizes Director's Choice to withhold 15 percent of performers' earnings as compensation for acting as their agent. Director's Choice ensures payment of the fee by requiring that the remuneration paid by the production companies be sent to it. The cheques issued by the production companies are made out in the names of both the performers and Director's Choice and are mailed to Director's Choice. Statements summarizing the pay and copies of time sheets are included with the cheques. Director's Choice cashes the cheques and then sends its own cheques to performers for the amount received less its 15 percent fee. Director's Choice includes with the cheques the pay summaries and time sheets sent to it by the production companies.

[12] The 15 percent fee charged by Director's Choice is the amount that the association representing background performers recommends as a maximum that agencies should charge.

[13] *Production Companies* - When performers report for work on the movie set, they fill out a form signed by both the performer and the production company. Two forms were entered into evidence at the hearing. The two documents, Exhibits A-4 and R-4, are similar but not identical and are typical of the forms that all background performers are asked to sign.

[14] The first part of the form is described as a declaration of residency. It states that the declaration is required by income tax regulations and needs to be signed by "individuals who provide services to the Production as an Employee of the

Production Company" to enable the production company to claim an income tax credit. Although the form uses the term "employee," the performers were not treated by the production companies as employees for purposes of income tax source deductions. The following statement in the form describes the relationship between the production company and background performers and suggests that the production company pays them for services rendered:

The intent is to show that payments made by the Production for Canadian services are taxable to the individual (Canadian resident) who receives such payments and are directly attributable to the making of the Production.

[15] The second part of the form is a consent regarding use of the performer's picture and voice. One of the two forms entered into evidence contains the following sentence regarding remuneration to be paid to the performer:

In consideration of the grant of these rights, R.R. FILMS INC., hereby agrees to pay the undersigned the rate of \$7.00 (Seven Dollars) per hour and 1.5 X the rate after 8 hours.

[16] The third part contains the performer's contact information and SIN number. The address given in both forms is the address of Director's Choice.

[17] The last part of the form is a time sheet. It has a space for noting hours worked and a computation of remuneration to be paid.

[18] Mr. Sinclair, who owns an agency similar to Director's Choice, testified that the actors' union, ACTRA, negotiated the hourly rates paid to background performers. It is not clear to me that ACTRA negotiated the rates throughout the 2000 and 2001 assessment period because a letter from ACTRA dated November 21, 2001 (Exhibit A-11) suggests that it had only recently negotiated rates for background performers. If the performers were not unionized throughout the assessment period, the hourly rates, which are printed on the production companies' forms, were set by the production companies. Director's Choice had nothing to do with negotiating the remuneration.

[19] *Accounting services* - The production companies hired independent agencies to provide payroll services in respect of the cast. Mr. Emmerson testified that TVD Televector Enterprises Inc. typically provided this service in the Calgary area. TVD wrote the pay cheques, prepared a pay summary for each performer (Exhibit R-3) and issued tax information (T4A) forms (Exhibit A-7). By issuing tax

slips, the production companies acknowledged that they are paying remuneration to the performers. The T4A slips represent that the background performers are not engaged as employees and no income tax is deducted at source.

[20] *Background performers* - Mr. Emmerson testified that most of the people who registered with Director's Choice only did background work for a few days. Some of the witnesses testified that they did not continue because the work was not enjoyable and others testified that they only participated as a one-time fun experience. Many of the performers had full time jobs and many others were children.

[21] The four background performers who testified stated that they had virtually no freedom on the movie set. While they waited to perform, they were kept in an area away from the rest of the cast, and when performing, every movement was under the detailed direction and control of the production company.

Analysis

[22] The regulations under the *Employment Insurance Act* and the *Canada Pension Plan* extend insurance and pension coverage to certain work arrangements involving placement agencies. The general object of the regulations appears to be to extend coverage to situations that may not otherwise qualify because the individuals are hired by a placement agency but are under the control of clients of the placement agency. The regulations are not intended to apply where the individual is hired by, and paid by, a client of a placement agency. In this case, the client is obligated to pay, deduct and remit premiums if the individual is engaged as an employee.

[23] In order for Director's Choice to be subject to the regulations, the following conditions need to be satisfied:

- (i) Director's Choice must be a placement or employment agency;
- (ii) persons who register with Director's Choice must be remunerated by the agency;
- (iii) in respect of employment insurance, the registrants must perform services for and under the direction and control of a client of Director's Choice; and
- (iv) in respect of the Canada pension plan, the registrants must perform services for a client of Director's Choice under terms and conditions that constitute a contract of service or that are analogous to a contract of service.

[24] Despite an excellent submission on behalf of the Crown, I have concluded that the condition set out in (ii), that the registrants are remunerated by Director's Choice, is not satisfied. In light of this conclusion it is not necessary that I consider whether the other conditions are satisfied and I do not express any opinion on them.

[25] In my view both the form and substance of this arrangement is that the production companies, and not Director's Choice, remunerates the performers.

[26] I would note that Director's Choice does not engage the performers. The production companies hire the performers, enter into written contracts with them and issue their pay cheques. The performers, by signing a form that gives the address of Director's Choice instead of their own, in effect give a direction for the remuneration to be mailed to Director's Choice. The result of this implicit direction is that the remuneration is paid to the performers by the production companies when the cheques are sent to the address specified in the forms. The action of the Director's Choice in issuing cheques to the performers cannot be described as paying remuneration in these circumstances. The remuneration was already paid.

[27] In these circumstances, the production companies have the obligation to pay, deduct and remit premiums under the *Employment Insurance Act* and the *Canada Pension Plan* if they engage background performers as employees.

[28] Counsel for the Crown suggests that the placement agency regulations apply even if the agency has only a limited role in respect of remuneration, as

Director's Choice did in this case. The following case authorities were cited in support: *Sheridan v. M.N.R.*, [1985] FCJ No. 230 (F.C.A.); *Silverside Computer Systems Inc. v. M.N.R.*, [1997] FCJ No. 1591 (F.C.A.), aff'g [1997] TCJ No. 38; and *Tandem Placement Services v. M.N.R.*, [2001] TCJ No. 640 (T.C.C.).

[29] In my view, these cases do not go as far as the Crown suggests because the placement agencies in all the cases played a significant role with respect to the remuneration. In *Silverside Computer Systems* and *Tandem Placement Services*, the client for whom the services were performed had nothing to do with paying the remuneration. It was handled entirely by the placement agency. The *Sheridan* case is closer to the facts in these appeals because the clients did send cheques to the placement agency which deducted a 10 percent fee before remitting the net amount to the workers. Again, though, the placement agency had a substantive role with respect to the remuneration. Heald J. of the Federal Court of Appeal stated:

She was not a mere conduit. She remitted to the nurses the amount they earned for their services which amount was dependent on their rate of pay which was determined, not by the hospitals but by the applicant. [...] If her role was that of a mere conduit, she would simply have transmitted the remuneration in toto. I think also that a mere conduit would not have been involved in fixing the quantum of the remuneration. I therefore reject this submission by counsel for the applicant.

[30] I disagree with the submission of the Crown that the facts in *Sheridan* are similar. The fact that the placement agency in *Sheridan* determined the rates of pay is a key fact. The Crown suggests that because ACTRA negotiated the hourly rates for background performers that the setting of remuneration was irrelevant in this case. As discussed above, I am not satisfied that ACTRA did negotiate the rates during much of the assessment period. Even if it did, however, the fact remains that ACTRA did not set the rates on its own but negotiated with representatives of the production companies. Either way, it was the production companies that agreed to the remuneration – not Director's Choice.

[31] In my view, none of the case authorities cited by the Crown support its position that Director's Choice paid remuneration in this case.

[32] For the above reasons, I have concluded that the placement agency regulations do not apply to the appellants in this case. The appeals are allowed, without costs, and the assessments are vacated.

Signed at Ottawa, Canada, this 25th day of May 2005.

“J. Woods”

Woods J.

CITATION: 2005TCC362

COURT FILE NO.: 2004-2583(EI)/2004-2585(CPP)
2004-2586(EI)/2004-2588(CPP)

STYLE OF CAUSE: Cheryl Wegener and Larry Emmerson o/a
Director's Choice v. M.N.R.

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: March 14 and 15, 2005

REASONS FOR JUDGMENT BY: The Honourable Justice Judith Woods

DATE OF JUDGMENT: May 25, 2005

APPEARANCES:

Agent for the Appellants: Larry Emmerson

Counsel for the Respondent: Carla Lamash and Elena Sacluti

COUNSEL OF RECORD:

For the Appellants:

Name: N/A

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario