Docket: 2002-2027(EI)

BETWEEN:

MICHAEL JUSENCHUK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Michael Jusenchuk* (2002-2028(CPP)) and *Lyte Enterprises Inc.* (2002-2040(EI) and 2002-2042(CPP)) on July 16, 2003 at Toronto, Ontario

Before: The Honourable W.E. MacLatchy, Deputy Judge

Appearances:

Counsel for the Appellant: Gregory Dimitriou

Counsel for the Respondent: Nimanthika Kaneira

JUDGMENT

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

Signed at Toronto, Ontario, this 19th day of August, 2003.

"W.E. MacLatchy"

MacLatchy, D.J.

Citation: 2003TCC549
Date: 20030819
Dockets: 2002-2027(EI)
2002-2028(CPP)

BETWEEN:

MICHAEL JUSENCHUK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Dockets: 2002-2040(EI)
2002-2042(CPP)

LYTE ENTERPRISES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

MacLatchy, D.J.

[1] These appeals were heard on common evidence, on consent, on July 16, 2003 at Toronto, Ontario.

[2] Lyte Enterprises Inc., the Payor, appealed a ruling to the Minister of National Revenue (the "Minister") for the determination of the question of whether

or not the Workers, Craig Bagshaw, Philip Greg Banks, Brian Carpenter, Frank Danek, Roland Dodman, Michael Downie, Thomas Glister, Paul Humphrey, Ghulam Mohammad, Erastus Wall, Philip West and Michael Jusenchuk, who is also an Appellant in the cases at bar, were employed in insurable and pensionable employment, while engaged by it from January 1, 2000 to August 15, 2001, within the meaning of the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*").

[3] By letter dated February 28, 2002, the Minister informed the Workers and the Payor that it had been determined that their engagement with the Payor, during the period in question, was insurable and pensionable employment for the reason that they were employed pursuant to a contract of service.

[4] The question before this Court is whether the Workers were engaged as independent contractors by the Payor (Lyte) under contracts for services or as employees under contracts of service.

[5] A brief review of the decisions of the Higher Courts that provide guidance to assist this Court in reaching its determination would be in order. In 1986, the Federal Court of Appeal in *Wiebe Door Services Ltd. and M.N.R.*, 87 DTC 5025, directed that there should be four tests that could assist the courts to determine the type of arrangement of the parties. Control, ownership of tools/equipment, chance of profit and risk of loss were the recommended tests. But it was also realized that this four-fold test should lead to the ultimate test of "examining the whole of the various elements which constitute the relationship between the parties". Lord Wright in *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161, uses the four tests to seek out the meaning of the whole transaction.

[6] Out of further decisions, the organizational test, also known as the integration test, became accepted as stated by Denning, L.J. in *Stevenson, Jordan and Harrison, Ltd. v. MacDonald and Evans*, [1952] 1 T.L.R. 101 (C.A.), at 111:

> One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.
>
> ...

[7] MacGuigan, J.A. in *Wiebe Door* (*supra*) stated at p. 5030:

> ...
>
> What must always remain of the essence is the search for the total relationship of the parties. ...
>
> ...
>
> Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright addressed the question "Whose Business is it"?

The further admonition is given:

> There is no escape for the trial judge, when confronted with such a problem, from carefully weighing all of the relevant factors, ...

[8] The recent decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 274 N.R. 366, although the issue being vicarious liability, considered the question of whether the parties had entered into a contract for services or a contract of service. Major, J. in paragraph 47 of this judgment stated:

> 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, ... 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.

[9] Recent decisions of the Federal Court of Appeal in *Wolf v. Canada*, [2002] F.C.J. No. 375 and *Precision Gutters Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 771 give further insight into a more generous interpretation of who "is deemed an employee". Mr. Justice Décary in the *Wolf* decision stated:

> 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 characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.

[10] There appears to be a shifting towards recognizing that in consulting work the parties can call themselves independent contractors and, as a result, their characterization of their relationship should not be interfered with by the Courts, bearing in mind, however, that the Courts have recognized that labelling of the relationship is not determinative (see *Standing v. Canada (Minister of National Revenue – M.N.R.*) (F.C.A.), [1992] F.C.J. No. 890 and *Wolf* (*supra*).

[11] The facts in this case need the careful consideration by this Court. The assumptions relied on by the Minister were listed in paragraphs 11(a) to (n) of the Reply to the Notice of Appeal as follows (file 2002-2027(EI)):

a) The Payor operates a trucking business which hauls freight for the Payor's clients (the "clients"), across Canada and the United States;

b) The Workers and the Appellant [Michael Jusenchuk (Micheal)] were hired by the Payor to drive the Payor's trucks to deliver the freight for the Payor's clients;

c) The Workers and the Appellant [Michael] were required to have a AZ Driver's License and have experience driving trucks;

d) The Workers and the Appellant [Michael] were required to keep logbooks of the time driven in order to comply with government regulations;

e) The Workers and the Appellant [Michael] had to comply with laws and regulations governing the trucking industry;

f) The Workers and the Appellant [Michael] reported regularly to the Payor when a load was delivered, to obtain new assignments or for other miscellaneous reasons;

g) The Workers and the Appellant [Michael] were provided with pagers;

h) The Workers and the Appellant [Michael] were required to perform their duties within timeframes which were determined by the Payor, in order to ensure clients' satisfaction and needs;

i) The Workers and the Appellant [Michael] were required to perform the services personally for the Payor;

j) The trucks and equipment used by the Workers and the Appellant [Michael] were provided by the Payor;

k) The Payor's name and authority numbers appeared on the trucks driven by the Workers and the Appellant [Michael];

l) The Workers and the Appellant [Michael] were mainly paid on a per mile basis;

m) All the costs related to the trucks and equipment including repairs, maintenance, fuel, insurance, road and bridge tolls were paid by the Payor;

n) The Payor offered the workers and the Appellant [Michael] medical, dental and life insurance coverage under the Payor's plans.

[12] The questions of control, ownership of tools, chance of profit and risk of loss must be firstly considered.

[13] Control - The concept of control in this more complicated and sophisticated environment can be a neutral item. The driver is not supervised directly at anytime because he is beyond the sight of the Payor. His job is to deliver products for clients of the Payor. The driver is called to see if he is available and wishes to work. If he wishes to work he reports to a dispatcher and is given the necessary paperwork to carry out the delivery. This would include custom forms and declarations, manifest and bills of lading and whatever was required by the driver to deliver the load. If a time limit is set by the dispatcher, it must be complied with,

and the driver must contact the dispatcher after the delivery is completed in order to be directed where to obtain a return load. It was admitted that the driver could return empty but he would not be paid for his time. It would not be fiscally responsible to do this, however.

[14] The ultimate element of control would be the right of termination retained by the Payor. The Payor could just not call the driver for any further work without any explanation whatsoever. As to control in these circumstances, I would suggest it points toward an employer/employee relationship.

[15] Ownership of tools – I believe it is a test strongly in favour of an employer/employee relationship. The tool being a truck of obvious value and/or a trailer included is owned by the Payor and its name is on the vehicle. It is a large investment made by the Payor. The driver had his qualifying license in order to be available to the Payor. This, in my opinion, is not a tool as such. The major tool is the vehicle. If unavailable the Worker cannot perform his function. It is also important to note that the Payor covered all of the expenses for the vehicle including insurance, maintenance, gasoline or other fuel, workers compensation for injury or costs occasional by a breakdown of the vehicle.

[16] Chance of profit – The only way a driver could increase his income was to drive more miles. He is limited by the laws that govern drivers and can only perform his duties for a prescribed period of time. This is not profit in the true entrepreneurial sense.

[17] The Payor stated that the driver could substitute himself by providing another driver but the substitute must have the necessary qualifications which would have to be reviewed by the Payor before he would entrust an expensive vehicle to someone else.

[18] The risk of loss to the driver is negligible. He could take a longer route to the destination that was approved by the Payor and he would not be paid for the extra mileage involved. He could return from a delivery without a load when such was available but this would mean he would not receive payment for the return trip. It would also put a further burden on the Payor to get another person to pick up the load while its expensive equipment was returning empty.

[19] The driver would be responsible for his own meals and other personal comforts on his trip. These items cannot be considered as an entrepreneurial loss.

The rates for delivery were pre-set by the Payor. All costs on the road were paid by the Payor except for driving infractions imposed by statute or by-law.

[20] The question of integration further points to an employer/employee relationship. From the Workers' perspective it could be said that it was otherwise because they signed a simple acknowledgement of them being independent contractors; this is not a signed contract. Nowhere does the Payor become involved, thus a decision only of the driver/worker wishing to be an independent contractor. The law is reasonably clear in this regard that the mere naming of the relationship by the parties (in this instance only named by the worker) is not determinative of the relationship. This Court must look at the actual circumstances of that relationship based on the evidence adduced. The driver did not approach the Payor and state he had a driving business and that he would be prepared to take the Payor's business deliveries on as his business. If he had done so it would be assumed he would seek some protection guarantees from the Payor against other persons offering to do the same work. Michael Jusenchuk did advise he had a "drivers' overload business" but it included only himself and his services were only required as the Payor decided. The only investment to be made by the Workers was time.

[21] After considering the evidence adduced and giving it the necessary weight relative to the classical tests, as above described, it seems clear to this Court that the relationship between the Payor and the Workers was one of employer/employee and the Workers were engaged pursuant to contracts of service.

[22] These appeals are dismissed and the decisions of the Minister are hereby confirmed.

Signed at Toronto, Ontario, this 19th day of August 2003.

"W.E. MacLatchy"

MacLatchy, D.J.

CITATION:	2003TCC549
COURT FILE NO.:	2002-2027(EI), 2002-2028(CPP), 2002-2040(EI) and 2002-2042(CPP)
STYLE OF CAUSE:	Michael Jusenchuk and M.N.R. and Lyte Enterprisese Inc. and M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 16,2003
REASONS FOR JUDGMENT BY:	The Honourable W.E. MacLatchy, Deputy Judge
DATE OF JUDGMENT:	August 19, 2003

APPEARANCES:

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