

Dockets: 2006-274(EI)
2006-277(CPP)

BETWEEN:

WAYNE DERKSEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of
Dale Derksen (2006-373(EI) and 2006-374(CPP))
on April 13, 2007 at Saskatoon, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Anne Jinnouchi

JUDGMENT

The appeals are dismissed and the decisions of the Minister are confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 17th day of August, 2007.

"G.A. Sheridan"

Sheridan, J.

Dockets: 2006-373(EI)
2006-374(CPP)

BETWEEN:

DALE DERKSEN,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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Appeals heard on common evidence with the appeals of
Wayne Derksen (2006-274(EI) and (2006-277(CPP))
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For the Appellant: The Appellant himself

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"G.A. Sheridan"

Sheridan, J.

Citation: 2007TCC477
Date: 20070817
Dockets: 2006-274(EI)
2006-277(CPP)

BETWEEN:

WAYNE DERKSEN,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent,

Dockets: 2006-373(EI)
2006-374(CPP)

AND BETWEEN:

DALE DERKSEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellants¹, Dale² and Wayne³ Derksen, are appealing the respective decisions of the Minister of National Revenue that they worked as independent contractors. Their appeals were heard together, although there are slight differences in their circumstances that will be noted below where applicable.

¹ Normally, it is my practice to refer to an appellant formally, which in this case would be as “Mr. Derksen”; to avoid the obvious confusion that would ensue, however, the Appellants are referred to as “Dale” and “Wayne”.

² The period under appeal is January 1, 2004 to February 21, 2005.

³ The period under appeal is January 1, 2004 to March 2, 2005.

[2] Most of the facts are not in dispute and are essentially those set out in the Minister's assumptions in the reply to Dale's notice of appeal⁴:

- (a) the Payor [Thermal Tek Insulation Contracting Inc. ("Thermal Tek")] was in the business of supplying and installing insulation and vapour barriers;
- (b) the Appellant's duties included installing insulation and vapour barriers;
- (c) the Appellant[s] ... entered into a written sub-contract with the Payor, on January 21, 2004, which included the following:
 - (i) the Appellant was called the sub-contractor,
 - (ii) the Appellant shall provide services in accordance with an attached purchase order,
 - (iii) the Appellant is required to work in accordance with industry standards and correct any deficiencies at their own expense,
 - (iv) the Appellant is required to provide its own tools and vehicle,
 - (v) the Appellant may engage agents or other sub-contractors, and
 - (vi) the Appellant agrees it is not an employee and the Payor shall not be required to pay remittances;
- (d) the original intent of the Appellant and the Payor was for the Appellant to be self-employed;
- (e) the Appellant performed his services at the Payor's job sites;
- (f) the Appellant was paid by piece work including \$.10 per insulation batt installed of \$.09 for poly;
- (g) the Appellant submitted invoices to the Payor;
- (h) the Payor's normal business hours were 8:00AM to 5:00PM, Monday to Friday;
 - (i) the Appellant's hours of work were dependent on the jobs to be completed and the weather;

⁴ Paragraph 5 of the Reply to the Notice of Appeal (*Canada Pension Plan and Employment Insurance Act*).

- (j) the Appellant did not record his hours or submit timesheets;
- (k) the Payor did not supervise the Appellant;
- (l) the Payor did not assign work to the Appellant;
- (m) the Payor offered jobs to the Appellant;
- (n) the Appellant had the power to accept or refuse work;
- (o) the Payor did not instruct the Appellant on how to perform his duties;
- (p) the Appellant was not required to attend meetings;
- (q) the Appellant did not prepare reports;
- (r) the Appellant was not paid to correct his errors;
- (s) the Payor did not provide training for the Appellant;
- (t) the Appellant could hire his own helpers or replace himself;
- (u) the Appellant had the freedom to work for others while performing services for the Payor;
- (v) the Payor did not provide the Appellant with a guarantee of work;
- (w) the Payor provided materials required including caulking, insulation, staples, tape and poly;
- (x) the Appellant provided his own tools including hand tools, ladders, saw horses, planks, compressor, air stapler and vehicle;
- (y) the Appellant incurred expenses for tools and vehicle expenses;
- (z) the Appellant operated under a trade name "Dales (*sic*) Insulators"; [Note: not included in Wayne's assumptions.]
- (aa) the Appellant declared business income on his income tax returns prior to the period under review; [Note: not included in Wayne's assumptions.]
- (bb) the Appellant charged the Payor GST, and
- (cc) the Appellant was treated differently than the Payor's employees.

[3] The insurability and pensionability of Dale and Wayne's work became an issue after Dale was injured and applied for employment insurance benefits. The four-fold

test for the determination of whether a worker is an employee or an independent contractor was developed in *Wiebe Door Services Ltd. v. The Minister of National Revenue*⁵ and applied by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*⁶:

[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.

[4] In addition to the consideration of control, ownership of tools, chance of profit and risk of loss and the degree of integration, the Court may also take into account the intentions of the parties⁷. The jurisprudence of the common law is clear that no one factor has precedence; rather, they are intended to provide a framework for analysis of the particular facts of each case.

[5] The principal of Thermal Tek, Mr. Wes Sass, was called by the Respondent. I found his evidence entirely credible.

[6] Dale and Wayne represented themselves and testified at the hearing. They had obviously put a lot of effort into researching the principles governing the determination of a worker's status. It was their submission that the evidence supported a finding that they had worked as employees for Thermal Tek. Despite the vigour of their argument, for the reasons set out below, I am not persuaded that they

⁵ 87 DTC 5025.

⁶ [2001] 2 S.C.R. 983.

⁷ *The Royal Winnipeg Ballet v. The Minister of National Revenue*, [2006] F.C.J. No. 339.

have met the evidentiary onus of proving wrong the assumptions upon which the Minister based his conclusion that they were independent contractors.

[7] Although they provided additional details or clarifications, Dale and Wayne essentially admitted the Minister's assumed facts. In particular, they admitted signing the contract dated January 21, 2004⁸ and that "in the beginning", they believed, like Mr. Sass, that they were taking on the work offered by Thermal Tek as independent contractors. Wayne testified that he had signed the contract "under duress"; by this he meant that he believed if he did not sign it, he would not get the work. Such a concern in itself (especially when not voiced until long after the fact) falls far short of proof of "duress" in the legal sense of the word.

[8] The Appellants' evidence was entirely consistent with that of Mr. Sass that they negotiated with him the price for each installation job offered; they were free to accept or reject projects; they could (and did) work for others, including Thermal Tek's competitors; they set their own hours, subject only to the externally imposed deadlines of the construction industry; they were not "assigned" work by Thermal Tek, but rather performed the work to the customers' specifications as set out in the purchase orders⁹. Upon completion of their work, they submitted invoices¹⁰, without which they would not have received payment; long before the periods in question, they were GST registrants and in Dale's case, GST was collected and remitted in respect of the work done on Thermal Tek jobs. The fact that "Dale's Insulators" was not technically a registered business name does not in itself preclude a finding that Dale was in business for himself.

[9] Dale and Wayne were unsupervised in their work. Mr. Sass described their skill and experience in the insulation field as "among the best in the city". As such, they were completely capable of doing the work on their own, a fact which undoubtedly made their services attractive. Dale's own testimony was that although Thermal Tek's site supervisor, Trevor, could critique their work, they were not obligated to act upon his suggestions. In addition to his supervisory duties, Trevor performed the same sort of insulation work as Dale and Wayne. I accept the evidence of Mr. Sass that there, however, the similarity ended. Unlike Dale and Wayne, Trevor was required to report to Mr. Sass, he was paid a flat annual salary and worked fixed

⁸ Exhibit R-1.

⁹ Exhibits A-2 and A-3.

¹⁰ Exhibit R-2.

hours, he could not take time off without permission, and his tools and a vehicle were supplied by Thermal Tek.

[10] Dale, on the other hand, provided his own tools and had a major investment in his air stapler and compressor and truck. The materials provided by Thermal Tek such as the insulation itself, caulking, tape and "poly" were not "tools" *per se* as they were costed back to the customer.

[11] I accept Dale and Wayne's evidence that Thermal Tek paid Workers' Compensation premiums on their behalf and they were assigned a WCB number. However, this was a provincial statutory requirement without which a worker would not be allowed on a job site. Compliance with this provision is not determinative of the nature of the working relationship between the Appellants and Thermal Tek.

[12] Taken as a whole, the evidence satisfies me that Dale was working on his own behalf as an independent contractor in the insulation business.

[13] As Wayne quite correctly pointed out at the hearing, although their cases were heard together, each must be decided on its own merits. Wayne's situation was slightly different from Dale's in that he did not have his own tools; those he used, however, were supplied by Dale not Thermal Tek. Similarly, he was approached about taking on Thermal Tek projects not by Mr. Sass, but by his brother who had his own insulating business which might lead to the conclusion that he was, if anyone's, Dale's employee. That conclusion, however, is not supported by the evidence: Dale was very clear in his testimony that he did not want employees in his business because he did not want to take on the obligation of remitting employee deductions. Given the closeness of their working relationship, I have no reason to think Wayne was unaware of his brother's views on that subject. While it is true that he did not have a business name, that fact and his lack of tools, when weighed against the other evidence, are not sufficient to convert his status from independent contractor to employee. Accordingly, I am satisfied that Wayne was also working as an independent contractor for Thermal Tek during the period in question.

[14] The appeals are dismissed and the decisions of the Minister are confirmed.

Signed at Ottawa, Canada, this 17th day of August, 2007.

"G.A. Sheridan"

CITATION: 2007TCC477

COURT FILE NOS.: 2006-274(EI); 2006-277(CPP);
2006-373(EI); 2006-374(CPP)

STYLE OF CAUSE: WAYNE DERKSEN AND THE MINISTER
OF NATIONAL REVENUE AND DALE
DERKSEN AND THE MINISTER OF
NATIONAL REVENUE

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: April 13, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: August 17, 2007

APPEARANCES:

For the Appellants: The Appellants themselves

Counsel for the Respondent: Anne Jinnouchi

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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