Docket: 2006-1145(CPP)

BETWEEN:

ROBERT D'OVIDIO,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *Robert D'ovidio* (*2006-1146(EI))* on February 22, 2007 at Kelowna, Bristish Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Max Matas

JUDGMENT

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

Signed at Sidney, British Columbia, this 22nd day of May, 2007.

"D.W. Rowe"

Rowe, D.J.

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Date: 20070522
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Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The appellant – D'Ovidio - appealed from decisions issued by the Minister of National Revenue (the "Minister") on January 3, 2006, pursuant to the *Employment Insurance Act* (the *"Act"*) and the *Canada Pension Plan* (the *"Plan"*), wherein the Minister decided the employment of D'Ovidio with The Sault Area Hospitals as Chief of a Department during the period from January 1, 2002 to August 31, 2003, was both insurable and pensionable because he was engaged under a contract of service.

[2] The parties agreed both appeals could be heard together.

[3] The appellant testified he is a radiologist residing in Kelowna, British Columbia. He graduated from University of Toronto in 1981 and completed his speciality in radiology in 1987. He was at McMaster University in Hamilton, Ontario for 7 years and moved to Sault Ste. Marie, Ontario in 1995 where he practiced as a hospital-based radiologist pursuant to a fee-for-service basis and billed Ontario Health Insurance Program (OHIP) through an internal mechanism of The Sault Area Hospitals (Sault Hospitals). For most of the relevant period prior to an amalgamation of facilities, there were two hospitals, the General Hospital and the Plummer Memorial Hospital. The appellant received a cheque each month from Sault

Hospitals which varied according to the amount of work he had performed in the preceding period that had been billed to – and paid by – OHIP. Various procedures such as Computer Tomography (CT) scans, Magnetic Resonance Imaging (MRI) and ultra-sound procedures, angiograms and biopsies were billed at the scheduled OHIP rate. D'Ovidio stated he did not have any overhead associated with his practice because all the equipment and machinery – worth millions of dollars – was provided by Sault Hospitals which also employed all the technologists and technicians required within the radiology department. D'Ovidio stated it was standard procedure for other specialists such as cardiologists or urologists to provide their services to Sault Hospitals under a similar arrangement and that surgeons also needed to use expensive, high-tech work areas – known as suites - within the hospital. The radiology suite was near the emergency ward. The appellant stated he was free to work whatever hours he chose and because Sault Hospitals radiology department was chronically understaffed, he relied on temporary replacement physicians – locums - to assume his responsibilities when absent. At maximum, there were only 3 radiologists practising at Sault Hospitals and they took turns being on call. The position of Chief of Diagnostic Imaging (CDI or Chief) became vacant and the appellant decided to assume that function, in part because he could exercise control over medical aspects of the Diagnostic Imaging (DI) department in his role as Chief Radiologist. The department employed a Technical Manager – Joe D'Angelo - who was responsible for day-to-day operations pertaining to technicians, technologists and the equipment. The appellant was in charge of medical programs, procedures, quality of service and liaison with other physicians. Prior to accepting the position of CDI, he attended an interview with members of the Board of Directors of Sault Hospitals. He assumed duties as Chief in August and on September 1, 2000, he and Sault Hospitals entered into a written agreement whereby D'Ovidio agreed to provide his services as CDI in return for an "administrative fee" in the sum of $1,500 per month, pursuant to paragraph 7.1 thereof. The term of the contract was 5 years subject to early termination in accordance with the relevant clauses therein. The appellant stated he had negotiated that fee with the Chief Executive Officer (CEO) and that amount - paid monthly – was included in the same cheque as the one issued by Sault Hospitals for the amount of his entitlement from OHIP for medical services rendered as a radiologist but the administrative fee was shown separately on the accompanying itemized pay statement. There were no deductions of any sort from the cheque and he did not receive a T4 slip from Sault Hospitals. The written contract did not include any terms regarding the frequency or hours of work. The appellant stated that in the course of carrying on his radiology practice within the Sault Hospitals facility, he also discussed matters – pursuant to his role as CDI - with Joe D'Angelo, Technical Director. D'Ovidio stated that a normal working day involved this sort of multi-tasking and he regarded the $1,500 monthly payment for serving as

Chief as a flat fee that was not based on any amount of time nor linked to the provision of any particular services. In that role, he was not subject – *per se* – to any performance review but Sault Hospitals had guidelines with respect to turnaround times for X-rays and other diagnostic results that also pertained to several other disciplines within the hospital. D'Ovidio stated he understood he was required to perform – personally - his duties as Chief and when a replacement radiologist assumed his medical practice on a temporary basis that individual did not assume any of the responsibilities associated with the CDI position and any issues arising in relation thereto during his absence remaining unresolved pending his return. The appellant did not incur any expenses in carrying out his role as Chief. He disagreed with the assumption relied on by the Minister – at subparagraph 6. s) of the Reply to the Notice of Appeal (the "Reply") that his duties as Chief were essential to the day-to-day operations of Sault Hospitals because that aspect was within the jurisdiction of the Technical Director and his staff. Instead, the appellant – as Chief - dealt with issues such as the merit of adopting new procedures and programs and evaluating the need for certain equipment and personnel. In D'Ovidio's experience, even without a CDI at Sault Hospital, life went on and the practising radiologists continued their work albeit without a framework or a source of direction to deal with medical issues or to liaise with other specialists. The appellant stated that when entering into the agreements – initially oral, then written – to perform duties as CDI, both he and the Board clearly intended that he would do so as an independent contractor rather than as an employee and that intent was expressed clearly at paragraph 16.1 of the contract. He was also permitted under the terms of said contract – paragraph 13.1 – to provide his services to others whether as a practitioner, teacher, consultant or researcher. D'Ovidio stated he had always considered that he was in business for himself not only as a radiologist but also when providing his services as CDI. In his opinion, throughout the relevant period he had functioned autonomously without obligation to attend meetings or to report to anyone. As a radiologist, all his patients were referred to him by physicians within the hospital system or from other medical practitioners who had seen those individuals on an out-patient basis. He read the images that had been generated by the technologists who operated the equipment. In addition to those duties, he was also qualified – as an interventional radiologist - to perform biopsies and to conduct angiography and barium examinations and to undertake procedures required to drain a blocked kidney. The appellant left his radiology practice, vacated his position as Chief of DI on August 31, 2003, and relocated to Kelowna.

[4] The appellant was cross-examined by Counsel for the respondent. Concerning the nature of the position of CDI, D'Ovidio stated that position had remained vacant until at least the end of 2006. He was referred to paragraph 5 of the written agreement

– Exhibit A-1 – and agreed that he was entitled to retain 100% of the professional component of the fee payable – by OHIP – for diagnostic services and Sault Hospitals was entitled to the technical component thereof. The appellant did not invoice Sault Hospitals for his services and did not charge any Goods and Services Tax (GST). The appellant's predecessor CDI had also received a monthly payment of $1,500. D'Ovidio stated he was required by the wording of paragraph 11.1 of the written agreement to indemnify and save harmless Sault Hospitals with respect to any causes of actions, claims or demands made against that institution arising out of any medical malpractice on his part. The appellant acknowledged that he had completed, signed and returned the Questionnaire – Exhibit R-1 – dated September 23, 2005. Counsel pointed out that at subparagraph 2. b. hereof, he explained that he had control of day-to-day medical management of the imaging department. D'Ovidio conceded that was so but added that the aspect of control referred to had nothing to do with the operation of machines, equipment and personnel since that was within the jurisdiction of the Technical Director. The appellant stated he reviewed relevant studies pertaining to the quality of imaging and related dependency on the operator and in that context he discussed any quality issues with Joe D'Angelo and left it to him to rectify. D'Ovidio agreed that if a radiologist acting a locum had not performed according to professional standards he would have had to deal with that matter in his capacity as Chief. Due to the chronic shortage of qualified radiologists in the Sault area, the appellant attempted to recruit some from Toronto and also was consulted when radiologists were hired to perform locums. The appellant and Joe D'Angelo created a locum pool because D'Ovdio knew most of the radiologists as a result of having practised in the Toronto area. As CDI, the appellant attended meetings dealing with medical issues within his field of expertise and matters involving other departments. However, his attendance was not mandated and it was understood that he would attend if and when he could. The appellant estimated that during the relevant period he was not absent from Sault Hospitals more than two weeks at any time. With respect to his obligations pursuant to paragraph 15.1 of the written contract, D'Ovidio stated he did not have any designate and with respect to duties to be carried out by the CDI, he was solely responsible. According to subparagraph 15.1 (d), the appellant was to "train medical technologists that have been hired to assist in the Department." D'Ovidio explained that on occasion medical students observed procedures but Joe D'Angelo - in his role as Technical Director - was responsible for training and his input was limited to the circumstance where some new procedure required particular instruction to be imparted to the technologist. During the relevant period, Sault Hospitals was not affiliated with any medical school but interns and residents were assigned to the radiology department from time to time. The appellant stated he enjoyed that aspect of his role as Chief because he had taught at McMaster University. He agreed he was under a contractual

obligation – subparagraph 15.1 (k) to provide adequate on-site coverage of the department by qualified radiologists and Joe D'Angelo created a schedule and an on-call rotation to meet that need. In the rare event that a report of a diagnostic image took longer than normal, D'Angelo – who had particular expertise as a former ultrasound technologist – investigated the matter. D'Ovidio acknowledged that pursuant to paragraph 14.1 of the agreement, he was subject to the authority of the President of Sault Hospitals and the Medical Advisory Committee (MAC) which was responsible for setting medical standards in the department. The appellant agreed that if the DI department had become dysfunctional, the President and MAC would have needed to deal with the problem since members of the Board were not medically trained and wanted to be assured the radiology services were being delivered adequately. The appellant stated he was not involved in any issues concerning termination of department personnel and had no jurisdiction over these matters. Counsel referred the appellant to a Medical Organization Structure chart – Exhibit R-2 – dated August, 2004 - for Sault Area Hospital. D'Ovidio stated that structure came into effect following amalgamation and after he had relocated to Kelowna. During his time as Chief, he worked autonomously and would have spoken with the Chief of Staff – Dr. Tait - prior to discussing any matter with the President/ CEO. D'Ovidio stated Dr. Tait was an orthopaedic surgeon carrying on his own practice while acting as Chief of Staff for Sault Hospitals which served an area population of 110,000. The appellant agreed that – as Chief – he had conducted talks and attended a conference in Toronto at the request of Sault Hospitals CEO but never had any business cards printed identifying him as Chief of the DI department. He also directed the Algoma Breast Cancer Program. He conceded the wording of paragraphs 16.1 of the agreement seems to relate to his status as independent contractor with respect to his provision of services as a radiologist – as opposed to CDI – but added that the purpose of that agreement was to govern the duties related to that specific role. D'Ovidio agreed he had to bear the cost of malpractice insurance coverage and Sault Hospitals paid for all public liability coverage covering both employees and medical staff of the radiology department. The appellant stated the sum of $1,500 per month for serving as Chief constituted a small percentage of his annual income.

[5] The appellant submitted he had carried out his duties as Chief in accordance with the terms of the written contract which clearly expressed the intention of the parties that he would be providing his services as an independent contractor.

[6] Counsel for the respondent conceded the intention of the appellant and Sault Hospitals was clear and that there would have been less control than might otherwise be expected over his performance because he was a highly-qualified, competent specialist. On balance, counsel submitted the other factors weighed

heavily in support of the Minister's decision that the appellant – in his role as CDI - was an employee of Sault Hospitals even though the Minister had acknowledged that the appellant provided his services - as a hospital-based radiologist - as an independent contractor.

[7] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – (*Sagaz*) dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. - at paragraph 47 of his reasons 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, 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.
>
> 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.

[8] In several recent cases including *Wolf v.* Canada, [2002] DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue*, [2006] DTC 6323. (*RWB*), *Vida Wellness Corporation DBA Vida Wellness Spa v. M.N.R.*, [2006] T.C.C. No 534, 2005-1677(EI) and *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2006] F.C.J. No 1653, the mutual intent of the parties was clear. Both intended that the person providing the services would be doing so as an independent contractor and not as an employee. That is the situation in the within appeals.

[9] In the *RWB, supra, case* the issue was whether the dancers performing for that world-renowned ballet company were employees or independent contractors. The Ballet Company was supported in its position by Canadian Actors' Equity Association (CAEA) as the bargaining agent for the dancers. In the course of deciding the dancers were not employees of the Ballet Company, at paragraphs 60-64, inclusive of her reasons Sharlow, J. A. – referring to the decision in *Wolf, supra*, stated :

> [60] Décary, J.A. was not saying that the legal nature of a particular relationship is always what the parties say it is. He was referring particularly to Articles 1425 and 1426 of the *Civil Code of Quebec*, which state principles of the law of contract that are also present in the common law. 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.
>
> [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' statements 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 stated intention will be disregarded.
>
> [62] It is common for a dispute to arise as to whether the contractual intention professed by one party is shared by the other. Particularly in appeals under the *Canada Pension Plan* and the *Employment Insurance Act*, the parties may present conflicting evidence as to what they intended their legal relationship to be. Such a dispute typically arises when an individual is engaged to provide services and signs a form of agreement presented by an employer, in which she is stated to be an independent contractor. The employer may have included that clause in the agreement in order to avoid creating an employment relationship. The individual may later assert that she was an employee. She may testify that she felt coerced into signifying her consent to the written form of the contract because of financial need or other circumstances. Or, she may testify that she believed, despite signing a contract containing such language, that she would be treated like others who were clearly employees. Although the court in such a case may conclude, based on the *Wiebe Door* factors, that the individual is an employee, that does not mean that the intention of the parties is irrelevant. Indeed, their common intention as to most of the terms of their contract is probably not in dispute. It means only that a stipulation in a

contract as to the legal nature of the relationship created by the contract cannot be determinative.

[63] What is unusual in this case is that there is no written agreement that purports to characterize the legal relationship between the dancers and the RWB, but at the same time there is no dispute between the parties as to what they believe that relationship to be. The evidence is that the RWB, the CAEA and the dancers all believed that the dancers were self-employed, and that they acted accordingly. The dispute as to the legal relationship between the dancers and the RWB arises because a third party (the Minister), who has a legitimate interest in a correct determination of that legal relationship, whishes to assert that the evidence of the parties as to their common understanding should be disregarded because it is not consistent with the objective facts.

[64] In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[10] In *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2006] FCA 350, the Federal Court of Appeal considered the appeal from the finding by the Tax Court of Canada that the City Water workers were employees. The judgment of the Court was delivered by Malone J.A. who set out the facts -at paragraphs 5 to 12, inclusive of his reasons – as follows:

II. Factual Background

[5] City Water is in the business of selling and renting water purification units (the Units) to businesses and residences. The Canada Revenue Agency issued a notice of assessment to City Water in respect of its 2002 and 2003 taxation years, assessing on the basis that certain of its workers were engaged in insurable and pensionable employment.

[6] City Water provides its customers with two separate services: the initial installation of Units and their ongoing service and maintenance. This appeal relates only to workers who service and maintain the Units (Service Workers). Service Workers were engaged under oral contracts wherein the terms of their relationship was outlined by City Water management and agreed to by each worker before work was commenced. City Water made it clear at the outset that the Service Workers would be engaged in a self-employed contract position.

[7] Service Workers performed both regular and emergency service calls to City Water customers. For regular service calls, they were provided with a list of clients who would require such service within the upcoming 30 days and were then free to schedule those calls at any time during that period. They had flexibility to plan their routes, to perform the service at their own convenience, and were not required to fulfill a fixed number of assignments in any given day or week. With respect to emergency calls, these calls were required to be done as soon as possible. Service Workers who performed emergency services were paid extra.

[8] No representative of City Water came to the customer's premises to supervise or inspect the services performed by the Service Workers.

[9] As agreed at the outset of their engagement, there was no vacation, overtime or sick pay, no benefits and no deductions at source. Service Workers were required to provide invoices and justify work done, hours expended and expenses claimed and were paid by the hour at various rates. They were not required to attend at the offices of City Water on a daily basis. Monthly meetings were held in Toronto in order to inform Service Workers about new products, to provide payment for work done and to allocate assignments for the upcoming month. Attendance was not mandatory.

[10] Service Workers were required to have only a screwdriver and a wrench. City Water provided them with other necessities such as a pail, sponge, towels, water testing pills, gloves, sanitizers, glass cleaner, replacement filters, a plastic filter wrench, and a meter to test the water for its metal content.

[11] Service Workers also provided their own vehicle or bicycle if working in the downtown Toronto core. Many drove extensive distances in the Greater Toronto Area and elsewhere to provide services. They incurred the cost of insurance and maintenance of their vehicles or bicycles and were reimbursed for certain expenses, such as the cost of gasoline and parking, and received a monthly car allowance for driving in excess of 100 kilometres.

[12] In the City of Toronto, the workers were given a $200.00 monthly incentive bonus to avoid recall work, which was reduced by $50.00 for each recall until the $200.00 was exhausted.

[11] At paragraphs 13 to 15, inclusive, Malone J.A., referred to the decision of the Tax Court stating:

III. <u>Decision of the Judge</u>

[13] On the issue of control, the Judge held that City Water exercised little or no supervision or control over the Service Workers. However, he held that this factor should not bear the weight it would in other cases, because the lack of control, in his view, is a function of the simplicity of the task at hand. On the issue of tools, the Judge held that a vehicle was not required since three workers did service work by bicycle, rather than by vehicle. As a result, he determined that City Water provided the bulk of the tools used by the Service Workers.

[14] The Judge then considered the Service Workers' chance of profit. He relied on this Court's decision in *Hennick v. Canada (M.N.R)*(1995) [1995] F.C.J. No. 294, 53 A.C.W.S. (3d) 1134 (F.C.A.) and held that hourly earnings, whether longer or shorter, are not profits. Thus, the workers had no chance of profit insofar as their service and maintenance work was concerned. Lastly, the Judge concluded that since they had virtually no expenses, they had no risk of loss.

[15] In his findings of fact, the Judge held that it was the intent of the parties that all the workers be independent contractors. In this regard, he mentioned the decision of this Court in *Wolf v. Canada (C.A.)*, [2002] 4 F.C. 396, whereby Noël J.A. held that when a contract is generally entered into and is performed in accordance with its terms, the intention of the parties cannot be disregarded. However, it does not appear that he actually took the parties' intention into account when arriving at his final conclusion. Ultimately, the Judge determined that during the period in issue, to the extent that the workers performed service and maintenance functions, income so earned was income from employment.

[12] Referring to the issue of control, Malone J.A. in paragraphs 18 and 19 commented:

[18] A contract of employment requires the existence of a relationship of subordination between the employer and the employee. The concept of control is the key determinant used to characterize that relationship (see *D&J Driveway Inc. v. Canada (Minister of National Revenue)*, [2003] F.C.J. No. 1784, 2003 F.C.A 453). City Water also referred the panel to *Livreur Plus Inc. v. Canada (Minister of National Revenue)*, [2004] F.C.J. No. 267, 2004 FCA 68, where this Court applied the *Wiebe Door* test to determine whether the employment of two workers was insurable under the *EIA*. In considering the control component of the test, Létourneau J.A. stated at paragraph 19:

> ... the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it ... As our colleague Décary J.A. said in *Charbonneau v. Canada (Minister of National Revenue - M.N.R.)*, [1996] F.C.J. No. 1337, "It is indeed rare for a person to give out work and not to ensure that the work is performed in accordance with his or her requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker."

> In other words, controlling the quality of work is not the same as controlling its performance by the worker hired to do it.
>
> **[19]** In my analysis, the simplicity of the task can have no bearing on control and should not be considered in determining whether a degree of subordination exists. As such, the Judge made a legal error in concluding that the control factor should bear little weight because of the simplicity of the tasks conducted by the Service Workers. In the present case, City Water attracted the customers but left the actual performance of the service function to the Service Workers without any supervision. Accordingly, control here clearly points to a contract for services.

[13] In that case, the City Water workers had provided their own vehicles which were not only essential to the job but constituted a major investment and Malone J.A. held this favoured a finding that they were providing their services as independent contractors. With respect to the matter of opportunity for profit, degree of financial risk, continued at paragraphs 24 to 26, inclusive as follows:

> **[24]** On the present facts, in my analysis, the chance of profit was entirely City Water's. The Service Workers were guaranteed an hourly wage and were subject to an incentive bonus. While it is true that the workers could earn more if they worked more hours, the jurisprudence is clear that that does not constitute a chance of profit (see *Hennick* at paragraph 14). While they may have had an incentive to work harder and get paid an extra $200, this is not the same as the commercial risk of running a business (see *Page v. Canada (Minister of National Revenue)*, [2004] T.C.J. No. 131, 2004 TCC 211 at paragraph 38). Therefore, I would agree with the Judge when he found that the workers had no chance of profit, which points to a contract of service.
>
> **4. Degree of Financial Risk**
>
> **[25]** Since I have determined that on the evidence the Service Workers required a vehicle, I must also determine whether they faced a risk of loss of any kind. The evidence shows that the Service Workers were reimbursed for several expenses, including gasoline, parking and a cell phone. They were also given a monthly car allowance. Most importantly, they did not have any risk of bad debt as they were paid whether or not the customer paid City Water.
>
> **[26]** Based on this record, I would agree with the Judge that there was no risk of loss to the Service Workers, notwithstanding the fact that they had to maintain insurance on their respective vehicles. This factor points to a finding that the Service Workers were engaged in a contract of employment.

[14] Malone J.A. stated at paragraphs 27 and 28:

5. Other Factors

[27] In balancing the above factors, the result of the inquiry is not obvious. Therefore, it is necessary to determine what weight should be given to the intention of City Water and the Service Workers at the time of their initial engagement.

[28] If it can be established that the terms of the contract, considered in the appropriate factual context, reflect the legal relationship that the parties intended, then their stated intention cannot be disregarded (see *Royal Winnipeg Ballet v. Canada (Minister of National Revenue*, [2006] F.C.J. No. 339, 2006 FCA 87, at paragraph 61). *Royal Winnipeg* was not decided at the time the Judge rendered his decision.

[15] In the course of concluding that the workers were not employees of City Water, Malone J.A. summarized as follows:

[30] Thus, the parties' intention will only be given weight if the contract properly reflects the legal relationship between the parties (see *Royal Winnipeg* at paragraph 81). In this case, there is no written agreement that purports to characterize the legal relationship between the Service Workers and City Water; however, there is no dispute between the parties as to what they believe that relationship to be. The evidence is that both parties believed that the workers were self-employed and each acted accordingly.

[31] In my analysis, since the relevant factors yield no clear result, greater emphasis should have been placed on the parties' intention by the Judge in this case. The Judge was required to consider the factors in light of the uncontradicted evidence, and to ask himself whether, on balance, the facts were consistent with the conclusion that the workers were persons in business on their own account' (see *Sagaz supra* at paragraph 3), or were more consistent with the conclusion that the workers were employees. In failing to do this, he made a palpable and overriding error on a question of mixed law and fact. Had he conducted that analysis, in my view, he could only have concluded that City Water was not the employer of the Service Workers.

[16] Returning to the facts in the within appeal, following an examination of all of the evidence, the intention of the parties – as noted earlier – is clear. A perusal of the entire written contract supports the finding that both D'Ovidio and Sault Hospitals intended him to be an independent contractor when serving as CDI in return for a monthly administrative fee of $1,500, although it omitted to state that intent expressly as it had done when dealing the provision of his services as a radiologist throughout the remainder of that agreement.

[17] I will examine the facts in relation to the indicia set forth in the judgment of Major, J. in *Sagaz.*

Level of control:

[18] The appellant was a highly-qualified radiologist and as a specialist in his field would not require supervision. Pursuant to the terms of the written agreement, he was required to perform certain specified services and to serve on various committees and to engage in research as time and facilities would permit. In that contract, the appellant undertook to perform such clinical and other administrative functions as were required for the proper functioning of the department. The evidence disclosed there was no need for D'Ovidio to report to any person in authority at Sault Hospitals and it was understood that he would attend any meetings or conferences and participate in other activities enumerated in paragraph 15.1 of the contract when not otherwise occupied in carrying out his main function as a radiologist. The organization chart – Exhibit R-2 – was not in existence during the relevant period and the Chief of Staff during the appellant's tenure was a surgeon with an active practice. Just as there is no authority to reduce the importance of the control test when the nature of the work is simple, there is no basis for doing so when the work is complex and specialized. Often, the appellant carried out his duties as Chief contemporaneously with his own professional hospital-based radiology practice and – in a notional sense – switched hats from time to time as required in the course of a busy schedule. As a practicing radiologist, he had to deal with other physicians who had referred patients or were seeking consultations and then – as CDI – interacted with many of these same colleagues in order to fulfill his mandate. In the event Sault Hospitals wished to dispense with his services as Chief whether in response to a notice of complaint or otherwise, that institution was bound by the terms of the written contract in that respect including the duty to participate in an arbitration proceeding.

Provision of equipment and/or helpers

[19] The preamble to the written contract expresses the intent of Sault Hospitals to engage the services of the appellant as CDI. However, much of the contract deals with the terms of the relationship of D'Ovidio – and other radiologists – to Sault Hospital and the mechanisms that will govern the supply of their services and receipt of payment therefore. Curiously, paragraph 15.1 – dealing with the duties of D'Ovidio – presumably as Chief – permits him to carry out the subsequently enumerated duties through a designate. The appellant stated the actual circumstances did not afford that opportunity and when absent, the duties of Chief were not performed by anyone and

matters were not dealt with until he returned. The equipment required in the DI department costs millions of dollars. As a practicing radiologist providing his services to Sault Hospitals as an independent contractor on a fee-for-service basis, he did not own his own tools or equipment and this same expensive infrastructure was required in order that he could serve as Chief. The nature of the task to be performed precludes ownership on the part of the supplier of the service except – perhaps – in the situation where a private clinic is owned by radiologists who have deep pockets and a friendly banker and can purchase that sort of equipment and machinery.

Degree of financial risk and responsibility for investment and management

[20] There was no financial risk involved since Sault Hospitals carried the necessary public liability insurance to cover any actions against D'Ovidio that might arise in the course of his duties as Chief. He was not required to make any investment of capital to earn the sum of $1,500 per month.

Opportunity for profit in the performance of tasks

[21] As noted above, the appellant's administrative fee was $1,500 per month regardless of the time spent in carrying out his duties as Chief. However, since he was totally in charge of that aspect of his role, he was at liberty to devote more time to satisfying the needs of Sault Hospitals in terms of meeting all contractual commitments as a radiologist. Each time he elected to perform a service for a fee that would be billed – through Sault Hospitals – to OHIP, rather than spend that block of time working in his capacity as Chief for the fixed monthly sum, he had the ability to increase his professional income. In the course of negotiating that monthly payment, the appellant must have been satisfied that the combination of the services provided to Sault Hospitals as a medical practitioner and administrative department Chief was profitable from his perspective in terms of time available to devote to both pursuits.

[22] It is worth noting that the position of CDI was not essential because that post remained vacant for more than 3 years after the appellant left the Sault. The nature of the work performed by the appellant as Chief was so thoroughly and inextricably bound up with his ongoing work as a practicing radiologist supplying his services to Sault Hospital that it is unreasonable to separate the two functions in the sense that as a medical practitioner he was an independent contractor but was an employee when carrying out his duties as Chief. The monthly fee paid to the appellant was not an honorarium in the proper sense of that word but it was not a salary within the entire context of the agreement. The best way to describe the payment is to defer to the

language of the contract which identifies the monthly payment as an “administrative fee” paid in compensation for his duties as Chief. From the perspective of the appellant, he did not receive any holiday pay or any benefits attributable to that revenue and he had never considered that service to have been delivered in the context of any employment relationship with Sault Hospitals. He received the administrative fee together with the amount of his entitlement from the OHIP payment for the appropriate billing period. As a result, the appellant had no reason to regard himself as an employee even for the limited purpose of serving as Chief. As he testified, the within matter probably arose as a consequence of a payroll audit by CCRA which led to a subsequent ruling and confirmation by the Minister that he was an employee.

[23] In my opinion, the intent of the parties is significant in view of the fact the other relevant factors are incapable of yielding an obvious result when considered as a whole in the context of all relevant circumstances pertaining to the subject working relationship. The appellant and Sault Hospitals wanted him to be an independent contractor both as a radiologist and as CDI – although that could have been expressed more elegantly in the contract – and they acted accordingly throughout the course of the working relationship.

[24] Taking into account the whole of the evidence and applying the relevant jurisprudence, I am satisfied the appellant did not provide his services as CDI to Sault Hospitals during the relevant period pursuant to a contract of service and - therefore – was not an employee engaged in either insurable or pensionable service.

[25] Both appeals are allowed and the decisions issued pursuant to the *Act* and the *Plan* are hereby varied to reflect that finding.

Signed at Sidney, British Columbia, this 22nd day of May, 2007.

"D.W. Rowe"

Rowe D.J.

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