

Docket: 2004-200(EI)

BETWEEN:

THE ESTATE OF THE LATE TODD VANKOUGHNETT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SIMPLE IMPROVEMENTS INC.,

Intervenor.

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Appeal heard together on common evidence with the appeal of  
*The Estate of the Late Todd Vankoughnett, (2004-217(CPP))*  
on December 2, 2004 at Kingston, Ontario

Before: The Honourable Justice T. O'Connor

Appearances:

Agent for the Appellant: Brian Leigh Atkinson

Counsel for the Respondent: Daniel Bourgeois

Counsel for the Intervenor: Sandra Lee Deseron

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JUDGMENT

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

Signed at Ottawa, Canada, this 21st day of December, 2004.

"T. O'Connor"

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O'Connor, J.

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O'Connor, J.

Citation: 2004TCC834

Date: 20041221

Dockets: 2004-200(EI)  
2004-217(CPP)

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### **REASONS FOR JUDGMENT**

#### **O'Connor, J.**

[1] The issue in these appeals is whether for the period January 1, 2002 to March 1, 2003, ("the Period") the engagement of the Appellant, Todd Vankoughnett (the "Worker") with Simple Improvements Inc., the Intervenor ("Payor") was pursuant to a contract of service (i.e. employee relationship), thus entitling him to employment insurance and Canada pension plan benefits or was it pursuant to an independent contract with no entitlement. The engagement consisted in installing a product called "Gutter Topper" to eaves of homes in the Kingston general area.

[2] The Worker unfortunately died accidentally shortly prior to the hearing which was held in Kingston on December 2, 2004. The Agent for the Worker, Brian Leigh Atkinson, stated at the hearing that the Worker died intestate (no will) leaving as his intestate heirs his common-law wife Sharon Hamilton and 3 young children. It appeared from various documents that this Agent was a lawyer with a Q.C., however, it turned out in fact, as the Agent for the Appellant stated at the hearing, that this was not true and that the Agent was simply acting as an Agent and was not a lawyer. The Minister of National Revenue ("Respondent") was

represented by Department of Justice counsel, Daniel Bourgeois and the Intervenor was represented by counsel, Sandra Lee Deseron.

[3] The only witness called by the Agent for the Appellant was Violet Campbell. She was an eligibility officer for Canada Customs and Revenue Agency ("CCRA") who, after interviewing the Worker and the Payor made a determination dated June 17, 2003 (Exhibit A-1) that the Worker was an employee during the Period. This determination went to the Appeals Division of CCRA and was overturned by a decision mailed September 25, 2003 which held that the Worker's employment with the Intervenor during the Period was not pensionable or insurable for the following reason: "Todd Vankoughnett was not engaged under a contract of service". It is this latter decision that the Worker contests and that the Payor and the Respondent contend is correct.

[4] The Amended Reply to the Notice of Appeal is dated June 1, 2004. It sets forth the basic facts as well as some incidental facts. All are stated as being assumptions relied on by the Respondent none of which have been disproven. Paragraph 4 of the said Amended Reply to the Notice of Appeal reads:

4. In making his decision, the Respondent relied on the following assumptions of facts:
  - (a) the Payer operates as a contractor for renovations and new constructions, both residential and commercial, with the main focus on "Gutter Topper";
  - (b) the Payer operates year round;
  - (c) the Payer's shareholder are as follows:

- Audra Wash	45%	
- Curtis Wash	45%	
- Audra's parents		each 5%
  - (d) the Payer has the exclusive rights to "Gutter Topper" in the Kingston area;
  - (e) "Gutter Topper" is a gutter system with a top to keep out leaves and debris. It is an aluminium product imported from the United States;
  - (f) the Appellant has no ownership in the Payer;

- (g) the Appellant is not related to the Payer;
- (h) the Appellant's duties included the following:
  - loading and unloading the materials at the shop
  - supervision of other workers
  - doing general carpentry and gutter topping
- (i) the Appellant performed his duties at different job sites;
- (j) the Appellant required a valid drivers licence to drive to and from the work sites;
- (k) the Appellant wore the Payer's T-shirt;
- (l) the Appellant's hours of work were, in general, Monday to Saturday, from 7:00 a.m. to 5:00 p.m.
- (m) the Appellant was free to set hours provided the job was done in the time-frame promised to the customer;
- (n) the Appellant had to invoice the Payer in order to be paid;
- (o) the Appellant recorded his hours of work on timesheets which were given to the Payer in order to be paid and to allow the Payer to invoice it's clients;
- (p) the Appellant was paid \$15.00 an hour, by cheque on a bi-weekly basis;
- (q) the Payer did not withhold any deductions from the Appellant's cheques;
- (r) the Payer did not offer any employment benefits to the Appellant and none were requested by the Appellant;
- (s) the Appellant was not entitled to paid vacations or vacation pay;
- (t) the Appellant was regularly paid for his services;
- (u) the Payer provided WSIB to the Appellant;
- (v) the Payer provided the Appellant "Gutter Topper" training as provided for under the Payer's territory agreement with "Gutter Topper";

- (w) the Payer is the only provider of "Gutter Toper" training in the area covered by its territory agreement with "Gutter Topper";
- (x) the Payer of "Gutter Topper" did not inspect the work completed by the Appellant;
- (y) the Payer provided all the required materials to the Appellant;
- (z) the Payer also provided the required equipment;
- (aa) the Appellant provided his own small tools;
- (bb) the Payer was responsible for resolving customer complaints;
- (cc) the Payer covered the costs relating to bad debts;
- (dd) the Appellant used the Payer's truck to perform his duties;
- (ee) the Payer covered all the costs related to the truck;
- (ff) the Appellant had to perform his services personally;
- (gg) the Payer did all the quotes and estimations for a job;
- (hh) the Appellant was provided with a work order for each job that he had to do;
- (ii) the Payer's clients had to sign a form approving his job;
- (jj) the Appellant provided the guarantee on the work performed;
- (kk) the Appellant was responsible if work needed to be redone and was not remunerated for redoing the work;
- (ll) the Appellant received bonus from the Payer if a job is completed faster than expected;
- (mm) the Appellant could decline work requests from the Payer;
- (nn) the Appellant could work for others and often did;
- (oo) the Appellant and the Payer did not agree that the relationship would necessarily be ongoing;

- (pp) the Payer had no right to demand or expect the attendance (consecutive) of the Appellant and the Appellant did not have a guarantee of work;
- (qq) the Appellant, beginning in 2003, charged the Payer GST for services rendered;
- (rr) the Appellant often advertised his services to third parties, informally;
- (ss) the Appellant on occasion outbid the Payer for the provision of various services to third parties;
- (tt) the Appellant determined his own hours of work, including the timing and length of breaks;
- (uu) the Appellant was not dependant upon the Payer for this type of work;
- (vv) the Payer maintained the right to terminate the Appellant's services.

[5] The Agent for the Appellant was unable to call the Appellant, who had died, nor his wife, Sharon Hamilton, who was in a state of grief and unable to attend the hearing. Also the Agent, although apparently having attempted to call other witnesses, was unable to secure their presence at the hearing. As mentioned the only witness that he called was the said Violet Campbell who reviewed her initial determination and her reasons for that determination.

[6] The Agent had the opportunity to adjourn the hearing but decided against that and proceeded with the hearing. Moreover, by his letter to the Tax Court of Canada dated November 23, 2004 the said Agent for the Appellant stated as follows:

...

Please allow this letter to confirm Mr. Todd R. VanKoughnett was tragically killed on October 15, 2004.

I am advised by Todd's wife Mrs. Sharon N. Hamilton to advance this matter forward altering the style of action to the Estate of The Late Mr. Todd R. VanKoughnett. We are in the process of filing the APPLICATION FOR CERTIFICATE OF

APPOINTMENT OF ESTATE TRUSTEE (Form 74.14 under Rules) in the Superior Court of Justice at Kingston, Ontario.

We are set to proceed on December 2, 2004. As the last two proceedings have been adjourned at the request of Simple Improvements, we respectfully request this matter proceed as scheduled.

It should be noted that these appeals had been adjourned twice previously at hearings held on June 16, 2004 and September 29, 2004 for reasons considered sufficient by the Justices who sat at those hearings.

[7] After the Agent for the Appellant completed his questioning of Violet Campbell he declared that he had no more witnesses to call and closed his case. Counsel for the Respondent at that stage made a Motion to dismiss the appeals as the Appellant's Agent had not discharged the burden of proof to show that the decision in question was wrong nor had he disproved any of the assumptions contained in the Amended Reply to the Notice of Appeal. Counsel for the Intervenor supported this Motion to dismiss.

[8] Considering the extremely unusual circumstances of the Worker having died shortly prior to the hearing and his widow being unable to attend because of grief, I considered that it would be in the interests of justice to hear at least one witness who could testify as to the position of the Intervenor and the Minister.

[9] That witness, namely Bob Webb, a carpenter was called and testified essentially that relationships between the Intervenor and its various workers, including the Worker and himself, were independent contracts. At this stage I took the Motion to dismiss under reserve with the understanding that if I was to dismiss the Motion, the Court would reconvene the parties to hear further evidence and conclude the matter.

[10] Having now further considered the matter I have firstly determined that the preliminary determination dated June 17, 2003 of Violet Campbell and the reasons therefore are of no effect because that determination was reversed by the appeals decision. Further, considering the verbal testimony, the Exhibits produced and the Pleadings, in particular the assumptions of fact contained in the Amended Reply to the Notice of Appeal, and the fact that the Appellant has not discharged the burden of proving that the decision in question was wrong nor has the Appellant disproved any of the said assumptions of fact, in my opinion the Motion to dismiss must be granted. Consequently the appeals are dismissed.



Signed at Ottawa, Canada, this 21st day of December, 2004.

"T. O'Connor"

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O'Connor, J.

CITATION: 2004TCC834

COURT FILE NOS.: 2004-200(EI) and 2004-217(CPP)

STYLE OF CAUSE: The Estate of the Late  
Todd Vankoughnett v. MNR and  
Simple Improvements Inc.

PLACE OF HEARING: Kingston, Ontario

DATE OF HEARING: December 2, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice T. O'Connor

DATE OF JUDGMENT: December 21, 2004

APPEARANCES:

Agent for the Appellant: Brian Leigh Atkinson

Counsel for the Respondent: Daniel Bourgeois

Counsel for the Intervenor: Sandra Lee Deseron

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Morris Rosenberg  
Deputy Attorney General of Canada  
Ottawa, Canada