

Docket: 2007-2041(CPP)

BETWEEN:

DONALD L. MANCELL PERSONAL LAW CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DONALD MANCELL,

Intervenor.

Appeal heard on common evidence with the appeal of *JKBC Holdings Ltd.*
(2007-2042(CPP)) on August 11, 2008, at
Nanaimo, British Columbia.
Before: The Honourable Justice B. Paris

Appearances:

Agent for the Appellant:	Donald Mancell
Counsel for the Respondent:	Christa Akey
Agent for the Intervenor:	Donald Mancell

JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* from the decision of the Minister of National Revenue dated February 16, 2007 is allowed and the said assessments are varied in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 18th day of September 2008.

“B.Paris”

Paris J.

Docket: 2007-2042(CPP)

BETWEEN:

JKBC HOLDINGS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DONALD MANCELL, KATHRYN MANCELL,

Intervenors.

Appeal heard on common evidence with the appeal of *Donald L. Mancell Personal Law Corporation* (2007-2041(CPP)) on August 11, 2008,
at Nanaimo, British Columbia.

Before: The Honourable Justice B. Paris

Appearances:

Agent for the Appellant: Donald Mancell

Counsel for the Respondent: Christa Akey

Agent for the Intervenors: Donald Mancell

JUDGMENT

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Signed at Ottawa, Canada, this 18th day of September 2008.

“B.Paris”

Paris J.

Citation: 2008 TCC 521
Date: 20080918
Docket: 2007-2041(CPP)

BETWEEN:

DONALD L. MANCELL PERSONAL LAW CORPORATION,
Appellant,
and
THE MINISTER OF NATIONAL REVENUE,
Respondent,
and
DONALD MANCELL,
Intervenor.

AND:

Docket: 2007-2042(CPP)
JKBC HOLDINGS LTD.,
Appellant,
and
THE MINISTER OF NATIONAL REVENUE,
Respondent,
and
DONALD MANCELL and KATHRYN MANCELL,
Intervenors.

REASONS FOR JUDGMENT

Paris, J.

[1] Donald Mancell Law Corporation (“Law Corporation”) is appealing from an assessment of contributions under the *Canada Pension Plan* (the “*Plan*”) in respect of services provided to the corporation by the Intervenor, Donald Mancell, in 2002, 2003 and 2004.

[2] JKBC Holdings Ltd (“JKBC”) is appealing from an assessment of contributions under the *Plan* in respect of services provided to the corporation by the Intervenors, Donald and Kathryn Mancell, in the same years.

[3] The issues in these appeals are whether Donald Mancell was in pensionable employment with Law Corporation and whether Donald and Kathryn Mancell were in pensionable employment with JKBC, within the meaning of subsection 6(1) of the *Plan*. The Appellants and Intervenors maintain that the Mancells were never employees of the corporations but were independent contractors working under contracts for services.

[4] At the request of the parties, the appeals were heard on common evidence. Mr. Mancell represented the Appellants and himself and his spouse as Intervenors in the appeals.

[5] The facts relied upon by the Minister of National Revenue (“Minister”) in assessing the Appellants are set out in the Replies to the Notices of Appeal and are reproduced below:

Law Corporation:

9. a) the Appellant was incorporated in the Province of British Columbia in 1991; (admitted)
- b) the Worker incorporated the Appellant to hold ownership in a law practice; (admitted)
- c) the Worker was a director, officer and sole owner of the voting shares of the Appellant; (admitted)
- d) the Worker sold the law practice in 1997; (admitted)
- e) prior to and subsequent to the 1997 sale of the law practice, the Appellant held ownership in a 5000 plus square foot complex in Port Hardy British Columbia; (admitted)

- f) the Worker's duties included providing investment advice for the repair and upkeep of buildings, setting rent amounts and doing on site visits; (admitted)
- g) the Worker managed the Appellant's day to day operations;
- h) the Worker performed his duties from his office located at his personal residence in Comox, British Columbia;
- i) the Worker's remuneration was based on draws (advances) from the Appellant with his fees being set at the end of the year based on performance;
- j) both the Worker and his wife had single signing authority on the Appellant's bank account; (admitted)
- k) the Worker determined his own hours and days of work; (admitted)
- l) the amounts paid by the Appellant to the Worker were management fees and wages;
- m) the Worker provided his own tools and equipment to perform his duties; (admitted)
- n) the Worker was required to provide his services personally;
- o) the Worker did not incur expenses in the performance of his duties;
- p) the Worker did not share in the Appellant's potential for profits or the risk of loss;
- q) the Worker did not claim personal expenses on his tax returns in respect of the services he provided to the Appellant;
- r) the amounts paid by the Appellant to the Worker were recorded as wages or management fees in the Appellants corporate tax returns; and
- s) the Worker was not in business for himself;

JKBC:

- 9. a) the Appellant was incorporated in the province of Alberta on August 8, 1996; (admitted)

- b) the Appellant owns a 26 suite and a 22 suite apartment building located in Edmonton Alberta; (admitted)
- c) the Appellant's voting shares are owned equally by the Workers; (admitted)
- d) the Workers are directors and shareholders of the Appellant; (admitted)
- e) Donald is an officer of the Appellant; (admitted)
- f) during the period under review, the workers lived in Comox, British Columbia; (admitted)
- g) the Workers provided investment advise for repair and upkeep of the buildings, set rent amounts and did on site visits; (admitted)
- h) the Workers provided direction and or recommendations to the Appellant and the property managers on maintenance and repair issues; (admitted)
- i) the Workers were in charge of the day to day operations of the Appellant and were responsible for all business decisions;
- j) Donald performed some legal work for the Appellant in respect of evictions; (admitted)
- k) the Appellant's apartment buildings are professionally managed by Peter Miller in Edmonton;
- l) the Workers took draws from the profits of the Appellant with final settlement set at the Appellant's fiscal year end;
- m) the Workers have never worked without payment from the Appellant;
- n) the amounts paid by the Appellant to the Workers were management fees and wages;
- o) the Workers were required to provide their services personally;
- p) the Workers did not incur expenses in the performance of their duties;
- q) the Workers did not claim personal expenses on their tax returns in respect of the services provided to the Appellant;
- r) amounts paid to the Workers were recorded as management fees in the Appellants corporate tax returns; and
- s) the Workers were not in business for themselves.

Law Corporation

[6] Law Corporation owned a rental property in Port Hardy, British Columbia, which is a three and a half hour drive from the Mancell's residence in Comox, British Columbia. The property had six commercial units, one residential unit and an office. The office was rented by a lawyer, Mr. Grier, who also acted as the caretaker for the building in exchange for a reduced rent. Mr. Grier dealt with day-to-day matters and tenant problems that arose and contacted Mr. Mancell if there was something Mr. Mancell needed to do.

[7] Mr. Mancell said his role in running the building was like that of a property manager. He found tenants and organized any repair work, and handled the paper work for the building. Most of the repairs were done by contractors although on occasion he would also do some of the work himself using his own tools. He said he visited the property a couple of times each year.

[8] Mr. Mancell was paid the following amounts by Law Corporation:

2002: \$17,000
2003: \$22,000
2004: \$26,500

His pay was roughly equal to the profit earned by Law Corporation. The payments were made as money was available to Law Corporation.

[9] Mr. Mancell said that he did most of the work for Law Corporation from a home office he maintained in Comox. Any expenses incurred in doing work for the Corporation were charged back to it, although he said that he did not charge for the use of the office. He did not consider himself to be an employee and said that since Law Corporation's only activity was to earn rental income, it did not need any employees.

[10] He had no written contract with Law Corporation and did not invoice it for any of the work done. He did not charge GST on his services, saying that since the corporation could have claimed an input tax credit for any GST he charged, it would just be a wash anyway. He believed that the corporation recorded the amounts paid as management fees on its financial statements.

[11] During the periods in issue, Mr. Mancell was absent on at least two extended trips taken with his spouse and children to the U.S. and Mexico. He continued to oversee the Port Hardy property as well as he could by keeping in contact with Mr. Grier by e-mail. A friend and business associate of the Mancells, Mr. Peter Miller made himself available to Mr. Grier for consultation and to write cheques for work that needed to be done.

JKBC

[12] Mr. and Mrs. Mancell were the directors of JKBC and owned the shares along with their children. JKBC owned two apartment buildings in Edmonton which were managed by Mr. Miller. Mr. Miller also owned some apartment buildings in Edmonton and was responsible for convincing the Mancells to acquire property there.

[13] Mr. Miller's company charged JKBC 3% of its gross rental revenue for the property management services it provided. There were also caretakers working on-site in the two buildings who were paid by JKBC. The caretakers and Mr. Miller (through his company) made the day-to-day decisions affecting the rental properties, and Mr. Mancell was involved in major decisions concerning repairs and rental rates.

[14] Mr. Miller and Mr. Mancell travelled to Edmonton about twice a year for about 3 days at a time to inspect the properties, prepare a list of any work that was required and line up contractors for the work. They also investigated the rental and real estate market in Edmonton. Mr. Mancell occasionally went to Edmonton for the same purposes. Mrs. Mancell apparently did not go to Edmonton with him but was consulted on certain matters relating to the rental operations, most notably the decoration of the buildings.

[15] Mr. and Mrs. Mancell were paid monthly by JKBC, and Mr. Mancell received additional amounts based on the profits and availability of cash in the corporation. He said that there were a couple of months over two years that he and Mrs. Mancell were not paid when no cash was available in the company. However, copies of the cheques from JKBC to Mr. and Mrs. Mancell were put into evidence (Exhibit A-8) showed only one month (January 2002) where no payment was made. According to those cheques the total amounts received by Mr. and Mrs. Mancell were as follows:

Cheques made out to both Mr. and Mrs. Mancell	Cheques made out to Mr. Mancell
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2002	14,000	106,000
2003	55,000	32,000
2004	56,000	33,000

[16] In cross-examination Mr. Mancell said that he and his spouse reported income from JKBC as follows:

	Kathryn Mancell	Donald Mancell
2002	22,300	37,000
2003	—	28,000
2004	34,500	34,500

[17] No reason for the discrepancy between the amounts paid by JKBC and the amounts reported was given.

Arguments

[18] Mr. Mancell referred to the four factors that have been cited frequently in the relevant jurisprudence dealing with the determination of whether a worker is working under a contract of service or a contract for services: control, ownership of the tools, the chance of profit and risk of loss and the integration of the worker into the payor's business.

[19] He argued that neither he nor his spouse were given any direction by either Appellant in the performance of their work, that they set their own hours and even took long trips during the time they were managing the real estate belonging to Law Corporation and JKBC. They provided their own office, although many of their other expenses were reimbursed. They were not responsible for the day-to-day operations at any of the rental properties and their work did not occupy a great deal of their time.

[20] Mr. Mancell submitted that the analysis of the relevant factors clearly indicated that both he and Mrs. Mancell were independent contractors.

[21] Counsel for the Respondent argued that the duties undertaken by Mr. and Mrs. Mancell were appropriately seen as the duties of the directors of a corporation and not those of independent contractors. She submitted that since a director of a corporation is included in the definition of “officer” found in section 2 of the *Plan*, and an officer is included in the definition of the term “employee” in the same section, the Court should find that Mr. and Mrs. Mancell were both employees of JKBC and that Mr. Mancell was an employee of Law Corporation by virtue of their being directors of those corporations.

[22] Alternatively she said that an analysis of the four elements referred to by Mr. Mancell also supported this conclusion.

[23] She contended that even if the corporations did not exercise control over Mr. and Mrs. Mancell that it still retained the power to do so, which was the critical factor according to the Federal Court of Appeal in *Groupe Desmarais Pinsonneault & Avaré Inc. v. M.N.R.*, 2002 FCA 144.

[24] Counsel also submitted that the Appellants effectively provided most of the tools needed for the work done by the Mancells by reimbursing them for the expenses they incurred in the course of that work. She also said that there was no chance of profit or risk of loss because while the remuneration paid may have varied, it was always paid.

[25] Finally counsel said that there was no evidence to corroborate Mr. Mancell’s testimony that the Appellants as well as Mr. and Mrs. Mancell intended that the Mancells be independent contractors. No written agreement was entered into and no GST was charged to the Appellants. She also suggested that the recording of the amounts paid as “management fees” indicated that there was an employment relationship.

Analysis

[26] I will deal firstly with the Respondent’s submission that Mr. and Mrs. Mancell were employees because they were directors of the Appellant corporations.

[27] The definitions of “officer” and “employee” found in section 2 of the *Plan* reads as follows:

office and officer —means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a lieutenant governor, the office of a member of the Senate or House of Commons, a member of a legislative assembly or a member of a legislative or executive council and any other office the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity, and also includes the position of a corporation director, and “officer” means a person holding such an office;

employee —includes an officer;

[28] In order for the position of a director to fall within the definition of “officer” set out above, the director must be entitled to a “fixed or ascertainable stipend or remuneration” for carrying out the duties of the position. In this case there has been no evidence led to show that the amounts received by Mr. and Mrs. Mancell from the Appellants were connected with any activities they undertook as directors, and there was no assumption made by the Minister to this effect at the time of the assessments. I am not satisfied that there was any fixed or ascertainable stipend attached to the position of director with the two Appellant corporations, and therefore the Respondent’s first argument cannot succeed.

[29] I am also not convinced that the work done by Mr. and Mrs. Mancell for which they were paid was work that could be said to be the ordinary work of a director of a corporation. Much of the work appears to have been more in line with that done by a property manager than a director.

[30] It is therefore necessary to carry out an analysis of the elements of the relationship between the Appellants and Mr. and Mrs. Mancell as set out in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1986] 3 F.C. 553 (F.C.A.) and approved by the Supreme Court in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59. In this case, the relevant factors are the control that the Appellants had over the Mancells’ activities, ownership of the tools, and the chance of profit and risk of loss to the Mancells from the activities.

[31] I agree with the Respondent’s counsel that it is difficult to determine the level of control a corporation exercises over the worker when the worker is either the sole director or one of two directors of the corporation. However, in this case the evidence discloses that the Mancells were not required to work fixed hours and were not responsible for day-to-day operations. They took time off (sometimes for long periods) when they wished and apparently arranged for a replacement (Mr. Miller) to

take over their duties while they were away. To this extent, the control element points to the existence of a contract for services.

[32] To the extent that the use of the Mancells' home office was not reimbursed, the next element in the *Wiebe Door* test, the ownership of the tools used in the work, also points towards a contract for services.

[33] I also find that the Mancells had a substantial chance of profit given that most if not all of the profits of both Appellants were flowed out to them under the work arrangements. To a certain extent those profits would be determined by the decisions made concerning the rents to charge and the expenditures to incur in the operation of the rental properties.

[34] It also appears that there may have been a slight risk of loss to the Mancells in their work for the Appellants. I understood that the Mancells would only be paid if there were profits from the Appellants' rental operations. In the event that the Appellants were not profitable, the costs of the home office would still only be borne by the Mancells.

[35] Although the intention of the parties respecting their relationship may be relevant in cases of this kind, the evidence of the parties' intention here is less than clear. Mr. Mancell's explanation for not charging GST on the management fees is not convincing, and it is also surprising that the contractual arrangements between the Appellants and the Mancells were not put in writing. Given the non-arm's length relationship between the parties and the large sums of money paid out, one would expect some form of documentation to have been drawn up. I infer that little thought was actually given to the status of the Mancells with the Appellants.

[36] In light of the foregoing analysis, I conclude that the balance of the pertinent factors support the Appellants' position that the Mancells were engaged under contracts for services. In so concluding, I would accord the greatest weight to the absence of supervision and control by the Appellants over the Mancells' work, which is a strong indicator of the existence of a contract for services.

[37] The appeals are therefore allowed.

Signed at Ottawa, Canada, this 18th day of September 2008.

“B.Paris”

CITATION: 2008 TCC 521

COURT FILE NOs.: 2007-2041(CPP) 2007-2042(CPP)

STYLE OF CAUSE: DONALD L. MANCELL PERSONAL
LAW CORPORATION, JKBC HOLDINGS
LTD. AND M.N.R. AND DONALD
MANCELL, KATHRYN MANCELL

PLACE OF HEARING: Nanaimo, British Columbia

DATE OF HEARING: August 11, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: September 18, 2008

APPEARANCES:

Agent for the Appellants:	Donald Mancell
Counsel for the Respondent:	Christa Akey
Agent for the Intervenors:	Donald Mancell

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