Dockets: 2008-357(EI)
2008-358(CPP)

BETWEEN:

G. G. PAINTING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 1, 2008 at Vancouver, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

Agent for the Appellant:	Guy Gagnon
Counsel for the Respondent:	Andrew Majawa

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed, and the decision of the Minister of National Revenue is vacated on the basis that the workers were independent contractors under a contract for service with G.G. Painting Ltd. and accordingly, were not engaged in pensionable employment pursuant to paragraph 6(1)(*a*) of the *Canada Pension Plan* or insurable employment pursuant to paragraph 5(1)(*a*) of the *Employment Insurance Act*.

Signed at Ottawa, Canada, this 19th day of November, 2008.

"G.A. Sheridan"

Sheridan J.

Citation: 2008TCC607
Date: 20081119
Dockets: 2008-357(EI)
2008-358(CPP)

BETWEEN:

G. G. PAINTING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The issue in this appeal is whether three house painters[1] were working for the Appellant, G.G. Painting Ltd., as employees or independent contractors.

[2] The Minister's position is that the workers were engaged in insurable[2] and pensionable[3] employment under a contract of service. The Respondent called as witnesses the Rulings Officer, Linda Flores, and one of the workers, Katherine Stephens. Ms. Stephens was the only one of the workers to testify but I accept her evidence as common to all the workers in this appeal.

[3] The Minister's decision was based on the following assumptions of fact:

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[1] Katherine Stephens, Benjamin Kohlman and Michel Émond.

[2] Pursuant to paragraph 5(1)(*a*) of the *Employment Insurance Act*.

[3] Pursuant to subsection 6(1)(*a*) of the *Canada Pension Plan.*

a) the facts admitted in paragraph one and two, above;

b) during the Periods, the nature of the Appellant's business was a painting contractor;

c) the Appellant operated the business under the name G. G. Painting Ltd.;

d) Guy Gagnon controlled the day-to-day operations of the Appellant and made all the major business decisions of the Appellant;

e) the Appellant contracted with its client to perform the painting services (the "Painting Services");

f) the Workers performed the Painting Services for the Appellant's clients;

g) the main duty of the Workers was to paint;

h) the Workers' related duties included sanding, scraping and cleaning up the worksite;

i) the Appellant purchased the paint, materials, supplies, tools and equipment used to fulfill the contracts for the clients;

j) the Appellant was responsible for any costs of repairs, maintenance and insurance on the tools and equipment;

k) the Workers were not responsible for any of the Appellant's operating expenses;

l) the Appellant instructed the Workers on what Painting Services needed to be performed;

m) the Appellant instructed the Workers on where the Painting Services would be performed;

n) the Appellant required the Workers to perform the Painting Services personally and the Workers could not hire assistants or subcontractors;

o) the Workers were paid between $10.00 to $16.00 per hour, depending upon experience;

p) the Appellant set the Workers' rates of pay;

q) the Appellant's days of operations were weekdays and weekend;

r) the Workers performed the Painting Services on weekdays and weekends based on deadlines and priorities set by the Appellant;

s) the Appellant determined the Workers' hours of work;

t) the Workers' hours of work were recorded on timesheets;

u) the Workers were not financially liable if they did not fulfill the obligations of the Appellant's contracts with its clients;

v) the Appellant was responsible for resolving client complaints about the Painting Services;

w) the Appellant provided the client with a guarantee on the Painting Services performed;

x) the Workers did not advertise their Painting Services and did not market themselves as being in business on their own;

y) the Workers did not operate their own businesses in respect of the Painting Services;

z) the Appellant paid Workers' Compensation Board premiums on behalf of all of the Workers;

aa) the Appellant provided the Workers with business T-shirts;

bb) the Workers were trained by the Appellant;

cc) the Appellant maintained the right to terminate the Workers' services;

dd) the Workers had no capital investment in a business;

ee) the Workers were not in a position to realize a profit or loss from the Appellant's business;

ff) the Workers were paid weekly by cheque;

gg) the Workers were not hired by the Appellant under a written contract; and

hh) during the Periods, the Workers performed the Painting Services as employees of the Appellant under a contract of service.

[4] Counsel for the Respondent presented a thorough review of the jurisprudence establishing the tests for the determination of whether a worker is an employee or an independent contractor; in particular, *Wiebe Door Services Ltd. v. Minister of*

National Revenue[4], *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[5] and *The Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*[6]. Briefly summarized, in making this determination, the Court must consider the degree of control the payor exercises over the worker; the ownership of tools; the chance for profit and risk of loss; and the degree to which the worker is integrated into the business of the payor. In circumstances where the *671122 Ontario Ltd. v. Sagaz* analysis does not produce a conclusive answer, the Court may consider the intention of the parties, provided that intention is consistent with their conduct[7].

[5] The Appellant was represented by its principal, Guy Gagnon, who also testified at the hearing. As is often the case in appeals of this nature, it is not so much the facts that are in dispute as how they ought to be interpreted. However, the Appellant specifically disputes the facts assumed in paragraphs 8(p), (s), (t), (z) and (gg).

[6] Before incorporating G.G. Painting Ltd. in 1988, Mr. Gagnon had himself been a house painter. He always worked as a sub-contractor, a practice he said was typical of the painting business. Intending to engage workers for his own company on that footing, he took steps to find out how to structure the Appellant's relationship with its workers accordingly. He first sought information on what distinguished an employee from an independent contractor. He had his lawyer draft a standard form contract[8] designed for sub-contractors that he could use in the business. He contacted WorkSafeBC as to the circumstances in which premiums were payable for sub-contractors and based on the information provided[9], caused the Appellant to pay the premiums for the three workers in question. Further, in the relevant years, the Appellant duly reported the amounts it paid to the workers for their labour services

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[4] 87 DTC 5025 (F.C.A.).

[5] [2001] S.C.J. No. 61.

[6] 2006 DTC 6323 (F.C.A.).

[7] *National Capital Outaouais Ski Team v. Canada (Minister of National Revenue – M.N.R.),* 2008 FCA 132; *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.),* [2006] F.C.J. No. 1653 (F.C.A.).

[8] Exhibit A-2.

[9] Exhibit A-1.

by filing a Form T5018 "Summary of Contract Payments"[10], a form prescribed by the *Income Tax Act* to report the earnings of sub-contractors, for Katherine Stephens, Benjamin Kohlman and Michel Émond.

[7] It was the discovery of their T5018 forms that triggered Ms. Flores' further investigations into the workers' status. She interviewed Katherine Stephens and Benjamin Kohlman as well as Rosamartha Gonzalez, the Appellant's bookkeeper. She also had them complete the department's standard questionnaires, essentially a checklist of the tests established in the jurisprudence. She reviewed the contracts signed by Katherine Stephens and Benjamin Kohlman. Based on this information, she concluded that the workers were engaged under a contract of service and were employees.

[8] In my view, the evidence points in a different direction. For the reasons set out below, I am satisfied that the Appellant has met the burden of proving that the workers were engaged as independent contractors.

[9] Mr. Gagnon's practice when hiring workers for the Appellant was to have them complete the company's standard form contract. It specifically identifies the worker as the "sub-contractor". It sets out the worker's name, address, social insurance and driver's licence number along with the address of the first job site and the rate of pay. The preamble of the contract reads as follows:

> WHEREAS:
>
> A. GG has contracted with a property owner to provide painting services at [civic address of house to be painted] (the "Property").
>
> B. GG wishes to hire the Sub-contractor as a sub-contractor to complete some or all of those painting services at the Property.
>
> C. The Sub-contractor wishes to be hired as a sub-contractor to provide his/her painting services to GG.

Paragraph 3 of the contract states that:

> 3. **The Sub-contractor agrees that (s)he is not an employee or partner of GG**. When not acting as a sub-contractor for GG, the Sub-contractor is free to pursue painting opportunities with persons other than GG, provided that those opportunities do not detract from his/her obligations to GG as outlined in this

[10] Exhibit A-3.

> Contract. As such, GG will is responsible to make the usual payroll deductions which the law requires an employer to make. The Sub-contractor alone will be responsible to remit his/her own income tax and other remittances to the relevant governmental authorities.

[10] I accept the Respondent's submission that how the parties label their relationship is not determinative of its true nature[11]. However, in my view, the evidence of the existence of a payor/sub-contractor relationship between the Appellant and the workers goes beyond mere labeling.

[11] Katherine Stephens was a 17-year-old student when she signed her agreement with the Appellant. Like Mr. Gagnon and Ms. Flores, she was credible in the presentation of her evidence. Because school was her priority, she was interested in work that she could fit easily into her academic timetable. Mr. Gagnon testified that it was the Appellant's practice to negotiate the rate of pay with each worker, depending on his or her experience and the amount they wanted to be paid. Consistent with this is Exhibit A-2 which shows a variation in the rates paid to the workers: Benjamin Kohlman was paid $9 per hour; Ms. Stephens started at a rate of $10 per hour. She accepted that amount because it was better than what she had been paid in other jobs. Though her work experience was understandably limited, she had been an "employee" in the fast food industry and was candid in her evidence that in comparison, working for the Appellant was an attractive alternative. As her skills improved and she began to receive compliments from Mr. Gagnon on her work, Ms. Stephens took it upon herself to negotiate increases in the hourly rate they had originally agreed upon.

[12] Ms. Stephens testified that she had complete control over the number of hours she worked; on the rare occasion when she was sick or did not want to work, she simply notified Mr. Gagnon that she would not be available. She described Mr. Gagnon as being "pretty easy" about her hours, an appraisal that lends support to his contention that the workers, as sub-contractors, were the masters of their own destiny: free to work or not; free to perform services for the Appellant or others, as they chose.

[13] At the job site, Ms. Stephens was her own boss: within the framework of client specifications, she managed the tasks for which she was responsible: scraping,

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[11] *Hodgkinson v. Canada* (Minister of National Revenue – M.N.R., [2007] F.C.J. No. 1409; *National Capital Outaouais Ski Team v. Canada (*Minister of National Revenue – M.N.R.*),* [2008] 4 C.T.C. 273.

sanding, setting up tarps and ladders, cleaning brushes and painting. Contrary to the assumptions in paragraphs 8(l), (m) and (r), the Appellant and the workers were equally subject to perform their respective roles according to the clients' requirements: i.e., the nature of the work to be done and its location. That it passed on such practical information to the workers is not an indicator of the Appellant's "control" over them.

[14] While the assumption that the workers' hours were recorded on timesheets[12] is technically correct, the inference of control drawn from it is not. Ms. Stephens also kept track of her hours, sometimes recording them on her cell phone. She did not present Mr. Gagnon with a formal invoice: their arrangement was that she would review the hours recorded by Mr. Gagnon against her own tallies; if any discrepancies were discovered, she would discuss the matter with him and they would arrive at a mutually agreed amount. It is evident from Mr. Gagnon's and Ms. Stephens' testimony that the Appellant relied on the services of independent individuals who for various reasons, were attracted by the control over their own hours and lack of long-term commitment. For example, Ms. Stephens testified that although she was working for the Appellant during much of the same period as the other two workers, she had no clear recollection of them; she "barely knew anyone's name, certainly not last names" and there were always "lots of people coming and going". This is consistent with the workers having made their own agreements to provide labour services to the Appellant on their own terms at individual job sites. In these circumstances, it would be unreasonable to expect the workers to issue formal invoices. By the same token, the fact that the workers did not have business cards and did not advertise their services is of little significance.

[15] In his submissions, counsel for the Respondent described Ms. Stephens as "young and unsophisticated"; she struck me, however, as a very bright young woman with the self-discipline to balance her studies and her work. She kept a close eye on the money she was owed for her services and had the confidence to renegotiate her rate of pay commensurate with her improving performance. I am satisfied that she understood and agreed with Mr. Gagnon, on behalf of the Appellant, that she was working as an independent contractor.

[16] The assumption in paragraph 8(d) that Mr. Gagnon controlled the business of the Appellant is hardly surprising as he was the directing mind of the company; his control over *that* operation however, is not determinative of whether the Appellant

[12] Reply to the Notice of Appeal, paragraph 8(t).

exercised control over Ms. Stephens and the other workers. Similarly, regarding paragraph 8(cc), I infer from Ms. Stephens' evidence that she could work when and if she chose that she was equally entitled to terminate her contract with the Appellant at any time. Finally, the assumption in paragraph 8(bb) deals with training; to the minimal extent training occurred, there is no question it was the Appellant who provided it. This fact, however, does not outweigh the effect of the other evidence militating against a finding that the Appellant was in control of the workers. As for the payment of Workers' Compensation premiums[13], Exhibit A-1 shows that in certain circumstances, a payor is required to pay premiums for its independent or sub-contractors. Thus, the fact that the Appellant paid the premiums for the workers is not determinative of the matter.

[17] Finally, the Minister assumed that "the Workers were not hired … under a written contract"[14]. While not challenging the validity of the Appellant's contracts with Katherine Stephens and Benjamin Kohlman, the Rulings Officer disregarded them because, she said, they were not "for the period"[15]. Exhibit A-2 shows that the contracts of Katherine Stephens and Benjamin Kohlman were signed in July 2004 and June 2004, respectively, dates that are indeed outside the period during which the work in question was performed. This fact, however, does not lead inexorably to the conclusion that the workers were employees. A finding that a worker was engaged under a contract for services does not hinge on the existence of a written contract. The evidence of Ms. Stephens and Mr. Gagnon gives me no reason to doubt that it was implicitly agreed that the original written agreement, verbally modified as required from time to time, would be continually renewed with each new project until it was ultimately terminated by one or the other of them. In the context of the Appellant's and the workers' respective business operations, proceeding on this basis was entirely reasonable.

[18] The oft-cited *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* makes clear that not every factor will be applicable in every case and that no one factor has any more weight than another. In the circumstances of the present case, the ownership of tools does not come into it. I accept the Respondent's submission that the workers had little chance of profit/risk of loss; however, I am satisfied that the

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[13] Reply to the Notice of Appeal, paragraph 8(z).

[14] Reply to the Notice of Appeal, paragraph 8(gg).

[15] In the case of Katherine Stephens, January 1, 2005 to July 4, 2005; Benjamin Kohlman, February 26, 2005 to July 29, 2006; Michel Émond, January 1, 2005 to November 16, 2006.

preponderance of the evidence supports the conclusion that the workers were not controlled by the Appellant; nor were they integrated into its business. They were independent contractors and accordingly, were not engaged in insurable or pensionable employment. The appeal is allowed.

Signed at Ottawa, Canada, this 19th day of November, 2008.

"G.A. Sheridan"

Sheridan J.

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APPEARANCES:

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