Docket: 2008-527(EI)

BETWEEN:

NORMAN F. EINARSSON LAW CORPORATION,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Norman F. Einarsson Law Corporation (2008-529(CPP))
on November 18, 2008, at Vancouver, British Columbia

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

Appearances:

Counsel for the Appellant:	Andrea Donohoe Donald W. Smetheram
Counsel for the Respondent:	Whitney Dunn

JUDGMENT

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

Signed at Sidney, British Columbia, this 26th day of January, 2009.

"D.W. Rowe"

Rowe D.J.

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Citation: 2009TCC45
Date: 20090126
Dockets: 2008-527(EI)
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REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant, Norman F. Einarsson Law Corporation ("ELC") appealed from two decisions issued by the Minister of National Revenue (the " Minister") on November 20, 2007 pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"), wherein the Minister decided the employment of Diana Tecson ("Tecson") with ELC from January 1, 2005 to March 31, 2006 was both insurable and pensionable because she was employed under a contract of service.

[2] Counsel for the Appellant and counsel for the Respondent agreed both appeals could be heard together.

[3] Although Tecson had been working with ELC under the same terms and conditions since 2003, only the period referred to above is in issue.

[4] By agreement, the parties filed – as Exhibit A-1 – a Partial Agreed Statement of Facts and paragraphs 1-21, inclusive, read as follows:

1. Norman F. Einarsson Law Corporation (the "Firm") provides legal services in British Columbia in real estate conveyancing, wills and estates, corporate law and, to a small amount, corporate litigation.

2. Diana Tecson provided legal support services to the Firm. Ms. Tecson started working for the Firm in 2003 and worked from then through the period under appeal (January 1, 2005 to March 31, 2006).

3. The Firm and Ms. Tecson mutually agreed that she would provide her services as an independent contractor, and the Firm did not withhold income tax, or CPP or EI premiums for her.

4. The intent of the Firm and Ms. Tecson was that Ms. Tecson was not an employee of the Firm but was a self-employed person.

5. Ms. Tecson's duties included typing, filing and answering the phone.

6. Ms. Tecson was experienced in providing these types of services and did not need supervision by the Firm.

7. The Firm monitored the results of Ms. Tecson's work to ensure that it was of acceptable quality.

8. The Firm's office hours were 9 am to 4 pm, Monday to Friday.

9. Ms. Tecson generally worked about 6 hours per day, Monday to Friday.

10. Ms. Tecson was paid at the rate of $16.50 per hour.

11. Ms. Tecson submitted invoices to the Firm setting out the number of hours she had worked.

12. Ms. Tecson did not add Goods and Service Tax (GST) to these invoices.

13. The Firm paid Ms. Tecson by cheque.

14. The Firm, at its office, provided Ms. Tecson with a computer, telephone, filing cabinet and some office supplies.

15. Ms. Tecson worked for the Firm occasionally from her own home using her own computer, telephone and fax.

16. Ms. Tecson was responsible for the cost of her home office telephone, fax machine, cell phone, preparation of invoices, and keeping accounting records.

17. Ms. Tecson incurred few, if any, expenses in providing her services to the Firm.

18. Ms. Tecson was free to take other jobs in which she might provide the same or similar services that she provided to the Firm. However, during the period under appeal, she never did so.

19. Ms. Tecson did not have a Business Number for taxation purposes.

20. Ms. Tecson had no business cards, no business bank account, and no business liability insurance.

21. Ms. Tecson did not advertise her services to the public.

[5] Counsel for the Appellant – with consent of counsel for the Respondent filed – as Exhibit A-2 - a binder of documents containing copies of invoices submitted to ELC by Tecson during the relevant period.

[6] Norman Franklin Einarsson testified he is a Barrister and Solicitor, practising in Surrey, British Columbia. He was called to the Bar in 1972 and after carrying on a practice with a firm in Vancouver for 30 years, relocated to a small office in Surrey where he operated solo through his professional corporation – ELC – of which he was the only director. Einarsson stated he met Ms. Svelander ("Svelander") – a paralegal – who had been working in a real estate conveyancing practice in Port Coquitlam prior to undertaking a similar position with a lawyer in south Surrey who left that practice thereby providing an opportunity for Einarsson to take over the space. Tecson was Svelander's sister-in-law and had been employed in a Vancouver accounting firm but was seeking employment closer to home to avoid the daily commute. Einarsson stated he was satisfied Tecson had good work experience and accounting skills and could perform secretarial duties in his practice which was comprised – mainly - of solicitor's work but included some litigation. However, Einarsson was unable to determine the amount of work available and discussed that matter with Tecson who acknowledged the number of hours of work could vary. Einarsson stated he taught Tecson how to prepare certain documents but she did not need any instruction to post transactions to the ledgers which she took home with her, nor concerning preparation of mandatory trust reconciliations. During the relevant period, he and Tecson agreed her rate of pay would be $16.50 per hour without any extra payment for overtime and without any benefits and she began providing services to ELC in 2003. Einarsson had been carrying on a real estate conveyancing practice by utilizing the services of Ms. Svelander who occupied a space in the same office and was remunerated for her services on the basis of a percentage of the fee billed by Einarsson on those files. By January, 2005, Svelander needed assistance to

handle conveyancing files and Tecson agreed to assume some of that work. Einarsson stated he and Tecson agreed she would receive a commission based on 13% of the fee portion billed on a particular file in addition to her hourly rate of $16.50. Einarsson stated the hourly fee paid to Tecson had increased – through negotiation – since 2003 and that she earned approximately $24,000 per year during the relevant period. Einarsson requested notice from Tecson if she was to be absent from the office but he regarded that as a courtesy. Tecson informed him if she was taking a camping holiday for a week or would not be working on a particular Friday. According to the January 4 to January 14, 2005 invoices submitted by Tecson to ELC – January tab of Exhibit A-2 – she billed for only 5.5 hours on January 5 and 6 and for 6 hours on 4 other days and a full 7 hours only on January 13. Einarsson could not recall when he and Tecson agreed she would clean the office – as determined by her – for a flat fee of $70.00 but she was billing for that service during the relevant period. Due to the nature of the conveyancing work, Tecson was able to take files home and work on them at her own pace. The February invoice for the period January 31 to February 11 had an entry for 3 hours work performed at home which was described as "bank recs" meaning bank reconciliations. Einarsson stated Tecson was free to decline work on particular files and in that event he had an arrangement with a 5-person law firm who could provide paralegal assistance if – for example - it involved the sale of a business for a large amount of money. Although it was earlier in their working relationship and prior to the relevant period, Tecson had secured the services of a replacement paralegal while she was away on a 5-week holiday. Tecson's sister was a paralegal at a downtown Vancouver law firm and there were other experienced people Tecson could contact for advice and assistance. Einarsson stated he and Tecson had agreed at the outset of their working relationship that either party could terminate the arrangement but that situation did not arise until Tecson informed him that she and her husband would be moving to Prince George, a process that took about 6-8 months to complete before she quit working for ELC in June, 2008. Einarsson stated he had discussed the working status with Tecson more than once because she was not receiving any vacation pay nor any benefits but she wanted to retain her status as an independent service provider and not be tied down to a job where she had to work until 5:00 p.m. because it was important to be with her children when they finished school at 3:00 p.m.. Einarsson was referred to the third page of the June tab in Exhibit A-2 wherein Tecson had billed a total of $159.46 based on a 13% share of the fees billed on 3 separate conveyancing files. She did not include any Goods and Services Tax ("GST") because she was not billing in excess of $30,000 per year and had not registered as a supplier under the *Excise Tax Act.*

[7] Einarsson was cross-examined by counsel for the Respondent. Einarsson agreed that as a member of the Law Society of British Columbia ("Law Society")

carrying on a practice, he was ultimately responsible for the work performed by Tecson. Although she had not worked in a law office before, Einarsson ascertained she learned quickly and when she began working on real estate files, his level of oversight was greater than when the work was handled by Svelander. In Einarsson's assessment, for the majority of the period at issue in the within appeals, Tecson was well-trained and qualified to perform the necessary work and was able to prepare various documents on her own initiative. Svelander had been performing services to ELC based on a 40% share of the fee billed on each relevant file until she left in the summer of 2005. During the period at issue, Einarsson estimated the ELC practice was composed of 10-15% conveyancing, 50%-55% corporate law and some personal injury litigation included in the balance.

[8] Einarsson was re-examined by his counsel. Einarsson stated he had considered Svelander to have provided her services to ELC as an independent contractor and that prior to Tecson's arrival at the office, the accounting had been done by a Certified General Accountant. Einarsson could not recall whether he had needed to rely on the services of the 5-person law firm to provide paralegal assistance to ELC during the relevant period.

[9] The Respondent did not call any witnesses.

[10] Counsel for the Appellant submitted written argument which I have summarized as follows:

1. It was beyond dispute that Einarsson – through his corporation ELC – and Tecson intended that she would provide her services as an independent contractor to type, file, answer telephone calls, liaise with clients and provide accounting services.

2. The extent of supervision of Tecson by Einarsson was minimal to the extent required by prudence to ensure quality and to comply with the requirements of the Law Society.

3. Tecson and ELC had an arrangement whereby she submitted invoices which set forth the hours worked at the applicable rate - $16.50 – together with additional amounts based on a percentage of the fee in respect of real estate files and other miscellaneous services not compensated at the usual hourly rate.

4. Tecson and Einarsson dealt with each other throughout the working relationship – including the relevant period – in a manner consistent with their original intent that Tecson would provide her services as an independent contractor and not as an employee pursuant to a contract of service.

5. Although Tecson usually worked 6 hours per day, she was free to work more or less and was able to be absent for some part of the work day and to choose which work would be performed at her home office for which she was responsible for all associated costs.

6. Tecson was able to decline work on certain files, could take prolonged holidays or days off at her discretion and was permitted to accept similar work from other persons or firms without obtaining the consent of Einarsson.

7. Although it did not occur during the relevant period, Tecson could hire a replacement worker or assistant.

8. The circumstances of the working relationship were such that it was normal and reasonable for the tools and equipment to have been provided by ELC at its office.

9. Tecson was at risk of having her contract with ELC terminated at any time without compensation and had the option of withdrawing her services at any time without notice to ELC.

10. Tecson was providing her services to a one-person law practice carried on by Einarsson and did not enjoy the security of tenure one would associate with a larger law firm whose continued existence could be assumed in the normal course.

11. Tecson was not provided with any of the usual employee benefits such as vacation pay, statutory holiday pay, overtime or sick leave.
12. Tecson was able to generate additional revenue by earning a percentage of the total fee on real estate transactions.

13. Tecson performed cleaning services at the ELC office and invoiced ELC based on a fixed fee of $70.00.

14. Tecson prepared her own invoices calculated on the agreed hourly rate, the percentage share of the fee on certain files and the fixed rate for cleaning services.

15. ELC and Tecson made a conscious decision to deal with each other in a manner consistent with modern business practice whereby Tecson would provide her services pursuant to a contract for services and thereafter – as demonstrated by their actions - adhered to that intent.

[11] Counsel submitted the appeals should be allowed and the decision of the Minister varied to find Tecson was not engaged in employable nor pensionable employment with ELC during the relevant period.

[12] Counsel for the Respondent conceded the intent of the parties was clear and that they wanted Tecson to provide her services as an independent contractor and acknowledged she had invoiced ELC for her services. Counsel referred to the invoices – Exhibit A-2 – and pointed out the consistency of the billing for services provided on 20 or 21 days per month. When preparing invoices for certain periods, Tecson described a particular day as a Statutory Holiday and entered the number "0" under the heading, Daily Hours. She followed the same procedure when identifying a date and adding the description – Sick Day – with the corresponding entry of zero hours. In counsel's view of that evidence, it was consistent with the method by which any hourly-compensated employee is paid because it is based on the number of hours actually worked. Counsel pointed out Tecson did not perform much work for ELC from her in-home office and had billed only 3 hours in each of February and March, 2005. Otherwise, she worked a regular schedule of 6 hours per day, Monday through Friday, for a total of approximately 30 hours per week and her hourly rate had been increased at some point prior to the period under appeal.

[13] Counsel submitted that with respect to the matter of control, it was Einarsson as the directing mind and sole officer of ELC who was responsible for the work performed by Tecson and he was ultimately answerable to the Law Society for conduct of the files and the accuracy of her accounting work whether performed for clients or to meet requirements of his own practice, including compliance with Law Society rules.

[14] Counsel referred to the invoices submitted by Tecson to demonstrate the amount earned by her in the form of a fixed percentage of the fee on real estate files was not significant in the context of the amount – about $26,000 – paid to her during the relevant period. In counsel's view of the matter, the office cleaning services

provided by Tecson was part of her overall function as an employee of ELC and it enabled the one-man law firm to operate efficiently. Tecson had no business cards and was not required to charge GST due to her level of earnings which was below the threshold required for registration.

[15] Counsel submitted the decision of the Minister should be confirmed.

[16] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *Royal Winnipeg Ballet v. M.N.R. (F.C.A.)*, 2006 FCA 87 (CanLII) ("*Royal Winnipeg Ballet*"), *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.)*, [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada*, 2006 FCA 350 (CanLII) ("*City Water*"), there was no issue in this regard due to the clearly-expressed mutual intent of the parties that the person providing the services would be doing so as an independent contractor and not as an employee. That is the case in the within appeals as stated in the Partial Agreed Statement of Facts.

[17] 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. Canada (Minister of National Revenue - M.N.R.)*, [1986] 3 F.C. 553 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 paragraphs 47 and 48 of his judgment stated:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

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

Level of control

[19] Initially, when Tecson began providing her services to ELC – in 2003 – she required training and a higher degree of supervision by Einarsson and this was also the case when she began handling real estate conveyance files. After Tecson became accustomed to that sort of work and could perform miscellaneous tasks pertaining to other matters, the amount of supervision required was reduced and she could prepare some documents on her own initiative. However, the duty owed by Einarsson to his clients and to comply with the rules imposed by the Law Society, required him to assume ultimate responsibility for work done by Tecson including accounting work performed not only for clients on their files but for ELC as it pertained to the accuracy of the ledgers, bank reconciliations, accounts to clients and – most important – the trust ledgers to verify the proper handling of clients' money. During the relevant period, Tecson only billed ELC for a total of 7 hours work performed at her in-home office so it is obvious she was working almost exclusively in the law office where her various duties – except for cleaning – were subject to scrutiny, direction and instruction, as required.

Provision of equipment and/or helpers

[20] During the relevant period, there is no evidence Tecson hired any helpers or assistants and the only equipment needed to perform those limited duties – 7 hours in total – at her home would have been minimal particularly since it seemed to relate to accounting matters. There is no evidence that any expense was attributable to the small amount of work performed by Tecson for ELC for that space and it is admitted she incurred, few – if any – expenses in providing her services to ELC. The equipment at the office was provided by ELC and Einarsson had established an arrangement with a 5-person law firm to provide necessary paralegal assistance in the event Tecson was absent from the office or otherwise unwilling or unable to perform certain duties in the context of a large commercial corporate transaction for which she did not have the required experience. She may have brought her own cleaning supplies to the office in the course of earning $350.00 in a 15-month period or she

may have paid someone either to help her or to do the cleaning but there is no evidence of that.

Degree of financial risk and responsibility for investment and management

[21] Counsel for the Appellant submitted the lack of job security was a factor that constituted a financial risk. That may be, but it has little to do with the analysis required in the context of the within appeals. She was working for a one-person law firm but had worked for ELC since 2003 and was not in the same situation as a person who had to line up each morning and wait to be assigned a job to install gutters or to clean ducts at a residence or to service and maintain water purification units. Tecson did not run any risk of losing money as a consequence of carrying out her duties as a paralegal whether in the course of performing ordinary secretarial duties or when working on conveyancing files or doing the accounting work required by ELC. She was not required to make any investment in the operation of the law firm or with respect to any component of the service she was providing. She did not have to manage any staff nor was she fixed with the responsibility of ensuring other paralegal assistance was available during her absence since that had been arranged by Einarsson.

Opportunity for profit in the performance of tasks

[22] Tecson billed ELC by the hour for secretarial tasks performed. She billed only for those hours worked which – usually - were 6 hours per day, Monday through Friday. When performing work on real estate conveyance files, she billed ELC 13% of the total fees and could earn more money only if Einarsson had more of those files. Tecson had the option to refuse work on certain complex files but that would only reduce her ability to earn additional revenue. It was submitted on her behalf that she was free to take on other jobs but that is the case with anyone who is working a regular shift unless bound by a restrictive clause in an agreement with the payor. For those working about 30 hours per week at one workplace, it is not unusual for some to supplement that income by working at another endeavour either as an employee or an independent contractor performing the same, similar or completely different service. Within Tecson's working relationship with ELC, she could earn more money only by working more hours, obtaining a higher hourly rate, working on more real estate files or - through negotiation with Einarsson - by receiving a higher percentage of the total fee. Also, she could have cleaned the office more frequently and negotiated a higher fixed rate for that task. She earned the sum of $1,432.16 – or 5.3% of total income - $26,677.00 - during the period at issue as disclosed by the invoices in the binder, Exhibit A-2. She did not have the ability to arrange her affairs

or to work in a more efficient manner so as to increase the amount of remuneration directly attributable to her efforts. Perhaps, she could have cleaned the office more often but during the relevant period she earned only $350.00 or 1.3% of total revenue from performing that task.

[23] In *Royal Winnipeg Ballet, supra,* the issue was whether the dancers 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 Québec*, 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 CPP and the EIA, 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, wishes 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.

[24] In the within appeals, the parties agreed Tecson would provide her services to ELC as an independent contractor. The question remains as to the significance of that consent in light of all the circumstances.

[25] In *City Water*, *supra*, Malone, J.A. set out the factual background in paragraphs 5 to 12, inclusive:

> [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.

[26] In reviewing the evidence, Malone, J.A. found the control test was of little weight due to the simplicity of the task carried out by the workers and that controlling the quality of work was not the same as controlling its actual performance. As a result, he stated the control aspect of the analysis pointed to a contract for services. Justice Malone held that although City Water provided almost

all the necessary equipment, the overwhelming majority of workers provided their own vehicles which were essential to the job and represented a major investment. In his view, this favoured a finding the service workers were independent contractors. There was no opportunity for profit because the workers were paid by the hour and the chance of profit was completely attributable to City Water. Even though the workers could have worked harder to obtain a bonus of $200.00, that was not regarded in the same light as the opportunity to gain profit by someone running a business. In terms of exposure to financial risk, Justice Malone found there was no risk of loss of any kind since the workers were reimbursed for various expenses and were paid a monthly car allowance. They did not run any risk of payment since they were remunerated for their work even if the customer did not pay the invoice submitted by City Water.

[27] It was necessary for Malone, J.A. to deal with the issue of intent of the parties. Commencing at paragraph 27 and continuing through paragraph 31, he stated:

> [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 FCA 87 (CanLII), 2006 FCA 87 at paragraph 61). *Royal Winnipeg* was not decided at the time the Judge rendered his decision.
>
> [29] *Royal Winnipeg* is essentially a re-codification of the law as stated by this Court in *Wolf, supra* at paragraph 15. In that case, the issue before this Court was whether Mr. Wolf was an employee or an independent contractor. Concurring with Desjardins J.A. in the end result, but on the basis of a different analysis, Noël J.A. stated at paragraphs 122 to 124:
>
> > … But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.
> > …
> > My assessment of the total relationship of the parties yields no clear result which is why I believe regard must be had to how the parties viewed their relationship.
> > …
> > It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been

> mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding.

> [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.

[28] In the case of *Standing v. Canada (Minister of National Revenue – M.N.R.)(F.C.A.)*, [1992] F.C.J. No. 890 Stone, J.A. stated:

> ... There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the Wiebe Door test. ...

[29] In deciding the case of *Dean Lang and Sharon Lang v. M.N.R.*, 2007 TCC 547(CanLII), Chief Justice Bowman considered the decision of the Federal Court of appeal in *Wolf* and other decisions post-*Wolf*. At paragraph 24, he stated:

> [24] I doubt that it is possible to find one *ratio decidendi* that would apply to all three judgments. The three judges agreed that the Tax Court of Canada judgment could not stand but beyond that I can discern no common thread. Desjardins J.A. did not refer to intent whereas Décary J.A. held common intention to be determinative and, if other factors were necessary, lack of job security, disregard of employee benefits, freedom of choice and mobility were to be considered. While these factors do not appear to have been mentioned previously they are certainly factors whose absence or presence I would consider as significant in the

determination of an employer/employee relationship. Noël J.A. treated intention as a balancing factor if the traditional *Wiebe Door* test yielded no conclusive result.

[30] Chief Justice Bowman – at paragraphs 33 to 40, inclusive - continued his analysis as follows:

> [33] With respect to the factor of intent I would make a couple more observations. The first is that the Supreme Court of Canada has not expressed a view on the role of intent. In *Sagaz*, it was not mentioned as a factor. The second is that if the intent of the parties is a factor it must be an intent that is shared by both parties. If there is no meeting of the minds and the parties are not *ad idem*, intent can not be a factor. The third, if intent is a factor in determining whether someone is an employee or an independent contractor, then it must necessarily be a factor in all cases where the question is relevant. In this court our focus is usually on the rather narrow question whether a person is employed in insurable or pensionable employment or, under the *Income Tax Act*, whether a person is an employee for the purposes of deducting certain types of expenses or being taxed in a particular way. The *Sagaz* case, on the other hand dealt with vicarious liability. If the test is the same then the rights of third parties could potentially be affected by the subjective intent of the contracting parties as to the nature of their relationship — a concern expressed by Evans J.A. in his dissent in *Royal Winnipeg Ballet.*
>
> [34] Where then does this series of cases leave us? A few general conclusions can be drawn:
>
> (a) The four-in-one test in *Wiebe Door* as confirmed by *Sagaz* is a significant factor in all cases including cases arising in Quebec.
>
> (b) The four-in-one test in *Wiebe Door* has, in the Federal Court of Appeal, been reduced to representing "useful guidelines" "relevant and helpful in ascertaining the intent of the parties". This is true both in Quebec and the common law provinces.
>
> (c) Integration as a test is for all practical purposes dead. Judges who try to apply it do so at their peril.
>
> (d) Intent is a test that cannot be ignored but its weight is as yet undetermined. It varies from case to case from being predominant to being a tie-breaker. It has not been considered by the Supreme Court of Canada. If it is considered by the Supreme Court of Canada the dissenting judgment of Evans J.A. in *Royal Winnipeg Ballet* will have to be taken into account.
>
> (e) Trial judges who ignore intent stand a very good chance of being overruled in the Federal Court of Appeal. (But see *Gagnon* where intent

was not considered at trial but was ascertained by the Federal Court of Appeal by reference to the *Wiebe Door* tests that were applied by the trial judge. Compare this to *Royal Winnipeg Ballet, City Water* and *Wolf.*

[35] I turn then to the question of the status of the people hired to do the duct cleaning. Despite the temptation to use Sir Wilfred Greene's method I shall endeavour to apply as best I can the principles to be deduced from the Federal Court of Appeal's decisions.

[36] I have considered this case on the basis of four alternative hypotheses. They all lead to the same conclusion.

(a) Intent is determinative (*Royal Winnipeg Ballet*).

(b) *Wiebe Door* is all that is needed and intent need not be considered (*Sagaz,Wiebe Door* and *Precision Gutters*).

(c) The *Wiebe Door* test does not point conclusively in any direction and so intent is a tie-breaker (*Wolf* and *City Water*).

(d) Common sense, instinct and a consultation with the man on the Clapham omnibus.

[37] If the law did not permit me to look at anything but the *Wiebe Door* test, standing by itself, then I would have to say that it pointed more to independent contractor than employee. There was no supervision and no control. The workers were picked and told to go to a particular house. If mistakes had to be corrected the workers had to go back at their own expense and correct their mistakes. They had a chance of profit and bore the risk of loss. They got paid a percentage of the fee paid to Dun-Rite. If Dun-Rite did not get paid neither did they. If Dun-Rite got plenty of orders their chances of increased income were commensurately enhanced. If Dun-Rite chose not to hire a worker he simply was not hired. If they did a good job their chances of getting hired for the next job were enhanced. Ownership of tools points in neither direction. The appellants supplied the vacuum equipment and the van and the workers supplied the small tools.

[38] If intent is determinative clearly the workers were independent contractors. (*Royal Winnipeg Ballet)* Both the appellants and the workers who were called as witnesses regarded themselves as independent contractors. This is evident from their oral testimony and from the fact that no employee benefits, no vacation pay, and no job security were provided. The workers had to wait around until they were contacted by the appellants or Monty Hagan. They could accept or decline the job and they could take other jobs. They had no assurance that they would be hired by Dun-Rite and they had no guarantee of being hired again after the particular jobs for which they were hired were completed. These factors bring them within the considerations enunciated by Décary J.A. in *Wolf.*

> [39] If we regard intent as merely a tie-breaker (as stated in Noël J.A.'s judgment in *Wolf* as well as in Malone J.A.'s decision in *City Water*), the same result would apply even if the *Wiebe Door* tests pointed unequivocally in neither direction. While the law does require me to look at the *Wiebe Door* test it does not prevent me from looking beyond it in order to determine the true relationship between the parties. If the *Wiebe Door* test yielded an inconclusive result, a consideration of the parties' intent clearly tips the scales toward an independent contractor relationship.
>
> [40] If I were to rely solely on my own instincts and common sense I would say that quite apart from the *Wiebe Door* test, quite apart from intention, workers who are called on to clean the ducts of a couple of houses, paid a portion of the fee and then sent on their way do not by any stretch of the imagination look like employees.

[31] The difference in philosophy with respect to the matter of intention of the parties was put into sharp focus by Evans, J.A. in the course of his dissenting reasons in *Royal Winnipeg Ballet* and expressed in paragraphs 96-105, inclusive, as follows:

> [96] Because the more recent cases from this Court discussed in the reasons of Sharlow J.A. all place some reliance on the *Civil Code of Québec*, I cannot regard them as elevating the significance traditionally attached by the common law of contract to the parties' understanding of the legal nature of their contract. When the scope of federal legislation refers to a private-law concept, which is not defined in the statute, the bijural nature of our federation leaves open the possibility that the statute may be applied differently in Quebec from common-law Canada: *Interpretation Act*, R.S.C. 1985, c. I-21, section 8.1 [as enacted by S.C. 2001, c.4, s. 8]; see also, for example, *9041-6868 Québec Inc. v. M.N.R.*, 2005 FCA 334 at paragraph 6.
>
> [97] I do not know to what extent the *Civil Code of Québec* differs from the common law in the manner in which contracts are to be characterized, or whether any of those cases would have been decided differently on the basis of the common-law approach as I have described it.
>
> [98] When a dispute arises over the proper legal character of a contract, there are good reasons to attach little if any weight to the parties' understanding of it, or to their objective in entering into the contract. First, it is difficult to understand on what basis the parties' view of their contract's legal characterization is relevant, or how it should be weighed with the objective *Wiebe Door/Sagaz* factors. It is one thing to draw an inference about the legal nature of a contract based on, for example, the factors of control, and risk of loss and opportunity for profit. It is quite another to draw an inference from the parties' view of the legal nature of their contract, which is the ultimate question that the court must decide. It is not a legal characteristic of a

contract for the supply of services that the parties intended to enter that kind of contract.

[99] Secondly, the parties' view of the legal nature of their contract is inevitably self-serving. Parties generally care primarily about their ultimate objective and only secondarily, if at all, about the legal means of achieving it. Suppose, for example, that their objective was to be exempt from EI premiums. The legal means of achieving this is by entering into a contract for the supply of services. Whether they succeed depends on whether the terms of their contract and their conduct are more consistent with the *indicia* of a contract for the supply of services than of employment. To the extent that they have thought about it, parties will want to enter into the kind of contract that in law will enable them to attain their ultimate objective.

[100] Similarly, the law attaches little or no weight to the fact that the parties' conduct is consistent with the legal consequences of having entered into a contract for the supply of services. These consequences may include the payor's exemption from having to deduct and pay EI premiums and CPP contributions, and the service provider's obligation to register for and to charge GST. These are the legal consequences of a contract for the supply of services, not proof of its existence. The fact that the parties may intend these consequences does not assist in determining whether they have adopted the legal means of achieving them, namely, entering into a contract which has the characteristics of a contract for the supply of services, rather than of employment.

[101] Third, parties to contracts for the performance of work (to use a neutral term) are often not in equal bargaining positions. To attribute appreciable weight to a statement in the contractual document signed by the parties that the contract is one for the supply of services may disadvantage the more vulnerable party, who may subsequently say, for example, that she intended the relationship to be one of employment so that she would be covered by EI.

[102] In the face of a clear provision in a signed contract that it is a contract for the supply of services, not a contract of employment, it may be difficult for such a party to deny that, on an objective analysis, this provision embodied the parties' common intention, at least in the absence of misrepresentation or duress. In other words, the vulnerable party is not only bound by the terms of the contract, but her contractual status and, consequently, her statutory rights may also be prejudiced by the stronger party's legal characterization of the contract.

[103] Fourth, the legal characterization of a contract may have an impact on third parties, such as the victim of a tort committed by a service provider in the course of performing the contract or, as in this case, Revenue Canada. Not to base legal characterization squarely on the terms of the contract, interpreted contextually, may jeopardize those interests, and undermine non-voluntary protective statutory programs, such as EI and CPP.

> [104] I am concerned also about the impact on other dancers with the RWB of a finding about the contractual status of the dancers in this case. If the understanding of the dancers is significant to the decision, could the result be different in the case of another dancer with the RWB who denied entering into his contract on the understanding that it was a contract for the supply of services? It seems odd that essentially the same contract could be characterized differently on this basis.
>
> [105] In my opinion, the only significant role of the parties' stated intention or understanding about the legal nature of their contract is as part of the interpretative context in which the Court views the contract in order to resolve ambiguities and fill in silences in its terms.

[32] It is not necessary to have been providing services in the course of a business already in existence nor is it vital to a determination of status that the service provider have other customers or clients. However, if one wishes to be seen as operating a business on their own account, it is helpful to have some indicia of entrepreneurship attaching to the provision of those services. In the circumstances of the within appeals, Tecson was not operating as a paralegal agency nor was she seeking any similar work from other law firms. She was not operating under a business name nor did she have any commercial advertising or listing and was not registered for purposes of GST which – although not obligatory in view of her annual income – would have permitted her to claim Input Tax Credits. I cannot find on the evidence there were two businesses operating, one by ELC and another by Tecson.

[33] There is no doubt the parties wanted Tecson to provide services as an independent contractor. In my view, they acted consistently thereafter to reinforce their own belief that the status assigned to her by agreement was correct. Einarsson asked Tecson a couple of times if she was certain she wanted to be treated as an independent contractor rather than as an employee and Tecson had confirmed she was content with the arrangement as it afforded her a sense of freedom. With respect to Einarsson and Tecson and their intentions and actions - rooted as they were throughout in absolute good faith and honesty – it is apparent they attempted to transform a cordial, comfortable, flexible employer-employee relationship into one where the services provided by Tecson were in her capacity as an independent contractor. Tecson wanted to work about 30 hours per week under circumstances where – as a working Mom – she could pick up her children from school at 3:00 p.m. and could miss work on certain days to go camping or take longer holidays with her husband and children. As a matter of courtesy, she gave notice of her intentions to Einarsson who was content with that arrangement as he had a back-up plan to obtain paralegal services, if required.

[34] Considering the factors set forth in the judgment of Major, J. in *Sagaz, supra*, I do not find any of them clearly favour a finding that Tecson was providing her services pursuant to a contract *for* services. [Emphasis added.] Looking at the working relationship as a whole, the facts lead to the conclusion that Tecson was an employee rather than a person carrying on business on her own account. There is no doubt the parties wanted Tecson to have that status when working for ELC, regardless of whether she was providing secretarial services - including work on real estate files - or cleaning the office. In my assessment of the evidence, to find the working relationship was characterized by that status would be to recognize the right of parties to opt out of the national schemes created by the *Act* and the *Plan*. It may be that at some point - in view of the rapidly-changing workplace - Parliament will legislate a mechanism for that to occur under circumstances where there is no coercion, imbalance in bargaining power or potential for inequitable treatment of the service provider in terms of requiring waiver of other rights and protection afforded by either federal or provincial laws. However, that day has not yet arrived and to allow the within appeals would be to permit Einarsson and Tecson to determine their own status and thereby affect the rights of third parties represented by the Minister pursuant to relevant provisions of the legislation at issue.

[35] The decisions of the Minister issued pursuant to the *Act* and the *Plan* are correct and both are confirmed.

[36] Both appeals are hereby dismissed.

Signed at Sidney, British Columbia, this 26th day of January, 2009.

"D.W. Rowe"

Rowe D.J.

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