Docket: 2009-1220(EI)

BETWEEN:

GREG KLEM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on September 10, 2009, at Victoria, British Columbia.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Matthew W. Turnell

JUDGMENT

The appeal is allowed and the decision made by the Minister of National Revenue on March 31, 2009 under the *Employment Insurance Act* is varied to reflect that the appellant was employed in insurable employment during the period from April 26, 2008 to May 25, 2008.

Signed at Ottawa, Canada, this 21st day of September 2009.

"Patrick Boyle"

Boyle J.

Citation: 2009 TCC 476
Date: 20090921
Docket: 2009-1220(EI)

BETWEEN:

GREG KLEM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] Mr. Klem is a British Columbia forestry worker who has appealed the characterization by the Canada Revenue Agency (the "CRA") of his work in April and May of 2008 for the Pacheedaht First Nation (the "Band") as one of independent contractor and not one of employment.

I. Introduction

[2] Mr. Klem is a forestry worker with many years of experience. He has worked as a tree planter as well as in a number of other silvicultural roles including pruner, spacer and landslide rehabilitation work. He has held these positions at times as employee and at times as independent contractor. He had worked as an employed tree planter for the Band in prior years as well as in the weeks immediately leading up to the tree clearing work.

[3] Tree planting is short-term seasonal work for a period of weeks in the spring and fall. Many tree planters, including Mr. Klem, are characterized and recognized as employees for provincial labour law purposes as well as for Employment Insurance ("EI") purposes. Indeed, the CRA recognizes that Mr. Klem's tree planting work for

the Band in April 2008 on the Band's traditional area was employment. The issue in this appeal involves Mr. Klem's work for the Band as a tree clearer on the 25 kilometres stretch of the West Coast Trail that is on the Band's traditional area. At the request of the Band, Mr. Klem had switched his work from tree planting to tree clearing. At the time there were only three or four days of tree planting work left whereas there was an estimated eight to ten days of tree clearing work needed on the West Coast Trail.

II. Issue

[4] The only issue in this case is whether for EI purposes Mr. Klem's work for the Band changed from a contract of service, as employee, to a contract for services, as independent contractor, at the time of the change of his work duties from tree planter to tree clearer.

III. Law

[5] As set out by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, there is no single conclusive test that can be universally applied to determine whether a person is an employee or independent contractor. The issue of employee versus independent contractor for purposes of the definition of insurable employment is to be resolved by determining whether the individual is truly operating a business on his own account. This is the question set out by the British courts in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), approved by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, for purposes of the Canadian definition of insurable employment, and adopted by the Supreme Court of Canada in *Sagaz Industries*. This question is to be decided having regard to all of the relevant circumstances and having regard to a number of criteria or useful guidelines including: 1) the intent of the parties; 2) control over the work; 3) ownership of tools; 4) chance of profit/risk of loss and 5) what has been referred to as the business integration, association or entrepreneur criteria.

[6] The decision of the Federal Court of Appeal in *The Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, 2006 DTC 6323, highlights the particular importance of the parties' intentions and the control criterion in these determinations. This is consistent with the Federal Court of Appeal's later decision in *Combined Insurance Co. of America v. M.N.R.*, 2007 FCA 60, as well as its decision in *City Water International*

Inc. v. M.N.R., 2006 FCA 350. The Reasons given by the former Bowman C.J. of this Court in *Lang et al. v. M.N.R.*, 2007 TCC 547, 2007 DTC 1754, are also very helpful on this point.

[7] I turn now to address the circumstances and considerations I find relevant to Mr. Klem's particular situation.

IV. Intention

[8] The intention of the parties upon making arrangements for Mr. Klem's tree clearing services is not significantly helpful in this case. It appears that there was a failure to communicate clearly and precisely. The use of the word "contract" does not appear to have helped. Mr. Klem was clear in his testimony that he intended this to be a continuation of his employment because he needed the additional hours for EI purposes and neither Mr. Jones on behalf of the Band nor anyone else suggested anything differently at that time.

[9] The Band's Forester, Mr. Jones, could not recall whether he raised the change from employment to independent contractor with Mr. Klem at that time. He could only be sure he described it as a contract or contract work. That is not very clear. Not only are contracts of service and contracts for services both contracts, but it is apparent from the witnesses that, in this part of the forestry industry, contract work was used to describe both work done as employee and as independent contractor. For example, even Mr. Jones described the piece rate paid to the Band's employed tree planters as a contract rate.

[10] I accept Mr. Klem's statement that it was his intention for this to be employment work. With respect to the Band's intention, I find only that, at the time Mr. Klem was offered the tree clearing work, both Ms. Hunt, the Band's Administrator, and Mr. Jones were aware that Mr. Klem was looking for more work and that, in addition to needing the money, he needed additional employment hours for EI purposes. The evidence is insufficient to satisfy me that the Band intended at that time to change Mr. Klem's relationship from employee to independent contractor and communicated that intention to Mr. Klem.

V. Characterization by the Parties

[11] Immediately prior to commencing his tree clearing work, Mr. Klem was an employed tree planter for the Band. (While Mr. Jones mentioned that technically the employer was an ordinary business corporation owned by the Band, that is not how either party pleaded its case, and is inconsistent with the Minister's position and assumptions throughout, and I do not therefor regard the distinction as significant.) As an employee, Mr. Klem had completed for the Band the appropriate employee withholding forms.

[12] The West Coast Trail tree clearing was work that Parks Canada had contracted with the Band to complete. Ms. Hunt said that Parks Canada advised her it should take two experienced workers eight to ten days to complete the work and that $2,000 would be reasonable pay for each worker.

[13] Mr. Jones and Mr. Klem each testified that Mr. Klem was to be paid $2,000 for the work, whether it took him ten days as expected or eight or fewer days. Mr. Klem said he was to do what he could in ten days, whereas Mr. Jones said he expected the work to be completed in any event.

[14] When it came time to make payments to Mr. Klem for work done before the work was completed, the Band was clearly paying $200 per day worked. Significantly, they had Mr. Klem fill out forms showing his hours and days worked in detail for this purpose on a Band form for employees. While they had struck out some parts of the form as not applicable to this contract, they did not strike out the employment-related language. Similarly when it came to pay Mr. Klem for the use of his truck to access the West Coast Trail remote work area via unmarked logging rods when the Band's contracted ferry could not take Mr. Klem and his co-worker there, that too was done on an employee expense reimbursement form.

[15] I note that the Band had a number of employees as well as a number of independent contractors working for it in numerous positions. I note also that Mr. Klem did other work for others as an independent contractor and also ran a seasonal tour guide business as a proprietorship. Nonetheless, both parties used the Band's employee forms for monitoring Mr. Klem's days and hours worked and the days he used his own truck.

[16] The Band also paid Workers Compensation Board ("WCB") assessments in respect of Mr. Klem and it was aware that he did not have his own WCB coverage. On the Band's accounts payable voucher form, the Band has added to the amount payable to Mr. Klem the WCB assessment payable and then has shown the same

amount as a deduction with the result that Mr. Klem's pay was unaffected and the WCB amount was borne by the Band.

[17] Portions of the Band's contract with Parks Canada were put in evidence by Mr. Klem. He had made an Access to Information request for the Band's contract with Parks Canada for the relevant period in respect of the West Coast Trail maintenance, etc. Ms. Hunt in her testimony referred to and produced two of these pages herself and said they were part of the contract. I am satisfied on the evidence before me that the page headed General Terms and Conditions Appendix "A" formed part of that contract.

[18] Clause 3 of the General Terms and Conditions headed Assignment and Subcontracting provides that "The contract shall not be assigned in whole or in part, nor shall the work under the contract be subcontracted in whole or in part, without the written consent of the Minister . . ." (emphasis added). If the Band intended Mr. Klem to be a subcontractor, there was no evidence this requirement was complied with.

[19] In addition the Parks Canada contract bidding process included provisions for a so-called Set-Aside Program for Aboriginal Business referred to as the SAP. As part of that process and program the Band agreed "to ensure that any subcontractor it engages with respect to the contract shall, if required, satisfy the requirements set out in "Requirements for the Set-Aside Program for Aboriginal Business" attached as Appendix 2 to Annex E". Mr. Klem was not such a qualifying aboriginal person. However, it was not clear on the evidence whether or not compliance with this provision was required.

[20] The lack of communication by the Band to Mr. Klem that he had ceased to be in employment, the use by the Band and Mr. Klem of the Band's employment-related forms, the Band paying the WCB in respect of Mr. Klem's work, and the apparent failure by the Band to seek Parks Canada authorization for Mr. Klem to be approved as a subcontractor as the Band was contractually required to do, all incline in favour of the work relationship having been intended during its course to be one of employment.

VI. Tools

[21] Both parties agreed that the ownership by Mr. Klem of the chainsaw he used for work and his safety clothing and gear is neutral in this case as this would be

required of tree clearers and other forestry workers in this part of British Columbia whether the worker was an independent contractor or an employee. As Bowie J. said in *McPhee v. M.N.R.*, 2005 TCC 502, in a case involving a New Brunswick forestry worker, in paragraph 13, "Indeed, it would not be possible for them to get work if they did not own a saw" and in paragraph 16:

> As to the power saw, it is usual practice in many industries for employees to own their own tools. Mechanics and carpenters are two examples. It is an invariable practice in the industry with which we are dealing here, at least in this location. Anyone who wants to work in the woods in New Brunswick must own his own power saw. That is simply the way the trade has always operated.

[22] In this case the ownership of tools consideration does not point in one direction or the other but is neutral.

VII. Control

[23] The Band hired a very experienced forestry worker whom they knew well from past employment dealings. The Band dictated a tight and short ten-day work period which effectively required full-time work by Mr. Klem throughout the period. The work began in April 27. The Parks Canada's contract required it be completed by May 15. Access to the work site was weather-dependent.

[24] The Band controlled access to the work site whether by water or land. Mr. Klem was told which ferry service provider to use.

[25] Parks Canada reported to the Band on the progress of Mr. Klem's work.

[26] The Band told him to choose a co-worker to be hired and paid by the Band from a list of names given to him, either by Mr. Jones or at the Band office.

[27] The Band told Mr. Klem he was responsible for arranging for transportation by ferry of himself and his co-worker to the remote work site. The Band told him he would need to arrange for adequate radio contact at the remote work site. He was told to do these things and the evidence is he did them. He was not free to pick or choose to do them as he wished.

[28] The Band required him to fill out and sign forms tracking his particular and detailed hours and days worked when he wished to be paid. Similar forms were required to be paid for the use of his own truck as transportation.

[29] While this degree of control by the Band over Mr. Klem's work is not necessarily inconsistent with the relationship being either employment or that of an independent contractor, when looked at in its totality I find it more consistent with Mr. Klem being the Band's employee.

[30] Moreover, the evidence did not disclose that Mr. Klem was subject to any greater degree of control by the Band when he worked the immediately preceding weeks as their employed tree planter.

VIII. Risk of Loss / Chance for Profit

[31] The risk of loss resulting from Mr. Klem's obligation to provide his own functioning chain saw and safety gear is insubstantial. His chain saw cost him $450 and was used by him on any number of other forestry work assignments. His safety gear consisted primarily of a hard hat, construction boots and safety pants – the type of rugged, long-lasting clothing suitable for the work involved.

[32] Similarly I am satisfied that his chance of enhanced profit if he was able to complete his work in eight days instead of ten was minimal. The range of time for the work was established by Parks Canada and accepted by the Band as eight to ten days. This range was not suggested or established by Mr. Klem. Mr. Klem could only complete the work early if his co-worker over whom he had no control was also able to finish his share of the work early. Further, I note the evidence suggests strongly the Band was really only prepared to pay Mr. Klem $200 per full day worked regardless of what Mr. Jones and Mr. Klem may have discussed about getting paid the full $2,000 if the work was finished early. The fact is the Band paid Mr. Klem $1,800 for nine days of work. While the Band had to pay someone else to finish the work, I infer that the person was paid no more than $200 to complete the work as I was not told otherwise and I would expect I would have been told given the testimony of all the witnesses.

[33] For practical purposes, Mr. Klem was not free to take on work for others during this period given the work schedule and the fact that the inclement weather of the type that prevented work on some days could not be planned for or around. His tour guide business season had not started this early in the season.

[34] For these reasons, I find Mr. Klem to have been engaged in insurable employment under a contract of service for the period in April and May 2008 during which he worked for the Band as a tree clearer on the West Coast Trail.

[35] While it may appear to be unusual to many people that a work contract of ten days would be an employment contract or an extension of an employment contract otherwise only lasting several weeks, we are clearly dealing with one of Canada's industries in which very short-term recurring seasonal work is set up as employment. That this may be done in part to ensure access to EI benefits does not negate it being employment. Indeed, the government recognizes such short-term seasonal recurring work as employment.

[36] Mr. Klem's appeal is allowed.

Signed at Ottawa, Canada, this 21st day of September 2009.

"Patrick Boyle"

Boyle J.

CITATION:	2009 TCC 476
COURT FILE NO.:	2009-1220(EI)
STYLE OF CAUSE:	GREG KLEM v. THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	September 10, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	September 21, 2009

APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Matthew W. Turnell

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada