

Citation: 2009 TCC 203

Dockets: 2006-2196(EI)
2006-2197(CPP)

BETWEEN:

1478399 ONTARIO INC. c/o LARRY KRAUSS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

CERTIFICATION OF TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Toronto, Ontario, on November 24, 2008, be filed.

“N. Weisman”

Weisman D.J.

Signed in Toronto, Ontario, this 24th day of April 2009.

TAX COURT OF CANADA

BETWEEN:

1478399 ONTARIO INC. c/o LARRY KRAUSS

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent

*** * * * ***

ORAL REASONS

HEARD BEFORE JUSTICE WEISMAN
in the Courts Administration Service,
Federal Judicial Centre, 180 Queen Street West,
Toronto, Ontario
on Monday, November 24th, 2008

*** * * * ***

APPEARANCES:

Mr. Larry Krauss

Self-Represented Appellant

Ms. Sharon Lee

for the Respondent

Also Present:

Mr. D.W. Burtnick

Court Registrar

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Decision with Reasons

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1 Toronto, Ontario
2 --- Upon commencing the Decision with Reasons on
3 Monday, November 24, 2008.

4 JUSTICE WEISMAN: These were two
5 appeals against decisions by the respondent
6 Minister of National Revenue that the appellant,
7 1478339 Ontario Incorporated, was a deemed employer
8 of Michael Gotkin from the 4th of March, 2003, to the
9 4th of March, 2005, while he was working as site
10 manager on the project known as the Wallace Street
11 Lofts. The Minister based his decision on
12 regulation 10(1) of the insurable earnings and
13 collection of premiums which is passed under the
14 *Employment Insurance Act*, and regulation 8.1(1)
15 passed under the *Canada Pension Plan*, both of which,
16 in short, provide that if someone pays an employee
17 they are a deemed employer and are responsible for
18 deducting and remitting Canada pension contributions
19 and Unemployment Insurance premiums.

20 There are two prongs to the
21 appellant's appeal. First is that
22 Terradigm Developments Incorporated merely hired
23 Mr. Gotkin as agent for the developer
24 1317621 Ontario Incorporated. That is relevant
25 because when we come to decide control, which is one

1 of the four-in-one guidelines under *Wiebe Door*
2 *Services Ltd. v. M.N.R.* (1986), 87 DTC 5025, the
3 question arises, whose control; if it is control of
4 1317621, the control of Terradigm, the control of
5 1478399. Who actually retained Mr. Gotkin?

6 The second prong of the appellant's
7 argument is that Mr. Gotkin was an independent
8 contractor, in any event, and therefore not covered
9 by the aforementioned two regulations.

10 After considering all the evidence
11 that I have heard, I find that Mr. Gotkin was
12 retained by Terradigm Developments Incorporated as
13 site manager of the project. It was Terradigm that
14 advertised for a site manager, which advertisement
15 was successfully replied to Mr. Gotkin. It also makes
16 sense to me that a project manager with no experience
17 in renovating and refitting an existing facility
18 would need someone with Mr. Gotkin's qualifications
19 to serve as site manager.

20 Over and above that, in his
21 testimony and in his submissions, Mr. Krauss kept
22 referring to "our relationship with him", and I could
23 not construe that as Mr. Krauss referring to 131's
24 relationship with Mr. Gotkin, nor could I construe it
25 as the relationship that consists merely, in one

1 1478339 issuing cheques to Mr. Gotkin.

2 Mr. Gotkin was clearly paid by the
3 appellant, so the sole remaining issue is whether he
4 was an employee under a contract of service or was an
5 independent contractor under a contract for
6 services. In order to resolve this question, which
7 has been variously characterized as fundamental,
8 central, and key, the total relationship of the
9 parties and the combined force of the whole scheme of
10 operations must be considered.

11 To this end, the evidence in this
12 matter is to be subjected to the four-in-one test
13 laid down as guidelines by Lord Wright in
14 *Montreal City v. Montreal Locomotive Works Ltd.*
15 *et al*, which is cited at [1947] 1 D.L.R. 161, which
16 guidelines were adopted by Justice MacGuigan in
17 *Wiebe Door Services*, which is cited at (1986),
18 87 DTC 5025, in the Federal Court of Appeal. The
19 four guidelines consist of control over the worker;
20 whether the worker or the payer owns the tools
21 required to fulfill the worker's function; and the
22 worker's chance of profit and risk of loss in his or
23 her dealings with the payer.

24 I think Mr. Krauss misconstrued the
25 jurisprudence that he read, because the *Wiebe Door*

1 and *Montreal City* guidelines are not in pursuit of
2 the intention of the parties, it is in pursuit of the
3 total relationship between the parties.

4 Adverting first to the control
5 guideline, the law differentiates between those in
6 standard employment and those who are highly skilled
7 and have expertise beyond the ability of their
8 supervisors to tell them how to perform their
9 functions. So in the case of a worker who is in
10 standard employment, control necessitates that the
11 supervisor have the right to tell a worker not only
12 what to do but how to do it. In the latter case, when
13 you are dealing with someone whose expertise exceeds
14 that of a supervisor, it is sufficient if the
15 supervisor has the right to tell the worker what to
16 do, although he lacks the skill to tell him how to do
17 it.

18 The evidence was clear that
19 Mr. Larry Spring was an employee of the project
20 manager, Terradigm, and he had the right to tell
21 Mr. Gotkin what to do, which was to manage the
22 project. This indicates that Mr. Gotkin was an
23 employee of Terradigm. But the evidence also
24 indicates that there was little control exercised
25 over Mr. Gotkin, above and beyond the aforementioned;

1 he came and went as he pleased; he theoretically was
2 obliged to report to Mr. Spring, but Mr. Spring was
3 rarely at the job, the evidence being that he was
4 there some two times a month.

5 Aside from there being little actual
6 control over Mr. Gotkin, I note that Mr. Gotkin
7 negotiated his remuneration rather than it being set
8 by Terradigm, which indicates that he was an
9 independent contractor.

10 Then in trying to resolve which way
11 the scales should tilt when it comes to control, I
12 agreed with Mr. Krauss that quite significant was the
13 confrontation between Mr. Gotkin and Mr. Krauss about
14 Mr. Gotkin's being aware of the conspiracy between
15 Mr. Spring and Mr. Van Den Burg to defraud 131 out of
16 money by accepting \$20,000 honorariums from potential
17 clients in exchange for a \$50,000 reduction in the
18 cost of the loft.

19 The counsel for the Minister is
20 quite correct; there is no jurisprudence saying that
21 an employee has to be loyal, but an important element
22 of control that has been imported from the
23 *Québec Civil Code* is the concept of subordination.
24 Employees are subordinate to their employers.
25 Independent contractors are independent of those who

1 retain them.

2 In my view, this failure of
3 Mr. Gotkin to forewarn Mr. Krauss of this conspiracy
4 indicates to me that there was no relationship of
5 subordination between him and Terradigm. I would
6 quote for the record page 129 of the transcript,
7 line 10. The exchange starts by Mr. Krauss saying:

8 "When met in February 2005,
9 you may recall that you
10 advised me that Harold Spring
11 and Gerard Van Den Burg had
12 both been involved in
13 purchasers paying George and
14 Harold some cash up front and
15 reducing the purchase price
16 under the agreement of
17 purchase and sale." (as read)

18 Mr. Gotkin's answer was:

19 "There were rumours.

20 "Question: You brought that
21 to my attention.

22 "Answer: Yes.

23 "Question: Was there a reason
24 for waiting until that meeting
25 to tell me?

1 "Answer: You never came to
2 the site. I never saw you.

3 "Question: But you did come
4 to my office on a number of
5 occasions to pick up cheques.

6 "Yes.

7 "Did you ever ask to see me?

8 "I never asked to see anyone.

9 "That wasn't my question.

10 Did you ever ask to see me?

11 "No.

12 "You had this relevant
13 information.

14 "I didn't know it was
15 relevant. I didn't know how
16 it was relevant.

17 "Question: That George might
18 be receiving money on the
19 side, outside the terms of the
20 agreement of purchase and
21 sale? You didn't see the
22 relevance of that?" (as read)

23 On balance, few things in this world
24 are completely black and completely white. There are
25 elements in the relationship that indicate that

1 Mr. Gotkin was an employee, but on balance, most of
2 the indicia are that he was an independent
3 contractor, and I so find that is the way the control
4 factor indicates.

5 So far as tools are concerned, there
6 were not many involved in Mr. Gotkin's duties. He
7 was provided with a workplace, being a vacant loft,
8 but that was provided by the developer, 131, not by
9 Terradigm. But Terradigm did equip that office with a
10 fax machine and a telephone that Mr. Gotkin and
11 others could avail themselves of. On the other hand,
12 Mr. Gotkin provided his own hard hat and construction
13 boots, and we have the Federal Court of Appeal in
14 *Precision Gutters Ltd. v. M.N.R.*, [2002] F.C.J.
15 No. 771, in paragraph 25 saying:

16 "It has been held that if the
17 worker owns the tools of the
18 trade which it is reasonable
19 for him to own, this test will
20 point to the conclusion that
21 the individual is an
22 independent contractor even
23 though the alleged employer
24 provides special tools for the
25 particular business."

1 Here we have Mr. Gotkin supplying
2 the tools that it is normal for him to supply. On the
3 other hand, we do not have any very expensive special
4 tools for this particular business that are being
5 provided by the person that retained Mr. Gotkin. In
6 the case of *Precision Gutters*, there was a very
7 expensive machine that would take raw strips of
8 aluminum and form them into eavestroughing.

9 So I cannot see this particular
10 factor leaning in either direction, and I declare and
11 I find that the tools factor is equivocal and
12 neutral.

13 Chance of profit. Mr. Krauss on
14 behalf of the appellant argues that yes, there was a
15 chance of profit in two different ways. First, there
16 was no restriction in the oral agreement between
17 Mr. Krauss and Terradigm barring him from working for
18 others, and therefore he could profit by working
19 elsewhere in the 18-month hiatus that the project
20 suffered while dealings were ongoing with CNR over
21 whether there could be a berm or a crash wall. And
22 according to Mr. Krauss, the second opportunity for
23 Mr. Gotkin's profit was that he originally expected
24 to earn \$49,000 over seven months at the rate of
25 \$7,000 a month, but because the project took four

1 years, he wound up grossing some \$336,000, which in
2 Mr. Krauss's view is a significant profit.

3 On this particular point, I found
4 Mr. Gotkin credible as to his -- as to the first
5 branch of Mr. Krauss's argument that he could work
6 elsewhere in the 18-month hiatus. Mr. Gotkin said the
7 company expected him to be on the job site for
8 tenants and trades and building inspectors.
9 Mr. Krauss tried to advance the argument that two of
10 the trades that worked on the job resided in lofts
11 and were on site to look after whatever little had to
12 be done during the 18 months, but I did not find that
13 a realistic argument, to expect trades who had no
14 responsibility whatsoever aside from their own jobs
15 to take over Mr. Gotkin's duties if he was elsewhere.

16 And then the second branch of the
17 argument that a \$7,000 earning turned into a \$336,000
18 profit, I also reject agreeing with counsel for the
19 Minister that this ongoing salary does not constitute
20 profit. He was restricted to a fixed monthly income,
21 and just because the income went on for considerably
22 longer than it was supposed to, that is not profit,
23 and I am sure that Mr. Krauss well knows what the
24 definition of profit is in the business sense. It is
25 business revenues exceeding business expenses, and

1 that does not fit Mr. Gotkin's situation at all.

2 There is authority for the
3 proposition that if one works harder and longer or is
4 on piece work and puts out more pieces and earns more
5 money, that is not profit, and that is *Hennick v.*
6 *M.N.R.*, [1995] F.C.J. No. 294, in the Federal Court
7 of Appeal.

8 There being, in my view, no chance
9 of profit for Mr. Gotkin, that indicates that he was
10 an employee during the period under review.

11 The risk of loss revealed an
12 interesting tension between Mr. Gotkin and Mr. Krauss
13 in their attitudes, because Mr. Gotkin says words to
14 the effect that I have been on unemployment
15 insurance, and so I am risk averse. I was out of
16 business and did not want to be in business, so I
17 answered the Star ad and went to work with Terradigm.

18 A completely contrary attitude and
19 expressed by Mr. Krauss, who says we would not hire
20 an employee who had more expertise than we did,
21 because we needed recourse in the case that he fouled
22 up. We could not be exposed to third party claims
23 without having an expert third party who we could
24 recourse.

25 In this regard, I prefer the

1 evidence and the attitude of Mr. Krauss, because it
2 makes more business sense, that as he explained on a
3 number of occasions, they are into some endeavour
4 that was new to them, meaning Terradigm, and they
5 needed someone's expertise and they needed that
6 person to be accountable and they needed him to be an
7 independent contractor and not an employee.

8 What detracts from Mr. Gotkin's
9 argument is that he agreed to be an independent
10 contractor, at least for the first seven months,
11 which is directly contrary to his aforementioned
12 quoted attitude. Not only that, Exhibit A-6 is an
13 agreement drawn up by his counsel, which I understand
14 was executed by him, although not by anybody
15 representing the other side, being Terradigm, 131, or
16 147, in which he refers to himself as an independent
17 contractor, still, and here we are in 2005.

18 So that is one reason that I prefer
19 Mr. Krauss's understanding of the relationship.
20 Another is that throughout the period Mr. Gotkin
21 collected and presumably remitted GST, which is
22 nothing that employees do. Next, he filed his income
23 tax returns throughout the period in question as an
24 independent contractor, deducting from income
25 allowable expenses under the *Income Tax Act*. There is

1 jurisprudence that if someone does that, that is
2 evidence of their intent to be an independent
3 contractor and the case in support of that
4 proposition is *Combined Insurance Co. of America v.*
5 *M.N.R.*, [2007] F.C.J. No. 124, in the Federal Court
6 of Appeal.

7 Finally, I heard no evidence that
8 there was ever any change in the relationship between
9 Mr. Gotkin and his employer over the entire period as
10 he claims there was, so his working conditions did
11 not change. His manner of remuneration did not
12 change. There was no T4. There were no source
13 deductions. I think that he was an independent
14 contractor. He bore a great risk of loss if he
15 misread the architect's drawings or if he misdirected
16 the trades, and the risk of loss factor indicates,
17 accordingly, that he was an independent contractor.

18 If I may summarize, the control
19 factor indicates that he was an independent
20 contractor. The tools factor is neutral. The chance
21 of profit factor indicates that he was an employee;
22 the risk of loss factor that he was an independent
23 contractor.

24 Out of the three relevant -- out of
25 the three probative considerations, two indicate that

1 he is an independent contractor.

2 Which brings me to the intention of
3 the parties, which gains in weight as the four
4 *Wiebe Door* criteria become less convincing, or
5 predominant, or conclusive. *The Royal Winnipeg Ballet*
6 *v. M.N.R.*, 2006 FCA 87, says that in these
7 circumstances, the intention of the parties is not to
8 be ignored. I have already said that *ab initio* it was
9 clear that the mutual intent of the parties was that
10 Mr. Gotkin be an independent contractor, and nothing
11 that I can see changed thereafter, particularly in
12 view of Exhibit A-6, wherein that independent
13 contractor agreement is extended right on through
14 March of 2005.

15 If I had to highlight the most
16 important considerations under the heading of the
17 relationship of the parties, I would point to the
18 lack of subordination and to that 2005 contract,
19 which designates Mr. Gotkin as an independent
20 contractor.

21 The law is that the burden is upon
22 the appellant to demolish the assumptions set out in
23 the Minister's reply to the notice of appeal, and in
24 this case, there is an amended reply to the notice of
25 appeal. The assumptions are to be found in

1 paragraph 15. There is always a problem in
2 demolishing assumptions which are not controversial,
3 or are not probative, or do not point to the worker
4 being either an independent contractor or an
5 employee.

6 In circumstances such as these, I am
7 more than happy to go over the assumptions that the
8 Minister makes. You will see that they are not
9 determinative, like 15(a): "the owner of the project
10 was 1317621." That is true. There is no way the
11 appellant can demolish that, but it does not help me
12 in any way decide the status of Mr. Gotkin. Similarly
13 with (b): "the owner of the project hired the
14 Appellant to provide "project management"." True.
15 (c): "the Appellant was established to provide
16 project management for one specific construction
17 project 'The Wallace Station Lofts'"; true. What we
18 have here is a collection of history, but nothing
19 that follows the *Wiebe Door* guidelines that help a
20 court determine the status of a worker.

21 Rather than taking everyone's time
22 and going through all of these assumptions that do
23 not get us anywhere, I will jump down to (f) as to
24 the worker's duties, which is a very nice summary of
25 his duties, but again, he could be doing these duties

1 as an employee or independent contractor. It is not
2 probative. It is not determinative.

3 Now we get to (g), which is wrong:
4 "the Worker performed his duties at the job-site
5 location where an office was provided." An office was
6 provided, but the problem is it was not provided by
7 the right person or entity in order to establish that
8 that entity was an employer.

9 Then they set out the annual
10 salary, and break it down on a weekly basis.

11 Then they get to something that is
12 true, (j) and (k): he did not receive vacation or
13 paid vacation leave. No employment-related benefit
14 package. Those assumptions are true, but they tend to
15 indicate exactly what the Minister is arguing
16 against. They indicate that he is an independent
17 contractor. It would be difficult for the appellant
18 to rebut or demolish those assumptions.

19 (l) sets out the job hours.

20 (m) sets out that the worker was
21 expected to be at the work site during its working
22 hours, and also be available nights and weekends.
23 Finally we get to some assumption that tends to
24 indicate that he is under the control of the project
25 manager and might therefore be an employee.

1 (n) is another assumption: "the
2 Worker was not paid for overtime." That indicates an
3 independent contractor, not an employee, and that is
4 again an assumption that is very difficult for the
5 appellant to demolish.

6 (o) "the Worker's hours of work were
7 not recorded." That is certainly true, but I do not
8 think that indicates that he was an employee.

9 (p) "the Worker was supervised by
10 Harold Spring." Well, as I have said, the evidence
11 is that, in theory, Mr. Spring probably had the right
12 to supervise him, but in fact he was only on the site
13 a couple of times a month and he did not really
14 exercise supervision over him. But as I have said, he
15 did have the right to tell him what to do, and that
16 would indicate that Mr. Gotkin was an employee.

17 (q) was demolished: "the Worker was
18 in constant contact with his supervisor,
19 Harold Spring since the Appellant made the final
20 decision." The evidence produced by the appellant
21 demolished that. That was not established.

22 We are back to the job site office
23 in (r): "the Appellant provided the job site office."
24 The evidence does not support that. That was
25 demolished.

1 (s) is true: "the Worker was
2 reimbursed for cellular expenses by the Appellant by
3 the way of a monthly allowance." I do not know about
4 the monthly allowance, but I agree it would be
5 unusual to reimburse an independent contractor for
6 cellular expense, so you might say that assumption
7 (s) supports the minister's position that this man
8 was an employee, and that has not been demolished by
9 the appellant.

10 (t): "the Appellant did not provide
11 any training to the Worker." That is true, but it
12 also indicates that he is an independent contractor.
13 You do not train independent contractors, you train
14 employees.

15 (u): "the Appellant covered the
16 costs of any materials." That is wrong. It was 131
17 that covered the cost of materials.

18 (v): "the Appellant decided if work
19 had to be redone and was responsible for the related
20 costs." I have found that the appellant purposely set
21 things up and wanted Mr. Gotkin to be an independent
22 contractor for the very reason that they needed
23 someone to be accountable other than themselves,
24 someone who knew this retrofitting requirement as
25 they did not. So that assumption has been rebutted

1 and demolished.

2 (w): "the Appellant was responsible
3 for the cost of liability insurance." That really
4 does not weigh very heavily with me one way or
5 another.

6 (x): "the Worker had no capital
7 investment in 'the' business." That is true. That
8 would tend to indicate that he was an employee.

9 (y): "the Worker had to provide his
10 services personally." That is very true, but that is
11 not determinative because I am sure we would all like
12 our surgeons to perform their services personally,
13 but that does not make them employees. So there is
14 another assumption that cannot be demolished, but it
15 is not determinative.

16 (z): "the Worker was performing
17 services exclusively for the Appellant." I find that
18 is true, but I also find it not determinative because
19 there are many independent contractors who only have
20 one client.

21 In (aa), "the Appellant had the
22 right to terminate the Worker's Services." That
23 statement by itself does not get one very far. The
24 question is: Do they have the right to terminate the
25 service without notice, or without pay in lieu of

1 notice? That statement does not help me decide
2 whether the worker in question, Mr. Gotkin, was an
3 employee or independent contractor.

4 I find that the appellant has
5 demolished sufficient of the controversial or
6 probative assumptions that the remaining assumptions
7 are not sufficient to support the Minister's
8 determinations, and I am not sure I can provide you
9 with a reference, but that was decided in
10 *Jencan Ltd. v. M.N.R.*, [1997] F.C.J. No. 876, where
11 the Federal Court of Appeal holds that:

12 "Even though some assumptions
13 are demolished, if the
14 remaining assumptions are
15 sufficient to support to
16 Minister's determination, it
17 stands." (as read)

18 I do not find that that is the case
19 before me. The Minister's determination, both of
20 them, are objectively unreasonable because I have
21 heard new evidence at trial or the evidence known by
22 the Minister has not been correctly assessed. In the
23 result, I am going to allow both appeals, and vacate
24 both decisions of the Minister.

25 I am indebted to you for your

1 assistance. I will close court now until 9:30
2 tomorrow morning.
3 --- Whereupon the Decision with Reasons concluded.

I HEREBY CERTIFY THAT I have, to the best
of my skills and abilities, accurately transcribed
the foregoing proceeding.

Catherine Keenan, Computer-Aided Transcription

CITATION: 2009 TCC 203

COURT FILE NOS.: 2006-2196(EI)
2006-2197(CPP)

STYLE OF CAUSE: 1478399 Ontario Inc. c/o Larry Krauss
and The Minister of National Revenue

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 24, 2008

REASONS FOR JUDGMENT BY: The Honourable N. Weisman,
Deputy Judge

DATE OF ORAL JUDGMENT: November 24, 2008

APPEARANCES:

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COUNSEL OF RECORD:

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Name:

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