Citation: 2007TCC527

2006-2546(EI)
2006-2547(CPP)

BETWEEN:

CARE NURSING AGENCY LTD.,

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 August 1, 2007, be filed.

"N. Weisman"

Weisman D.J.

Signed at Toronto, Ontario, this 3rd day of October 2007.

Court File Nos. 2006-2546 (EI)
2006-2547(CPP)

TAX COURT OF CANADA

IN RE: the *Employment Insurance Act* and the *Canada Pension Plan*

BETWEEN:

CARE NURSING AGENCY LIMITED

Appellant

- and -

MINISTER OF NATIONAL REVENUE

Respondent

HEARD BEFORE MR. JUSTICE WEISMAN
in the Courts Administration Service,
Federal Judicial Centre, 180 Queen Street West,
Toronto, Ontario
on Wednesday, August 1 , 2007 at 3:58 p.m.

ORAL REASONS

APPEARANCES:

Mr. Ed Sarmiento	Representative of the Appellant
Ms. Kandia Aird	for the Respondent

Also Present:

Mr. C.F. Nethercut	Court Registrar

A.S.A.P. Reporting Services Inc. 8 2007

200 Elgin Street, Suite 1004	**130 King Street West, Suite 1800**
Ottawa, Ontario K2P 1L5	**Toronto, Ontario M5X 1E3**
(613) 564-2727	**(416) 861-8720**

INDEX

PAGE

Decision with Reasons **1**

****

1 Toronto, Ontario
2 --- Upon commencing the Decision with Reasons on
3 Tuesday, August 1, 2007 at 3:58 p.m.
4 JUSTICE WEISMAN: I have heard two
5 appeals against decisions by the Respondent,
6 Minister of National Revenue, that the Appellant is
7 responsible for the Employment Insurance premiums
8 and Canada Pension Plan contributions with reference
9 to some 130 nurses listed on schedule A to the
10 Minister's reply to the notice of appeal.
11 It was agreed by the parties at the
12 beginning of these proceedings that the two
13 witnesses who are nurses were representative of the
14 remaining nurses listed in schedule A and were
15 working under the same terms and conditions and had
16 the same relationship with the Appellant and with
17 hospitals as all the others did, and so therefore we
18 could proceed on consent to hear these many matters
19 on common evidence, utilizing the witnesses that
20 were heard *viva voce* as representative of all the
21 nurses listed in schedule A.
22 The Minister based his decisions on
23 regulation 6(g) under the *Employment Insurance Act*
24 and on regulation 34(1) under the *Canada Pension*
25 *Plan*. These two provisions are similar. Regulation
26 34(1) says:

1 "Where any individual is
2 placed by a placement or
3 employment agency in
4 employment with or for
5 performance of services for a
6 client of the agency and the
7 terms or conditions on which
8 the employment or services are
9 performed and the remuneration
10 thereof is paid constitute a
11 contract of service or are
12 analogous to a contract of
13 service, the employment or
14 performance of services is
15 included in pensionable
16 employment and the agency or
17 the client, whichever pays the
18 remuneration to the
19 individual, shall, for the
20 purposes of maintaining
21 records and filing returns and
22 paying, deducting and
23 remitting contributions
24 payable by and in respect of
25 the individual under the Act
26 and these Regulations, be

1 deemed to be the employer of
2 the individual."
3 The *Employment Insurance Act*
4 regulation 6 says:
5 "Employment in any of the
6 following employments, unless
7 it is excluded from insurable
8 employment by any provision of
9 these Regulations, is included
10 in insurable employment."
11 And (g) says:
12 "Employment of a person who is
13 placed in that employment by a
14 placement or employment agency
15 to perform services for and
16 under the direction and
17 control of a client of the
18 agency, where that person is
19 remunerated by the agency for
20 the performance of those
21 services."
22 As I have noted in earlier
23 decisions, notably *Isomeric Inc. v. the Minister of*
24 *National Revenue*, [2000] T.C.J. No. 843, the
25 regulation under the Plan is broader in scope than
26 regulation 6(g) under the *Employment Insurance Act*

1 in that it requires the court, before someone can be
2 fit into this section, to be satisfied that the
3 terms and conditions were either a contract of
4 service or analogous thereto. I plan to deal with
5 that in due course.
6 The facts established at trial are,
7 first, that all nurses in schedule A were placed in
8 hospitals or nursing homes or rehabilitation centres
9 by the Appellant. We have the evidence of Ms. Tran:
10 "We send the nurses to the
11 hospitals."
12 And we also have the standard-form
13 employment contract, which has been filed as an
14 exhibit in these proceedings, A2. It specifically
15 provides that:
16 "The professional shall not
17 approach or solicit service
18 directly to the healthcare
19 facility."
20 So we have evidence that the
21 Appellant places the nurses in the hospital, and we
22 have a prohibition by contract against the nurses
23 directly approaching the hospital.
24 Therefore, I am satisfied that the
25 first requirement in both statutory provisions has
26 been satisfied in that the Appellant is a placement

1 agency that has not denied that they do place these
2 nurses in hospitals. And, of course, the hospitals
3 are the clients of the Appellant.
4 The next issue is whether these
5 nurses are under the direction and control of the
6 client where they were placed. There is clear
7 evidence from Glennette London that she, and
8 therefore the rest of the nurses in schedule A, were
9 subject to the direction and control of the nurse
10 manager or resource person or team leader or
11 physicians in the hospitals. They could be sent
12 home for unsatisfactory service. They were, upon
13 reporting in the morning, given their duties and
14 assignments for the day and they were bound to
15 comply with the hospital's safety procedures and
16 rules. That was not only the evidence of Ms. London
17 but also of Ms. Tran. So the second requirement has
18 also been satisfied.
19 In adverting to the *Canada Pension*
20 *Plan* regulation 34(1) requirement that the terms and
21 conditions constitute a contract of service or are
22 analogous to a contract of service, I would point
23 out a few relevant considerations.
24 There is a case called *Silverside*
25 *Computer Systems v. the Minister of National*
26 *Revenue*, [1997] F.C.J. No. 1591 in the Federal Court

1 of Appeal. At paragraph eight, referring to
2 regulation 34 under the Plan, and in 1997 it was
3 section 12(g) of the *Employment Insurance Act*
4 *Regulations*, which is now 6(g) of the Regulations,
5 the Court says:

6 "Those provisions, in our
7 view, are consistent with the
8 powers so conferred, and
9 indicate that the respective
10 regulatory authority has
11 implicitly concluded that the
12 activities of the person who
13 is placed by an agency to
14 perform services for and under
15 the direction and control of
16 an agency's client, and the
17 nature of the work done, are
18 “similar” or “analogous” to
19 services performed under a
20 contract of service." (as
21 read)

22 And indeed, in the *Silverside* case,
23 the Court was dealing with independent contractors
24 who were expert in computers, and it was nonetheless
25 held that they were caught by regulation 34(1) under
26 the Plan and regulation 12(g) of the Act.

1 Therefore, certainly for the
2 purposes of the *Employment Insurance Act*, it does
3 not matter whether the workers are an independent
4 contractor or an employee; both are caught by that
5 section.
6 It might make some difference under
7 the Plan because, as I have said, the Court has to
8 find that their terms and conditions are similar or
9 analogous to a contract of service.
10 In that regard, adverting to the
11 four-in-one test set out in *Wiebe Door*, which is
12 still the law and was confirmed as recently as 2001
13 by the Supreme Court of Canada in *Sagaz Industries*,
14 which is *671122 Ontario Ltd. v. Sagaz Industries* --
15 the 2001 Supreme Court judgment is No. 61 -- and
16 more recently in *Precision Gutters v. the Minister*,
17 [2002] F.C.J. No. 771, the control issue, which is
18 the first guideline, I have already said is clearly
19 established. Counsel for the Minister had a
20 question as to whose intention one was talking
21 about. I think it is pretty clear in a control
22 issue that it has to be the control of the client. I
23 have already said that the evidence is quite clear
24 that these nurses were working under the control of
25 the client.

1 As far as tools are concerned, the
2 evidence of Ms. London was that while she had her
3 own uniform, and while she had her own stethoscope,
4 when she went to a hospital the hospital provided
5 the stethoscope. That takes it out of the rule in
6 *Precision Gutters* where a worker owns the tools that
7 it is normal and reasonable for him or her to own,
8 that person is an independent contractor.
9 In these particular circumstances,
10 we have the hospital providing all the equipment and
11 facilities, and whatever is required in a
12 complicated function of looking after ill people,
13 and that all the nurse provided was her uniform.
14 Therefore, under the peculiar circumstances of this
15 trade, I find that the tools factor indicates that
16 the workers were also employees.
17 Of course, there is no chance of
18 profit. They are getting paid on an hourly basis as
19 was recognized by the Minister, and also was ruled
20 upon in the case, cited by the Minister, of *Hennick*,
21 [1995] F.C.J. No. 294, in the Federal Court of
22 Appeal.
23 As far as risk of loss is
24 concerned, I have not heard any evidence that the
25 nurses had any expenses other than the uniform, and
26 the four guidelines being determinative, it really

1 isn't necessary to go into the conundrum of whose
2 intention is involved, because of the cases as
3 recently as *City Water International*, [2006] F.C.A.
4 No. 350.
5 At paragraph 31 the Court says:
6 "Since the relevant factors",
7 which are about four-in-one
8 *Wiebe Door* factors, "yield no
9 clear result, greater emphasis
10 should have been placed on the
11 parties' intention by the
12 Judge in this case."
13 In the matter before me, the
14 relevant factors do yield a clear result.
15 So I find within the meaning of
16 regulation 34(1) of the *Canada Pension Plan* that the
17 terms and conditions were indeed analogous to a
18 contract of service.
19 The next requirement of these
20 sections are that the nurses be remunerated by the
21 agency, and it is patently clear on the evidence
22 that they were.
23 Notwithstanding the fact that both
24 sections are clearly satisfied on the facts of this
25 case, there were various arguments raised by the
26 representative of the Appellant that I feel, in

1 fairness, I should address myself to. The first one
2 was the argument that regulations 6(g) and 34(1)
3 cover only employees.
4 We have already said that it is
5 negated by the case of *Silverside*, but also the
6 cases cited by counsel for the Minister, *Sheridan v.*
7 *the Minister of National Revenue*, [1985] F.C.J. No.
8 230, 57 N.R., page 69 in the Federal Court of
9 Appeal, dealing with nurses, as in this case. The
10 Court held that even though there was no contract of
11 service either with the agency or with the hospital,
12 the nurses were still caught by Employment Insurance
13 regulation 12(g), which is now 6(g).
14 And, using the same reasoning if
15 that is the case, I see no reason why it should be
16 different under the Plan regulation 34(1).
17 The representative of the Appellant
18 also argued that there was no direction and control
19 because we are dealing with highly skilled and
20 experienced nurses who, while they had to be told
21 what to do, could not be told how. The problem with
22 that argument is that it evokes archaic law, which
23 is no longer followed in the courts in the case of
24 highly skilled workers.
25 That conclusion comes directly out
26 of *Wiebe Door* itself, where they quote Baron

1 Bramwell in *Regina v. Walker*, [1858] 27 LJMC, pages
2 207-208, and he lays down the principle as follows:
3 "A principal has the right to
4 direct what the agent has to
5 do; but a master has not only
6 that right, but also the right
7 to say how it is to be done."
8 Justice McGuigan has said:
9 "The test has broken down
10 completely in relation to
11 highly skilled and
12 professional workers, who
13 possess skills far beyond the
14 ability of their employers to
15 direct."
16 So the cases no longer speak the
17 language of "what" versus "how", and people have been
18 found to be employees even though they were so
19 skilled that their employers could tell them what to
20 do but not how.
21 Finally, it was argued that the
22 employment in regulation 34(1) of the Plan and
23 regulation 6(g) of the Act means a contract of
24 service; but as counsel for the Minister has pointed
25 out, quoting, I believe, my decision once again in
26 *Isomeric*:

1 "It was held in the case of
2 *A.G. v. Skyline Cabs*, [1986]
3 F.C.J. No. 335, employment in
4 section 12(g)," which is now
5 6(g), "is not to be given a
6 narrow interpretation of
7 contract of service but is to
8 be construed in a broader
9 sense of activity or
10 occupation."
11 I repeat that that applies under
12 the *Employment Insurance Act*, and I see no reason
13 why it should not apply to the construction of the
14 relevant regulation of the Plan as well.
15 In these matters, the burden is on
16 the Appellant to demolish the assumptions contained
17 in paragraph 13 in the Minister's reply to the
18 Notices of Appeal, both under the *Employment*
19 *Insurance Act* and the *Canada Pension Plan*. I would
20 say that the only assumption that has been
21 demolished would be 13(d): The workers did not run
22 their own businesses and did not represent
23 themselves as self-employed persons. The remaining
24 assumptions, accordingly, clearly satisfy the
25 requirements of regulations 34(1) and 6(g), and the
26 Appellant has failed to demolish them.

1 The decision of the Minister is
2 objectively reasonable within the meaning of *Légaré*,
3 [1999] F.C.J. No. 878 and *Pérusse*, [2000] F.C.J. No.
4 310, both in the Federal Court of Appeal.
5 In the result, the appeals with
6 reference to all the workers mentioned in schedule A
7 under the *Canada Pension Plan* and under the
8 *Employment Insurance Act* will be dismissed and the
9 decisions of the Minister confirmed.
10 Thank you for your assistance.
11 --- Whereupon the hearing concluded at 4:24 p.m.

I HEREBY CERTIFY THAT I have, to the best

of my skill and ability, accurately transcribed from a recording

the foregoing proceeding.

Catherine Keenan, Court Reporter

CITATION:	2007TCC527
COURT FILES NO.:	2006-2546(EI) and 2006-2547(CPP)
STYLE OF CAUSE:	Care Nursing Agency Ltd., and The Minister of National Revenue
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 1, 2007,
ORAL REASONS FOR JUDGMENT BY:	The Honourable N. Weisman, Deputy Judge
DATE OF ORAL JUDGMENT:	August 1, 2007

APPEARANCES:

Agent for the Appellant:	Ed Sarmiento
Counsel for the Respondent:	Kandia Aird

COUNSEL OF RECORD:

Counsel for the Appellant:

Name:

Firm:

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