

Dockets: 2006-3241(EI) and 2006-3289(CPP)

BETWEEN:

MICHAEL CALUORI O/A CALUORI PROPWERKS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

KANNAN PAGALAM,

Intervener.

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Appeal heard on July 23, 2007 at Vancouver, British Columbia

Before: The Honourable Justice T. O'Connor

Appearances:

Counsel for the Appellant:	Nathan S. Ganapathi
Counsel for the Respondent:	Shannon Walsh, Student-at-Law
For the Intervener:	The Intervener himself

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**AMENDED JUDGMENT**

The appeal is allowed and the decision of the Minister dated September 15, 2006 is vacated; dismissed are the appeals in respect of the October 18, 2006 rulings of the Canada Revenue Agency relative to a period from August 25, 2003 to November 30, 2005 and the appeal relative to the Canada Pension Plan (2006-3289 (CPP)), the whole in accordance with the attached Reasons for Judgment.

**This Amended Judgment and Amended Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment dated August 20, 2007.**

Signed at Ottawa, Canada this **13<sup>th</sup>** day of **November**, 2007.

"T. O'Connor"

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O'Connor, J.

Citation: 2007TCC490

Date: 20071113

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BETWEEN:

MICHAEL CALUORI O/A CALUORI PROPWERKS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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### **AMENDED REASONS FOR JUDGMENT**

O'Connor, J.

[1] The issue in this appeal is whether the Intervener (“Pagalam”) was employed by the Appellant (“Caluori”) during the period from December 1, 2005 to January 19, 2006 (the “Period”) under a contract of service (i.e. an employee relationship) within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act*, S.C. 1996, c-23 (“Act”).

[2] The following is the background to this matter. In response to a request for a ruling from Human Resources Skills and Development Canada the Canada Revenue Agency (“CRA”) Rulings Division issued a decision dated April 21, 2006 that Pagalam was not employed by Caluori under a contract of service. By letter dated June 28, 2006 Pagalam appealed that decision to the Minister pursuant to section 91 of the *Act*. By letter dated September 15, 2006 the Minister decided that Caluori employed Pagalam under a contract of service during the Period. Caluori now appeals that decision to this Court.

[3] It should be noted that the CRA's Ruling Division also issued a decision dated October 18, 2006 to the effect that Pagalam's employment with Caluori from August 25, 2003 to November 30, 2005 was insurable employment. Caluori filed an appeal of the October 18, 2006 decision to the Minister but the Minister has not yet made a decision in respect of that appeal. Consequently any appeal to the Tax Court in respect of the October 18, 2006 decision is premature. Moreover, although Caluori purported to appeal a Canada Pension Plan decision, the Minister has not made any such decision. Therefore, that appeal is also premature and has been discontinued by Caluori. Consequently, the appeals in respect of the October 18, 2006 decision and the Canada Pension Plan are dismissed, leaving however to the parties their respective rights in respect of any decisions that may be made by the Minister.

### Facts

[4] Some of the facts are stated in the Reply to the Notice of Appeal ("Reply") either as assertions or assumptions and the substance of those that were not refuted are mentioned below. Other facts were established by the evidence, oral and written, and are also mentioned below to the extent they are relevant.

[5] During the Period Caluori operated a business that manufactured props for the movie industry. Caluori hired Pagalam to do bookkeeping and administrative duties. The arrangement between them was oral and they agreed that Pagalam would be paid on the basis of an hourly rate.

[6] Caluori was in effect a proprietorship and had commenced business in 1993. Caluori did much of the prop work himself and from time to time engaged the services of other prop builders.

[7] Caluori had no full-time employees treating all workers as independent contractors, including Pagalam.

[8] The business was conducted out of rented premises on Parker Street in Vancouver, British Columbia.

[9] Pagalam had skills in the bookkeeping, financial and administrative areas and was retained mainly in these functions. He also did casual services of a general and administrative nature and sometimes attended to various menial tasks such as obtaining lunches.

[10] During the Period Pagalam also carried on other business activities. He was a teacher of English as a second language, was an organizer of teen dances and was involved with a magazine called "Point Magazine". He registered as a proprietorship in British Columbia in February, 2003, named AYK Marketing, describing the business as a Marketing Agency.

[11] He did not have fixed hours of work throughout the Period, although when prop work got heavy he was ordered to start at certain hours.

[12] In his bookkeeping and administrative functions he looked after the pay and time sheets of himself and other workers and issued cheques in payment both of his own wage and those of the other workers. He had no benefits or vacation time. Pagalam mentioned to Caluori on several occasions that the independent contractor relationships between Caluori and the various workers, including himself, were not correct and that matters should be based upon an employee-employer relationship. However in arranging payment of the various wages including, his own, Pagalam never made any deductions for taxes, EI premiums or CPP premiums. He did not issue any T4 slips. His work also involved recording expenses incurred by the business, creating invoices, preparing cheques for signature and making entries in journals. Pagalam did most of his work at the premises of the business (Studio) and also did some of the work at his home.

[13] There is some disagreement on the ownership of some tools such as computers, calculators, supplies and writing materials. Caluori indicated that some of the calculators, etc. were provided by Pagalam and Pagalam is essentially denying this. The Studio belonged to Caluori under lease.

[14] Caluori did not exercise any significant control or supervision over Pagalam. Pagalam was told what needed to be done but not how to do it.

[15] Pagalam invoiced the Appellant periodically for his services, typically bi-weekly, at the agreed rate of \$18.00 per hour, and prepared the cheques in payment thereof simultaneously with payment of other invoices received by the Appellant from other workers and suppliers.

[16] Pagalam's hourly rate was subsequently raised to \$20.00 on his request.

[17] Pagalam kept a record in the Studio of his hours of service for Caluori.

[18] On or about December 17, 2005 Pagalam, as a result of an incident with a female prop maker within the Studio, was asked to leave and not to return until he could conduct himself professionally. He did not return until the first week of January 2006.

[19] On his return, Pagalam disclosed that he had raised his hourly rate to \$25.00 and had been billing Caluori at that higher rate for the preceding 5 months without the knowledge of Caluori. He attempted to justify his conduct, and demanded a further increase to \$40.00 per hour. Pagalam contended that he deserved a bonus, although no profit sharing had been discussed or agreed upon at the inception of the contract for services. Caluori demanded return of the overpayment, but Pagalam refused and left the premises. Pagalam also removed the file containing his own time sheets. Pagalam has ignored written demand for repayment of the sum of \$1,862.00, which Caluori claims Pagalam overpaid himself.

### Analysis and Decision

[20] The relevant provisions of the *Employment Insurance Act* are the following:

...

"employment" means the act of employing or the state of being employed;

...

"insurable employment" has the meaning assigned by section 5;

...

5. (1) Types of insurable employment - Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

...

[21] In cases of this nature the whole relationship must be looked at bearing in mind the well known tests of control, ownership of tools, chance of profit, risk of loss, the integration test (whose business was it) and any other relevant factors.

[22] In deciding the issue I am not simply to substitute my opinion for that of the Minister and I am to give some deference to the decision of the Minister. These principles have been developed by the Federal Court of Appeal in various cases. In *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 878, the Court had occasion to review the issue in question. Paragraph 4 of that decision by Marceau, Desjardins and Noël, J.J. stated as follows:

The *Act* requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the *Act* confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[23] I have concluded that the following considerations are most important in the determination of the issue:

1. The degree of control was very limited. Pagalam could work either at the premises or at his home, where he had an office. There were no permanently set fixed hours. Also Pagalam had other business interests which he carried on during the Period. He did the bookkeeping and checked the hours and made out the cheques in payment of the various workers including himself, Caluori being very busy with the prop work.

2. As to the ownership of tools, Caluori supplied the premises but Pagalam also worked from his own home. There was disagreement as to the ownership of some of the tools such as computers and calculators. In any event, the question of ownership of tools is not, in my opinion, that significant.

3. From the point of view of integration, the services of Pagalam were only accessory to the prop business and not essential to that business. Those services were, however, necessary as housekeeping, invoicing and paying salaries are to any business. However, Pagalam, unlike a normal regular employee, carried on several other businesses and enterprises.

4. The fact that Pagalam attempted to persuade Caluori to change the relationship of himself and other workers to an employee relationship is in itself an indication that he realized that his relationship was that of an independent contractor as opposed to an employee. He may not have wanted that situation but that was the arrangement between the parties.

5. Although Pagalam had very little chance of profit or risk of loss as a general rule he did write out his own cheques and increased them unilaterally. He stated that since he was considered as a contractor, he could set his own rates and did so.

6. Recent jurisprudence has analyzed the importance of the intention of the parties as to the nature of their relationships, concluding, essentially, that if their common intention is an independent contractor relationship and if the facts can support that position even though some of the facts may not, intention will be considered. In this case, Caluori's intention of independent contractor was clear. Pagalam resisted, but went along with that position and actually invoked it as an excuse to unilaterally raise his remuneration. If anything, intention supports a conclusion of independent contractor.

[24] In conclusion some of the tests point one way and some of the tests point another, but in my opinion, on a balance of probabilities, I find that Pagalam was engaged under a contract for services with Caluori that is to say he was an independent contractor as opposed to an employee.

[25] In arriving at that decision, I have determined that the testimony of Caluori was more credible than that of Pagalam.

[26] For all the above reasons, the appeal is allowed and the decision of the Minister is vacated.

**This Amended Judgment and Amended Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment dated August 20, 2007.**



Signed at Ottawa, Canada this **13<sup>th</sup>** day of **November**, 2007.

"T. O'Connor"

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O'Connor, J.

CITATION: 2007TCC490

COURT FILE NO.: 2006-3241(EI) **and 2006-3289(CPP)**

STYLE OF CAUSE: MICHAEL CALUORI O/A CALUORI  
PROPWERKS AND M.N.R. AND  
KANNAN PAGALAM

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: July 23, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice T. O'Connor

DATE OF **AMENDED** JUDGMENT: November 13, 2007

APPEARANCES:

Counsel for the Appellant:	Nathan S. Ganapathi
Counsel for the Respondent:	Shannon Walsh, Student-at-Law
For the Intervener:	The Intervener himself

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