Docket: 2009-3225(EI)

BETWEEN:

WELLBUILT GENERAL CONTRACTING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

TIMOTHY J. BAKLINSKI

Intervenor.

Appeal heard on common evidence with the appeal of *Wellbuilt General Contracting Ltd.* (2009-3226(CPP)), on May 17, 2010, at Ottawa, Canada.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the appellant:	Andrew Haden-Pawlowski
Counsel for the respondent:	Sara Chaudhary
For the intervenor:	The intervenor himself

JUDGMENT

The appeal under the *Employment Insurance Act* is allowed and the Minister's decision of July 6, 2009 is vacated in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada, this 22nd day of October 2010.

"Patrick Boyle"

Boyle J.

Docket: 2009-3226(CPP)

BETWEEN:

WELLBUILT GENERAL CONTRACTING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

TIMOTHY J. BAKLINSKI

Intervenor.

Appeal heard on common evidence with the appeal of *Wellbuilt General Contracting Ltd.* (2009-3225(EI)), on May 17, 2010, at Ottawa, Canada.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the appellant:	Andrew Haden-Pawlowski
Counsel for the respondent:	Sara Chaudhary
For the intervenor:	The intervenor himself

JUDGMENT

The appeal under the *Canada Pension Plan* is allowed and the Minister's decision of July 6, 2009 is vacated in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada, this 22nd day of October 2010.

"Patrick Boyle"

Boyle J.

Citation: 2010 TCC 541
Date: 20101022
Dockets: 2009-3225(EI)
2009-3226(CPP)

BETWEEN:

WELLBUILT GENERAL CONTRACTING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

TIMOTHY J. BAKLINSKI

Intervenor.

REASONS FOR JUDGMENT

Boyle J.

I. Introduction

[1] These appeals were heard in Ottawa in May. The appellant corporation, Wellbuilt General Contracting Ltd., ("Wellbuilt"), carries on a small construction contracting business in the Barry's Bay area of the Ottawa Valley. It has appealed from rulings made by the Canada Revenue Agency ("CRA") that three of its workers were engaged throughout 2007 in insurable employment for purposes of the Employment Insurance ("EI") legislation and in pensionable employment for purposes of the Canada Pension Plan ("CPP").

[2] The owner-manager of Wellbuilt is Andrew Haden-Pawlowski. Wellbuilt has a number of employees and, in addition, has a number of trades or subcontractors. Wellbuilt employed a number of employees and used 30 or more subcontractors in the period in question. Wellbuilt's business is primarily new residential construction and residential additions and improvements; it also does some institutional and other construction projects. The three workers are Tim Baklinski, Joseph Baklinski and

Edward Thompson. Each of these workers did what could best be described as general construction labour and carpentry work. Tim and Joseph Baklinski are brothers. Joseph Baklinski and Edward Thompson jointly formed a new business after they stopped working for Wellbuilt. Their new business is StoneView Masonry and Landscaping ("StoneView") which also does small construction and other work. Tim Baklinski also went to work for StoneView after he left Wellbuilt.

[3] Each of the workers left Wellbuilt on his own. (There is no issue of any of the workers needing their Wellbuilt work to be insurable employment in order to qualify for EI benefits.) Joseph Baklinski left and was fully paid in 2006 and did not work at all for Wellbuilt in 2007. One is therefore immediately doubtful of both the CRA ruling that he was a Wellbuilt employee in 2007 and the quality of the CRA Appeal's review of that ruling. Surprisingly, the end result of the ruling and appeal process was to have the CRA issue a T4 indicating that Joseph Baklinski earned $1,734 from Wellbuilt in 2007. The appeal with respect to Joseph Baklinski is allowed.

[4] Similar T4s were issued by the CRA in respect of the other two workers' 2007 income.

[5] Tim Baklinski's T4, as finally issued by the CRA indicates he earned almost $20,000 from Wellbuilt, a number which far exceeds the amount that he says he was paid. Tim Baklinski believes the CRA's T4 includes his self-employment income from two other jobs of his in 2007.

[6] No one from the CRA was called to testify in this case to explain the state of the file presented to the Court.

[7] Edward Thompson left Wellbuilt in January 2007 having earned about $1,000 for about 70 hours of work in 2007. Tim Baklinski left Wellbuilt in June 2007 having earned about $11,000 for about 575 hours of work in 2007. The timesheets, invoices and cancelled cheques confirm this and were made available to the CRA. The payor and the worker agree on these amounts of time worked and wages paid. Nonetheless, at the conclusion of the CRA rulings and appeal process, a Wellbuilt T4 was issued by the CRA to Mr. Thompson for $8,149 and to Tim Baklinski for $19,868.

[8] It appears quite inappropriate that Wellbuilt and Mr. Haden-Pawlowski should have to bring the government to court to challenge such shoddy work, analysis and review. Mr. Haden-Pawlowski could not be faulted for thinking Wellbuilt's file suffered from too much civil service and not enough public service. It is no less unfair to Tim Baklinski to leave him trying to defend the indefensible conclusion of the CRA review.

[9] The CRA owes everyone involved in this file an apology. Granted the CRA is a large organization and it is unrealistic to expect it to do everything perfectly. Things will fall through cracks. However, it should be able to do the exceedingly simple things very well. A review of what was done and what went wrong at CRA Appeals is clearly warranted lest individual Canadians and Canadian businesses be similarly dragged into court and Canadians as a whole have to pay for valuable and scarce court resources being used so wastefully.

II. The Witnesses

[10] Each of Mr. Haden-Pawlowski and the three workers testified. Mr. Haden-Pawlowski represented Wellbuilt in this appeal and Tim Baklinski intervened in the appeal. I must observe that, while there is a commercial/business dispute between them, each testified in what appeared to be a forthright and honest manner as to their recollection and interpretation of the events relating to the work for Wellbuilt. While there are some inconsistencies in their testimony, I believe that they were each telling their story truthfully as they recalled it. Further, they remained polite and respectful with each other in their written communications and when cross-examining each other. For this they are each to be highly commended.

III. Applicable Law

[11] The tests for a contract of service/employment versus a contract for services/independent contractor are well settled. The issue of employee versus independent contractor for purposes of the definitions of pensionable employment and insurable employment are to be resolved by determining whether the individual is truly operating a business on his or her 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.*, [1986] 3 F.C. 553, for purposes of the Canadian definitions of insurable employment and pensionable employment, and adopted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. 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. There is no

predetermined way of applying the relevant factors and their relative importance and their relevance will depend upon the particular facts and circumstances of each case.

[12] The decision of the Federal Court of Appeal in *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, [2007] 1 F.C.R. 35, 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 decisions in such cases as *National Capital Outaouais Ski Team v. Canada (The Minister of National Revenue)*, 2008 FCA 132, *Combined Insurance Company of America v. Canada (The Minister of National Revenue)*, 2007 FCA 60, and *City Water International Inc. v. Canada (The Minister of National Revenue)*, 2006 FCA 350.

IV. Intention

[13] In this case the intention of the parties at the time the workers were hired and worked is significant. It is clear that Mr. Haden-Pawlowski and Wellbuilt intended these three workers to be subcontractors and not employees. He told each of them this when they were hired. With limited exceptions mentioned below, Wellbuilt behaved entirely consistently with that intention and Wellbuilt accounted for their work accordingly. Wellbuilt's employees were those persons to whom Wellbuilt committed to provide work on a consistent daily basis and who, in turn, committed to work daily for Wellbuilt. Wellbuilt's contractors on the other hand were persons to whom Wellbuilt offered work when it was available if they were free to, and chose to, take it. While that was Wellbuilt's approach to the two categories of workers, it is not necessarily determinative since it does not seem to account for part-time employees, casual employees and similar employment arrangements. Using Wellbuilt's distinction between its employees and its contractors, both workers' 2007 work hours would be consistent with being Wellbuilt's contractors and not employees.

[14] Tim Baklinski indicated to the CRA in his interview after the fact and in his written Worker Questionnaire that, at the time he was hired, he had intended to be self-employed. He reported his Wellbuilt income as business income and, according to the CRA report, claimed business expenses. Tim Baklinski testified that he perhaps did not understand the significance of the distinction between employment and self-employment at the time.

[15] It appears from his evidence that he only really understood the difference once he reported business revenues in excess of the small supplier goods and services tax ("GST") threshold and was assessed a significant amount of GST by the CRA. I

think it is fair to conclude from his testimony that, once he realized the significant differing treatment of employees and contractors for GST purposes, he was able to see that he should have been characterized as an employee at the outset. If the ruling is upheld, presumably Tim Baklinski's GST problem will go away. I should also note that, at this time, the CRA has ruled that Tim Baklinski was an employee and has also assessed him for not collecting and remitting GST for his work as employee. This is a remarkably inconsistent position for the CRA to be taking. Further, Tim Baklinski has sent Wellbuilt a bill for the GST the CRA says he should have collected, resulting in Tim Baklinski also taking an inconsistent position vis-à-vis Wellbuilt for GST purposes from his position that he was its employee.

[16] These inconsistencies, combined with the ruling that Joseph Baklinski was an employee in 2007 when, by his own records and testimony, he never worked for Wellbuilt after November 2006 and he had relayed this to the CRA at the outset, and combined with the outrageously incorrect 2007 employment income numbers finally determined for each of the three workers, demonstrate that the respondent's files were nowhere close to be ready for trial. This should have been apparent to the CRA and the Department of Justice. Wellbuilt and Mr. Haden-Pawlowski would be correct to think they were not being listened to or understood since the respondent was not even listening to the information or looking at the documentation provided by the workers themselves.

[17] Mr. Thompson similarly testified that, at the time he was hired and worked, he had intended to be self-employed and not an employee. He understood that meant he was to be responsible for his own tax reporting, etc. He indicated the same in his 2009 CRA interview. According to the CRA report, he reported the Wellbuilt income as business income and deducted business expenses. He maintains he reported it as "Other Employment Income" in his tax return. In any event, Mr. Thompson now says he probably did not fully understand the distinction between employee and independent contractor at the time.

[18] I am entirely satisfied that each of Wellbuilt, Tim Baklinski and Edward Thompson intended the workers' status to be independent contractors from the outset and throughout their time working for Wellbuilt. While Tim Baklinski may now wish that he had been an employee and, therefore, not facing a significant GST bill, that is not sufficient to negate his intention at the time not to be an employee.

[19] Overall, a consideration of the parties' intentions is consistent with the workers not being employees of Wellbuilt.

[20] Before leaving a discussion of the intention of the parties, I must return to the CRA's report on appeal. In its analysis of the relationship, the CRA considers 1) level of control, 2) ownership of tools and equipment, 3) subcontracting work or hiring assistants, 4) financial risk, 5) responsibility for investment and management, and 6) opportunity for profit. The CRA concludes that, having weighed these considerations, there was an employment relationship. Only then does the CRA consider the intention of the parties. The CRA makes it clear that the payor and the workers intended that they were self-employed and that there was a common intention in this regard. However the CRA dismisses this consideration with the following statement: "The payer stated the workers were self-employed, employed under contracts for service. The workers also intended to be self-employed. Therefore, it is clear that Wellbuilt Contracting Ltd. and the workers were incorrect on the true nature of their relationship." So much for considering the intention of the parties. This approach, in effect negating the relevance of the parties' common intention, was entirely wrong by the CRA. The intention of the parties is a significant and material guideline or criteria to be considered along with all of the other considerations. Just as none of the guidelines developed by Canadian courts are determinative, none are to be dismissed with barely an acknowledgement. Indeed, in many cases, including this one, intention may well be one of the prevalent considerations.

V. Control

[21] A consideration of the extent of Wellbuilt's control over the work done by the workers, how and when it was to be done, and when the workers were required to work, is consistent with the workers' intended status as independent contractors not employees. According to the testimony of the intervenor Tim Baklinski, he was not supervised in his work and there was no direct control over his work by Wellbuilt or Mr. Haden-Pawlowski or other senior staff members. He was told what needed doing and felt Wellbuilt and Mr. Haden-Pawlowski assumed from his background and experience that he would do it or know when to call Mr. Haden-Pawlowski or a Wellbuilt senior staff member for guidance or instruction. That description is generally consistent with Mr. Haden-Pawlowski's testimony of work arrangements and typical work days and tasks. It is not inconsistent with the evidence of the other two workers. Tim Baklinski worked for Wellbuilt the longest in 2007 and received significantly more income from Wellbuilt in 2007 than Mr. Thompson. His brother Joseph did not work for Wellbuilt at all in 2007. Tim Baklinski was the only worker who intervened in the proceedings. I accept his specific testimony on this point as representative of how the work was assigned and carried out by the workers.

[22] A consideration of the extent of control in this case also leans in favour of an independent contractor characterization and is certainly not inconsistent with the parties' shared common intention at the time that they be independent contractors.

VI. Ownership of Tools

[23] Each of the workers was responsible for providing their own tool belt and small basic hand tools. These are the tools they were told at the outset they would be responsible for. Generally, power tools were provided by Wellbuilt but Tim Baklinski said that at times he would bring his own cordless tools when he anticipated needing them on days that Wellbuilt's tools would not already be at the worksite.

[24] With respect to the consideration of the ownership of tools in a case such as this, guidance can be drawn from the Federal Court of Appeal's decision *Precision Gutters Ltd. v. Canada (The Minister of National Revenue),* 2002 FCA 207. In that case the workers owned their own small hand tools, drills, bits and ladders, but the substantial and large equipment required for the workers to form the gutters on site was owned by the payor. The Federal Court of Appeal wrote in paragraph 25:

> It has been held that if the worker owns the tools of the trade which it is reasonable for him to own, this test will point to the conclusion that the individual is an independent contractor even though the alleged employer provides special tools for the particular business.

[25] At the very least, it is not uncommon in some business sectors and trades, such as auto-mechanics, some forestry workers, and some construction workers, to expect or require all workers, whether employees or independent contractors, to own and supply their own basic hand tools, blades and bits, etc., and in cases such as those, the ownership of tools consideration may tip in neither direction in particular.

[26] Clearly, most of the substantial tools needed in Wellbuilt's construction business were owned by Wellbuilt and provided to the workers, whether employees or independent contractors. In this segment of the construction industry it does not appear that the ownership of tools is very telling or particularly helpful since it would not be inconsistent for an employee to be required to have a significant investment in basic tools nor would it be inconsistent for an independent contractor not to be required to provide all the tools needed to do his work. Each business sector in Canada is free to develop its own practices that make economic sense and work efficiently in that sector. In this case, a consideration of the ownership of tools leans

slightly in favour of employee status but is certainly not inconsistent with the shared common intended status of independent contractors.

VII. Chance of Profit/Risk of Loss

[27] Each of the workers was paid on an hourly basis. In addition they were reimbursed mileage on some jobs. They were responsible for getting themselves to and from either Wellbuilt's office or particular jobsites. The financial risk of people earning an hourly wage, whether employees or independent contractors, is often minimal especially in the context of independent contractors in businesses that do not require significant capital investments beyond vehicles and basic tools. This would include many construction trades.

[28] In this case, the more significant financial risk to the workers was that Wellbuilt might not have enough work each week to keep them busy on a full-time daily basis. The timesheets, invoices and pay cheques all confirmed that in fact this was the case for each of them in 2007. They did not in fact get work from Wellbuilt from 7:30 a.m. to 4:30 p.m. five days of the week as targeted (or four days a week in Tim Baklinski's case once he took Mondays off to start his music teaching business). The evidence is that each of them was engaged in other jobs, including so-called cash weekend jobs, to earn additional income in these times.

[29] The evidence is inconsistent on whether or not the workers worked for others on any or all of the weekdays where the records clearly indicate they did not work for Wellbuilt. The workers say they did not, Mr. Haden-Pawlowski believes they did. CRA's documents, such as they are, indicate they each reported business income in excess of what has been shown and agreed to have been paid to them by Wellbuilt. I am unable to conclude one way or the other on this point and it is therefore not a helpful consideration in deciding this particular case.

[30] Timothy Baklinski was aware that he was not receiving vacation days, sick days or parental leave as employees often expect. He did not at any time raise this with Wellbuilt, Mr. Haden-Pawlowski or his co-workers.

[31] The pay cheques consistently referred to sub and sub-work. Invoices were submitted by the workers. One of Mr. Thompson's 2007 invoices described the services as sub-work. These invoices were prepared by the workers.

[32] On the facts of this case and in the context of the construction business and subcontracted trades and workers, I do not find the chance of profit/risk of loss

analysis pointing particularly in either direction. I do conclude that a consideration of it does not identify anything inconsistent from the shared common intention throughout the hiring and work period that the workers be independent contractors. It is clear that these references are describing the work as subcontracted work.

VIII. Conclusions

[33] Given the clear shared common intention between Wellbuilt and each of Timothy Baklinski and Edward Thompson, and given the absence of control over whether the workers would work on any given day and the minimal degree of control over how the needed work was to be completed beyond being done to a schedule that had to accommodate all of the workers, trades and others involved in a construction project, I find that Timothy Baklinski and Edward Thompson were independent contractors and not employees of Wellbuilt in the period in question. There was nothing inherent in the actual work arrangements which would preclude the intended and desired independent contractor relationship or which would negate it.

[34] I must acknowledge that there were two aspects of the evidence that could be considered unusual. First, Wellbuilt insisted that all persons working on their jobsites be covered by accidental disability and life insurance. For independent contractors this meant that they had to arrange such an insurance policy. Wellbuilt agreed that it would reimburse them on a monthly basis for the cost of the policy premiums. While this may be unusual, it is an item open to negotiation between contracting parties just as a mileage, tool, educational or work clothing allowance might be. In any event, it certainly does not point to an employment relationship since an employer would be expected to have its employees covered under its own insurance policy, not to be reimbursing employees the cost of premiums for insurance arranged by and in the name of the employee.

[35] Secondly, Mr. Haden-Pawlowski gave confirmation of employment and income letters to the financial institution which made home mortgage loans to each of Timothy Baklinski and Edward Thompson. Mr. Haden-Pawlowski testified that he “fudged” the facts as a personal favour and accommodation to these two regular workers. Timothy Baklinski and Edward Thompson would have known that at least the income amounts set out in these letters were not correct. Clearly, this was wrong on the part of Mr. Haden-Pawlowski since it was not true. Equally clear, it was wrong of the workers to knowingly mislead their mortgage lenders. However, these wrongs and misrepresentations do not have the effect of turning the relationship into employment status from independent contractor status anymore that the overstatement of their income became their new wage. Mr. Haden-Pawlowski’s

fudging of these letters for the benefit of his workers tells me something about him, just as these workers taking cash weekend jobs with others that they did not report or did not fully report for tax purposes tells me something about them. However, in neither case does it tell me anything about whether they were employees or independent contractors.

[36] I find that neither Timothy Baklinski nor Edward Thompson was engaged in insurable employment or pensionable employment with Wellbuilt in 2007.

[37] Based on the written evidence and testimony in this case, this appears to be a case of independent contractor's remorse and regret, where a possible recharacterization of the intended, agreed and acted upon independent contractor status to employee status would convert one of the workers' GST problems into an EI and CPP problem for Wellbuilt. Such a recharacterization would be an odd and inappropriate sort of retroactive tax planning, would be unfair to Wellbuilt, is inconsistent with the preponderance of the evidence, finds no support in the legislation, and will not be sanctioned by the Court.

IX. Costs

[38] The Tax Court has inherent jurisdiction and discretion to award costs in informal appeals where costs are not normally provided for in order to regulate the potential abuse of the court process. This has been sanctioned by the Federal Court of Appeal in *Fournier v. Canada*, 2005 FCA 131, [2006] G.S.T.C. 52, and applied by this Court in *Harold Isaac OP Sunrise Electrical v. M.N.R.*, 2010 TCC 225, and *Bono v. M.N.R.*, 2010 TCC 466.

[39] I have made several observations and comments above regarding the information available to the CRA, both at the rulings and appeals stage, and the inappropriate decisions taken by the CRA. This appeal was an appeal from the CRA Appeals decision following its administrative review of Wellbuilt's objection to the rulings. This appeal is not a review of the process, practices, decision-making process and operations of CRA Appeals nor was either the CRA appeals officer or rulings officer called to testify to explain what the CRA has done. It would therefore be inappropriate of me to say anything further on the topic. I must add however that the respondent might want to carefully review how this file has been handled through every stage lest another appellant in another case argue that proceeding with a case in a state such as this, to the point of requiring the payor to appeal to the Court and the Court to decide it, constitutes an abuse of process warranting an award of costs.

[40] In this case, the appeals are allowed without costs having been asked for and none will be ordered.

Signed at Ottawa, Canada, this 22nd day of October 2010.

"Patrick Boyle"

Boyle J.

CITATION:	2010 TCC 541
COURT FILE NOS.:	2009-3225(EI), 2009-3226(CPP)
STYLE OF CAUSE:	WELLBUILT GENERAL CONTRACTING LTD. v. THE MINISTER OF NATIONAL REVENUE AND TIMOTHY J. BAKLINSKI
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	May 17, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	October 22, 2010

APPEARANCES:

Agent for the appellant:	Andrew Haden-Pawlowski
Counsel for the respondent:	Sara Chaudhary
For the intervenor:	The intervenor himself

COUNSEL OF RECORD:

For the appellant:

Name:	
Firm:	

For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada