

Docket: 2010-2758(CPP)

BETWEEN:

1351678 ONTARIO LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ELIZABETH RANKIN,

Intervenor.

Appeal heard together on common evidence with the appeal of
1351678 Ontario Limited (2010-2759(EI)) on April 14, 2011,
at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Agent for the Appellant:	R.A. Judges
Counsel for the Respondent:	Tony Cheung Brandon Siegal
For the Intervenor:	The Intervenor herself

JUDGMENT

The appeal from the decision made under the *Canada Pension Plan* for the period from April 10, 2007 to November 2, 2008 is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 9th day of May 2011.

“V.A. Miller”

V.A. Miller J.

Docket: 2010-2759(EI)

BETWEEN:

1351678 ONTARIO LIMITED,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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Appeal heard together on common evidence with the appeal of
1351678 Ontario Limited (2010-2758 (CPP)) on April 14, 2011,
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Agent for the Appellant:	R.A. Judges
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For the Intervenor:	The Intervenor herself

JUDGMENT

The appeal from the decision made under the *Employment Insurance Act* for the period from April 10, 2007 to November 2, 2008 is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 9th day of May 2011.

“V.A. Miller”

V.A. Miller J.

Citation: 2011TCC252
Date: 20110509
Docket: 2010-2758(CPP)
2010-2759(EI)

BETWEEN:

1351678 ONTARIO LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ELIZABETH RANKIN,

Intervenor.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issues raised in these appeals are:

(a) whether Avie Foxton was employed with Elizabeth Rankin for the period April 10, 2007 to November 2, 2008 in insurable and pensionable employment pursuant to paragraph 5(1)(a) of the *Employment Insurance Act (EIA)* and paragraph 6(1)(a) of the *Canada Pension Plan (CPP)*; and,

(b) whether the Appellant was Ms. Foxton's deemed employer in accordance with subsections 1(2) and 10(1) of the *Insurable Earnings and Collection of Premiums Regulations (IECPR)* and subsection 8.1(1) of the *Canada Pension Plan Regulations (CPR)*.

[2] The Minister of National Revenue (the "Minister") determined that there was a contract of service between Ms. Foxton and Ms. Rankin. He then assessed the

Appellant for employment insurance and Canada Pension Plan premiums on the basis that it was Ms. Foxton's deemed employer because it paid her wages. Ms. Rankin has intervened in these appeals. The Appellant was represented at the hearing by its agent, Mr. Judges.

[3] Ms. Rankin was an associate broker with RE/MAX First Realty Ltd. She operated her business as a sole proprietor. Her hours of operation varied; but, she worked seven days a week. It was her evidence that, due to the growth of her business, she was out of the office, meeting with clients, for most of each day. She decided that she needed to engage a person to work in the office who would contact her if there were any important e-mails; who would schedule house showings; who would prepare materials which she needed to conduct her business; and, who would generally assist with any other activities on an as needed basis. I gather from the evidence, that over the years, Ms. Rankin has hired several people to perform these duties. She stated that, due to the fluctuations in the real estate market, these persons were always engaged as independent contractors. They were instructed that they had to submit an invoice to Ms. Rankin for the hours they worked.

[4] The Appellant was incorporated on June 29, 1999 and its sole shareholder was Ms. Rankin. The only business operated by the Appellant was the management of the two properties which it owned. Ms. Rankin stated that, on the advice of her previous accountants, she paid her workers through the Appellant. She has now stopped that practice and has engaged another accountant.

[5] Ms. Rankin testified that Ms. Foxton had been a real estate agent whose licence was rescinded by the Real Estate Council of Ontario. Ms. Foxton was advised that her licence could be reinstated if she passed the examinations in several courses. Ms. Rankin stated that she only hired Ms. Foxton because Ms. Foxton was destitute and she wanted to help her.

[6] Ms. Foxton was paid \$10 per hour. According to Ms. Rankin, Ms. Foxton worked independent of her; she determined her own hours of work as her main concern during this time was to complete her real estate courses so that her licence would be reinstated. Ms. Rankin testified that she did not check to see if Ms. Foxton actually worked the number of hours that she invoiced. She was not supervised in her duties. Ms. Rankin stated that Ms. Foxton had problems completing the tasks assigned and very often her work had to be completed by one of the other two workers who were in the office during this period.

[7] Both parties agreed that Ms. Foxton performed the following clerical duties:

- a) scheduled Ms. Rankin's appointments with clients;
- b) answered telephone calls;
- c) contacted Ms. Rankin about important new emails and new messages;
- d) sent faxes;
- e) screened and saved data;
- f) organized envelopes for Ms. Rankin's advertising;
- g) prepared, printed and organized documents related to real estate transactions;
- h) assisted with any other activities as required by Ms. Rankin.

[8] Ms. Foxton's real estate licence was reinstated on June 25, 2008 and from this point in time, she performed the services of a real estate agent as well as clerical services. She showed homes; did open houses; and, did home inspections. She still received \$10 per hour for the clerical services; but, as a real estate agent, she was paid a certain rate for each service that she performed. For instance, she was paid \$100 for home inspections and \$50 each time she had to revisit a property for a home inspection.

[9] The question is whether Avie Foxton was engaged by Elizabeth Rankin as an employee or an independent contractor. Mr. Judges submitted a decision, dated February 11, 2010, from the Ontario Ministry of Labour which had found that another individual was not an employee of Ms. Rankin in accordance with the definition of employee as contemplated by the *Employment Standards Act 2000*. Mr. Judges relied on this decision to state that Avie Foxton was self-employed while she was performing tasks for Ms. Rankin and that she was not an employee.

[10] This court is not bound by a decision made by the Ontario Ministry of Labour. The decision relied on by the Appellant did not concern Avie Foxton and it was made with respect to a different piece of legislation.

[11] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*¹, Major J. described the analysis that should be used when answering the question whether an individual was employed as an employee or an independent contractor. He wrote:

47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a

persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. **The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account.** In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. (emphasis added)

[12] These factors described by Major J. were those given in *Wiebe Door*. In *Combined Insurance Company of America v. M.N.R.*², Nadon, J.A. reviewed the case law and stated the principles to be applied as follows:

[35] In my view, the following principles emerge from these decisions:

1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door, supra*, and in the light of any factor which may prove to be relevant in the particular circumstances of the case;

2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.

Although as a general rule the control test is of special importance, the tests developed in *Wiebe Door* and *Sagaz, supra*, will nevertheless be useful in determining the real nature of the contract.

[13] I am satisfied from the evidence that there was a common intention between the parties that Ms. Foxton was to be employed as an independent contractor. Ms. Rankin testified that she told Ms. Foxton, at the time that she was being interviewed, that the position was that of an independent contractor. This was not refuted by Ms. Foxton.

[14] In the context of a contract of service, it is the right to control that is important and not the actual *de facto* control³. In this appeal, control would require that Ms. Rankin have the right or power to direct what Ms. Foxton did, and the manner in which, or how it should be done⁴.

[15] Ms. Foxton generally worked on Wednesdays to Sundays. However, she arranged her hours so that she could attend her classes. If she left work to attend a class, she sometimes did not return to work. No one checked the number of hours that she worked. As Ms. Rankin stated, "It was taken on good faith that she accurately reported her hours".

[16] The Minister assumed that Ms. Foxton was required to have general office experience; that she was trained by Doreen Bryant; and, that she was supervised by Ms. Rankin and Doreen Bryant. Ms. Rankin denied these assumptions. She stated that Doreen Bryant showed Ms. Foxton how the office operated; but she did not train her. There was an office policy manual that Ms. Foxton could use. It was her evidence that no one supervised Ms. Foxton. She was given various tasks to do but had problems functioning in the office. She could not learn how to use the office software, so she could not prepare a letter. If a client telephoned and Ms. Foxton did not know how to complete the work, she left it for the other workers to complete. When she worked evenings (which was Wednesday, Thursday and Friday), she placed the telephones on call forward so that she would not have to answer them.

[17] Ms. Rankin stated that she probably should have terminated her working relationship with Ms. Foxton on the basis of non-performance. However, she was trying to help her.

[18] Ms. Rankin may not have exercised strict control over Ms. Foxton, but that does not mean that she did not have the right to exercise that control. Ms. Rankin agreed with the following assumptions of fact that were pled by the Minister. She instructed Ms. Foxton on a daily basis on which tasks needed to be completed; she set all priorities and deadlines; she required that Ms. Foxton report to her on a regular basis; and she gave Ms. Foxton time off to study but Ms. Foxton was required to make up that time in the evening. She agreed that she did instruct Ms. Foxton on the tools and equipment to use when performing her duties.

[19] Ms. Rankin may have wanted to assist Ms. Foxton at a time when she was in need. However, I infer from the evidence that she was not entirely altruistic. Ms. Rankin was lax with Ms. Foxton concerning the quality of her work because she had hoped that Ms. Foxton would work with her when she regained her real estate licence.

[20] I have concluded from a review of all of the evidence that Ms. Rankin had the right to control how Ms. Foxton performed her duties.

[21] I have also concluded that Ms. Foxton was engaged by Ms. Rankin pursuant to a contract of service and therefore she was Ms. Rankin's employee. She was engaged in insurable and pensionable employment.

[22] As well as exercising control over Ms. Foxton, Ms. Rankin agreed that she supplied all of the tools and equipment which were necessary for Ms. Foxton to perform her duties. Ms. Foxton was required to provide her duties personally and she

could not hire a substitute. There was no negotiation concerning Ms. Foxton's rate of pay as a clerk or as a real estate agent. She received \$10 per hour for her clerical duties and a flat rate for specific tasks as a real estate agent. Both of these rates were determined by Ms. Rankin. In fact, it was Ms. Foxton's evidence that, when she became a real estate agent, she asked for more than an hourly wage. Ms. Rankin made it very uncomfortable for her so she left.

[23] Ms. Foxton had no chance of profit and no risk of loss. She had no expenses. When she had to drive to perform her duties as a real estate agent, Ms. Rankin reimbursed her the automobile expenses. If there were complaints from any of Ms. Rankin's clients, Ms. Rankin was responsible for resolving those complaints. If a file was not prepared properly, it was redone by other staff members and Ms. Rankin covered the related costs. Ms. Foxton was paid regardless.

[24] Although Ms. Rankin intended to hire Ms. Foxton as an independent contractor, the terms of their relationship, when analyzed against the *Wiebe Door* factors, do not support her intention.

[25] Mr. Judges submitted that Ms. Foxton was an independent contractor because she submitted invoices to Ms. Rankin. I disagree. In an attempt to create a relationship where her workers would be independent contractors, Ms. Rankin insisted that they submit an invoice. This evidence is self serving.

[26] During the period in issue, the Appellant was Ms. Foxton's deemed employer because it paid her wages.⁵

[27] The appeals are dismissed.

Signed at Ottawa, Canada, this 9th day of May 2011.

“V.A. Miller”

V.A. Miller J.

¹ 2001 SCC 59

² [2007] F.C.J. No. 124 at paragraph 35

³ 1546617 *Ontario Ltd. v R*, 2010 TCC 26 at paragraph 7

⁴ *Logitek Technology Ltd. v M.N.R.*, 2008 TCC 331 at paragraph 19

⁵ See subsections 1(2) and 10(1) of the *Insurable Earnings and Collection of Premiums Regulations* and subsection 8.1(1) of the *Canada Pension Regulations* which are attached.

Appendix 1

The relevant provisions of the IECPR read as follows:

1. (1) The definitions in this subsection apply in these Regulations.

(2) For the purposes of Part IV of the Act and for the purposes of these Regulations, “employer” includes a person who pays or has paid earnings of an insured person for services performed in insurable employment.

10. (1) Where, in any case not coming within any other provision of these Regulations, an insured person works

(a) under the general control or direct supervision of, or is paid by, a person other than the insured person’s actual employer, or

(b) with the concurrence of a person other than the insured person’s actual employer, on premises or property with respect to which that other person has any rights or privileges under a licence, permit or agreement,

that other person shall, for the purposes of maintaining records, calculating the insurable earnings of the insured person and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the insured person in addition to the actual employer.

Appendix 2

Canada Pension Plan Regulations

Regulations Respecting the Administration of the Canada Pension Plan

8.1 (1) Every person by whom the remuneration of an employee for services performed in pensionable employment is paid either wholly or in part is, for the purpose of calculating the employee's contributory salary and wages, maintaining records and filing returns, and paying, deducting and remitting the contributions payable thereon under the Act and these Regulations, deemed to be an employer of that employee in addition to the actual employer of that employee.

(1.1) The amount of any contributions paid by the person who is deemed to be the employer under subsection (1) is recoverable by that person from the actual employer.

(2) Where a person who is deemed by subsection (1) to be an employer fails to pay, deduct or remit the contributions that an employer is required to pay, deduct and remit under the Act and these Regulations, the provisions of Part I of the Act shall apply to that person as if he were the actual employer.

CITATION: 2011TCC252
COURT FILE NO.: 2010-2758(CPP)
STYLE OF CAUSE: 1351678 ONTARIO LIMITED AND M.N.R.
AND
ELIZABETH RANKIN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 14, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: May 9, 2011

APPEARANCES:

Agent for the Appellant: R.A. Judges
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