Docket: 2010-3070(EI)

BETWEEN:

JONATHAN KOWALCHUK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Jonathan Kowalchuk, (2010-3071(CPP))
on March 29, 2011, at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Bryn Frape

JUDGMENT

For the reasons attached hereto, the appeal is allowed and the assessments of the Minister of National Revenue for *Employment Insurance Act* premiums in the 2007, 2008 and 2009 years are vacated on the basis that the workers were performing their services as independent contractors.

Signed at Ottawa, Canada, this 18th day of May 2011.

"G. A. Sheridan"

Sheridan J.

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Counsel for the Respondent:	Bryn Frape

JUDGMENT

For the reasons attached hereto, the appeal is allowed and the assessments of the Minister of National Revenue for *Canada Pension Plan* contributions in the 2008 and 2009 years are vacated on the basis that the workers were performing their services as independent contractors.

Signed at Ottawa, Canada, this 18th day of May 2011.

"G. A. Sheridan"

Sheridan J.

Citation: 2011TCC265
Date: 20110518
Dockets: 2010-3070(EI)
2010-3071(CPP)

BETWEEN:

JONATHAN KOWALCHUK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, Jonathan Kowalchuk, is appealing the assessment of the Minister of National Revenue for *Employment Insurance Act* premiums and *Canada Pension Plan* contributions in respect of certain workers who performed services for his concrete business in 2007, 2008 and 2009.

[2] In those years, the Appellant was a sole proprietor engaged in installing concrete for both residential and commercial purposes. The workers assisted him in the work which included such things as preparing and cleaning up the work site, digging trenches, building forms, tying rebar and leveling the poured concrete.

[3] The Minister's position is that the workers were hired as labourer-employees working under a contract of service.

[4] The Appellant denies this saying that most of the workers were fellow tradesmen of long acquaintance, each engaged in their own businesses and with whom he had an arrangement that when and if available, they would provide their services as independent contractors. While they did not reduce this agreement to writing, the Appellant's uncontradicted evidence was that this was their clear intention when negotiating the terms of the performance of their services and undertaking the work.

[5] To determine whether the workers were employees or independent contractors, the Court must be guided by the principles in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 4 C.T.C. 139, (S.C.C):

> …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.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.[1]

[6] More recently, the question of the intention of the parties has come into the equation. In *Royal Winnipeg Ballet v. Minister of National Revenue*, [2008] 1 C.T.C. 220, the Federal Court of Appeal considered *Wolf v. Canada*, 2002 FCA 96 in which Décary, J.A. recognized the realities of the modern workplace:

> In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns.[2]

[7] Concurring with the result in *Wolf*, Noël, J.A. added the following qualifications to Justice Décary's reasons:

> … I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual

[1] *Ibid*, at paragraphs 47-48.
[2] Above, at paragraph 120.

> intent, and in particular their mutual understanding of the relationship cannot be disregarded.
>
> …
>
> This is not a case where the parties labelled their relationship in a certain way with a view of achieving a tax benefit. No sham or window dressing of any sort is suggested. It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding … .[3] [Emphasis added.]

[8] After considering *Wolf* and the related jurisprudence in some detail, Sharlow, J.A. went on, in *Royal Winnipeg Ballet*, to summarize the emerging principles and their application to determining whether a worker is an employee or an independent contractor:

> … One principle is that in interpreting a contract, what is sought is the common intention of the parties *rather than the adherence to the literal meaning of the words.* Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.[4] [Emphasis added.]

[9] In the present case, as the Appellant was the only witness to testify, the determination of the workers' status depends on the credibility of his evidence. I found him to be straight-forward in presenting his testimony and his evidence, generally persuasive. I am satisfied on a balance of probabilities that the workers were performing their services as independent contractors.

[10] Before turning first to the traditional four-fold test under *Sagaz*, it is important to consider the backdrop against which the work was performed. I accept the Appellant's evidence that 2007-2009 were busy years in the construction industry in Saskatchewan and to keep up with the demands imposed by a booming industry, it

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[3] Above, at paragraphs 122 and 124
[4] Above, at paragraph 60.

was not only practical but necessary for the Appellant and his fellow tradesmen-workers to operate in the fashion described in paragraph 4 above. Though in less busy times the Appellant said he usually worked alone, in the years under appeal, most of his work was done for a general contractor engaged in a large commercial project; in these circumstances, he needed to sub-contract some of his work to others.

[11] In this context, I have no reason to doubt the Appellant's evidence that the workers intended to provide their services on their terms when it suited them. Like the Appellant, they were engaged in businesses of their own. As it turned out, some of them were not successful in or exaggerated their commitment to these pursuits; here, I am thinking of workers Toms and Drever who seem, after the fact, to have decided it would be more beneficial to their needs to reinvent themselves as employees. That does not, however, detract from their intention at the time they made their agreement with the Appellant to provide services as independent contractors. Nor can it be said that their agreement was a "sham" or that the parties were "mistaken as to the true nature of their relationship" as contemplated by Noël, J.A. in *Wolf*. The Appellant was candid that in prior years he had run into problems when hiring workers as employees. Like many others who have faced similar difficulties, he discussed the matter with Canada Revenue Agency officials, struggling to understand the different requirements for employees and independent contractors so that he could govern himself accordingly. As is evident from the number of decisions and range of outcomes in the jurisprudence, this fact-based distinction is difficult enough even for the courts; all the more so for the small business owner whose day-to-day obligations restrict his contemplation of such questions.

[12] All in all, I accept the Appellant's evidence that at the time the workers accepted the work, their intention was and they agreed to provide their services as independent contractors. Each negotiated his own rate of pay – by the hour, at a flat fee or on a percentage of the total contract price - depending on the project contract and their individual experience. The Appellant paid them daily, weekly or on such other terms as were agreed upon. While acknowledging that he paid them in cash for their services, the Appellant's uncontradicted evidence was that he obtained receipts for such payments and issued T-5's for each worker. The workers were responsible for obtaining and maintaining their own workers' compensation insurance and for paying any tax on their earnings, a factor in their having commanded a higher rate of pay than the Appellant had paid to his employee workers in the past. All of these actions are consistent with the parties' intentions that the workers were working under a contract for services.

[13] Turning, then, to the *Sagaz* factors, the evidence shows that the workers were not under the control of the Appellant. When they showed up at the job site to work, the Appellant would brief them on the specifications of the general contractor. While there was a range of experience, aptitude and enthusiasm among the workers, all worked under their own steam; for example, the Appellant described worker McAllister as a self-starter who knew concrete and worked quickly and efficiently to maximize the time he would have available to work on other projects.

[14] The Appellant admitted he provided the tools, generally small items like trowels. He also leased large equipment, as required, such as bobcats for work on the site. This factor is not particularly significant in light of the findings under the other factors of the test.

[15] As for chance of profit and risk of loss, the workers were free to accept the work or not, to work for others and to complete the work quickly so as to be able to take on other projects. They could also engage replacement workers to do the work they had contracted to provide for the Appellant; worker McLean, for example, brought in two workers to do his work and was responsible for paying them. If the workers did not perform the work well, it was their responsibility to fix it – although the Appellant did say that on one occasion, he had had to absorb the loss caused by worker Toms' shoddy work because by the time it was discovered, he was nowhere to be found. While the margin was small on both counts, I am satisfied that the workers had a chance of profit and a risk of loss in these circumstances.

[16] Looking finally at integration, counsel for the Respondent contended that the Appellant's evidence that there was too much work for him to have handled on his own showed that the workers were fully integrated into his business because they were necessary for the proper operation of the Appellant's business. While acknowledging that the integration factor is by far the most difficult to apply, I am not persuaded by that argument. The same could be said of any sub-contractor on a large general project: while their services are absolutely required for the general contractor's completion of the work, that fact, in itself, does not convert them into employees.

[17] For the above reasons, I am satisfied that the Appellant met his onus of rebutting the Minister's assumptions. Having done so, it was for the Respondent to call evidence to buttress the Minister's contention that the workers were employees: perhaps the workers' testimony would have led to a different conclusion. But based on the evidence before me, I am satisfied that the workers were independent contractors and the Minister's assessments ought to be vacated.

Signed at Ottawa, Canada, this 18th day of May 2011.

"G. A. Sheridan"

Sheridan J.

CITATION:	2011TCC265
COURT FILE NOS.:	2010-3070(EI) 2010-3071(CPP)
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APPEARANCES:

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Name:

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