Docket: 2013-1344(CPP)
2013-1345(EI)

BETWEEN:

766743 ONTARIO LIMITED
SOBEN MGMT. LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on March 4, 2014, at Toronto, Ontario
Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

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| Counsel for the Appellant: | Jeffery Randoff/Symon Zucker |
| Counsel for the Respondent: | Rita Araujo |

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**JUDGMENT**

IN ACCORDANCE with the Reasons for Judgment attached, the Appeals are dismissed on the basis that the worker was engaged in pensionable and insurable employment under the provisions of subsections 2(1) and 5(1) of the *Canada Pension Plan* and the *Employment Insurance Act*, respectively.

Signed at Vancouver, British Columbia, this 2nd day of May 2014.

"R.S. Bocock"

Bocock J.

Citation: 2014 TCC 133
Date: 20140502
Docket: 2013-1344(CPP)
2013-1345(EI)

BETWEEN:

766743 ONTARIO LIMITED
SOBEN MGMT. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**REASONS FOR JUDGMENT**

Bocock J.

I. Introduction

[1] The Appellants appeal the determination of the Minister that a worker, Ms. Balastros, a dental hygienist (the "worker"), was engaged in insurable and pensionable employment with the Appellants at their Dental Clinic, Unite Here Wellness and Dental Centre (the "Dental Clinic").

[2] All of the dental hygienists at the Dental Clinic were described as self-employed independent contractors. In reassessing, the Minister characterized Ms. Balastros' services as those delivered under a contract of service rather than a contract for services or, in more common language, as an employee and not that of an independent contractor. This is the relevant distinction at law for the purpose of subsection 2(1) of the *Canada Pension Plan*, S.C. 1996, c. 23 (the "*CPP*") and subsection 5(1) of the *Employment Insurance Act*, R.S.C. 1985 c. C-8 (the "*EI Act*"). The Dental Clinic was operated solely to provide dental hygienic services and related dental care to employees of various hotels in Toronto organized within the Unite Here Union, Local #75. Various

dentists, dental hygienists, denturists and related ancillary dental health care providers worked at the Dental Clinic.

## II. The legal test and analysis required

[3] The legal principles, tests and authorities used over time to decipher this oft litigated question before this Court are most recently encapsulated in two Federal Court of Appeal decisions.

[4] *TBT Personnel Services Inc. v. MNR,* 2011 FCA 256 at paragraphs 8 and 9 established that *Wiebe Door Services Ltd. v. MNR,* [1986] 2 C.T.C. 200, as approved by the SCC in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, reinforces the central question: whether the worker performing the services does so in business on his/her own account? While the level of control of the recipient of the services is relevant, other factors are to be considered in relation to the worker: supervision and control, provision of equipment, financial risk, responsibility and management; and opportunity to profit in the performance, manipulation and the exploitation of the services provided, among other factors. The Federal Court of Appeal reconciles the common intention of the parties, held as a factor in *Wolf v. R,* [2002] F.C.J. No. 375, and *Royal Winnipeg Ballet v. MNR,* 2006 FCA 48, by stating that subjective intention of the parties is evidence to be considered, but the consideration of the factors in *Wiebe Door* remain the proving ground for the express intention of the parties.

[5] More recently and perhaps more fulsomely, the Federal Court of Appeal in *1392644 Ontario Limited v. MNR,* 2013 FCA 85 *sub nom. Connor Homes,* reviewed the developed "deceivingly simple" test laid down in *Sagaz* as that of operating "one's own business for one's own account" (paragraph 23). The fourfold test of *Wiebe Door* is to be considered as regards the worker in its totality of the whole operation (paragraph 28). This non-exhaustive list of factors adopted by *Sagaz* (paragraph 29) is the prism through which one measures the intention of parties relevant in *Wolf* and *Royal Winnipeg Ballet*. Once a common intention is established, does the analysis of the factors established within *Wiebe*, buttress or contradict such intention? (paragraph 33). While parties may establish their intention through contract (express or implicit), a *prima facie*, self serving narrative of what shall be does not make it

so; the analysis of the objective factors in *Wiebe* Door must reveal, replicate and highlight the subjective intention of the parties (paragraph 36 and 37).

[6] In summary, *TBT Personnel v Services Inc.* and *Connor Homes* establish a two step process for the determination of whether a worker is in fact a person in business on her own account. Firstly, was the subjective intention of the parties established or reflected in writing and/or by action? Secondly, does the objective reality, based upon an analysis of the *Wiebe* Door factors, sustain or deny the subjective intention of the parties.

III. Intention of the parties

[7] Witnesses testifying at the hearing regarding the intention of the parties included: the worker dental hygienist, Ms. Balastros; the Dental Clinic director, Dr. Iperifanou; and, another worker dental hygienist at the Dental Clinic, Kathy Peak.

[8] Ms. Balastros commenced work for the Dental Clinic for one day a week in 2006. This oral agreement paid the worker $38.00 per hour. Eventually, she began working 2.5 days a week and by 2011 she was earning the sum of $39.58 per hour, at which level her rate of pay has since remained. On January 31, 2011, the Appellants requested that all workers execute a document entitled employment letter which contained specific terms (the "Employment Letter").

[9] After executing the written agreement, Ms. Balalstros' salary did not increase; she, like all other workers at the Dental Clinic, was paid $500 for signing the agreement. At the same time, a written job description was provided encapsulating almost verbatim the applicable professional code of conduct and ethics established by the College of Dental Hygienists of Ontario ("CDHO").

[10] Within the January 2011 agreement were certain relevant provisions:

i) confirmation throughout of the status of "independent contractor" and not that of "employee";

ii) the right of the Appellants to change working hours in their sole discretion;

iii) the title of the document was that of "Employment Letter for Hygienists";

iv) execution of the agreement was mandatory for continued services:

v) the establishment of a written "job" description which may be unilaterally amended from time to time by the Appellants;

vi) an express statement of no "pay" when absent from work and, if more than one day's absence, a doctor's note was required;

vii) upon termination of the agreement, *Employment Standards Act* minimum termination pay provisions would apply;

viii) a conflict of interest provision governing "direct or indirect personal interests" of the worker and the requirement of the worker to report such "personal interests" promptly to the Dental Clinic; and,

ix) the non-compliance of providing a doctor's note ((vi) above) would constitute a breach and cause for termination, without notice or payment in lieu thereof.

[11] While the balance of the analysis concerning the express intention of the parties follows in the Analysis and Decision, Section V of these reasons, the parties testified directly that they intended the relationship to be that of independent contractor. The worker viewed the relationship this way because she testified the Employment Letter provided no other option. Even aside from the name of the document, the terms of the Employment Letter *per se* were not unequivocal or determinative of the worker's legal relationship with the Appellants.

IV. <u>Subjective intention measured against the verifiable objective reality</u>

[12] The following is an analysis of the factual findings in relation to the objective factors to be considered under the authorities cited in Section II above.

*a) Supervision and Control*

[13] Factually there was no dispute that the CDHO was the pre-eminent authority providing the overall regulatory oversight for the worker. The worker's livelihood depended upon compliance with the CDHO's code of conduct and professional standards. Occasional on-site interviews by the CDHO provided for oversight which, when occurring, gained the focus of the worker and Dental Clinic alike.

[14] While patients might request the worker's services, the patients remained those of the Dental Clinic which chose which hygienist a patient saw, where possible taking into account patient requests. The attending dentist would see each patient at some point during a dental hygienist session so that the dentist could conduct an oral examination. This likely contributed to the nexus each patient had to the dentist rather than to the worker.

[15] Hours of work were scheduled by the Dental Clinic upon advance notice from the worker. Extra work was to be discussed as were any changes to the schedule. The worker was allowed to work elsewhere outside of her scheduled hours. In the present case, the worker did so as an employee. Extended holidays were permitted provided sufficient notice was provided. The worker was encouraged to attend certain staff meetings held by the Dental Clinic for infection control, major policy announcements and changes.

[16] The worker paid for her own uniforms, course tuition fees for continuing education and licensing fees. Remedial work arising from errors was scheduled by the Dental Clinic, carried out by the worker, but at the usual rate of pay paid to the worker by the Dental Clinic. If CDHO policies were not complied with, the worker would likely be disciplined by CDHO and terminated by the Dental Clinic.

[17] In terms of the worker's daily routine, the worker would utilize the Dental Clinic's premises, computers, charts, day sheets, attending staff dentist and front office reception staff in order to deliver her entirely on-site provision of

services. The worker described her job as not "supervised," but "interdependent" with those other services provided at the Dental Clinic supporting her efforts.

*b) Ownership Tools and Equipment*

[18] Initially, a favorite scaler or two might be brought by the worker, but that practice was discontinued in order to ensure consistent sterilization techniques. Otherwise, all tools and equipment were supplied, maintained, and replaced by the Appellants. The worker paid for her own licensing fees, insurance, continuing education and uniforms. No rental or user fees were paid by the worker for the use of the equipment and tools. There was some discrepancy in testimony as to whether the worker's hourly rate of pay was reduced by an amount representing a cost for equipment overheads, but there was no clear or specific evidenced offered as to the details of any such calculation. The costs of repair for damage to any equipment were borne by the Appellants.

*c) Chance of Profit*

[19] The worker had no capital investment in the Dental Clinic, could not manipulate or exploit labour or production costs in order to enhance her profit. The worker could, as always, work more or less hours to increase her revenue. She had no business cards, promotional materials, nor did she have a trade name, corporation, registered business entity and/or business information number. There was no opportunity for the worker to directly hire or sub-contract replacement workers at will. Such replacements and payment for such replacements were undertaken directly by the Dental Clinic.

*d) Risk of Loss and Liability*

[20] The Appellants suggested professional liability related to negligence constituted a risk of loss for the worker. In reality this also was an imposition by the CDHO, which required mandatory malpractice insurance to ensure that personal impecuniosity did not place patients at risk of non-collection for damages arising from the worker's negligence. Any dental hygienist in Ontario, whether employee or independent contractor, would incur the same responsibility and require the same college provided insurance. In fact, if there were such a choice, and an independent contractor were free to decline such insurance, declining such mandatory insurance might be evidence of risk of loss, but this was not the case. Moreover, the Court suspects the Dental Clinic would strongly object to this freedom of choice and would likely impose a mandatory insurance requirement of its own as a contractual term.

## V. Analysis and Decision

[21] The analysis of the objective factors, when coupled with the superimposed third party directives dictated by the CDHO, dislodge the subjective intention of the parties which was already less than clear from the ambiguous documentation. The Appellants own lawyer drafted the Employment Letter, without input on the terms from the worker who saw no opportunity for negotiation. The Employment Letter incorporated by reference the CDHO code of conduct which was comprehensively instructive as to the duties and the methods for discharging same. Moreover, the document was laced with tailings of both a services contract and an employment agreement. It narrates repeatedly the intention to establish a relationship of independent contractors, each responsible for the payment of taxes and remittances. However it also contains terms indicative of employment: its title of "Employment Letter", a unilateral right of the Appellants to change hours of work, a precondition of execution of the document for the continuation of the relationship, the requirement of notice of a particular worker's absence from the worksite without a right to sub-contract and the requirement of doctor's certificates after more than one day's sickness.

[22] At best, this somewhat hybrid document expresses a muted versus an express intention of independent contractor which must be measured against the

objective factors. Nonetheless, the subjective intention, even if opaque, gravitates slightly more favourably towards that of independent contractor.

[23] The ensuing analysis of the *Wiebe Door* factors is neither a mathematical exercise nor a checking of boxes; an assessment of the factors is to be based upon the totality of the entire organized arrangement: *Sagaz* at paragraph 48.

[24] Supervision and control, when not interdicted by the overlay of the CDHO code of conduct and its oversight as a mandatory regulatory college, leaves the Court with a situation where each patient was also seen by a licenced dentist during each worker's cleaning. The Dental Clinic organized patients, bookings, replacements workers, staff meetings, holidays, absences, operatories and the Dental Clinic marshalled the conduct of and paid for remedial work.

[25] Tools and equipment, apart from some favored hand tools (themselves now forbidden), were uniformly and consistently provided, maintained, cleaned and replaced by the Dental Clinic. Whatever obfuscated charge-back fee there may have been for such tools and equipment appears to have been accounted for more tangibly in the Dental Clinic's business model than by any focused and impactful adjustment to the worker's rate of pay.

[26] Aside from increasing hours of work or working elsewhere there were no opportunities for the worker to enhance revenue or reduce costs by the manipulation and exploitation of capital, labour and materials. The worker attended the Dental Clinic, worked the hours scheduled and returned home. The substitution of sub-contracted labour by the worker was forbidden. There were no other collateral or related endeavors in combination with the service recipient (the Dental Clinic) demonstrating the worker's ownership, propriety of clients or provision of value added services. There were no other indicia of a separate business operation: trade name, corporation or sole proprietorship, rendered invoices, business identification numbers or other recognizable business structures, customs or dealings.

[27] Risk of loss did not exist. Mandatory professional liability insurance is not evidence of such a risk in this context. As stated earlier in these reasons, there was no capital, labour or materials at risk by the worker. Such a business risk

relates to the obligation of an independent contractor to provide contracted services, even where the negotiated revenue received for such services may not exceed by a sufficient margin (or at all) the labour, capital and/or material costs of production and delivery of the services. The costs were nominal and commensurate with those of an employee and no someone in business. Where the costs of such services provided are not comprised of such expenses of delivery and/or production, objectively finding the existence of a distinct business becomes more difficult. Save the costs of work uniforms, professional accreditation renewal and transportation to the same workplace each day, all of which were fixed costs borne by employee and independent contractor alike, there were no other costs impacting or affecting a potential profit or a correlative risk of loss for the worker.

[28] Based upon the entire arrangement as revealed by analysis of the objective factors, there is only one business present here: the Dental Clinic. The final three factors analyzed above clearly draw such a picture within that singular frame. The hierarchy of control and supervision of the "services" may be ranked in priority: the highest level was primarily through regulatory authority usurped by the CDHO; the next was secondarily exercised by the Dental Clinic in the protection of its business; and the lowest level of control was possessed by the worker in carrying out her scheduled, regular and daily job as a regulated dental hygienist in the part-time service of the Dental Clinic.

[29] In conclusion, while the agreement among the parties was somewhat equivocal as to subjective intention (at least to the extent of the Employment Letter), the analysis of the *Wiebe Door* factors was not; the factual objective reality reveals much greater indicia of employment than that of an independent contractor in business on her own account.

[30] For these reasons, the appeals are dismissed.

Signed at Vancouver, British Columbia, this 2nd day of May 2014.

"R.S. Bocock"

Bocock J.

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| CITATION: | 2014 TCC 133 |
| COURT FILE NO.: | 2013-1344(CPP)<br>2013-1345(EI) |
| STYLE OF CAUSE: | 766743 ONTARIO LIMITED SOBEN MGMT. LTD. AND<br>HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | March 4, 2014 |
| REASONS FOR JUDGMENT BY: | The Honourable Mr. Justice Randall S. Bocock |
| DATE OF JUDGMENT: | May 2, 2014 |

APPEARANCES:

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COUNSEL OF RECORD:

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