Dockets: 2013-2443(EI)
2013-2444(CPP)

BETWEEN:

PETER SZELI O/A GRAND OAK LAWN AND LANDSCAPE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on January 24 and March 31, 2014, at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Stephen Oakey

JUDGMENT

The appeal is dismissed, without costs, and the decision of the Minister is confirmed.

Signed at Ottawa, Canada, this 19th day of June 2014.

"Diane Campbell"

Campbell J.

Citation: 2014 TCC 203
Date: 20140619
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2013-2444(CPP)

BETWEEN:

PETER SZELI O/A GRAND OAK LAWN AND LANDSCAPE,

Appellant,

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REASONS FOR JUDGMENT

Campbell J.

Introduction

[1] The issues in these appeals are factually driven. However, those facts were, for the most part, disputed and the testimony of the witnesses was highly contradictory. Consequently, I must decide which story most likely reflected the reality of their relationship in accordance with a preponderance of probabilities.

[2] The Appellant has appealed a determination of the Minister of National Revenue (the "Minister") that the employment of Scott Heward (the "Worker") was both pensionable and insurable during the period from January 1, 2008 to December 31, 2009 (the "Period"). Both appeals, under the *Canada Pension Plan* (the "*Plan*") and the *Employment Insurance Act* (the "*EIA*"), were heard together on common evidence.

[3] The Appellant contended that the Worker was engaged pursuant to a contract for services as an independent contractor. The issue, therefore, is whether the Worker was engaged by the Appellant as an employee or as an independent contractor.

[4] Only a few of the pertinent facts were undisputed. The Appellant operated a sole proprietorship under the trade name, Grand Oak Lawn and Landscape. It provided property maintenance and snow removal services to both residential and commercial customers. The Worker was engaged at some time in 2005 to perform property maintenance duties, such as cutting grass and pruning hedges and trees during the summer months and snow removal during the winter months (Transcript, Volume 1, Examination-in-Chief of Scott Heward, at page 82). There was no written agreement governing the terms of their relationship. In October 2005, the Worker had registered a business name, Scott Heward Landscaping. Around this time he also leased a truck. Other than these few facts, the Appellant and the Worker had different recollections of their work relationship.

The Appellant's Position

[5] In 2004/2005, the Appellant purchased a block of work from another landscaper. This block was equal in size to a group of approximately 80 to 100 customers that he was already servicing with the assistance of one other individual. Consequently, he engaged the Worker in 2005. He contended that he brought the Worker onboard as an independent contractor to look after this second block of work. According to the Appellant, both individuals intended to create an independent contractor relationship. He testified that he understood the Worker was trying to start his own business and he felt this opportunity would allow him to establish his own company.

[6] When the Appellant purchased this second block of work, he purchased additional tools and equipment. This equipment was stored at a self-storage facility in Brampton. The Appellant had his own vehicle and a tandem trailer. While the Worker was eventually required to have his own vehicle, the Appellant provided him with the necessary equipment to perform his duties as well as the use of the tandem trailer.

[7] The Worker's rate of pay fluctuated based on the number of customers he serviced. Both the Appellant and the Worker negotiated the clients to be serviced by the Worker. This work was completed according to the Worker's schedule, except when a customer requested that work be done on a particular day. The Appellant did not supervise the Worker nor did he require the Worker to track his hours. The Worker did not report to the Appellant and communication was sporadic. According to the Appellant, he contacted the Worker when there was a customer complaint. The Worker could hire his own helpers and was also free to

work for others under his own landscaping company. The Appellant stated that he believed that the Worker had two of his own customers during the Period.

The Respondent's Position

[8] The Respondent's general proposition was that the Worker's services were performed like any other general labourer who was under the direction and control of the Appellant. The fact that the Worker was denied entitlements, such as statutory holidays or sick days, did not make him an independent contractor. The Worker contended that, contrary to the Appellant's evidence, there was no discussion between them respecting the characterization of their relationship. The Worker assumed he was being hired as an employee.

[9] The Respondent agreed that the evidence of the Appellant and the Worker conflicted but submitted that the testimony of the Worker should be preferred because some of the Appellant's evidence was unclear. The Appellant controlled the Worker's day-to-day operations, determining his deadlines and priorities. He set regular work hours, commencing at 7 a.m. and ending when the work was completed. The work was performed at the property of the Appellant's clients. The Worker did not have his own clients. The Worker was engaged on a full-time basis of 40 hours per week for an indefinite period of time. He was not required to submit invoices, record his hours or complete time sheets.

[10] The Appellant was responsible for resolving customer complaints and for any costs in rectifying them. He determined the Worker's salary and paid him by cheque.

[11] Prior to the Worker purchasing his own vehicle, he travelled with the Appellant in the Appellant's truck and worked alongside him. On some of the Fridays, all of the workers would work together on one property. When the Worker leased his own vehicle, he used it to haul the Appellant's tandem trailer and tools. The Worker's salary fluctuated seasonally and took into account the use of his truck and gas expenses.

[12] All of these facts support the Minister's determination that the Appellant was an employee during the Period.

Analysis

[13] The jurisprudence governing the issue in these appeals is well established. Two observations stand out with respect to the caselaw. First, in determining whether an individual is an employee or an independent contractor, there is no one conclusive test that can be applied uniformly to the individual facts of every appeal. Second, the central question in such appeals that must be answered is whether the worker, who is performing the services, is truly a person in business on his own account (*1392644 Ontario Inc. o/a Connor Homes v Minister of National Revenue*, 2013 FCA 85, ["*Connor Homes*"]).

[14] This central question was established in *Market Investigations Ltd. v Minister of Social Security*, [1968] 3 All ER 732 (QBD) and later adopted by the Federal Court of Appeal in the widely-cited case of *Wiebe Door Services Ltd. v Minister of National Revenue* (1986), 87 DTC 5025 (FCA) ["*Wiebe Door*"] and then by the Supreme Court of Canada in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] SCJ No. 61. The factors to be canvassed in answering this central question, as set out in *Wiebe Door*, are commonly referred to as the 'four-in-one test'. They are: control over the work, ownership of tools and equipment, the chance of profit and the risk of loss. However, the relative importance accorded to each factor will be dependent upon the facts and circumstances presented in each case. Intention of the parties must also be ascertained and considered in determining the issue (*Royal Winnipeg Ballet v Minister of National Revenue*, 2006 FCA 87, 2006 DTC 6323).

[15] To summarize, in answering the central question in this type of issue, the Court must follow a two-step analysis. First, the intention of the parties must be determined in order to ascertain what type of relationship the parties intended to create. Second, an analysis of the facts of the case must be undertaken to determine if the objective reality reflects that intention. It is in the second step that the *Wiebe Door* factors must be considered. At paragraph 42, Justice Mainville, in *Connor Homes*, summarized the test as follows:

> … The first step of the analysis should always be to determine at the outset the intent of the parties and then, using the prism of that intent, determining in a second step whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of independent contractor. …

[16] The Appellant and the Worker expressed completely different views of what their intention was concerning the work relationship. The Appellant testified that the Worker supplied his services as an independent contractor. The Appellant

testified that he explained the difference between an employee and an independent contractor at the time of hiring the Worker and that it was the Worker who chose to be an independent contractor. While the Worker admitted that he intended to start his own landscaping business, he testified that this intention never extended to supplying his services to the Appellant as an independent contractor. There was no meeting of minds with regard to the terms of their engagement and there was no written agreement. In such circumstances, the intent of the parties must be determined by their actual conduct and behaviour. The Worker was never required to produce invoices for his work. He never filed tax returns for the Period. The Appellant never issued a T4 to the Worker. The Worker did not collect or remit GST. However, he had registered a GST number. He had also registered his business name but it was in 2005, before he started to work for the Appellant. In addition, he testified that while he intended to start his own business at some point, he never intended to be a service provider to the Appellant. A letter dated August 19, 2011, reportedly signed by the Worker and introduced into evidence by the Appellant, outlined the amounts he received from the Appellant. The Worker denied ever meeting with the Appellant at the Worker's home respecting this letter, although he admitted it contained his signature. Because of the doubtful veracity of this document, it is of little value in determining the parties' intention respecting their relationship.

[17] Because the evidence of the Appellant and the Worker was dramatically opposed in so many areas, no conclusions can be drawn respecting the intent of the parties except that the Worker claimed he was an employee while the Appellant says the Worker was an independent contractor. This leads me to a consideration of the *Wiebe Door* factors. In some instances, these factors are considered in order to ascertain whether the facts and circumstances are consistent with and reflect the parties' stated intention. However, in these appeals, since I can draw no conclusions in respect to the intent of the parties, those factors must be canvassed in order to ascertain the true legal nature of the Worker's engagement. Those factors are not exhaustive and the relative weight to be given to each will depend on the particular facts of the case.

[18] Because the testimony of the Appellant and the Worker was largely contradictory, I want to preface my analysis of each of the *Wiebe Door* factors by referencing several pertinent comments, found in the caselaw, concerning credibility findings by a court. In *Springer v Aird & Berlis LLP*, 96 OR (3d) 325, at paragraphs 14 to 17, the Court made the following statements concerning credibility assessments:

14. In making credibility and reliability assessments, I find helpful the statement of O'Halloran J.A. in *R. v. Pressley* (1948), 94 C.C.C. 29 (B.C.C.A.):

> The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

15. I also find it helpful, particularly in this case, the statement of Farley J. in *Bank of American Canada v. Mutual Trust Co.* (1998), 18 R.P.R. (3d) 213 at para. 23:

> Frequently in cases judges will be called upon to make findings concerning credibility of witnesses. This usually is a most difficult task absent the most blatant of lying which is tripped up by confession, by self-contradictory evidence, by directly opposite material developed at the relevant time period or by evidence of an extremely reliable nature from third parties. One is always cognizant that people's perceptions of the same event can sincerely differ, that memories fade with time, that witnesses may be innocently confused over minor (and even major) matters as well as the aspect of rationalization, a very human and understandable imperfection. A point that a witness may not be sure of initially becomes eventually a point that the witness is certain about because it fits the theory of his side. Rationalization will also affect some person's views so that a certainty that a fact was "A" evolves into a confirmation that that fact was "not A".

16. In *Olympic Wholesale Co. v. 1084715 Ontario Ltd.* [1997] O.J. No. 5482 at para. 3, Farley J. also made the following statement which I find helpful:

> I would like to review the aspect of assessing credibility and the weighing of evidence, and I do this in a very general way. ... The evidence and the way it is given should be taken in context and in a balanced way. No one should expect perfection in testimony and it is often said that evidence which is too consistent may be a sign of it being artificially constructed. I also recognize that there can be an inadvertent rationalization of memory to fit what is afterwards said that must have happened as opposed to actually remembering what did happen. This usually increases over time…

17. Farley J. used the word "rationalization". I take his comments to refer to what is often said to be "reconstruction" of evidence. Reconstruction can be either inadvertent or advertent. In either case, when it occurs, it is something that the trier of fact must consider in weighing evidence.

[19] In summary, the contradictory evidence of each witness should be weighed, as stated by O'Halloran J.A. in *Pressley*, on the basis of its "harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances."

Control

[20] The evidence respecting the factor of control supports my conclusion that the parties were in an employee/employer relationship. The Appellant testified that he did not supervise or even communicate with the Worker on a regular basis. The Appellant testified that he never reprimanded, penalized or told the Worker how to perform the work. The Worker's evidence in this regard was contradictory. However, the evidence supports that it was the Appellant that delegated the work and scheduled the Worker's routes. The Appellant admitted that he "… put the routes together based on minimum driving" (Transcript, Volume 1, page 10) and provided the Worker with a list of the clients to be serviced. He also admitted that, in fact, the Worker "… serviced them on the days they were assigned" (Transcript, Volume 1, page 14). The evidence also suggests that the Worker was not at liberty to complete the assigned work as he pleased. The Worker was directed on the customer's preferences respecting how the work was to be completed. The Worker did state that he might be at liberty to service one house before another in the same block "… but for the most part, we had to follow the route" (Transcript, Volume 1, page 97). It is interesting that the Worker referred to himself as one of the other employee labourers by the use of the pronoun "we". In addition, he followed the Appellant's directions respecting those customers that wanted their services during a particular time of the day. He had to check boxes on the Appellant's list provided to him when the work was completed on a customer's property. If the work was completed prior to the end of the Worker's required eight hour day, then the Appellant would direct him to work at another property where another group of workers was located. On days when it rained, the Worker was required to sit in a coffee shop with other employees, either awaiting further instructions from the Appellant or completing other jobs for the Appellant, such as tending to the equipment.

[21] The Appellant testified that he did not provide the Worker with a schedule to follow and, in cross-examination, stated: "It wasn't a schedule, it was properties that needed to be done on specific days" (Transcript, Volume 1, page 62). However, the Appellant was 'splitting hairs'. The conduct of the parties clearly supports that, contrary to the Appellant's evidence, the Worker had a schedule and company preferences to follow when completing the work.

[22] When the Worker was asked if he was free to not show up, he replied that "…I always had to show up, and if I didn't, I had to call in and let Peter know" (Transcript, Volume 1, page 98). If the Worker missed work, he was penalized by losing a percentage of his paycheque for the regular eight hour day he was

supposed to work. The Worker's amount of pay varied to some extent and although the evidence was not particularly clear, it does support that this variance was meant to compensate the Worker for gas expenses relating to the use of his own vehicle and for seasonal business fluctuations.

[23] There were several facts that supported the Worker's testimony that he was engaged as an employee. First, the Appellant testified that the Worker, at the direction of the Appellant, was required to rectify problems, such as customer complaints.

[24] Second, the Worker testified that he was asked to wear a uniform with the Appellant's logo. The Appellant's evidence was that his workers were not required to wear a uniform and they could decide personally whether to wear that promotional apparel. The Worker's testimony again is more in harmony, on a preponderance of probabilities, with the totality of the facts before me. The Appellant's testimony is undermined by virtue of his own website. An excerpt from that website states:

> … Our uniformed team will take pride in maintaining your property with our regular lawn cut and trim service. …
>
> (Exhibit R-1)

According to the Appellant, his website was set up to pursue his recent goal of eventually franchising his business. However, he acknowledged that the website has been active since 2008, which is within the Period before me.

[25] Third, the Appellant's workers were provided with his business cards to pass out to customers. When asked, on cross-examination, whether he directed the Worker to give his business card to potential new customers he stated:

> Obviously I'm trying to grow my company and if he was to give out my cards that would be great, but I know that's not what happened. They kept the clients for themselves, which was acceptable.
>
> (Transcript, Volume 1, page 56).

This response just goes against the grain of common sense.

[26] Finally, the Appellant stated that he purchased an additional block of work and engaged the Worker as an independent contractor to service those new

customers. I was never given any explanation to the obvious question: Why would the Appellant hire an individual that he believed was attempting to establish his own competing landscaping business and risk losing new customers with whom he had not yet built a rapport? It would seem preferable to employ an individual to oversee these new customers, but not one who was supposedly actively pursuing new clientele in competition with the Appellant's business. There was no evidence, to support the Appellant's testimony that the Worker was actively pursuing his business, other than the registration of the Worker's business name, which was never used, and the leasing of a vehicle. The Worker's evidence was that, after he registered his business name and picked up his truck, "… that is as far as it ever went" (Transcript, Volume 1, page 89). He definitely had an intention to pursue his own business but there was no evidence that it ever materialized. He never advertised his alleged business, never actively pursued customers and never purchased the necessary tools because he could not afford them. Although he leased a truck, he did try to return it when he decided not to pursue the business, but the lease prevented him from doing so. After he left the Appellant's employment, he worked for another landscaping company. The Appellant claimed that the Worker was actively pursuing customers and serviced two clients during the Period, who did not belong to the Appellant. However, taken with the totality of the evidence, I believe the Worker's testimony is closer to the reality of what actually occurred. He stated that he never actively solicited customers and that the only additional work he did was for a neighbour of one of the Appellant's customers, a widowed lady who gave him lunch in exchange for some work on that day.

[27] In summary, control has been defined as "the right to direct the manner of doing the work, as opposed to whether that right was exercised by the Appellant" (*Gagnon v Minister of National Revenue*, 2007 FCA 33, [2007] FCJ No. 156, at paragraph 7, emphasis added). So it is whether the Appellant had the right to control and not whether he actually exercised that control that is relevant. I do not doubt that, as the Appellant claimed, he never reprimanded or penalized the Worker, but I have no doubt that he had the ability to do so. The Appellant controlled the work apparel, the scheduling, the routes, the manner of payment and the rectification of customer complaints. Taken together, the evidence supports my conclusion that the control factor is indicative of an employer/employee relationship between these individuals.

Ownership of Tools

[28] The Worker's only asset was his vehicle, a leased truck. The Worker maintained and insured this vehicle. However, the Appellant compensated the Worker for the use of his vehicle, which he used to pick up the Appellant's tools from the Appellant's storage building in order to complete the work. The Appellant testified that the Worker had none of the tools and equipment essential to completing the landscaping work. The Appellant supplied all of those tools, including lawn mowers, leaf blowers, trimmers and pruners. He also purchased additional tools for the new block of work that he had acquired. The tools were carried on a tandem trailer to the work sites, sometimes using the Worker's vehicle. The Appellant also testified that he maintained the trailer and tools. The Worker testified that the Appellant trained him on the proper use of those tools. Again, this factor substantiates that the Worker was an employee.

Chance of Profit and Risk of Loss

[29] The Worker had little, if any, opportunity to earn a profit or incur a loss. He worked full-time, eight-hour days. If he finished the route earlier than scheduled or on days that rained, the Appellant directed him to complete additional work. The Worker testified, and a summary of the cheques paid to him confirms, that the Appellant regularly paid the Worker in bi-weekly intervals, consistent with a salary. The payment fluctuations were related to compensation for the Appellant's truck or for seasonal work fluctuations, when he would be paid less during the winter months while he performed snow removal. Based on these facts, the Worker could not make more money by completing more work nor would it make any difference to him economically if he finished his work before his eight-hour day ended.

[30] The only potential for loss was if he missed a day from work as he would not be paid. His only liability was his vehicle. However, the Appellant reimbursed him for fuel and mileage when the truck was used in the course of the Appellant's business. Although the Appellant stated that the Worker was moonlighting by taking on independent clients and completing the work utilizing the Appellant's tools, it is more probable that the Worker completed a few tasks for a couple of individuals on a *pro bono* basis. The Worker had ambitions to start his own business and took a few steps in that direction but, otherwise, his plans did not materialize. The evidence supports my conclusion that the Worker had no opportunity to profit and had no risk of loss, both factors supporting an employer/employee relationship.

Conclusion

[31] Applying the two-step test, set out in *Connor Homes*, to the facts before me, supports a finding that the Worker was an employee. The ultimate question to be asked, after reviewing the totality of the evidence, is: "Whose business is it?" Or, as Respondent Counsel succinctly framed the question: "… [W]ho had the right to call the shots?" (Transcript, Volume 2, page 56). The Worker's response concisely sums up the nature of their relationship as follows:

> I pretty much just showed up and did the work. He talked to all customers. He told me what time we were starting and -- yeah, he made all the calls, all the shots, called the shots.
>
> When we got to each property he would say what I was to do at each one and how we would split up the work.
>
> (Transcript, Volume 1, page 86)

[32] Despite able argument by Appellant Counsel, I have no hesitation in concluding that this was the Appellant's business. All of the *Wiebe Door* factors support the conclusion that the Worker was not in business on his own account.

[33] For these reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 19th day of June 2014.

"Diane Campbell"

Campbell J.

CITATION:	2014 TCC 203
COURT FILE NOS.:	2013-2443(EI); 2013-2444(CPP)
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REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
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APPEARANCES:

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