Docket: 2010-712(CPP)

BETWEEN:

INTEGRATED AUTOMOTIVE GROUP,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Integrated Automotive Group 2010-713(EI)
on July 15, 2011 and September 21, 2011, at Toronto, Ontario

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Timothy Fitzsimmons Christian Orton (student)
Counsel for the Respondent:	Alisa Apostle Jose Rodrigues

JUDGMENT

The appeal from the decision made under the Canada Pension Plan for the period January 5, 2006 to September 6, 2007 is allowed on the basis that the Worker was not in pensionable employment with the Appellant during the Period.

Signed at Ottawa, Canada, this 5th day of October 2011.

"F.J. Pizzitelli"

Pizzitelli J.

Docket: 2010-713(EI)

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INTEGRATED AUTOMOTIVE GROUP,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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Appeal heard on common evidence with the appeal of *Integrated Automotive Group* 2010-712(CPP) on July 15, 2011 and September 21, 2011, at Toronto, Ontario

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Timothy Fitzsimmons Christian Orton (student)
Counsel for the Respondent:	Alisa Apostle Jose Rodrigues

JUDGMENT

The appeal from the decision made under the *Employment Insurance Act* for the period January 5, 2006 to September 6, 2007 is allowed on the basis that the Worker was not in insurable employment with the Appellant during the Period.

Signed at Ottawa, Canada, this 5th day of October 2011.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2011TCC468
Date: 20111005
Docket: 2010-712(CPP)
2010-713(EI)

BETWEEN:

INTEGRATED AUTOMOTIVE GROUP,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] These matters involve appeals by the Appellant from the decisions of the Minister each dated December 30, 2009 that Margaret Alison Smith (the "Worker") was employed by the Appellant in insurable employment and pensionable employment throughout the period from January 5, 2006 to December 31, 2008. The Appellant's appeals only pertain to the period from January 5, 2006 to September 6, 2007, (the "Period").

[2] The only issues to be decided in these matters is whether the Worker was during the Period employed in insurable employment within the meaning of Subsection 5(1)(*a*) of the *Employment Insurance Act* and whether she was employed in pensionable employment within the meaning of Subsection 6(1)(*a*) of the *Canada Pension Plan*. In short, whether the Worker was in a contract of services, and hence an employee of the Appellant, or whether in a contract for services and hence an independent contractor during the Period.

[3] The parties submitted a Statement of Agreed Facts which, together with the evidence not in dispute, generally confirms that the Appellant, an Ontario corporation, has it corporate address in Mississauga, Ontario, and is a leading

provider of marketing services to clients in the automotive industry, mainly car manufacturers, advertising firms and automotive dealerships.

[4] The Appellant's marketing services include: "ride and drives" which involve setting up for the public or other targeted markets the ability to test cars and compare them to others often at different locations across the country; "auto show support" involving assisting customers to transport vehicles to auto shows, detailing or cleaning the vehicles, and representing the manufacturer with personnel at such shows including any necessary organizational and registration requirements; "vehicle launches" which generally involves staging an event for the media to introduce new products of clients; "automotive transportation" which involves arranging transportation of client products to different events and between events; "advertising photography shoots", usually for advertising companies that require finding the appropriate vehicle, transporting it to the required location, modifying the vehicle as may be necessary for their purposes and pick up and refitting of same; "displays" which generally involve arranging and managing the displays of clients vehicles at public and private venues such as hotels, the Air Canada Centre, The Centre for Performing Arts and other venues; "vehicle management" which generally involves arranging for prototype vehicles and others vehicles to be put on display at an event, tracking the vehicle between locations and generally attending to the specific vehicle itself and "automotive detailing" which generally involves cleaning and keeping the vehicle in pristine looking shape inside and out for its events.

[5] The Appellant's executives and management team included: Jason Guttman, the founder and Chief Executive Officer who travels extensively and provides the leadership and vision for the Appellant; Shane Bennett, the managing director who also travels but spends most of his time in the office being in charge of day to day operations and strategic growth; and Drew Black, the director of Client Services during the Period whose main responsibility was to ensure the Appellant's services were delivered to its customers and accordingly was the member of management who had the closest contact and interaction with the Appellant's employees and independent contractors during the Period, including with the Worker in this matter. Mr. Black is no longer in that role for the Appellant and presently works from home as an independent contractor for the Appellant.

[6] The Appellant is involved in several hundred events a year across Canada, notwithstanding that it is based in Mississauga, Ontario, and to deliver its services to its customers employs both employees and utilizes the services of independent contractors. The Appellant's business is somewhat seasonal in that its busiest times

are in January to April of each year being the time its main auto shows occur and during which time it ramps up its use of independent contractors for short or longer periods depending on the level of business. The evidence of the Appellant was that its business plan was, as the Appellant's non seasonal business grew, it would hire full time employees to meet that demand. It was based on this rationalization that the Worker was asked to join the Appellant as an employee in her third contract.

[7] The Worker performed work for the Appellant from January 5, 2006 to August 14, 2008 under three different contracts, and under the third contract dated September 7, 2007 as an acknowledged employee. The Appellant performed work under the first contract dated December 15, 2005 ("First Contract") which applied to the period January 5, 2006 to July 31, 2006 and under the second contract dated November 2, 2006 ("Second Contract") which applied to the period from August 1, 2006 to July 31, 2007 and which the Appellant testified was effectively extended until August 5, 2007, being the date before the third contract, being an Employment Contract, was signed. Under the First and Second Contracts, whether described as an "associate" or "contractor" respectively, the Worker was described as providing freelance services which included the duties and responsibilities of a project manager generally. Although the description of duties appears to have slightly increased from the First to the Second Contract it is not disputed that the Duties of the Worker pursuant to the Employment Contract were the same as she had under the Second Contract, which included the somewhat extended description of her project management duties. However, it should be noted that the actual duties of the Worker during the entire Period were very similar if not the same and were not really in dispute, consisting generally of meeting with management and being assigned a project within the scope of services provided by the Appellant described above, creating a plan for the delivery of such services including identifying what specific services were required, preparing a budget estimate and delivery of such plan, which was then reviewed with a manager and discussed, usually by management with the client for budget approvals. Once accepted by the client, the project manager was charged with carrying out the contracted services or project and preparing bills on behalf of the Appellant to send to clients. In effect, the project manager was involved with the project assigned to him or her from beginning to end and while some project managers were employees, others were independent contractors hired by the Appellant as explained above, and had the same if not similar duties above described.

[8] The Worker has several years experience in event planning and was initially retained by the Appellant because of such experience, which was not limited solely

to the automotive sector. As stated above, she became a full time employee pursuant to the Third Contract which is not in dispute.

[9] The remuneration of the Worker during the Period covered by the First Contract was $869.39 per week with no stipulation for any minimum hours of work to be given although the Worker testified she usually worked about 40 hours or more a week which was not disputed. The remuneration during the second contract was $903.85 per week with a stipulation that the Worker had to provide a minimum of 40 hours of service and the Worker would adjust its invoicing if less than 40 hours worked. The contracts were silent as to any hours worked in excess of 40 hours and the evidence is that no extra remuneration was ever paid although the Worker testified it had raised that issue with the Appellant on one occasion. It should be noted that the Worker testified that these weekly rates were competitive rates for such services which by simple mathematics amount to an annual total of about $45,000. In both the first and second contract the Worker submitted an invoice as per the agreement and was paid semi-monthly without any deductions for payroll taxes or other normal payroll remittances. Under the contract of employment however, she was paid by direct deposit to her bank account on a bi-weekly basis based on an annual salary of $51,000 and entitled to paid vacation and other benefits offered by the Company. There is no dispute the Appellant did not issue T4 slips to the Worker for the Period but did for the time the Worker was employed under the Third Contract. The evidence also not in dispute is that the Worker did not file its tax returns for the 2006 and 2007 years on the basis that the remuneration it received under the first two contracts was employment remuneration from the Appellant and in fact the Worker claimed in both periods expenses for motor vehicle use and home office expenses which it did not claim for the period covered under the third being the Employment Contract.

[10] The Appellant provided the Worker with a McIntosh laptop computer used by all employees and independent contractors for the Appellant due to the special software developed for and owned by the Appellant which ran on that system but the Worker executed a Property Agreement with the Appellant acknowledging it was the property of the Appellant and that the Worker would return it on termination of its contract and would be responsible for it to the extent of its stated value. The Worker was required to and did supply its own home office and computer and vehicle, although the Appellant testified she did not keep a business phone line but rather used the cell phone which also had two way radio capabilities with the Appellant, as provided to her by the Appellant.

[11] The Worker was terminated pursuant to Notice of Termination dated August 14, 2008.

Position of the Parties

[12] The Appellant takes the position that for the Period, being the time represented pursuant to the First and Second Contract, the Worker was an independent contractor because the parties intended that relationship and the criteria used in determining the issue to be discussed later favour a finding of such relationship namely that the Appellant did not control how the Appellant performed her services, did not provide all the tools to do so and the Appellant had the chance of profit and risk of loss; in effect because it states the reality of the relationship confirms the stated intention of the parties to be one of an independent contractor as found in the First and Second Contract. The Respondent effectively disagrees and takes the opposite view, in essence arguing that the First and Second Contract did not reflect the reality of the relationship or acts of the parties, which due to the determinative criteria establish she was an employee.

The Law

[13] In considering the factors to consider in determining whether a worker is an employee or independent contractor, Justice Major of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*. 2001 SCC 59, cited with approval in paragraph 47 the approach of MacGuigan J. A. of the Federal Court of Appeal in *Wiebe Door Services Ltd. v. MNR* 1986 3 F.C. 553, that:

> "…there is no universal test to determine whether a person is an employee or an independent contractor [but that] …the central question is whether the person who has been engaged to perform 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.

[14] Justice Major however confirmed in paragraph 48 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."

[15] There is no dispute between the parties that the approach taken in *Wiebe Door Services supra*, often described as the four-in-one test of control, ownership of tools, chance of profit and risk of loss, has been applied by the Federal Court of Appeal and this Court continually since the *Sagaz* decision of the Supreme Court of Canada including in *City Water International Inc. v. Canada (Minister of National Revenue-MNR)* 2006 FCA 350 and *Royal Winnipeg Ballet v Canada (Minister of National Revenue-MNR)* 2006 FCA 87, relied on by both parties.

[16] It is accepted law that the intention of the parties is another factor to be considered although there appears to be a dispute between the parties as to the relevant weight to be given to it in the context of what role it has on the analyses of the four in one test. The Appellant's has suggested that if the intention of the parties is clear from the Contracts that it is one of a contract for services, which is its position, then the four in one test factors should be analyzed on the basis of whether the factors are consistent with the parties' understanding and if so such understanding should prevail. Although counsel for the Appellant acknowledged in argument that if the analyses of the factors clearly suggest the relationship is one of employee then the stated intention of the parties can be ignored, he is, it seems to me, taking the position that there should be some kind of presumption in favour of respecting the clear intention of the parties unless the four-in-one test clearly suggests otherwise. The Respondent does not agree with this approach and takes the position that the analyses of the factors from the four-in-one test in *Wiebe Door Services* above must be done first and only if the analyses does not yield a result should the intention of the parties be considered and only if the intent is shared by both parties. Counsel for the Respondent states that any such mutual intention can only be given weight if it reflects the reality of the legal relationship between the parties. The difference in approach between the parties in my view really goes to the weight the court should give to the stated intention of the parties, with the Appellant suggesting that such weight should be such as to invoke the existence of a presumption with respect to the intention of the parties.

[17] With respect to the Appellant, I do not agree with its suggested approach for a few reasons. Firstly, the issue was directly considered by the Federal Court of Appeal in *National Capital Outaouais Ski Team v. Canada (Minister of National Revenue-MNR)* 2008 FCA 132. In paragraph 4 thereof Letourneau stated:

> The appellant submits that the judge erred in law in looking first to the reality of the relationship between the parties based on the facts rather than looking first to see whether the intent of the parties is consistent with that reality. I believe this complaint is not founded.

[18] And at paragraphs 7-9:

> At paragraph 17 of its memorandum of fact and law and the hearing before us, the appellant contended that the judge should have started her analysis of the parties' relationship with the presumption that Mr. Belanger was a contractor.
>
> It is misleading and confusing to invoke the existence of a presumption with respect to the intention of the parties to the contract because it calls for a rebuttal of that presumption by the minister. Indeed, this approach runs contrary to the way the law and the system operate in matters of insurability of employment.
>
> As a matter of fact, the minister's assessment of the overall legal relationship of the parties to a contract is based on assumptions of fact that the minister makes. The assumed facts are presumed to be true unless they are rebutted…….The burden of rebutting the assumptions and the presumption of truth or correctness which attaches to the assumed facts is on the opposing party….

[19] Accordingly the approach suggested by the Appellant has been considered by the appellate court and found unacceptable on the basis it would change the burden of proof from the Appellant to the Minister.

[20] Secondly, I am of the opinion the appellate courts have well established the role of the intent factor and that the weight to be given it is in accordance with the position of the Respondent. In *Royal Winnipeg Ballet v. MNR* 2006 FCA 87, Sharlow J.A. stated in paragraphs 60 and 61:

> 60.….The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given proper weight.
>
> 61. I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment of *Wolf*, if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded".

[21] The inescapable conclusions reached by Sharlow J.A. above is in my view totally consistent with the finding of Major J.in *Sagaz supra*, in par 48 wherein he stated that the *Wiebe Door* factors were not intended to be exhaustive, hence acknowledging there was room for other relevant factors, such as intention for example, to be considered with the weight of each factor dependent on the facts and circumstances of each case. There is however no suggestion in either *Royal*

Winnipeg Ballet nor *Sagaz* that the intention of the parties as a factor should be dominant or have attached to it a presumption of applicability unless clearly overweighted by other factors. Sharlow J.A clearly took the position in paragraph 62 above that the parties' declarations as to the legal character of their contract is not determinative and will be disregarded if the facts do not reflect that stated relationship which suggests there is no such presumption. This same sentiment was expressed in the recent decision of the Federal Court of Appeal in *TBT Personal Services Inc. v. Her Majesty The Queen* 2011 FCA 256, and brought to the intention of the Court by the parties after the trial but before release of my judgement, where Sharlow J.A., in a situation where there were written contracts containing a clause identifying the relationship as being one of a contract for services stated at par 35:

> Such intention clauses are relevant but not conclusive. The *Wiebe Door* factors must also be considered to determine whether the contractual intention suggested by the intention clauses is consistent with the remaining contractual terms and the manner in which the contractual relationship operated in fact.

[22] In *City Water, supra*, the Federal Court of Appeal considered the four-in-one test factors and only when they did not yield an obvious result, considered the weight to be given to the mutual intention of the parties. In paragraph 27 and 28 of *City Water*, Malone J.A. stated:

> 27. "In balancing the above factors, the result of the inquiry is not obvious. Therefore, it is necessary to determine what weight should be given to the intention of City Water and the Service Workers at the time of their initial engagement.
>
> 28, If it can be established that the terms of the contract, considered in the appropriate factual context, reflect the legal relationship that the parties intended, then their stated intention cannot be disregarded."

[23] Likewise, in the earlier case of *Wolf v. Canada (C.A.)*, [2002] 4 F.C.396, relied upon in *City Water* above in par 29 thereof, Noel J. A. stated at paragraphs 122 to 124:

> "…But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.
>
> …My assessment of the total relationship of the parties yields no clear result which is why I believe regard must be had to how the parties viewed their relationship."

[24] What is clear from the Federal Court of Appeal decisions in *Royal Winnipeg Ballet, TBT Personal Services, City Water* and *Wolf* is that while the declaration of the parties intentions is a factor to consider, such factor will only be given weight if the analyses of the four–in–one test factors of control, ownership of tools, chance of profit and risk of loss do not yield a result first. This is more in keeping with a secondary factor to consider after consideration of the primary factors and far from any presumption in favour of intention.

[25] This Court has followed that line of reasoning and refused to give any weight to the intention of the parties when *Wiebe Door* factors above were sufficiently conclusive in the cases of *A&T Tire& Wheel Ltd. v. Canada (Minister of National Revenue (MNR),* 2009 TCC 640 and *Choi v. Canada (Minister of National Revenue-MNR),* 2010 TCC 461. I note that the case of *Vida Wellness Corporation DBA Vida Wellness Spa v. Canada (Minister of National Revenue-MNR)* 2006 TCC 534 pleaded by the Appellant in support of its position was decided before the Federal Court of Appeal decision in *National Capital Outaouais Ski Team* and accordingly has been overruled on this issue.

[26] Accordingly, I am in agreement with the Respondent that the four–in-one test facts must be examined first to determine the legal relationship between the parties if possible, regardless of any stated intent and will now examine those relevant factors with a view to answering the central question as to whether the Worker here, as the person who had been engaged to perform services, was performing them in business on her own account.

Control

[27] The Respondent takes the position that the Worker was under the daily direct supervision of the Appellant at the Appellant's main office and was required to work fixed hours of 40 hours per week during fixed hours of 9-5, report to the Appellant's place of business everyday when not on the road or at a client's premises, wear the Appellant's or its clients' uniforms and was evaluated in the same manner as an employee on an annual basis, all of which indicate an employment relationship. Furthermore the Respondent takes the position that the duties of the Worker were the same under both the first two contracts wherein she was identified as an independent contractor as under the third Employment contract and states there was no change in her status and that notwithstanding that the terms of the first two contracts allowing her to hire others, she was in reality required to perform the services personally. The Appellant obviously disagrees with the Respondent other than agreeing that the duties of a project manager were similar

regardless if the project manager was an employee or independent contractor but disagreeing as to the level of supervision applied to the two on that issue and the affect of other changes to the relationship.

[28] With respect to the issues of hours worked and place or work, the first of which is also relevant to the factor of Chance of Profit to be discussed later, I must say that in the context of evaluating the issues with respect to the Control factor I cannot find there is any credible evidence to support the Respondent's contention that the worker was required to work a fixed 9-5, 40 hours a week let alone at the Appellant's main place of business, which would normally suggest the relationship of an employee. There is no doubt from the evidence that not withstanding that the First Contract makes no reference to any minimum number of hours worked, while the Second Contract requires a minimum of 40 hours, that in fact the Worker did in fact work a minimum of 40 hours per week for the Appellant. The evidence of the Appellant is that if she did, that was what was necessary to meet her obligations to complete her contracted services. Furthermore, the evidence of the worker herself was that she often worked from home evenings and weekends as well as attended weekend events, thus suggesting she often worked in excess of 40 hours, but also testified she took days off on occasion and hence did not invoice the Appellant the full weekly rate thus suggesting she was not under an obligation to work 9-5 or meet her 40 hours at the office. More importantly, the Worker testified she could not recall which of the managers advised her she was to report to the office 9-5 when not at a client's or on the road, a fact I find difficult to accept considering she testified she usually only dealt with one manager, Drew Black most of the times and a second one on occasion. The Appellant's witnesses on the other hand were consistent in their testimony that she was not under any obligation to work from the office let alone during the hours of 9-5, but that it would make sense if she did so since the Appellant's clients, mostly situated in the Toronto area, would also keep those office hours, thus in performing her duties, the Worker would be able to access the Clients more readily during those hours which seems highly credible having regard to the stated duties of a project manager. Moreover, the Respondent acknowledged in its Reply that the Worker performed her duties both at the Appellant's office and her personal home.

[29] With respect to the Respondent's position and assumptions that the Worker reported to the Appellant on a daily basis except when working at an event site and that the Worker was supervised by two managers who gave her directions on how to complete the work, the evidence is that the duties of a project manager effectively required a project manager to take control of the project from beginning

to end, with the Appellant approving the budgets, after consultation with the client, after preliminary budgets were created by the project manager, and providing whatever support or dealing with whatever client complaints were necessary where the project manager could not deal with them. The parties are not in disagreement over the stated duties of a project manager as described earlier and the Worker testified she effectively carried out these duties. It seems the only examples of direct supervision appear to be that management assigned a specific project to the Worker and briefed the Worker on what had to be done and the client expectations, approval of the overall plan and budget estimate created by the Worker, that the Worker had to get approval of any expenses over $2000 and the Worker's statement that she reported to Drew Black on a daily basis, with no specific details in connection with same. The Respondent on the other hand testified on a consistent basis that independent contractors were hired due to their experience and expertise and were expected to be able to work without or with a minimum of supervision, which frankly is reflected in the duties of a project manager both parties agree with. The Worker herself admits she had several years experience as an event planner which was the basis of retaining her services in the first place, and thus qualified to take charge of a project assigned to her, from beginning to end, which is consistent with the evidence of the Appellant that the project manager was expected to get the job done.

[30] In my view the so called supervision exercised by the Appellant does not amount to day to day supervision of the Worker nor supervision as to "how" to render her services. In the Federal Court of Appeal decision in *Poulin v. Canada (Minster of National Revenue-MNR)* 2003 FCA 50, Letourneau J.A. acknowledged there is always some measure of control in a contract of enterprise and at paragraph 16 stated:

> Furthermore, the notion of control is not necessarily lacking in the contract for service. It is generally apparent, albeit to varying degrees, as it is somewhat in the contract of employment, and sometimes to a surprising extent without necessarily distorting its nature as a contract of enterprise. For example, control in regard to the premises in general and the specific places in which the work is to be performed is exercised over general contractors and their subcontractors. The latter are also given specific instructions as to the materials and the drawings and specifications with which they must comply. Often the times and work schedules of some in relation to others is also controlled and determined to ensure the effective and harmonious operation of the construction site. The work performed by contract for services is also subject to some performance, productivity and quality controls.

[31] Furthermore, in times of increased specialization, the courts acknowledge that the control factor can be less reliable particularly when a worker is retained on a results oriented basis. In *Direct Care In-Home Health Services Inc. v. Minister of National Revenue* 2005 TCC 173, Hershfield J of the Tax Court in analysing the Control factor stated at par 11:

> However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply “results” oriented; i.e. “here is a specific task-you are engaged to do it” In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship. Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.

[32] The case at hand, it seems, is just the type of scenario addressed by the comments of J. Hershfield, where the Worker was given a project and was expected to complete it, due to her expertise and experience in event management. The Worker may have been told who the client was, what the clients goals were, what the ultimate budget would be agreed upon by the client and where and when to complete the task, just like a subcontractor referred to in the comments of Letourneau J. A in the *Poulin* case above, and the worker may have been monitored, but these do not amount to a level of subordination necessary to place the worker in the realm of being an employee. As counsel for the Respondent pointed out in *On Masse Inc. v. Minister of National Revenue* 2010 TCC 250, Webb J. commented that in *Royal Winnipeg Ballet*, the dancers were told what works would be performed, at what time and location, where and when rehearsals would be held, what roles they were assigned, given choreography and even direction at each performance, and were still not found to be employees because they provided the element of individualistic expression to the Work. I share the view of Webb J. in *On Masse*, that the level of control over the Worker here, as in that case, is hardly comparable to that of the dancers in *Royal Winnipeg Ballet*.

[33] It follows from the above analyses that the Respondent’s position that the Worker was subject to annual reviews is not conclusive of an employment relationship. The Appellant testified that it conducted annual reviews of all its employees and independent contractors alike each year as it found it useful to provide feedback in order to provide better services to its clients which I consider an astute business practice. As Hershfield J. stated in *Direct Care In-Home Health Services* above, the monitoring of services should not be confused with control or subordination of a worker. The Respondent points to the fact that the Worker signed these work appraisals, entitled Project Manager Performance Appraisal

Review Document above a line with "employee" identified under her signature as evidence of such relationship, however it is clear in the body of both the appraisals that she was not considered an employee. In the Appraisal dated August 21, 2006 the goal expressed for the Worker in the Development Plan for 2007 was: "Continue in developing your knowledge with Integrated's services" referring to the internal operations and employees of the Appellant and in the Overall Comments of such appraisal the words: "Alison, over the past few months, you have built strong relationships with Integrated Staff.." The fact the same form was used for both employees and independent contractors of the Appellant alike is in my view inconsequential and I accept the testimony of the Appellant that it did so due to its limited resources.

[34] With respect to the argument of the Respondent that the Appellant required the Worker to wear uniforms as indicative of control over an employee, the evidence is that the Worker was indeed provided a company jacket, golf shirt and other items of clothing. However the Worker herself testified that whether she wore them or Client branded clothing, provided either directly by the Client or through the Appellant, was a decision of the Client. Clients often required the Worker and other project managers or independent contractors and employees of the Appellant alike to wear Client branded clothes at an event for their branding purposes. The evidence was also that the Appellant's clothing was worn for branding purposes at events where Client branded clothing was not required so the public could identify who to seek for help or who were the representatives available. The Appellant conceded that in such situation its own branding was important to convey. There was however no evidence the Worker was required to wear any Appellant branded clothing at the office or anywhere outside the actual events. Frankly, it seems to me the Client ultimately controlled the uniform to be worn by the Employee, and even when it didn't, the Appellant's explanation for its own branding at events hardly seems unreasonable, particularly in light of the type of business the Appellant was in where branding is an important element of marketing strategy. The requirement to wear any such uniform in these circumstances is not determinative of any relationship.

[35] The Respondent also takes the position that the Worker was required to work exclusively and personally for the Appellant, a form of control suggestive of an employee relationship. The Worker however testified that in effect she was not prohibited from working for others as permitted in the First and Second Contracts and that she had the skills to work for others who did not compete with the Appellant but in effect testified that since she dedicated 40 hours per week for the

Appellant that she in fact had no time to do so and hence in reality could not do so. The fact that she only provided services to the Appellant during the Period, as the Worker testified, does not in my view mean she was required to work exclusively for the Appellant. The Appellant testified, through different witnesses, that she had the ability to do so as also stated in the First and Second Contracts. In the *On Masse Inc*. case, the worker, one Robert C. Caputi, an artist, was able to work for other clients but was spending 40 hours a week in the service of the appellant in that case was not found to be in a role of subordination to the appellant by choosing not to work for others. Moreover, nothing prevented the Worker from hiring others to undertake the work for other clients if she so chose. Short of strong evidence that you are prohibited from doing so by the party engaging your services, not choosing to work for others when you have the legal right and ability to do so should lead to the inference you can in fact do so.

[36] As for the Respondent's suggestion and assumption that the Worker had to personally perform the services for the Appellant, the evidence of the Appellant is that she was permitted to hire help at her own expense as per the terms of the First and Second Contracts but the Appellant agrees that notwithstanding such contractual terms she could not send another person to meet with the Appellant's Clients without the Appellant's approval. There is no evidence by the Worker that she ever sought any such approval or even that she ever hired others to perform the services on her behalf so there is no way for the court to weigh the position of the Respondent. However, I do not consider a requirement of having to obtain prior approval before you send a stranger to meet your clients when it is your reputation and business contract at risk to be an unreasonable control by the Appellant. The stipulation is clearly a form of monitoring or quality control. Even if it were found to be the case that the worker had to render its services personally, Letourneau J.A. in *Poulin* above made it clear in paragraph 20 thereof, in agreeing with Madam Justice Desjardins in *Wolf, supra* "that the fact that a person cannot delegate his labour to someone does not necessarily mean that this person is an employee."

[37] Finally in dealing with the Control factor, I wish to examine the Respondent's contention that the acknowledged fact that the duties of a project manager were identical and were performed by both independent contractors such as the Worker and employees of the Appellant suggests the level of control must have been the same as an employee. The argument of the Respondent is in effect that nothing changed for the Worker between its time under the First and Second Contracts and the Third Contract which was acknowledged to be an employment agreement.

[38] With respect to the Respondent, the Federal Court of Appeal has made it clear in *Poulin* that the control factor is not decisive in situations where services supplied can be rendered equally under a contract for services or a contract of employment and one must look to the other factors of the test. Frankly, the Respondent's position is suggestive of a presumption in favour of a finding of an employment relationship in such circumstances which I find unacceptable; just as I would equally find in favour of a presumption of a contract for services. The clear rationale of *Sagaz Industries* as expounded by Major J. in his decision above referred to is that all of the factors must be considered with the appropriate weight assigned to them as the circumstances require. There is no presumption given in the decision of the Supreme Court of Canada or any of the Federal Court of Canada decisions above referred to either.

[39] I must also disagree with the contention of the Respondent that the services were the same and that nothing changed. While the duties performed by an independent contractor such as the Worker on behalf of the Appellant are decidedly very similar or the same as the duties performed by project managers in the employ of the Appellant, the other terms under which such services were provided were clearly not the same. Under the Worker's Third Contract, the Employment contract, the Worker was given vacation pay and employee benefits not available to it as an independent contractor. The Worker was also given a higher salary, about $6000 more per annum, required to perform her services personally, required to abide by the Appellant's Company manual not applicable to independent contractors, not permitted to work for others, had payroll deductions such as income tax and other source deductions deducted from her pay and had her pay deposited into her bank account directly rather than having to invoice and receive a cheque as before and was required to show up for work at the Appellant's offices unless outside the office on the Appellant's business. The Worker also had the benefit of job security and the right to enforce her tenure of employment under the employment laws of the Province of Ontario and common law which would include damages for wrongful dismissal. In all, the conditions under which a Worker performs the services can change substantially in my view when the Worker transitions from an independent contractor to an employee which is the case here.

[40] It also bears mentioning that the services performed by the Worker appear also to have changed somewhat in the sense there is evidence that the Worker did not like undertaking smaller projects assigned to her and preferred to work on big projects only. The Appellant's president testified that one of the reasons she was given an employment contract was to gain a further element of control over her

work so as to ensure she would undertake small projects as well. Such evidence is corroborated by the work Appraisals signed by the Worker and described earlier. In particular, in the Overall Comments found in the second Project Manager Performance Appraisal Review Document dated September 7, 2007 relating to the Second Contract states:

> "You are extremely motivated and attentive when challenged with large scale projects. I believe you thrive and are most happy while working on these types of projects. However, your motivation seems to decrease when given smaller projects that need to be executed. As you know, all projects, big and small are just as important."

[41] Clearly, the ability to take away a Worker's option as to whether to work any particularly sized project is a departure from the independent contract relationship. While there is no evidence the Worker refused to work on smaller projects, there is evidence her services were not performed to the same level of satisfaction of the Appellant, suggesting there was concern that if her preferences for being assigned bigger projects was not met that her services might not be available in the future.

[42] Having regard to all of the above analyses regarding the Control factor, I am of the view the Appellant did not exercise a degree of control over the worker so as to be indicative of an employment relationship but rather that such level of control is more consistent with a contract for services.

Ownership of Tools

[43] There is no dispute that both parties provided some of the tools for the provision of the services of the Worker. The Appellant provided a Macintosh computer together with its proprietary software that ran on the Macintosh system, together with a cell phone that had two way radio capability with the Appellant's office as well as the Appellant's branded jacket, golf shirt and other minor items. Reference has been made in the analyses of the Control factor above as to the "branding" reasons for the uniform pieces and does not bear repeating here. As to the provision of the computer and software, explanation was also discussed in the facts earlier that the proprietary software of the Appellant was used by the Appellant, all its employees and independent contractors and even its clients for the provision of the Appellant's services and was a necessary tool to deliver same, especially when out of office. Obviously the cell phone with two way radio between the office and other employees and independent contractors was necessary to keep in touch with the main office and each other during events. As above mentioned the

Worker signed a Company Property Agreement which all independent contractors and employees alike signed, agreeing to return the tools at the end of their contract or employment and taking responsibility for their loss or damage to the extent of their stated value.

[44] Considering the nature of the Appellant's business and unique proprietary software it makes ultimate sense that anyone providing services would need to use the Macintosh laptop computer which ran the unique software and cell phone with two way radio to keep in touch with each other and the clients of the Appellant as explained by the Appellant and it is clear that the proprietary software at least could not be a tool capable of being provided by the Worker on its own in any event. As Letourneau J.A. stated in *Poulin* above in par 24 of that decision:

> Once again, I do not think that in this case much weight can be accorded to this factor, given the nature of the services rendered, the needs served and the few work instruments used. Furthermore, ownership and supply of equipment must not be confused with ownership and supply of work instruments.

[45] In *On Masse* above, in a situation where the Worker was provided use of the appellant's computer and software Webb J. stated in par. 13 that:

> "He needed to use the Appellant's computer system and software to integrate his work with the work of the other individuals who were working on the film."

[46] In my view the provision of those tools by the Appellant was just that; equipment necessary for the integration of work of the Worker with the Appellant, its staff and the Clients of the Appellant and was a necessity in order for the services to be performed, and practically speaking, in respect of the software and two way radio connection at least, only providable by the Appellant. Accordingly, I do not see the provision of these tools by the Appellant to be indicative of an employee relationship.

[47] The Appellant also provided the use of a desk at its main office together with the office equipment to the Worker. The First and Second contracts provide that the Workers primary base of operations would be her home office but that she would be given use of a work station and computer at the Appellants office only on an as required basis; a temporary use. The evidence however is that the Worker attended at the office on an almost daily basis, had her own phone extension at such desk and kept her plants and family pictures there and stated that this was her permanently assigned desk. Interesting enough, a witness called by the Respondent testified that while she was an employee of the Appellant she shared a work area

with the Worker who kept her plants and family pictures there as stated by the Worker thus corroborating her evidence. The Appellant's evidence is that work stations were not specifically assigned to any independent contractors and all independent contractors were furnished business cards for the same branding reasons given above and that calls could be rerouted so that the provision of a phone extension did not limit mobility between stations. The same witness who corroborated the Workers evidence as to the use of her desk above also testified however that when she left the employ of the Appellant and agreed to become an independent contractor, that she worked mainly from home, as did Drew Black who testified he had left the employ of the Appellant and was now a stay at home dad who worked mainly at home, in the Township of Severn, a few hundred kilometres from the Appellants office, as an independent contractor for the Appellant. Clearly independent evidence establishes that at least one of those independent contractors, who testified she also did project management work, was able to work from home and did, demonstrating a daily trip to the office was not a necessity and supporting the Appellant's contention that the Worker used the office desk and facilities on an almost daily basis simply as a matter of choice. In addition I note that the Worker could not recall which of the management team had assigned the desk to her on a permanent basis when asked, even though there were only a few members that could have done so thus drawing her credibility into issue here. Likewise, if the contracts provided she was to use the office facilities on an as required, temporary basis, one must question why she would be allowed to use them on an almost daily basis, even if by choice. In all, it is clear from the conflicting evidence that the issue of the use of the Appellant's office desk and facilities is not indicative, one way or another of the relationship between the parties.

[48] The Worker on the other hand, pursuant to its contractual obligation in the First and Second Contractors provided computer equipment and a home office used by her in the delivery of her services while working at home, mainly evenings and weekends together with a vehicle and claimed expense deductions for all of these items in her tax returns for those years. The Worker however ceased claiming these expenses for the period she was an employee under the Third Contract. The provision of such tools and premises by the Worker would seem indicative of a contract for services. The Respondent's argument that she prepared her own tax returns using preparation software to suggest she was not aware of the consequences of such filing is not convincing. The Worker was an intelligent and educated person who knew enough when to claim such expenses and when to cease

claiming them and I find her actions here supports the Appellant's contention that she was an independent contractor.

[49] On balance, I find that the Ownership of Tools factor tends to support the relationship of a contract for services, particularly due to the provision of equipment and home office and vehicle by the Appellant and her tax treatment of same.

Chance of Profit/Risk of Loss

[50] I do not find these factors on their own to be determinative of any of the relationships.

[51] The Respondent argued that the fact the Worker effectively worked about 40 hours per week and her remuneration was based on a weekly amount are indicative of an employment relationship. While I would normally tend to agree, the fact that the Worker testified she often worked in excess of 40 hours per week, often at home or at client events evenings or weekends, without further remuneration is not indicative of an employment relationship but more of a contract for services at a fixed price. The Worker testified she considered her remuneration competitive as well. The Worker did indicate that she brought up the question of overtime pay with the Appellant once but was not successful, which the Appellant denied. It begs the question as to why the Worker would not have acted on the matter further with the appropriate labour ministry or refused to work overtime if she considered the relationship to be one of employment and why she would contradictorily suggest her remuneration was competitive.

[52] The Appellant suggests the Worker had the chance of profit since, pursuant to the Second Contract at least, if she did not work the 40 hours, had to reduce the normal weekly amount, which the Worker testified it did on the occasion when she took a few days off and by corollary that if sufficient hours were not worked the Worker had a risk of loss if it did not cover its home office and vehicle expenses. The evidence on the whole was that she normally met the 40 hour threshold and it is not the case that employees are necessarily paid when they take days off in any event.

[53] The Respondent states that, as the Federal Court of Appeal confirmed at paragraph 24 of the *City Water International* case, the ability to earn more money if one works longer hours at an hourly rate to increase pay does not constitute a chance of profit as it is not the same as the commercial risk of running a business and I would agree with this premise, but the Respondent counters that it is not extra

hours to be worked for the Appellant that gives her a chance for greater profits, but the ability to work for others or hire staff to do so, which, as discussed earlier, was an option the Worker had although never availed herself of. Considering the Worker was not paid for extra hours any event, the ability to earn more by the hour was not even an option so the issue of chance of profit in that context is not even applicable.

[54] On the whole while I agree that the Worker had a chance of profit by availing herself of the ability to work for others and hire staff to do so if she was so inclined and had a risk of loss if it did not work the requisite 40 hours and had to invoice amounts less than the cost of her expenses for home office and vehicle, it is clear that the risk of loss was minimal having regard to the size of those expenses and the chance of profit is speculative at best since the Worker did not avail herself of the opportunity.

Conclusion

[55] On balance I find that the *Wiebe Door* factors as above analysed support a finding that the Worker was an independent contractor. As a result I am of the view that it is not necessary to consider the intention factor. However, since the applicability of this factor was the subject of large debate between the parties here I should like to add that if it had been necessary to consider it I would have found that the intention of the parties at the time of entering into the relationship, the relevant time to consider as confirmed in the reasoning of Malone J.A. in *City Water* at par 27 above, was that they were entering into a contract for services for three main reasons. Firstly, the Worker testified she was aware she would not have income taxes and other payroll deductions made and would not be entitled to benefits enjoyed by employees, a clear indication she was not to be an employee. It is one thing for her to argue she expected to be kept on and did not understand the difference, but to not make an issue of these matters, or the matter of overtime pay and still enter into a Second Contract defies credibility.

[56] Secondly, the Worker availed herself of the deductions available to businesses for home office and vehicle expenses during the Period but did not during the time she was under a contract of employment, indicating she clearly understood when such tax treatment was available to her. Her actions are consistent and delineated the relationship.

[57] Finally, the Appellant referred to her relationship throughout the CRA Employee questionnaire submitted into evidence as being “self–employed” or “self-

employed as per the contract". While the Respondent explained such actions as the Worker wanting to be consistent with the way she had filed her tax returns, the fact is she referred to this role even in the Questionaire which was filled out after the Worker had arranged to change the recording of her income from the Appellant from "other income from employment" to "employment income", after discussions with the CRA and thus amend her tax returns for the Period. The Worker testified she had no recollection of any such discussions yet they are referred to in the Notice of Reassessment as the reason for the Minister to have changed the income entry to "employment income". Frankly, this, together with her inability to remember other important facts such as who assigned her a permanent desk at the office or who advised her that she had to report to the office daily between the hours of 9-5, suggest a selective memory and I find her evidence to have been suspect and not credible as a result. Her actions are indicative of trying to change the record after the fact.

[58] This is a case where the Appellant had a growing business that allowed it to transition an independent contractor to a full time employee. It makes absolute business sense that the Appellant would look to its independent contractors, with whom it tried to establish long term relationships for its benefit and the benefit of its clients as part of its strategic business plan, to increase its employed staff when volume of business allowed. This plan confirms its intention to have entered into a contract of services with the Worker at the start. In my view it was inappropriate for the Minister to have assumed, in argument, that "nothing changed" after the transition solely because the duties of the Worker may have been substantively the same without giving weight to the other terms of the relationship that did in fact change.

[59] In all, it is clear the both parties had a mutual intention at the time of entering into their relationship that such relationship was to be one of a contract for service.

Decision

[60] The Appeals are allowed. The Worker was not in insurable or pensionable employment with the Appellant during the Period.

Signed at Ottawa, Canada, this 5th day of October 2011.

"F.J. Pizzitelli"

Pizzitelli J.

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