Dockets: 2012-5119(EI)
2012-5122(CPP)
2012-5123(EI)
2012-5124(CPP)

BETWEEN:

TAGISH LAKE GOLD CORP.,

appellant,

and

THE MINISTER OF NATIONAL REVENUE,

respondent.

Appeals heard on common evidence on August 29, 2013,
at Vancouver, British Columbia.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant:	Andrea S. Donohoe
Counsel for the respondent:	Shankar Kamath Shannon Fenrich (student-at-law)

JUDGMENT

The appeals are dismissed and the determinations rendered by the Minister of National Revenue on March 5, 2012 and April 16, 2012, respectively, are confirmed on the basis that Henry Siu and Grace Jackson were engaged in insurable employment and pensionable employment from April 19 to November 8, 2011 and April 19 to October 19, 2011, respectively, within the meaning of paragraphs 5(1)(*a*) of the *Employment Insurance Act* and 6(1)(*a*) of the *Canada Pension Plan*, in accordance with the attached reasons for judgment.

Signed at Ottawa, Ontario, this 31st day of December 2014.

"Gaston Jorré"

Jorré J.

Citation: 2014 TCC 381
Date: 20141231
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BETWEEN:

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THE MINISTER OF NATIONAL REVENUE,

respondent.

REASONS FOR JUDGMENT

Jorré J.

[1] The appellant, Tagish Lake Gold Corp., appeals from determinations made by the Minister of National Revenue, the respondent, that Henry Siu[1] and Grace Jackson were engaged in insurable employment within the meaning of the *Employment Insurance Act*, and pensionable employment within the meaning of the *Canada Pension Plan*, at the appellant's mine in Yukon during the periods of April 19 to November 8, 2011 and April 19 to October 19, 2011, respectively.[2]

[2] Mr. Siu was paid by the appellant to plan the menu, purchase food, transport it to the mine, cook and clean up afterwards. According to the evidence, he was a good cook. Ms. Jackson was paid to do cleaning at the mine. Mr. Siu was Ms. Jackson's husband.

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[1] The Notices of Appeal of the appellant refer to Henry Siu while the Ministers' replies refer to Henry Sui. Given that the ruling was in respect of Henri Siu, I have followed the spelling Henry Siu throughout. The contract in Exhibit A-1 is between the appellant and Henry Siu and the invoices in Exhibit A-2 are for Henry Siu. I assume Sui in the Ministers' replies is a typo.

[2] Although the determination relating to Ms. Jackson was for the period from April 19 to October 19, 2011, the documentary evidence produced by the appellant shows her as having worked every day from October 20 to October 30, 2011: see last page of Exhibit A-5. As this last period was not included in the ruling and was not an issue at the hearing of the appeal, I will not deal with that last period in my judgment; I will however, examine it as part of the overall evidence in these reasons.

[3] The parties agree, and I am also of the view, that there is nothing in the facts or the law which would result in a different outcome to the appeals as between the employment insurance and Canada Pension Plan determination. Accordingly, I will simply deal with the question of whether the two individuals, the payees, were engaged in insurable employment. The outcome for the purposes of the *Canada Pension Plan* will be the same as the outcome for employment insurance purposes.

The Law

[4] It is useful to begin by reviewing the general principles applicable in distinguishing between a contract of employment[3] and a contract for services. Because both types of relationships are contractual, intention has a role to play.

[5] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,[4] the Supreme Court of Canada has established that there is no one conclusive test to determine whether an individual is an employee or an independent contractor:

> 47 . . . The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> [Emphasis added.]

[6] More recently, in the decision *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*,[5] the Federal Court of Appeal reviews the case law and the test for determining whether an individual is an employee or an independent contractor. Justice Mainville, writing for the Court, summarizes the analysis to be followed and sets out a two-step process:

> 39 Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party,

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[3] Or contract of service; I use the term contract of employment because it reduces the risk of confusion between a contract of service and a contract for services.
[4] 2001 SCC 59, paragraphs 46 and 47.
[5] 2013 FCA 85, paragraphs 23 to 41.

> such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.
>
> 40 The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties' intent as well as the terms of the contract may also be taken into account since they color the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, i.e. whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.
>
> 41 The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

The Facts

[7] With these principles in mind, let us turn to the facts.

[8] The only witness called was Peter Torn, the appellant's corporate secretary. He is employed at the corporate head office in Vancouver, British Columbia.[6]

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[6] While some of Mr. Torn's testimony was hearsay, no objection was raised. The absence of any objection does not change the fact that the hearsay portions of the evidence may have less weight. The person in the company who would have been best placed to testify about the relevant facts would have been Mark Greasley, the project manager on-site at the Yukon mine. However, the appellant was unable to locate Mr. Greasley and could not call him as a witness. The respondent stated that it was not calling Mr. Siu or Ms. Jackson because it was not economically viable to bring them from Yukon to Vancouver for the hearing. Neither Mr. Siu nor Ms. Jackson intervened. I note that subsection 18.29(1) of the *Tax Court of Canada Act* makes subsection 18.15(3) of that *Act* applicable to employment insurance and Canada Pension Plan appeals before this Court.

[9] The mine site where the work was done is approximately an hour and a half drive from Whitehorse and is a general exploration early-stage mine site. The exploration involves drilling.

[10] The company had to obtain an exploration permit from the Yukon government. Among other things, the permit imposes a number of occupational health and safety requirements; it also restricts the maximum number of workers permitted on the site to 50.

[11] Some of the requirements are pursuant to the Yukon *Occupational Health and Safety Act* which applies to anyone on the mine site.

[12] The person in charge of the site for day-to-day operations was the project manager, Mark Greasley.

[13] The exploration work is seasonal because they cannot carry out the work when there is snow and ice. Sometime in February, they will start with a skeleton crew; however, the actual drilling season is relatively short and can only start towards the end of May or early June and continues until late September or early October. After that, there will again be a skeleton crew until sometime in November.

[14] The camp includes a dormitory for 50 people. There is also a mess hall with kitchen facilities. The camp also has facilities for first aid, for the storage and repair of equipment, as well as facilities for the geological work.

[15] In early April 2011, Mr. Siu came to the mine site looking for work. He met with Mr. Greasley and discussed possible opportunities.

[16] It is Mr. Torn's understanding that Mr. Siu and Mr. Greasley reached a verbal agreement that Mr. Siu would be engaged by the appellant as a consultant and that Mr. Siu would be an independent contractor. It is Mr. Torn's further understanding that they negotiated the rate of pay and that the rate of pay was based on Mr. Siu being an independent contractor.

[17] One factor of importance to the company, because of the various health and safety requirements, was that Mr. Siu had a first aid certificate.

[18] Based on the verbal agreement, a written agreement was prepared in Vancouver and Mr. Torn signed on behalf of the company. The agreement was filed as Exhibit A-1.

[19] Mr. Torn stated that it was the company's intention that the agreement with Mr. Siu be that of an independent contractor.

[20] During the busier period, there could be up to two or three cooks and up to four or five cleaners simultaneously under contract to the appellant to do work at the mine. They were all hired under the same kind of arrangement as Mr. Siu and Ms. Jackson.[7]

Intention

Mr. Siu's Contract

[21] The contract appears to be a standard form; parts of the form do not appear to have been adapted to the specific context of the agreement with Mr. Siu. Clause 1 provides that "the company hereby engages the consultant to work as a cook and camp/safety/first aid worker".[8] In clause 2.1, it refers to these services as more specifically set out in schedule "A". Schedule "A" says:

> Services and obligations to be provided by the consultant to the company:
>
> 1. complete health & safety, cooking and camp operation services on the project site for the company;
> 2. be and act safety conscious; and
> 3. complete related duties as required by the company.

[22] Clause 2.2 says:

> The consultant shall at all times be an independent contractor and not the servant or agent of the company. No partnerships, joint venture or agency will be created or will be deemed to be created by this agreement or by any action of the parties under this agreement.

[23] Clause 3.1 sets out that Mr. Siu is to be paid $26.29 per hour minus workers' compensation board fees and that the consultant will be responsible for income taxes, employment insurance and pension payments. Clause 3.2 sets out that the

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[7] Transcript at pages 57, 68 and 89. My references are to the pages in "print layout".
[8] The use of the word "consultant" is surprising.

company will pay the consultants $0.60 per kilometre for any business use by the consultant of his vehicle. In order to be paid, the consultant must submit daily time sheets to a company representative who is to review and approve the time sheets (clause 3.3).

[24] There are other provisions regarding confidentiality and termination for cause. I would note two of the specific provisions about termination for cause. I would note clauses 4.1 a) and f) which provide that the company may terminate the agreement without notice if the consultant fails to carry out his duties under the agreement in a competent and professional manner and if the consultant fails to follow reasonable and lawful directions from the company.

[25] Certainly, clause 2.2 of the contract states that the intention is to set up an independent contractor relationship.[9]

[26] However, the description of the services to be provided is rather general and vague for a contract for services where one would usually expect a more detailed description of the services to be rendered. In particular, I note bullet three in schedule "A" that says the consultant is to provide related duties as required by the company. Usually, in a contract for services, one would expect that, if additional services not set out in the agreement are to be provided, they would be subject to negotiation by the parties, not to unilateral instructions by one party with no adjustment to the contract. The choice of the word "duties" is also surprising.[10]

[27] While the terminology "independent contractor" is used, when read as a whole, especially the generality of the services to be provided, the contract is not clearly a contract for services nor is it clearly a contract of employment.

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[9] At first glance, the provision stating that Mr. Siu is solely responsible for payment of income taxes, employment insurance and pension payments appears to have an intent consistent with that. However, when one considers the provision a little more, it is actually an unusual provision. Individuals are always responsible for their own income tax; what is probably meant is that the company will not be withholding tax. Also, if the appellant and Mr. Siu are indeed in an independent contractor relationship, why would anyone be responsible for employment insurance contributions which would not be payable?

While I would infer that what the author of the document presumably intended was to say that, as an independent contractor, the appellant will not be eligible for employment insurance, I have no way of knowing what Mr. Siu understood. This raises a question as to what Mr. Siu understood to be the arrangement he was entering into.

[10] There are other clauses in the contract which are also more consistent with employment. For example, in clause 1 of Exhibit A-1, the appellant engages Mr. Siu "to work as **a cook and camp/safety/first aid worker**." In the context of a contract of services, one would have expected language such as "engages Mr. Siu to provide cooking services and camp/safety/first aid services".

The same comment applies to the fact that one of the grounds of termination for cause in clause 4 is a failure to carry out duties in a competent and professional manner.

The same comments apply to the contract with Ms. Jackson.

Ms. Jackson's Contract

[28] Ms. Jackson came out to the mine on the same day as Mr. Siu. It is Mr. Torn's understanding that Ms. Jackson and Mr. Greasley came to a verbal agreement that she would also be retained as a consultant and that she would be an independent contractor. As with Mr. Siu, they also negotiated a per hour rate for Ms. Jackson.[11]

[29] The agreement is reflected in the "Consulting Agreement".[12] The agreement provides in clause 1 that "the company hereby engages the consultant to work as camp attendant." In clause 2.1, it refers to these services as more specifically set out in schedule "A". Schedule "A" says:

> Services and obligations to be provided by the consultant to the company:
>
> 1. complete camp operation services on the project site for the company;
> 2. be and act safety conscious; and
> 3. complete related duties as required by the company.

[30] The agreement provided that Ms. Jackson was to be paid $23.79 per hour.[13]

[31] Apart from the difference in the rate of pay and the different services to be provided, the contract is quite similar to that with Mr. Siu. For the same reasons as in the case of Mr. Siu, I conclude that the contract itself is not clearly a contract for services nor is it clearly a contract of employment.[14]

Other Indications of Intent

[32] There is no evidence and there were no assumptions made by the Minister with respect to how Mr. Siu or Ms. Jackson filed their tax returns.

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[11] The Minister assumed that the company set the rate.

[12] Exhibit A–4, dated July 19, 2011. The agreement of July 19, 2011 superseded the agreement dated April 19, 2011 – Exhibit A-3. The April 19, 2011 agreement made reference to both cooking and camp operation services. Mr. Torn testified that the change in the description was a correction so that the July 19, 2011 agreement reflected Ms. Jackson's actual tasks, camp operation services – see pages 88 and, especially, 89 of the transcript.

[13] Ms. Jackson's agreement also provided compensation of $0.60 per kilometer if she were to use her vehicle for company business. This appears to have happened only once – see Exhibit A-5 at the page dated September 15, 2011.

[14] Again, what is striking is the lack of detail of the service to be provided and the ability of the company to require undescribed related services without any opportunity to discuss the terms of the agreement. One small example of the generality: there is no indication whether the rooms where people sleep were to be cleaned once a day or once a week.

[33] Apart from Mr. Torn's hearsay evidence,[15] and apart from the fact that Mr. Siu and Ms. Jackson signed the contracts, there is no evidence and there were no assumptions made with respect to the intention of Mr. Siu and Ms. Jackson.

[34] The evidence was quite clear that the company wanted Mr. Siu and Ms. Jackson to be independent contractors.

[35] No amounts were withheld for income tax, employment insurance or the Canada Pension Plan. This is consistent with the appellant's stated intention and would certainly indicate to Mr. Siu and Ms. Jackson that they were not being treated as employees.[16]

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[15] See paragraph 16 above. His testimony of what was agreed verbally between the appellant and Mr. Greasley.

[16] The company did pay Worker's compensation premiums. However, the fact of paying premiums under the Yukon *Workers' Compensation Act*, SY 2008, c.12, as amended, is not necessarily contrary to that intention because the *Workers' Compensation Act* covers not only a contract of employment, see (a) the definition of "worker" in section 3(1) of that Act, but also includes persons who are not employees. Subsection 3(2) provides that:

> Subject to subsection (3), **when a person does any work in an industry for an employer engaged in that industry, the person who does the work shall**, for the purposes of this Act, **be deemed to be a worker** of that employer except when the person doing the work is
>
> (a) an employer in an industry;
> (b) a director of a limited company who is deemed by the board not to be a worker;
> (c) a worker of another employer; or
> (d) a sole proprietor deemed by the board to be a worker.
>
> [Emphasis added.]

Subsection 3(1) defines a "sole proprietor" as

> "an unincorporated, self-employed person who carries on or engages in any industry."

Subsection 3(1) also defines "employer" as someone having

> ". . . in their service one or more workers in an industry . . . ."

Thus, whether Mr. Siu and Ms Jackson are employees or independent contractors for employment insurance purposes, they are workers of the appellant for the purpose of the Yukon *Workers' Compensation Act*.

Neither Mr. Siu nor Ms. Jackson charged GST on their invoices. Mr. Torn testified that it was the appellant's understanding that they both had an exemption. If they were independent contractors and they were small suppliers within the meaning of subsection 148(1) of the *Excise Tax Act*, then they would not have had to charge GST and the failure to charge GST would not be inconsistent with being an independent contractor. Subsection 148(1) sets out the rules for applying the $30,000 small supplier threshold.

Assuming that they were independent contractors, we do not know if they made other supplies apart from those made to the appellant and whether, if such supplies were made, it would affect their status as small suppliers. What we do know is the amount of their billings to the appellant based on Exhibits A-2 and A-5. Ms. Jackson did bill the appellant more than $30,000 in 2011; however, she only crossed the $30,000 threshold in October 2011. Given the provisions of subsection 148(1) of the *Excise Tax Act*, and assuming that she had no other taxable supplies made to persons other than the appellant, she would have been a small supplier throughout the period in issue here.

The case of Mr. Siu is different. Based on Exhibit A-2, we can see that he billed the appellant in excess of $40,000 during the period in issue and that he passed the $30,000 threshold before September 30, 2011. Given the provisions of subsection 148(1) of the *Excise Tax Act*, and assuming that he had no other taxable supplies made to persons other than the appellant, he would have ceased to be a small supplier on November 1, 2011 with the result that he should have charged GST on the last two invoices contained in Exhibit A-2. This failure is inconsistent with being an independent contractor, although it may be an oversight. Given that the appellant's accountant prepared the

The Objective Reality

[36] Mr. Siu worked very intensely during the period in question. In the period in question, there were 204 days and he worked on 133 days. On the days he worked, he averaged slightly more than 11.8 hours per day; to put that in perspective, that is equivalent to an 82 and ¾ hour work week every week he worked.[17]

[37] Ms. Jackson was also working very intensively during the period. On the basis of Exhibit A-5, one can see that she worked for the company from April 19 to October 30, 2011. There were 194 days in this period; of those 194 days, she worked on 137 days and did not work on 57 days. On the days that she worked, she averaged 10.35 hours of work per day; put differently, she averaged a 72.4 hour workweek during weeks she worked.[18]

[38] Mr. Siu and Ms. Jackson's residence was about four hours away from the mine site by car.

Tools/Investments

[39] While Mr. Siu and Ms. Jackson used their own clothes and footwear, their work was performed entirely on the appellant's premises using the appellant's tools, equipment and supplies. The appellant maintained the equipment.

[40] When Mr. Siu went to pick up food, he sometimes used his own vehicle and he sometimes used a vehicle belonging to the company.[19] There is no suggestion in

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invoices, it is an inconsistency on the part of both Mr. Siu and the appellant; to the extent it is an oversight, it is an oversight on the part of both Mr. Siu and the appellant.

[17] Even if one averages his work hours over the total period including the days he did not work, it is equivalent to slightly more than 7.7 hours per day for every singly day in the period or, put differently, about a 54 hour work week. Mr Siu:

worked 34 days in a row from April 19 to May 22, followed by 14 days off;
worked 28 days in a row from June 6 to July 3, followed by 14 days off;
worked 28 days in a row from July 18 to August 14, followed by 28 days off;
worked 13 of the 14 days from September 12 to September 25, followed by 14 days off; and finally,
worked 30 days in a row from October 10 to November 8.

See Exhibit A-2.

[18] If one averages her work hours over the total period, including days not worked, she averaged 7.3 hours of work per day, or slightly more than a 51 hour week.

Her periods of work were the same as Mr. Siu with two exceptions. First, she worked from August 30 to September 11, 2011 while he did not; she stopped work on October 30 whereas he continued working until November 8, 2011.

I also note that during five of her last six days, she only worked six hours and on her last day of work, she worked eight hours.

[19] Transcript at page 26.

the evidence before me that Mr. Siu's vehicle was specially acquired for the purpose of the work as opposed to simply being the motor vehicle that he owned.[20]

Chance of Profit

[41] Both Mr. Siu and Ms. Jackson were paid by the hour and were reimbursed per kilometer for any use of their vehicle for the business of the appellant. They had no expenses that they had to pay for.

[42] If they worked longer hours, they could earn more; if they work shorter hours, they would earn less.

[43] This is consistent with either the contract of employment or a contract for services. However, generally, but not always, a person in their own business does have an opportunity to increase their profit if they can find a way of performing their service more efficiently or using equipment they have invested in more efficiently; that is not the case here.

Risk of Loss

[44] Given that Mr. Siu and Ms. Jackson were paid by the hour and had no expenses, they had no risk of loss.

Helpers

[45] Neither Mr. Siu nor Ms. Jackson hired any helpers. It is clear from Mr. Torn's testimony that they could not hire persons to do the work in their place; only persons who contracted with the appellant could do the work. What they could do, according to Mr. Torn, was reach an agreement with the other cooks or cleaners that they would be away and someone else would be there to cook or to clean.[21] When such arrangements were made, it was the appellant who paid the person who worked.

Control

[46] In the case of Mr. Siu, the Minister assumed, *inter alia*, that:

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[20] As previously indicated, Ms. Jackson was only reimbursed once for use of her vehicle; on the basis of the evidence, we do not know if she and Mr. Siu had one common vehicle or whether they had separate vehicles.

[21] Transcript at pages 77, 78, 89, 90 and 91.

1. the appellant determined the mealtimes;
2. Mr. Siu was responsible for determining when to shop and what the menu for each meal should be;
3. the worker was not free to work for others at the same time as he was working at the mine;
4. the worker was required to record his time in the appellant's logbook;
5. the worker was required to attend safety meetings with the appellant every morning at 7:00 a.m.;
6. the worker was not free to take time off without the appellant's prior approval; and
7. the worker was not supervised; however, he did report to Mr. Greasley, the camp manager.

[47] In the case of Ms. Jackson, the Minister assumed, *inter alia*, that:

1. the appellant determined her hours of work;
2. she was required to attend safety meetings with the appellant every morning at 7:00 a.m.;
3. she was not free to take time off work without the appellant's prior approval;
4. she was required to record her hours of work in the appellant's logbook; and
5. she was supervised by the manager who inspected her work.

[48] Mr. Torn testified that no one told Mr. Siu: what to buy, how much he could spend on groceries, what his priorities were or when to work.[22] He also testified that Mr. Siu was free to take breaks at his discretion and come and go as he wished without requiring permission to take time off. Mr. Siu did have to attend the safety meetings at 7:00 a.m. The safety meetings lasted from 10 to 30 minutes.[23]

[49] Mr. Torn also testified that Mr. Siu had to submit time sheets to the on-site accountant who would then prepare Mr. Siu's invoice to the company. Mr. Greasley would have to approve the time.

[50] He also testified that at one point, in respect of the period late July/early August, Mr. Siu told others at the mine that he was going to work elsewhere for a

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22 Transcript at pages 22 to 25.

23 See, *inter alia*, transcript at pages 26 and 28.

while. The Minister admitted that Mr. Siu provided his services to at least one other payor during the 2011 tax year.[24]

[51] With respect to Ms Jackson, Mr. Torn testified that no one told her: where to clean on a daily basis, what her priorities were, how to clean or what tools or supplies to use. Ms. Jackson was responsible for maintaining the inventory. No one oversaw her and she was free to come and go when she wished.[25] She was also free to work elsewhere.

[52] Ms. Jackson was obliged to attend 7:00 a.m. safety meetings.

[53] Like Mr. Siu, Ms. Jackson also provided to the on-site accountant her hours and the accountant prepared her invoices.[26] Mr. Greasley would have to approve the time.

[54] Mr. Siu and Ms. Jackson did not receive statutory holiday pay or overtime; they were not provided with any health or dental benefits or any pension plan. They did not receive any form of bonus

[55] According to Mr. Siu's last invoice,[27] he received a payment of $1472.24 which is described as "Termination paid". The amount is shown as 56 hours times Mr. Siu's rate of pay. Ms. Jackson received no similar amount.

[56] The appellant did not provide Mr. Siu or Ms. Jackson with any training.

[57] In cross-examination, Mr. Torn agreed that there were customary hours for serving meals at the camp and that while there was no specific budget for groceries, the amount that could be spent was limited to a reasonable amount. The reasonable amount would be determined by the manager, Mr. Greasley, and by the on-site accountant.[28]

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[24] See paragraph 12 of the Notice of Appeal in case 2012–5119(EI) and paragraph 1 of the Reply to the Notice of Appeal therein. The fact that Mr. Siu provided his services to someone else sometime in late July/early August, does not tell us whether he did so as an employee or as an independent contractor. Apart from that period, given the long hours he worked for the appellant, he had limited time to work for others if he was to get any rest. Ms. Jackson had limited time to work for others during the period in question given her hours of work with the appellant.

[25] Transcript at pages 41 and 42.

[26] Exhibit A–5.

[27] See last page of Exhibit A-2.

[28] Transcript at pages 60, 61 and 64.

[58] He also agreed in cross-examination that the time during which cleaning could be performed was constrained by a pattern of camp activities. For example, rooms had to be cleaned at times when they were not being used. He did not know how quality was verified and also admitted that while the cleaners would divide the work up among themselves, someone would have to have some overarching responsibility for what was cleaned.[29]

[59] I have difficulty accepting that the appellant exercised as little control as Mr. Torn suggested, especially in the way he described the work of the cooks and the cleaners in direct examination. In direct examination, it almost seemed as if having been hired to provide meals or to cook, the cooks and cleaners worked with almost no interaction with the appellant, apart from attendance at safety meetings.

[60] While this general description was attenuated in cross-examination where it became clear that the cooks and cleaners were not quite as free as suggested in direct examination, I cannot accept that there was as little interaction as suggested even after cross-examination. My first reason for this conclusion is that even where one is dealing with independent contractors, those contractors need some specific direction as to what is expected, especially when the contracts are as vague as they are here with respect to specifics.

[61] My second reason for this conclusion is the fact that at the busiest times, according to the evidence, there were up to three cooks under contract simultaneously, and up to five cleaners under contract simultaneously.

[62] While three cooks or five cleaners, whether employees or independent contractors, may well be able to agree most of the time on who will do what and who will work when, there will be times when agreement cannot be reached and when someone will have to give direction. There will also be times when there is more to do than can be done in a fixed period of time and, again, someone will have to give direction as to the order of priorities.

[63] While I am satisfied that a cook or a cleaner could choose to not work a given period if he or she were able to ensure that other cooks or cleaners could cover for him, I do not accept that if the person were unable to do so, they would be able to take that time off without consequences such as their contract being terminated.

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[29] Transcript at page 70.

[64] I cannot see who else, other than the appellant, could be the person to give direction when needed.[30]

[65] As a result, on the issue of control, I must give less weight to Mr. Torn's evidence. His evidence is probably a reflection of the fact that most of the time he worked in Vancouver and was at the mine site on limited occasions. There was more direction given that his evidence would suggest.

[66] Given that there are up to three cooks and up to five cleaners under contract at the same time, and given that there is no mechanism suggested by the evidence whereby independent contractors would know exactly what services are to be provided when or by which they could determine who was to provide what when, I am satisfied that the appellant had the power to control the work as needed.[31]

[67] However, I must deal with one peculiarity in the case of Mr. Siu. The Minister assumed that he "was not supervised, however he did report to Mr. Greasley, the camp manager." The Minister also admitted that "the appellant did not supervise [Mr. Siu] or control how his services were performed or provided."[32]

[68] It is clear from the other assumptions made by the Minister that the Minister assumed certain elements of control such as the assumed requirement to obtain permission before taking time off. Given that, I do not read the assumption that Mr. Siu was not supervised as meaning that there was no control of any sort; it is a statement that he was not watched over on an ongoing basis in the performance of his duties. I also note that that would be consistent with the admission that no control was exercised as to how the services were performed or provided; this admission leaves open whether control *could be* exercised and does not cover control of what work is to be done when.

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[30] It is important to remember in this context that the key in respect of the control test is not whether control is in fact exercised, but whether the payor, the appellant, has the right to exercise it. The power may be exercised only occasionally. However, it is important to distinguish between control of the work being done and exercising quality control over services being provided.

[31] I am also satisfied that this was the power to control the work and not the power to control the quality of the services provided.

[32] See paragraphs 9x) and 1 of the Reply to Notice of Appeal and paragraph 9 of the Notice of Appeal in 2012-5119(EI).

[69] What is the effect of the admissions? It narrows the scope of the control that could be found to have actually been exercised based on the other evidence.[33]

Other factors

[70] Both Mr. Siu and Ms. Jackson generally stayed overnight at the camp where they were provided with room and board during the period where they were working.[34]

[71] There is nothing in the evidence to suggest that Ms. Jackson was at the relevant time in the business of supplying cleaning services to a variety of customers. With one possible exception, there is nothing to suggest that Mr. Siu was providing cooking services to a variety of customers; in the case of the one possible exception, we do not know if Mr. Siu was an employee or an independent contractor.

Analysis

[72] Turning first to intent, the contract is less than clear cut either way. While we have the stated intent of the company, we have only limited evidence of the intent of Mr. Siu and Ms. Jackson. Given that limited evidence of the intent of the two workers, given the absence of any assumption as to what status they considered themselves to have, and given that there is no evidence to suggest that they disputed the failure to withhold income tax, employment insurance premiums or Canada Pension Plan premiums, I conclude that Mr. Siu and Ms. Jackson accepted the arrangement proposed by the appellant, an arrangement that they be independent contractors.

[73] I now turn to the second step, the objective reality.

[74] There are three factors which point towards a contract of employment: the two workers provided no significant tools, they could not hire helpers and they had no chance of loss.

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[33] See also paragraph 79 below.

[34] There was evidence regarding whether there was a pattern to the periods when Mr. Siu and Ms. Jackson worked. I am not satisfied that much turns on it but if one looks at footnotes 17 and 24 above there seems to be a certain pattern.

[75] As to the chance of profit, while they could earn more by working more, this is as indicative of employment as of a contract for services. They could not increase their profitability by being more efficient.

[76] As to control, in the case of Ms. Jackson, I am satisfied that the appellant had the power to control her work.

[77] The result in the case of Ms. Jackson is that the totality of the factors clearly point to a contract of employment.

[78] The situation with respect to Mr. Siu is more complicated because of the Minister's pleadings, especially the admission that the appellant did not control how his services were performed or provided.

[79] However, at most, this means that the control test is of no help in this case.[35] This is for the reasons set out by MacGuigan J.A. in *Wiebe Door* in a passage quoted by the Supreme court of Canada in paragraph 38 of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[36]

> 38 This criterion has been criticized as wearing "an air of deceptive simplicity" (Atiyah, *supra*, at p. 41). The main problems are set out by MacGuigan J.A. in *Wiebe Door*, *supra*, at pp. 558-59:
>
> A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. *In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct*.
>
> [Emphasis added.]

[35] And I am not satisfied that that is the case even though, as a result of the pleadings, I must conclude that the degree of control actually exercised in the case of Mr. Siu is less than in the case of Ms. Jackson.
[36] [2001] 2 S.C.R. 983, 2001 SCC 59.

[80] It is as a result of these problems with the traditional control test that the law has moved to the wider examination of all the factors in determining whether or not there is a contract of employment.[37]

[81] As a result, even if the pleadings forced me to conclude that control was entirely an neutral factor,[38] the factors still point overall to Mr. Siu being in a contract of employment.[39]

Conclusion

[82] As a result, the appeals will be dismissed.

Signed at Ottawa, Ontario, this 31st day of December 2014.

"Gaston Jorré"

Jorré J.

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[37] See paragraphs 5 and 6 above.

[38] As I indicated above in an earlier footnote, I am not satisfied that this is the case.

[39] The appellant referred to the decision of this court in *Therrien v. M.N.R.*, 2013 TCC 116. That case is rather different from this one in a number of ways; it is not applicable here.

There are two very important differences.

First, Mr. Terrien, a cook, was hired to "run the show" with respect to food services at the resort where the work was done. Not only did he oversee the preparation of food, the creation of the menu, the selection of suppliers, negotiation with suppliers and ordering the food, but he also hired, trained and directed all of the kitchen employees as well as all of the serving staff. He had complete control of the food service operation.

The situation here is quite different. Mr. Siu was not responsible for all the other kitchen staff; the other cooks were hired by the Appellant on the same terms as he was. He could not, for example, unilaterally decide that another particular cook would work on a particular day when he would choose to be absent.

Secondly and very importantly, Mr. Terrien was paid a flat amount per week; if he could run the food service while spending less time at it, he could increase the profitability of every hour worked. Indeed, according to the decision, that is what happened. Mr. Terrien worked fewer and fewer hours running food services as the months progressed thereby increasing the profitability of each hour worked.

Here the situation was quite different, if Mr. Siu had been able to do what he needed to do in less time because he found a more efficient way of doing it, his income would have fallen.

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