

Docket: 2013-3312(CPP)

BETWEEN:

ROYAL COLUMBIA DEVELOPMENT CORP.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

KEVIN KRAUS,

Intervenor.

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Appeal heard on common evidence with  
*Royal Columbia Development Corp.* 2013-3313(EI) on March 18, 2014  
and November 6, 2014, at Vancouver, British Columbia

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

|                             |                |
|-----------------------------|----------------|
| Counsel for the Appellant:  | Dimitra Bizos  |
| Counsel for the Respondent: | Holly Popenia  |
| Counsel for the Intervenor: | Erin Pritchard |

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**JUDGMENT**

WHEREAS at the outset of the hearing, counsel for the Respondent appeared and advised that the Minister had consented to the Appellant's appeal on the basis that the Intervenor, Kevin Kraus, was not employed in insurable earnings during the period described below;

AND WHEREAS the Intervenor advised that he did not agree with the Respondent's consent;

AND WHEREAS the matter proceeded to hearing on the basis that all of the parties to the appeal were not in agreement;

NOW THEREFORE THIS COURT ORDERS THAT the Intervenor, Kevin Kraus, was not employed in insurable employment with the Appellant during the period of October 5, 2011 to December 31, 2011 and from January 1, 2012 to December 31, 2012 and orders that such a determination be referred back to the Minister to afford a decision to be issued in accordance herewith.

Signed at Ottawa, Canada, this 16th day of January 2015.

“R. S. Boccock”

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Boccock J.

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Counsel for the Appellant: Dimitra Bizos  
Counsel for the Respondent: Holly Popenia  
Counsel for the Intervenor: Erin Pritchard

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**JUDGMENT**

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Signed at Ottawa, Canada, this 16th day of January 2015.

“R. S. Boccock”

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Boccock J.

Citation: 2015TCC12  
Date: 20150116  
Dockets: 2013-3312(CPP)  
2013-3313(EI)

BETWEEN:

ROYAL COLUMBIA DEVELOPMENT CORP.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

KEVIN KRAUS,

Intervenor.

## **REASONS FOR JUDGMENT**

Bocock J.

### I. Introduction

[1] The circumstances surrounding the dispute between the parties are well known and well litigated before this Court; the positions taken by the parties before the Court are more unique. An original determination was made by the Minister of National Revenue that Mr. Kraus, the Intervenor, and the Appellant, Royal Columbia Development Corp. (“Royal Columbia”) were engaged in a contract for services as independent contractors. In response, Mr. Kraus provided information to the Minister to assist the investigation. This caused the Minister to alter her view of the relationship to that of a contract of service or employee/employer.

[2] In response, Royal Columbia appealed the matter before this Court. Just prior to the originally scheduled hearing of the appeal, the Minister agreed with the Appellant, once again, that the relationship was one of a contract for services or independent contractor. Accordingly, the Minister then resiled from participating further in the hearing before the Court. Instead, Respondent’s counsel simply indicated to the Court that the Minister is in agreement with the Appellant. On the

other hand, Mr. Kraus continues to dispute that the relationship is one of a contract for services and argues instead that the relationship is one of a contract of service or employee/employer.

## II. The Overarching Legal Test

[3] There is no dispute with respect to the legal test that ought to be applied in the determination of whether there is a contract for services or a contract of service. While the facts are more or less emphasized or nuanced, as between the parties, the process for the determination of the central question remains constant: whether a person has been engaged to perform the services is performing them as a person in business on his or her own account (*Weibe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, (“*Weibe Door*”)) as approved by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59?

[4] The two-step process for such a determination is firstly to evaluate the subjective intention of the parties established or reflected in writing or by action at the outset, and secondly, to analyze the factual situation concerning the conduct of the parties to determine whether it supports or disavows the subjective intention (*TBT Personnel Services Inc v. Canada*, 2011 FCA 256; *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85). In comparing the objective reality to the subjective intention, the Court is required to look through the window of the *Weibe Door* factors: control, ownership of tools, ability to subcontract, opportunity to profit and risk of loss. After conducting that examination, the Court must determine on balance whether the person is in business on his or her own account.

## III. Facts

### A. Initial Hiring of the Worker

[5] Mr. Gu was the primary shareholder and controlling mind of Royal Columbia. Mr. Gu testified that, originally, Mr. Kraus was an employee with Hikea Homes, but after that company experienced financial difficulties, Mr. Kraus was hired to provide his work to Royal Columbia. Mr. Kraus had experience in factory design and pre-fabricated framing. He was primarily interviewed by and negotiated with Mr. Gu. Mr. Gu testified that the parties intended that Mr. Kraus would attend to the design, operations, and technology while Mr. Gu would attend to the marketing of the new business. In advance of formulating and rendering that business into an operational state, it was first necessary to construct and assemble a

building truss and framing factory equipped with a production line. Mr. Gu testified that it was in this context that he formulated an intended business relationship with Mr. Kraus. Mr. Gu further testified that Mr. Kraus was to receive a draw or advance of \$4,000 a month, later, at Mr. Kraus' request, raised to \$5,000 a month. Such amounts would be the subject of invoices rendered by Mr. Kraus, upon which GST was charged. That process commenced in September of 2011 and by October or November of 2011, the parties commenced procuring and assembling the factory and the respective rendering and paying of invoices which tracked the various labour contributions of Mr. Kraus.

[6] Mr. Kraus, in his testimony, indicated that there was no written contract, but his services were simply a continuation of his previous employment with Hikea Homes. His service and basis of retainer were very similar to that of any other employee employed by the Appellant (one of whom included Mr. Kraus' wife). Mr. Kraus was adamant that there was no initial discussion surrounding a business relationship and that any discussions which did occur were inchoate and gave rise to no identifiable commercial or business establishment steps being undertaken. In contrast, when completing a questionnaire for the Canada Revenue Agency, Mr. Kraus did indicate that, at the outset, he thought he was self-employed and in the process of establishing a partnership with the Appellant. Mr. Kraus also provided in his questionnaire evidence of an intention that his ownership share in any new business was to be 15%. A limited company would be ultimately formed in which Mr. Kraus would own a 50% interest, with Mr. Gu owning the balance.

## B. During the Work Term

[7] Similar to the disparate view of the relationship at the outset, testimony by Mr. Gu and Mr. Kraus described differently the work during its currency. In the context of each of the relevant *Weibe Door* factors, the following facts were offered by either Mr. Gu or Mr. Kraus:

### (1) Control

[8] From a photograph of the seating arrangement on the floor of the factory, it would seem that Mr. Kraus and Mr. Gu sat in very close proximity to each other as opposed to their joint proximity to other employees. Mr. Kraus' hours of work were extensive and extra hours were given volitionally. There were no additional wages paid for the considerable hours related to the greater-than-normal work week contributed by Mr. Kraus. Mr. Kraus was partially a supervisor of the production process, retaining and reserving unto himself elements of discretionary

approval related to various production stages of the manufacturing processes at the business premises. To that end, Mr. Kraus would independently attend trade shows for the purposes of marketing the business. He engaged in continuous provision of uninterrupted service during the period for which he rendered invoices. Upon the rendering of invoices by Art Technology (a business name under which Mr. Kraus undertook his services), cheques paid by Royal Columbia to Mr. Kraus referenced “contract work” on their face. Such practice is consistent with the reference line in other cheques issued to third party contractors engaged in contracts for service with Royal Columbia.

[9] In contrast, the ostensible operations manager for Royal Columbia clearly perceived that Mr. Kraus was subject to the operation manager’s overall supervision when present in the plant. A chart outlining the reporting requirements of employees prepared by the operations manager clearly envisaged that he supervised Mr. Kraus. In contrast, a much more general production flow chart indicated that it was Mr. Kraus who was effectively a lead decision maker in the work process, reposed with approval during at least two distinct and separate lock-steps in the work flow.

### (2) Ownership of Tools

[10] In respect of ownership of tools, the evidence was that Mr. Kraus provided his own hand tools, but that large equipment and vehicles were supplied by Royal Columbia, including Mr. Kraus’s computer required for the purposes of design. On the other hand, Mr. Kraus provided testimony that he provided certain tools he owned to Royal Columbia in order for Royal Columbia to carry on and complete the business. These tools provided by Mr. Kraus were utilized by other workers of Royal Columbia.

### (3) Ability to Subcontract

[11] The issue of subcontracting was not in issue. On balance, the evidence indicated that neither party directed a mind to such an issue.

### (4) Opportunity to Profit

[12] It is within this key factor, that the facts relating to the inchoate business venture must be analyzed. There was evidence that a name search was undertaken by Mr. Kraus with respect to the proposed business. Mr. Kraus testified that he had input into the construction of the plant and also with respect to the hiring of



employees for the ultimate company. During business negotiations, which became more pointed towards the end of the relationship between he and Mr. Gu, Mr. Kraus expressed in writing that he ought to have been allowed more latitude “to continue making money for both himself and Mr. Gu.” There was evidence that Mr. Kraus received quotations in his own name related to Royal Columbia’s truss business. This is also consistent with the fact that third parties occasionally generated invoices in favour of Mr. Kraus on behalf of Royal Columbia. Similarly, although the evidence was not entirely clear, business cards were produced, at least in draft, in which the company described Mr. Kraus as a director of Royal Columbia. As well, during the work period a draft partnership agreement was prepared by Mr. Kraus outlining proposed business terms. Additionally, upon cross-examination Mr. Kraus indicated that he had anticipated receipt of profit in relation to the planned new business.

#### (5) Risk of Loss

[13] Mr. Kraus admitted on cross examination, through the questionnaire he had provided to the Minister, that he had accepted lower wages in consideration of a share of profits in the new business and thereby in the process placed an otherwise greater salary at risk. This was consistent with Mr. Kraus’ admission that another employee had refused to become a prospective business partner of Mr. Gu and instead received a higher salary.

### IV. Analysis

#### A. Subjective Intention of the Parties

[14] Mr. Gu’s evidence was unequivocal that, at the outset, the parties had intended to form an inchoate business relationship culminating in the formulation of a partnership in which Mr. Gu and Mr. Kraus would be partners. Mr. Kraus grudgingly admitted this on cross examination. Notwithstanding that no agreement existed from Mr. Kraus’ perspective, Mr. Kraus nonetheless indicated in the CRA questionnaire which he completed that there was an intention to earn business profit both for he and Mr. Gu within their new mutual business relationship.

#### B. Objective Reality during the Course of Work

[15] While the initial intention of the parties may have been that the parties would be engaged in a contract for services or independent contractor relationship, the question remains: what does the objective reality do to either disavow or

support this subjective intention? On the issue of control, there is evidence that Mr. Kraus was treated as an employee by the operations manager who believed that his own supervision was necessary for the services and work being provided by Mr. Kraus to Royal Columbia. On the other hand, there were dealings between Mr. Gu and Mr. Kraus regarding the development of the new framing plant and the business related to it. There is also evidence that Mr. Kraus had the power on behalf of the fledgling business to enter into contractual negotiations and order various component parts and equipment for the new factory. Mr. Kraus' salary draw, the method of billing, the fact the salary was invoiced by his own business, the nature of the salary increase upon request, all reflect the tracking of contributions of capital to, and withdrawal of capital from, the proposed business. On balance and in the factual context, this suggests that Mr. Gu and Mr. Kraus were engaged during the work term in, under the auspices of support from Royal Columbia, in the formulization and establishment of a new business rather than the retainer by Royal Columbia of Mr. Kraus as its employee.

#### C. Tools

[16] In terms of the evidence related to tools, use of large tools and computers were provided by Royal Columbia. On the other hand, there was a contribution of certain tools for the business by Mr. Kraus and use of those by other workers. On balance, this particular *Weibe Door* factor would appear to be equivocal.

#### D. Subcontract of Services

[17] While this issue was largely not anticipated by the parties, it is noted that Mr. Kraus was instrumental in having his wife and others hired as employees of Royal Columbia. This is not customarily consistent with an employer/employee relationship unless someone is primarily employed within a human resources or personnel role for an employer, which Mr. Kraus clearly was not.

#### E. Opportunity to Profit and Risk of Loss

[18] With this particular factor, clarity comes to bear on the issue of whether Mr. Kraus was an employee or an independent contractor. By Mr. Kraus' own admission, at the outset the parties had intended to establish a relationship of entity to entity for the purposes of constructing and formalizing an ongoing business relationship. During the interim building phase, Mr. Kraus admitted that he was to be paid 15% of the profits and that he compromised the quantum of his base salary in anticipation of those future profits. Once the facility was completed, the

inchoate business relationship would become settled and a new entity, either a corporation or partnership, would be established under which Mr. Gu and Mr. Kraus would have equal ownership. Moreover, in the context of the operations manager and his relationship with Mr. Kraus, it is not clear from any of the documentation that the operations manager was ever intended to be a part owner of the new business, either at the outset or upon its full establishment after the construction of the framing plant. This treatment of Mr. Kraus by the operations manager is perhaps explained because an interim relationship had to exist within Royal Columbia because the new business itself was a recipient of capital and in-kind contributions from Mr. Gu, through Royal Columbia. It was in this light that one may see the quantifiable capital contributions of Mr. Gu, on one hand, and the quantifiable labour contributions of Mr. Kraus, on the other.

[19] The final convincing fact for the Court, which points towards a contract for services, is that the arrangement did not ultimately proceed because Mr. Kraus failed to tender or commit the additional capital contributions at the final stages of the business launch. During this start-up period, Mr. Kraus was extracting from the potential business a draw or salary which was to be tallied during the final reconciliation of capital contributions and percentages of profit. This is consistent with Mr. Gu's recollection of the need to track invoices and contributions. This practice is also buttressed by Mr. Kraus' own admission that a business was intended and respective interim contributions would be tracked. As further evidence, Mr. Kraus admitted that he was providing equal and perhaps lopsided in-kind contributions in the formation of the business, not just at the outset, but during the work period.

[20] In summary, this objective reality is not an instance where a worker's tasks were dictated by manuals and carried out under the supervision of the employer, where rates of pay were fixed and hours scheduled by Royal Columbia and where there were no financial risks imposed on, or investments required of, this particular worker. On the contrary, the Court finds that the worker and Mr. Gu through Royal Columbia, at the very inception, had a subjective intention to engage in a relationship of equals (or close to equals) for the purposes of establishing, after an interim period, a business relationship culminating in the finalization of a formalized business structure after construction of a framing plant and production line. While there were some factual inconsistencies, the evidence on balance indicates that the legal relationship between Royal Columbia and Mr. Kraus was that of an independent contractor relationship as opposed to that of employee-employer. Mr. Kraus was, in fact, engaged on his own account in the business of

working, admittedly within the existing business structure of Royal Columbia, with Mr. Gu in a business venture.

[21] For these reasons, the appeal is allowed and the original decision of the Minister appealed from is vacated based upon the facts now before the Court.

Signed at Ottawa, Canada, this 16th day of January 2015.

“R. S. Boccock”

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Boccock J.

CITATION: 2015TCC12  
COURT FILE NOS.: 2013-3312(CPP)  
2013-3313(EI)  
STYLE OF CAUSE: ROYAL COLUMBIA DEVELOPMENT  
CORP AND M.N.R. AND KEVIN KRAUS  
PLACE OF HEARING: Vancouver, British Columbia  
DATE OF HEARING: March 18, 2014 and November 6, 2014  
REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S.  
Bocock  
DATE OF JUDGMENT: January 16 2015

APPEARANCES:

Counsel for the Appellant: Dimitra Bizos  
Counsel for the Respondent: Holly Popenia  
Counsel for the Intervenor: Erin Pritchard

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