Docket: 2004-2966(EI)

BETWEEN:

GLEN MCMAHON
OPERATING ÉPREUVES ILLIMITÉES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MARIA MILAGROS RUANO,

Intervener.

Appeal heard on March 7, 2005 at Montreal, Quebec,

Before: The Honourable S.J. Savoie, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Emmanuelle Faulkner
For the Intervener:	The Intervener herself

JUDGMENT

The appeal is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 5th day of May 2005.

"S.J. Savoie"

Savoie, D.J.

Citation: 2005TCC271
Date: 20050505
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GLEN MCMAHON
OPERATING ÉPREUVES ILLIMITÉES,

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REASONS FOR JUDGMENT

Savoie, D.J.

[1] This appeal was heard in MontrÉal, Quebec, on March 7, 2005.

[2] This is an appeal from a decision of the Minister of National Revenue (the "Minister") whereby he determined that Maria Milagros Ruano, the worker, held insurable employment while working for the Appellant from August 19, 2002 to August 20, 2003, the period under review.

[3] In reaching his decision, the Minister relied on the following assumptions of fact:

a) The Appellant has been incorporated on November 24, 1994; (denied)

b) The Appellant operated a graphic arts business under the name of 'Épreuves Illimitées'; (admitted)

c) During the said period, the Worker worked for the Appellant, as a full-time employee, in the Appellant's office; (denied)

d) The duties of the Worker were:

-to mix the colors
-to cut boxes or business cards
-to make deliveries; (admitted)

e) The Worker generally worked from 9:00 a.m. to 5:00 p.m., for a total of 37.5 hours per week; (denied)

f) The Worker received a salary of $8.00 per hour; (denied)

g) All the equipment, tools and furniture were provided by the Appellant to the Worker; (denied)

h) When she had to use her car, the Worker received an allocation of $0.30 per kilometer from the Appellant; (denied)

[4] The evidence disclosed that the Appellant operates a business under the name of "Épreuves Illimitées" since February 2, 1990.

[5] The worker was hired by the Appellant in 2002 as a full-time employee. Previously, he had turned down her job application because she had sought full-time employment. Instead, he wanted to hire her as a self-employed person under contract. The Appellant disputes that he hired her for full-time employment. They entered into an oral employment contract which provided that she perform her services for the Appellant on a full-time basis, daily from 9:00 a.m. to 5:00 p.m. The Appellant needed an assistant and he agreed to pay the worker $8.00 an hour. She was to be paid time and a half for overtime work.

[6] The worker performed her services at the Appellant's place of business and although she was hired as a full-time employee, there were periods when she was unable to work because the Appellant was absent. The nature of the work to be performed required the services of two people, namely, the Appellant and the worker, as his assistant. The Appellant provided the necessary training for the work she was to perform. All tools required for the work were provided by the Appellant and the worker was paid 30 cents per kilometer for the use of her automobile upon submitting her invoice. According to the worker, the Appellant would sometimes refuse to pay the worker her kilometer rate.

[7] The work schedule was prepared by the Appellant on a calendar which the worker would then fill in with her hours of work. She testified that the Appellant

was meticulous with this schedule, deducting $20.00 off her pay if she took a phone call and compelling her to account for every single minute of her time, otherwise, the time would not be paid. The work of the worker was supervised by the Appellant who, at times, required her to redo the work because it did not meet with his approval. The Appellant replaced the worker on August 20th, 2003 when she left for a vacation in Spain, a trip which she claims he authorized but he denies she even gave him a notice of her intention to make the trip.

[8] The Appellant states that the worker established her own schedule and was free to work the hours she wanted. This is disputed by the worker who insists that she was unable to work alone. The very nature of the work required the participation of two people and she was the assistant in this process. The Appellant states further that the worker took time off for personal matters and had another job during the weekends. The worker confirms that she took another employment in July of 2003, because she wanted to survive. She explains that the Appellant kept reducing her working hours.

[9] The testimony of the worker is corroborated by two former employees of the Appellant. Wendy Boode testified that as an employee of the Appellant, she was expected to be there from 9:00 a.m. to 5:00 p.m. for duties similar to those entrusted to the worker. Further, she stated that she often visited the Appellant's place of business and can state that the worker was there 85% of the time. She added that the worker often made deliveries to her place of business while employed with the Appellant. She added that although she was hired for full-time work, she ended up self-employed because that status was forced upon her by the Appellant. Ms. Boode further stated that her work schedule varied from week to week because the Appellant would often send her home and deduct that time off her pay. All of this is documented in a letter signed by Ms. Boode and filed as Exhibit I-1.

[10] This Court also heard the testimony of Wendy Demongey who turned down full-time employment with the Appellant because she wanted to provide her services as a freelancer for $12.00 an hour. She then provided as a reference the worker's name to the Appellant.

[11] It must be stated that the independent testimony of these witnesses casts a serious doubt on the Appellant's credibility. Furthermore, the Appellant failed to discredit their testimony in his cross-examination. The Appellant also failed to cross-examine the worker on the contents of her memo dated December 3, 2003, received in evidence and filed as Exhibit R-3, wherein she charges that the

Appellant, because of her complaint to *Commission des normes du travail*, threatened her over the telephone, intimidated and blackmailed her.

[12] The Minister determined the insurability of the employment of the worker on the basis of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "*Act*"). The relevant provision reads as follows:

> INSURABLE EMPLOYMENT
>
> 5.(1) Subject to subsection (2), insurable employment is
>
> (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> ...

[13] The Courts have laid down certain criteria under which the circumstances of a particular case may be examined in determining whether the test of insurability has been met. The Federal Court of Appeal in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue – M.N.R.)* [1986] 3 F.C. 553 referred to the test applied by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd*. [1947] 1 D.L.R. 161 when he wrote, *inter alia*, as follows:

> ...In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. ...

CONTROL

[14] The worker had studied plastic art and could make models, etc., but was unfamiliar with the different methods used by the Appellant which is why he provided training to her. The worker was under the constant supervision of the Appellant who had hired her as his assistant and the two would work together, with the worker as the assistant. In other words, she could only perform her services when the Appellant was there. The work of the worker was constantly assessed by the Appellant who, at times, required her to do the work all over again because it was unsatisfactory to him. According to the timesheets, the Appellant controlled

the worker's schedule with minute precision. The Appellant decided when the worker could take her vacation. The worker was dismissed by the Appellant on August 20th, 2003.

OWNERSHIP OF THE TOOLS

[15] All tools, some of which were complicated and were used in the laminating and plastification process, were provided by the Appellant.

CHANCE OF PROFIT AND RISK OF LOSS

[16] The worker could not work weekends for the Appellant because he was absent from the business. She was paid time and a half for overtime. Her remuneration varied from week to week because the Appellant would, at times, send her home and did not pay her for that time. Although at times he was unwilling to do so, most of the time he would compensate the worker for running errands and making deliveries, for her time and a 30 cent per kilometer rate for the distances traveled.

INTEGRATION

[17] Mr. Justice Major went on to explain the notion of integration in the case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983, when referring to the *Wiebe Door* decision, *supra*, he stated at paragraph 40:

> As MacGuigan J.A. notes, a similar general test, known as the "organization test" or "integration test" was used by Denning L.J. (as he then was) in Stevenson Jordan and Harrison, Ltd. v. Macdonald, [1952] 1 The Times L.R. 101 (C.A.), at p. 111:
>
> > One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

And, at paragraph 44, Mr. Justice Major wrote:

> According to MacGuigan J.A., the best synthesis found in the authorities is that of Cooke J. in Market Investigations, Ltd. v. Minister of Social Security, [1968] 3 All E.R. 732 (Q.B.D.), at pp. 73-38 (followed by the Privy Council in Lee Ting Sang v. Chung Chi-Keung, [1990] 2 A.C. 374, per Lord Griffiths, at 382):

> The observations of LORD WRIGHT, of DENNING, L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person on business on his own account?". If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. ...

[18] Later, at paragraphs 47 and 48, he provided further insight into the analysis of the criteria for determining, as in the case at bar, whether there is an employer-employee relationship between the parties when he wrote the following:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. 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.
>
> It bears repeating that the above factors constitute a noon-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.

[19] The Appellant is asking the Court to set aside the decision of the Minister who relied on paragraph 5(1)(*a*) of the *Act* to determine that the worker held insurable employment.

[20] This Court has examined and analyzed the facts which the Minister investigated as well as the evidence both oral and documentary produced at trial under the criteria of the above quoted jurisprudence. This Court is of the view that the Minister's determination with respect to the insurability of the worker's employment is correct and in accordance with the *Act* and the case law. Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois, New Brunswick, this 5th day of May 2005.

"S.J. Savoie"

Savoie, D.J.

CITATION:	2005TCC271
COURT FILE NO.:	2004-2966(EI)
STYLE OF CAUSE:	Glen McMahon operating Épreuves Illimitées and M.N.R. and Maria Milagros Ruano
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	March 7, 2005
REASONS FOR JUDGEMENT BY:	The Honourable S.J. Savoie, Deputy Judge
DATE OF JUDGMENT:	May 5, 2005

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Emmanuelle Faulkner
For the Intervener:	The Intervener herself

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario

For the Intervener: