

Citation: 2003TCC50
Date: 20030307
Docket: 2002-3086(EI)
2002-3087(CPP)

BETWEEN:

ABCO PROPERTY MANAGEMENT INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

**(Delivered orally from the Bench at
Kitchener, Ontario, on February 5, 2003)**

Miller J.

[1] These are appeals by ABCO Property Management Inc., referred to as "ABCO", against determinations by the Respondent that for the period of time from January 1, 2001 to November 29, 2001, Roland St. Louis was employed in insurable employment pursuant to the *Employment Insurance Act* and was employed in pensionable employment pursuant to the *Canada Pension Plan*. ABCO maintains that Mr. St. Louis was, during that period, an independent contractor.

[2] This is, indeed, one of those borderline cases where the forest is not very particularly clear after having scrutinized the trees. The circumstances are as follows. Mr. Paul Hargreaves, the representative of ABCO, described the business of ABCO as property management, seldom owning buildings but simply managing them; up to 13 residential buildings during the period in question. The buildings were owned by a related company. Mr. Hargreaves placed an ad for a superintendent position, to which Mr. St. Louis responded. Mr. Hargreaves offered him a position as a superintendent of a building at 49 Vanier Drive, Kitchener, Ontario, and not the building advertised.

[3] Mr. St. Louis and his common-law wife, Virginia Nowak, signed a contract in December 1998 with Emvan Holdings Inc., the owner of the building, though the document was actually signed by Mr. Hargreaves on behalf of ABCO, the property manager. Paragraph 2 of that agreement, called the "Contractors Agreement", lists the extensive responsibilities of the superintendent, including carrying an emergency pager, showing the premises, cleaning, salting, snow removal, tenant relations, and a fairly lengthy list of other obligations. This provision concludes with the words, "The Contractors agrees (*sic*) to follow all lawful direction given by the Property Manager."

[4] The contract also had the following provision, paragraph 20, and I will read it: Nothing in this Agreement shall be construed as creating an employer/employee or principal/agent relationship between the parties. The Contractors have freely entered into this Agreement on the basis that that they are an independent business entity and have reported this to the Company. The Contractor shall provide all tools necessary to fulfill this agreement.

As well as free accommodation, Mr. St. Louis and Ms. Nowak received \$400 a month, which ultimately went up to \$633 a month by the end of 2001. Both Mr. St. Louis and Ms. Nowak did the work, Ms. Nowak doing the cleaning, other than the heavier work in the basement. She was around more during the day, given Mr. St. Louis' other responsibilities, which I will address shortly.

[5] Mr. St. Louis appears to have been more on-call in the evening with respect to the superintendent position. Mr. Hargreaves indicated that he did not care how they divided their labour. He would occasionally tell them what needed doing, though they appear to have had a routine of how to handle their superintendent duties.

[6] On November 30, 1998, Mr. St. Louis entered a separate contract with ABCO also entitled "Contractors Agreement." Pursuant to this contract, Mr. St. Louis was to provide the duties of "Renovator/Maintenance contractor" at "any building managed by ABCO". Remuneration was on an hourly basis starting at \$10 per hour. There are three particular provisions of this agreement I would like to read. Paragraph 2:

The Contractor agrees that he will carry out duties delegated to him by the Property Manager and that these duties may be changed by the Property Manager at his discretion. The contractor agrees to follow all lawful direction given by the Property Manager.

Paragraph 11:

Nothing in this Agreement shall be construed as creating an employer/employee or principal/agent relationship between the parties. The Contractor has freely entered into this Agreement on the basis that he is an independent business entity and has purported same to the Company. The contractor shall provide all tools necessary to fulfill this contract.

And paragraph 12:

The Contractor shall indemnify the Company and save the Company harmless from and against any liability, irrespective of nature and kind, which may arise out of any action or omission by the Contractor in his performance of the work.

[7] Mr. Hargreaves indicated that ABCO needed someone to work on renovations when the related owners first acquired their properties. Mr. Hargreaves sought Mr. St. Louis' advice on the acquisition of properties as to what might be necessary. Mr. Hargreaves would indicate the nature of renovations to be undergone but left it to Mr. St. Louis as to how to do them. If, for example, cupboards were incorrectly placed, Mr. Hargreaves would require moving them. Materials and supplies for these projects would be acquired by Mr. St. Louis, bought on ABCO's account at places such as Beaver Lumber or a local trader called Frank.

[8] Mr. St. Louis used his own tools unless larger equipment was required, which he would rent, again on ABCO's account. When it was necessary to do some window work and special tools were needed, ABCO loaned Mr. St. Louis the money so he could acquire the tools. Similarly, with vehicles, on two occasions Mr. St. Louis required replacement vehicles. On the first occasion, he borrowed \$4,900 from ABCO to acquire a truck. Both this loan and the equipment loan, he paid off with \$150 monthly payments. He later borrowed \$20,000 from ABCO for a second replacement vehicle, and that loan was to be repaid with \$650 monthly payments. He made approximately \$7,000 worth of payments toward his truck as well as putting another \$3,800 into it for upgrades. This truck was registered to ABCO, though no satisfactory explanation was given as to why.

[9] Mr. St. Louis would go to whatever building he was directed by Mr. Hargreaves. ABCO set the priorities. Mr. St. Louis usually would finish one project before moving on to the next. Mr. St. Louis requested increases in the hourly rate, which usually took some time to get, but the rate did go from \$10 to \$12 to \$16, to \$16.58 an hour. Mr. St. Louis claimed the 58 cents was a gas allowance while Mr. Hargreaves stated it was an increase to cover general expenses. Initially, Mr. St. Louis was paid weekly, then bi-weekly, then monthly; and was required to submit

invoices for the hours worked along with time sheets. Mr. St. Louis did not believe he would be paid without the time sheets, while Mr. Hargreaves maintained that they were for auditor's purposes only, in satisfying the owners the work was being done. The loan repayments would be deducted from the cheques to Mr. St. Louis. The cheques would come from either ABCO or the building owner.

[10] Once when Mr. St. Louis finished a project early, he was given a compressor as a bonus. Mr. St. Louis occasionally submitted invoices for what he called extra hours over and above the 40 hours plus weekly that he indicated was required of him. These extra hour invoices were not always for the one or two-week or one-month pay period.

[11] Mr. St. Louis was a handyman. He did roofing, drywalling, minor electrical and plumbing work. Only one example was given where there was a problem with his work and a roof had to be repaired, for which Mr. St. Louis received his regular hourly rate. Mr. Hargreaves indicated that it was not until later that he suspected the repairs may have been necessary due to a mistake made by Mr. St. Louis. Mr. St. Louis did perform some other handyman-type work for others during the year in question but said it was no more than \$2,000 worth of work for four or five others. Occasionally, Mr. St. Louis needed help and as Mr. Hargreaves would not know whom to hire, it was left to Mr. St. Louis to find assistants. He would get his sons or others to help. They would invoice ABCO directly themselves.

[12] Mr. St. Louis also handled some repairs, though clearly renovations were the bulk of his duties. Mr. Hargreaves stated that he did not supervise Mr. St. Louis' work on a daily basis nor did he set required or rigid hours. Mr. St. Louis felt there was an expectation to be at work at least from 9:00 a.m. to 5:00 p.m.

[13] ABCO bought liability insurance to cover itself for its workers' work. Mr. St. Louis was specifically named in this policy and he rendered an invoice to ABCO for that liability insurance though the premiums were actually paid by ABCO. Mr. St. Louis acknowledged that if something went wrong, it never came out of his pocket. Mr. St. Louis said he took only one and one-half weeks of holidays during the time with ABCO. He would provide backup to the maintenance man when he went on holiday, but no one was able to back up Mr. St. Louis if he wanted to take a break. He acknowledged he could refuse a project but felt that might put his position in jeopardy.

[14] In 2001, Mr. St. Louis' son started a business under his initials SDS. Mr. St. Louis paid for business cards and flyers which had both his and his son's

name and number on them. Mr. St. Louis indicated he was just helping out his son. These cards were left at places such as Beaver Lumber.

[15] Mr. St. Louis sought the help of an accountant to prepare his tax returns. ABCO did not provide T4s. Mr. St. Louis filed his returns on the basis of business income. He said he did what his accountant told him.

[16] Mr. St. Louis decided to leave his renovations' position in late 2001. He was advised by Mr. Hargreaves he could not then keep his superintendent position. He also returned the keys to the truck. There was a small claims dispute between Mr. St. Louis and ABCO regarding the truck. Those are the facts.

[17] Mr. George Voisin, counsel for the Appellant, cited Major J. in *671122 Ontario Ltd. Sagaz Industries Canada Inc.*¹ as establishing the test in these types of cases as follows:

... 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 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.

The factors the Appellant then relies on to support a finding of independent contractor are as follows. First, with respect to the superintendent's position, ABCO did not care whether Mr. St. Louis or Ms. Nowak did the work. Second, ABCO did not control that work. Third, with both positions, ABCO made it clear in the contract they were independent contractors, and Mr. St. Louis agreed. Fourth, Mr. St. Louis was self-trained. Fifth, ABCO did not tell him how to do the work, though did say what work needed to be done and set priorities. Sixth, Mr. St. Louis supplied his own tools. Seventh, Mr. St. Louis worked for others. Eighth, Mr. St. Louis found help,

¹ [2001] 2 C.R. 983 at paragraphs 47 and 48.

though ABCO paid for it. Ninth, Mr. St. Louis sought new business through distributing cards. Tenth, Mr. St. Louis in a minor way negotiated increases. Eleventh, Mr. St. Louis got something extra if he completed projects ahead of schedule. Last, he filed as an independent contractor.

[18] With respect to the question of profit and loss, counsel for the Appellant suggested that that factor had been refined in *Precision Gutters Ltd. v. M.N.R.*² and I quote:

In my view, the ability to negotiate the terms of a contract entails a chance of profit and risk of loss in the same way that allowing an individual the right to accept or decline to take a job details a chance of profit and risk of loss.

Mr. Voisin also relies on Justice Noel's comments in *Wolf v. R.*³ in this factor. The comment is as follows:

... With respect to financial risk, I respectfully agree with my colleagues that the appellant in consideration for a higher pay gave up many of the benefits which usually accrue to an employee including job security.

[19] Finally, Mr. Voisin relies on comments by Décary J. and Noël J. in the *Wolf* decision to the effect that notwithstanding the *Standing v. Canada*⁴ case the parties' intent as set out in their contract is a factor to assist in determining the relationship. As Noël J. said:

... 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.

The Respondent maintains the *Wolf*⁵ comments have not weakened the proposition in *Standing*, which is as follows:

... There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the

² 2002 FCA 207.

³ 2002 DTC 6853.

⁴ [1992] F.C.J. No. 890.

⁵ *supra*, at paragraph 71.

surrounding circumstances when weighed in the light of the *Wiebe Door Services Ltd. v M.N.R.*⁶ test. ...

This passage was quoted with approval in the *Wolf* decision with a preface that the terms of the written contract will only be given weight if they properly reflect the relationship between the parties.

[20] The Respondent looks to the list of factors to determine the real relationship and relies on the following. Firstly, with respect to control, ABCO set the minimum hours required. Mr. St. Louis had to carry a two-way radio. Mr. St. Louis had to submit time sheets. With respect to tools, yes, Mr. St. Louis had some of his own but ABCO provided anything extra by renting equipment. With respect to the helpers, they were paid by ABCO. With respect to the chance of profit and risk of loss, Mr. St. Louis was on a set income for the superintendent's job and an hourly rate for the renovations work. The only way to get more was if he would put in more hours. Mr. St. Louis was even paid to fix mistakes. Mr. St. Louis' requests for increases went unheeded. Personal liability insurance was paid for by ABCO.

[21] Turning to my analysis. There is certainly no dearth of jurisprudence on the issue of whether an individual is an employee or an independent contractor, or put another way, engaged in a contract of service or a contract for services. The test to follow in determining this issue was set out in the oft-cited *Wiebe Door*⁷ case, the four factors to be considered being control, ownership of tools, chance of profit and risk of loss. However, in the more recent Supreme Court of Canada case of *Sagaz*,⁸ the Government has tweaked the test by putting the question more succinctly, which I read earlier as an excerpt from Major J.

[22] Was Mr. St. Louis in business for himself? As in all these cases there are invariably factors that support both sides. It requires a weighing of those factors and an overall common-sense evaluation of the circumstances to answer this question. Before reviewing those factors, I wish to comment on the issue of the importance of the written contract. The *Standing* case has always put the emphasis in these determinations in substance over form. Ms. Neill says that remains correct and that the *Wolf* decision supports that decision. Noël J. has, however, added an interesting

⁶ 87 DTC 5025 (F.C.A.).

⁷ *supra*.

⁸ *supra*.

twist with his comments in the *Wolf* case. It is worth reading a couple of paragraphs from Noël J's. judgment:⁹

I too would allow the appeal. In my view, this is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. 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.

...

This is not a case where the parties labelled their relationship in a certain way with a view of achieving a tax benefit. No sham or window dressing of any sort is suggested. It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding.

[23] As will be clear from my following analysis of the factors, I believe this is a close case. I do not, however, start the analysis by looking at form over substance. But, if after the analysis based on factors suggested by Major J., I am unable to clearly see the relationship, then I am prepared at that point to look at the written contract and to determine what they had really agreed to. This strikes me as a sensible reliance on the written contract; that is, not presuming at the outset that form dictates substance but basically falling back on form in the event of a tie.

[24] Now, looking at the factors. First, the level of control. With respect to the superintendent's position, although Mr. Hargreaves may have occasionally pointed out the odd job, the responsibilities were clearly laid out in the agreement and Mr. St. Louis confirmed that he and Ms. Nowak performed those responsibilities when and how they saw fit. They simply looked after the building. It was not as though they reported to a separate place of employment. They lived at their place of employment and were constantly on call. With respect to the renovations work, ABCO did set the priorities and did indicate what was to be done, where walls were to go, for example.

⁹ *supra*, at paragraphs 122 and 124.

It was clear, however, that Mr. Hargreaves was not a general contractor. He relied on Mr. St. Louis for advice, as well as leaving to Mr. St. Louis how to actually do the work.

[25] I believe Mr. St. Louis' assessment that there was a requirement for a minimum of 40 hours and that generally meant between 9:00 a.m. and 5:00 p.m., but it was also clear that Mr. St. Louis could work well beyond that as he pleased. The two-way radio and the requirement for time sheets do evidence a level of control indicative of employment. Mr. Hargreaves may be right in describing the time sheets as a management tool rather than a prerequisite for Mr. St. Louis' payment, though I can see how Mr. St. Louis might view it differently. My impression of Mr. St. Louis' renovation duties was that he was free to come and go, to get supplies, rent equipment, seek help and do what he needed to do to finish the project. On balance, I find there is no overwhelming element of control to support an employment relationship.

[26] With respect to equipment, Mr. St. Louis brought some tools to the position and with ABCO's financial help acquired some more. ABCO provided the more major equipment requirements by paying for the rental of such equipment. Mr. St. Louis would arrange for such rental.

[27] Mr. St. Louis provided his own vehicles. The issue of the last vehicle is somewhat murky. Clearly, there was a loose arrangement by which Mr. St. Louis borrowed \$20,000 from ABCO to buy the truck, yet the truck was registered to ABCO, and upon termination of the contract was retained by ABCO. Yet, Mr. St. Louis had sole use of the vehicle, put almost \$4,000 into upgrades and was paying ABCO \$650 a month. This is a most unusual arrangement for an employer to enter with an employee. I am satisfied this major item of equipment effectively belonged to Mr. St. Louis. The equipment factor points on balance to an independent contractor arrangement.

[28] With respect to helpers, Mr. St. Louis found the helpers and ABCO paid them. Had Mr. St. Louis paid them and invoiced ABCO as part of his invoice this factor, frankly, would have pushed the independent contractor position out in front. The fact Mr. Hargreaves looked to Mr. St. Louis to provide required help still weighs, but to a lesser degree, in favour of an independent contractor arrangement.

[29] With respect to risk, Mr. St. Louis' comment that if something went wrong, it never came out of his pocket was quite telling. ABCO carried insurance. ABCO paid

Mr. St. Louis to repair work he may have been responsible for. Mr. St. Louis' exposure to risk seems minimal.

[30] Mr. Voisin says the *Wolf*¹⁰ case has provided a somewhat broader interpretation of risk by suggesting the following:

In consideration for a higher pay, the appellant in the case at bar, took all the risks of the activities that he was engaging in. He was not provided health insurance benefits nor a pension plan by Canadair. He had no job security, no union protection, no educational courses he could attend, no hope for promotion. The profit and the risk factors were his.

Certainly, Mr. St. Louis did not have some of those benefits. He acknowledged that he received no training from ABCO. However, on balance, these types of risk are not as significant in Mr. St. Louis' case as the lack of risk from more work-related matters. I find this factor points to an employment relationship.

[31] Next factor, chance of profit. If Mr. St. Louis worked more hours, he got more pay. There was a minor element of additional remuneration for finishing a project early, though only one example was provided of this. His hourly pay did increase. It is not clear to me whether Mr. St. Louis' requests for increased pay resulted in the increased pay, but certainly he did request more. There is some element, therefore, of negotiation. Hourly payment by itself does not fall strongly one way or the other. On balance, I do not give this factor a great deal of weight.

[32] In regards to the factor of responsibility for investment and management, the only element really to consider in this regard ties back to Mr. St. Louis' investment in his equipment which, given his remuneration, was significant. He borrowed close to \$30,000 to equip himself over a relatively short period of time. This is an indication of owning one's own business.

[33] Next factor, ability to seek other work. Mr. St. Louis did do work for others. Mr. Hargreaves put no restriction on Mr. St. Louis in that regard other than keeping him busy with ABCO work. Mr. St. Louis' involvement with SDS is evidence of further extracurricular work involvement but is not that significant. What is significant is that Mr. St. Louis was free to take other jobs, as he was free to decline projects presented by Mr. Hargreaves, though admittedly according to Mr. St. Louis,

¹⁰ *supra*, at paragraph 87.

that would have been risky. On balance this factor is an indication of an independent contractor.

[34] The last factor that I am prepared to give some weight to is that with respect to the superintendent's position, both Mr. St. Louis and Ms. Nowak were engaged by ABCO. Were they co-employees as Mr. Voisin asked or were they partners? Neither had their own specific job description. They could determine between themselves who was to do what and when. This is not a sign of employment.

[35] So having gone through this exercise, I find there is not a dominant overall view of one relationship versus the other, though the forest is slightly skewed to an independent contractor. I am, therefore, now prepared to fall back on Noel J.'s suggested approach and look at the contract and Mr. St. Louis' conduct. The agreements are called Contractors Agreements with specific wording to the effect it is not a contract of employment. Mr. St. Louis acknowledged he read that provision and understood it. He then went on to file his returns on the basis that he was in business. I find this is sufficient to tip the scales to an independent contractor. Based on a review of the factors and the contract, Mr. St. Louis was in business on his own account.

[36] The appeal is allowed and the matter is referred back to the Minister for redetermination on the basis Mr. St. Louis was neither in insurable employment nor pensionable employment during the period in question.

Signed at Ottawa, Canada, this 7th day of March, 2003.

"Campbell J. Miller"

J.T.C.C.

CITATION: 2003TCC50

COURT FILE NO.: 2002-3086(EI) and 2002-3087(CPP)

STYLE OF CAUSE: ABCO Property Management Inc. and The
Minister of National Revenue

PLACE OF HEARING Kitchener, Ontario

DATE OF HEARING February 4, 2003

REASONS FOR JUDGMENT BY: The Honourable Judge Campbell J. Miller

DATE OF JUDGMENT February 12, 2003

APPEARANCES:

Counsel for the Appellant: George Voisin

Counsel for the Respondent: Jennifer Neill

COUNSEL OF RECORD:

For the Appellant:

Name: George Voisin

Firm: Voisin, Lubczuk Law Firm

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada