

Docket: 2003-1041(EI)

BETWEEN:

DAVID M. MAGLADRY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of  
*David M. Magladry* (2003-1042(CPP)), on October 1, 2003 at Ottawa, Ontario.

Before: The Honourable Justice Gerald J. Rip

Appearances:

Counsel for the Appellant: Alan Riddell

Counsel for the Respondent: Joanna Hill

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JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* ("Act") is allowed and the decision of the Minister, on the appeal made to him under section 91 of that *Act*, is vacated.

Signed at Ottawa, Canada, this 6<sup>th</sup> day of November, 2003.

"Gerald J. Rip"

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Rip, J.

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Appeal heard on common evidence with the appeal of  
*David M. Magladry* (2003-1041(EI)), on October 1, 2003 at Ottawa, Ontario.

Before: The Honourable Justice Gerald J. Rip

Appearances:

Counsel for the Appellant: Alan Riddell

Counsel for the Respondent: Joanna Hill

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JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* ("*Plan*") is allowed and the decision of the Minister, on the appeal made to him under section 27 of that *Plan* is vacated.

Signed at Ottawa, Canada, this 6<sup>th</sup> day of November, 2003.

"Gerald J. Rip"

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Rip, J.

Citation: 2003TCC827  
Date: 20031106  
Docket: 2003-1041(EI)

BETWEEN:

DAVID M. MAGLADRY,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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Docket: 2003-1042(CPP)

AND BETWEEN:

DAVID M. MAGLADRY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Rip, J.**

[1] David Magladry appeals the determinations and rulings of the Minister of National Revenue ("Minister") pursuant to the *Employment Insurance Act* ("Act") and the *Canada Pension Plan* ("Plan"), respectively, that the employment of Raoul Budavari and various other Workers (collectively the "Workers") during the period from October 15, 2001 to February 18, 2002, and between the years 2000, 2001 and 2002, constituted both insurable employment under the *Act* and pensionable employment under the *Plan*. The appellant submits that at all material times the Workers were self-employed independent contractors.

[2] Mr. Magladry testified that he is the sole proprietor of "David Magladry Productions" ("Productions"), a stage and museum lighting design business in Ottawa, Ontario. Productions has been in the business of stage and museum lighting design for 15 years.

[3] For the last 12 years the Canadian Museum of Civilization Corporation ("CMCC") has been a principal client of Mr. Magladry. CMCC contracted with Productions to design, install and tear down lighting for various exhibitions, and productions. In order to fulfill certain aspects of the contract Workers needed to be retained for particular exhibits and productions. Mr. Magladry stated that CMCC would determine the number of Workers required and Mr. Magladry would then contact the Workers from his roster of 20 to 30 technicians. The contacted Workers were free to accept or decline to work at the CMCC; Workers who declined were not penalized. If a Worker who accepted work was unable to continue to work the Worker would contact the booking agent at CMCC, who would in turn find a replacement Worker.

[4] Mr. Magladry stated that the Workers worked without supervision from him and with very little supervision from the CMCC. The Workers would not report to Mr. Magladry and he was rarely, if ever, at the exhibits or projects. The instructions received from CMCC were general instructions in regards to what, not how, work needed to be completed. CMCC staff would assign roles to the Workers and require that the Workers follow a dress code. Usually Workers needed to be dressed in all black, but with high-end jobs CMCC requested the Workers to wear suits and on occasion tuxedos; CMCC would pay for the rental of tuxedos. Mr. Magladry testified that he did not pay for any of these items of clothing, nor did he reimburse the Workers for any items. Mr. Magladry stated that CMCC had the control to terminate a worker.

[5] Mr. Magladry testified that the Workers did not work exclusively for Productions but worked for various other competitors. The Workers were paid on the 1<sup>st</sup> and 16<sup>th</sup> of each month. The Workers received an hourly wage and occasionally a flat rate was negotiated. The Workers had to fill out two time sheets, one for CMCC and one for Productions. CMCC and Productions reviewed the time sheets and the Workers were paid accordingly. The tools used by the Workers consisted of a flashlight, wrench and knife, all owned by the Workers. Additional equipment was provided by CMCC on an as needed basis.

[6] In cross-examination Mr. Magladry stated that he drafted the time sheets used by the Workers. He determined how and when the Workers were paid.

Mr. Magladry testified that he would bring the cheques to the CMCC and he would place them in a cage in the hallway. Mr. Magladry stated that CMCC set the hourly wage for the Workers, CMCC informed him that the wage should be \$16 per hour and that Productions could not charge more than \$20 per hour for each worker. Workers were guaranteed a minimum of four hours work for each day they were called. Mr. Magladry testified that CMCC wanted him to provide the Workers with certain guidelines. These guidelines covered such areas as work attire, no drug use, meal breaks and security check at the CMCC. Mr. Magladry conceded that he provided shirts with the "David Magladry" logo to some of the Workers and that approximately 4 to 5 Workers wore the shirts.

[7] Mr. Denis Daganais testified that he has been working for the appellant from 1996 to 2002. He was a booking agent at the CMCC from 1998 to 1999. He stated that an employee of CMCC, Mark, would make a request for Workers and Mark would provide the start and finish times. Mr. Daganais testified that during his time with the appellant he worked for various other companies, as did other Workers. He stated that there was no supervision of the Workers by Productions; however, the CMCC curator would give directions. He testified that limited training was provided on the initiative of CMCC. Mr. Daganais stated that he had the opportunity to make a profit by negotiating a flat rate with the appellant. On cross-examination Mr. Daganais conceded that a worker could not receive payment for a replacement worker.

[8] Bill Sibitt, a witness for the respondent, testified that his work at the CMCC was his primary source of income in 2002. He stated that he has been self-employed with other companies. He did not negotiate with the appellant deductions from his pay cheque. He stated that from 1999 to 2003 he received a flat rate once and at all other times he was paid at an hourly rate.

[9] Counsel referred me to the reasons for judgment, among others, of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*<sup>1</sup> Major J. agreed with MacGuigan J.A. in *Wiebe Door Services Ltd. v. Minister of National Revenue*,<sup>2</sup> that in considering the various tests to determine if an employer-employee relationship exists, one must always search for the total relationship of the parties. The various test are referred to as (1) control; (2) ownership of tools; (3) chance of profit; and (4) risk of loss. A further test, the integration test, has also been

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<sup>1</sup> [2001] S.C.J. 61, 204 D.L.R. (4th) 542.

<sup>2</sup> [1986] 2 C.T.C. 200, 87 D.T.C. 5025.

applied. This test asks the question “is the person who has engaged himself to perform the services performing them as a person in business on his own account?”

### Control

[10] Respondent's counsel argued that the Workers were subject to a degree of control and supervision. The Workers were paid by the appellant, the appellant established when and how the Workers would be paid. The Workers were required to prepare two time sheets, and were required to wear clothing as instructed by the appellant. Further, the appellant added his own additional guidelines to the CMCC's guidelines and the Workers had to perform the services personally and could not hire others to complete the work.

[11] The evidence does not lead to the conclusion that a sufficient element of control existed. It appears that there were general guidelines the Workers had to follow; however, once at the CMCC's site, the Workers were not supervised by Mr. Magladry. Further, he did not have the right to control the Workers once they were at the CMCC's site; the Workers were controlled by employees of CMCC.

### Ownership of Tools

[12] The evidence does reveal, and the Minister does not deny, that the Workers supplied their own small tools, and that the clients supplied the heavy equipment and other needed supplies.

### Chance of Profit or Risk of Loss

[13] Respondent's counsel argued that the Workers received payment from the appellant in the amount of \$16 to \$20 per hour and that therefore there was no particular risk of loss. In addition the appellant had an agreement with the Workers that he would guarantee them four hours of work.

[14] The set hourly wage is not fatal. Although there was a set hourly wage the hours themselves were not set. A project at CMCC could extend beyond the additional hours, be shorter than expected or be cancelled. In addition, the Workers had no job security, no union protection, and no hope for promotion; in this regard the profit and the risk factors were theirs.

### Integration

[15] The evidence shows that Workers are not an essential or integral part of the appellant's business, but appear to be complementary. The evidence shows that the Workers were free to refuse work and occasionally did so. The evidence is that the Workers were not compelled to exclusively work for the appellant. The Workers were temporary and once the project was completed the Workers were released from their jobs. The Workers would not stay with Productions or a client of Productions unless another project was under way. If there were no projects, then they had to seek other work in the market place.

[16] An examination of the total relationship of the appellant and the Workers describes a relationship not of an employer and its employees but of a person and independent contractors. Each Worker engaged him or herself to perform services for Productions even though he or she may not have entered into the contract in the course of an existing business being carried on by that person.

[17] The appeals are allowed and the decision of the Minister, on the appeals made to him, are vacated.

Signed at Ottawa, Canada, this 6<sup>th</sup> day of November, 2003.

"Gerald J. Rip"

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Rip, J.

CITATION: 2003TCC827

COURT FILE NO.: 2003-1041(EI) and 2003-1042(CPP)

STYLE OF CAUSE: David M.Magladry v. The Minister of National Revenue

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 1, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice Gerald J. Rip

DATE OF JUDGMENT: November 6, 2003

APPEARANCES:

Counsel for the Appellant: Alan Riddell

Counsel for the Respondent: Joanna Hill

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