

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

TAX COURT OF CANADA

IN RE: THE INCOME TAX ACT

2007-926(CPP), 2007-925(EI),

2007-928(CPP), 2007-927(EI),

BETWEEN:

JIM F. MOORE, ANTOINETTE (ARYA) MOORE

Appellant;

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent.

-----

Held before Mr. Justice Paris at the Provincial Courthouse  
in Nelson, B.C., on Wednesday, August 15, 2007.

-----

APPEARANCES:

Mr. J. Moore,

For the Appellants;

Mr. M. Matas,

For the Respondent.

-----

THE REGISTRAR: L. Giles

-----

Allwest Reporting Ltd.  
#1200 - 1125 Howe Street  
Vancouver, B.C.  
V6Z 2K8

Per: H.H. Bemister

REASONS FOR JUDGMENT

(Delivered Orally in Nelson, B.C. on August 15, 2007)

(PROCEEDINGS COMMENCE AT 9:38 A.M.)

JUSTICE: These appeals which were heard on common evidence are from the determinations made by the Minister of National Revenue that both appellants were not employed in insurable or pensionable employment as defined in the *Employment Insurance Act* and the *Canada Pension Plan* by the intervenors, Ms. Ann Gover and Mr. W.D. Main. For Ms. Moore, the period covered by the determinations was from September 1<sup>st</sup>, 2004 to September 28<sup>th</sup>, 2005 and for Mr. Moore, the period covered is December 1<sup>st</sup>, 2004 to September 28<sup>th</sup>, 2005.

The appellants contend that throughout the relevant periods they were employed by the intervenors under contracts of service. The respondent and the intervenors maintain that the appellants were independent contractors engaged by the intervenors under contracts for services. The intervenors are married and were the owners of an apartment complex in Nelson, B.C. During the relevant periods, the appellants worked for the intervenors, Ms. Moore, as a property manager of the complex, and Mr. Moore, as maintenance person, and later on as property manager as well.

The intervenors acquired the apartment

1 complex in June 2004, and in July 2004 the appellants  
2 approached the intervenors to work as property managers  
3 when they were visiting Nelson. The intervenors contacted  
4 the appellants after they had returned home to Victoria  
5 and after an exchange of e-mail messages, on July 30<sup>th</sup>,  
6 2004, the intervenors offered Ms. Moore employment as the  
7 resident property manager, starting September 1<sup>st</sup>, 2004.  
8 Ms. Moore's intended status as an employee was confirmed  
9 in follow-up e-mails from Ms. Gover in August 2004. Ms.  
10 Moore's salary was set at \$2,000 a month with work above  
11 the regular duties of the resident property manager to be  
12 paid at \$15 an hour.

13 Mr. Main testified that in August 2004 he  
14 told Ms. Gover that he did not want to hire Mr. and Ms.  
15 Moore as employees and that he wanted them to be  
16 independent contractors. This information was apparently  
17 not communicated to the appellants until late October  
18 2004, after they had moved with their family to Nelson and  
19 into the apartment complex and begun, in Ms. Moore's case,  
20 her duties as resident property manager.

21 In a letter she wrote to the intervenors at  
22 the time, Ms. Moore said that this change left her without  
23 EI protection, which was a serious concern to her, but  
24 otherwise did not refuse the change. Eventually on  
25 December 15<sup>th</sup>, 2004 a written contract entitled "Management

1 and Basic Cleaning Contract" was entered into by the  
2 intervenors and Ms. Moore, who was shown as doing business  
3 as Expect Moore Property Management. The contract  
4 purportedly was effective from September 1<sup>st</sup>, 2004 to  
5 August 31<sup>st</sup>, 2005.

6 Mr. Moore did not have a written contract  
7 with the intervenors, although a proposed draught of a  
8 maintenance contract dated October 24<sup>th</sup>, 2004 was put into  
9 evidence. It showed a term from September 1<sup>st</sup>, 2004 to  
10 August 31<sup>st</sup>, 2005. However, Mr. Moore said that he did  
11 not perform any paid maintenance work for the intervenors  
12 until after November 2004. This coincides roughly with  
13 the period of work covered by the Minister's determination  
14 which started December 1<sup>st</sup>, 2004. Mr. Moore's evidence  
15 that he did not work for, or get paid by the intervenors  
16 prior to December 1<sup>st</sup>, 2004 was not seriously challenged  
17 and I accept that his work started at that point.

18 Finally, a new contract entitled  
19 "Management and Basic Cleaning Contract" was entered into  
20 July 29<sup>th</sup>, 2005 between the intervenors and both Mr. and  
21 Ms. Moore doing business as Expect Moore Property  
22 Management for the period September 1<sup>st</sup>, 2005 to August  
23 31<sup>st</sup>, 2006. However, in mid-September 2005 the intervenors  
24 terminated the contract and the appellants and their  
25 family vacated their two apartments at the complex.

1                   The contracts themselves will form  
2 appendices to these reasons.

3                   I'll deal separately with the question of  
4 whether the work done by Mr. and Mrs. Moore for the  
5 intervenors was done under a contract of service, or a  
6 contract for services. The relevant considerations in  
7 making this determination are set out by the Supreme Court  
8 of Canada in the *Sagaz* decision cited by counsel for the  
9 respondent at paragraph 47. And I read:

10                   "The central question is whether the person who  
11 has been engaged to perform the services has  
12 performed them as a person in business on his  
13 own account. In making this determination, the  
14 level of control the employer has over the  
15 worker's activities will always be a factor.  
16 However other factors to consider include  
17 whether the worker provides his or her own  
18 equipment, whether the worker hires his or her  
19 own helpers, the degree of financial risk taken  
20 by the worker, the degree of responsibility for  
21 investment and management held by the worker,  
22 and the worker's opportunity for profit in the  
23 performance of his or her tasks."

24 The terms and conditions of the work performed by Ms. Moore  
25 for the intervenors from September 1<sup>st</sup>, 2004 to August 31<sup>st</sup>,

1 2005 is set out in Exhibit A-1. The following points, in my  
2 view, indicate the existence of a level of control by the  
3 intervenors over her work that is more consistent with a  
4 contract of service than a contract for services.

5           Firstly, Ms. Moore was required to  
6 personally perform all the management and cleaning duties  
7 listed in the appendices to the contract, except that she  
8 was permitted to use a relief manager for weekends and for  
9 a two-week holiday period. Even in the case of weekend  
10 relief, Ms. Moore was only permitted to have Mr. Moore  
11 perform the service.

12           While the evidence showed that Ms. Moore  
13 may have used others to do some of the work required by  
14 her contract, under the terms of the contract, the  
15 intervenors had the power to require her to do the work  
16 personally. It is the right to control, rather than the  
17 exercise of the right that is material.

18           Secondly, Ms. Moore was required to reside  
19 on site and be available to take emergency calls from the  
20 tenants, and to be available to show suites to perspective  
21 tenants from 9:00 a.m. until 8:00 p.m. seven days a week.  
22 The requirement of Ms. Moore's presence on site is a  
23 further indicia of control by the intervenors.

24           Thirdly, the details of Ms. Moore's work  
25 are set out in relatively precise terms in the appendices

1 to the agreement and set out specific procedures that must  
2 be followed for many tasks, including the provision of  
3 rent rolls, preparation of petty cash reports, the filing  
4 of forms, and following procedures when tenants vacated  
5 the property, and the use of specific filing systems and  
6 forms, and meetings with the bookkeeper and evictions. The  
7 cleaning schedule is also set out in detail. These  
8 requirements, in effect, amounted to control over the  
9 manner in which Ms. Moore did the work.

10 Fourthly, the contract required Ms. Moore  
11 to meet with the intervenors' bookkeeper Beryl Knight in  
12 the first ten days of each month to view vacant  
13 apartments. It appears that this was intended as a means  
14 of control or supervision of the work to be done, or  
15 actually done, by Ms. Moore, cleaning the vacant  
16 apartments. This was confirmed by the evidence of Mr.  
17 Main who said it was his and Ms. Gover's expectation that  
18 Ms. Knight would periodically inspect Ms. Moore's work.  
19 This, though, did not work out.

20 In any event, it is not material whether  
21 the intervenors exercised this right of inspection of the  
22 suites. It is sufficient to say that they had the right  
23 to do so under the contract.

24 It is somewhat difficult to determine the  
25 level of actual supervision and control exercised by the

1 intervenors over matters not covered in the contract. It  
2 is apparent that there were frequent communications  
3 between the Moores and Main and Gover, because of the many  
4 problems presented by the complex. Also Mr. Main was  
5 staying at the complex on an average of ten nights per  
6 month during the year, and he admitted, he could have left  
7 notes for Ms. Moore about things that he felt needed to be  
8 done or that were not being properly done, at least in the  
9 fall of 2004 until he became involved in a major  
10 renovation of the complex with CMHC funding.

11 Ms. Gover also provided specific  
12 instruction on occasion by e-mail. It seems that the  
13 Moores wished to keep Mr. Main and Ms. Gover informed  
14 about what was going on, and Mr. Main and Ms. Gover were  
15 appreciative of their input and suggestions, and responded  
16 with directions when asked. Overall, however, given the  
17 particular terms of the written contract, I am satisfied  
18 that Mr. Main and Ms. Gover retained a degree of control  
19 over Ms. Moore's work that points to the existence of a  
20 contract of service.

21 With respect to the ownership of tools  
22 required for the job, the evidence shows that Ms. Moore  
23 provided a vehicle, a computer and a filing cabinet, while  
24 all other equipment and supplies were furnished by the  
25 intervenors including a phone. Ms. Moore was reimbursed



1 for gas for the vehicle. It is not clear how much use was  
2 made of it, or of the computer, or the cost of these  
3 items. Ms. Moore used part of her apartment, as well, as  
4 an office, but paid a reduced rent for it. This test does  
5 not point strongly in either direction.

6           The next factor is the degree of financial  
7 risk undertaken by Ms. Moore. She had no financial risk  
8 or responsibility for investment and no real chance of  
9 profit or risk loss from her work for the intervenors.  
10 Under the first contract she had a fixed salary, or hourly  
11 rate with extra work, and was not permitted to subcontract  
12 her work except in very limited circumstances as mentioned  
13 above. Also the contract, by its terms, indemnifies Ms.  
14 Moore from any loss arising from carrying out the  
15 contract. I refer to paragraph 12 thereof. This factor  
16 tends to show Ms. Moore was an employee rather than in  
17 independent contractor.

18           Another consideration is the intentions of  
19 the parties to the contract. The evidence in this regard,  
20 again is somewhat problematic. It appears that for the  
21 first months of the contract the parties considered Ms.  
22 Moore to be an employee. However, by late October 2004  
23 the intervenors let Ms. Moore know they wished her to be  
24 an independent contractor instead. With some reluctance,  
25 she agreed. However, there is no evidence that any of the

1 terms of her contract changed after October 2004,  
2 therefore this appears to be a case where the parties, or  
3 at least the intervenors, believed that they can control  
4 the nature of their legal relationship simply by virtue of  
5 the name they give to it. However, as stated by the  
6 Federal Court of Appeal in the *Royal Winnipeg Ballet v.*  
7 *the Queen* case, at paragraph 56:

8 "There is ample authority for the proposition  
9 that parties to a contract cannot change the  
10 legal nature of that contract merely by  
11 asserting that it is something else. The  
12 elements of the contract must be examined to  
13 determine whether the parties did, in fact,  
14 create the relationship they intended."

15 For the reason already noted above, I am of the view that  
16 the relationship created by the contract between Ms. Moore  
17 and the intervenors for the period September 1<sup>st</sup>, 2004 to  
18 August 31<sup>st</sup>, 2005 was a contract of service and that Ms.  
19 Moore was not in business on her own account. The insertion  
20 of the business name was a device intended to create the  
21 impression that she was running her own business, while the  
22 terms of the contract did not support that conclusions.

23 The second contract, dated July 29<sup>th</sup>, 2005  
24 contains two material differences from the first contract.  
25 It is between both the appellants and the intervenors

1 without specifying which tasks are to be done by Mr. or  
2 Ms. Moore. Next the rate of pay has been changed to a  
3 percentage of gross rents with a minimum salary. This  
4 introduces a chance of profit that was not present in the  
5 first contract. However, the contract still required  
6 personal service and that the appellants live on site.  
7 The duties of the appellant are set out in the same terms,  
8 and the situation regarding the ownership of tools,  
9 provision of supplies is still the same. Overall, in my  
10 view, this contract is also one of service rather than a  
11 contract for services for both appellants.

12 Finally, it remains to be determined  
13 whether Mr. Moore was an employee or independent  
14 contractor from December 1<sup>st</sup>, 2004 to August 31<sup>st</sup>, 2004. No  
15 written contract was executed between the parties. The  
16 draft contract is of little assistance in determining the  
17 rights and obligations of Mr. Moore and the intervenors  
18 since it was never signed by Mr. Moore. Mr. Moore's  
19 statement that it was verbally binding is not accepted,  
20 because if he had accepted the contract, there would have  
21 been no reason not to sign it. Furthermore, such an  
22 allegation was never put to Mr. Main or Ms. Gover for  
23 confirmation.

24 The evidence produced at the hearing showed  
25 that Mr. Moore carried out small repairs and minor

1 renovations at the apartment complex for \$15 an hour.  
2 There was no evidence that he was paid by the intervenors  
3 for any property management work done during that period.  
4 Mr. Moore's evidence was that Ms. Moore was responsible  
5 for the property management work set out in her contract,  
6 except for weekend relief work, but he wasn't paid by the  
7 intervenors for that.

8                   Mr. Moore invoiced for his work and no  
9 deductions were taken from the payments he received. The  
10 Minister assumed, in determining that Mr. Moore was an  
11 independent contractor, that he set his own schedule,  
12 priorities and timelines for completing the repairs and  
13 renovations. Mr. Moore alleged that the e-mails from Ms.  
14 Gover demonstrate control and supervision over his work.  
15 The only e-mails that deal with Mr. Moore's work, however,  
16 is Exhibit A-25 written or sent on June 18<sup>th</sup>, 2005  
17 instructing Mr. Moore not to do certain things in light of  
18 the CMHC renovations being planned and carried out.

19                   With respect to set work times, Mr. Moore  
20 said he had to work when units were vacated. Some members  
21 of Mr. Moore's family assisted him with the work, but they  
22 were paid directly by the intervenors and most tools and  
23 equipment were supplied by the intervenors. Mr. Moore  
24 used his van to pick up supplies and was paid for gas.  
25 Mr. Main said Mr. Moore was much more experienced than

1 himself and that he could not tell Mr. Moore how to do the  
2 work required. He also said that he did not supervise Mr.  
3 Moore because he was busy with the CMHC renovations.

4 In cross-examination Mr. Main was only able  
5 to recall one instance where he had shown Mr. Moore how he  
6 wanted a particular job, some window repairs, done. Mr.  
7 Moore gave two other examples where Mr. Main had input in  
8 the way a particular job was done, once in the type of  
9 paint that was to be used, and once regarding the removal  
10 of an asbestos tile floor. On the basis of the evidence  
11 that was presented, I'm satisfied that neither intervenor  
12 exercised any significant control, correction, or  
13 supervision over the work done by Mr. Moore. The few  
14 examples cited by him appear insignificant in light of the  
15 amount of work done by him over the period.

16 Also, given Mr. Moore's experience, and Mr.  
17 Main's occupation with other matters, it is much more  
18 likely that Mr. Main did not direct or supervise Mr. Moore  
19 when he was at the complex.

20 I'm also satisfied that Mr. Moore did not  
21 work fixed hours but worked when needed and set his own  
22 job priorities in order to look after the complex. On the  
23 other hand, the tools were supplied mostly by the  
24 intervenors, except for the appellant's fan, and the wages  
25 of helpers for Mr. Moore were paid by the intervenors.

1                   No evidence was led about who was  
2 responsible for the cost of redoing any work that was not  
3 properly done. No other risk of loss was shown to have  
4 been incurred by Mr. Moore and no investment of capital  
5 was required. There did not seem to be any restrictions  
6 placed on Mr. Moore that would have prevented him from  
7 working for others during this time, but Mr. Moore said he  
8 was kept too busy at the complex to work elsewhere.

9                   Finally, with respect to the intention of  
10 the parties, it is clear that the intervenors, from mid-  
11 October 2004 on made it clear to both Mr. and Ms. Moore  
12 that they wished to engage them as independent contractors  
13 rather than employees. Mr. Moore would have been aware of  
14 that when he began working on December 1<sup>st</sup>, 2004. There  
15 was no evidence that he objected to this arrangement, or  
16 to the fact that no deductions were taken from his pay. I  
17 read into this contract an acceptance by Mr. Moore of the  
18 status as independent contractor.

19                   In light of the absence of control and  
20 supervision, and the absence of any other factor which  
21 would counter the common intention that Mr. Moore  
22 performed his services from December 1<sup>st</sup> to August 31<sup>st</sup>,  
23 2005 for the intervenors as an independent contractor, I  
24 find that he was, in fact, an independent contractor at  
25 the material times, rather than an employee of the

1 intervenors.

2 For all of these reasons, therefore, the  
3 appeals of Ms. Moore are allowed, and the appeals of Mr.  
4 Moore are allowed only to the extent that the period from  
5 September 1<sup>st</sup>, 2005 to September 28, 2005 was worked as an  
6 employee rather than an independent contractor.

7 Thank you.

8 (PROCEEDING CONCLUDED AT 9:58 A.M.)

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25