

Citation: 2008 TCC 562

Dockets: 2007-4193(EI);
2007-4196(CPP)

BETWEEN:

10TATION EVENT CATERING INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

CERTIFICATION OF TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Toronto, Ontario, on August 28, 2008, be filed.

“N. Weisman”

Weisman D.J.

Signed at Toronto, Ontario, this 22nd day of October, 2008.

**Court File Nos. 2007-4193(EI);
2007-4196 (CPP).**

TAX COURT OF CANADA

BETWEEN:

10TATION EVENT CATERING INC.

Appellant

- and -

THE MINISTER OF NATIONAL REVENUE

Respondent

**TRANSCRIPT OF DECISION
RENDERED BY THE HONOURABLE MR. JUSTICE WEISMAN**
at Courts Administration Service, Room 6C,
180 Queen Street West, Toronto, Ontario
on Thursday, August 28, 2008

APPEARANCES

Mr. Howard J. Alpert

for the Appellant

Mr. Justin Kutyan

for the Respondent

Also Present:

Mr. William O'Brien
Ms Shirley Sereney

Registrar
Court Reporter

A.S.A.P. Reporting Services Inc. 8 2008

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1 Toronto, Ontario
2 --- Upon commencing on Thursday, August 28, 2008
3 at 2:00 p.m.

4 JUSTICE WEISMAN: These appeals
5 concern 91 workers who were involved in the food
6 catering business in 2005. They were then engaged by
7 10Tation Event Catering Inc. as servers, bartenders,
8 chefs, executive chefs and supervisors.

9 The Minister has decided that they
10 were employed under contracts of service and has
11 assessed 10Tation for arrears of contributions under
12 the *Canada Pension Plan* and premiums under the
13 *Employment Insurance Act*.

14 10Tation and all 91 workers now
15 appeal these assessments on the grounds that they
16 were independent contractors under contracts for
17 services and, therefore, were not in insurable or
18 pensionable employment during the year under review.

19 Four workers testified in these
20 proceedings: Lyndsy Deshima, who was a waiter or
21 server; Anouk Bikkers, a server and periodic
22 supervisor; Richard Peters, a chef; and
23 Fabio Ferrero, also a server. It was agreed that
24 their evidence was equally applicable to all 91
25 workers as they were all subject to the same terms

1 and conditions in their working relationship with
2 10Tation.

3 In order to resolve the question
4 before the Court as to the status of the 91 workers,
5 which question has been variously characterized in
6 the jurisprudence as fundamental, central and key,
7 the total relationship of the parties and the
8 combined force of the whole scheme of operations must
9 be considered. To this end, the evidence in this
10 matter is to be subjected to the four-in-one test
11 laid down as guidelines by Lord Wright in *Montreal*
12 *(City) v. Montreal Locomotive Works Ltd.*,
13 [1947] 1 D.L.R. 161, and adopted by Justice MacGuigan
14 in *Wiebe Door Services Ltd. v. The Minister of*
15 *National Revenue* (1986), 87 DTC 5025, in the Federal
16 Court of Appeal.

17 The four guidelines are the payor's
18 control over the worker, whether the worker or the
19 payor owns the tools required to fulfil the worker's
20 function, and the worker's chance of profit and risk
21 of loss in his or her dealings with the payor.

22 Adverting first to the right to
23 control criterion, the evidence is that 10Tation only
24 retained experienced workers in order to maintain the
25 highest quality of service for its clients. This

1 means that the workers involved were all seasoned
2 professionals who knew well their various duties when
3 running catered events, whether they were large or
4 small, formal or informal, sit-down dinners or
5 buffet-style meals.

6 While events took place at locations
7 other than at 10Tation's offices and kitchens where
8 the food was cooked and prepared, the workers who
9 were chosen to orchestrate a given event were
10 selected from a list accumulated by 10Tation by
11 advertising and by word of mouth. The workers were
12 offered the opportunity of working which they could
13 either accept or decline. According to their level
14 of expertise and experience, they all had established
15 hourly rates at which they were prepared to offer
16 their services, and more than one witness in his or
17 her testimony asserted that they would not work for
18 less.

19 They were advised by e-mail by
20 10Tation when and where the event was to be held and
21 the starting time. They arrived early to set up the
22 necessary tables and tablecloths, light candles, open
23 wine bottles, prepare coffee and do all things
24 necessary to ensure the smooth running of the event.

25 One of their number was designated

1 as supervisor for the occasion and was given an extra
2 \$5 per hour for this service in addition to their
3 normal hourly rate for waiting on tables, tending bar
4 or whatever their usual duties were. While called
5 supervisors, I find that they did not perform such a
6 function. Rather, they simply allocated all
7 necessary tasks to the workers who then went about
8 performing them without direction or supervision.
9 They were told what to do, but not how to do it.

10 This is of significance because, as
11 counsel for the Minister recognized, in *Regina v.*
12 *Walker* (1858), 27 L.J.M.C. 207, Baron Bramwell says:

13 "A principal has the right to
14 direct what the agent has to
15 do; but a master has not only
16 that right, but also the right
17 to say how it is to be done."

18 This traditional test has been refined in recent
19 years, starting, I believe, with *Wiebe Door Services*
20 itself because it has been recognized that in modern
21 industry there are highly trained and expert
22 personnel whose abilities are far beyond the power of
23 their supervisors to be able to tell them how to do
24 their job. In modern law one could be held to be an
25 employee even though their supervisor is only

1 qualified to tell them what to do but not how to do
2 it.

3 The cases distinguish between
4 standard employment as opposed to highly qualified
5 professional employment. In the former case, in
6 order to be found to be in employment, it is
7 necessary that the supervisor have the right to
8 direct not only what is to be done but how it is to
9 be done. In the latter it suffices if the supervisor
10 can only direct what is to be done. In those cases,
11 if it is non-standard, highly qualified professional
12 services, that suffices to make the worker an
13 employee.

14 I find in the matter before me that
15 all 91 workers were in standard employment as opposed
16 to being highly skilled persons such as IT computer
17 experts whose expertise exceed the ability of a
18 supervisor to direct. In the matter before me the
19 supervisors, being one of their own number, were well
20 qualified to direct not only what had to be done but
21 how it was to be done. Therefore, in this case, in
22 order for these workers to be found to be employees,
23 I would have to find that their supervisor, if there
24 was one, had the right to direct not only what was to
25 be done but how it was to be done.

1 consistently late or caused inordinate breakage, but
2 in my view, while this was control, it was no more
3 than 10Tation could exercise over an independent
4 contractor.

5 In the same vein, counsel for the
6 Minister has drawn the Court's attention to specific
7 elements of control that are in evidence in this
8 matter in that the workers were expected to arrive
9 possibly as much as two hours before a planned event
10 in order to set up. Also they were, I would say,
11 required to wear either black or white depending on
12 the event or occasion.

13 While there is no question that that
14 is an element of control, I have considered whether
15 there has to be absolutely no control for the worker
16 to be constituted an independent contractor or
17 whether it is a matter of weighing the controls as
18 opposed to the lack of controls, and I have decided
19 that the law is more consistent with the latter.

20 While there are these two
21 requirements that could well constitute control, they
22 are so minimal that, when one looks to see whether
23 there was a relationship of subordination between
24 10Tation and the 91 workers, these two requirements
25 come nowhere close, in my view, to constituting a

1 relationship of subordination which the jurisprudence
2 says is an element of control. This particular
3 element comes, I believe, from Article 2099 of the
4 *Quebec Civil Code*, and I personally find it quite
5 useful in examining the control factor and in order
6 to understand who is an employee and who is an
7 independent contractor.

8 In my view, the lack of direction
9 and control, the right to decline assignments and the
10 fact that all workers negotiated their hourly rates
11 indicate to me that they were not in a subordinate
12 relationship with 10Tation, but were independent
13 contractors during the year under review.

14 Turning now to the second *Wiebe Door*
15 criterion, ownership of tools, a word of explanation
16 as to why the ownership of tools is important might
17 be in order at this time.

18 The jurisprudence indicates that
19 this also goes to the element of control. If the
20 payor is supplying the tools, then the payor has the
21 right to direct how those tools are to be used.
22 Conversely, if the worker is supplying the tools, the
23 payor does not have that element of control.

24 In the matter before me so far as
25 tools are concerned, simply put, the 91 workers

1 provided their own tools. These included black and
2 white shirts and pants, shoes, lighters for candles,
3 pins for the tablecloths and corkscrews to open
4 bottles of wine. The bartenders brought their own
5 bar kit, like Mr. Ferrero, which included screens,
6 martini shakers and items like those.

7 I find that all other tools were
8 rented either by 10Tation or by the client whose
9 event it was, but were ultimately paid for by the
10 client. As a matter of fact, on those occasions when
11 they were rented by 10Tation, there was a mark-up on
12 the amount invoiced to the client for rentals. These
13 rentals could cover everything from the tables and
14 chairs to the candelabra, the serving trays, utensils
15 and tray tables.

16 Again, counsel for the Minister
17 adverted to stoves or ovens used by the chefs on
18 site. One example that was elucidated by the
19 evidence was the Distillery District in which
20 10Tation was provided with a room with four bare
21 walls in order to prepare the food. Therefore,
22 10Tation rented or provided the stoves.

23 In these circumstances where the
24 workers are supplying the tools that this category of
25 worker normally needs, whereas the payor was

1 supplying the large tools like stoves necessary for
2 the workers to perform their function, the case of
3 *Precision Gutters* offers guidance. This is *Precision*
4 *Gutters Ltd. v. Minister of National Revenue*,
5 [2002] F.C.J. No. 771, in which the workers were
6 people who installed rain gutters. There was some
7 quite large equipment required in order to form the
8 gutters from the raw aluminum, which was done
9 extensively on site. The issue, like the issue
10 before me, is: Is the payor supplying the tools that
11 would cause the workers to be employees rather than
12 independent contractors? In that case the workers
13 were supplying their own drills and bits, saws and
14 blades, pliers, small ladders, pry bars, measuring
15 tapes and hammers.

16 In paragraph 25 the Federal Court of
17 Appeal said:

18 "It has been held that if the
19 worker owns the tools of the
20 trade which it is reasonable
21 for him to own, this test
22 would point to the conclusion
23 that the individual is an
24 independent contractor even
25 though the alleged employer

1 provides special tools for the
2 particular business."

3 Therefore, I find *Precision Gutters*
4 on all fours, so far as tools are concerned, with the
5 matter before me. These 91 workers provided the
6 tools that they were expected to carry at their own
7 expense. Even though 10Tation provided some large
8 tools, nevertheless, according to *Precision Gutters*,
9 the tools factor indicates that they were independent
10 contractors.

11 This brings me to the chance of
12 profit and risk of loss. Like counsel for the
13 Minister, I find it convenient in this particular
14 fact situation to deal with the two together.

15 Again, *Precision Gutters* offers some
16 useful guidance at paragraph 27 on page 9 where the
17 Court says:

18 "In my view, the ability to
19 negotiate the terms of a
20 contract entails a chance of
21 profit and risk of loss in the
22 same way that allowing an
23 individual the right to accept
24 or decline to take a job
25 entails the chance of profit

1 and risk of loss."

2 In one paragraph the Federal Court of Appeal has
3 neatly solved two of the factual conundrums presented
4 by this case.

5 The workers before me had both the
6 ability to turn down any given assignment and the
7 ability to negotiate their hourly rates. I repeat,
8 some of them were so independent as to say that they
9 would not work for less than, in one case \$20 per
10 hour, and in another I believe it was \$18.

11 I will candidly say that were it not
12 for the binding authority of the Federal Court of
13 Appeal in *Precision Gutters*, I would question whether
14 the 91 workers really had any chance of profit or
15 risk of loss in their working relationship with
16 10Tation. While they could earn more the more they
17 worked and served and bartended and although they
18 could do that for more than one caterer on the same
19 day, one gets into the question that counsel for the
20 Minister was good enough to do his best to try to
21 resolve for us, which is: Is that profit or is that
22 just an increase in earnings?

23 The first case that I know of that
24 went into that distinction is *Hennick v. The Minister*
25 *of National Revenue*. That is cited at [1995] F.C.J

1 No. 294 in the Federal Court of Appeal. That was the
2 case of a piano teacher at the Royal Conservatory.
3 At trial the trial court held that she could earn
4 more money if she worked longer hours and, therefore,
5 that was a chance of profit. That was reversed on
6 appeal by the Federal Court of Appeal making the
7 distinction that, while it may be more earnings, it
8 was not more profit. The Conservatory is in a
9 position to earn profit or make losses, but not
10 someone who earns more money by virtue of working
11 more hours or earns more money on a piece-work basis
12 by producing more pieces.

13 In my view, profit denotes business
14 income in excess of business expenses. A problem in
15 this case, if one examines the income tax returns
16 filed by the four workers who testified, is that they
17 had virtually no business expenses and, therefore,
18 very little in terms of a chance of loss.

19 I would observe first that in all
20 cases none of them could possibly support themselves
21 on the amount of gross revenues that they were
22 earning from 10Tation in the year 2005. For
23 instance, the witness Peters had a total business
24 income of \$3,669.68, but his expenses were \$4,000 for
25 a car and \$3,000 for travel. Neither one of them

1 compares to the sort of expenses that I am sure
2 10Tation had -- fixed costs for rent, the vehicle
3 that was used to transport the food, employees who
4 were on the payroll, considerable, I would say,
5 investment in the business.

6 Deshima's 2005 T4A shows \$406.85
7 earned from 10Tation. On the other hand, her
8 expenses totalled \$4,573 -- mainly her rent of
9 \$3,120. There was advertising of \$318, memberships
10 of \$200, insurance of \$210, office \$62, and supplies
11 \$100, and finally \$400 for her phone. This is
12 clearly far different from the sort of business
13 expenses incurred by the payor 10Tation. As has been
14 recognized, her main source of income was as an
15 instructor of Shiatsu.

16 Similarly, Anouk Bickers' main
17 source of income was as an illustrator. So far as
18 her business income was concerned, in 2005 it was
19 \$3,467.69, compared with expenses totalling \$6,574,
20 mainly involving her occupation as an illustrator:
21 \$1,000 for supplies, \$125 for advertising, \$1,500 for
22 telephone. There are others, but there is really no
23 need for my purposes to go into that much detail.

24 Finally, Mr. Ferrero had business
25 income of \$7,695, again not a sum with which he could

1 support himself. There are expenses of \$2,688, none
2 of which exceeded \$500 individually. They involve
3 such items as repairs, meals, an office, a car, a
4 telephone, professional development, gifts, tickets.

5 He wound up with a net business income of \$2,934.86.

6 Clearly, all four workers were
7 anxious to be designated as independent contractors
8 so that they could deduct expenses that were
9 allowable under the *Income Tax Act*, even though they
10 were not really business expenses related to the
11 catering industry, with the exception of the black
12 and white clothing and their very minimal tools such
13 as pins, lighters and corkscrews. It is clear that
14 it is really all about their vehicles, their home
15 offices, their supplies, their telephones. If they
16 are able to legitimately deduct them from some source
17 of income, so be it.

18 I really do not know if it lies to
19 the Minister to reassess and disallow these workers'
20 expenditures as not being for the purpose of earning
21 income from a business no matter which way I rule. I
22 make no comment on that, but it is something that I
23 do wonder about.

24 Chance of profit and risk of loss,
25 as so much of this area of law is, is complicated.

1 There are two other considerations that, in fairness,
2 I would like to bring to your attention.

3 I have found on the authority of
4 *Precision Gutters* that there was a chance of profit
5 and a risk of loss for all 91 workers. Even had I
6 found to the contrary, the outcome would be the same
7 because the evidence would still point to their being
8 independent contractors because the control factor
9 and the tools factor indicates that they were
10 independent contractors.

11 Even had I found that the profit and
12 loss factor indicated that they were employees, we
13 would be in a situation where of the four *Wiebe Door*
14 factors two are indicative of their being employees,
15 which is control and tools, and two are indicative of
16 their being independent contractors, which would be
17 lack of chance of profit and lack of risk of loss.
18 In those circumstances, where *Wiebe Door* yields
19 inconclusive results, we must invoke the Court of
20 Appeal's directions in *Royal Winnipeg Ballet* where
21 intent of the parties becomes of greater
22 significance.

23 *Royal Winnipeg Ballet v. The*
24 *Minister of National Revenue* is cited as 2006 FCA 87.

25 I will simply repeat what counsel for the Minister

1 has already read into the record. Justice Desjardins
2 in *Royal Winnipeg Ballet* at paragraph 81 gives me the
3 following guidance where the intention of parties
4 assumes greater significance because of the equivocal
5 outcome after applying the *Wiebe Door* guidelines:

6 "-- what the Tax Court judge
7 should have done was to take
8 note of the uncontradicted
9 evidence of the parties'
10 common understanding that the
11 dancers --"

12 In that case, and workers in this case.

13 "-- should be independent
14 contractors and then consider,
15 based on the *Wiebe Door*
16 factors, whether that
17 intention was fulfilled."

18 I say that applying the *Wiebe Door*
19 factors and looking at the intentions of the parties,
20 by virtue of the fact that they all signed the same
21 agreement, there was a mutual understanding that
22 these parties were independent contractors. That
23 gets great weight. Even had I found no chance of
24 profit and no risk of loss, I would still have to
25 find them to be independent contractors.

1 That same conclusion arises from a
2 separate source. There was a case called *City Water*
3 *International Inc. v. The Minister of National*
4 *Revenue*, which is cited as 2006 FCA 350. *City Water*
5 was an interesting case because the workers in that
6 case had absolutely no chance of profit and
7 absolutely no risk of loss. While from a common
8 sense point of view one would have thought that the
9 very essence of a business was the chance of profit
10 and the risk of loss, the Federal Court of Appeal
11 nonetheless found those workers to be independent
12 contractors because there was a common intention to
13 that effect expressed by the parties.

14 In short, all four *Wiebe Door*
15 factors are equivocal, two and two, and I have
16 already told you what the result has to be in those
17 circumstances.

18 I am also to examine the total
19 relationship of the parties. I should not really
20 phrase it that way. The four *Wiebe Door* guidelines
21 are only guidelines with a view to determining the
22 total relationship of the parties. That is my
23 ultimate goal. There are a few things to be said
24 about a total relationship.

25 Lyndsy Deshima said something that

1 was apposite: "I left restaurants for catering for
2 flexibility of hours. I am not guaranteed hours. I
3 have no job security."

4 Those pronouncements were -- let me
5 say they got my attention because it was almost like
6 she had been reading *Wolf v. Minister of National*
7 *Revenue*. *Wolf* is cited at [2002] 4 F.C. 396 in the
8 Federal Court of Appeal. I won't quote verbatim, but
9 the Federal Court of Appeal at paragraph 12 says that
10 independent contractors choose the ability to deduct
11 allowable expenses and freedom of mobility over job
12 security and employee-type benefits.

13 I do not think I need say any more
14 about the total relationship between the parties.

15 In these matters the burden is on
16 the appellant to demolish the assumptions set out in
17 the Minister's Reply to Notice of Appeal, which
18 assumptions are presumed true if not effectively
19 challenged. There are four cases in support of that
20 legal proposition: *Elia v. The Minister of National*
21 *Revenue*, [1998] F.C.J. No. 316 in the Federal Court
22 of Appeal, *Livreur Plus Inc. v. The Minister of*
23 *National Revenue*, [2004] F.C.J. No. 267 in the
24 Federal Court of Appeal, *National Capital Outaouais*
25 *Ski Team v. The Minister of National Revenue*,

1 [2008] F.C.J. No. 557 in the Federal Court of Appeal,
2 and finally *Dupuis v. Minister of National Revenue*,
3 [2003] F.C.J. No. 1410, again in the Federal Court of
4 Appeal.

5 I personally took Anouk Bickers'
6 through the contentious assumptions set out in the
7 Minister's Reply, and in her case it was 25(g), (i),
8 (m) and (n). I am sure the same assumptions turn up
9 in all of these appeals. She succeeded in
10 demolishing them. The remaining assumptions were not
11 sufficient to support the Minister's determinations.

12 I have worded my statement that way because there
13 was one assumption that was not demolished, and that
14 was 25(p), that the workers had to perform their
15 services personally.

16 *Jencan Ltd. v. The Minister of*
17 *National Revenue*, [1997] F.C.J. No. 876 in the
18 Federal Court of Appeal, requires the Court to
19 determine, if some of the Minister's assumptions are
20 demolished, if the remaining assumptions are
21 sufficient to support the Minister's determination.
22 In the matter before me, they clearly are not.

23 Having heard the witnesses' testify
24 under oath for the first time, I have found new facts
25 not previously recognized by the Minister, or

1 possibly the known facts were misunderstood or
2 wrongly assessed or misconstrued by the Minister
3 whose determinations I therefore find to be
4 objectively unreasonable. I find the four appellants
5 who have formally filed Notices of Appeal and indeed
6 all 91 workers involved were in business on their own
7 account as either servers, bartenders, chefs or
8 executive chefs.

9 As a result all 10 appeals before me
10 will be granted. The 91 workers were not in
11 insurable or employable employment during the period
12 under review. The decisions of the Minister will be
13 vacated.

14 Gentlemen, I am in your debt for
15 excellent presentations. You both were very helpful
16 and very well prepared and were of great assistance
17 to me.

18 I will close Court.

19 THE REGISTRAR: This sitting of the
20 Tax Court in Canada is now concluded.

21 ---Whereupon the sitting was concluded at 2:56 p.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Shorthand and transcribed therefrom, the foregoing proceeding.

Shirley Sereney, Shorthand Reporter

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CITATION: 2008 TCC 562

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STYLE OF CAUSE: 10Tation Event Catering Inc.
and The Minister of National
Revenue

PLACE OF HEARING: Toronto, Ontario

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REASONS FOR JUDGMENT BY: The Honourable
N. Weisman, Deputy Judge

DATE OF ORAL JUDGMENT: August 28, 2008

APPEARANCES:

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Counsel for the Respondent: Justin Kutyan

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