

Docket: 2009-2010(EI)
2009-2162(CPP)

BETWEEN:

JAMES NIELSEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent

and

R.S.A. INSTALLATIONS LTD.,

Intervenor.

Appeal heard on January 15, 2010, at Winnipeg, Manitoba

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Penny Piper
Agent for the Intervenor:	Randal Semeniuk

JUDGMENT

The appeals from the decisions made under the *Employment Insurance Act* and the *Canada Pension Plan* for the period from January 1, 2005 to February 28, 2007 are allowed on the basis that the Appellant was employed as an independent contractor, and the decisions are vacated.

Signed at Ottawa, Canada, this 5th day of February 2010.

“V.A. Miller”

V.A. Miller, J.

Citation:2010TCC77
Date: 20100205
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2009-2162(CPP)

BETWEEN:

JAMES NIELSEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

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R.S.A. INSTALLATIONS LTD.

Intervenor.

REASONS FOR JUDGMENT

V.A. Miller, J.

[1] The Appellant appeals from a decision made by the Minister of National Revenue (the “Minister”) that he was employed in insurable and pensionable employment with R.S.A. Installations Ltd. (the “Payor”) during the period January 1, 2005 to February 28, 2007.

[2] These appeals were heard on common evidence. The only issue is whether the Appellant was employed as an employee or an independent contractor.

[3] At the hearing, evidence was given by the Appellant and Randal Semeniuk, President of the Payor. Both witnesses maintained that they intended the Appellant to be employed as an independent contractor.

[4] The Appellant stated that he works as a subcontractor in the construction industry in Winnipeg and surrounding area. He installs windows, doors and siding. He is currently installing windows as a subcontractor with Winmore Windows.

[5] It was the Appellant's evidence that, during the relevant period, he worked with other individuals as well as the Payor. When he worked with the Payor, he was hired to do a specific job. He stated that he negotiated the amount that he was paid by the Payor. If the job took between 1 ½ to 2 days, then he normally billed the Payor for \$18/ hr. However there were occasions when the project was very small and the Payor was not able to pay the Appellant \$18/hr. In these instances, the Appellant sometimes refused the offer to work for the Payor.

[6] The Appellant invoiced the Payor on a weekly basis for each job that he performed. He usually gave the Payor his invoice on a Friday. The Appellant received his wages on a weekly basis. He was not paid for rain days. He was only paid by the Payor when he worked. He did not receive vacation or sick days from the Payor.

[7] The Appellant stated that he determined his own hours of work. He usually worked more than 40 hours a week and he kept track of his own hours.

[8] Both the Appellant and Mr. Semeniuk stated that the Appellant was not supervised in his work. It was Mr. Semeniuk's evidence that he only inspected the Appellant's work when there was a complaint. If the Appellant made an error in his work, it was his responsibility to fix the error on his own time and at his own expense. It was the Appellant's evidence that there were occasions when he incurred a monetary loss as a result of an error that he made.

[9] The Appellant used his own tools and truck in the performance of his work. His tools consisted of an air compressor, a nailer, chop saw, drill, various saws, hammers and ladders. The Payor supplied the caulking and the items that had to be installed.

[10] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*¹, Major J. described the analysis that should be used when determining whether an individual is an employee or an independent contractor. He wrote:

47 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.

48 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.

[11] Applying the test to the facts in this appeal, it is my opinion that the Appellant was an independent contractor when he worked with the Payor.

[12] After a review of the evidence, I have concluded that the Payor did not supervise the manner in which the Appellant performed his duties. The Appellant determined his own hours of work; he was responsible for fixing any problem that he may have caused. He had a risk of loss. He owned all of the tools that he used to perform his duties.

[13] The terms of the relationship between the Appellant and the Payor support their intention that the Appellant was to be employed as an independent contractor.

[14] The appeals are allowed.

Signed at Ottawa, Canada, this 5th day of February 2010.

“V.A. Miller”

V.A. Miller, J.

¹ 2001 SCC 59

CITATION: 2010TCC77

COURT FILE NO.: 2009-2010(EI)
2009-2162(CPP)

STYLE OF CAUSE: JAMES NIELSEN AND
THE MINISTER OF NATIONAL
REVENUE AND
R.S.A. INSTALLATIONS LTD.

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: January 15, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller

DATE OF JUDGMENT: February 5, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Penny Piper
Agent for the Intervenor:	Randall Semeniuk

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
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