Docket: 2009-3411(EI)

BETWEEN:

ALLEN WILFORD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUSAN BONNAR (GIORDANO)

Intervener

Appeal heard together with the appeal of *Allen Wilford* (2009-3637(CPP))
on July 9, 2010 and December 3, 2010 at Toronto, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Roxanne Wong
For the Intervener:	The Intervener herself

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Toronto, Canada, this 7th day of January 2011.

"N. Weisman"

Weisman D.J.

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Signed at Toronto, Canada, this 7th day of January 2011.

"N. Weisman"

Weisman D.J.

Citation: 2011 TCC 6
Date: January 7, 2011
Dockets: 2009-3411(EI)
2009-3637(CPP)

BETWEEN:

ALLEN WILFORD,

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and

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Intervener.

REASONS FOR JUDGMENT

Weisman, D.J.

[1] The Intervener, Susan Bonnar ("Bonnar") is a law clerk. She worked for the Appellant, Allen Wilford ("Wilford"), in his Owen Sound law office from the 19th day of November, 2007 to the 7th day of November, 2008, when she was fired. She subsequently applied for, and received, benefits under the *Employment Insurance Act* ("the *Act*")[1]. Wilford's appeal is based on the grounds that she was an independent contractor during the period under review.

[2] At her initial interview, Bonnar held herself out to be experienced and knowledgeable in family law matters. She was therefore hired and entrusted with

[1] S.C. 1996, c. 23

interviewing Wilford's clients, and preparing the necessary affidavits and forms for filing in court within the various statutory limitation periods.

[3] On Bonnar's first day of work, Jacqueline Armstrong ("Armstrong"), the firm's bookkeeper and payroll officer, requested her social insurance number. Bonnar declined to share it on the grounds that she was an independent contractor. Armstrong subsequently requested the number numerous times. She also explained the difference between an independent contractor and an employee, as well as the benefits Wilford offered his employees, such as ten sick days per year, birthday days off, and deductions at source for Canada Pension Plan contributions and income tax remittances. Each time Armstrong asked her to be part of the payroll system Bonnar refused, saying that she was well aware of the distinction between a contractor and an employee, and the income tax ramifications of her chosen status, as well as the employment insurance benefits she was foregoing in the event of her illness.

[4] Wilford recollected that when he pointed out the benefits available to Bonnar if she joined his payroll system, he was told that she had incurred losses in a prior business venture and wanted to remain an independent contractor until such time as her revenues offset those losses, for income tax purposes. Bonnar testified that while she had no prior business ventures, she did have outstanding debts, and did seek independent contractor status so that the usual source deductions could be applied toward those debts.

[5] Accordingly, unlike Wilford's employees, Bonnar never claimed overtime pay or requested a T-4 slip; did not participate in the office birthday calendar or group lunches; or share office routines such as answering the telephone, gathering fax transmissions, and doing reception duties when the regular receptionist was absent. According to Armstrong: "She was different. She worked late and came in weekends."

[6] Wilford apparently acquiesced in this arrangement and shared Bonnar's understanding of their working relationship. He told Armstrong: "Yes, she is a contractor." Accordingly, Bonnar's pay stubs were endorsed "contract wages", whereas those of the firm's employees bore the designation "payroll".

[7] I found Wilford to be a beneficent person to work for. He continually encouraged Bonnar to join his payroll system so that she would be entitled to the benefits under the *Act* in the event of illness; would not be faced with a large income tax payment when she filed her return; and could enjoy his largess as an employer, even though it meant he would have to pay employment insurance premiums and

Canada Pension Plan contributions on her behalf. He paid for her to take a course on spousal support, gave her a Christmas bonus to cover the income she lost when the office was closed, and paid her $15.50 per hour instead of his standard $14.00 to compensate her for the loss of the employer's portion of her employment insurance premiums and Canada Pension Plan contributions.

[8] It is trite law that in order to ascertain the total working relationship between a payer and a worker, one must apply the four-in-one test formulated as guidelines in *Montreal (City) v. Montreal Motor Works Ltd.* ("*Montreal City*")[2]; *Wiebe Door Services Ltd. v. M.N.R.* ("*Wiebe Door*")[3]; and *671122 Ontario Limited v. Sagaz Industries Canada Inc.*("*Sagaz*")[4]. The four facets of the test are the payer's right to control the worker; whether the payer or the worker owns the tools required to perform the worker's function; and whether the worker had a chance of profit, or a risk of loss in the working relationship with the payer.

[9] There is no question that Wilford had the right to control Bonnar. She worked in his law office handling his clients' affairs, and he was accountable for any errors or omissions that she made. He had the expertise to tell her what to do and how to do it. When he found that the language used in her draft affidavits was unduly aggressive and inflammatory, he made her redo them. When he discovered that she was ordering expensive and unnecessary transcripts he "took that autonomy away from her." When asked what would happen if she refused to work on a particular file, he answered decisively: "I would terminate her." Accordingly, I find that Bonnar was not only under Wilford's *de jure* control, but that she was in a subordinate relationship to him, which indicates that she was an employee during the entire period under review.

[10] As far as the ownership of tools is concerned, Wilford supplied Bonnar with a fully-equipped office, including a computer with Divorcemate software, all necessary supplies and forms, a receptionist, and generally all that one would require to handle legal matters in a law office.

[11] In this regard, Wilford was of the opinion that law is a knowledge industry, and that lawyers really sell their expertise, which is their primary tool. He argued that Bonner supplied her own knowledge, as well as her network of contacts that she could resort to for advice and precedents.

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[2] [1947] 1 D.L.R. 161 (P.C.)
[3] (1986), 87 D.T.C. 5025 (F.C.A.)
[4] [2001] S.C.J. No. 61

[12] This raises the issue as to whether skill, knowledge and expertise are included in the *Wiebe Door* lexicon of "tools." There is some support for this position in two decisions emanating from the Tax Review Board (the "Board"). In *Latimer v. M.N.R.*[5], the umpire held an accountant, who had use of the company offices, equipment and staff, to be an employee. Then the Board added: "…to the degree the appellant's professional skills could be regarded as "tools", he was in possession of these." In 1983, the Board heard *Brandes v. M.N.R.*[6] which involved a film director. In finding him to be an independent contractor, the umpire said: "The appellant's experience, his intelligence, and his organizational abilities are his major tools."

[13] These are the only cases of which I am aware that agree with Wilford's position. There are three decisions in the Federal Court of Appeal, and one in the Supreme Court of Canada, that apparently restrict tools to material objects. *Hennick v. M.N.R.* ("*Hennick*")[7] concerned a respondent who was a talented piano teacher. The Court found:

> With regard to the second part of the test, the ownership of tools, the trial judge concluded, rightly in our view, that because the respondent was conducting her classes most of the time at the intervener's premises, her status was more likely to be that of an employee.

In *Precision Gutters v. M.N.R.* ("*Precision*")[8], the workers that installed eaves troughing required a costly piece of machinery that could form raw aluminium into the required shapes. This was supplied by the payer. The Court says, at paragraph 25:

> It has been held that if the worker owns the tools of the trade which it is reasonable for him to own, this test will point to the conclusion that the individual is an independent contractor even though the alleged employer provides special tools for the particular business. …

Again, *Wolf v. The Queen* ("*Wolf*")[9] dealt with a highly specialized aerospace consulting engineer. The Court says, at paragraph 82:

> This factor relates to who, of the employer or the worker, owns the assets or equipment that is necessary to perform the work. Traditionally, if the worker owns or controls the assets and is responsible for their operation and maintenance, he would likely be considered an independent contractor. On the other hand, if the

[5] 77 D.T.C. 84 at page 89
[6] 83 D.T.C. 158 at paragraph 4.02.9
[7] [1995] F.C.J. No. 294 at paragraph 8
[8] [2002] F.C.J. No. 771
[9] [2002] F.C.J. No. 375 (F.C.A.)

> employer owns the equipment, the worker would likely be characterized as an employee.

Finally, in *Sagaz*[10], the Supreme Court says: "… However, other factors to consider include whether the worker provides his or her own equipment…".

[14] So, in *Precision*, and *Sagaz*, "tools of the trade", and "equipment" respectively were considered tools, as was the premises where music was taught in *Hennick*. Further, the workers involved in *Hennick* and *Wolf* were both highly skilled individuals, yet their knowledge, expertise, and talents are not mentioned by the Court in its discussion of tools. I conclude that the "tools" guideline in *Wiebe Door* refers to material objects, not personal capabilities: equipment, not expertise; implements, not ingenuity; supplies, not skills. This guideline also indicates that Bonnar was an employee during the period under review.

[15] So far as the chance of profit is concerned, it is clear that Bonnar had no chance to profit by sound management. Since she was paid the hourly rate of $15.50, which was raised to $17.00 after three months, she could only increase her earnings by working longer hours. This is not a chance of profit.[11] While contractors such as electricians, plumbers, and repairmen also normally quote an hourly figure for their services, their hourly rate is calculated to cover the costs involved in running their business, and some additional margin of profit. Their costs typically include fixed or overhead costs such as heat, power, rent, and business taxes, as well as variable costs, which vary with the level of production or number of jobs the contractor does, such as wages, gasoline, parts and supplies. Bonnar had no such fixed or variable costs.

[16] Wilford reasoned that she could profit since the better she was at her job, the more clients she could attract, and the firm's profits, and her remuneration, would increase accordingly. Unfortunately, there are authorities, both old and new, that do not support this proposition. In *Montreal (City)*[12] Lord Wright says:

> … In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior. …

[10] Above, footnote 4, at paragraph 47
[11] Above, footnote 7
[12] Above, footnote 2, at paragraph 17

As my brother Bowie J. also finds, a contractor works to build up his own business, not that of his payer.[13] Bonnar's efforts served to build up Wilford's business, not her own. The chance of profit factor accordingly indicates that she was an employee during the period under review.

[17] Bonnar also bore no risk of loss in her working relationship with Wilford. She incurred no work-related expenses that were not reimbursed by the Appellant. He even provided her with a parking pass and paid her mileage for the use of her personal vehicle. Also, Wilford bore the expense of rectifying any errors that she made. He discovered that she would spend numerous hours on a client's file for which she was paid, but contrary to instructions, she neglected to docket her time so that the client could be charged accordingly. When this was drawn to her attention she went to the opposite extreme and billed clients excessively for simple tasks, or charged them for unbillable services, both of which resulted in complaints by the clients and rebates by Wilford. She ordered expensive and unnecessary transcripts when there were no funds in the client's trust account to pay for them. She incorporated a company with three directors and charitable objects, when the client wanted but one director, with a view to profit. It cost Wilford considerable time and expense to rectify these errors, yet no deductions were made from Bonnar's pay. Since independent contractors have to rectify their mistakes on their own time and expense,[14] this facet of the working relationship of the parties leads to the conclusion that Bonnar was an employee.

[18] If one files an income tax return as a self-employed worker, and deducts from their income any expenses incurred, this is indicative of their understanding of the contract they have concluded with the payer.[15] Accordingly, Wilford sought an order requiring Bonnar to produce her 2008 income tax return. Since interveners are not parties to the proceedings, however, such an order could not issue.[16] Notwithstanding this, Bonnar agreed to produce the desired return, and executed such releases as were required for the Respondent to furnish it. Surprisingly, in the 2008 taxation year, while she reported no business income, she claimed business expenses of $12,819.00. She also showed the income derived from Wilford in 2008 as employment income, against which she claimed another $13,982.00 in expenses. Upon further inquiry, it was ascertained that both expenses related almost entirely to her use of the same leased motor vehicle. It is clear from this that Bonnar wished to be classified as an

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[13] *Woodland Insurance Ltd. v .M.N.R.*, [2005] T.C.J. No. 276 (T.C.C.) at paragraph 7
[14] Above, footnote 8, at paragraphs 11 and 27; *Tremblay v. M.N.R.*, [2004] F.C.J. No. 802 (F.C.A.) at paragraph 44
[15] *Combined Insurance Co. of America v. M.N.R.*, [2007] F.C.J. No. 124 at paragraph 75; *Ambulance St. Jean v. M.N.R.*, [2004] F.C.J. No. 1680 at paragraph 2 (F.C.A.)
[16] *Budget Propane Corp. v. M.N.R.*, [2002] F.C.J. No. 175 (F.C.A.)

independent contractor, both to apply the saved source deductions to her outstanding debts, and to deduct the costs associated with the use of her motor vehicle from her taxable income.

[19] Looking at the total relationship between the parties, one sees uncontradicted evidence of a mutual agreement and clear understanding that the legal relationship of the parties during the period under review was that of principal and agent, with Bonnar's status being that of an independent contractor under a contract for services. This mutual agreement is not determinative of the issue, however, because a worker's status in a working relationship is a matter of law and not of private agreement.[17] Such understandings will be given weight only if the terms and conditions of the parties' working relationship are congruent with their common intention, according to the *Wiebe Door* factors examined above.[18]

[20] As I have determined, all four guidelines indicate that Bonnar was an employee of Wilford's, even though she chose not to integrate herself into the culture of his firm, and did not charge him for her overtime hours; while he paid for her gasoline, parking, and her course on spousal support.

[21] Wilford complains that Bonnar was incompetent in doing her job. An incompetent employee, however, is nonetheless an employee, just as an insubordinate worker can still be in a subordinate working relationship with his or her payer.[19]

[22] In view of my finding that that Bonnar was an employee of Wilford's during the entire period under review, the Minister of National Revenue (the "Minister") may want to re-examine the duplicitous deductions from income claimed on her 2008 income tax return.

[23] In these matters, the burden lies upon the Appellant to refute or demolish the assumptions set out in the Minister's Reply to his Notice of Appeal. He has failed to do so. The only assumptions he was able to refute were 12(g) "the Worker reported to the Appellant on a daily basis in person and by telephone or email"; 12(u) " the Worker normally worked from 8:15 a.m. to 6:00 p.m. Monday to Friday …"; 12(bb) "the Appellant paid the Worker for Statutory Holidays"; 12(ee) "the Worker was required to complete bi-weekly time sheets"; and 12(jj) "there were other workers

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[17] Above, footnote 3, at p. 2
[18] *Royal Winnipeg Ballet v. M.N.R.*, [2006] F.C.J. No. 339 (F.C.A.) at paragraph 64
[19] Above, footnote 7

performing the same services as the Worker". The remaining assumptions are to be taken as true, and are sufficient to support the Minister's determinations.[20]

[24] I have investigated all the facts with the parties and the witnesses called on behalf of the Appellant and the Intervener to testify under oath for the first time, and while I have found new facts, such as Bonnar's working without overtime pay, and Wilford's taking away her power to order transcripts, and his paying to rectify her errors, I found nothing to indicate that the facts inferred or relied upon by the Minister were unreal, or were incorrectly assessed or misunderstood. I can find no business that Bonnar was in on her own account. The Minister's conclusions are accordingly objectively reasonable.

[25] In the result, the decisions of the Minister are confirmed, and the appeals are dismissed.

Signed at Toronto, Canada, this 7th day of January 2011.

"N. Weisman"

Weisman D.J.

[20] *Jencan Ltd. v. M.N.R.,* [1997] F.C.J. No. 876 (F.C.A.)

CITATION:	2011 TCC 6
COURT FILE NOS.:	2009-3411(EI); 2009-3637(CPP)
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DATE OF JUDGMENT:	January 7, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Roxanne Wong
For the Intervener:	The Intervener herself

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada