Citation: 2011 TCC 16
Date: 20110211
Docket: 2009-939(EI)
2009-940(CPP)

BETWEEN:

OLEKSANDR PICHUGIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

HIGH-TECH REALTY INC.,

Intervener.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on July 7, 2010 in Toronto, Ontario)

Weisman D.J.

[1] Over the course of two days of hearings, the first one being January 25 and the second one being today, I have entertained two appeals by the Appellant, Olexsandr Pichugin, against determinations by the Minister of National Revenue that, while he was engaged by the Intervener, High-Tech Realty Inc., from the 6th day of September, 2007 to the 31st day of March, 2008, he was an independent contractor carrying on business on his own behalf.

[2] The Appellant appeals both decisions on the ground that, in his view, he was an employee and was therefore entitled to the benefit of not only the *Employment Insurance Act* but the *Canada Pension Plan*.

[3] This issue has been variously characterized as "fundamental" in *Wiebe Door Services v. Minister of National Revenue* (1986), 87 Dominion Tax Cases, 5025, in the Federal Court of Appeal, also characterized as "central" in *Sagaz Industries*, more accurately known as *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.C. 59, in the Supreme Court of Canada, and finally characterized as "key" in the Federal Court of Appeal decision in the *Royal Winnipeg Ballet v. Minister of National Revenue*, [2006] Federal Court Judgments No. 339. However this issue is characterized, my role is to examine the total relationship of the parties and the combined force of the whole scheme of operations.

[4] To this end, the evidence in this matter is to be subjected to the four-in-one test laid down as guidelines by Lord Wright in *Montreal City v. Montreal Locomotive Works*, cited at [1947] 1 Dominion Law Reports 161, in the Privy Council, which guidelines were adopted by Justice MacGuigan in *Wiebe Door Services* cited beforehand.

[5] It is trite law that the four guidelines are the payer's right to control the worker, whether the worker or the payer owns the tools required to fulfil the worker's function, and the worker's chance of profit and risk of loss in his or her dealings with the payer, who in this case is the Intervener.

[6] Dealing first with the criterion of control, which criterion has been augmented by a concept imported into the common law jurisdictions from the Civil Code of Quebec which is the concept of subordination. The two have to be examined together to ascertain whether the requisite degree of control is in evidence. To begin with, we are dealing with the right to control rather than actual *de facto* control. That distinction has been set out in a number of cases, one of which is *Gallant v. Minister of National Revenue*, [1986] Federal Court Judgments, No. 330, in the Federal Court of Appeal, and again in *Hennick v. Minister of National Revenue*, [1995] Federal Court Judgments No. 294 in the Federal Court of Appeal.

[7] I might say before I go any further that this case was unusual in two ways. First, much was determined by the issue of credibility between the witness for the Intervener and the Appellant himself. Second, in my experience there is an unusual number of facts that I heard over the two days of the hearing that pointed in both directions which somewhat complicated matters.

[8] The evidence is clear that Mr. Oulahen could direct what projects the Appellant was to work on, but he had no power to direct how the work was to be done. To use other words than "how", I am referring to the means or the manner in which the work was to be done.

[9] This is typical of cases where the worker has expertise that is above and beyond the ability of the payer to supervise. In this case we have the payee, the Appellant, being a paralegal and having legal knowledge, which is the very reason that Mr. Oulahen retained him for his primary project of changing the parking facility behind their offices from one in which an independent company enforced parking regulations to one that is self-regulated, but with the somewhat sensitive consideration that it had to be done in such a way so as not to alienate the people who were parking there, who primarily were clients of the Intervener.

[10] The reason I depart from the vernacular use of the word "what" and replace it with the word "means" is because the word "means" is the word used in the Civil Code of Quebec in article 1099 which defines what a contractor is: "The contractor, or, the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor, or the provider of services, and the client in respect of such performance."

[11] I listened, of course, with great interest to just what Mr. Oulahen could direct and what he could not and, as I have said, he could not control the means; he could only control what the Appellant was doing.

[12] I have misspoken. I have not replaced the word "what" with "means." It is the word "how" that is replaced by the word "means." In common law we talk about what to do and how to do it, but where the Civil Code comes in we talk about the means.

[13] As examples of what I am referring to, we have the main project that was entrusted to Mr. Pichugin, and that was this parking lot encompassing some 20 to 30 spaces on Avondale Road in North York, Toronto. That involved him negotiating or learning from the municipality what regulations were extant with reference to signage. He was also involved with the Avondale Cafe project. He wound up issuing parking tickets once he took the course and obtained the authority to do so. He was in charge of document management for

some of the residents or tenancies that the Intervener possessed. In his words, he "was in charge of supervision of documents with reference to the tenants".

[14] His main project, the parking lot, required legal expertise, which I have said was beyond the ability of the Intervener to supervise.

[15] In *Wolf*, which has been included in the Book of Authorities of the Intervener at tab 6, they refer to this type of "employment" -- and I use that term generically rather than technically-- as non-standard. In other words, the distinction, according to *Wolf*, between standard and non-standard employment is that in standard employment the supervisor knows the job as well as, if not better than, the worker and is in an excellent position to tell the worker not only what to do but how to do it. In non-standard employment (-- in *Wolf* we had a very highly specialized aeronautical engineer whose expertise was far beyond that of anyone in the employ of the payer to supervise --) it suffices that the control only extend so far as telling the worker what to do, and he could still be classified as an employee. In that particular case, however, he wound up being found to be an independent contractor. *Wolf* is the case that set out this distinction.

[16] Accordingly, we are dealing here with Mr. Pichugin who was in non-standard employment, and it was sufficient only that Mr. Oulahen be able to direct and have the right to direct what he should do, as I find he did so that facet of the control factor points towards the Appellant being an employee.

[17] When I said the evidence goes both ways, there are other pieces of evidence that I heard that do point in another direction. For instance, Mr. Pichugin had no set hours. He did not require permission from the Intervener to work for his one client that he was doing paralegal work for during lunch hours, on his days off, and even during his normal working hours, although he did give notice when he was required to be away during working hours, and he would endeavour to make other arrangements with Mr. Oulahen.

[18] In my view, there is a big difference between requiring permission and giving notice of what you intend to do. The former indicates subordination, but the latter does not.

[19] Then I get to the evidence with reference to Mr. Pichugin issuing parking tickets. His evidence was that he gave out parking tickets about six

times a day every one-and-a-half hours, and the question arises: Was this a requirement? Is this something that a paralegal would normally do?

[20] When it came to taking the parking enforcement course in the first place, Mr. Pichugin says it was not something that he wanted to do. It was interesting that Mr. Oulahen and Mr. Pichugin wanted to distance themselves from parking enforcement, but in Mr. Pichugin's case, while he says he didn't want to do it, others in the office, some four or five, were taking the course, so rather than creating waves, he went along with it.

[21] As counsel for the Intervener has pointed out, that does not explain why his wife and his son also took the course, which raises some question as to Mr. Pichugin's credibility. On closer inspection of the evidence, I don't find that he was required to issue parking tickets. It is something that he just did.

[22] Another facet of an employee is that an employee has to perform his services personally. It is very clear law that the right or the freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service.

[23] We find that in *Ready-Mixed Concrete (South East) Limited v. Minister of Pensions and National Insurance*, [1968] 1 All E.R. 433, Queen's Bench Division. I paid close attention to the evidence of Mr. Oulahen that Mr. Pichugin hired his son and possibly his wife to help him with his duties. I concluded that the evidence did not support that assumption on the part of the Minister and the submissions by counsel on behalf of the Intervener .

[24] Assumption 17(r) says that the Appellant could hire helpers at his own expense. The evidence is very clear that Mr. Oulahen financed this hiring of helpers. When I say "financed", he gave the money to Mr. Pichugin and quoting from Mr. Oulahen, "I paid you cash to pay your son $20 per hour or whatever." The evidence also came out that the son -- I don't know about the wife, but I think the son was not only issuing parking tickets, but he was cleaning up garbage, and that clearly was not part of a paralegal's jurisdiction.

[25] I do, however, find that Mr. Pichugin was required to perform his services personally, which indicates that he was an employee.

[26] There was argument by counsel for the Intervener that Mr. Pichugin had the right to refuse work. It gets back to his ability not to ask permission to leave during business hours, but simply give notice.

[27] I must draw to everyone's attention that there is a distinction between refusing a working relationship or refusing an assignment or a possibility of employment, and refusing to perform a task once employment has been accepted. Counsel quite often confuse these two. It is clear law that, if one has the right to refuse a working relationship, he is clearly an independent contractor.

[28] There are many cases that support that proposition, such as *A & T Tire & Wheel Limited v. Minister of National Revenue*, a case of my own in 2009, and many other cases: *Ambulance St-Jean v. M.N.R.*, [2004] F.C.J. 1680; *Livreur Plus Inc. v. M.N.R.*, [2004] F.C.J. No. 267; *Precision Gutters v. M.N.R.*, [2002] F.C.J. No. 779. There are others, but that is enough.

[29] There are also cases in which the worker refuses to perform a task within a working relationship, and that is quite a different thing. The primary case in that regard is one that I have already cited, and that is *Hennick*. Where one refuses to perform a task, the Court has to look at the reasons. Sometimes they are reasonable, such as unloading a truck that is full of contamination. This has nothing to do with whether the person is an employee or an independent contractor. On the other hand, the worker may simply be insubordinate. An insubordinate worker, however, can still be in a subordinate relationship with his or her payer.

[30] Getting back to Mr. Pichugin, I find that he did not have any right to refuse a working relationship. He accepted the working relationship. At the most, it can be said that, when those few occasions occurred when there was a conflict, he might refuse an assignment, but that does not make him an independent contractor.

[31] Moreover, there is the fact that his hours were not recorded, and he could work fast or slow as long as the project was done. That is inconsistent with subordination.

[32] Then there is an assumption that he had to report weekly or bi-monthly to Mr. Oulahen. There are exhibits of his report on the parking lot project which was done, I believe, in late March 2008. The question is: Is that

reporting an indicia of control or is it simply letting Mr. Oulahen know the progress that he was making, in which case it is not so much a matter of reporting but a matter of letting Mr. Oulahen monitor the result, which you are permitted to do with an independent contractor.

[33] We get to the famous case of *Charbonneau v. M.N.R.*, which articulated that monitoring the result must not be confused with supervising the worker. That is cited in [1996] Federal Court Judgments No. 1337 in the Federal Court of Appeal. I did not take that assumption as having been established, and I find that Mr. Pichugin was not really reporting on a regular basis to the Intervener or Mr. Oulahen. It was more a matter of Mr. Oulahen monitoring the quality of the work done.

[34] There is jurisprudence that says that independent contractors are not free of all control. It stands to reason that, if one is operating any sort of an establishment -- let's take the example of a real estate office where all the realtors are independent contractors working on commission, you can't let chaos reign. You can't have them come and go whenever they want. Someone has to be there in case clients come in. Mr. Oulahen well knows that.

[35] A certain amount of control of an independent contractor is reasonable and permissible without turning that person into an employee. *Poulin v. Canada,* [2003] F.C.J. No. 141 (F.C.A.) at paragraph 16.

[36] Here we have Mr. Oulahen telling Mr. Pichugin that on Mr. Pichugin's invoices he cannot have the Intervener's address, the same as his. He is not to see clients in the office. As far as I am concerned, those are reasonable controls not inconsistent with Mr. Pichugin still being an independent contractor.

[37] This brings me to the two weeks' vacation pay and Mr. Pichugin being paid for Christmas and New Year's. I do not find this means that he was an employee, using as authority the aforementioned case of *Wolf* where the highly specialized aeronautical engineer was given various benefits, and the Federal Court of Appeal did not say that his receipt of these various benefits turned him into an employee.

[38] I accept Mr. Oulahen's position that the office was closed and, therefore, Mr. Pichugin could not gain access to it and could not earn any income and, in fairness, his pay went on. That is similar to the situation, although not

identical, to that in *Wolf* where payments were made to Mr. Wolf as an inducement not to take his skills elsewhere. That sort of payment did not turn him into an employee. He got overtime pay and he was paid for statutory holidays, which is why I am comparing the two cases.

[39] Finally, with reference to the right to control, I reject the suggestion that I have heard many times that, once someone is an independent contractor, that person is always an independent contractor. In other words, by virtue of the admitted fact that Mr. Pichugin is an independent contractor as a paralegal, that means he must be an independent contractor with reference to his working relationship with the Intervener.

[40] It is clear that one can be an employee by day and be an independent contractor by night. It is called moonlighting. In this case, the difference is that Mr. Pichugin was daylighting, if I can coin a phrase. Sometimes it was during working hours that he was carrying on business as an independent contractor paralegal. The issue is: Did that somehow make him an independent contractor for all purposes? I don't accept that proposition. He could still be an employee of the Intervener and an independent paralegal at the same time.

[41] On balance, I think I have established that the control indicia go back and forth in both directions, but there comes a time when one has to see where the scales tip on balance. In my view, the essential elements that I have heard are that Mr. Pichugin had the freedom to come and go as he chose; that he was not required to seek permission in that coming and going, that it was a matter of him giving notice which, to me, indicates a lack of subordination.

[42] There was some suggestion that, because a lot of his invoices talked about interest at 4.5 per cent on overdue accounts and because there was a disclaimer on his report on the parking project, those were both indicia of being an independent contractor, but the only invoice that I could see that had the threat of interest was the last one, on March 24, 2008. Similarly, the disclaimer only shows up on the report which was called "Parking Project Review and Analysis", which also was right towards the end of the working relationship.

[43] Those two did not alter my conclusion that the control issue indicated that he was an independent contractor. Again, it was the lack of subordination that tipped the scale in that direction.

[44] I can be considerably more brief on the other indicia. The ownership of tools, in my view, is neutral. That is because the tools that were provided to the Appellant by the Intervener were not exclusive. He had the shared use of an office and the shared use of a computer and the shared use of Internet services. Conversely, the tools that were not brought to the job but were used for the job by Mr. Pichugin were also not exclusive. He had a home office; he had a laptop computer and Internet facilities, but they were not for the exclusive use of the Intervener. They were also for use in his business as a paralegal. I found the tools factor neutral and not conclusive one way or the other.

[45] In terms of chance or profit and risk of loss, I can be equally succinct. It is very clear that the amount of $550 under which Mr. Pichugin worked right from the beginning to the end was negotiated. It started off at $500 offered by Mr. Oulahen, while $750 was the figure that Mr. Pichugin required, and it was sawed off at $550. The $750 was possible, depending on just how he performed on the parking lot project.

[46] Then we have the Federal Court of Appeal decision in *Precision Gutters*, above, at paragraph 27, saying that the ability to negotiate the terms of a contract is *ipso facto* a chance of profit and a risk of loss, and I am bound by that.

[47] I also find that Mr. Pichugin had no risk of financial loss, because all his expenditures were reimbursed by the Intervener. I have to find that the profit and loss factor points to his being an independent contractor.

[48] There was some suggestion, I believe by counsel for the Intervener, that this was his parking lot business. I want it to be very clear, because it is important, that at no time was Mr. Pichugin in the parking lot business. For one to be in business, one has to be working to build up his own business, not somebody else's: *Woodland Insurance Ltd. v. M.N.R.*, [2005] T.C.J. No. 276 (T.C.C.). This was clearly the Intervener's parking lot.

[49] Insofar as the possibility of there being other parking lots and other projects if he did well, this was in the distant future. It is just too vague and speculative to constitute a chance of profit.

[50] Finally, with reference to chance of profit and risk of loss, the relationship ended because, as I understand it, Mr. Pichugin presented without warning an invoice for $750, which inadvertently was paid by

Mr. Oulahen. When he noticed the error, he went right back to the $550. That could have concluded in two ways. Number one, there could have been further negotiation between Mr. Oulahen and Mr. Pichugin, or the relationship could have terminated. The latter is what happened. It is just reinforcing the fact that negotiation was not only actually accomplished but was possible. As I say, that buttressed the conclusion that this man was an independent contractor during the period under review.

[51] To summarize, the control-subordination factor indicates that Mr. Pichugin was an independent contractor. The tools factor is neutral. The chance of profit and risk of loss factor indicates that he is an independent contractor. We have three out of the four *Wiebe Door* factors pointing in the direction of Mr. Pichugin being an independent contractor, which means that it is really not necessary for the Court to go into the issue of intent.

[52] I want to be very clear as to what my role is when it comes to intent. In the *Royal Winnipeg Ballet* case that I have already cited, Madam Justice Desjardins at paragraph 81 accepts Justice Sharlow's analysis in paragraph 64, saying:

> … -- what the Tax Court Judge should have done was to take note of the uncontradicted evidence of the parties' common understanding that the dancers should be independent contractors and then consider, based on the *Wiebe Door* factors, whether that intention was fulfilled.

[53] While it is not absolutely necessary to go into it because, even if there had been intention otherwise, the *Wiebe Door* factors are quite conclusive, there was enough argument addressed to this issue that, in fairness, I will comment upon it.

[54] That brings me to the handwritten letter, Exhibit I-3, dated August 29, 2007, which Mr. Oulahen testified he personally handed to Mr. Pichugin, which Mr. Pichugin denies. Having watched the witnesses under oath and assessed their demeanour and their consistency, I find that I prefer the evidence of Mr. Oulahen. I find that there was such a letter, that it was brought to Mr. Pichugin's attention, that he worked under its terms and conditions until March 2008 when he unilaterally increased his wage to $750. That, in my view, is evidence of a mutual intent that Mr. Pichugin be an independent contractor.

[55] Having said that, it was almost as if Mr. Pichugin had read *Wolf*, which I have cited, when he said, "I am not a risk-taker. I have four students at home and I want security and stability." Those words could have been read right out of *Wolf*. When they talk about what sort of person is an independent contractor and what sort of person is not, they use language that is almost identical to that spoken.

[56] In paragraph 118:

> We are dealing here with a type of worker who chooses to offer his services as an independent contractor rather than as an employee and with a type of enterprise that chooses to hire independent contractors rather than employees. The worker deliberately sacrifices security for freedom (the pay was much better, the job security was not there, there were no benefits involved as an employee receives, such as medical benefits, pension, things of that nature...

[57] Then it says at paragraph 120:

> In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services.

[58] In paragraph 94 of *Wolf* it says:

> Non-standard employment --

(I earlier said that that phrase emanated from *Wolf*),

> -- such as the one of the appellant, which emphasizes higher profit coupled with higher risk, mobility and independence, indicate, in my view, that the appellant correctly claimed the status of contractor or the provider of services under article 2098 of the Civil Code of Québec.

[59] I earlier said that the Federal Court of Appeal in *Wolf*, even though that worker got benefits as an employee would, he was still found to be an independent contractor. That is to be found in paragraph 91:

> The indicia of overtime pay, vacation pay and holidays are neutral in my view. The completion bonus, --

(Which I have already adverted to)

> -- the absence of health insurance and pension plan, and the whole risk factor, including the lack of any protection under provincial labour legislation, favour the status of independent contractor.

[60] In paragraph 87:

> In consideration for a higher pay, the appellant, in the case at bar, took all the risks of the activities he was engaging in.

[61] Notwithstanding that Mr. Pichugin has characterized himself as not a risk-taker, which resonates with the language spoken in *Wolf*, I find that three of the four *Wiebe Door* factors all point in the same direction, that he was an independent contractor, that the letter, Exhibit R-3, buttresses that conclusion, as does the fact that he worked under it without complaint for the seven and a half months that he was engaged by the Intervener. As aforesaid, he had the ability to negotiate his rate of remuneration and was not in a relationship of subordination with the Intervener.

[62] It remains that we go over the assumptions set out in paragraph 17 in the Reply to the Appellant's Notice of Appeal, because it is trite law that the burden is upon the Appellant to rebut or demolish those assumptions. Those that are not rebutted, as counsel for the Minister said, are to be taken as true.

[63] There was no issue with 17(a), (b) or (c).

[64] For (d) there was a caveat. They talk about the management of parking lots. I have already said that there was only one parking lot. Also in (d), when they list the Appellant's duties, it can be argued that they left out the issuance of parking tickets. Although I have said there was no evidence that he was required to do that, he did it every hour and a half.

[65] (e) is not disputed, nor is (f) or (g).

[66] In (h), "the Appellant was not supervised by the payer". That is true. Any reporting that was done, as I have already said, was more by way of monitoring the result rather than controlling the worker.

[67] In (i), "the payer provided the Appellant with directions", but only to the extent of what work had to be done for each assignment. That indicates that the man was an employee because this is non-standard employment and directing what work is to be done is enough. You don't have to dictate the means or the manner. That is something that is specifically set out in the Civil Code of Quebec. It goes to the issue of subordination, and I have already found that there was not sufficient subordination to indicate that this man was an employee.

[68] (j) is not contested, nor is (k).

[69] (l) says that the Appellant worked eight hours a day Monday to Friday. The evidence was that he had no set times, and his hours were flexible as long as the project was completed.

[70] The same goes for (m).

[71] I have already discussed (n) and (o) in my reasons with reference to the ownership of tools. I find that, because they were both shared, the tools factor is neutral.

[72] (p) is established, and (q) is established.

[73] (r) was demolished: "the Appellant could hire helpers at his own expense".

[74] (s) stands, as does (t), (u), (v), (w) and (x).

[75] (y) has been established, that he unilaterally increased his pay to $750 a month.

[76] (z) I have discussed at length. The payer did not provide the Appellant with any health benefits, life insurance benefits or paid vacation. I find that that has been established because what Mr. Pichugin was provided with, was ongoing income instead of vacations because the offices were closed and, therefore, he could not earn any income. Even if it could be construed as vacation pay, in the case of *Wolf* the man got vacation pay and was still held to be an independent contractor.

[77] The Appellant has succeeded in demolishing, at most, three of the assumptions set out in the Minister's Reply. According to *Jencan Ltd.*, even though he has demolished some of the assumptions, if the remaining assumptions are sufficient to support the Minister's determination, then they stand. *Jencan*, by the way, is *Jencan Ltd. v. M.N.R.*, [1997] Federal Court Judgments No. 876 in the Federal Court of Appeal.

[78] During these two days of hearings 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 I have found no new facts or nothing to indicate that the facts inferred or relied upon by the Minister were unreal or incorrectly assessed or misunderstood. I find that during the period under review, in his working relationship with the Intervener, Mr. Pichugin was an independent contractor on his own account. The Minister's conclusions are, therefore, objectively reasonable.

[79] Therefore, in the result, the Minister's determinations will be confirmed, and the two appeals are dismissed.

Signed at Toronto, Ontario, this 11th day of February 2011.

"N. Weisman"

Weisman D.J.

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