Docket: 2011-2508(EI)

BETWEEN:

687352 BC LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JASON ROBERT MARTIN,

Intervenor.

Appeal heard on March 22, 2012, at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Agent for the Appellant:	Peter Ronda
Counsel for the Respondent:	Dawn Francis
For the Intervenor:	The Intervenor himself

JUDGMENT

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

Signed at Sidney, British Columbia, this 18th day of April 2012.

"D.W. Rowe"

Rowe D.J.

Docket: 2011-2507(CPP)

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Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JASON ROBERT MARTIN,

Intervenor.

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Signed at Sidney, British Columbia, this 18th day of April 2012.

"D.W. Rowe"

Rowe D.J.

Citation: 2012 TCC 127
Date: 20120418
Dockets: 2011-2508(EI)
2011-2507(CPP)

BETWEEN:

687352 BC LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JASON ROBERT MARTIN,

Intervenor.

REASONS FOR JUDGMENT

Rowe D.J.

[1] The Appellant 687352 BC Ltd. ("BCL") appealed from two decisions issued by the Minister of National Revenue (the "Minister") on May 6, 2011 pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*") wherein the Minister decided Jason Robert Martin ("Martin" or "Intervenor") was engaged in both insurable and pensionable employment with BCL during the period from August 17, 2009 to August 7, 2010 on the basis he was employed pursuant to a contract of service.

[2] The agent for the Appellant, the Intervenor, and counsel for the Respondent agreed both appeals could be heard together.

[3] Douglas Kurtz ("Doug") testified he resides in Chilliwack, British Columbia and is a self-employed painter. During the relevant period, he provided his services to BCL as a site supervisor. He met Martin in a coffee shop as he understood Martin wanted to change his employment. Earlier, a business entity operated by Martin and his partner Trevor Henderson (Henderson) had provided services to BCL. In early

August, 2009, Henderson was working as an installer for BCL and Martin was working for a residential builder installing siding. When Martin agreed to do the same work for BCL, Doug stated there was no discussion about his working status and assumed the previous arrangement would apply whereby Martin issued an invoice for his labour – billed at an hourly rate of $25 – together with Goods and Services Tax (GST). Doug stated that every worker on a BCL site - including himself – was treated as a subcontractor. He had worked with Martin several months earlier and knew him to be an experienced and capable installer. Although there were no fixed hours of work, Doug was confident Martin would put in the time required to complete the work and to satisfy the general contractor. Martin owned hand tools and either BCL or Doug provided a table saw on site. Doug stated he is not a shareholder, director or officer of BCL now nor during the relevant period and is no longer employed by that company. Doug knew Martin billed BCL during each month for his services until August 7, 2010 when he left and moved to Kamloops.

[4] In cross-examination by counsel for the Respondent, Doug stated he was paid a monthly salary by BCL to act as a site supervisor. The workers arrived between 7:30 and 8:00 a.m. and took lunch breaks around noon. Usually, there were between four and seven workers on site and the usual construction involved duplexes and row housing. The builder/general contractor provided materials to the site. The first time he worked with Martin and Henderson was at a development - Retriever Ridge - and the method followed was for workers to arrive on their own with the tools required to do the work. Martin and Henderson were operating their own business - Aces High Exteriors (Aces High) and the builder paid them directly. After Martin agreed to provide his services to BCL – on August 17, 2009 – he worked at a residential development in Boston Bar, B.C., together with Henderson and Doug and other workers who were paid by BCL. Doug stated the workers were permitted to work on Saturday and were reimbursed for fuel costs incurred during the 1.5 hour drive (each way) from the Lower Mainland area. Doug stated he was on site generally except for a two-hour lunch break and the policy was for workers to inform him if they needed to leave the site. The usual workweek was Monday to Friday – eight hours per day – but some installers started earlier and quit earlier. Although the construction process was a team effort, there were some jobs that could be performed by one person outside of regular hours.

[5] In re-examination, Doug stated the Boston Bar project was done during the winter. With respect to Martin leaving the job site within usual working hours, he was unable to say whether Martin had requested time off or – instead – just told him he was leaving. The $25 an hour rate was the usual one paid - at that time – to experienced installers.

[6] In cross-examination by Martin - as Intervenor – Doug acknowledged that the planks required for scaffolding were provided by BCL or another worker at the site. Doug recalled an instance when he borrowed money to pay workers because his brother – Wayne Kurtz (Kurtz) – was in California. Doug recalled there had been a discussion with Martin about his abrupt departure for Kamloops who said the reason was that he had not been paid fully for his work. Doug was paid a fixed amount monthly and did not keep a time sheet. There had been a period when BCL was behind schedule and if workers were experienced – an easy assessment for Doug to make - they were offered work. Doug stated he was not involved in reviewing any billing by workers or in issuing BCL payments by cheque.

[7] Kurtz testified he is a contractor and the sole shareholder and director of BCL. The corporation installed siding for general contractors building residences. His role was to locate work and submit bids. If successful, installers were hired and Doug supervised the work. Kurtz met Martin at a coffee shop and had dealt earlier with Martin and Henderson. They did a job where each of them submitted an invoice billed at an hourly rate. Kurtz stated BCL has not had any employees and all workers – including Doug – were treated as subcontractors. When workers were required to travel to Boston Bar, each was paid an hourly rate - one-way – as that was the basis upon which BCL was compensated by the developer/builder. There was some variation in the hourly rate paid to workers and even though there was no extra pay for overtime, they were permitted to work additional hours at the regular rate. Prior to the relevant period, Martin and Henderson had operated Aces High and billed BCL for installing siding – at an hourly rate – and added GST. Kurtz stated that when Martin re-joined Henderson at BCL - after August 17, 2010 – and continued to submit invoices, he assumed the same GST number was in force and issued a cheque in payment, including the amount attributable to GST. Kurtz stated there were some weeks when no work was available.

[8] Upon consent of the Agent for the Appellant, and of the Intervenor, counsel for the Respondent filed – as Exhibit R-1 – a binder containing documents at tabs 1-11, inclusive. Hereafter, a tab number will refer to material within Exhibit R-1.

[9] In cross-examination, Kurtz stated that a general contractor pays BCL a lump sum for a job. BCL hires workers to perform the required task. At tab 1, an undated invoice pertains to work performed at a condominium development at Retriever Ridge. It was calculated on the basis of 73 hours at $25 per hour for a total of $1825. The amount of $91.25 – attributable to GST at 5% was inserted – in error – in the line assigned to Provincial Sales Tax (PST). Kurtz stated he understood Martin and

Henderson were operating a business - Aces High - but some invoices were submitted in Martin's personal name. An invoice - dated March 01/10 – for work performed by Martin at various locations included an item for work performed repairing a fuel pump for which he charged the sum of $200. In an invoice – dated July 1/10 in the sum of $1600 – Martin wrote the notations "Draw" and "Peace (sic) Work "thereon. No tax was charged. Kurtz stated Martin advised him that the piecework method was not acceptable and that further work would be billed at the $25 per hour rate. Subsequent invoices submitted by Martin were prepared on that basis. Kurtz identified two photocopied sheets – tab 2 – of cheques issued to Martin during the relevant period. All cheques were issued in the name of Jason Martin. Kurtz was referred to a chart prepared by the Appeals Officer – tab 8, p. 5 – indicating cheques were issued to Martin twice a month - generally near the middle and the end - although some cheques were issued almost back-to-back, depending on the circumstances. In July, 2010, payments to workers were irregular because the ability of BCL to pay depended on receiving funds from the general contractor and sometimes there was a delay. Kurtz stated he had advised workers this could be a problem from time to time if the contractor was slow in issuing a progress payment. However, there was no mention of what the situation might be if a general contractor either refused to pay or was unable to do so due to insolvency. Kurtz stated he was not aware – nor could he have been - whether some billable hours pertained to repairing mistakes or omissions by workers. All subcontractors on site billed BCL twice a month. He knew Martin earned some money by tinting windows when not working on BCL jobs and that was not any concern provided the installation jobs were performed properly. Kurtz stated there were two extension ladders on one site together with some scaffolding planks which Henderson sold to BCL when he left to work for another company.

[10] In cross-examination by the Intervenor, Kurtz stated the 24-foot aluminum plank was worth about $500 and other accessories pertaining to the installation work had a maximum value of about $2,000.

[11] Martin was called to the stand by counsel for the Respondent. Martin testified he lives in Kamloops and works as an exterior finisher. Prior to providing his services to BCL in August, 2009, he had worked as a fabricator and welder for six months at a plastics company and had the status of employee. Earlier, he and Henderson had operated Aces High as partners and in February, 2008, registered for GST purposes and were assigned a number by Canada Revenue Agency (CRA). Martin identified a printout – tab 3, pp. 1-3, inclusive – and accepted the accuracy of the gross revenue stated therein – p. 3 - which was $78,100 for the period from January 28, 2008 to December 31, 2008 and $31,202 for the period from January 1, 2009 to December

31, 2009. Martin stated he found employment with the plastics company and left the business which Henderson continued to operate. On December 13, 2005, Martin and another partner had registered a business for the purpose of carrying out automotive body repair but it did not proceed due to problems finding suitable premises. Near the first of August, 2009, Martin stated he received a telephone call from Doug stating that Henderson had recommended him and that BCL had work for an installer. Martin agreed to provide his services and gave three-weeks notice to his employer. Martin stated he spoke with Kurtz who offered him “the same deal as Trevor” which he understood referred to the hourly rate of $25. At that time, BCL was using a trade name, Can-Do Developments, to carry on business. Martin stated he worked side-by-side with Trevor at various job sites but they were no longer partners operating a business as in the past when Aces High was active and had subcontracted a one-week project from BCL at a flat fee which he and Henderson split 50-50. As partners in Aces High, they had contracted to do a job at Retriever Ridge for a bid price of $8,500 and ended up losing money. Martin stated he and Henderson purchased three ladders, a 24-foot aluminum plank, a table saw and other tools worth approximately $6,000. During August, 2009, Martin worked on a development at Boston Bar installing exterior finishing and roofs and decks. He was experienced and did not require instruction but received a work assignment after attending at a site. He had a pouch and personal tools valued at $280 and when a larger tool or piece of equipment was needed, he borrowed it from another worker for a brief period. Each morning, he attended at the Kurtz residence where he loaded necessary tools and supplies into the BCL truck and drove to the job site at Boston Bar for which he was paid for 1.5 hours at his regular rate. On occasion, as many as seven people were working there but the core group was comprised of four. During the relevant period, Martin worked at eight different sites and drove to work in his own vehicle if the jobs were local. Throughout that period, the usual workday started at 8:00 a.m. and ended between 3:30 and 4:00 p.m. with a one-hour lunch break at a place chosen by consensus by the group, including Doug. Martin stated he was paid only for hours worked and on one occasion informed Doug that he had to leave early to pick up his daughter. While providing services for BCL, Martin stated he had not hired anyone since it “was not my company”. Martin stated he added GST to his invoice in accordance with instructions received from Kurtz. He calculated his hours, multiplied by the $25 rate and added GST at 5% but inserted that amount in the space reserved for PST, except for one invoice where it was in the correct GST column. Martin stated he was not troubled by the request – by Kurtz - to include GST because – in referring to Doug and Kurtz - he was “happy to be working with guys I like”. He acknowledged that he had tinted some windows for a developer based on a fee per window and had performed the work when not working as an installer on BCL projects. Martin stated that - in July, 2010, he accepted the proposal by Kurtz that he work on a piecework

basis and received an advance of $1600. However, it did not take him long to realize he did not want to “partner-up” with other workers and share revenue based on a certain section of work at the project. He informed Kurtz this new method was not acceptable and that he would continue to provide services only on the basis of the former method of invoicing BCL at the hourly rate. While at Boston Bar, Martin stated that when he was “loaned out” to work with William Stoutjesdyk ("Stoutjesdyk"), he kept track of his hours and billed BCL for that work in the invoice submitted for that pay period. Martin stated he had not filed an income tax return since the 2006 taxation year. Martin acknowledged that each cheque issued to him by BCL was in his personal name and that each bore the notation, “Sub Cont” on the memorandum line which did not trouble him as he was friends with the Kurtz brothers. Toward the end of the working relationship, Martin was upset when he was unable to receive his full pay and during some period earlier, money was received – in the form of draws or advances – in irregular amounts. Martin said he left the job on a Friday, following which he telephoned Kurtz to request the balance of his pay, which he received.

[12] In cross-examination by the agent for the Appellant, Martin stated when he agreed to work for BCL, he was not aware of the working status of Henderson but knew he would be paid the same hourly rate of $25 and that payment would be made about the 15th and 30th of each month. Martin agreed that he and Henderson had charged GST on invoices when operating Aces High but stated he had not been a subcontractor since then and had been an employee when working for another company - in 2010 – after leaving BCL. Martin stated he was not involved in filing any GST return in May, 2010 for Aces High and was not aware of said filing until Henderson told him at some point. Martin acknowledged that Kurtz must have assumed that he would be using the GST number issued to them – as partners in Aces High - which had been used when invoicing BCL for work done prior to the relevant period. Martin stated that when he agreed to work as an installer on BCL projects as of August 17, 2009, he was no longer operating a business either within a partnership or as a sole proprietor. There was no discussion with Kurtz about being placed on a payroll which did not concern Martin since he considered his status would be that of employee because he was not bidding on any specific job and was not providing his services on any basis other than at the agreed hourly rate of $25 for which he would receive payment twice a month.

[13] Henderson testified that he lives in Chilliwack and works as an Exterior Finisher. He has known Martin for 20 years and they were partners in a business - Aces High – during the period from 2007 to mid-2009 when the recession hit and many developers stopped building residential units. At that point, Martin left

the business and found employment while Henderson carried on under the Aces High banner. That entity had been registered as a partnership with Service Canada for GST and income tax purposes. Henderson stated he received a telephone call from Kurtz who offered work at the Retriever Ridge project where he and Martin – through Aces High - had provided their services earlier to a builder, not BCL. With the consent of Martin, Henderson retained the assets that had been purchased for use by them - as Aces High - because he had taken out a loan for their acquisition. After returning to work on various BCL projects, Henderson was paid an hourly rate of $25 and used his own hand tools. Martin identified an invoice he had submitted to Cando (sic) Developments – Exhibit R-2 - dated October 30/09, in the sum of $1993.13 - based on 64.5 hours of exterior finishing at $25 per hour plus three months rental of equipment – ladders and scaffolding - at $100 per month and GST of $80.63. Henderson stated Doug acted as the Foreman on the job sites and called the lunch break and quitting time. Doug also had exercised his authority to fire a worker. About the middle of June, 2010, Kurtz announced that BCL was losing money by paying an hourly rate and decided to change the basis of remuneration to piecework. Henderson stated he did not agree to accept that revision and left the BCL project and found employment with another exterior finishing company.

[14] In cross-examination by the Agent for the Appellant, Henderson stated that when he accepted to work for $25 per hour, he had not considered that he would provide his services on any basis other than as an employee as he was not – at that point – operating Aces High nor any other business entity. He has not filed an income tax return for the 2009 taxation year but thought he would report his revenue as self-employed income. Every invoice he issued to BCL - or a trade name used by it - included GST. Henderson stated that even though he and other workers were experienced, that Doug assigned sections or areas of work and when he said, “Let’s go for lunch”, all the BCL workers went with him. In Henderson’s opinion, the workers looked upon Doug “as a boss.”

[15] In cross-examination by Martin, Henderson agreed that if a question arose about some work-related matter on the site, he and others asked Doug for advice and direction.

[16] Stoutjesdyk testified he is a self-employed contractor and has carried on the business of residential framing, concrete work and renovations since 2005 under the name of Brookbank Builders (Brookbank). He has three employees who are paid an hourly rate and are subject to the usual source deductions. He met Kurtz in 2006 when Brookbank was performing a job pursuant to a bid for a fixed amount. Stoutjesdyk knew Martin from having worked on the same sites at Retriever Ridge

and Boston Bar and although Martin worked with him, payment for his services was made to BCL. With respect to one aspect of that development, Brookbank and BCL both provided employees or workers and divided the profit equally. That particular work had been obtained initially by BCL.

[17] In cross-examination by the Agent for BCL, Stoutjesdyk agreed that most jobs have someone who acts as a Site Supervisor.

[18] In cross-examination by Martin – as Intervenor – Stoutjesdyk recalled an incident where Martin and Henderson helped him to frame a residential unit and that payment for their hours was made by BCL.

[19] Martin – as Intervenor – did not call evidence.

[20] The agent for the Appellant submitted that the relevant jurisprudence supported the position that Martin had provided his services as a person carrying on business on his own account and not as an employee. Martin had a history of operating within a business – Aces High – and had attempted a start-up of another entity and had generated income by working for other builders by tinting windows. In the agent's view of the evidence, the actions of Martin throughout were consistent with that of someone who was an independent contractor and the regular inclusion of GST – albeit mostly in the space reserved for PST – indicated he was following through as a GST registrant, using the number assigned earlier to him and Henderson, operating as Aces High. It was clear that Martin did not require supervision and had the ability to work at convenient times and to leave the site if required for some personal matter.

[21] Counsel for the Respondent submitted there had been no meeting of the minds when Martin and Doug and Martin and Kurtz discussed the provision of services to BCL. The evidence revealed that Martin was treated as an employee, who performed work assigned by Doug, acting as Site Supervisor. Counsel submitted that BCL had seconded Martin to work for Stoutjesdyk's business and paid him for those hours. Notwithstanding the purported inclusion of GST to the invoices submitted by Martin during the relevant period, it was clear that he was an hourly worker with no chance of profit nor did he have any risk of loss as he was paid for hours recorded by him even though some may have been attributable to repairing a mistake or correcting an oversight. Counsel submitted the evidence did not support a finding that Martin was carrying on business on his own account and that the decisions of the Minister should be confirmed.

[22] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *Royal Winnipeg Ballet v. M.N.R. (F.C.A.)*, 2006 FCA 87 (CanLII) ("*Royal Winnipeg Ballet*"), *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.)*, [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada*, 2006 FCA 350 (CanLII) ("*City Water*"), there was a clearly-expressed mutual intent by the parties that the person providing the services would be doing so as an independent contractor and not as an employee. That is not the case in the within appeals. There is no written agreement and the parties did not discuss the matter of working status at the outset of the working relationship nor did that subject arise at any point during the relevant period.

[23] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – ("*Sagaz*") dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1986] 3 F.C. 553 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 47 and 48 of his judgment stated:

> 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.

[24] I will examine the facts in the within appeals in relation to the indicia set forth in the judgment of Major, J. in *Sagaz*.

Level of control

[25] Martin – like Henderson – was an experienced exterior finisher and did not require supervision. However, he was directed – on occasion and as required – by Doug who functioned as an on-site Foreman and Supervisor of the group of workers. Doug assigned areas of work and announced his lunch break. The workers followed suit, ate at the same place and returned to work although Doug may have taken a longer break. Later, Doug advised them when the workday was finished. Sometimes, there was an opportunity for a worker to perform services on his own but that was rare. The Boston Bar job required Martin to attend at the Kurtz residence, load up supplies in the Kurtz/BCL truck and drive 1.5 hours to the job site. Martin was "loaned out" to Stoutjesdyk's business entity at Boston Bar to work on a specific segment of the development in which Brookbank and BCL were partners. BCL paid Martin directly and it is clear he was not a subcontractor of Stoutjesdyk.

Provision of equipment and/or helpers

[26] Martin brought his own tools to the job sites which is standard within the construction industry. Any other tools or equipment were owned by Henderson who retained them when Martin left the Aces High partnership to seek employment with a plastics company. Payment for the provision of the ladders and scaffolding plank to BCL was not made to Martin but was included in the invoice submitted by Henderson which BCL paid by cheque. Martin did not hire any helpers as all workers were hired and fired by Doug or Kurtz.

Degree of financial risk and responsibility for investment and management

[27] Martin did not have any financial risk during the relevant period. He was paid an hourly rate for his work, including 1.5 hours travelling time to Boston Bar. Although there were times when a developer was slow in paying BCL, Martin received all his pay including on one occasion when Doug had to use his own resources to pay workers because BCL did not have adequate funds during a particular pay period. Martin was not required to undertake any management of others to perform his own tasks and his only investment during the relevant period was in his own hand tools and pouch.

Opportunity for profit in the performance tasks

[28] Martin was paid an hourly rate of $25. There was no provision to receive a bonus or overtime pay. He did not participate in any profit-sharing mechanism. After Kurtz had changed – unilaterally – the method of remuneration in June, 2010, by altering payment to one based on piecework per section/segment of a development, Martin billed the sum of $1600 - as an advance - but informed Kurtz thereafter he would not work under that new regime and reverted to billing on the former basis - at $25 per hour – and BCL paid him accordingly.

[29] The facts in the within appeals are similar to those in the case of *Stephen Twilley v. The Minister of National Revenue ("Twilley")*, 2009 TCC 524 that I heard in 2009. In that case the worker agreed to provide his services at the flat rate of $25 per hour. The payor – Twilley – was charging his customers a flat rate based on a certain amount per square foot.

[30] In *Twilley*, counsel for the Appellant relied on my decision in the case of *Beaver Home Improvements Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [2003] T.C.J. No. 56 ("*Beaver Home*"). In that case, I found the worker to have been an independent contractor when undertaking roofing work for which he was paid by *Beaver Home*. There are some significant differences in the facts between that case and those in the within appeals. First, the only attendance at the job site by anyone from *Beaver Home* was a salesperson/estimator for the purpose of ensuring the work conformed to the demands of the customer. Second, 90% of the time, the jobs were ordinary and could be performed by using the personal hand tools and other equipment owned by the worker. If specialized equipment was required, it was provided by *Beaver Home*. The worker – O'Flynn – used his own vehicle to travel to and from work and also transported his fellow workers as a matter of convenience. *Beaver Home* provided O'Flynn's helpers with tools and equipment.

[31] In the *Beaver Home* case, there was not a significant amount of financial risk and O'Flynn received payment from *Beaver Home* whether the homeowner paid the invoice and the helpers were paid directly by *Beaver Home*. However, there was an opportunity for profit because of a particular revenue-sharing arrangement whereby O'Flynn could gain a profit from work performed by another worker. He also had the right to accept or decline a job and could negotiate for an additional payment if the project turned out to be more difficult than anticipated. In *Beaver Home*, I found O'Flynn had the ability to increase his own income by operating in an efficient manner and by exercising supervision over other workers to ensure efficiency.

[32] The facts in the within appeal are similar to those in *Copper Creek Homes Inc v. The Minister of National Revenue*, 2011 TCC 570 – ("*Copper Creek*"). In that matter, the Minister had registered the worker for purposes of GST and he had engaged a tax preparer who reported his earnings as self-employed income. In that case - at paragraph 22 - I stated:

> [22] As for the purported agreement at the outset that Wiebe provide his services to Copper Creek as an independent contractor, although there was no coercion, that status was offered by Falk on a "take-it-or-leave-it" basis at the negotiated hourly rate and the working relationship – in 2008 - commenced on that basis. Wiebe was providing his services to others – including Weststone – at that time but had not registered with GST nor had he considered that he was carrying on his own business. The manner of filing his income tax returns for the years 2008 and 2009 was dictated by the absence of a T4 slip from Copper Creek and in 2010 his return was prepared – again – by his tax preparer on the basis the money earned was business income. The manner of filing is not determinative nor is the arbitrary issuance of a GST/HST number to Wiebe, which was probably based on the filing of his income tax returns wherein he reported business income and claimed appropriate deductions.

[33] In the course of concluding that the worker was an employee of *Copper Creek*, I commented at paragraph 24:

> [24] The evidence in the within appeals does not indicate Wiebe was carrying on business on his own account during the relevant period. The business registration was thrust upon him by the Minister and it has been cancelled. Wiebe did not work for others during the period at issue and did not advertise his services nor did he consider that he had any status other than as an employee who should have been on the Copper Creek payroll. The overall evidence strongly favours a finding that Wiebe was employed by Copper Creek pursuant to a contract of service. Their conduct was consistent with that status even though Wiebe's earlier working relationship with Copper Creek – and the numbered company – may have been sufficiently different to have justified the decision of the Minister to issue Wiebe a business account number. Those circumstances are not before me except by way of background to explain the origins of the relationship between Wiebe and Falk and Wiebe and Copper Creek. Whether a clear expression of mutual intent would have saved the day for the Appellant is doubtful in any event but it was not a reliable factor in the within appeals. There was no true meeting of the minds on this point and early in 2010, Wiebe sought to have his status characterized as an employee. It was apparent that Falks' statement that Wiebe's hourly rate would have to be reduced from $25 to $17 or

> $17.50 if he were to be treated as an employee and subject to source deductions, was a negotiating ploy on his part that put an end to Wiebe's inquiries on that point. The difference of $7 or $7.50 per hour amounted to 30% which was disproportionate to the percentage of earnings required to be paid by the employer when making remittances pursuant to the *Act* and the *Plan* which – to a certain maximum not relevant here – are based on 2.42% and 4.95% or earnings, respectively. As an employer, Copper Creek would have been responsible for paying the 4.4% WCB premium so the total percentage payable by Copper Creek would have been 11.77%. Based on the hourly rate of $25, that would have reduced Wiebe's pay by $2.94.

[34] The central question posed in *Sagaz, supra,* is:

> … whether the person who has been engaged to perform the services is performing them as a person in business on his own account.

[35] In the within appeals, the parties had known each other prior to the relevant period and had worked on the same sites. Kurtz and Doug were aware that Martin and Henderson had operated Aces High as a business entity and that Martin was employed at a company when contact was made to invite him to provide his services to BCL in August, 2009. Kurtz testified that he assumed Martin would add GST to his invoices based on the agreed hourly rate and would use the same number as the one assigned to the Martin-Henderson Aces High partnership that had billed BCL for certain work prior to the relevant period. Martin testified he had no intention to provide his services to BCL in any context other than as an hourly employee, who would be paid twice a month, and that he added the 5% tax to accede to the request of Kurtz whom he regarded – along with Doug – as a friend. Martin wanted to work but not under any circumstances that could lead to a loss since he had already had that experience while a partner in Aces High and did not want to repeat it. This intent is borne out by his swift rejection of the new payment scheme Kurtz attempted to impose by changing the hourly rate to piecework. Martin balked and refused to continue working on any basis other than by billing his regular hourly rate.

[36] Kurtz testified that BCL never had any employees. His brother - Doug - worked as a Site Supervisor and was paid a monthly salary, yet was treated as an independent contractor. Doug's working status was not before me but the evidence did not disclose that Doug was operating his own business and the terms and conditions of his service appear to be consistent with that of an employee. This arrangement with Doug is indicative of the attitude of Kurtz who assigned the status of subcontractor to everyone working on a BCL job, perhaps because BCL was not a builder or developer and won bids as a subcontractor to carry out certain work on

various residential housing projects. The status of subcontractor does not accord with the facts revealed by the working relationship between Martin and BCL during the relevant period, despite whatever had gone on before. Unlike the situation in *Precision Gutters Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, 2002 FCA 207, the evidence does not permit a finding that there were two businesses operating here, one by Martin and the other by BCL, in respect of work done on those projects referred to during the relevant period.

[37] Assumptions are not equal to agreements and unilateral declarations of status are not binding on the parties in this instance. Without more, even a mutual intent to characterize a working status is insufficient.

[38] In the case of *Standing v. Canada (Minister of National Revenue - M.N.R.)(F.C.A.)*, [1992] F.C.J. No. 890 Stone, J.A. stated:

> ... There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the Wiebe Door test. ...

[39] There was no mutual intent that Martin would provide his services as an independent contractor. The inclusion of GST in the invoices by Martin is not determinative of his status when providing services to BCL after August 17, 2009. It was not reasonable for Kurtz – as the sole directing mind of BCL – to have proceeded on the basis that Martin was – somehow – still functioning as a sole proprietor in business on his own account when he had been offered work while an employee at another entity and someone who – in good faith – gave that employer three-weeks notice of his intent to leave.

[40] In stark contrast to the facts in the within appeals, Boyle J. heard the case of *Domart Energy Services Ltd. v. The Minister of National Revenue*, 2007 TCC 585 ("*Domart*"). At paragraphs 6 to 13, inclusive, the facts were stated as follows:

> 4 In servicing its oilfield rental business' clients, Domart Energy uses two picker trucks. Picker trucks are large, expensive trucks that have a boom crane mounted on them suitable for delivering and picking up machinery and equipment of the type and size that it rents out. One of Domart Energy's picker trucks is owned by it and the other is retained by it from an arm's length third party, McCallum Trucking Ltd. McCallum Trucking provides to Domart Energy the operator of the picker truck which it provides. Picker trucks are expensive pieces of equipment costing in the $400,000 range.

5 Prior to the period in question, Domart Energy employed a private operator for the picker truck that is owned by it. However, when its employed picker operator left, Domart Energy had difficulty finding a new employee to take the job despite its advertising and recruiting efforts.

6 Mr. Wilfrid Flanagan approached Mr. Pavlis to offer the services of Mr. Flanagan's business, Grubbs Oilfield Services, to operate Domart Energy's picker truck. Mr. Pavlis was familiar with Grubbs Oilfield Services and with Mr. Flanagan's predecessor business Skookum Inc. through which Mr. Flanagan had operated previously. Domart Energy had been a client of both Skookum and Grubbs Oilfield.

7 Grubbs Oilfield Services carried on a number of transport-related services for businesses in the oilfield exploration and development sector. In addition to operating picker trucks, Grubbs Oilfield Services provided pilot trucking services or piloting as well as hotshotting services. Pilot trucking, or piloting, involves providing the lead small truck and driver or the rear small truck and driver that accompany large, slow or dangerous transports. Grubbs Oilfield Services provided pilot trucking services to Domart Energy regularly, about twice a month, during the relevant period. When providing piloting services, Grubbs Oilfield Services provided both the pilot truck and operator. Hotshotting involves making small trucks available to make immediate deliveries to the oilfield of replacement parts and accessories needed for the leased equipment. Domart Energy did not use Grubbs Oilfield for hotshotting as it had other arrangements in place. Grubbs Oilfield had a rate sheet that set out the rates and terms for its piloting, hotshotting and picker operating activities. Mr. Flanagan made a copy of this available to Mr. Pavlis for purposes of their discussion. Mr. Flanagan was insistent to that he was not interested in being Domart Energy's employee but that Grubbs Oilfield was willing to provide the services as a contractor. Grubbs had its GST number, clearance letter for workers' compensation, and its own liability insurance and provided these documents to Domart Energy.

8 Domart Energy was aware that Grubbs Oilfield had other clients and that Grubbs would not be able to take each picker operator job offered. Grubbs had the option to refuse work when called and Mr. Flanagan did.

9 Domart Energy has been able to replace Grubbs Oilfield Services and Mr. Flanagan with an employed picker operator since the period in question.

10 Mr. Flanagan obtained and maintained his own Class 1 driver's license required to operate a picker truck. Mr. Flanagan was a Certified Journeyman Crane and Hoisting Equipment Operator which means he had the required provincial operator license permitting him to operate the

> picker. These credentials were maintained by Mr. Flanagan on his time and at his expense. In addition, Grubbs Oilfield/Flanagan maintained the statutory log books for the picker truck and for the crane.
>
> 11 Grubbs Oilfield/Flanagan also bore the cost of highway traffic infractions. It was not standard in the industry for a driver to be responsible for tickets and fines in the way that Grubbs Oilfield Services had agreed to be.
>
> 12 Domart Energy agreed to pay Grubbs Oilfield Services $45 per hour for Mr. Flanagan's picker operator time. This significantly exceeded the hourly rate of $35 it had previously paid its employed picker operators and that it was offering to potential employee candidates. There was no written contract. Mr. Pavlis was clear that, from their discussions, the increased rate reflected the fact this was a contract rate and there would be no overtime, etc. paid. While Domart Energy's strong preference was for an employed picker truck operator, Mr. Pavlis on behalf of Domart Energy did expressly agree with Mr. Flanagan that this picker truck operating would be done as part of Grubbs Oilfield Services business.
>
> 13 Domart Energy did not pay Grubbs anything additional for meal or hotel expenses, holiday pay, sick leave or any other benefits. Domart Energy's employees, including its employed picker operators, did enjoy a benefits package. Domart Energy paid the invoice received monthly from Grubbs Oilfield at the agreed rate together with GST.

[41] Justice Boyle found the worker was not required to report for work and the times of the jobs were set by the clients and the worker could select the routes and take breaks at his own discretion. At paragraphs 21 and 22, Boyle J. continued as follows:

> 21. Before turning to these criteria and considering them in the facts of this case, I should note that it is both abundantly clear and conceded by the Crown that Mr. Flanagan does indeed carry on a business under the name Grubbs Oilfield Services. The Crown's position is that the work Mr. Flanagan does as picker operator for Domart Energy is within the context of a separate employment relationship. They do not dispute that the piloting work Mr. Flanagan's business does for Domart Energy is done in the context of the Grubbs Oilfield Services business Mr. Flanagan carries on. Nor does the Crown dispute that Mr. Flanagan's Grubbs Oilfield Services does piloting and hotshotting work, and perhaps other picker operator work, for persons other than Domart Energy as part of its business. This aspect makes this particular case quite different from many of the reported cases in this area and from most of the authorities referred to by the Crown. In essence, the Crown's position is that Mr. Flanagan's picker operator work constituted a separate employment activity from his piloting work performed for Domart

> Energy in the same period and from his services provided to others in the period. The contra view to the Crown's position would be that Domart Energy was merely one of Grubbs Oilfield Services' best and largest customers in the period in question.
>
> The intent of the parties:
>
> 22. It is clear in this case that both parties intended the relationship to be that of independent contractor. Mr. Flanagan carried on business as Grubbs Oilfield Services and, prior to doing picker operating work for Domart Energy, did other work for them and did work for other customers. Mr. Pavlis on behalf of Domart Energy testified that, while he would have preferred to be able to hire Mr. Flanagan as an employed picker operator, at Mr. Flanagan's insistence Domart Energy knowingly and intentionally agreed to enter into an independent contractor relationship with Mr. Flanagan's business Grubbs Oilfield Services instead.

[42] At paragraph 29, Boyle J, concluded:

> 29. Based on the evidence in this case I am satisfied that the provision of picker truck operator services was an integral part of the Grubbs Oilfield Services business carried on by Mr. Flanagan. There is no factual or legal basis to justify treating those services used by Domart Energy as separate from Grubbs Oilfield's overall business activities and characterizing them as being in the nature of the employment of Mr. Flanagan by Domart Energy. This is a case of Mr. Flanagan providing the services to Domart Energy in the course of an already established business of his own. As set out in *Market Investigations* , this makes it an easier case in which to apply the relevant tests.

[43] Having analyzed all the evidence and following a review of relevant jurisprudence, I conclude that the decisions issued by the Minister pursuant to the *Act* and the *Plan* are correct and are confirmed.

[44] Both appeals are dismissed.

Signed at Sidney, British Columbia, this 18th day of April 2012.

"D.W. Rowe"

Rowe D.J.

CITATION:	2012 TCC 127
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