Docket: 2011-3523(EI)

BETWEEN:

YOUNG TILE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
Young Tile Inc. 2011-3524(CPP) and *Young Tile Inc. 2011-3759(CPP)*
on October 19, 2012, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall Bocock

Appearances:

Counsel for the Appellant:	Dale Barrett
Counsel for the Respondent:	Thomas O'Leary Rishma Bhimji

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the ruling of the Minister of National Revenue determined under section 91 of the *Act* is confirmed.

Signed at Ottawa, Canada, this 2nd day of November 2012.

"R.S. Bocock"

Bocock J.

Docket: 2011-3524(CPP)

BETWEEN:

YOUNG TILE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
Young Tile Inc. 2011-3523(EI) and *Young Tile Inc. 2011-3759(CPP)*
on October 19, 2012, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall Bocock

Appearances:

Counsel for the Appellant:	Dale Barrett
Counsel for the Respondent:	Thomas O'Leary Rishma Bhimji

JUDGMENT

The appeal pursuant to section 28 of the *Canada Pension Plan* is dismissed and the decision of the Minister of National Revenue made under section 27 of the *Plan* is confirmed.

Signed at Ottawa, Canada, this 2nd day of November 2012.

"R.S. Bocock"

Bocock J.

Docket: 2011-3759(CPP)

BETWEEN:

YOUNG TILE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
Young Tile Inc. 2011-3523(EI) and *Young Tile Inc. 2011-3524(CPP)*
on October 19, 2012, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall Bocock

Appearances:

Counsel for the Appellant:	Dale Barrett
Counsel for the Respondent:	Thomas O'Leary Rishma Bhimji

JUDGMENT

The appeal pursuant to section 28 of the *Canada Pension Plan* is dismissed and the decision of the Minister of National Revenue made under section 27 of the *Plan* is confirmed.

Signed at Ottawa, Canada, this 2nd day of November 2012.

"R.S. Bocock"

Bocock J.

Citation: 2012 TCC 383
Date: 20121102
Dockets: 2011-3523(EI)
2011-3524(CPP)
2011-3759(CPP)

BETWEEN:

YOUNG TILE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Bocock J.

I. Nature of the Appeal

[1] The three appeals before the Court comprise the often litigated issue of whether workers within the construction trades constitute independent contractors under a contract for service or employees under a contract of service. There are two appeals under the *Canada Pension Plan* and one appeal under the *Employment Insurance Act* related to two workers of the Appellant's tile installation business.

[2] The Appellant is an Ontario company and is owned and operated by Rudolph Young. The Appellant appeals the Minister's assessment for CPP employer premiums in respect of pensionable earnings for each of Ian Dixon and Stephen Rose under section 6 of the *Canada Pension Plan* (the "*Plan*") and the assessment of the Minister for EI employer contributions in respect of insurable earnings of Stephen Rose under section 5 of the *Employment Insurance Act* (the "*Act*"). Each assessment falls within the identical period of January 1, 2008 to December 31, 2009 (the "Assessment Period").

A. Witnesses

[3] Both workers, Mr. Rose and Mr. Dixon, and the owner, Mr. Young, testified before the Court. Although the testimony of Mr. Dixon, Mr. Rose and Mr. Young differed on some points, the Court found they were generally credible, but in matters of nuance or conflict concerning the factual assertions of the relevant determinative legal factors of the issue to be decided, the Court has preferred the testimony of Mr. Rose, Mr. Dixon (Mr. Young's stepbrother) and lastly Mr. Young in that order of precedence.

B. Legal Test

[4] At the outset, counsel for the parties both agreed that the four operative legal factors to consider in the employee/independent contractor issue were enunciated clearly in the case of *Wiebe Door Services Ltd. v. The Minister of National Revenue*[1]. These four factors from *Wiebe Door* are all part of one single test described as the four-in-one test, namely: the extent to which an employee has control, ownership of tools of the trade, a chance of profit and/or a risk of loss within the working relationship.

C. Facts

[5] On the issue of evidence related to the four factors, the evidence and factual findings may be summarized as follows. The two workers, Mr. Dixon and Mr. Rose, relocated to Calgary, Alberta for the purposes of working for the Appellant by installing floor tiling at various job sites. Mr. Young, the principal of the Appellant, booked the jobs with the head general contractor (the "Primary Contractor"), handled all communications with the Primary Contractor including the flow of information. The workers as a whole would correct any remedial or faulty work and would be paid according to the amount of tile laid on a pay by piece work basis. The amount of pay was ascertained, calculated and distributed by the Appellant in the sole discretion of its principal, Mr. Young. There were no written agreements between the workers and the Appellant. In terms of tools of the trade, aside from small personal tools such as trowels and a portable tile cutter, all large tools, supplies, materials and like items were provided by either the Appellant or the Primary Contractor. There was never any request of the workers for investment into the venture nor were the parties on an individual basis sanctioned or additionally compensated on the basis of the

1 87 DTC 5025

qualitative results of their work, save and except for the quantity of work generated. Any remedial work was identified by the Primary Contractor, relayed to the Appellant and then all workers collectively carried out the remedial work to correct deficiencies.

[6] There was testimony by Mr. Dixon and Mr. Rose that T4 statements may have been issued for their pay and also that the worker's safety authority premiums were paid by the Appellant. In telling testimony, Mr. Rose, indicated that he "worked on Mr. Young's time." In addition, although Mr. Rose incorporated his business or registered a business name during the course of the Assessment Period, the testimony of Mr. Rose was that this did not in any way change his working relationship with the Appellant. As well, neither Mr. Dixon nor Mr. Rose deducted any business expenses nor recounted for the Court the accrual of business expenses beyond what could best be termed as their personal living expenses. In addition, the workers were driven to and from work by the principal of the Appellant.

II. Appellant's Argument

[7] The Appellant offered to the Court that the two-step process for the determination of whether a contract of service or a contract for service existed could be extracted from the Canada Revenue Agency's own brochure identified as "RC4100". The two-step process required an examination of the intent of the parties. The Appellant indicated that the parties intended to be independent contractors by agreeing to pay their own taxes. The Appellant also argued that there was a clear understanding between the Appellant and the workers which reflected the intention that they be independent contractors by each agreeing to "pay his own taxes."

[8] Further, the Appellant stated that the second step is to examine the "true nature of the working relationship." The Appellant argued that the Appellant and workers effectively replicated and mirrored the working relationship to that which existed between the Appellant and the Primary Contractor as to the issues of control, tools of the trade, opportunity for profit and risk of loss. The Appellant argued that it had little control, had to remediate all deficiencies at the direction, discretion and control of the Primary Contractor who oversaw the process and progress of the entire job. Similarly, the Appellant provided some, but not all, of the tools which, in turn, were supplemented by the provision of tools by the Primary Contractor. The Appellant had no significant investment or financial risk and, (as with all the workers although they did not do so) the Appellant hired additional workers to perform the task. The method of compensation although not scientific was based upon piece work for each worker as it was between the Primary Contractor and the Appellant. Appellant's

counsel argued that there is no legal justification for the different treatment of the relationship between the Appellant and its workers and the relationship between the Appellant and the Primary Contractor which, in turn, was clearly a relationship of independent contactor and contract for service. Therefore, so should the working relationship between the Appellant and its workers be characterized.

[9] The Respondent's submissions were more legal in nature and directed the Court to examine the true relationship of the structure as indicated in *Wiebe Door*. At paragraphs 33 and 34 of the case of *Lang v. Canada*[2], Chief Justice Bowman of this Court reviewed a summary of the applicable case law and said as follows:

> **[33]** With respect to the factor of intent I would make a couple more observations. The first is that the Supreme Court of Canada has not expressed a view on the role of intent. In *Sagaz*, it was not mentioned as a factor. The second is that if the intent of the parties is a factor it must be an intent that is shared by both parties. If there is no meeting of the minds and the parties are not *ad idem*, intent can not be a factor. The third, if intent is a factor in determining whether someone is an employee or an independent contractor, then it must necessarily be a factor in all cases where the question is relevant. In this court our focus is usually on the rather narrow question whether a person is employed in insurable or pensionable employment or, under the *Income Tax Act*, whether a person is an employee for the purposes of deducting certain types of expenses or being taxed in a particular way. The *Sagaz* case, on the other hand dealt with vicarious liability. If the test is the same then the rights of third parties could potentially be affected by the subjective intent of the contracting parties as to the nature of their relationship — a concern expressed by Evans J.A. in his dissent in *Royal Winnipeg Ballet*.
>
> **[34]** Where then does this series of cases leave us? A few general conclusions can be drawn:
>
> (a) The four-in-one test in *Wiebe Door* as confirmed by *Sagaz* is a significant factor in all cases including cases arising in Quebec.
>
> (b) The four-in-one test in *Wiebe Door* has, in the Federal Court of Appeal, been reduced to representing "useful guidelines" "relevant and helpful in ascertaining the intent of the parties". This is true both in Quebec and the common law provinces.
>
> (c) Integration as a test is for all practical purposes dead. Judges who try to apply it do so at their peril.

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2 2007 TCC 547, 2007 DTC 1754

(d) Intent is a test that cannot be ignored but its weight is as yet undetermined. It varies from case to case from being predominant to being a tie-breaker. It has not been considered by the Supreme Court of Canada. If it is considered by the Supreme Court of Canada the dissenting judgment of Evans J.A. in *Royal Winnipeg Ballet* will have to be taken into account.

(e) Trial judges who ignore intent stand a very good chance of being overruled in the Federal Court of Appeal. (But see *Gagnon* where intent was not considered at trial but was ascertained by the Federal Court of Appeal by reference to the *Wiebe Door* tests that were applied by the trial judge. Compare this to the *Royal Winnipeg Ballet*, *City Water* and *Wolf*.

[10] The Respondent argued that given the absence of discussion, written agreement or other objective evidence of the nature of the relationship, the mere understanding of each party of "paying his own taxes" was, at best, form over substance and, at worst, lacked any clear direction as to even a bare consensus of an agreement between the parties resembling an intention to legally act as independent contractors. Moreover, the Respondent argued that the absence of an agreement (written or otherwise) in this case fails to establish any badge of intention.

[11] On the control issue, the Respondent argued as follows:

a) on the issue of payment for services and on the issue of calculations of pay, the workers were never shown compensation calculations and moreover the calculations were determined in the sole discretion of the Appellant;

b) there was continuous oversight, direction and instruction provided directly to the workers by the Appellant;

c) the workers gave clear priority and ranking (and perhaps exclusively) to their delivery of tile installation services to the Appellant; and

d) each worker was not free to engage subcontractors and was not free to refuse or reschedule delivery, scope and timing of services; working instead in accordance with the Appellant's direction and schedule.

[12] With respect to tools and equipment of the trade, the custom in the industry was that employers or contractors alike would have certain nominal tools of the trade in their own possession. Accordingly, the issue of employer versus independent contractor cannot be determined in this case by that factor since it would apply equally to either characterization.

[13] With respect to opportunity for profit and risk of loss, the workers had no opportunity to exploit expense margins, reschedule for other jobs or subcontract additional workers. No business expenses were generated nor deducted which could be managed to increase margins of profitability for each worker. Lastly, there were no invoices, spreadsheets, calculations or reconciliations, but merely wage payments made at the discretion of the principal of the Appellant. The treatment of the Appellant by the Primary Contractor is irrelevant and not determinative of the appeals before the Court. In conclusion, the Respondent argued that no evidence was presented to demolish the assumptions of the Minister of the existence of an employee relationship.

III. Analysis and Decision

[14] The argument of Appellant's counsel of the similarity of the Appellant's relationship with the Primary Contractor, while novel, cannot thwart the clear authority in *Wiebe Door*, as clearly cited with clarity and approval in *Lang*. The fact remains that the Appellant did control how many workers it hired, the means for its service completion and its ultimate profitability by scheduling, direction and control. The workers in question were the Appellant's employees, working at the Appellant's direction. By illustration, the scheduling and remedial work were both directed, controlled and otherwise organized by the Appellant. The workers worked under the Appellant's control, driven to and from the job site and were compensated entirely within the Appellant's compensation regime where the amount of pay was distributed without invoices and reconciliation. Wages were doled out coincidently with the Appellant's own receipt of funds from the Primary Contractor, all of which occurred completely at the Appellant's discretion without further justification, negotiation or discussion with the workers.

[15] The absence of any evidence of a consistent mutual intention to establish written or even supportable verbal contracts for services between the Appellant and workers and the lack of any recognizable elements of meaningful control, opportunity for profit, risk of loss or other considerations on the part of the workers which might demonstrate some independent commercial arrangement all leave the assumptions by the Minister of an employee and employer relationship unassailed. In

summary, the Minister's assumptions are not only reasonable, but are entirely supported by the facts proven, which relevant factual findings all together instinctively render the workers to the status of employees within the Court's mind.

[16] Accordingly the appeals are dismissed.

Signed at Ottawa, Canada, this 2nd day of November 2012.

"R.S. Bocock"

Bocock J.

CITATION:	2012 TCC 383
COURT FILE NOS.:	2011-3523(EI) 2011-3524(CPP) 2011-3759(CPP)
STYLE OF CAUSE:	YOUNG TILE INC. AND M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 19, 2012
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall Bocock
DATE OF JUDGMENT:	November 2, 2012

APPEARANCES:

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Counsel for the Respondent:	Thomas O'Leary Rishma Bhimji

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