Docket: 2012-1019(EI)

BETWEEN:

166020 CANADA INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

NICOLAS PLANTE and MARTIN LABELLE,

Intervenors.

Appeal heard on March 6 and 7, 2014, at Montreal, Quebec

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the Appellant:	Nicolas Simard
Counsel for the Respondent:	Christina Ham
Counsel for the Intervenor:	Nicolas Simard

JUDGMENT

The Appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed and the matters are referred back to the Minister for reconsideration and reassessment on the basis that none of the Workers here under consideration were engaged in insurable employment while engaged by the Appellant during the period under consideration, in accordance with the attached Reasons for Judgment.

Signed at Kingston, Ontario, this 15th day of July 2014.

"Rommel G. Masse"

Masse D.J.

Citation: 2014 TCC 220
Date: 20140715
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REASONS FOR JUDGMENT

Masse D.J.

[1] The Appellant, 166020 Canada Inc., is a corporation having its head office and principal place of business in the City of Lasalle, Province of Québec. On August 30th, 2010, the Minister of National Revenue (the "Minister") issued rulings whereby it was determined that Francois Matte, Carl Brault, Nicolas Plante, Martin Labelle and Patrick Laquerre (the "Workers") were engaged in insurable employment with the Appellant during the period of January 1st, 2009 and December 31st, 2009 (the "period"), on the basis that they were employed under a contract of service within the meaning of paragraph 5(1)(*a*) and section 93 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "EIA"). The Appellant appealed these rulings and on September 27th, 2010, the Minister assessed the Appellant for all of its Workers (the "Assessment") for the period here under consideration, for a total of $20,866.83 including penalty and interest. The Appellant filed a Notice of Objection to this Assessment and by letter dated December 6th, 2011, the Minister confirmed the Assessment and confirmed the rulings issued on August 30th, 2010. Hence the appeal to this Court.

[2] The issue in this appeal is whether the Workers engaged by the Appellant were independent contractors or were they employed in insurable employment with the Appellant under a contract for service for the purposes of the EIA.

Factual Context

[3] Mr. Panos Christodoulopoulos is the president and one of the shareholders of the Appellant who carries on business under the name of "Magie Seal". The Appellant is in the business of providing fabric and leather protection treatment (the "treatment") to the customers of large retail furniture stores such as Brault & Martineau and Leon's Furniture. The clients of the Appellant are the furniture stores and not the purchasers of the furniture since there is no privity of contract between the purchasers and the Appellant.

[4] The Appellant engaged the Workers, who were considered as self-employed technicians, to actually apply the treatment. There was no written agreement between the Appellant and the Workers but it is clear that both the Appellant and the Workers considered that they were independent contractors and not employees.

[5] When a store like Leon's or Brault & Martineau sells furniture, it will offer the treatment to the purchaser as part of the bargain for an additional cost. If the purchaser purchases the treatment, the furniture store will then contract the Appellant to apply the treatment to the new furniture. The Appellant will then contact the purchaser and make an appointment to have the treatment done. The Appellant will then contact one of the Workers by fax or email in order to have the Worker actually apply the treatment. The Appellant had about 15 Workers doing this work during the period. Each Worker had an assigned territory. The Workers are given a number of appointments to handle per day and the Workers are responsible for arranging their own schedule any way they want to attend the purchaser's residence and apply the treatment. The Worker can accept as many or as few appointments as he/she wants. It is expected that the work will be performed between the hours of 8:00 a.m. and 5:00 p.m. The Workers are completely on their own as to when to perform the work but it is expected that the work will be done on the day that the purchaser is expecting it to be done since the purchaser will likely stay home all day to receive the Worker. If the Worker is not able to perform the work on the day scheduled, then it is up to the Worker to contact the purchaser and reschedule the work.

[6] Most of the Workers were individuals but some were private enterprises and others were corporate entities (see Exhibit A-1). The Appellant does pay Goods

and Services Tax/Quebec Sales Tax (GST/QST) to those Workers whose revenues are sufficiently high to require GST/QST to be paid on their services.

[7] According to Mr. Panos Christodoulopoulos, the Appellant had hired a payroll company, Ceridian, to prepare T4A slips for the Workers. By error, Ceridian issued T4 slips (for employment income) to the Workers, rather than T4A slips (for other income), and that is how the matter came to the attention of the Canada Revenue Agency (the "CRA"). The error made by Ceridian was explained to the CRA but the CRA still conducted a review even though there was never, at any time, any dispute between the Workers and the Appellant regarding the nature of their relationship. To the best of Mr. Christodoulopoulos' knowledge, none of the Workers submitted an employment insurance application nor did they ask for a determination as to their insurability.

[8] Mr. Christodoulopoulos explained that when the workers are taken on, it is explained that they are independent contractors. Workers are not expected to come in to the Appellant's business premises except for the purposes of picking up stain-treatment fluid and leather-treatment cream which is provided exclusively by Magie Seal, or to submit their completed work orders in order to get paid. The Workers do not have any office space at the Appellant's premises. The Appellant does supply a spray machine which is capable of producing a certain pressure with which to spray the anti-stain fluid. However, the Workers have to supply everything else in the way of equipment and tools. The Workers must supply their own motor vehicle and they must pay their own automobile expenses such as gas, repairs, purchase price, insurance, etc. The Workers also supply a fax or computer to receive work orders, a home office if the Workers feel the need for an office, and rags to apply the leather-treatment cream. Even though the Appellant supplies a specialized spray pump, there are some Workers who go to Canadian Tire and buy a hand-pump sprayer to apply the liquid but it takes longer to effect an application. This hand-pump is also used by some as a back up if there is a problem with the Magie Seal supplied sprayer. Mr. Christodoulopoulos indicated that he is aware of a Worker who only uses the hand pump and not the Magie Seal pump. If the Magie Seal supplied pump sprayer is lost or damaged, it is up to the Workers to replace or repair it.

[9] The Workers have to do the work on their own time, on their own schedule and under their own control. They decide how many calls they want to do, and how many days they want to work. Some of the Workers do hire others to help them perform the work. Some of them will have their spouse assist in doing the scheduling. The Workers can do what they want so long as the work gets done.

[10] A vehicle is a necessity; without a vehicle, the Worker cannot carry on. If a vehicle breaks down, the Worker will often rent a replacement vehicle. The Appellant does not pay for the extra help that a Worker may contract. It is the Worker who decides in what order the purchasers are serviced and the route that is taken. If a Worker damages any property belonging to the purchaser, such as breaking a lamp or damaging flooring while moving furniture, he/she is responsible for it. If the application of the treatment is not done properly, then the Worker is responsible for seeing that it is done right.

[11] The purchaser does not get billed for the treatment. The purchaser pays the furniture store for the treatment and the store in turn contracts the Appellant to do the work. The Appellant then farms out the work to the Worker. The only thing the Appellant does is to monitor that the work gets done. There is no in field supervision by the Appellant as to how the work is performed. The Appellant is only concerned that the work be done satisfactorily and if it is not, then it is the responsibility of the Worker to make it right. There is no evaluation or performance review of the Worker. The Worker does not fill out time sheets or otherwise account for his/her time. The only training is to show the Worker how to operate the spray machine and apply the liquid. Then the Worker is on his/her own. Some Workers get someone else to drive them around and Mr. Christodoulopoulos testified about one Worker who lost his driver's license and got his father to drive him to make sure that he had an income coming in. The Worker has the right to refuse work. The Workers are in a position to dictate when they want to work; some of them will only work certain days of the week and that is their choice, not that of the Appellant. The Workers get paid by the job. The amount paid is usually a standard amount but this amount is quite often subject to negotiation between the Worker and the Appellant; especially in cases where the Workers have to travel some distance to service the purchaser. The Worker can even negotiate with the purchaser to apply the treatment to other furniture that the purchaser may want to have treated. The Workers can change the appointments that they have with the purchaser directly without contacting the Appellant.

[12] The Worker decides when he/she takes vacation or how much vacation time is taken. There is no vacation pay, no benefits, no at source deductions such as income taxes, *Canada Pension Plan* ("CPP") and Employment Insurance ("EI"). There is no guarantee of work and there is no guarantee of any minimum income. If the work is not done for any reason, including the absence of the purchaser, then the Worker does not get paid. Each Worker can decide for himself/herself how many jobs they are willing to do per day. There is no exclusivity of services. The Appellant does not provide any liability insurance for the Workers. The Appellant

does not tell the Workers how, when or at what times to do the work. Mr. Christodoulopoulos sees his role as getting work for the Workers; the Workers control everything else.

[13] In cross-examination, Mr. Christodoulopoulos indicates that it is clear that if a purchaser has a problem, then they would call the Appellant to have it corrected. If the problem was with a stain, then that is a product problem and that is the responsibility of the Appellant. If the problem was with the application of the product, that is the responsibility of the Worker. If a Worker does any extras for a purchaser, the Worker is free to negotiate the contract price for the extra but there is a threshold below which they cannot go since it is clear that it would not be profitable for either the Appellant or the Worker. As well, charging too low a price would harm business relations with the furniture stores. He agrees that the Workers do not purchase the liquid or leather cream, it is supplied to them. If a Worker shows up at the home of a purchaser and the purchaser is not home, the Worker leaves a note or card with instructions to call Magie Seal in order to reschedule.

[14] Martin Labelle is one of the Workers as well as one of the Intervenors. He has been doing this work for nine years. He does not consider himself to be an employee of the Appellant, he considers himself to be an independent contractor. He was engaged on that basis and he is given an area to service. He is responsible for all expenses incurred to do his work such as automobile expenses, fuel, insurance, repairs; and he deducts these expenses from revenue in completing his income tax returns. He says that if it is determined that he has to work as an employee, then he will quit since the operation would no longer be profitable for him. He is free to pursue other employment or revenue earning opportunities as well. He sets his own hours and he has in the past done work in the evening at the convenience of the purchaser. Even though he has his own territory, he often does work in other areas when needed and if he agrees and can earn a profit doing so. He would negotiate a higher rate of remuneration in such a case. He does a lot of travelling in order to service his area. The further he has to travel, the more he asks to be paid and he negotiates the fee with the Appellant. He makes use of the pump provided by Magie Seal but he also always carries his own pump as a spare in his vehicle. He has his own tools with which to repair the spray machines when needed. If he loses the Magie Seal supplied pump or if it is destroyed, he is responsible for replacing it. He has insured himself against such an eventuality. When he files his income taxes, he files as an independent contractor, not as an employee and he deducts all expenses including all home office expenses, meals while on the road, fax machine, computer and internet. He does offer and provide extra fabric/leather treatment to the purchaser at a fee that he negotiates with the

purchaser. This fee is split with the Appellant. He is the one who decides the route he takes on any given day and the order in which customers will be serviced. He is completely free to refuse any work for any reason. He is not supervised or evaluated. He states that he is free to hire anybody else to do the work or to help him. His father has driven him around for a short period of time. He takes vacations when he wants to and for as long as he wants. He does not wear a Magie Seal uniform or shirt.

[15] Marie-Josée Simard is employed by the CRA as an Appeals Officer. She reviewed the matter following a Notice of Objection filed by the Appellant. She prepared the Report on an Appeal, Form CPT110 (Exhibit I-1) which sets out the reasons for her decision and her recommendations. This report essentially speaks for itself. It is clear according to her report that even though the Appellant supplied a spray pump machine, all of the Workers interviewed stated that they used their own spray machine and did not use the one provided by the Appellant. She based her decision almost entirely on the fact that she believed the Appellant exercised direction or control over the work of the Workers and that the Workers were in a relationship of subordination to the Appellant.

[16] She does agree in cross-examination that it is clear that the relationship that exists between the furniture store and the Appellant is not at all different from the relationship that exists between the Appellant and the Workers, yet the Appellant is not the employee of the furniture stores. She agrees that the purchaser is a client of the furniture store and is not a client of either the Appellant or the Workers. One of the factors that Ms. Simard also considered in addition to subordination and control was the factor of integration of the Workers in the business of the Appellant, yet this was not mentioned in her report CPT110. She agrees that the technicians do negotiate a fee or tariff in cases where the technician has to travel some distance to service the client. She agrees that there has never been any dispute between the Workers and the Appellant concerning the nature of the relationship and none of the Workers have ever requested or asked for a determination that they were engaged in insurable employment. She agrees that the intention of the parties is quite clear that they considered the relationship to be that of independent contractors, not employer/employee. Indeed, all of the Workers interviewed held this point of view.

Theory of the Parties

[17] The Appellant argues that the common intention of the parties is a determinative factor and in the case at bar it is patently clear that the Appellant and

the Workers regarded the relationship as one of independent contractor. This relationship was never disputed at any time. In addition, the Appellant exercised no supervision or control over the manner in which the Workers performed their work. There was an absence of subordination and control.

[18] The Appellant submits therefore, that the Appeal should be allowed.

[19] The Respondent submits that the Workers were engaged in insurable employment in accordance with paragraph 5(1)(*a*) of the EIA because they were working under a contract of service, or they were employees of the Appellant. This is because the Workers were in a relationship of subordination to the Appellant and the Appellant exercised direction and control over the work performed by the Workers.

[20] The Respondent submits therefore that the appeal should be dismissed.

Analysis

[21] It is not necessary to set out the relevant provisions of the EIA since it is clear that if the workers are employees, then they are engaged in insurable employment and if they are independent contractors, then they are not engaged in insurable employment within the meaning of subsection 5(1) of the EIA.

[22] The case at bar arises out of the province of Québec. In the Province of Québec, it is the *Civil Code of Québec*, S.Q. 1991, c. 64 (the "C.c.Q."), that determines what rules apply to a contract entered into in Québec. Therefore, the determination of whether a worker is an employee or is an independent contractor must be analyzed from the perspective of the civil law of Québec. There are three characteristic constituent elements of a "contract of employment" in Québec: 1) the performance of work, 2) remuneration; and 3) a relationship of subordination. The first two elements are rarely contested. It is the element of subordination that is at issue in this case as it is in almost all cases.

[23] The civil law and the common law approach the question here at issue from different perspectives. It goes without saying that since this matter arose out of the province of Québec then the civil law of that province applies. However, that does not mean that the common law rules applied in the rest of Canada to determine the existence of an employer/employee relationship are to be entirely ignored. Indeed, the common law rules provide very useful indicators of whether or not a relationship of subordination does in fact exist. Nonetheless, in the final analysis, it

is the C.c.Q. which makes "direction or control" the actual purpose of the exercise and therefore that element is much more than a mere indicator of the relationship: see *9041-6868 Québec Inc. v. M.N.R.*, 2005 FCA 334, [2005] F.C.J. No. 1720 (QL), at para. 12.

[24] The relevant provisions of the C.c.Q. in relation to contracts are the following:

> 1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> 1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.

[25] Article 2085 of the C.c.Q. defines a contract of employment as follows:

> 2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> (My Emphasis)

[26] Articles 2098 and 2099 of the C.c.Q. define a contract of enterprise or for services as follows:

> 2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.
>
> 2099. 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.
>
> (My Emphasis)

[27] In *Grimard v. Canada*, 2009 FCA 47, [2009] 4 F.C.R. 592, Justice Létourneau of the Federal Court of Appeal had to consider the interaction between the common law and the Québec civil law in determining whether or not there existed a contract of employment or a contract for services. The Court held that the

Québec civil law defines the elements necessary for a contract of employment or for services to exist. On the other hand, the common law enumerates factors or criteria which, if present, may be used to determine whether such a relationship does in fact exist. A contract of employment is characterized by the exercise over the performance of the work by the employer. This control must not be confused, however, with the control over quality and result. In the case of an independent contractor, the contractor must have free choice in the means of performing the contract. In Québec civil law, the notion of control is more than a mere criterion to be considered as it is in the common law, it is an essential characteristic of a contract of employment. Justice Létourneau stated at para. 43:

> In short, in my opinion there is no antimony between the principles of Québec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Québec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators the other criteria used under the common law, that is to say, the ownership of the tools, the chance for profit, the risk of loss, and the integration into the business.
>
> (My Emphasis)

[28] This concept was repeated by the Federal Court of Appeal in its decision in *NCJ Educational Services Limited v. M.N.R.*, 2009 FCA 131, [2009] F.C.J. No. 507 (QL). Justice Desjardins observed as follows:

> [58] While the test of control and the presence or absence of subordination are the benchmarks of a contract of service, the multiplicity of factual situations have obliged the courts to develop indicia of analysis in their search for the determination of the real character of a given relationship.
>
> [59] In the most recent edition of the book of Robert Gagnon (6e édition, mis à jour par Langolis Kronstrm Desjardins, sous la direction de Yann Bernard, Audré Sasseville et Bernard Cliche), the indicia (underlined below) have been added to those found in the earlier 5th edition. Those added indicia are the same as those developed in the *Montréal Locomotive Works* case and applied in this court in *Wiebe Doors*.
>
> > 92 – Notion – Historiquement, le droit civil a d'abord élaboré une notion de subordination juridique dite stricte ou classique qui a servi de critère d'application du principe de la responsabilité civile du commettant pour le dommage causé par son préposé dans l'exécution de ses fonctions (art. 1054 C.c.B.-C.; art. 1463 C.c.Q.). Cette subordination juridique classique était caractérisée par le

> contrôle immédiat exercé par l'employeur sur l'exécution du travail de l'employé quant à sa nature et à ses modalités. Elle s'est progressivement assouplie pour donner naissance à la notion de subordination juridique au sens large. La diversification et la spécialisation des occupations et des techniques de travail ont, en effet, rendu souvent irréaliste que l'employeur soit en mesure de dicter ou même de surveiller de façon immédiate l'exécution du travail. On en est ainsi venu à assimiler la subordination à la faculté, laissée à celui qu'on reconnaîtra alors comme l'employeur, de déterminer le travail à exécuter, d'encadrer cette exécution et de la contrôler. En renversant la perspective, le salarié sera celui qui accepte de s'intégrer dans le cadre de fonctionnement d'une entreprise pour la faire bénéficier de son travail. En pratique, on recherchera la présence d'un certain nombre d'indices d'encadrement, d'ailleurs susceptibles de varier selon les contextes : présence obligatoire à un lieu de travail, assignation plus ou moins régulière du travail, imposition de règles de conduite ou de comportement, exigence de rapports d'activité, contrôle de la quantité ou de la qualité de la prestation, propriété des outils, possibilités de profits, risque de pertes, etc. Le travail à domicile n'exclut pas une telle intégration à l'entreprise.

[29] My colleague, Justice Bédard, of the Tax Court of Canada, provides a wonderfully simple and easy to follow roadmap on how to approach the issue here being litigated under the C.c.Q. in his well reasoned decision in *Promotions C.D. Inc. v. M.N.R.*, 2008 TCC 216, [2008] T.C.J. No. 321 (QL), at paragraphs 12 and 13:

> [12] It can be said that the fundamental distinction between a contract for services and a contract of employment is the absence, in the former case, of a relationship of subordination between the provider of services and the client, and the presence, in the latter case, of the right of the employer to direct and control the employee. Thus what must be determined in the case at bar is whether there was a relationship of subordination between the Appellant and the workers.
>
> [13] The Appellant has the burden of proving, on a balance of probabilities, the facts in issue that establish its right to have the Minister's decisions set aside. It must prove the contract entered into by the parties and establish their common intention with respect to its nature. If there is no direct evidence of that intention, the Appellant may turn to indicia from the contract and the Civil Code provisions that governed it. In the case at bar, if the Appellant wishes to show that there was no employment contract, it will have to prove that there was no relationship of subordination. In order to do so, it may, if necessary, prove the existence of indicia of independence such as those stated in *Weibe Door*, *supra*, namely the ownership of tools, the risk of loss and the chance of profit. However, in my

> opinion, contrary to the common law approach, once a judge is satisfied that there was no relationship of subordination, that is the end of the judge's analysis of whether a contract of service existed. It is then unnecessary to consider the relevance of the ownership of tools or the risk of loss or chance of profit, since, under the Civil Code, the absence of a relationship of subordination is the only essential element of a contract for services that distinguishes it from a contract of employment. Elements such as the ownership of tools, the risk of loss or the chance of profit are not essential elements of a contract for services. However, the absence of a relationship of subordination is an essential element. For both types of contract, one must decide whether or not a relationship of subordination exists. Obviously, the fact that the worker behaved like a contractor could be an indication that there was no relationship of subordination.
>
> [14] Ultimately, the courts will usually have to make a decision based on the facts shown by the evidence regarding the performance of the contract, even if the intention expressed by the parties suggests the contrary. If the evidence regarding the performance of the contract is not conclusive, the Court can still make a decision based on the parties' intention and their description of the contract, provided the evidence is probative with respect to these questions. If that evidence is not conclusive either, the appeal will be dismissed on the basis that there is insufficient evidence.
>
> [15] Thus, the question is whether the Workers in the case at bar worked under the Appellant's control or direction, or whether the Appellant could have, or was entitled to, control or direct the Workers.

[30] Justice Bédard went on to say that even though the contracting parties state their intention clearly, freely and in a fully informed manner, this does not mean that their intent is decisive. The contract must also have been performed in a manner that is consistent with this intent. Just because the parties stipulated that the work would be done by an independent contractor does not mean that the relationship was not between an employer and an employee. The court must verify whether the relationship described in the contract was consistent with reality.

[31] Any analysis of whether a worker is an employee or an independent contractor under the common law must start with the landmark decision of the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 (F.C.A.). Mr. Justice MacGuigan, speaking for the Court, adopted Lord Wright's four-in-one test as stated in *Montréal v. Montréal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161, describing it as "a general, indeed an overarching test, which involves 'examining the whole of the various elements which constitute the relationship between the parties'." This four-in-one test involves a consideration of (1) control; (2) ownership of tools; (3) chance of profit; and (4) risk of loss.

Neither one of these factors is determinative in and of itself under the common law. The determination requires a trial court to combine and integrate the four factors in order to seek out the meaning of the whole transaction. Justice MacGuigan also stated that the "organization test" or the "integration test", that is the extent to which the worker is integral to the employer's business, may also be of assistance. The true question is whether or not the worker engaged to perform services as a person in business on his or her own account.

[32] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, Mr. Justice Major of the Supreme Court of Canada held that in the common law, the difference between an employee and an independent contractor was the element of control that the employer has over the worker. However, control is not the only factor to consider in determining if a worker is an employee or an independent contractor. Justice Major was of the opinion that there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. He stated as follows at paragraphs 47 and 48:

> 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.

[33] *Wolf v. R.*, 2002 FCA 96, [2002] 4 F.C. 396, is a case that came out of Québec but it has found application in the common law provinces. Mr. Wolf was a citizen of the United States who was working as a consulting engineer in Québec. He sought to deduct lodging and travel expenses as business expenses which he could do if he was an independent contractor but not if he were an employee. At trial, the Tax Court held that he was not an independent contractor and the business expenses were properly disallowed. The taxpayer appealed to the Federal Court of

Appeal. The appeal was allowed by the unanimous decision of all three Justices of Appeal but for slightly different reasons. Justice Desjardins applied the relevant provisions of the C.c.Q. as well as the common law tests. Justice Desjardins examined the level of control the payer exercised over the worker's activities, the ownership of the equipment necessary to perform the work, whether the worker hired his own helpers, and the degree of financial risk and of profit as they relate to circumstances of an individual with specialized skills. Justice Noël was of the view that this was a case where the characterization which the parties had placed on their relationship ought to be given great weight although it is not determinative. Justice Noël was of the view, however, that in a close case where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded. Mr. Justice Décary was also of the view that the contractual intent was an important factor that ought to be given much weight. He stated the following:

> 117. The test, therefore, is whether, looking at the total relationship of the parties, there is control on the one hand and subordination on the other. I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e. the intention of the parties. Article 1425 of the Civil Code of Québec establishes the principle that "[t]he common intention of the parties rather than the adherence to the literal meaning of the words shall be sought in interpreting a contract". Article 1426 C.C.Q. goes on to say that "[i]n interpreting a contract the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which may have received, and usage, are all taken into account".
>
> 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…" Mr. Wolf's testimony, Appeal Book, vol. 2, p. 24). The hiring company deliberately uses independent contractors for a given work at a given time ("it involves better pay with less job security because consultants are used to fill in gaps when local employment or the workload is unusually high, or the company does not want to hire additional employees and then lay them off. They'll hire consultants because they can just terminate the contract at any time, and there's no liabilities involved", ibid., p.26). The hiring company does not, in its day-to-day operations, treat its consultants the same way it treats its employees (see para. 68 of Madam Justice Desjardins's reasons). The

> whole working relationship begins and continues on the basis that there is no control and no subordination.
>
> 119. […] When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. […]
>
> 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 the 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 characterized as a contract for services. If specific factors have to be identified, I would name the lack of job security, disregard for employee type benefits, freedom of choice and mobility concerns.

Thus it is clear that the common intention of the parties, if it can be ascertained, is very important in determining if the relationship is that of employer-employee or independent contractor.

[34] In *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, [2007] 1 F.C.R. 35, the Federal Court of Appeal was again swayed by the common intention of the parties. The Court was of the view that dancers engaged by the Royal Winnipeg Ballet were independent contractors rather than employees. Justice Sharlow was of the view that the trial judge erred by not considering the intent of the parties. The parties did not intend an employment relationship to result from the contract. Justice Sharlow traced the jurisprudential history since *Wiebe Doors*:

> 60. […] One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.
>
> 61. I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual

> context, do not reflect the legal relationship that the parties profess to have intended, then their shared intention will be disregarded.
>
> […]
>
> 64. In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[35] In the case of *1392644 Ontario Inc. (c.o.b. Connor Homes) v. M.N.R.*, 2013 FCA 85, [2013] F.C.J. No. 327 (QL), the payer was operating foster homes and group homes through which it provided care for children who have serious behavioral and development disorders. The workers worked as caregivers and in one case as an area supervisor. The Minister had determined that the workers were engaged in pensionable employment pursuant to the CPP and the EI. The workers appealed this determination to the Tax Court of Canada and the appeal was dismissed. A further appeal was taken by the workers to the Federal Court of Appeal. Justice Mainville discussed the test to determine whether a worker is an employee or an independent contractor:

> 23. The ultimate question to determine if a given individual is working as an employee or as an independent contractor is deceivingly simple. It is whether or not the individual is performing the services as his own business or on his own account: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 (S.C.C.) at para. 47 ("Sagaz Industries Inc.").
>
> […]
>
> 29. […] The factors to consider may thus vary with the circumstances and should not be closed. Nevertheless, certain factors will usually be relevant, such as the level of control held by the employer over the worker's activities, and whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.
>
> […]

33. As a result, *Royal Winnipeg Ballet* stands for the proposition that what must first be considered is whether there is a mutual understanding or common intention between the parties regarding their relationship. Where such a common intention is found, be it as independent contractor or employee, the test set out in *Wiebe Door Services Ltd.* is then to be applied by considering the relevant factors in light of that mutual intent for the purpose of determining if, on balance, the relevant factors support and are consistent with the common intent. […]

[…]

38. Consequently, *Wolf* and *Royal Winnipeg Ballet* set out a two step process of inquiry that is used to assist in addressing the central question, as established in *Sagaz Industries Canada Inc.* and *Wiebe Door Services Ltd.*, which is to determine whether the individual is performing or not the services as his own business on his own account.

39. Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

40. The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Minister of National Revenue*, 2011 FCA 256, 422 N.R. 366 (F.C.A.) at para, 9, "it is also necessary to consider the *Wiebe Door Services Ltd.* factors to determine whether the facts are consistent with the parties expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties' intent as well as the terms of the contract may also be taken into account since they color the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts with the purpose of determining whether the test set out in *Wiebe Door Services Ltd.* and *Sagaz Industries Canada Inc.* has been in fact met, i.e. whether the legal effect of the relationship the parties have established is one of independent contractor or one of employer-employee.

41. The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account. As stated in both *Wiebe Door* and *Sagaz*, in making this determination no particular factor is dominant and

> there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in *Wiebe Door* and *Sagaz* will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

Having set out this brief jurisprudential review under both the civil law and the common law, I now will go on to discuss the various factors.

A. The parties' common intention

[36] This is a very important factor. The Workers did not have any written employment agreement with the Appellant. However, it was most certainly understood as between the Workers and the Appellant that the Workers were independent contractors. No one, not even Ms. Simard of the CRA, disputes that this was the common intention of the parties. All of the Workers interviewed regarded themselves as independent contractors.

[37] In addition, the parties certainly dealt with each other in their day-to-day business as if the Workers were independent contractors rather than employees. Some of the Workers carried on business under their own trade names and some of them actually incorporated themselves. The Workers were responsible for all expenses related to the performance of their work. The Workers were free to refuse work. There were no at source deductions for income taxes CPP or EI. There were no benefits at all, such as medical, dental etc., and no pension plan. There were no paid vacations and the Workers were not paid for statutory holidays. The Workers could determine when they took vacations and for how long. The Workers filed their income tax returns reporting their income as business income and they deducted business expenses from this revenue. Those Workers who earned sufficient revenues did in fact register for GST/QST pursuant to the *Excise Tax Act* and did charge GST/QST for their services.

[38] The nature of the contract, the circumstances in which it was formed, the interpretation given to it by the parties and the usage all lead me to the inescapable conclusion that the parties most certainly viewed their relationship as independent contractors rather than employer/employees. I find that the Workers and the Appellant mutually intended and understood that the Workers were engaged as independent contractors and not as employees of Appellant.

B. Subordination

[39] This is the most important and determinative factor under the civil law. I am satisfied on the balance of probabilities that the Workers were self-employed because the Appellant and the Workers were not in a relationship of subordination within the meaning of article 2099 of the C.c.Q. I am also satisfied that the Appellant did not exercise the degree of direction or control over the work of the Workers that would be required in order to classify their relationship as one of a contract of employment pursuant to article 2085 of the C.c.Q. A review and examination of the common law factors certainly bears this out.

(i) Control or direction

[40] I am of the view that the Appellant exercised very little control or direction over the manner in which the Workers performed their work.

[41] The Workers were free to refuse any work that was offered. The workers did not have any office space at the Appellant's business premises and they were not obliged to attend the Appellant's business premises other than for the purpose of picking up stain-protection fluid and leather cream. The Workers were never subject to any supervision while out in the field. The Workers were free to organize their work day in any manner they chose. The Workers did not have a fixed schedule and they could themselves arrange alternate times with the purchasers to have the treatment done. The Workers could do the work themselves or they could engage others to do it for them or to help them out such as drive them around. Even though there was a standard fee that the Workers would be paid depending on the size and type of furniture to be treated, the Workers were free to negotiate a higher fee and would often do so if they had to travel long distances to service the purchaser. The Workers were free to perform extra treatments for the purchasers without the permission of the Appellant. The negotiated fee for such extras, however, could not be so low as to harm the Appellant's business interests or its relationship with the furniture stores. The Workers only got paid after the work was done. If a Worker attended the home of a purchaser in order to apply the treatment and the purchaser was not home such that the application could not be made, the Worker was not paid for his/her wasted time.

[42] There was no evaluation of the performance of the Workers. The Appellant was only concerned that the treatment be applied right. In other words, results and not the means of doing the work were of importance. In *Charbonneau v. M.N.R.*,

[1996] F.C.J. No. 1337 (QL), the Federal Court of Appeal held that monitoring the result of the work must not be confused with controlling the worker.

[43] This factor, in my opinion, establishes that the Appellant exercised little control over the work performed by the Workers. A consideration of this factor indicates that the workers were independent contractors and contra-indicates an employer/employee relationship.

(ii) Equipment and tools

[44] This is also an important factor in determining if the Workers were in a relationship of subordination to the Appellant. It is true that the Appellant was the sole and exclusive supplier of the anti-stain fluid and the leather-treatment cream. It is argued by the Respondent that this is an indicator of subordination. However, it is to be noted that the Magie Seal treatment is what the purchaser bargained for, not some other product. It is also argued that the Appellant supplied a spray pump capable of generating a certain pressure for the application of the liquid treatment. However, none of the Workers interviewed used this pump and they all used their own supplied pump to do the applications or as a back-up. The Respondent argues that these tools are a compelling indicator of subordination since the Appellant supplied these tools. However, it is clear based on the evidence which I have heard that the most important tool and the most expensive tool was the motor vehicle which the Worker had to supply. The Worker had to assume all of the expenses related to the operation of their motor vehicle and they were not reimbursed for any such expenses. The Workers had to have either a fax machine or a computer with which to receive work orders from the Appellant; they did so at their own expenses. The Workers had to provide their own home offices. The Workers had to repair the Magie Seal supplied spray pump or replace it in the event that it was lost or destroyed. In matter of fact, the Workers simply purchased their own spray pumps from Canadian Tire or other such hardware store.

[45] In essence, the only tool that the Appellant supplied was the liquid spray product and the leather cream. The Workers had to supply everything else. Although the liquid and cream are important, the most important and likely the most expensive tools are the vehicles which the Workers had to supply themselves.

[46] A consideration of equipment and tools tends to indicate that the relationship that existed between the Appellant and the Workers was that of independent contractors and tends to contra-indicate the existence of a relationship of subordination.

(iii) The hiring of helpers

[47] The Workers had the full discretion to hire anyone they wanted to either do the work for them or to help them. Examples were given of one Worker's wife assisting him with scheduling and another Worker's father driving the Worker around. I am of the view that the ability to hire assistants without any interference from the Appellant is a strong indicator that the relationship is that of an independent contractor rather than that of employer/employee: see *Malleau v. M.N.R.*, 2013 TCC 47, [2013] T.C.J. No. 45 (QL).

(iv) Financial Risk

[48] This factor is best discussed under the chance of profit and risk of loss factor.

(v) Investment and Management

[49] The Workers were expected to invest in a motor vehicle which can be very costly. They were free to choose whatever motor vehicle they wanted but certainly one factor in their choice of motor vehicles would be dependability since without a dependable motor vehicle the Worker would not be able to perform any work. If the Worker-owned motor vehicle broke down, a replacement had to be purchased or rented.

[50] A consideration of this factor tends to indicate that the relationship was that of an independent contractor and tends to contra-indicate that it was that of an employer/employee.

(vi) Chance of Profit and Risk of Loss

[51] There was no guarantee of any work and thus there was no guarantee of any income. The Worker's ability to earn profit was variable and entirely within the Worker's control. It depended on the extent to which the Worker was willing and able to accept the work that was offered and it most certainly depended on how efficient the Worker was in performing work and organizing his/her work schedule – the more efficient the Worker was, the more jobs he/she could do and the more he/she could earn. The chance for profit was also dependent on the extent to which the Worker could convince the purchaser to purchase extras. It was also necessary for the Worker to control expenses if he/she wanted to maximize profits and minimize losses.

[52] The Worker had to be careful in the performance of the work since the Worker was responsible to the purchaser for any damages caused by him/her while performing the work. The Appellant was only responsible for defective material which the Appellant supplied.

[53] A consideration of this factor tends to contra-indicate an employer/employee relationship and does tend to indicate an absence of subordination.

(vii) Integration into the Appellant's operations

[54] The degree of integration of workers into a business has to be assessed from the standpoint of the workers, not that of the business: *671122 Ontario Ltd. v. Sagaz Industries, supra,* at 1003. Doing so from the standpoint of the business nearly always leads unavoidably to the conclusion that the Worker's activities were organized and programmed to suit the principal and overriding activity of the business. In other words, the Worker's activities will always appear to be integrated into the business. In the instant case, the Workers were not integrated into the Appellant's business operations in any meaningful way. They could be dismissed at any time and immediately replaced by others. The worker did not have an office at the Appellant's business premises.

[55] This is not a telling factor but to the extent that it must be considered, it would contra-indicate an employer/employee relationship.

Conclusion

[56] In conclusion, on considering all of the evidence and the applicable legal principles, I come to the conclusion on the balance of probabilities that the Appellant did not exercise any direction or control over the work to be performed over the Workers and I also conclude that the Workers were not in a relationship of subordination with the Appellant. Therefore, I am satisfied that the Workers were independent contractors and were not employees of the Appellant.

[57] For all of the foregoing reasons, the appeal is allowed and these matters are referred back to the Minister for reconsideration and reassessment on the basis that none of Workers here under consideration were engaged in insurable employment while engaged by the Appellant during the period under consideration.

Signed at Kingston, Ontario, this 15th day of July 2014.

"Rommel G. Masse"

Masse D.J.

CITATION:	2014 TCC 220
COURT FILE NO.:	2012-1019(EI)
STYLE OF CAUSE:	166020 CANADA INC. v. M.N.R. and NICOLAS PLANTE and MARTIN LABELLE
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	March 6 and 7, 2014
REASONS FOR JUDGMENT BY:	The Honourable Rommel G. Masse, Deputy Judge
DATE OF JUDGMENT:	July 15, 2014

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