

Tax Court of Canada



Cour canadienne de l'impôt

Dockets: 2011-241(EI)
2011-242(CPP)

BETWEEN:

1324455 ONTARIO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent;

AND BETWEEN:

Dockets: 2011-237(EI)
2011-239(CPP)

1392644 ONTARIO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent;

AND BETWEEN:

Dockets: 2010-948(CPP)
2010-949(CPP)
2010-950(EI)
2010-951(EI)

1392644 ONTARIO INC. OP CONNOR HOMES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally, by conference call
on March 20, 2012, in Ottawa, Canada)

D'Arcy J.

[1] The Appellants are appealing decisions made by the Minister of National Revenue ("the Minister") under the *Canada Pension Plan* (the "CPP") and the *Employment Insurance Act* (the "Act").

[2] The issue raised in the appeals of 1392644 Ontario Inc, operating as Connor Homes ("Connor Homes") is whether Ms. Rollie Alliare, Ms. Jodi Greer and Ms. Zoe Fulton were employed in pensionable and insurable employment within the meaning of the above Acts.

[3] Similarly, the issue raised in the appeals of 1324455 Ontario Inc. operating as Connor Group Homes ("Connor Group Homes") is whether Ms. Greer was employed in pensionable and insurable employment within the meaning of the above Acts.

[4] It is the Appellants' position that each of the individuals was retained as an independent contractor, not an employee.

[5] These are my oral Reasons for Judgment.

[6] Connor Homes is owned by Robert and Elaine Connor.

[7] Connor Homes is licensed by the Province of Ontario to operate a foster home system. It also operates a number of group homes (each group home has five or more residences).

[8] Through the group homes and foster homes, Connor Homes provides care for children who have serious behavioural and development disorders and are wards of the local Children's Aid Societies.

[9] The childcare services are provided by numerous individuals retained by Connor Homes, including child and youth workers, social workers, certified therapists and psychologists.

[10] In addition, Connor Homes, through a contract with one of the Ontario Boards of Education, provides a specialized school for certain of the children.

[11] Connor Group Homes is operated by the Connor's son, Sean Connor. Sean Connor noted during his testimony that Connor Group Homes provides a number of services to Connor Homes, including the services of children and youth workers, supervisors for the youth workers, and the service of supervising foster homes.

[12] During the course of the hearing, I heard testimony from Mr. Robert Connor, Mr. Sean Connor, Ms. Alliare, Ms. Greer and Ms. Fulton.

[13] I found Mr. Sean Connor, Ms. Alliare, Ms. Greer and Ms. Fulton to be credible witnesses. I do not believe that Mr. Robert Connor was completely forthcoming in his testimony.

[14] Ms. Allaire entered into an agreement with Connor Homes on July 6, 2008 pursuant to which she agreed to provide certain services. She testified that she was hired to provide services in the foster homes as an area supervisor, as well as a child and youth worker.

[15] At some point she was told by her supervisor, Ms. Liz Doll, that she could only provide services as an area supervisor.

[16] Her duties as an area supervisor were to find qualified child and youth workers, and to, in her words, "ensure all things were in place before they were able to start work".

[17] These workers were hired by Connor Homes after being approved by Ms. Doll.

[18] Ms. Allaire supervised the interaction the workers had with the children and was responsible for actions required by the Ontario Minister, such as the plans of care.

[19] Ms. Greer testified that she worked for both Connor Homes and Connor Group Homes. She worked for Connor Homes as a child and youth worker and for Connor Group Homes as an area supervisor for foster homes.

[20] Her duties as an area supervisor for Connor Group Homes were similar to Ms. Alliare's duties. She developed plans of care, reviewed requests for funds, attended Children's Aid Meetings, and hired foster parents and child and youth workers. She was also a crisis manager. She reported to Sean Connor who supervised her work.

[21] Ms. Greer's duties as child and youth worker for Connor Homes mainly involved providing relief services. She testified that she took on these tasks to supplement her income as a supervisor.

[22] It appears that her duties as an area supervisor for Connor Group Homes included supervising foster homes operated by Connor Homes. As a result, she supervised herself when she provided relief services

[23] Ms. Fulton worked for Connor Homes as a child and youth worker in foster homes. Her duties involved supervision of the children in the mornings and evenings. On certain days she worked at the sectional school. She reported to her supervisor Leanne Hawks.

[24] For the services they rendered as area supervisors, Ms. Allaire and Ms. Greer were paid a per-diem rate based upon the number of children they supervised. For the services they rendered as child and youth workers, Ms. Greer and Ms. Fulton were paid an hourly rate plus a flat rate for overnight and weekend stays in the foster homes.

[25] Each of Ms. Allaire, Ms. Greer and Ms. Fulton submitted invoices on a regular basis for the services they rendered.

[26] The question that must be answered in these appeals is whether each of the three individuals performed her services as a person in business, on her own account, or was performing them in the capacity of an employee.

[27] The leading case on the principles to be applied in distinguishing a contract of service from a contract for services is *Wiebe Door Services Ltd.*¹ (“*Wiebe Door*”)

[28] *Wiebe Door* was approved by the Supreme Court of Canada in *Sagaz Industries Canada Inc.*. The Supreme Court summarized the relevant principles as follows²:

[...] 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.

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.

[29] This is the fourth time that Connor Homes has appealed the decision of the Minister under the *CPP* and the *Act* that its workers were employees.

¹ *Wiebe Door Services Ltd. v. Canada*, [1986] 3 F.C. 553.

² *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 4 C.T.C. 139 at paras 47 and 48. (“*Sagaz Industries Canada Inc.*”)

[30] The first decision of the Court was rendered orally by my colleague Justice McArthur on September 4, 2003³.

[31] This appeal involved two child care workers. Justice McArthur dismissed the appeal with respect to one of the workers. He allowed the appeal with respect to the second worker on the basis that the worker in question did not testify, and as a result the Respondent did not satisfy the onus placed on him for the particular worker.

[32] Justice McArthur based his finding that the first worker was an employee on the following findings of fact:

- the child care workers required very few tools;
- the Appellant ran a “tight ship”. He noted that it had to do so in order to satisfy the strict criteria imposed by the Province of Ontario legislation;
- the childcare workers job was structured by Connor Homes who was obligated to comply with legislation and regulations. When discussing Connor Homes procedure manual he noted the following; “While the manual may follow provincial regulations, this does not derogate from its being a serious source of control by Connor Homes over Janet in her carrying out her duties.”⁴; and,
- the hour and flat pay rates were set by Connor Homes. The childcare worker had no say in her rate of pay.

[33] He concluded as follows:

There is no doubt in answer to the question of whose business was it, it was not her business. Her overall relationship with Connor Homes has the indicia of employment. The independence that she had is greatly overshadowed by the control exercised by Connor Homes. [...]⁵

[34] The second decision of the Court is the oral decision of my colleague Justice Paris, which was rendered on March 17, 2004⁶. The following findings of fact made by Justice Paris are consistent with the facts in this appeal: The childcare worker was supervised by an employee of Connor Homes and was required to perform work

³ 1392644 *Ontario Inc. O/A Connor Homes v. Canada*, 2003 TCC 816.

⁴ *Supra*, at para 14.

⁵ *Supra*, at para 17.

⁶ 1392644 *Ontario Inc. (c.o.b. Windswept on the Trent) v. Canada*, 2004 TCC 297.

in accordance with a set of policies and procedures that were set out in a manual that was made available to her.

[35] Justice Paris noted the following with respect to the manual⁷:

The manual was not produced in evidence, but I am satisfied that it contained directions that Ms Leitch was expected to follow in her works and constituted a means of control over her carrying out her duties.

[36] Justice Paris then continued and found the following⁸:

The child care worker could only have a replacement who appeared on the appellant's roster of workers. In effect she had little choice of who could work in her place and the system did not permit her to hire her own helpers.

[...]

[...] The only manner in which the child and youth worker could increase her pay was to work more hours. There was no chance for her to increase her return on the time she spent working by reducing expenses or by producing more.

[37] Justice Paris concluded that the child and youth worker was an employee.

[38] The third decision of the Court is the decision of Justice O'Connor which was rendered on September 28, 2006⁹. This appeal involved three child and youth workers.

[39] The following findings of fact by Justice O'Connor are consistent with the facts in this appeal:

- the rates of pay were essentially established by Connor Homes. The only manner in which a worker could increase her pay was to work more hours;
- the workers reported directly to an employee of Connor Homes;
- each worker was required to attend monthly meetings; and,

⁷ *Supra*, at para 22.

⁸ *Supra*, at paras 25 and 29.

⁹ *1392644 Ontario Inc. o/a Connor Homes v. Canada*, 2006 TCC 521.

- the workers were supplied with a “policies and procedures manual” which contained considerable detail as to how a worker was to carry out her duties. It was Connor Homes’ position that the manual was established pursuant to regulations under the *Child and Family Services Act*.

[40] Justice O’Connor noted the following with respect to the manual¹⁰:

The Procedures Manual contained directions that the Workers were expected to follow and constituted a very powerful means of control. It is true that this Manual conforms with regulations under the Child and Family Services Act but that explanation of where the controls come from does not alter the fact that the controls existed and were extensive.

[41] Justice O’Connor then found that the three workers were employees.

[42] There was no evidence before me that the facts with respect to the operation of Connor Homes has changed since the previous decisions of the Court or that Connor Group Homes was operated in a different manner. In fact, it is clear from the evidence before me that Connor Homes continued to exercise significant control over the workers and that Connor Group Homes exercised similar control.

[43] This control existed for both child and youth workers and for the area supervisors. In particular, both groups of workers were expected to follow the lengthy and detailed procedural manual, attend the mandatory monthly staff meetings, and continuously fill out forms relating to the performance of their duties. Both groups of workers were supervised by Connor Homes or Connor Group Homes employees and it was important for both that childcare workers and area supervisors to respect the chain of command. Approval was required before the workers could change shifts and, similar to the previous appeals, the wages of the workers was set by Connor Homes and Connor Group Homes.

[44] The only manner in which the child and youth workers and the area supervisors could increase their pay was to work more hours. There was no chance for the worker to increase her return by reducing expenses or by producing more. It is clear from the evidence before me that only a few tools were required by the worker: a cell phone and access to a computer.

[45] Counsel for the Appellant placed significant weight on what he perceived to be the intention of the parties to be independent contractors. He relied on the contracts signed by each of the workers with either Connor Homes or Connor Group Homes.

¹⁰ *Supra*, at para 23.

These contracts state that the worker will provide services as an independent contractor.

[46] Each of Ms. Allaire, Ms. Greer and Ms. Fulton testified that they felt they were compelled to sign the contract if they wanted to work for Connor Homes or Connor Group Homes.

[47] The Federal Court of Appeal recently addressed the intention issue in *TBT Personnel Services Inc. v. The Minister of National Revenue*¹¹. The Court stated the following:

The agreement signed by each of the 39 drivers contained a clause in which the driver represented that he was an independent contractor, and another clause expressing the driver's agreement that he was not being engaged as an employee. Those clauses suggest a common intention that the driver would be engaged as a person carrying on his own business.

Such intention clauses are relevant but not conclusive. The *Wiebe Door* factors must also be considered to determine whether the contractual intention suggested by the intention clauses is consistent with the remaining contractual terms and the manner in which the contractual relationship operated in fact. [...]

[48] In the current appeal any contractual intention suggested by the clauses in the agreements between the workers and Connor Homes or Connor Group Homes that the workers were independent contractors is not consistent with the manner in which the contractual relationship operated in fact. Rather, the relationship operated in a manner consistent with an employee-employer relationship.

[49] After considering the extensive evidence before me, I have reached the same conclusions as was reached by my colleagues in the previous three appeals. The workers were employees employed in insurable and pensionable employment.

[50] For the forgoing reasons, the appeals are dismissed, without costs.

D'Arcy J.

¹¹ 2011 FCA 256, at paras 34 and 35.