Docket: 2006-2111(EI)

BETWEEN:

DARLENE JENNIFER HOOKHAM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CHRISTEL VIGOREN,

Intervenor.

Appeal heard June 12, 2007 and judgment delivered orally on June 15, 2007
at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Agent for the Appellant:	Albert M. Osborne
Counsel for the Respondent:	Max Matas
For the Intervenor:	The Intervenor herself

JUDGMENT

The appeal is allowed and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment, delivered orally.

Signed at Ottawa, Canada, this 10th day of July 2007.

"Diane Campbell"

Campbell J.

Citation: 2007TCC373
Date: 20070710
Dockets: 2006-2111(EI)

BETWEEN:

DARLENE JENNIFER HOOKHAM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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CHRISTEL VIGOREN,

Intervenor.

REASONS FOR JUDGMENT
(Delivered orally from the Bench on June 15, 2007
at Vancouver, British Columbia)

Campbell J.

[1] The Appellant appeals a ruling made by the Minister of National Revenue (the "Minister") under the *Employment Insurance Act* in which it was determined that she was not employed by Christel Vigoren, the intervenor/payor, in insurable employment for the period October 12, 2004 to June 27, 2005.

[2] The payor, Ms. Vigoren, is the mother of a severely autistic child, Anna, who is also mentally disabled. Anna's mother likened her mental age to that of a five year old, although during this period she was 18 years old. At times she can "act out" and can be physically aggressive. Ms. Vigoren works outside the home from eight o'clock to four o'clock each day. She received funding from the Department of the Ministry of Children and Family Development to assist with payment of therapists who administered programs to help improve Anna's communication, social and life skills and to enable Ms. Vigoren to be away from the home to attend her employment. As I understood Ms. Vigoren's evidence, these programs were based on an applied behavioral analysis in which the

therapists use “teaching building blocks” for simple tasks. Ms. Vigoren is not a therapist and has no training so, in order to implement the therapy, she engaged Krista Johnson, a behavioral interventionist. Ms. Johnson, who also gave evidence, runs her own business and works as a head therapist for a number of families. She provided the necessary training and supervision of workers hired to implement the applied behavioral programs with Anna. Initially the Appellant, a full-time student, was the only worker that was trained and providing these services but shortly after her engagement a number of other workers were hired to work in shifts of approximately three hours each daily. The result was that Anna received therapy from three different therapists throughout the day.

[3] The Appellant was a full-time student in psychology when she responded to Ms. Vigoren’s want-ad which was seeking to engage and train workers to assist with her daughter. She was interviewed by both Ms. Vigoren and Ms. Johnson. According to the Appellant’s evidence, when she was hired, there was no discussion of whether she was being employed as an independent contractor or an employee. The Appellant received 40 hours of training from Ms. Johnson. A contract was signed in which the Appellant agreed to work for a period of six months, at the termination of which she would receive her payment for the two weeks of training. Most of the Appellant’s hours were spent at the home of Ms. Vigoren with occasional public outings with Anna. The hourly rate of pay was established by Ms. Johnson as well as the several raises the Appellant received. In addition, Ms. Johnson set the work schedule to be followed, although the Appellant’s schedule was adjusted to accommodate her classes.

[4] The Appellant was paid by cheque but no source deductions were taken. She tracked her own hours and presented them to Ms. Vigoren for payment. She testified that her work was supervised by Ms. Johnson when their shifts overlapped. Ms. Johnson would then oversee the program she was administering with Anna. In addition, shift summaries were completed at the end of a shift and submitted to Ms. Johnson. She attended monthly meetings to report on the implementation of the programs. She had the choice of picking a program to administer within the structure of six or seven programs that were specifically designed for Anna.

[5] According to the evidence of Ms. Vigoren, it was always Ms. Johnson, and never herself, that discussed with workers at the outset of the work engagement, that they were being hired as independent contractors. However, Ms. Johnson testified that it was either she or Ms. Vigoren who “touched on it” during the hiring interview. Ms. Johnson stated that she discussed this with the Appellant during the

initial interview and advised her that she might be able to deduct car and phone expenses. Ms. Johnson also admitted that she had a supervisory role over the workers and that she was responsible for their initial and on-going training. She also coordinated the scheduling of the workers. Ms. Johnson requested that the workers summarize each session at its termination and that they also read the summaries of the other workers for that day before they started their shift. This was to assist them in choosing the program appropriate for Anna. There was also a book that documented Anna's behavior and a binder with notes and recommendations of Ms. Johnson. All of these communications assisted in a unified approach to the therapy.

Analysis

[6] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, is the leading case in this area and expressly approved the four-in-one test set out in *Wiebe Door Services Ltd, v. M.N.R.*, 87 DTC 5025. These factors include control, tools and equipment, change of profit and risk of loss. The importance of each factor will vary depending on the facts in each case. There is no universal formula for applying these factors to the circumstances. In certain cases, one or more of these factors may carry very little weight while others may simply be neutral. As a general rule, however, control will play an important role. The Federal Court considered this issue in *Wolf v. The Queen*, 2002 DTC 6853, and although the Court's analysis was based on the Articles of the Civil Code of Quebec, it referenced the principles in *Sagaz Industries*. At paragraph 93 of the *Wolf* case, Justice Desjardins referenced the question to be addressed as "Whose business is it?". In the more recent case of *Royal Winnipeg Ballet v. Canada*, [2006] F.C.J. No. 339, the Federal Court canvassed the role of the intention of the parties. That case makes it clear that when the nature of a legal relationship is questioned a court must "look and see" if the circumstances at the heart of the relationship reflect the parties stated intentions. As I stated in my own decision in *National Capital Outaouais Ski Team v. M.N.R.*, [2007] T.C.J. No. 82, at paragraph 37:

> … It is only through a consideration of the particular facts and circumstances (which may vary from case to case) that one can actually determine whether the parties' stated intentions are consistent with the reality of their relationship. If they accomplished that in light of objective evidence, then their intention should prevail, …

[7] When I look at the intention of the worker, the Appellant and the payor, Ms. Vigoren, they are diametrically opposed. The Appellant told me that when she was

hired no one ever told her she would be considered an independent contractor. I believe she was an 18 year old girl, and a full-time student, who needed extra cash from a part-time job that just happened to be related to her field of study in psychology. She explained that she was young and naïve and I believe she was just happy to have a pay cheque. On the flip side, Ms. Vigoren's evidence was that Ms. Johnson advised all workers that they were independent contractors while Ms. Johnson stated that either she or Ms. Vigoren "touched" on this issue. I believe Ms. Vigoren's primary concern was to find workers that would be compatible with her daughter, Anna. In listening to her give her evidence, I realize that her daughter's condition has been a difficult, heartbreaking and stressful situation for her to deal with. I have no reason to disbelieve anyone here. Whether any discussion of employee versus independent contractor actually occurred or not, I think each party's intent was met when the Appellant got a part-time job and a cheque and Ms. Vigoren found a worker she felt could assist her daughter. If it was discussed, I think it was certainly the least important factor that went into the establishment and essence of their legal relationship. I do not believe that either of them really turned their mind to the implications until the Appellant became pregnant and made her claim. In fact the appeals officer's interview notes with Ms. Vigoren on February 15, 2006 are quite revealing in respect to her intention. She states that "I was like her employer …" and when the officer explains to her the difference between employee and independent contractor, Ms. Vigoren goes on to state: "I went through the social worker and she said not to make deductions because it's too much work. The social worker said to tell that the workers (verbally) to tell [sic] care of their own taxes. … But to me I feel we are their employers". In a follow-up on February 16, 2006, Ms. Vigoren again stated to the appeals officer that "She feels that she is the worker's employer but want [sic] the worker to take care of her own taxes." Whether or not Ms. Vigoren gave much thought to the issue of employee/independent contractor at the commencement of the Appellant's engagement, it is clear from the appeals officer's notes that upon reflection after the engagement ended, she considered herself to be very much the Appellant's employer. Although Ms. Ngo's evidence was that she sometimes rephrases or summarizes what she is told in an interview, Ms. Vigoren made the references to herself as an employer on a number of occasions during the interview process. I do not believe that Ms. Vigoren had a true understanding of the legal ramifications of these labels and how they affect the working relationship. However, I do believe that in her mind at the point in time when this issue first arose she saw herself in the role of the employer no matter what, if anything, the Appellant was told. I also believe she considered herself the Appellant's employer only in the loose sense that the money flowed from the Ministry to her and she signed the cheques that paid the Appellant. She provided no training or supervision and although the

evidence was unclear, I do not believe she was even at the house when the workers were present. Beyond this I do not believe she ever thought she was running a business of any sort where she could hold herself out as an employer; nor do I believe the Appellant, from her perspective, ever had any notion that she was running a business of providing home care services to families. It was simply a job to earn extra money as a student and I do not believe the question "Whose business is it?" is of much assistance as it relates to the circumstances between these two parties to this appeal.

[8] The written agreement is also of no assistance here. It consisted of one short paragraph and was meant to encourage a worker to stay at least six months once they received training, because the payment for training would not be paid until the termination of the six months. Beyond this, there is no reference to the nature of the legal relationship the parties intended to create. I believe the reason for this is that neither party had truly turned their minds to this at the time of the hiring.

[9] Let me turn now to the *Wiebe Door* factors. In the case of *Poulin v. Canada*, [2003] F.C.J. No. 141, which I note is a Quebec case governed by the Articles of the Quebec Civil Code, the Federal Court found that the factor of control played a less central role than it generally does because the patient's needs dictated the delivery of the services. That is also true to some extent in the present appeal but there are facts here nevertheless that point to the Appellant being an employee. She had no training as a behavioral interventionist and this was required before she could administer the programs with Anna. Ms. Vigoren had no such expertise so Ms. Johnson, as head therapist, provided two weeks of initial training as well as ongoing support and assistance. Ms. Johnson described herself as acting in a supervisory capacity in relation to the Appellant. Overlapping sessions occurred once weekly between the Appellant and Ms. Johnson. Monthly meetings were held. The Appellant had to summarize each of her sessions with Anna and record it in a special binder. Although she had flexibility to choose which of six or seven programs she would administer with Anna, on a daily basis, the totality of the programs was dictated by Ms. Johnson in conjunction with another therapist, Amanda Sharp. The programs were designed specifically for Anna and therefore there was a well defined structure within which the Appellant had to operate. She had a choice of which program to implement at each session but no discretion in how it was to be applied and performed. Even her choice was limited, to some extent, by Anna's behavior on that day and what programs had been administered by previous workers on the same day. She tracked her hours on a calendar in Ms. Vigoren's residence and submitted her hours for payment but I do not believe this was anything close to what we generally think of as an invoice. The fact, that there

was initial extensive training, as well as on-going training, coupled with regular monitoring and supervision, goes a long way in indicating that the how, when and where of this work was controlled by the payor. The worker is clearly in a position of subordination when viewed under the umbrella of the control factor.

[10] The only tools employed were the materials and supplies that served the needs of Anna. I believe they were small items like candy or crafts that were used to reward and reinforce positive behavior. Although some of the cases make a distinction between work instruments or equipment and work materials I see no benefit to such a distinction. The factor of tools is of no assistance here and I consider it to be a neutral item.

[11] I draw the same conclusion in respect to profit and loss. The Appellant was paid an hourly rate, determined by the payor. She was given regular raises but had no part in the determination of these amounts. There was some evidence she worked for another family doing similar work during this period and I suppose that could be viewed as an opportunity to increase profit by increasing earnings; but it is simply working two different part-time jobs. These factors again shed little light on the true nature of the relationship.

[12] On the facts before me, it would also appear that the Appellant was integrated into the system of programs and support tailored to Anna's needs and requirements.

[13] In summary, except for the control test, none of the other *Wiebe Door* factors offer much assistance. However, the control factor clearly and definitively supports that the Appellant was in a relationship of subordination vis-à-vis the payor. The written agreement is of no assistance to me nor is it an attempt to answer the question "Whose business is it?". The intent of the parties appears to be one of employer/employee throughout until the legal ramifications of this relationship became evident.

[14] As a result, the appeal will be allowed based on my conclusion that the Appellant was engaged as an employee throughout this period.

[15] I have some additional comments that I want all parties to hear and I believe my comments are just as important, if not more important, than my reasons and conclusions in this appeal.

[16] Although the Ministry of Children and Family Development was not a party to these proceedings, it may be that this department is in fact the "deemed employer" pursuant to subsection 10(1) of the *Insurable Earnings and Collection of Premiums Regulations.* It would appear that the department could easily be brought within the wording of this subsection and, if that were so, Ms. Vigoren may be simply the conduit through which the funds to pay the worker flowed. For the most part, she played only a passive role in relation to the service providers. I am cognizant that the Policies and Procedures Manual for Autism Programs lists as a parental responsibility the determination of whether or not an employer/employee relationship will exist with the service provider. However, I was given only one page of this manual, containing this section, with no evidence before me respecting the manual and the program implementation. I therefore cannot draw any conclusions other than to observe that there may have been a responsibility upon the Respondent to canvas this avenue. It does not assist Ms. Vigoren in respect to the portions of the deductions she will owe for the brief seven or eight months for which this Appellant is claiming. However, if there is consideration given to reassessing Ms. Vigoren for other years, this issue may well have some relevance and a direct bearing on any such course taken by the Minister in the future.

[17] Lastly, I want to direct my concluding remarks to the Appellant and her agent, Mr. Osborne. The Appellant, Ms. Hookham, has been successful in her appeal despite the representation provided by her agent. She would have achieved the same result without her agent's assistance.

[18] I can only surmise that Mr. Osborne's pretentious attitude and demeanor, displayed in this Court throughout the hearing, were the direct result of finding himself in an unfamiliar and foreign arena in which he lacked the essential skills, legal expertise and experience to properly navigate this arena.

[19] Ms. Hookham, you have been successful in your appeal but there are really no winners here today. The implications of this appeal may have far-reaching consequences, beyond the financial obligations, for Ms. Vigoren in respect to the period under appeal. She must now address her future course of action in respect to service providers as it relates to the care to be administered to Anna as well as the additional problems Ms. Vigoren will have to face should she be reassessed for other years.

Signed at Ottawa, Canada, this 10th day of July 2007.

"Diane Campbell"

Campbell J.

CITATION:	2007TCC373
COURT FILE NOS.:	2006-2111(EI)
STYLE OF CAUSE:	Darlene Jennifer Hookham and The Minister of National Revenue and Christel Vigoren
PLACE OF HEARING	Vancouver, British Columbia
DATE OF HEARING	June 12, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF ORAL JUDGMENT	June 15, 2007

APPEARANCES:

Agent for the Appellant:	Albert M. Osborne
Counsel for the Respondent:	Max Matas
For the Intervenor:	The Intervenor herself

COUNSEL OF RECORD:

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