Docket: 2009-42(EI)

BETWEEN:

STEPHEN TWILLEY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Stephen Twilley 2009-44(CPP) on September 15, 2009
at Vancouver, British Columbia

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

Appearances:

Agent for the Appellant:	Daylyn Miller (Student-At-Law)
Counsel for the Respondent:	Shaunagh Stikeman

JUDGMENT

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

Signed at Sidney, British Columbia, this 21st day of October 2009.

"D.W. Rowe"

Rowe D.J.

Docket: 2009-44(CPP)

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STEPHEN TWILLEY,

Appellant,

and

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Respondent.

Appeal heard on common evidence with the appeal of
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JUDGMENT

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

Signed at Sidney, British Columbia, this 21st day of October 2009.

"D.W. Rowe"

Rowe D.J.

Citation: 2009 TCC 524
Date: 20091021
Dockets: 2009-42(EI)
2009-44(CPP)

BETWEEN:

STEPHEN TWILLEY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant, Stephen Twilley ("Twilley") appealed from two decisions issued by the Minister of National Revenue (the "Minister") on December 16, 2008, pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"), wherein the Minister decided Joseph Pilnasek ("Pilnasek") was employed in both insurable and pensionable employment with Twilley during the period from January 1, 2006 to October 16, 2006, because he was engaged under a contract of service.

[2] Daylyn Miller – articling student – acting for the Appellant and counsel for the Respondent agreed both appeals could be heard together.

[3] Counsel for the Respondent advised the Court the period – January 1, 2006 to December 31, 2007 - as stated in the Reply to the Notice of Appeal ("Reply") was incorrect as that period was relevant only to the Ruling appealed by the Appellant to the Minister.

[4] Twilley testified he is a building contractor residing in Squamish, British Columbia. During the relevant period, he operated a construction business - as a sole

proprietor - under the name Brama Construction ("Brama"). He has been involved in residential construction since the mid-1980s and his primary activity is framing houses and preparing foundations. He carries on his business as a subcontractor to larger residential builders who act as general contractors. In 2006, he was providing services to Rommel Homes Ltd. ("Rommel"). Twilley stated Pilnasek was his neighbour with whom he had been acquainted since the 1990s and that Pilnasek had done some framing work for him in the past. On those occasions, Pilnasek had provided his services as an independent contractor. Twilley stated Pilnasek was an experienced carpenter and obtained his services in January, 2006 to work on the framing and foundation construction projects undertaken through Brama. Twilley stated he was aware Pilnasek had other work to perform and that he did not want to be an employee of Twilley because he had operated in the past as an independent contractor and wanted to continue in that manner by invoicing Twilley/Brama for his services. Twilley stated he agreed to this arrangement because Pilnasek was undertaking a renovation on his own residence and could do that and perform jobs for other clients by following his own schedule. Twilley stated Pilnasek could decide if and when – and how many hours – he would work on any given day framing a house for Brama. Although 2006 was an extremely busy period, Twilley recalled Pilnasek was absent – sometimes - from the job site for as long as one week. Twilley stated Pilnasek had his own tools but could borrow other tools and equipment, as needed, from those owned by Brama. Because they were neighbours, Twilley drove Pilnasek to the job site fairly often but Pilnasek also used his own vehicle. Twilley stated Pilnasek brought his son to work and presumed Pilnasek paid him because he did not. Pilnasek was paid for his invoices when Brama received payment/draw from the general contractor on the basis of work completed. Since Pilnasek was not paid until Brama was paid, there was no set schedule for Pilnasek to submit his invoices. Pilnasek's invoices contained an amount for Goods and Services Tax ("GST") and the total amount was paid on each occasion by a cheque issued on the Brama bank account. Twilley referred to a sample invoice contained in a bundle of documents – Exhibit A-1 – and to the first page thereof, which is a 2006 calendar with the dates marked – by rectangles - of the invoices submitted by Pilnasek. Each invoice contains an amount for GST, initially at 7%, later reduced to 6%. The first invoice is dated January 23, 2006 and the last is dated October 16, 2006. Twilley stated Pilnasek's hourly rate was either $22 or $25 per hour but the specific amount was not stated in any of the invoices. Twilley stated he was told by Pilnasek at some point that Canada Revenue Agency ("CRA") was performing an audit pertaining to previous work done by Pilnasek and was alleging those earnings ought to have been the subject of GST collection and remittance.

[5] The Appellant – Twilley – was cross-examined by counsel for the Respondent. Twilley stated he did not know whether he had a business license for his business. He did not carry out any advertising but relied on word-of-mouth to attract work. The main residential builder in the Squamish area was Rommel and Twilley – operating as Brama – performed the necessary work pertaining to forms, framing and foundation, the original stages in the construction of new houses. Twilley charged Rommel a flat rate – based on square footage – and carried on the required work within a 2 to 4 month period. He had the option to attend – or not – a particular site on any given day. Most of the work carried out required the services of an experienced carpenter and Pilnasek was familiar with the work Brama had undertaken for Rommel. There was no written contract between Twilley and Pilnasek. Twilley provided an air compressor, nail gun, saw and certain power tools which Pilnasek was free to use on the job site. Pilnasek brought tools to work - including a tool belt with usual small tools - and a saw, sledge hammer and crowbar. All building materials were provided by Rommel. Twilley agreed he required Pilnasek's services to complete each job but there was no strict completion date set by Rommel. For each new project, Twilley informed Pilnasek of the address of the construction site and the date when work would commence. Twilley stated Pilnasek did not require supervision and knew what had to be done. He agreed he had to be satisfied with Pilnasek's work before invoicing Rommel. Twilley acknowledged that Pilnasek billed for his work at an hourly rate and not on any other basis and that he did not record Pilnasek's hours. Twilley's business – Brama - paid the premium to Workers' Compensation Board to cover Pilnasek while working on Brama jobs and also paid for the coverage of Pilnasek's son who came to the job site 3 or 4 times during the relevant period. Twilley stated he took Pilnasek to work about 60% of the time and that Pilnasek used his own vehicle and arrived at the site according to his own schedule. Their practice was to begin work at 6:00 a.m. and to finish by 3:00 p.m.. Twilley agreed Pilnasek had no investment in the Brama business and no chance for profit and could increase his earnings only by billing more hours at the agreed rate. In his opinion, Pilnasek ran the risk of not being paid for some portion of his work in the event the general contractor could not pay Twilley's invoices submitted under the Brama trade name. Such a default did not occur but there were occasions when Rommel was one or two months late in paying Twilley which delayed – in turn – payment to Pilnasek who prepared and submitted an invoice only after Twilley advised him that Rommel had paid Brama. When filing a GST return for the 2006 taxation year, Twilley claimed Input Tax Credits for the amounts paid to Pilnasek pursuant to his invoices.

[6] Pilnasek testified he resides in Squamish, British Columbia and has worked as a carpenter for 20 years but does not have any official qualification or "ticket" to

designate him as such. He is known as Rene and issued invoices to Twilley under the name Rene Pilnasek. He has known Twilley for 10 or 12 years and at some point during their acquaintance had worked for Twilley every working day for a period of approximately 3 months. Although the relevant period of the within appeals is from January 1, 2006 to October 16, 2006, Pilnasek started providing his services to Twilley on October 7, 2005. Pilnasek stated that when Twilley offered him the carpentry job there was no specific discussion about deductions for Unemployment Insurance ("UI") premiums but Twilley indicated he was going to establish a payroll account. While working on projects for Brama, Pilnasek issued invoices as he had done when working for other customers in previous years. Pilnasek stated that although he had been issued a GST number and had included an amount for GST in his invoices to Brama, he did not consider that he was operating his own business. When working for others prior to October, 2005, he did not charge any GST but CRA performed an audit and determined he was providing a taxable supply within the meaning of the GST provisions of the *Excise Tax Act* and assessed him accordingly. Subsequently, he was issued a GST number and used it to charge GST in respect of all invoices submitted by him to Brama during 2006. Pilnasek stated that during 2006, except for a few hours of work undertaken directly for Rommel which was the subject of an invoice - dated July 12, 2006 in the sum of $280.00 plus GST of $16.80 - he did not provide carpentry services to any entity other than Twilley's sole proprietorship, operating as Brama. Pilnasek stated he provided small tools but Twilley supplied all power tools which were necessary for the work to be done. The building materials were provided by Rommel. Pilnasek stated that during the relevant period he worked with Twilley every working day at a particular construction site. Twilley determined the starting time of 7:00 a.m. or 8:00 a.m. and they took a lunch break at noon. Each project took 3 or 4 months to complete and while they usually worked on just one house, sometimes there was an overlap when they worked on another residence at a different site. Pilnasek stated he wanted to be paid an hourly rate of $25.00 - which Twilley accepted - and in turn agreed to wait for payment until Brama was paid a draw by Rommel. Usually, he was paid the same day but only submitted an invoice to Twilley after having been advised funds were available to pay it. Pilnasek stated he wanted – at the outset – to be an employee of Twilley and to be paid for his services in the context of an employee on a payroll. He stated that near the end of the relevant period, Twilley advised him that he would not be on the Brama payroll as an employee and maintained that position even though Pilnasek offered to pay his portion of the remittances required. With regard to the employment of his 15 year-old son, Pilnasek stated the boy stripped some foundation forms and Twilley paid him in cash. At the beginning of the relevant period, Pilnasek rode to work with Twilley but at some point Twilley moved from next door and Pilnasek began driving his own vehicle to the job site. He had no investment in the Brama

operation nor did he have any opportunity for profit but agreed he might have lost money had Rommel not paid Brama for work he and Twilley had done. He did not guarantee his workmanship to Twilley nor to Rommel. Pilnasek stated that prior to 2005, he had provided his carpentry services to a company for a period of 6 years and it was this body of work that led to the CRA audit and the resulting "back-charge" or assessment of GST in respect of that work. He stated he was surprised at the ruling issued by the Rulings Officer and the subsequent decision of the Minister since he had not claimed any UI benefits arising from his working relationship with Twilley.

[7] Pilnasek was cross-examined by counsel for the Appellant. Pilnasek stated he had been working in Langley - a municipality in the Lower Mainland – but the project had been shut down and by accepting work from Twilley there was no longer any need to commute. Each invoice was based on an hourly rate of $25.00 which was noted in a separate portion of the invoice book but not on the actual copy submitted to Brama. Pilnasek agreed he had "hoped" Twilley would put him on the payroll and acknowledged he was aware that persons providing their services as employees do not charge GST. Because he was experienced and worked directly with Twilley, he did not require any supervision generally. If he attended a site and Twilley was not there, he would leave because Twilley had all the necessary power tools in his truck and there was little or no useful work that could be done without them except for some minor site maintenance. Pilnasek reiterated that Twilley had hired directly – and paid – his son for the casual work done. Pilnasek stated he mentioned to Twilley several times during the relevant period that he wanted employee deductions to be taken from his pay.

[8] Daylyn Miller, acting for the Appellant submitted the facts in the within appeals were similar to those in other reported cases where it had been held the worker had been providing services as an independent contractor. Counsel referred to the intention of the parties, the nature of the work done and the evidence that Pilnasek had provided services to others in the past in that context and had invoiced Rommel – including GST - on that basis for work performed during 2006. She pointed out Pilnasek was aware employees did not charge GST for their services and submitted that his actions prior to the commencement of the working relationship with Twilley and throughout the relevant period were determinative of this issue. In her assessment of the evidence, it demonstrated Pilnasek had functioned as an independent contractor when providing his services to Twilley and others.

[9] Counsel for the Respondent submitted that when CRA deemed Pilnasek was providing a taxable supply to a construction company or companies during some years prior to October, 2005, that decision was based on facts applicable to those

particular circumstances which are not known in the context of the within appeals. As such, that characterization is of no assistance in determining the true status of Pilnasek during the relevant period. Counsel submitted there was no clear expression of mutual intent that Pilnasek would provide his services as an independent contractor and that he had made it clear to Twilley he wanted to be treated as an employee subject to usual payroll deductions including UI premiums and CPP contributions. With respect to the usual factors required to be considered in such cases, counsel submitted there was control and supervision exercised by Twilley who provided major tools and that Pilnasek had no opportunity for profit and little or no real risk of loss and was not required to make any investment nor to manage any aspect of the work performed.

[10] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue – M.N.R.*, 2006 DTC 6323, *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.*), [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2006] F.C.J. No. 1653, there was a clearly-expressed mutual intent of the parties that the person providing the services would be doing so as an independent contractor and not as an employee. That is not the case in the within appeals as there is a conflict in the evidence on this point. Twilley's position is that Pilnasek had been - and continued to be – an independent contractor who had provided his carpentry services to others in the past – and also during 2006 – in that context and who had operated a business which billed his services at an agreed hourly rate together with applicable GST. Pilnasek testified he had been issued a GST number by CRA following an audit and a decision by the Minister that he had been providing a taxable supply during a certain period prior to October, 2005 and had continued to bill GST when submitting invoices to Brama even though he had made it clear to Twilley during the relevant period that he wanted to be an employee and to have EI premiums, CPP contributions and other usual deductions taken from his pay which was based solely on an hourly rate of $25.00.

[11] Because Twilley and Pilnasek have known each other for a long time, had worked together in the past and were neighbours, it is understandable that some events which transpired in other periods have been misplaced as occurring during the relevant period. I accept Pilnasek's evidence that the only work he performed for any other person or entity in 2006 was the few hours of work billed directly to Rommel. He was not carrying on any other construction activity - including drywall installation – as alleged by Twilley. I accept Pilnasek's version of the discussions between himself and Twilley during 2006 concerning the status of the working

relationship and find Pilnasek wanted to be treated as an employee even if there had to be some retroactive adjustments made by deducting an appropriate sum from a particular invoiced amount to accommodate that intent. Pilnasek stated he continued to bill GST because of the previous CRA audit but knew that once he was placed on the Brama payroll as an employee – applicable from the outset - he would not have been required to include GST in respect to his services.

[12] I find there was no clearly expressed mutual intent that Pilnasek provide his services to Twilley as an independent contractor and that the weight of the evidence supports the view Pilnasek wanted to be an employee and that Twilley refused to accommodate said request or to consider it at any time during the relevant period.

[13] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – ("*Sagaz*") dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 47 and 48 of his judgment stated:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

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

Level of Control:

[15] Pilnasek was an experienced carpenter with respect to the framing, forms and foundation work pertaining to that aspect of residential construction. He did not require supervision in a general sense but worked together with Twilley each day during the relevant period and the quality of his work had to satisfy Twilley. The hours of work were governed in the sense Pilnasek rode to the job site about 60% of the time during the relevant period and even when he drove himself to work could not perform any meaningful tasks unless Twilley – who determined the start and end times – was present.

Provision of equipment and/or helpers:

[16] I accept the evidence of Pilnasek that his son was hired – and paid - by Twilley for the few hours of work performed on one or two days. The usual small tools were provided by Pilnasek but the power tools and other equipment necessary to carry out the construction were supplied by Twilley and – as noted above – there was not much point in Pilnasek attending a construction site unless Twilley brought the requisite tools in his truck. The general contractor – Rommel – provided all the building materials.

Degree of financial risk and responsibility for investment and management:

[17] Pilnasek had no investment in Brama - the sole proprietorship of Twilley – and was not required to undertake any management of the business. The only financial risk would arise only from the need to undertake collection/lien procedures against either Twilley or Rommel if he had not been paid for some portion of work on a particular residential project.

Opportunity for profit in the performance of his tasks:

[18] Pilnasek provided his services at the hourly rate of $25.00. He did not participate in any program that would permit him to gain additional revenue whereas Twilley – via Brama – was charging Rommel a flat rate based on a certain amount per square foot. As such, Twilley had the ability to manage his own business in an efficient manner to maximize his profit within the context of overall gross revenue.

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

[20] In the *Beaver Home* case, there was not a significant amount of financial risk and O'Flynn received payment from Beaver whether or not the homeowner paid the invoice and the helpers were paid directly by Beaver. However, there was an opportunity for profit because of a particular revenue-sharing arrangement whereby O'Flynn could gain a profit from work performed by another worker. He also had the right to accept or decline a job and could negotiate for an additional payment if the project turned out to be more difficult than anticipated. In *Beaver Home,* I found O'Flynn had the ability to increase his own income by operating in an efficient manner and by exercising supervision over other workers to ensure efficiency. At paragraph 27 of that decision, I commented as follows:

> 27 That leaves the central question to be decided. Was O'Flynn providing services to Beaver as a person in business on his own account or was he performing them in his capacity as an employee? In this case, there is no doubt that he had - initially - been an employee of Beaver and, thereafter, both parties had agreed the nature of the working relationship should be transformed into one involving two entities each carrying on a specific activity within the context of an overall industry. One must remember that Beaver also had its own employees who were installers, apart from the trainees working on O'Flynn's crew. In fact, about 40% of roofing and siding installations were undertaken by Beaver employees rather than by offering those jobs to the pool of roofers. Beaver also undertook new home construction, renovation, deck, patio, sun-room construction, and installation of siding. All work except for roofing and/or siding installations was performed by workers having the undisputed status of employees. That range of supply of material and services constituted the Beaver business, while the business of O'Flynn was to perform the installation of specified material in a satisfactory manner and, by doing so, becoming entitled to

> collect an agreed-upon amount from which he had to account to his co-venturer - Aspinall - for 40% of the revenue attributable to the overall work performed. In a sense, O'Flynn, Aspinall and Beaver were co-venturers on each job since Beaver incurred the expense of paying the wages for the two helpers and provided them with tools and equipment. In accordance with that working arrangement, O'Flynn and Aspinall were then able to divide the balance of the remuneration attributable to a job without having to share it with other workers/partners who would probably require more remuneration for their services than that paid by Beaver to the helpers as mere trainees.

[21] In the case of *Dempsey v. Canada (Minister of National Revenue – M.N.R.)*, [2007] T.C.J. No. 353; 2007 TCC 362**,** Hershfield J. considered the appeal of a service provider who - as a chartered accountant - had entered into a written contract with the payor in which he agreed to perform auditing and professional services in relation to loans and grants made by said payor and to do so as an independent contractor who would submit invoices based on a stipulated daily rate with a maximum amount during the contract period based on a maximum number of days. Pursuant to said contract, the parties agreed the worker would be an independent contractor. The worker submitted invoices each month for the number of hours worked on each day of the month and GST was charged on the relevant amount. In the course of his analysis at paragraphs 39-46, inclusive, Hershfield J. commented as follows:

> Analysis
>
> [39] If intentions were determinative of the status of the Appellant's engagement, there would be no doubt that his engagement would be that of an independent contractor. The Appellant not only accepted the status imposed by circumstance and organizational structure but played out the role of an independent contractor until it was no longer to his benefit to do so. He honoured the contract which defined his status by becoming a GST registrant, invoicing his time with GST set out and bidding on new contracts as existing contracts expired. He claimed business expenses on his income tax return and paid no union dues as a public servant. He had no benefits and was not part of the public service pension plan. These were all contractually established, understood and accepted by the Appellant. At the end of the day, he preferred the independent status that this contractual arrangement gave rise to, although when he lost it he seized on the opportunity to deny that which he had accepted for almost 13 years.
>
> [40] However, it has long been accepted that the terms of a contract dictating whether an engagement is one of employment or independent contractor are not determinative of the relationship for the purposes of the *EIA* and the *CPP* even if outside of the four corners of the actual working relationship both parties treat such dictated term as definitive of their relationship. Mutuality of intention as to

the status of an engagement, even coupled with conduct outside the working relationship that recognizes that intended contractual status, is not determinative of that status. While recent authorities have recognized the potential importance of intentions in so called close cases,[8] this is not a close case. The test to be applied in this case is clearly that set down by the Supreme Court of Canada in 2001 in *Sagaz Industries Canada Inc. v. 671122 Ontario Limited*[9] which in large measure accepted the tests applied in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue).*[10]

[41] Applying the *Wiebe Door* tests the Appellant is clearly an employee. He was engaged in a wholly subordinate position as subject as any professional employee would be to do what his manager required of him. He had no freedom as to how, when or where he performed his services. In virtually every sense he was subject to the control of his manager at WD. He was treated in almost every respect as an employee and held out as one. He did what was asked of him in the context of his position. He had to correct reports as dictated by persons above him and was subject to deadlines. The specific list of duties that the Appellant was contracted to do for WD was an expanding list that covered everything that WD might require of an employee in the position occupied by the Appellant and even then at the direction of his manager, the Appellant did more than the specified duties that he was contracted to perform and he was paid in the normal course for such services. The reason for that is that he was under the complete control of his manager in WD as any employee would be. If control over the worker is the relevant test, the Appellant's engagement status is employment.

[42] The Appellant provided no tools in respect of the performance of his duties. All of the tools were provided by WD. If the provision of tools is the relevant test, the Appellant's engagement status is employment.

[43] The Appellant worked at a fixed rate for fixed hours and had no expenses in respect of the performance of his duties. There is no more entrepreneurial risk of loss or opportunity for profit than any employee working on a fixed term employment contract basis has. That he had no job security at the end of the term of each contract and that he had to bid on each contract are compatible with a series of negotiated term employment contracts. During the term of each contract, work was done for a wage. If this is the relevant test, the Appellant's engagement status is employment.

[44] All the *Wiebe Door* factors point to the Appellant being an employee. This is not a close case where the intentions of the parties can impact the status of the engagement.

[45] Before concluding these Reasons, however, it is important to return to the analysis engaged in by the Supreme Court in *Sagaz*. While the tests considered above were effectively endorsed in that case, they were applied to what was referred to as the central question in making the required determination which was

> whether the worker was working as a person in business on his own account. In addressing this question of the degree of control by the engaging party over the worker, the provision of tools and the entrepreneurship of the worker become factors. Assessing the last factor requires more than an examination of risk of loss and chance of profit. It also requires examining whether the worker can be said to have a business that he is engaged in. Here, there are some indices of the Appellant having a business. He was a GST registrant, he invoiced his time, he listed himself on data bases used for engaging contractor services and engaged in a contract proposal or bidding system.[11] These indicia however are insufficient in this case to support a finding that the Appellant had a business that he was engaged in for his own account in performing services for WD.
>
> [46] The Appellant was not engaged in any real sense in a government contract seeking business. He had a job that was only secure for a fixed term and he had to re-apply for that job periodically. The way in which the re-application was submitted and handled however was hardly entrepreneurial. It was essentially admitted that the contracting system in this case was abused. Even if that were not the case, it is hard to imagine that someone without a substantive business of his own (no office, no tools) who has worked for one "client" for almost 13 years in a subordinate position, can be said to be in business for his own account because he could "negotiate" his contract rate. Indeed, in general terms, the enduring long term nature of the relationship between the Appellant and WD as a full-time worker is not consistent with viewing the Appellant as an independent contractor carrying on business for his own account.

[22] Returning to the facts of the within appeals, it is apparent the worker – Pilnasek – did not agree to provide his carpentry services as an independent contractor although he submitted invoices based on an hourly rate for work done throughout the relevant period. He stated he wanted to be an employee of Twilley and requested – on several occasions - that Twilley take steps to establish this status. Until Pilnasek received confirmation that he was on the Brama payroll and subject to the usual employee deductions, he continued to charge GST on the amounts billed to Brama because he was leery of running afoul of CRA in light of the decision he should have been charging GST on work done for another entity during some period prior to October, 2005. Other than the fact Pilnasek was a GST registrant and charged GST on the amount of his invoices based on his labour as a carpenter, there were no other factors strongly in favour of his status as an independent contractor.

[23] The facts in the within appeals are somewhat peculiar in the sense the Minister – enforcing provisions of the GST legislation – deemed Pilnasek to have made a taxable supply for a certain period while providing his carpentry services to a business entity. However, I have no knowledge of the facts leading to that conclusion and it does not assist in the determination of the issue in the within appeals except to

take into account Pilnasek was a GST registrant during the relevant period and had included GST in each invoice submitted to Twilley's proprietorship, Brama.

[24] Based on the evidence, I conclude the decisions of the Minister are correct and both are confirmed. Both appeals are hereby dismissed.

Signed at Sidney, British Columbia, this 21st day of October 2009.

"D.W. Rowe"

Rowe D.J.

CITATION:	2009 TCC 524
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STYLE OF CAUSE:	STEPHEN TWILLEY AND M.N.R.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 15, 2009
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	October 21, 2009

APPEARANCES:

Agent for the Appellant:	Daylyn Miller (Student-At-Law)
Counsel for the Respondent:	Shaunagh Stikeman

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada