Docket: 2009-3686(CPP)

BETWEEN:

ON MASSE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard together on common evidence with the appeal of
*On Masse Inc.* (2009-3687(EI))
on April 7, 2010 at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

| | |
|---|---|
| Agent for the Appellant: | Jethro Bushenbaum |
| Counsel for the Respondent: | Laurent Bartleman |
| | Martin Park (Student-at-law) |

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**JUDGMENT**

The appeal under the *Canada Pension Plan* with respect to the decision of the Minister of National Revenue, dated September 17, 2009, is allowed, without costs, and the decision of the Minister is varied to provide that the worker, Robert C. Caputi, was not engaged by the Appellant in pensionable employment within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan* for the period from November 10, 2008 to February 17, 2009.

Signed at Toronto, Ontario, this 7th day of May, 2010.

"Wyman W. Webb"

Webb, J.

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*On Masse Inc.* (2009-3686(CPP))
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| Agent for the Appellant: | Jethro Bushenbaum |
| Counsel for the Respondent: | Laurent Bartleman |
| | Martin Park (Student-at-law) |

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**JUDGMENT**

The appeal under the *Employment Insurance Act* with respect to the decision of the Minister of National Revenue, dated September 17, 2009, is allowed, without costs, and the decision of the Minister is varied to provide that the worker, Robert C. Caputi, was not engaged by the Appellant in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* for the period from November 10, 2008 to February 17, 2009.

Signed at Toronto, Ontario, this 7th day of May, 2010.

"Wyman W. Webb"

Webb, J.

Citation: 2010TCC250
Date: 20100507
Dockets: 2009-3686(CPP)
2009-3687(EI)

BETWEEN:

ON MASSE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

## REASONS FOR JUDGMENT

Webb, J.

[1] The issue in these appeals is whether Robert C. Caputi was engaged by the Appellant in a contract of service or a contract for services during the period from November 10, 2008 to February 17, 2009 for the purposes of the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"). The Respondent had determined that Robert C. Caputi was an employee of the Appellant and therefore was engaged by the Appellant in insurable employment for the purposes of the *Act* and pensionable employment for the purposes of the *Plan* during the above period.

[2] The Appellant operated an animation production company and retained the services of Robert C. Caputi as a texture artist to work on one specific project – the short animated film "Ollie the Otter". The work was expected to take two to three months to complete. Robert C. Caputi knew when he started working on the project that this was the expected time that his services would be required. The period that he actually worked was only slightly over three months. He was retained for only a short period of time and to only work on one specific project.

[3] Wesley Lui, Director of Operations for the Appellant, and Robert C. Caputi

testified during the hearing. Both clearly stated that it was their mutual intention that Robert C. Caputi would be retained as an independent contractor. Robert C. Caputi stated that he understood that he would not be receiving the benefits that the employees of the Appellant would be receiving. As well, his access to the server of the Appellant was limited. Employees would have access to all files on the server but Robert C. Caputi did not have access to all files. His access was limited to those files that he needed to access to work on the Ollie the Otter project. Robert C. Caputi would not be invited to all of the meetings of employees to which employees would be invited. He would attend meetings related specifically to the Ollie the Otter project.

[4] Wesley Lui also stated that Robert C. Caputi was treated as an independent contractor when the Appellant claimed the Ontario Computer Animation and Special Effects Tax Credit. If Robert C. Caputi would have been an employee, the Appellant could have claimed a larger credit. Therefore the classification of Robert C. Caputi as an independent contractor resulted in a smaller credit than if he would have been an employee and clearly shows that the intention of the Appellant was that Robert C. Caputi was an independent contractor.

[5] The Appellant and Robert C. Caputi entered into a contract on which it is stated at the top that it is an “Independent Contractor Deal memo”. Robert C. Caputi is identified in the document as a contractor. The agreement contemplates that Robert C. Caputi will send invoices to the Appellant before he is paid. Robert C. Caputi did send invoices for his services by e-mail.

[6] The question of whether an individual is an employee or an independent contractor has been the subject of several cases. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. 61, 2001 S.C.C. 59 (“*Sagaz*”), Justice Major of the Supreme Court of Canada stated as follows:

> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, supra, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:

> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> 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.

[7] In *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, 2006 DTC 6323, the dancers and the ballet company had a common intention that the dancers would be hired as independent contractors. The Federal Court of Appeal reviewed the relevant facts of that case as determined by the factors outlined in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200, 87 DTC 5025 ("*Wiebe Door*"). The Federal Court of Appeal concluded that the relevant facts in that case did not change the intended relationship between the dancers and the Royal Winnipeg Ballet and that the dancers were independent contractors. Justice Sharlow of the Federal Court of Appeal made the following comments in the *Royal Winnipeg Ballet* case:

> 65. The judge chose the following factors as relevant to the *Wiebe Door* analysis (it is not suggested that he chose the wrong factors or that there are any relevant factors that he failed to consider):
>
> · The indispensable element of individual artistic expression necessarily rests with the dancers. The RWB chooses what works will be performed, chooses the time and location of the performances, determines where and

when rehearsals will be held, assigns the roles, provides the choreography, and directs each performance.

- The dancers have no management or investment responsibilities with respect to their work with the RWB.

- The dancers bear little financial risk for the work they do for the RWB for the particular season for which they are engaged. However, their engagements with the RWB are for a single season and they have no assurance of being engaged in the next season.

- The dancers have some chance of profit, even within their engagement with the RWB, in that they may negotiate for remuneration in addition to what is provided by the Canadian Ballet Agreement. However, for the most part remuneration from the RWB is based on seniority and there is little movement from that scale.

- The career of a dancer is susceptible to being managed, particularly as the dancer gains experience. Dancers engaged by the RWB have considerable freedom to accept outside engagements, although there are significant contractual restrictions (the need for the consent of the RWB, and the obligation to hold themselves out as being engaged by the RWB).

- Although the dancers bear many costs related to their engagement with the RWB and their dancing careers generally, the RWB is obliged to provide dance shoes, costumes, tights, wigs and certain other necessary items.

- The dancers are responsible for keeping themselves physically fit for the roles they are assigned. However, the RWB is obliged by contract to provide certain health related benefits and warm-up classes.

66. The control factor in this case, as in most cases, requires particular attention. It seems to me that while the degree of control exercised by the RWB over the work of the dancers is extensive, it is no more than is needed to stage a series of ballets over a well planned season of performances. If the RWB were to stage a ballet using guest artists in all principal roles, the RWB's control over the guest artists would be the same as if each role were performed by a dancer engaged for the season. If it is accepted (as it must be), that a guest artist may accept a role with the RWB without becoming its employee, then the element of control must be consistent with the guest artist being an independent contractor. Therefore, the elements of control in this case cannot reasonably be considered to be inconsistent with the parties' understanding that the dancers were independent contractors.

67. The same can be said of all of the factors, considered in their entirety, in the context of the nature of the activities of the RWB and the work of the dancers

> engaged by the RWB. In my view, this is a case where the common understanding of the parties as to the nature of their legal relationship is borne out by the contractual terms and the other relevant facts.

[8] Since the facts in *Royal Winnipeg Ballet* were not sufficient to alter the arrangement from that which was intended by the parties, unless the relevant facts in this case, as determined by the factors as set out in *Wiebe Door* and *Sagaz*, would more strongly indicate an employer-employee relationship than in the case of the *Royal Winnipeg Ballet*, it seems to me that Robert C. Caputi would be an independent contractor since both the Appellant and Robert C. Caputi clearly had a mutual intention to create an independent contractor relationship.

[9] With respect to the control factor, the evidence in this particular case was that the amount of control that the Appellant had over Robert C. Caputi would have been less than the amount of the control that the Royal Winnipeg Ballet had over the ballet dancers. In the *Royal Winnipeg Ballet* case, Justice Sharlow described the degree of control that the Royal Winnipeg Ballet had over the dancers as "extensive". The dancers in the *Royal Winnipeg Ballet* case would not have been allowed to set their own hours and were only allowed to work for others with the consent of the Royal Winnipeg Ballet. As noted in the above decision:

> The RWB chooses what works will be performed, chooses the time and location of the performances, determines where and when rehearsals will be held, assigns the roles, provides the choreography, and directs each performance.

[10] Robert C. Caputi was able to set his own hours of work, although within certain limits as he was part of a team that was working on the Ollie the Otter project. He was also able to work for other clients, but since he was working 40 hours per work on the Ollie the Otter project, he did not have a lot of time to work for someone else. He could either work at the Appellant's premises or at his home, although most of the time he worked at the Appellant's premises. He would be required to attend meetings related to the "Ollie the Otter" project. He was part of a team that was working on this animated film and he was retained to perform certain tasks. He was retained as a texture artist to work on certain parts of the animated film.

[11] In the case of *Direct Care In-Home Health Services Inc. v. M.N.R.*, 2005 TCC 173, Justice Hershfield made the following comments in relation to control:

> 11 Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of

> independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship. **However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task -- you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship.** Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.
>
> 12 In the case at bar, the Worker was free to decline an engagement for any reason, or indeed, for no reason at all. …
>
> (emphasis added)

[12] The arrangement with Robert C. Caputi appears to be very similar to the arrangement described by Justice Hershfield as Robert C. Caputi was assigned a specific task in relation to the production of the animated film and engaged to do it.

[13] With respect to the ownership of equipment, the Appellant provided some of the tools that Robert C. Caputi needed but Robert C. Caputi also supplied some tools. Robert C. Caputi had a laptop at home that he would use. He needed to use the Appellant's computer system and software to integrate his work with the work of the other individuals who were working on the film. In *Royal Winnipeg Ballet* the dancers bore many costs but the Royal Winnipeg Ballet was obliged to provide dance shoes, costumes, tights, wigs and certain other necessary items.

[14] Robert C. Caputi was hired personally to perform the services and therefore he would not have been able to hire other workers to perform the tasks that were assigned to him. In the *Royal Winnipeg Ballet* case, there was no discussion with respect to whether or not the dancers could hire any helpers but it would seem illogical to suggest that the dancers could hire any person to replace them in the production.

[15] With respect to the degree of financial risk/opportunity for profit, Robert C. Caputi had little financial risk. Wesley Lui stated that Robert C. Caputi was a very good texture artist. If any work had to be redone it was generally because the producers of the film wanted to make a change. In the *Royal Winnipeg Ballet* case the dancers, as acknowledged by the Federal Court of Appeal, had little financial risk.

[16] With respect to the opportunity for profit, the dancers with the Royal Winnipeg Ballet could negotiate for additional remuneration, although most were paid in accordance with a predetermined scale. In this case Robert C. Caputi was paid a set amount per week as agreed upon by Robert C. Caputi and the Appellant. In *Royal Winnipeg Ballet* the dancers were allowed to accept outside engagements provided that they had the consent of the Royal Winnipeg Ballet and provided that they held themselves out as being engaged by the Royal Winnipeg Ballet. In this case, there were no such restrictions imposed on Robert C. Caputi in accepting outside engagements.

[17] In the *Royal Winnipeg Ballet* case, the dancers did not have any management or investment responsibilities with respect to their work with the Royal Winnipeg Ballet. In this case Robert C. Caputi did not have any management or investment responsibilities with respect to his work with the Appellant.

[18] As a result, I find that the relevant facts related to the engagement of Robert C. Caputi by the Appellant as determined by the factors as set out in *Wiebe Door* and *Sagaz* do not suggest more strongly an employer/employee relationship than did the facts in *Royal Winnipeg Ballet* and since there was clearly a mutual intention to create an independent contractor relationship, Robert C. Caputi was an independent contractor and not an employee of the Appellant during the period under appeal.

[19] As a result, the appeals from the decision of the Minister of National Revenue, dated September 17, 2009, that Robert C. Caputi was engaged by the Appellant in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Act* and pensionable employment within the meaning of paragraph 6(1)(*a*) of the *Plan* are allowed, without costs, and the decision of the Minister is varied to provide that Robert C. Caputi was an independent contractor and was not engaged by the Appellant in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Act* and was not engaged by the Appellant in pensionable employment within the meaning of paragraph 6(1)(*a*) of the *Plan* during the period under appeal.

Signed at Toronto, Ontario, this 7th day of May, 2010.

"Wyman W. Webb"

Webb, J.

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| CITATION: | 2010TCC250 |
| COURT FILE NOS.: | 2009-3686(CPP)<br>2009-3687(EI) |
| STYLE OF CAUSE: | ON MASSE INC. AND<br>THE MINISTER OF NATIONAL REVENUE |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | April 7, 2010 |
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| DATE OF JUDGMENT: | May 7, 2010 |

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| | |
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| Counsel for the Respondent: | Laurent Bartleman<br>Martin Park (Student-at-law) |

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