

Docket: 2010-1506(EI)

BETWEEN:

ALERT CARPET CLEANING (NIAGARA) INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DAVID HALL,

Intervenor.

Appeal heard on common evidence with the appeal of
Alert Carpet Cleaning (Niagara) Inc. *2010-1505(CPP)*
on April 1, 2011, at Hamilton, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant: Marc Digirolamo

Counsel for the Respondent: Ernesto Caceres

For the Intervenor: The Intervenor himself

JUDGMENT

In accordance with and for the reasons set in the attached Reasons for Judgment, the appeal is allowed, without costs, and the decision of the Minister of National Revenue dated February 16, 2010 is varied to find that David Hall was not engaged in insurable employment with Alert Carpet Cleaning (Niagara) Inc. during the period from September 1, 2006 to January 30, 2009.

Signed at Ottawa, Canada this 24th day of June 2011.

"J.E. Hershfield"

Hershfield J.

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Counsel for the Respondent: Ernesto Caceres

For the Intervenor: The Intervenor himself

JUDGMENT

In accordance with and for the reasons set in the attached Reasons for Judgment, the appeal is allowed, without costs, and the decision of the Minister of National Revenue dated February 16, 2010 is varied to find that David Hall was not engaged in pensionable employment with Alert Carpet Cleaning (Niagara) Inc. during the period from September 1, 2006 to January 30, 2009.

Signed at Ottawa, Canada this 24th day of June 2011.

"J.E. Hershfield"

Hershfield J.

Citation: 2011 TCC 321
Date: 20110624
Dockets: 2010-1506(EI)
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DAVID HALL,

Intervenor.

REASONS FOR JUDGMENT

Hershfield J.

[1] These appeals concern the decision of the Minister of National Revenue (the “Minister”) that the employment of the Intervenor, Mr. Hall, was insurable under the *Employment Insurance Act* (the “EIA”) and pensionable under the *Canada Pension Plan* (the “CPP”).

[2] The issue under the *EIA* and the *CPP* is whether Mr. Hall was engaged under a contract of service or a contract for services as contemplated in paragraph 6(1)(a) of the *CPP* and paragraph 5(1)(a) of the *EIA*.

[3] Mr. George Callura who is the manager of the Appellant company (“Alert”) and his wife Ms. Anita Prain who provides office administrative services testified at the hearing on behalf of Alert. Mr. Christopher Johnson testified on behalf of

Alert as well. The Respondent called Mr. Hall, who, in effect, testified on his own behalf as the sole worker whose services are at issue.

Background

[4] Mr. Callura has been in the carpet cleaning business for some 20 years. He testified that he personally carries out most of Alert's cleaning activities himself but does have workers, as well, to perform such services. Some of the work he does is quite specialized. For example, he referred to cleaning up after dead bodies. Such work, he said, he does himself. Most of the work, however, involves steam-cleaning and deodorizing carpets.

[5] Alert operates three enclosed trucks in which carpet cleaning units have been installed. The trucks, referred to at the hearing as truck mounts, required special heavy duty features and cost in the area of \$70,000 to \$80,000 each.

[6] The truck mounts provide the power supply to the cleaning equipment mounted in the truck itself. One truck mount used, a one-ton enclosed specially fitted truck, is capable of servicing a 40 storey high building although the highest that Mr. Callura has actually ever run his hoses was about 23 stories.

[7] The carpet cleaning equipment includes hosing, a blower and a pump, a stainless steel clean water holding tank holding up to 200 gallons, a 180 gallon dirty-water tank and a large muffler. The pump and blower are belt driven, powered by the truck's diesel engine using a drive shaft designed for that purpose. The clean water is heated up to 200 degrees Fahrenheit and the set-up produces water pressure from 50 psi to clean a velvet chair to up to 3000 psi to clean a fired wall. Hoses are run up and down the interior of the building through stairwells so the trucks do not require cranes of any sort. In the Niagara region, there are only between six to eight truck mounts available with that capacity.

[8] Two of the truck mounts are usually used just for water clean-up as opposed to carpet cleaning as there is less demand for the carpet cleaning unit. If a second carpet cleaning truck mount was needed, it had to be prepared differently such as flushing lines that might have contained anti-freeze. Water clean-up is generally flood related work. There is clean water clean-up from water lines, water tanks and the like and sewage water clean-up. In the former case, after water removal, carpets may be dried and sprayed for mildew and cleaned and in the latter case they are cut and ripped and removed. All such tasks require a certain amount of training as does the operation of the truck mounts. Tool requirements for these jobs for the worker

are minimal but, as necessary, would have to be provided by the worker. They might include a good knife, cutters and other equipment such as hammers and screwdrivers, depending on the project. Cleaning up after a flood might require such tools.

[9] Although the evidence relating to the ownership of the truck mounts was not clear, I am satisfied that at least one of the truck mounts was owned by Mr. Callura personally not by Alert.¹

[10] Mr. Callura testified that when a worker is first engaged by Alert, he is advised of the nature and terms of the relationship contemplated. That relationship is clearly set out as being that of a subcontractor. He said that he had between six and eight people that he would call upon regularly as subcontractors.² If one is not available he goes down the list until one says he can do the job. They might be middle of the night calls for emergency flood work jobs so several calls might be required to find a willing worker. As well, since there is not always work, you cannot expect someone to stand around and wait. They have to have the freedom to do other things and to say no to work.

[11] These subcontractors included retired persons that were already experienced, however, training as and if required would be provided by Mr. Callura or another subcontractor. If a subcontractor had their own truck mount and all their own equipment then they receive 50% of what is charged to the customer. If they used his (or Alert's) truck mount, Alert pays the expenses and the worker receives 25% of what is charged to the customer.

[12] In the immediate Niagara Falls and St. Catharines area there are only two or three other truck mounts. It is therefore quite rare that the subcontractor will actually have their own heavy equipment. In Niagara Falls there would be no subcontractor that has such equipment except a major carpet cleaning company

¹ I have no evidence regarding the usage arrangement between Mr. Callura and Alert for the truck mount owned by Mr. Callura.

² While it is peculiar to me that Mr. Callura often referred to such workers as his subcontractors as opposed to contractors, I have not taken that to be indicative of any subtle revelation of how he viewed them or what they were. Correctly, if they were in their own business of providing services they would be contractors, or more accurately still, independent contractors, to whom he subcontracted work. True, in that context they would be subcontractors, however, saying that he had "subcontractors" made it sound, at times, like they were casual workers on whom he could call, if they were available, on the basis that they accept work as subcontractors (whether they were truly independent contractors or not). In any event, the status of such workers is not in question here. I am only dealing with the status of Mr. Hall. His case will depend on the facts relating to his services.

known as F.I.R.E.. However, Mr. Callura acknowledged that more often he acted as a subcontractor for them. If Alert was swamped he might refer work to F.I.R.E. but in such case the customer was essentially turned over to F.I.R.E.. Alert received no benefit from such a referral except that it encouraged getting subcontract work from F.I.R.E. when F.I.R.E. could not handle a particular job.

[13] In other words, none of the workers that Alert used as subcontractors had their own truck mounts. When such a worker agreed to do a job, he would usually come, pick up the truck mount, find out the job requirement and then go out and do the work. Alert provided all the cleaning supplies and paid for the maintenance of the truck mounts. Mr. Callura said a subcontractor might get additional work from the same customer all of which would go to that subcontractor not to Alert. For example, if Alert was hired to do a living room, dining room and bedrooms then that is all that would be billed to the customer by the company. If the subcontractor was able to do additional work such as upholstery, he said they were allowed to do that on their own.

[14] Turning to Mr. Hall's work with Alert, Mr. Callura's testimony was along the following lines:

- Mr. Hall was introduced to Mr. Callura through Mr. Hall's brother on the basis that there would be occasional work for Mr. Hall if he wanted to learn how to do it. It was offered as a favour;
- Mr Hall was told originally that there would not be much work available and that he would be a subcontractor not an employee. Mr. Callura insisted that Mr. Hall wanted to be a subcontractor and understood that to be the nature of the relationship from the beginning;
- At first Mr. Hall went out with another subcontractor, Mr. Al Decaire (Al). They went out together a number of times doing hallways and apartment buildings. Mr. Callura asserts that Mr. Hall was trained by Mr. Decaire on the use of the truck mount and all the cleaning equipment and on how to clean carpets with the cleaning supplies provided by Alert. He acknowledged that he did take Mr. Hall out a few times to make sure that he knew how to use the equipment properly and how to clean carpets and upholstery. Proper operating and maintenance instruction was essential because the equipment was so expensive;

- Mr. Hall was then allowed to use the carpet cleaning truck mount on his own but at first Mr. Callura did not call him. It was after Al began to have reliability issues that Mr. Hall was called. Mr. Hall was continually asking for work so by that time he was being used more often;
- He was told he had to have a cell phone so he could be reached if there was a job for him but he was entitled to refuse work;
- Mr. Callura acknowledged that three or four months after Mr. Hall first started, Alert provided him with a cell phone and that they would, from time to time, call forward Alert's line to that number if circumstances were such that Alert would otherwise miss calls. Alert did not have a secretary or voice mail so this was necessary as there were people calling for immediate service, such as when their basement was filling with water and sewage. They wanted to reach somebody, not hear a recorded message. The phone provided was an extra phone owned by Alert. It was provided because Mr. Hall's phone was not operative or was lost at the time;
- Mr. Callura also testified that he made business cards for Mr. Hall. He said that at first Mr. Hall carried his own business card without Alert's number and that he did not like that. The card that Mr. Callura gave him had both numbers. Mr. Hall was supposed to pay for half the cost of the card but paid nothing;
- Mr. Hall was given four or five Alert logo shirts which he was not required to wear. However, they were nice golf shirts and Mr. Callura suggested that Mr. Hall may have wanted to wear them. Mr. Callura said providing subcontractors such shirts was not uncommon. He said he personally had subcontracted for as many as five companies including F.I.R.E. and that he had different shirts for each of them. Alert even had magnetic signs for its trucks that would show F.I.R.E. as the operator when they were subcontracted to do a job for them. Still, Mr. Hall was not required to wear Alert shirts. Mr. Callura said he gave Mr. Hall a variety of his old clothes that did not have logos. They could be used on the job – it was dirty work. He did this as a personal favour to Mr. Hall as they had become friends. Their friendship was illustrated in a number of ways:
 - Mr. Callura lent him a vehicle on more than one occasion when Mr. Hall did not have a vehicle to go pick up the truck mount.

Such vehicles were owned by Mr. Callura personally as was the truck mount used by Mr. Hall.³ The loan of the personal vehicles was a personal gesture;

- In the summer he let Mr. Hall take the truck mount home when he did not have a vehicle to come to pick it up or when it was too late to return it;⁴
 - He lent Mr. Hall money – several thousand dollars never to be repaid;
 - They met together with their wives as couples and exchanged Christmas gifts;
 - When Alert received a garnishment order demanding funds owed to Mr. Hall, Mr. Callura at Mr. Hall's request, went to see if he could have it rescinded on the basis that Mr. Hall was not an employee;
 - He and his wife had talks with Mr. Hall and his wife about their taking over the company;
 - He introduced Mr. Hall to his accountant;
 - He let him use his credit card and allowed continued use in spite of repeated abuses. It was supposed to be used for gas for the truck mount but Mr. Hall put all types of personal expenses on it like lottery tickets and cigarettes and he never repaid Mr. Callura;
 - He co-signed a loan for Mr. Hall.
- After a job was complete, Mr. Hall would prepare an invoice to calculate his percentage and then the company would pay him as an independent contractor;

³ The personal vehicles given to Mr. Hall to use were needed by Mr. Hall as his own vehicle had blown an engine and there was more than one of Mr. Callura's vehicles lent to Mr. Hall as even these were breaking down and requiring repairs.

⁴ This could only happen in the summer as in the winter the truck mount needed to be kept inside as the use of anti-freeze was problematic.

- The invoices are on a form entitled D+J's Carpet Cleaning. D stood for David (the Intervenor, Mr. Hall) and J for Jill, his wife. It is a registered business name.⁵ Cheques were made payable to David Hall with a notation of sub-contracting on each cheque. In spite of the name on the invoice, Mr. Callura understood that the cheque was to be in Mr. Hall's name because he did not have a bank account in the name of D+J's Carpet Cleaning;
- The invoices did not have a GST component which did not seem unusual since Mr. Callura understood that that was not necessary if gross income of the subcontractor was less than \$30,000 a year;
- One invoice reviewed by Mr. Callura during the hearing was an invoice where he had subcontracted for F.I.R.E. and Mr. Hall did the work. Mr. Hall had put in 8.5 hours for F.I.R.E.. That invoice would indicate that Mr. Hall was paid by Alert by the hour. The 25% remuneration formula would have required a payment of less than the amount actually paid at \$15 per hour;
- Mr. Hall would be free to use helpers. On larger jobs, Mr. Hall would need an assistant to help handle the hose and assist in other work. He was free to choose his own helpers and he would be responsible to pay them. Invoices indicated that there were other workers involved on work invoiced by Mr. Hall such as his brother, his sons and his wife. Mr. Callura insisted that such assistants were never retained or paid by Alert. They were brought along by Mr. Hall who was responsible for whatever arrangements he made with those assistants. He was also responsible for the work done and the care and operation of the equipment. Invoices examined at the hearing showed that some jobs, said to be flood work, were paid by the hour. This was insurance referral work. Where assistants were engaged for such work, the hourly rate was increased from \$15 per hour to \$25 per hour to, in effect, allow the subcontractor, Mr. Hall in this case, to pay the assistant \$10 per hour;
- At one point, Mr. Hall had a sore shoulder and had to use an assistant. Mr. Hall complained that he was not making enough to pay his assistants.

⁵ The name was registered by Mr. Hall in early 2007 formally as D+J's Carpet Cleaning Service/Carpet Cleaning.

Further, due to his condition and the number of medical appointments, he was often not available to work which was acceptable as he was free to decline work for any reason. Mr. Callura cited another example of this freedom to decline work as well. It concerned a flood clean-up where he, Mr. Hall, arrived, said “no” to the work, and Mr. Callura had to come in and do it;

- If work was done unsatisfactorily then Mr. Hall would have to go back and do the job over again for free. Even if the problem was not his fault, such as the removal of a difficult stain, he is still required to go back and redo the job for free;
- There was never any withholding for income tax or EI or CPP. This was understood between them on the basis that Mr. Hall was a subcontractor. Mr. Hall never requested a T4 statement;
- Mr. Callura also testified that he was aware that Mr. Hall did other work on his own, independent of Alert. For example, he did work on his own for Christopher Johnson and work for the landlord of a retail jewellery store. In fact, Mr. Callura understood that Mr. Hall intentionally manoeuvred this latter client away from Alert so that he could do the work for his own account. Mr. Callura said he did not object to this and that he understands his subcontractors will look to do their own work;
- Mr. Callura acknowledged that he paid for workers’ insurance as made available under the *Workplace Safety and Insurance Act* for people like Mr. Hall but he understood that he was not doing it to cover “employees”. To the contrary, it was his understanding from the Workplace Safety and Insurance Board that insurance should be carried whether or not the worker was an employee or subcontractor. Although he thought they should pay it themselves, Alert paid it to protect itself. Accordingly, Alert paid workers’ insurance premiums based on amounts paid for work done by its subcontractors as shown on invoices submitted by them.⁶ Mr. Callura said that he understood that Mr. Hall made a worker’s compensation claim related to his shoulder injury and that the claim was denied on the basis that the injury had been sustained prior to any engagement by Alert;

⁶ As noted later in these Reasons, the amounts shown on the invoices were purposefully and knowingly altered in a manner that does not speak well of either Mr. Hall or Mr. Callura.

- Mr. Callura testified that he agreed to pay for half the cost of having Mr. Hall certified by a cleaning supplies company that offered courses. He said that Mr. Hall never completed the course so he never paid Mr. Hall the promised half of the cost for attending.⁷ The course was important as carpet cleaners get business from carpet manufacturers and retailers who have warranties that were only good if cleaning was done by persons on an approved list. To be, and to stay, on the list you have to take certain courses;
- Mr. Callura did not dispute that Mr. Hall was available for work for much of the period between late 2006 and 2009 when Alert stopped using his services. This is suggested by invoices indicating several jobs a month showing that Mr. Hall had worked fairly consistently for Alert since 2006;
- Still Mr. Callura maintained that contact would only be when there was work for him. However, on average he said they were in contact once a week and that jobs might be for three to four days at a time. Other subcontractors were still being engaged as needed;
- Mr. Callura testified that the reason for ending Mr. Hall's subcontractor services was that he got stuck with three months of credit card bills and unpaid parking tickets in addition to loans to Mr. Hall of over \$6,000 initially to bail him out of financial difficulty and which mounted to some \$12,000 in unpaid loans. He co-signed other loans obtained by Mr. Hall as well and Mr. Callura said he was using up his own RRSP funds to help Mr. Hall.⁸

[15] On cross-examination by Respondent's counsel and by Mr. Hall the following further evidence was solicited from Mr. Callura:

- invoices were prepared and paid on the basis of reducing the amount payable for services by 40% and adding that amount as payable for materials even though Mr. Hall provided no materials at all;

⁷ In a questionnaire filled out by Mr. Callura, he indicated that Mr. Hall had completed a cleaning course. Such inconsistencies often suggest faint respect for candour and truth.

⁸ Mr. Callura also referred to his own personal bankruptcy although I have no evidence as to the connection, if any, between Mr. Hall and that bankruptcy.

- The remuneration paid to subcontractors, including Mr. Hall, was determined by Alert;
- Mr. Callura was not so easy-going about Mr. Hall billing Alert's customers for his own account as he had suggested in his earlier testimony;
- The truck mount parked at Mr. Hall's residence at times in the summer was not out of the reach of Mr. Callura. If the truck was at Mr. Hall's place, Mr. Callura could pick it up with another set of keys. He was only five minutes away;
- In spite of suggestions to the contrary made by Mr. Hall in cross-examining Mr. Callura, Mr. Callura did not back down regarding who trained Mr. Hall, how often he had the truck mount parked at his residence, whether he had his own business card, who hired and paid the assistants, who came up with the idea of a business name registration for D+J's Carpet Cleaning and whether subcontracting was discussed at their first meeting. Mr. Hall (acting in the capacity of a person cross-examining a witness) stated: "How can I be a subcontractor when I am just a normal person?";

[16] The next witness to testify was Mr. Johnson.

[17] Mr. Johnson operated an auto repair shop and was a volunteer firefighter as well. He knew Mr. Callura as one of his customers at the shop and as a friend.

[18] He said he met Mr. Hall when he came to have some work done on a van that Mr. Hall said he was buying from Mr. Callura. Mr. Hall had said that the van was going to be used for his business. He checked with Mr. Callura who said that it was okay to work on the van as long as Mr. Hall took care of the bill personally. He said Mr. Hall never paid him all that was owed.

[19] Still, he retained Mr. Hall to clean his house. He was told by Mr. Hall, at that time, that he was a contractor and worked separately from Alert. He remembered that Mr. Hall used the name D+J's Carpet Cleaning.

[20] The cleaning job did not involve carpet cleaning, it was just general cleaning. It was a once-over of the whole house. Mr. Callura, whom Mr. Johnson had known for some eight to ten years, had provided such services in the past. Mr. Hall was paid \$150 for the clean-up job. There were no invoices, no GST, just a cash transaction.

[21] Mr. Hall cross-examined Mr. Johnson getting him to correct a few details of his testimony but none that were of much consequence. The relevant aspects of Mr. Johnson's testimony were unshaken.

[22] The next witness was Ms. Anita Prain.

[23] Ms. Prain gave evidence along the following lines:

- She was involved with Alert for 20 years;
- Her work primarily concerned doing the paper work or office administration for the company. She received invoices from subcontractors and paid bills. She is the one that personally signs the cheques. She only pays for work done if she receives an invoice and she testified that she received invoices on a regular basis from D+J's Carpet Cleaning. Her husband, George, verified the invoices first;
- She confirmed that material costs on invoices were a breakdown of the total amounts payable on a formula that was 60% for labour and 40% for materials;
- She denied that she prepared any of the invoices.

[24] Last to testify was Mr. Hall.

[25] Mr. Hall's testimony was along the following lines:

- Mr. Hall testified that he came to work with Alert having been called by his brother who knew Mr. Callura through the hotel, Travel Lodge, and was told that Mr. Callura was looking for workers. So he met with him and he was told he could get a 25% fee for his work but as an assistant he understood that he would get paid \$10 an hour to pull hoses and that sort of thing because he did not know about the truck mount and other aspects of the work. Mr. Hall admits that he was told he would get work only if work comes in;
- At the first meeting with Mr. Callura, Mr. Hall said that he was just told what the pay arrangement would be. At the hearing Mr. Hall said: "I was

just a person” so I thought I was getting a job as an employee. There was no mention of subcontractor;

- Prior to meeting Mr. Callura in about August 2006, Mr. Hall said he was employed by the Flamingo Hotel. He was just looking for some extra money when he met with Mr. Callura. He continued to work for the hotel for a while and acknowledged that Mr. Callura would call for work but that he could not take it because of his obligations to the hotel. Sometime later, Mr. Hall received a call to do a flood in Welland with Al. He was instructed by Al. Next he was asked to do an apartment building and again he was assisting Al;
- In spite of such admission, Mr. Hall insisted that it was really Mr. Callura that trained him. Mr. Callura (George) taught him about the use of the truck mount and how to handle floods and clean carpets. He also trained him on how to deal with customers. That included self-grooming and he got along with him well. Mr. Hall said it was on-the-job training when he would go out with George on different types of jobs. He worked with George in October of 2006 during a flood when they were getting a lot of work from F.I.R.E.. After that George approached him to take over a truck mount and from that point on Mr. Hall said he “ran the business until 2009.” He did the phone, the truck, everything, booked appointments and did more carpet cleaning than George himself. He did more floods than George himself. Even George’s wife worked harder than George. He said he ran the company, not George. The equipment was provided by George and Alert;
- George only appeared for the big jobs where it affected his reputation;
- Mr. Hall said he was required to wear a shirt with the Alert logo and that he wore one everyday except during a flood clean-up and dirty work like that when he would not necessarily wear the shirt. He said he never had a F.I.R.E. shirt. He admitted however that George’s real concern was just to be presentable;
- Mr. Hall said he was not able to hire his own workers or subcontractors and that he never hired any of his own subcontractors except as a person running the business. He said that both he and George did that and that he was told by George to get helpers to help him but they were Alert’s helpers, not his;

- He admitted that he got his family to help him. At first he said that when his family helped him, they never got paid. Contradicting himself he also said that he did not want the payments he was making to his brother, as a helper, to be on his cheque. He said it made no sense the way George wanted to do it by paying him \$15 an hour and if he worked with a helper it was \$25 an hour;
- Mr. Hall testified that he took a three day training course at Corporate Chemicals in St. Catharines and that it was arranged through George for him to go there while George was away in Florida and he, Mr. Hall, was running the company. Mr. Hall confirmed that he did complete the program and did get his Certificate which would have been mailed to Alert. Mr. Hall said he took the course because George insisted that he had to take it in order to do floods for F.I.R.E.;
- Mr. Hall acknowledged that the only way he would make money with Alert was if there were jobs. Floods were good paying because they paid on your time;
- Mr. Hall admitted that he was asked whether or not he wanted to buy the company in April of 2007 and that is when he registered a business in the name of D+J's Carpet Cleaning, a name he discussed with George. He also obtained information as to GST and other business compliance requirements relating the operation of D+J's Carpet Cleaning. Mr. Hall said he was getting along great and that he did think that he could make a lot of money by taking over the company;
- Mr. Hall admitted that he was borrowing money from George who also helped in many other ways including helping him get a place to live;
- Mr. Hall admitted that he was responsible to correct his own mistakes. He did not get paid extra.

[26] In cross and re-examination, the following further evidence was given:

- Mr. Hall acknowledged that Al did teach him about doing carpets and “just a little bit about the truck but not fully.” He acknowledged that some of the shirts that George provided, at the beginning at least, were just used shirts

without the Alert name, so that he would have some work shirts for floods which was very dirty work;

- He acknowledged that he could call a helper but non-related helpers were people that had worked with Alert before and they would invoice Alert separately;
- For tax purposes, Mr. Hall said that he never treated a helper like his brother Dale, as his employee. He treated all he received from Alert as his own and then would pay Dale without any accounting for him as an employee. For example, he did not withhold for tax;
- When asked whether or not he had a corporation, Mr. Hall denied that he did. Presented with a corporate registration for a company called 1602066 Ontario Inc. which he had registered, at first he still denied that he had a company. On being further confronted with corporate reports showing his name and that it was active, he admitted he had incorporated the company. Later in his testimony he elaborated. He said that he was approached by an individual to open up a submarine restaurant. Mr. Hall was to get a percentage of the business. He would have had to come up with \$30,000 as his participation in the operation. The deal fell through because of the rental charge on the property that they were planning to operate the outlet on. All the surveys and everything required to be done had been done and the other fellow was happy with the arrangement and it only fell through because of the rental issue. The other fellow ended up opening in another location in Port Colborne and Mr. Hall did not want to go there and the operation, in any event, was shut down in a couple of months. This all happened in 2004 and that is when the corporation was incorporated, February 2004;
- Regarding invoicing Alert for his services, he was shown invoices he had signed showing, in his handwriting, D+J's Carpet Cleaning as a subcontractor. He noted that he only registered the business name D+J's Carpet Cleaning in early 2007 and said that any invoices that showed earlier use of a name D+J's Carpet Cleaning would have been back-dated. Evidence to the contrary makes this dubious and suggests that he was the one who would have done it if, in fact, they were back-dated .
- Mr. Hall denied being able to do other cleaning work on his own. However, he changed his testimony and said he was allowed to do so but because he

was on call at Alert, he did not do other work. He argued that his work for Mr. Johnson and for the landlord of the jewellery store were isolated examples;

- He denied refusing work when offered by George but acknowledged that because of his shoulder injuries, he required MRIs on several occasions and that he would have been unable to do any work during those periods. Mr. Hall testified that, in fact, it was ultimately the shoulder injuries that caused him to be unable to work at all;
- He denied walking off the job the time George had testified that he had done so and then he recanted and said that he was not sure if he completed the work there because he only stayed until the others arrived;
- With respect to filing tax returns, Mr. Hall said that he believed he filed tax returns because of his income from the Flamingo Hotel in 2006. He acknowledged getting a T4 from the hotel but not getting a T4 from Alert. He never asked for a T4. He said he never filed returns for 2007;
- At previous jobs, Mr. Hall acknowledged that he would receive T4s when he was employed;
- Mr. Hall denied having business cards for D+J's Carpet Cleaning and testified that he was supervised by George from time to time;
- Mr. Hall acknowledged that he had told George and his wife at a meeting early on all about the subway shop and having a business.
- Mr. Hall testified that he knew nothing about the reason for the 60%- 40% split for materials on his invoices.

Submissions of the Parties

[27] As the hearing ended late in the day, I asked for written submissions. I was careful to point out that what I wanted counsel to do was turn their minds to evidence that might be dismissed on one hand or given more weight on the other. I made that suggestion given that it seemed obvious at the hearing that the reliability of the testimony of the two principal witnesses was an issue given that both engaged in business practises that were less than laudable and both spun their testimony in a manner that made fact finding challenging to say the least. More

pointedly, I suggested that there were credibility issues that they should address in their submissions. Some adversarial input on what evidence should carry the day might have been helpful. However, the challenge was not accepted by Appellant's counsel and to the extent it was dealt with by Respondent's counsel, it left me unconvinced that I should trust much of Mr. Hall's testimony. In any event, in the end, it was not a helpful aspect of the submissions requested. I have therefore employed a somewhat detailed recitation of the evidence of each witness in the hope that the picture painted speaks for itself. On that basis, my summary of submissions and my analysis will be brief.

Appellant's Submissions

[28] The Appellant referred me to the following cases: *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue – M.N.R.)*,⁹ *Watson (c.o.b. Bonnie's Cleaning Services) v. Canada (Minister of National Revenue – M.N.R.)*,¹⁰ *Royal Winnipeg Ballet v. Minister of National Revenue*,¹¹ *Vandervelde v. Canada (Minister of National Revenue – M.N.R.)*.¹²

[29] Applying the tests in *Wiebe Door* on the question of control it was argued that: Mr. Hall could decline or accept work;¹³ he operated his own competing business as he was free to and did do cleaning work for others; he was not supervised in the performance of his work. On the question of tools it was argued that the onerous costs of the major equipment like the truck mount could not work against a finding of independent contractor.¹⁴ On the question of the chance of profit it was argued that the opportunity to compete reflected a chance to profit as did the percentage method of payment. Not much was said about the risk of loss. The integration test was addressed as well. The argument was that Alert had a choice of a variety of contractors and was not dependent on any one contractor and that D+J's Carpet Cleaning was a distinct business operated for Mr. Hall's benefit. As to the intention of the parties, a factor considered in *Royal Winnipeg Ballet*, a list of indicators pointed out by Appellant's counsel include: Mr. Hall was aware that there were no payroll deductions or T4s issued; he registered a business and

⁹ [1986] 3 F.C. 553.

¹⁰ 2005 TCC 134, [2005] T.C.J. No. 77.

¹¹ 2006 FCA 87.

¹² 2009 TCC 200, [2009] T.C.J. No. 172.

¹³ This was admitted in the Reply to the Notice of Appeal.

¹⁴ On this point reference was made to *Bonnie's Cleaning*.

obtained information as to GST and other business compliance requirements relating the operation of D+J's Carpet Cleaning.¹⁵

Respondent's Submissions

[30] The Respondent provided the Court with the following authorities: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,¹⁶ *OLTCPI Inc. v. Canada (Minister of National Revenue - M.N.R.)*,¹⁷ *Gagnon v. Canada (Minister of National Revenue - M.N.R.)*,¹⁸ *Hodgkinson v. Canada (Minister of National Revenue - M.N.R.)*,¹⁹ *City Water International Inc. v. Canada (Minister of National Revenue - M.N.R.)*,²⁰ *Royal Winnipeg Ballet v. Canada (Minister of National Revenue - M.N.R.)*,²¹ *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue - M.N.R.)*,²² *Choi v. Canada (Minister of National Revenue - M.N.R.)*,²³ *Dynamex Canada Corp. v. Canada (Minister of National Revenue - M.N.R.)*,²⁴ *Dempsey v. Canada (Minister of National Revenue - M.N.R.)*,²⁵ *Ferme Yoanie Inc. v. Canada (Minister of National Revenue - M.N.R.)*,²⁶ *Hodgkinson v. Canada (Minister of National Revenue - M.N.R.)*,²⁷ *Gagnon v. Canada (Minister of National Revenue - M.N.R.)*,²⁸ *Direct Care In-Home Health Services Inc. v. Canada (Minister of National Revenue - M.N.R.)*,²⁹ *Britcom Communications Ltd. v. Canada (Minister of National Revenue - M.N.R.)*,³⁰ *Gartry v. Canada*.³¹

[31] Addressing the *Wiebe Door* tests on the question of control, reliance was placed on the training given Mr. Hall done to be sure the way in which the work

¹⁵ Appellant's submissions included a response to the Respondent's submissions. They added nothing that my recitation of the facts has not covered.

¹⁶ 2001 SCC 59.

¹⁷ 2010 FCA 74.

¹⁸ 2007 FCA 33.

¹⁹ 2007 FCA 334.

²⁰ 2006 FCA 350.

²¹ 2006 FCA 87.

²² [1986] 3 F.C. 553.

²³ 2010 TCC 461.

²⁴ 2010 TCC 17.

²⁵ 2007 TCC 362.

²⁶ 2007 TCC 391.

²⁷ 2006 TCC 592.

²⁸ 2006 TCC 66.

²⁹ 2005 TCC 173.

³⁰ [2001] T.C.J. No. 85.

³¹ [1994] 2 CTC 2021 (TCC).

was done and the means employed in doing it would be adhered to. Relying on *Gagnon*, the Respondent asserts that initial supervision and training that assures less supervision does not alter the ultimate right to control. The Respondent's counsel argued that Mr. Callura controlled the staff by controlling the choice of assistants used by Mr. Hall. I note, however, that this assertion ignores the whole question of Mr. Hall's credibility and his conflicting evidence relating to the use of assistants and how they were paid.

[32] As to doing contractor work for others, reliance is placed on *Dynamex* where Justice Archambault spoke of casual workers having many jobs. I do not see this as an analogous situation.

[33] While not dealing with "control" *per se*, Respondent's counsel argued that dealing with complaints about the quality of work, that resulted in Mr. Hall having to redo it at no charge, was part of Alert's guarantee to its customers. This overlooks Alert's perspective that it was the worker's guarantee to Alert and its customers.

[34] As to tools, it was pointed out that the most necessary tools, the truck mount and all cleaning supplies, were provided by Mr. Callura or Alert.

[35] On the question of chance of profit and risk of loss, Appellant's counsel argued that there was no substantial investment in tools so there was no risk if loss. Mr. Hall was not, as described in *Gagnon*, an entrepreneur employing capital and skillful management together with the concomitant risk of suffering a loss. It was argued that Mr. Hall could not profit from engaging an assistant, a conclusion with which I do not agree as set on in my analysis below.

[36] Under a different heading dealing with whether Mr. Hall had a business, it is argued that the business name was registered for a specific purpose unrelated to his work with Alert. It was argued then that there were no indicia of Mr. Hall having his own separate business.

[37] On the question of the intentions of the parties, it is asserted that Mr. Callura imposed subcontractor status on all his workers. It was a self-serving imposition aimed at avoiding Alert's responsibility to include its workers in social assistance programs that were not intended to be optional or unilaterally avoided.

Intervenor's Submission

[38] Mr. Hall's submission offered a restatement of his evidence adding an occasional new asserted fact. He denies assertions made by Mr. Callura based, in some cases, on evidence he, Mr. Hall, gave at the trial, and in other cases, based on freshly asserted facts. Unfortunately, much of the evidence he gave at trial was not convincing and his freshly asserted facts are not evidence that I can consider.

[39] Mr. Hall does review exhibits filed at the hearing and in doing so raises some points that showed some inconsistencies in Mr. Callura's testimony. As well, he used a few of the exhibits to raise hypothetical questions aimed at undermining more of Mr. Callura's assertions regarding his, Mr. Hall's, status as a worker. However, none of these points impressed me as being particularly helpful to Mr. Hall and certainly did not dissuade me from my view of the evidence.

[40] Some of his review of the evidence did raise questions such as distances he travelled, variations in the fixed rates, evidence of training periods and how often he was in contact with Mr. Callura. In this regard, I can only say I am in total agreement with Mr. Hall that Mr. Callura's testimony often varies from the truth. Unfortunately, I come to the same conclusion in respect of his, Mr. Hall's, testimony, but more so. He has failed to convince me that he is anything other an opportunist who eagerly embraced entrepreneurship for all the advantages it offered. Mr. Callura gave the impression by his testimony that he was led on by Mr. Hall about many things. Whether that is the case or not, I cannot be certain, but I am certain that that is my impression of what Mr. Hall was attempting to do with me.

Analysis

[41] This case might best have been dealt with from the bench. The troubling aspect of it that needed reflection was what to say when the two principal witnesses had so little difficulty spinning a tale. As past good friends, they may still deserve each other notwithstanding Mr. Hall's ultimate betrayal.

[42] Mr. Hall's attempt at portraying himself as an ordinary person did not impress me. His inflated sense of his ability to carry that off went flat from the outset. However, it did encourage me to believe that he was right in there getting his own business name, taking clients and imagining that he had taken over Alert's business – after all, according to him, he was running it anyway. This man was under the control of Mr. Callura only as much as it served his purpose.

[43] The one witness whose credibility might be taken as disinterested and credible was Mr. Johnson. His testimony essentially corroborates the picture Mr.

Callura painted as to Mr. Hall having his own business; however, that does not add to my confidence in much of Mr. Callura's own evidence. Saying a worker was welcome to take work from an Alert client was nonsense. If Alert got a contract to do carpets, he said a worker was free to clean upholstery for his own account? No such concocted tolerance was displayed when he spoke of Mr. Hall taking the business of the landlord of the jewellery store away from Alert.

[44] And what do I make of this doctoring of invoices? Is everyone here colluding in a blatant fraud? False invoices for services on the basis of 60% for services and 40% for materials are knowingly submitted by Mr. Hall and accepted? Would I really be impressed to discover whose idea that was? They are all co-conspirators. As to their respective objective, that is not clear. Was it to understate Mr. Hall's revenue both for income tax and GST collection purposes? Or was it simply to misrepresent service fees for insurance premium purposes as boldly asserted by Mr. Callura? Let me just say that I have concluded that each of these two storytellers act on their own behalf for their own entrepreneurial purposes.

[45] Having said that, I must acknowledge that I have no idea what the business relationship is between Alert and Mr. Callura. Mr. Callura owns the main truck mount used for commercial cleaning services. That is the truck mount that was used by Mr. Hall as provided by Mr. Callura. Do I still assume that Alert, the asserted employer, provided the equipment to the worker? I am not satisfied of that at all and even if that were an assumption in respect of which the Appellant has some burden of proof, that assumption, based on the say-so of Mr. Hall whose respect for the truth I have already commented on, must fail. I do not even know who the principals of Alert are and whether they are aware of the shenanigans here although I suspect they are Mr. Callura and or his wife.

[46] A review of the authorities in this case is not necessary. I am very familiar with them. However, to assure the parties that I have not ignored them, my brief conclusions on the application of those authorities are as follows.

Control

[47] I find on the evidence that Mr. Hall worked when he wanted to work. He was free to turn down work and even though the invoices show that he provided his services on a fairly regular basis, that degree of regularity was part of Mr. Hall's business plan of running his own business and taking over that of Alert. His entrepreneurial ambition, course of acting and mindset is also displayed by his own evidence of how he approached a previous business opportunity. He knew full well

what he was doing when he registered D+J's Carpet Cleaning and acted accordingly. That Alert contracted out much of its work from time to time by relaying calls to Mr. Hall is not persuasive of a master servant relationship in this case. Mr. Hall's role, in this regard, is not indicative of his being in a subservient position. He is simply not a subservient character acting under a contract of service.

Tools

[48] The ownership of tools is neutral in this case. Even if it favoured a finding of a contract of service it would not be a factor that I would weigh heavily in this case.

Chance of Profit and Risk of Loss

[49] Mr. Hall had a chance of profit by being free to hire assistants. He was free to pay them as he might negotiate with them. He was paid \$25 an hour if an assistant worked with him. His profit was not just on his own time but was based on the leverage he could obtain by paying an assistant less than \$10 per hour which in one version of his testimony he did do at least when the assistant was a family member.

[50] Mr. Hall admitted having a risk of loss where he had to redo work for no remuneration whether it was his fault or not.

Whose Business Was It?

[51] If it is not already clear, the evidence supports a finding, considering all relevant factors including those mentioned above, that there was a business here being engaged in by Mr. Hall. Admittedly, that business might have been distinct from his work for Alert. A person can in one endeavour be an employee while at the same time be operating as an independent contractor in other endeavours. Taking calls for Alert could be acting as an employee while doing work for Mr. Johnson could be as an independent contractor. Alternatively, having one major client who you assist at many levels and who keeps you so busy as to limit your work for other clients or potential clients, does not make you an employee of that client. At best, this might be a close call in this case, however, on balance, there is an underlying entrepreneurial independence here in the way Mr. Hall conducts himself that I find makes it hard for me to come to any other conclusion than that his work for Alert was carried out in the course of his operating his own business.

Intentions

[52] Should this have been a close call, I would not hesitate for a moment in finding that it was the mutual intention of the parties not to engage in a contract of service. Mr. Hall intended to take full advantage of independent contractor status. This was clearly not a status imposed on him.

Conclusion

[53] Notwithstanding the brevity of this analysis, I am hopeful that my review of the testimony of the witnesses in this case and my observations about such testimony made throughout these Reasons speak for themselves.

[54] In any event, for all these reasons the appeals are allowed, without costs, on the basis that Mr. Hall was not engaged in either insurable or pensionable employment throughout the periods in respect of which such appeals have been filed.

Signed at Ottawa, Canada this 24th day of June 2011.

"J.E. Hershfield"

Hershfield J.

CITATION: 2011 TCC 321

COURT FILE NOS.: 2010-1506(EI) and 2010-1505(CPP)

STYLE OF CAUSE: ALERT CARPET CLEANING (NIAGARA)
INC. AND M.N.R. AND DAVID HALL

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: April 1, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice J.E. Hershfield

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