Dockets: 2020-1116(EI)
2020-1579(CPP)

BETWEEN:

KEVIN LEE HACHULLA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

and

BEN ROBERTSON,

Intervenor.

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Appeal heard on September 12, 2022, at Vancouver, British Columbia

Before: The Honourable Justice Sylvain Ouimet

Appearances:

| | |
|---|---|
| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Jonathan Cooper |
| | Spencer Landsiedel |
| For the Intervenor: | The Intervenor himself |

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**JUDGMENT**

In accordance with the attached reasons, the appeal from the determination made by the Minister of National Revenue on February 6, 2020 under the *Employment Insurance Act* and the *Canada Pension Plan* is dismissed, without costs.

Signed at Ottawa, Canada, this 19th day of May 2023.

"Sylvain Ouimet"

Ouimet J.

Citation: 2023 TCC 63
Date: 20230518
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BETWEEN:

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**REASONS FOR JUDGMENT**

Ouimet J.

## I. INTRODUCTION

[1] This is an appeal by Mr. Kevin Lee Hachulla ("Mr. Hachulla") from a determination made by the Minister of National Revenue (the "Minister") on February 6, 2020, under the *Employment Insurance Act* [1] and the *Canada Pension Plan*.[2] The Minister determined that Ben Robertson ("Mr. Robertson") was employed by Creative Concepts Landscaping ("Creative Concepts") in insurable and pensionable employment from April 5, 2019 to September 3, 2019 (the "Period") under paragraph 5(1)(a) of the EIA and paragraph 6(1)(a) of the CPP.

[2] Mr. Hachulla testified at trial. The Respondent called Mr. Robertson.

## II. THE ISSUES

[1] S.C. 1996, c. 23, para. 5(1)(a) ("EIA").
[2] R.S.C. 1985, c. C-8, para. 6(1)(a) ("CPP").

[3] The issues in this appeal are as follows:

- Whether Mr. Robertson was, during the Period, engaged in insurable employment with Creative Concepts under paragraph 5(1)(a) of the EIA.

- Whether Mr. Robertson was, during the Period, engaged in pensionable employment with Creative Concepts under paragraph 6(1)(a) of the CPP.

[4] To answer these questions, the Court must determine whether Mr. Robertson was, during the Period, employed by Creative Concepts under an express or implied contract of service, written or oral.

## III. THE LEGISLATIVE PROVISIONS

[5] The relevant provision of the EIA read as follows:

> 5. (1) Subject to subsection (2), insurable employment is
>
> > (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[6] The relevant provisions of the CPP read as follows

> 2. (1) In this Act,
>
> > "employment" means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office;
>
> …
>
> 6. (1) Pensionable employment is
>
> > (a) employment in Canada that is not excepted employment;

## IV. THE FACTS

### A. Context

[7] During the Period, Mr. Robertson provided landscaping and hardscaping services to Creative Concepts.

[8] On September 3, 2019, Mr. Robertson stopped providing services to Creative Concepts after he injured himself.

[9] On September 26, 2019, Mr. Robertson filed an application for Employment Insurance benefits with Service Canada. Service Canada requested a ruling from the Canada Pension Plan/Employment Insurance Rulings Division of the Canada Revenue Agency ("CRA") in order to determine his employment status during the Period.

[10] On November 14, 2019, the CRA notified Mr. Hachulla, Mr. Robertson, and Service Canada it had determined that during the Period, Mr. Robertson had been an employee of Creative Concepts engaged in insurable and pensionable employment under the EIA and the CPP.

[11] Mr. Hachulla disagreed with the CRA's determination and filed an appeal to the Minister.

[12] On February 6, 2020, the Minister confirmed the CRA's determination and notified Mr. Hachulla, Mr. Robertson, and Service Canada thereof.

### B. Mr. Hachulla's Testimony

[13] Mr. Hachulla is the owner and operator of Creative Concepts. Creative Concepts provides landscaping and hardscaping services.

[14] According to Mr. Hachulla, during the Period, Creative Concepts hired subcontractors to work on landscaping and hardscaping projects. During the Period, he was often looking for subcontractors, who were difficult to find. He told the Court that his subcontractors frequently stop working without warning because they decide to no longer provide landscaping and hardscaping services or because they can obtain more money elsewhere.

[15] Creative Concepts was financially liable if a project was not completed in the time agreed upon with clients. Creative Concepts was also liable for the quality of the work done by its subcontractors.

[16] Mr. Hachulla required that each new worker of its subcontractors be entitled to work in Canada. He stated that on a new worker's first day, he verified whether the worker had a Canadian social insurance number. He also required that he be notified when a subcontractor had new workers on a project site.

[17] Creative Concepts paid its subcontractors an hourly rate for their services. Before the beginning of the Period, Creative Concepts had paid its subcontractors on a project basis, but Mr. Hachulla realized that this was not a financially sound way of proceeding. According to Mr. Hachulla, when subcontractors were paid on a project basis, the completed work often had quality issues because it was done too fast, so much so that in some cases, the work had to be redone at Creative Concepts' expense.

[18] In order to ensure that Creative Concepts would make a profit on every project, Mr. Hachulla would meet with the subcontractor before the beginning of each project to tell them his budget for the work that had to be done. Taking the budget into consideration, Mr. Hachulla and the subcontractor would agree on an acceptable number of hours within which to complete the project. The subcontractor was paid for that number of hours.

[19] Creative Concepts provided the tools used by its subcontractors to perform their services. These tools included a pick-up truck, gardening tools, sledgehammers, shovels, rakes, wheelbarrows, compactors, chop saws, and small machinery or heavy machinery, depending on the project.

[20] Mr. Hachulla scheduled the date and time that the subcontractors began working on projects. He expected the subcontractors to pick up the tools to perform their services at Creative Concepts' office around 7:30 a.m. and begin working on the project site between 8:00 a.m. and 8:30 a.m. He testified that ideally, he would have liked them to be on a project site for 8 to 10 hours a day. He wanted them to start between 8:00 a.m. and 8:30 a.m. and finish at approximately 6:00 p.m. because of the noise levels associated with that type of work. Unfortunately, the workers did not always follow this schedule because they often decided to sleep in or because they had "side jobs" for other clients. Mr. Hachulla did not address the situation because he believed the workers were subcontractors, not employees, and he was unable to fire the subcontractors for not beginning their work at a certain time.

[21] Mr. Hachulla expected the subcontractors to notify him by text message when they could not start working on a project at 8:30 a.m. or if they were unable to work on a project on a specific day. However, Mr. Hachulla stated that he was not always notified. When he was not notified, Mr. Hachulla did not penalize the subcontractors because he believed they were subcontractors, not employees.

[22] During the Period, Mr. Robertson was one of Creative Concepts' main subcontractors and was required to provide services every day.

[23] At the beginning of September 2019, Mr. Hachulla received a text message from Mr. Robertson saying that he had fallen down a set of stairs and that he had injured his knee. In the same text message, Mr. Robertson then told him that he could no longer work because of this injury.

C. Mr. Robertson's Testimony

[24] Mr. Robertson is an experienced installer of paving stones. He testified that he has worked as an installer all his life. A few years prior to the Period, he had done some landscaping work for Mr. Hachulla as a subcontractor. At that time, he had his own landscaping business, which was called Viper Paving Stones.

[25] At the beginning of 2019, Mr. Robertson ran into Mr. Hachulla in a store. Mr. Hachulla asked Mr. Robertson if he wanted to work as a subcontractor for Creative Concepts. At trial, Mr. Robertson stated that he had worked for Mr. Hachulla in the past and described Mr. Hachulla as a "great guy". Since Mr. Robertson was looking for work and had liked working for Mr. Hachulla in the past, he accepted the offer.

[26] Mr. Robertson agreed to be paid a rate of $25 per hour and to invoice Creative Concepts for his services.

[27] During the Period, Mr. Robertson was paid by cheque made to his name. He was paid after having invoiced Creative Concepts, but he did not use a business name on the invoices; Mr. Robertson's invoices only mentioned the amounts payable and the names of the projects that he had worked on. The invoices also did not include a business number or an amount payable for GST. The invoices that Mr. Robertson had provided to Creative Concepts for work done before the Period did include this information. At that time, Mr. Robertson used his pick-up truck and his tools to provide his services to Creative Concepts.

[28] Mr. Robertson was not paid vacation time. He stated that he did not ask Mr. Hachulla to be paid vacation time because he "didn't want to make waves". He added that "[w]hen you've got five kids to feed and you're battling stuff, it's an easier situation to work in sometimes you make sacrifices, you don't question stuff you just work."

[29] During the Period, Mr. Robertson only worked for Creative Concepts. Mr. Robertson was required to begin working on a project at approximately 8:45 a.m. He stated that he did so most days.

[30] Creative Concepts provided Mr. Robertson with the tools and equipment that he needed to provide his services. In general, these tools included a pick-up truck, sledgehammers, shovels, rakes, wheelbarrows, compactors, and a chop saw. Sometimes, but not often, Mr. Robertson chose to use his own tools. He did not do so on a regular basis, although he did use his own regular skill saw a few times because he liked it better than the one provided by Creative Concepts.

[31] Mr. Robertson used a Creative Concepts truck ("Truck") to go to the worksite. Mr. Hachulla let him use the Truck to travel between Mr. Robertson's home and the worksite because Mr. Robertson did not have a vehicle during the Period. Consequently, Mr. Robertson would sometimes keep the Truck overnight so that he could use it to drive to the worksite the next morning.

[32] Mr. Robertson purchased some of the material used for projects for Mr. Hachulla. He used the Truck to transport materials to the worksite. Mr. Hachulla reimbursed Mr. Robertson for any materials that he purchased for projects and for the fuel used while driving the Truck.

[33] Mr. Robertson could hire a subcontractor to work on Creative Concepts projects, but Mr. Hachulla needed to be informed because he was liable for the workers' safety. Mr. Hachulla did not care whom his workers brought as subcontractors as long as they could legally work in Canada.

[34] Mr. Robertson brought his wife to work on a Creative Concepts project two or three times during the Period. She was the only person whom he asked to work on a Creative Concepts project. Mr. Robertson's wife was paid an hourly wage. Before she started working on a Creative Concepts project, Mr. Robertson asked for Mr. Hachulla's authorization. He also asked Mr. Hachulla if he would agree to pay for Ms. Robertson's services in addition to what they had agreed that Mr. Robertson was going to be paid. Mr. Hachulla agreed and recorded the hours that

Ms. Robertson worked in a book that he normally used for that purpose. The cost of Ms. Robertson's services was included in Mr. Robertson's invoices.

[35] The majority of the time, Mr. Hachulla was on project worksites with Mr. Robertson. When he was not on other project sites, he was seeing clients in order to obtain payment.

[36] According to Mr. Robertson, there was no set deadline. A worker would go to the worksite and complete every job as fast as possible.

[37] Mr. Hachulla would tell Mr. Robertson what had to be done on a specific day and Mr. Robertson would then do it.

[38] Mr. Robertson stated that his work schedule varied, every day. He indicated that there was no set number of work hours. Most of the time, Mr. Hachulla would tell Mr. Robertson to either meet him on a project site or meet at his house at a specified time, and Mr. Robertson would try to be there for that time.

## V. ANALYSIS

### A. The Law

[39] In this case, this Court must determine whether Mr. Robertson was, during the Period, employed by Creative Concepts under an express or implied contract of service, written or oral, pursuant to paragraph 5(1)(a) of the EIA and paragraph 6(1)(a) of the CPP. To make this determination, this Court must determine whether the relationship between Mr. Robertson and Creative Concepts was one of independent contractor or of employer-employee.[3]

[40] Consequently, the central question that this Court has to answer is whether Mr. Robertson has, on the basis of the facts, rendered services as a person in business on his own account during the Period.[4] If the Court finds that Mr. Robertson has rendered services to Creative Concepts as a person in business on his own account, then the Court will conclude that Mr. Robertson was not engaged in insurable and pensionable employment. Conversely, if the Court finds that Mr. Robertson did not

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[3] *1392644 Ontario Inc. (Connor Homes) v. M.N.R.*, 2013 FCA 85 at para. 40 [*Connor Homes*]; *Wiebe Door Services Ltd. v. M.N.R.* [1986], 2 C.T.C. 200 [*Wiebe Door Services Ltd.*]; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 [*Sagaz Industries Canada Inc.*].

[4] *Connor Homes*, *supra* note 6 at para. 41.

render services as a person in business on his own account, the Court will conclude that Mr. Robertson was engaged in insurable and pensionable employment.

[41] In *1392644 Ontario Inc. (Connor Homes) v. Minister of National Revenue*, the Federal Court of Appeal stated that the leading decisions on the central question of whether or not an individual has rendered services as a person in business on his or her own account are its decision in *Wiebe Door Services Ltd. v. MNR* and the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*.[5] Given the number of decisions that have relied on *Connor Homes* since then, I am of the view that *Connor Homes* has become a leading decision on this question as well.

(1) The Test to Be Applied in Order to Answer the Central Question

[42] In *Sagaz Industries Canada Inc*., the Supreme Court discussed the test to be applied in this case. I summarize the Supreme Court's statements as follows:

- There is no one conclusive test that can be universally applied in order to determine whether a person provides services as an independent contractor or as an employee.[6]

- In determining whether a person provides services as an independent contractor or as an employee, the courts must always search for the total relationship of the parties.[7]

- In order to assess the total relationship of the parties, the most a court can do is to examine all the possible factors bearing on the nature of the relationship between them.[8]

- Not all factors are relevant in all cases, or have the same weight. Furthermore, the Court stated that there is no magic formula for determining which factors should, in any given case, be the determining ones.[9]

- The level of control that the employer has over the worker's activities is always a factor to take into consideration. Other factors to consider include

[5] *Ibid* at para. 26, citing *Sagaz Industries Canada Inc.*, *supra* note 6, and *Wiebe Door Services Ltd.*, *supra* note 6.
[6] *Sagaz Industries Canada Inc*., *supra* note 6 at para. 46.
[7] *Ibid*, citing *Wiebe Door Services Ltd.*, *supra* note 6 at 563.
[8] *Ibid* at para. 47.
[9] *Ibid*, citing Professor P.S. Atiyah, *Vicarious Liability in the Law of Torts*, (London: Butterworths, 1967) at 38, quoted in *Wiebe Door Services Ltd.*, *supra* note 6 at 206.

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 chance of profit in the performance of his or her tasks.[10] These factors do not constitute an exhaustive list, and there is no set formula as to their application.

- The relative weight of each factor in the determination that has to be made will depend on the particular facts and circumstances of a case.[11]

[43] In *Connor Homes*, the Federal Court of Appeal revisited the test established in *Sagaz Industries Canada Inc*., as well as the idea of using the parties' intention as a consideration in applying the test. This idea was raised by the Federal Court of Appeal in *Wolf v. R.*[12] and in *Royal Winnipeg Ballet v. M.N.R.,*[13] which both put forward using intention as a first consideration in applying the test.[14] The Court stated that when determining whether a person provides services as an independent contractor or as an employee, the courts must use a two-step process of inquiry.[15]

[44] Under the first step, the courts must ascertain the subjective intent of each party to the relationship. This means determining whether the parties shared a common intention or mutual understanding about the legal nature of their relationship.[16]

[45] In order to determine the intention of the parties with respect to their relationship, the courts should look either to the written contractual relationship that the parties have entered into or to the actual behaviour of each party. Assessing the actual behaviour includes considering whether invoices for services rendered were issued, whether the provider of the services was registered for GST purposes, and whether the worker filed his or her income tax returns as an independent contractor.[17]

[46] In my view, the first element to look for is whether there is a written agreement between the parties. If the parties entered into such an agreement, and the agreement clearly states the nature of the relationship, there is no need to look at their behaviour.

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[10] *Sagaz Industries Canada Inc*., *supra* note 6 at para. 47.
[11] *Ibid* at para. 48.
[12] 2002 FCA 96 [*Wolf*].
[13] 2006 FCA 87 [*Royal Winnipeg Ballet*].
[14] *Connor Homes*, *supra* note 6 at para. 38, citing *Wolf* at para. 117 and *Royal Winnipeg Ballet* at paras. 59–62.
[15] *Ibid.*
[16] *Ibid* at paras. 42–43.
[17] *Ibid* at para. 39.

The same applies if, in their respective testimony, the parties both clearly state what their common intent was. I consider that the parties' behaviour should be taken into consideration only when the parties did not enter into a written agreement; when a written agreement does not clearly state the nature of the relationship; or when the parties' testimony indicating that they had a common intent is not credible, and therefore not reliable. This is so because in my view, since the Court is looking to identify what the parties' subjective intent was, a written agreement is sufficient to establish that fact and should not be ignored. If the parties have a clear agreement, what a party does afterwards, such as becoming registered for GST purposes or filing an income tax return as an independent contractor, becomes irrelevant for determining the parties' subjective intent. This is the case because these actions can be completed without the knowledge of the other party after an agreement has been reached and the common intent has been agreed upon by the parties.

[47] Therefore, under the first step, the Court can either conclude that the parties shared a common intent and identify what it was, or conclude that the parties did not share a common intent.

[48] Under the second step, the courts must ascertain whether an objective reality sustains the subjective intent of the parties. This is done by taking into consideration all of the relevant factors from the objective facts of a case, including the factors mentioned in *Sagaz Industries Canada Inc.* and *Wiebe Door Services Ltd.*, and examining whether these factors are consistent with the subjective intent of the parties.[18]

[49] The Court stated that the subjective intent of the parties cannot trump the reality of the relationship as ascertained through the objective facts.[19] Consequently, in my view, where the parties share a common subjective intent but the objective facts are clearly inconsistent with that common shared intent, the shared subjective intent of the parties should not be given any weight. On the other hand, the parties' common subjective intent should be given some weight in a situation where some of the objective facts support the common subjective intent and some do not. Obviously, if the objective facts are completely consistent with the subjective intent of the parties, the parties' common subjective intent should be given weight.

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[18] *Ibid* at para. 40.
[19] *Ibid*.

[50] In my opinion, this reasoning is consistent with statements made by the Federal Court of Appeal in *Connor Homes* with respect to the parties' intent. I summarize the Court's statements in *Connor Homes*, as follows:

- The legal effect that results from the parties' relationship, i.e., the legal effect of the contract, is not a matter which the parties can simply stipulate in the contract, and it cannot simply be left to be decided at the sole discretion of the parties.[20]

- It is insufficient for parties to simply state in a contract that the services are provided as an independent contractor to make it so.[21]

- The legal effect of the relationship between the parties cannot be left to their sole discretion. According to the Court, this is because an employee-employer relationship has important and far-reaching legal and practical ramifications extending to, among other things, social programs (eligibility and financial contributions thereto), labour relations (union status) and taxation (GST registration and status under the *Income Tax Act*).[22]

[51] Therefore, I consider that the determination of the parties' intent under the first step serves the two purposes. They are as follows:

i. It will determine the starting point of the analysis to be conducted under the second step of the test, as well as the purpose of the analysis. If the Court finds that the parties had a common intent in step one, then in step two, the Court will determine whether or not the relevant factors in the circumstances support the parties' common intent.

   If the Court finds that the parties had a different intent or none at all, then in step two, the Court will determine the nature of the relationship based on the relevant factors in the circumstances, excluding the intent of each party.

ii. It will determine whether the parties' intent is a factor to take into consideration in the second step of the test. If the Court concludes that the parties had a common intent, then the intent will be a factor to take into

[20] *Ibid* at paras. 36–37.
[21] *Ibid* at para. 36.
[22] *Ibid* at para. 37.

consideration in the second step of the test, along with the other relevant factors.

[52] With respect to the purpose and use of the parties' common intent in the two-step test, a statement made by the Federal Court of Appeal in *Connor Homes* was recently discussed by this Court, namely in *Insurance Institute of Ontario v. M.N.R.*[23] This case was not brought to my attention at trial, and the parties did not comment on it. The relevant passage of *Connor Homes* is the following:

> In this case, the Tax Court Judge appears to have proceeded in an inverse order, dealing with the parties' intent as set out in their mutual contracts at the end of his analysis. The first step of the analysis should always be to determine at the outset the intent of the parties and then, using the prism of that intent, determining in a second step whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of independent contractor. However, in the circumstances of this case, the inverse order of analysis followed by the Tax Court Judge is not in itself sufficient to vitiate the decision since the evidence, taken as a whole, supports the conclusions reached by the judge.[24]
>
> [Emphasis added.]

[53] Relying on this statement, the appellant in *Insurance Institute of Ontario* argued that the results of the first step should affect the application of the test in the second step. The Minister did not agree. This Court agreed with the appellant and came to the following conclusion:

> Taking all of the above into account, I favour the Institute's interpretation of the second step of the *Connor Homes* test. I find that the results of the first step affect the application of the test in the second step. Respectfully, the Respondent's interpretation of the second step is illogical. If the outcome of the first step had no bearing on the second step, then what purpose would the first step serve? If the sole question to be determined was what the *Wiebe Door* and *Sagaz* factors indicated the relationship was, then why bother considering what the parties believed the relationship to be? For the first step to mean something, the outcome of the first step has to have an impact on the application of the test in the second step.[25]
>
> [Emphases added]

[54] In *Insurance Institute of Ontario*, this Court's description of the application of the second step of the *Connor Homes* test is as follows:

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[23] 2020 TCC 69 [*Insurance Institute of Ontario*].
[24] *Connor Homes*, *supra* note 6 at para. 42.
[25] *Ibid* at para. 18.

Based on all of the foregoing, I conclude that the second step of the *Connor Homes* test should be applied as follows:

> a) Where the payor and the worker do not share a common intention, their relationship will be the relationship indicated by the *Wiebe Door* and *Sagaz factors.*
>
> b) Where the payor and the worker share a common intention:
>
> > i. if the *Wiebe Door* and *Sagaz* factors are consistent with that common intention, then their relationship will be the relationship that they intended;
> >
> > ii. if the *Wiebe Door* and *Sagaz* factors are completely inconsistent with that common intention, then their relationship will be the relationship indicated by those factors; and
> >
> > iii. if the *Wiebe Door* and *Sagaz* factors are inconsistent with that common intention but the parties nonetheless act and carry on their relationship in a manner that is similar to what one would expect from their intentions, then their relationship will be the relationship that they intended.[26]

[55] Given what I have indicated earlier in this decision, I agree with these statements. For clarity, my view of the application of the test can be summarized as follows:

Step 1: The Court must determine whether the parties had a common intention.

Step 2: If the parties did not have a common intention then the Court must, using all the relevant factors in the circumstances, including those listed in *Wiebe Door Services Ltd.* and in *Sagaz Industries Canada Inc.*, determine the nature of the actual relationship between the parties. In these circumstances, the intent of each party is not a relevant factor, and the weight to be given to each factor is determined by the judge.

If the parties had a common intention then the Court must, using all the relevant factors in the circumstances, including those listed in *Wiebe Door Services Ltd.* and in *Sagaz Industries Canada Inc.*, determine whether that intention is supported by the objective reality of their relationship. In these circumstances, the parties' common intention is a factor to take into consideration and the weight to be given to each factor is determined by the judge.

(2) <u>The Application of the Law to the Facts of This Case</u>

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[26] *Ibid* at para. 26.

(a) The First Step: The Intention of the Parties/The Parties' Understanding of Their Relationship

[56] Under the first step, this Court must ascertain the subjective intent of each party to the relationship.

[57] Mr. Robertson did not provide his services to Mr. Hachulla under a written contract. The evidence shows that he provided his services under an express oral contract for service and not under a contract of service. Pursuant to the agreement, Mr. Robertson was to provide his services as a person in business on his own account, so as an independent contractor. The parties' testimony confirms this fact, as do text messages submitted in evidence at trial.

[58] As a result, the Court finds that the parties' common intention was for their contractual relationship to be one of independent contractor.

(b) The Second Step: Whether in Reality, After Taking Into Consideration All the Relevant Factors in the Circumstances, the Actual Relationship Sustains the Parties' Common Intent

[59] Under the second step, the Court must ascertain whether in reality, after taking into consideration all the relevant factors in the circumstances, the relationship of the parties was the one that they intended.

[60] The Court finds that in the circumstances, the relevant factors are the following:

- the level of control that Creative Concepts had over Mr. Robertson's activities;
- whether Mr. Robertson provided his own equipment;
- whether Mr. Robertson could hire workers to provide his services;
- whether Mr. Robertson had a chance of profit in the performance of his tasks while providing services to Creative Concepts;
- whether Mr. Robertson managed and assumed financial risks while providing services to Creative Concepts;
- the frequency of the payments for services rendered; and

– the invoices for services rendered.

(1) The Level of Control That Creative Concepts Had Over Mr. Robertson's Activities

[61] The control factor has also been referred to by the courts as the "control test".[27] Control refers to the payer's right to give orders and instructions to the worker regarding the manner in which to carry out work.[28] Other indicators used in analyzing the control factor are the scheduling of working hours, the policies and procedures used at work, and the location of the workplace.[29] The more control the payer has over a worker, the more this is an indication that the relationship is one of employer-employee.

[62] Mr. Hachulla scheduled the date and time that Mr. Robertson had to begin working on projects. Mr. Robertson needed to notify him if he was sick and could not provide his services. Mr. Hachulla told Mr. Robertson which project to prioritize and which worksite to go to on a specific day. During the Period, Mr. Robertson was required to provide services every weekday.

[63] The fact that Mr. Hachulla required that workers notify him when they hired new workers to work on a project site is a factor that supports the conclusion that Mr. Robertson was an employee of Creative Concepts. The level of control that Mr. Hachulla had over Mr. Robertson's work schedule also supports the conclusion that Mr. Robertson was an employee of Creative Concepts. The Court finds that the level of control that Creative Concepts had over Mr. Robertson's activities supports the conclusion that Mr. Robertson was an employee of Creative Concepts.

(2) Whether Mr. Robertson Provided His Own Equipment

[64] When a worker uses his or her own tools and equipment in order to provide their services, it is an indicator that he or she is providing services as an independent contractor.[30] The use by the worker of his or her own vehicle for work-related activities is also an indication of being an independent contractor.[31] Conversely, the more the payer supplies the tools and equipment for the worker's work-related

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[27] *Wiebe Door Services Ltd.*, *supra* note 6 at 203, citing *R. v. Walker* (1858), 27 L.J.M.C. 207.
[28] *Ibid*, citing *Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent et al*, [1978] 1 S.C.R. 605 at 613.
[29] *Connor Homes*, *supra* note 6 at paras. 44–47; see also *Wolf*, *supra* note 15 at para. 74 and *Canada Sun Education Inc. v M.N.R.*, 2019 TCC 117 at para. 41.
[30] *Sagaz Industries Canada Inc.*, *supra* note 6 at para. 47; see also *Wiebe Door Services Ltd.*, *supra* note 6 at 201–202.
[31] *Connor Homes*, *supra* note 6 at para. 50.

activities, the more likely that their contractual relationship is one of employer-employee.

[65] Creative Concepts provided Mr. Robertson with all of the tools and equipment that he needed to perform his work, including the heavy machinery. Mr. Robertson used only one or two of his own small tools because of personal preference. While Creative Concepts let Mr. Robertson use the Truck to travel between his home and the worksites as a courtesy to Mr. Robertson, the evidence shows that Mr. Robertson used the Truck to go directly from his home to suppliers' locations to pick up material for Creative Concepts projects, which was convenient for Creative Concepts.

[66] Mr. Hachulla provided almost all the tools and equipment for Mr. Robertson's work-related activities. Because of this, the Court finds that this factor supports the conclusion that Mr. Robertson was an employee of Creative Concepts.

(3) Whether Mr. Robertson Could Hire Workers to Provide His Services

[67] When a person providing services can hire their own workers to help them provide their services, it is an indicator that the relationship between the payer and the person is one of independent contractor. In this case, Mr. Robertson had his spouse coming to provide services with him for Creative Concepts. According to the evidence, this happened a few times, but the exact number of times is unclear. Mr. Robertson had to ask permission from Mr. Hachulla before bringing a new worker on a project site. This requirement applied to Mr. Robertson's spouse, and permission was obtained before she came to a project site.

[68] Mr. Robertson had to ask Mr. Hachulla for permission before bringing a new worker on a project site. Because of this, the Court finds that this factor supports the conclusion that Mr. Robertson was an employee of Creative Concepts. To the Court's knowledge, a subcontractor does not need to obtain permission in order to bring new people on a worksite.

(4) Whether Mr. Robertson Had a Chance of Profit in the Performance of His Tasks While Providing Services to Creative Concepts

[69] When a worker can increase the amount of money that he or she makes by working efficiently to complete more projects, he or she has a chance of profit. The more a worker has a chance of profit, the more this indicates that the worker is an

independent contractor.[32] If a worker is paid at a set wage per hour, this limits that worker's ability to profit from being more efficient and is likely to indicate an employer-employee relationship.

[70] The evidence shows that Mr. Robertson was paid at an hourly rate of $25. Mr. Hachulla testified that Creative Concepts paid his workers this way because he had previously paid them a fixed amount per project and this was costly. Mr. Hachulla stated that while other workers did complete the projects faster when paid per project, the work was not done properly and had to be redone at his expense.

[71] The evidence shows that Mr. Robertson did not have a chance of profit when he was providing services to Creative Concepts. Because of this, the Court finds that this factor supports the conclusion that Mr. Robertson was an employee of Creative Concepts.

(5) Whether Mr. Robertson Managed and Assumed Financial Risks While Providing Services to Creative Concepts

[72] This factor pertains to the risk that workers will lose money while performing their work-related activities. For example, if a worker who completes a project has the obligation to redo the work at no cost to the payer when the project is poorly done, this is likely to indicate that the worker is an independent contractor.[33]

[73] The evidence shows that while providing services to Creative Concepts, Mr. Robertson did not assume any financial risk. In this case, it was Creative Concepts that assumed the financial risks on all projects, including those that Mr. Robertson worked on. The evidence shows if a project completed by Mr. Robertson had to be redone, Mr. Robertson would have been paid to redo the work correctly. It was Creative Concepts' financial loss if a project required additional work to complete a project, not Mr. Robertson's.

[74] Because Mr. Robertson did not assume any financial risk while providing services to Creative Concepts, the Court finds that this factor supports the conclusion that Mr. Robertson was an employee of Creative Concepts.

(6) The Frequency of the Payments for Services Rendered

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[32] *AE Hospitality Ltd. v. M.N.R.*, 2019 TCC 116 at para. 150, aff'd 2020 FCA 207; *WCT Productions MCT Ltd. v M.N.R.*, 2022 TCC 107 at para. 78.

[33] See *Wiebe Door Services Ltd.*, *supra* note 6 at para. 3, see also *Connor Homes*, *supra* note 6 at para. 44.

[75] Mr. Robertson was paid by Creative Concepts every two weeks by cheque. Mr. Robertson was paid an hourly rate for his services.

[76] The evidence shows that Mr. Robertson was paid at a regular interval, which is similar to how employees are paid by their employers. Because of this, the Court finds that this factor supports the conclusion that Mr. Robertson was an employee of Creative Concepts.

(7) The Invoices for Services Rendered

[77] Mr. Robertson provided invoices to Creative Concepts for his services.

[78] Employees do not provide invoices to their employers. Because Mr. Robertson provided invoices to Creative Concepts for his services, the Court finds that this factor supports the conclusion that Mr. Robertson was an independent contractor.

## VI. CONCLUSION

[79] In this case, the central question that this Court had to answer was whether Mr. Robertson had, during the Period, rendered services to Creative Concepts as a person in business on his own account.

[80] After a review of the relevant factors in the circumstances, the Court finds that during the Period, the relationship that the parties had established in reality was not the one that they had intended, which was one of independent contractor The Court finds that Mr. Robertson did not provide services to Creative Concepts as a person in business on his own account and that therefore, he did not provide services as an independent contractor. The Court finds that, following the analysis of the relevant factors in paragraphs 60 to 78 above, the majority of these factors do not support the parties' subjective intent. The factors support the conclusion that the contractual relationship between the parties was one of employer-employee.

[81] Consequently, the Court finds that Mr. Robertson was employed under a contract of service and was thus an employee of Creative Concepts during the Period. Therefore, pursuant to paragraph 5(1)(a) of the EIA, Mr. Robertson was engaged in insurable employment during the Period. On the basis of the same finding, Mr. Robertson was engaged in pensionable employment during the Period pursuant to paragraph 6(1)(a) of the CPP.

[82] For all these reasons, the appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 19th day of May 2023.

"Sylvain Ouimet"

Ouimet J.

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| COURT FILE NO.: | 2020-1116(EI) 2020-1579(CPP) |
| STYLE OF CAUSE: | Kevin Lee Hachulla AND HIS MAJESTY THE KING AND BEN ROBERTSON |
| PLACE OF HEARING: | Vancouver, British Columbia |
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| REASONS FOR JUDGMENT BY: | The Honourable Justice Sylvain Ouimet |
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APPEARANCES:

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| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Jonathan Cooper<br>Spencer Landsiedel |
| For the Intervenor: | The Intervenor himself |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

| | |
|---|---|
| For the Respondent: | Shalene Curtis-Micallef<br>Deputy Attorney General of Canada<br>Ottawa, Canada |