

Docket: 2014-674(EI)

BETWEEN:

QUINTE CHILDREN'S HOMES INC.,

Appellant,

-and-

THE MINISTER OF NATIONAL REVENUE,

Respondent,

-and-

SARA FOBEAR,

Intervenor.

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Appeal heard on October 21, 2015, at Belleville, Ontario

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:

Suzanne E. Hunt

Counsel for the Respondent:

Christopher Kitchen

For the Intervenor:

The Intervenor herself

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JUDGMENT

The Appeal of the Ruling is allowed and the Ruling varied to reflect that the Intervenor was not engaged in insurable employment with the Appellant in the period from January 1 to October 30, 2012.

Signed at Ottawa, Canada, this 26<sup>th</sup> day of October, 2015.

“David E. Graham”

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Graham J.

Docket: 2014-675(CPP)

BETWEEN:

QUINTE CHILDREN'S HOMES INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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Counsel for the Appellant:

Suzanne E. Hunt

Counsel for the Respondent:

Christopher Kitchen

For the Intervenor:

The Intervenor herself

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JUDGMENT

The Appeal of the Ruling is allowed and the Ruling varied to reflect that the Intervenor was not engaged in pensionable employment with the Appellant in the period from January 1 to October 30, 2012.

Signed at Ottawa, Canada, this 26<sup>th</sup> day of October, 2015.

“David E. Graham”

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Graham J.

Citation: 2015 TCC 250

Date: 20151026

Docket: 2014-674(EI); 2014-675(CPP)

BETWEEN:

QUINTE CHILDREN'S HOMES INC.,

Appellant,

-and-

THE MINISTER OF NATIONAL REVENUE,

Respondent,

-and-

SARA FOBEAR,

Intervenor.

### **REASONS FOR JUDGMENT**

Graham J.

[1] Quinte Children's Homes Inc. ("QCH") provides foster care and treatment for children. QCH does so by placing children in one of the 35 foster care homes that it manages. QCH receives compensation for its services from the Ontario Ministry of Community and Social Services (the "Provincial Ministry"). Under QCH's agreement with the Provincial Ministry, each foster child is allocated a certain number of hours of support services each week as part of the treatment plan for that child. Those support services are provided by individuals known as child and youth workers. QCH enters into contracts with and pays those workers. The written contract states that the parties' intention is that their relationship be that of an independent contractor. One of those child and youth workers was the Intervenor, Sara Fobear. The Minister of National Revenue (the "Minister") issued a ruling that during the period from January 1 to October 30, 2012, Ms. Fobear was engaged in insurable employment under *Employment Insurance Act* and pensionable employment under *Canada Pension Plan* with QCH. QCH has appealed that ruling. Ms. Fobear, who agrees with the ruling, has intervened.

Issues

[2] In accordance with the test set out by the Federal Court of Appeal in *1392644 Ontario Inc. v. Minister of National Revenue* (“*Connor Homes*”)<sup>1</sup>, the first issue in this case is whether the intention stated in the contract that Ms. Fobear be an independent contractor was, in fact, the shared intention of QCH and Ms. Fobear. If it was their shared intention, then the second issue is whether, when examined through the prism of that shared intention, their objective relationship was that of an employer and employee or that of an independent contractor. If the parties did not have a shared intention that Ms. Fobear be an independent contractor, then the second issue is whether Ms. Fobear was an independent contractor or an employee.

### Intention

[3] Ms. Fobear testified that she had worked at QCH through what sounded like a co-op program at her college. She stated that she was ultimately asked to join QCH after she graduated. Ms. Fobear explained that she met with one of the shareholders of QCH, Cara Pinchuk, and that Ms. Pinchuk presented her with a copy of a contract called a Consulting Services Agreement. As set out above, that contract stated that Ms. Fobear was retained as an independent contractor. Ms. Fobear testified that Ms. Pinchuk neither pointed out that the contract was an independent contractor agreement as opposed to an employment agreement nor explained the difference between the two. Ms. Fobear explained that she did not know that the title of the agreement meant that the agreement was an independent contractor agreement and that she did not read the agreement before signing it.

[4] Ms. Pinchuk did not testify. John Stevenson is another shareholder of QCH. He testified that it was QCH’s normal practice to explain to new workers that they were signing an independent contractor agreement and to explain to them the difference between being an employee and an independent contractor. However, he stated that he had not spoken to Ms. Pinchuk about whether she followed that normal practice when she met with Ms. Fobear.

[5] In the absence of evidence from Ms. Pinchuk as to what she said to Ms. Fobear in the meeting, I accept Ms. Fobear’s statement that she was unaware of the fact that the Consulting Services Agreement stated that she was an independent contractor.

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<sup>1</sup> 2013 FCA 85

[6] Ms. Fobear's actions support her statement that she believed she was an employee. Ms. Fobear's evidence was that she filed her 2012 income tax return on the basis that she had earned employment income rather than business income. Some individuals who appear before this Court are quite happy to be independent contractors while they are earning higher wages and paying fewer taxes and only become convinced that they were employees when they find themselves in the position that they want to collect employment insurance. There was no evidence to suggest that this was the case with Ms. Fobear.

[7] Based on all of the foregoing, I find that QCH and Ms. Fobear did not share a common intention that Ms. Fobear be an independent contractor.

### Relationship

[8] Having concluded that QCH and Ms. Fobear did not share a common intention, the second issue that I must address is what the nature of their relationship was. In considering this issue it is appropriate to consider what are commonly referred to as the Wiebe Door factors<sup>2</sup>: control; ownership of tools; chance of profit; and risk of loss.

### Control

[9] At first glance, it would appear that QCH exercised an enormous amount of control over Ms. Fobear. There were a number of large operations manuals that QCH provided to Ms. Fobear setting out in great detail what she was and was not to do when interacting with foster children, how she was to report on the work that she had done, the training that she was required to have or undergo and the reviews of her performance that would occur. However, these detailed policies and procedures, are not of QCH's making. They are required because of the legislative environment in which QCH operates. QCH is involved in the care, not only of children but, often, of very vulnerable children. Not surprisingly, the Provincial Ministry has established extensive regulations governing how companies in QCH's position are to interact with foster children and how they are to select, train and monitor the people who work with those children. In addition, the Provincial Ministry has established extensive reporting requirements to ensure that these regulations are being followed. As a result of these regulations, QCH had no option but to impose extensive policies and procedures on its workers and to advise those workers of those policies and procedures through operating manuals.

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<sup>2</sup> *Wiebe Door Services Ltd. v. Minister of National Revenue*, 1986 CarswellNat 366 (FCA)

[10] The Respondent submits, in essence, that if a payor chooses to operate in such a highly regulated industry then that payor must accept the fact that the degree of control that it must exercise over its workers will mean that those workers will be employees. While I can see the Respondent's position, I do not agree with it.

[11] Counsel for QCH put forward a good analogy which I will adopt. When a developer hires various tradespeople to construct a building, the developer imposes on those tradespeople that they will not only construct the building but that they will do so in accordance with numerous provincial and municipal building codes and safety regulations and that, as necessary, they will provide reports confirming that they have done so. In these circumstances, the developer is not controlling how, for example, the electrician does his or her job. The developer is simply stating that the job that the electrician is being hired to do is to wire the building in accordance with the law.

[12] The same can be said for QCH. QCH is simply engaging workers to perform services in accordance with the law. For example, if QCH's policies restricted the means by which Ms. Fobear could control a child who was acting out, QCH did so because the Provincial Ministry required it to do so, not because QCH was trying to control Ms. Fobear. Similarly, if QCH required Ms. Fobear to provide a report describing the circumstances in which a child sustained an injury, it did so because the Provincial Ministry required it to do so, not because QCH was trying to control Ms. Fobear.

[13] Based on the foregoing, I will analyze the control factor without regard to any control that QCH exercised over Ms. Fobear as a result of the requirements imposed on it by the Provincial Ministry.

[14] In order to better analyze the control factor, it is important to first understand, in general, how QCH and Ms. Fobear operated. Once Ms. Fobear had passed the various Provincial Ministry required training and verification process, QCH placed her on a list of qualified child and youth workers. That list was provided to all of QCH's foster parents. As set out above, the foster parents were allocated a certain number of hours of support services that their foster children could receive from child and youth workers per month. If a given foster parent needed help from a child and youth worker, he or she would contact that worker directly and arrange for the work to be done. The foster parent and the worker would then both record the hours worked and would advise QCH of those hours at the end of the month. QCH would then pay the worker for that work.

[15] I find that the most telling aspect of the relationship between QCH and Ms. Fobear was the means by which the work was assigned. That aspect strongly indicates that Ms. Fobear was an independent contractor. QCH did not assign work to Ms. Fobear. It did not assign foster parents to Ms. Fobear. It did not specify when or where Ms. Fobear was to work. In fact, QCH had no direct knowledge of where, when or even whether Ms. Fobear was working until the end of the month when she sought payment for that work<sup>3</sup>. The choice of which child and youth worker to use, when to use them, how often to use them and for what purpose they would be used was made entirely by the foster parents. Ms. Fobear was free to turn down work from any foster parent and the foster parents were free to continue to use or not to use Ms. Fobear as they saw fit. Ms. Fobear could work with as many foster parents as she wished. QCH did not guarantee Ms. Fobear a certain minimum amount of work. If Ms. Fobear was sick or had to miss a shift that she had previously arranged with a foster parent, she advised the foster parent of the problem, not QCH. It was then up to the foster parent to make other arrangements.

[16] The method by which Ms. Fobear was paid also suggests that she was an independent contractor but the argument is not strong. Ms. Fobear recorded her hours on a form that was called an “invoice”. I put no weight on the naming of this form. The form was prepared by QCH and all of its child and youth workers were required to use it in order to get paid. Other than the title “invoice” (which I feel is a self-serving title placed on the form by QCH), I see no difference between this form and similar forms by which an employee might record their hours. I do, however, see some difference in the timing of Ms. Fobear’s payments. She was paid on the 15<sup>th</sup> of the month for the work that she had performed in the previous month. This delay in payment is more consistent with an independent contractor relationship than an employment relationship.

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<sup>3</sup> In Ms. Fobear's case she worked almost exclusively for a foster parent who was also a QCH employee. This was not the case with other foster parents. I do not consider any knowledge that QCH gained indirectly through this foster parent because of this unique situation to be knowledge that it had since it did not have similar knowledge in respect of other workers in similar situations and since the fact that the foster parent happened to also be an employee was a coincidence rather than a condition of Ms. Fobear's working relationship with QCH. At the same time, I do not give any weight to the fact that Ms. Fobear viewed this foster parent as her “boss” since it was difficult to distinguish between whether that view arose from her relationship with the foster parent in the parent’s role as a foster parent or in the parent’s role as an employee of QCH.

[17] Ms. Fobear did not receive any vacation pay or other benefits available to QCH employees. None of Ms. Fobear's work was provided at QCH's office. To the extent that there was any ongoing supervision of Ms. Fobear's work, that supervision was performed by the foster parents, not QCH. Ms. Fobear was free to work for competitors. She was also free to make private arrangements with the foster parents to work additional hours beyond the allotted per child hours at the foster parents' own cost. All of these things indicate an independent contractor relationship.

[18] However, there were other things that indicate an employment relationship. While I am disregarding any control exercised by QCH as a result of the requirements of the Provincial Ministry, the Respondent pointed out a number of policies that QCH had in place that would not have been required by the Provincial Ministry. Examples include policies concerning lateness, conflicts of interest, intellectual property, off-duty conduct, computer use, use of portable electronic devices and dress code. Mr. Stevenson explained that these policies were in QCH's corporate manual, that QCH had inadvertently stated in that manual that these policies covered both independent contractors and employees, and that, in practice, these policies were not applied to child and youth workers. While I accept his evidence, the fact remains that these policies were in a manual that was provided to the child and youth workers and were expressed to apply to those workers. The mere presence of these types of policies, whether the control suggested by them was exercised or not, is indicative of an employment relationship.

[19] The Respondent entered a document into evidence entitled "Performance Review – Child and Youth Worker". The document was a completed performance review for Ms. Fobear. The Respondent submitted that this performance review went further than what would have been required by the Provincial Ministry's requirement that child and youth workers be assessed on an annual basis. The Respondent pointed out that the review looked at areas such as confidence, leadership and professionalism and that those areas appear to be more focused on developing the long term growth of Ms. Fobear in the QCH organization than on meeting Provincial Ministry reporting requirements. The presence of a review of this type suggests an employment relationship. The same is true of the fact that the review sets goals for the coming year. Overall, the document looks and feels like an employee review. Ms. Fobear is described as being "Level 1-1". The form lists her "manager", is prepared by human resources, provides a rating for each category on a scale of 1 to 5, and contains separate written feedback from both the

manager and someone described as “staff” which describes Ms. Fobear’s plans for the future and her potential for continuing work with QCH.

[20] Taking all of the above into account, I find that the control factor points to an independent contractor relationship. I find that in general, in QCH’s relatively limited interactions with Ms. Fobear, QCH treated her in the same manner as it treated its employees. However, I find that QCH’s lack of control over Ms. Fobear in the most important aspect of their relationship (i.e. the assignment of work), outweighs the potential for control that they had in the balance of the relationship.

### Ownership of Tools

[21] The tools necessary for Ms. Fobear to look after children were, for the most part, provided by the foster parents themselves. QCH made computers available to all of its workers (both those it considered employees and those it considered independent contractors) in its main office but Ms. Fobear’s evidence was that she used the computer belonging to the foster parent that she worked with when she needed a computer.

[22] The primary tool that Ms. Fobear provided was her car. The car was used to drive the children to and from activities and appointments. QCH reimbursed Ms. Fobear on a per kilometre basis for the use of her car. Because of the fact that Ms. Fobear was reimbursed for its use, I do not place any significance on the fact that she provided her car. In my view, the fact that a worker who is paid on an hourly basis is reimbursed for the use of her car is not inconsistent with either an employment or independent contractor relationship.

[23] In light of all of the foregoing, I place no weight on the tools factor in my analysis.

### Chance of Profit

[24] Ms. Fobear testified that she was paid \$13 per hour and that that she was advised of that pay rate when she signed the Consulting Services Agreement. There was no negotiation. The hourly rates paid to child and youth workers varied based on their experience and training. I do not consider the fact that Ms. Fobear did not actively negotiate her rate of pay to be indicative of anything. Ms. Fobear was made an offer and she accepted that offer. She had the choice of refusing the offer. I do, however, consider the fact that Ms. Fobear was paid in accordance with an established QCH pay scale to suggest an employment relationship.

[25] Ms. Fobear testified that she did not have the ability to subcontract her services. Article 12.4 of the Consulting Services Agreement indicates that the agreement cannot be assigned. QCH submits that Article 12.4 means that Ms. Fobear could not assign the agreement as a whole and argues that she was free to subcontract to anyone so long as that person had been approved by QCH. Even if I accept that Ms. Fobear was free to subcontract and was merely unaware of that ability, the only people that she was free to use as subcontractors were the people already on QCH's approved list of child and youth workers. Those people were already available to the foster parents. I have difficulty imagining a situation in which a foster parent, having selected Ms. Fobear from the approved list, would be indifferent to having a different worker show up instead. The foster parents are choosing a worker to look after their foster children, not rake their lawn. The personal connections between the worker and the children are an essential part of the work. If a foster parent wanted a different worker, he or she would simply ask them to do the work instead of Ms. Fobear. I find it difficult to believe that Ms. Fobear, who was already at or near the bottom of QCH's pay scale, could have convinced another worker to take on Ms. Fobear's hours for a discounted rate such that Ms. Fobear could make a profit. Based on the foregoing, I find that Ms. Fobear had no ability to profit through subcontracting.

[26] The only way that Ms. Fobear could earn more money was to work more hours. Since the Federal Court of Appeal decision in *City Water v. The Queen*<sup>4</sup>, it has generally been accepted that a worker who is paid by the hour does not have a chance of profit simply by having the ability to earn more by working more. QCH submits that the Federal Court of Appeal has moved away from that position. QCH points me to the *Connor Homes* decision where the Court, in considering whether the workers in question had a chance of profit, stated<sup>5</sup>:

“Furthermore, the appellants also imposed a number of financial limits on the individuals. Remuneration for the workers was set either at a fixed hourly rate determined as a function of the Minister's allotment for child and youth workers, or at a rate *per diem* per child for area supervisors... While in theory the individuals retained the ability to adjust their pay through their hours of work, the degree of control exercised by the appellants over their schedules effectively prevented the individuals from realizing this benefit. Indeed, the appellants determined the type of hours the individuals could work, as well as scheduled the actual hours of work, which could amount to a standard 40 hour work week... Though the workers could refuse certain schedules which were offered to them, this arrangement closely resembled that of employees employed in the service

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<sup>4</sup> 2006 FCA 350 at para 24

<sup>5</sup> At paragraph 48

industry who retain a limited ability to adjust their work schedules to their personal schedules.”

[emphasis added]

[27] *Connor Homes* also dealt with child and youth workers. QCH submits that the control that the appellants in that case exercised over the hours worked by their child and youth workers is not present in QCH’s case and thus that Ms. Fobear had the ability to realize the “benefit” described by the Federal Court of Appeal. QCH submits that the only limit on the number of hours that Ms. Fobear could work was the provincially mandated monthly cap of support hours provided for each child. Even then, Ms. Fobear was not limited by the cap on a given child or a given set of children within a foster family as she could always seek additional work from a different family. Her limit was effectively the collective caps of all of the children under QCH’s care.

[28] Unfortunately, there is no mention of *City Water* in *Connor Homes*. The fact that the Federal Court of Appeal did not rely on *City Water* to conclude that the workers in *Connor Homes* had no chance of profit could mean that the Court wanted to depart from *City Water* or it could simply mean that counsel did not draw the case to the Court’s attention. In the circumstances, without any clarifying comments to indicate what the Court intended and no specific analysis of the issue, I am not prepared to depart from the long standing decision in *City Water*. Accordingly, I find that Ms. Fobear’s ability to work more hours did not amount to a chance of profit.

[29] QCH also submits that Ms. Fobear was able to earn money outside of the monthly hour cap. As discussed above, she made side arrangements with the foster parent that she primarily worked for where that parent paid her personally for additional hours. This amounted to Ms. Fobear having more than one client for her services. I have already given weight to this fact in the control factor. I do not feel I need to give it additional weight here.

[30] I note that there was also some discussion at trial about a means by which Ms. Fobear and the foster parent she was primarily working with found a way to get around the monthly hour cap for a given child. It was clear that QCH was unaware of this arrangement and that what Ms. Fobear and the foster parent were doing was not something that was contemplated by the contract between Ms. Fobear and QCH. Accordingly, I do not think that it is appropriate that I consider this arrangement when examining the chance of profit factor. That said,

although I did not mention this arrangement in the discussion of the control factor above, I do consider it to be additional strong confirmation of the lack of control that QCH had over the assignment of work.

[31] Based on all of the foregoing, I conclude that the chance of profit factor points in favour of an employment relationship.

#### Risk of Loss

[32] There is very little evidence of Ms. Fobear facing a risk of loss. She had no expenses that were not reimbursed. Accordingly, the risk of loss factor points in favour of an employment relationship.

#### Conclusion

[33] Based on all of the foregoing, I conclude that Ms. Fobear was an independent contractor. In reaching this conclusion I place a great deal of emphasis on the control factor. I find that QCH's lack of control over the actual assignment of work to be significant enough to overcome Ms. Fobear's lack of either a chance of profit or a risk of loss.

#### Decision

[34] Based on all of the foregoing, the appeal is allowed. The Ruling issued by the Minister is varied to reflect that Ms. Fobear was an independent contractor of QCH in the period from January 1 to October 30, 2012.

Signed at Ottawa, Canada, this 26<sup>th</sup> day of October 2015.

“David E. Graham”

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Graham J.

CITATION: 2015 TCC 250

COURT FILE NO.: 2014-674(EI); 2014-675(CPP)

STYLE OF CAUSE: QUINTE CHILDREN'S HOMES INC.  
AND M.N.R. AND SARA FOBEAR

PLACE OF HEARING: Belleville, Ontario

DATE OF HEARING: October 21, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice David E. Graham

DATE OF JUDGMENT: October 26, 2015

APPEARANCES:

Counsel for the Appellant:	Suzanne E. Hunt
Counsel for the Respondent:	Christopher Kitchen
For the Intervenor:	The Intervenor herself

COUNSEL OF RECORD:

For the Appellant:

Name: Suzanne E. Hunt

Firm: Templeman Menninga LLP

For the Respondent:

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Canada