Docket: 2006-1711(EI)

BETWEEN:

SANDRA JENNIFER VIEL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

CORINNE FRANCIS,

Intervenor.

Appeal heard on common evidence with the appeal of *Sandra Jennifer Viel (2006-1712(CPP)*) on March 16, 2007 at
Nanaimo, British Columbia

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

Appearances:

Counsel for the Appellant:	Devinder K. Sidhu
Counsel for the Respondent:	Lise Walsh
Counsel for the Intervenor:	Devinder K. Sidhu

JUDGMENT

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

Signed at Sidney, British Columbia, this 4th day of June 2007.

"D.W. Rowe"

Rowe D.J.

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Counsel for the Respondent:	Lise Walsh
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Citation: 2007TCC299
Date: 20070604
Dockets: 2006-1711(EI)
2006-1712(CPP)

BETWEEN:

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Intervenor.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The appellant appealed from two decisions issued by the Minister of National Revenue (the "Minister") - on April 12, 2006 - pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"), wherein the Minister decided her employment with Corinne Francis from September 3, 2002 to July 6, 2005, was neither insurable nor pensionable because she was not engaged under a contract of service.

[2] Counsel for the respondent, counsel for the intervenor and the appellant agreed both appeals could be heard together.

[3] Sandra Jennifer Viel (Viel) testified she lives in Nanaimo, British Columbia and is a Home Support Worker. In the early part of 2002, she started working for Barb's Home Care and Support Services, an agency that provided in-home care to clients in the Nanaimo area. Viel was paid every two weeks – by cheque – based on an hourly rate and the usual source deductions were made. During the last two weeks

of August 2002, the appellant was assigned – by Barb Boekings (Barb) - the agency owner - to provide services to Corrine Francis (Francis), her husband – Dr. Francis - and their two children at their home in Nanoose Bay, located about 20 kilometres north of Nanaimo. The appellant stated Barb had requested that she work as many shifts as possible because Francis was not content with the existing arrangement whereby different workers were dispatched to her home. Viel stated Barb informed her that Francis wanted Viel to provide her services 5 days per week on an exclusive basis, an arrangement that Barb declined. Viel stated she understood that Dr. Francis was a physician practising in the area by undertaking locums to relieve other practitioners. She met with Francis and they discussed the nature of the work to be performed. Viel agreed to work for Francis at an hourly rate of $15 and to perform duties ranging from child care to cleaning the house and running family errands. Viel stated that within a few weeks, the nature of her duties changed and she was assigned additional tasks by Francis although the rate of pay remained the same. Typically, Viel worked from 9:00 a.m. to 3:00 p.m., 5 days per week, Monday to Friday, until the end of 2002. While performing errands such as shopping, Viel drove one of two vehicles owned by Francis and her husband. She used the van to transport the Francis children to activities and for other purposes during the day. The appellant was paid – by cheque – every two weeks and Francis recorded Viel's hours of work on a calendar kept in the kitchen. Viel did not maintain her own record but recalled that during the first few months working for Francis, she averaged about 30 hours per week. Viel stated that in January, 2003, more duties were added and her hours of work were extended to 4:00 p.m. throughout the week and she worked on a weekend, if required. In April, 2004, Francis increased her hourly pay to $17. Viel stated Francis decided when, where and how she was to perform her duties which she was required to carry out personally. She did not incur any work-related expenses nor provide any tools or equipment and did not charge any amount for Goods and Services Tax (GST) to Francis in respect of her services. Viel stated that after she had received two or – possibly – four pay cheques, she brought up the subject of deductions which Francis had not calculated. Viel stated Francis was upset and informed her that "we do not do it that way, there is too much paperwork" and that "we had done that in the past but not now." The appellant stated she was confused by that response. An issue arose concerning the use of the Francis family van by the appellant because Viel became concerned that the insurance coverage might be deficient because Francis was named on the policy as the primary driver and the appellant considered that was not correct since she used the van during the week more than Francis. Following this difference of opinion, Viel began using her own vehicle to perform her duties throughout the day. From the outset, Francis paid the appellant $25 every month as a fuel allowance as compensation for using her own vehicle to run errands either before or after work. The appellant did not bother

calculating whether that amount was sufficient to cover her cost. The appellant lived in the central part of Nanaimo where most businesses were located and she was able to make purchases for Francis on her way home from work. Francis' 4-year old daughter was in daycare until 12:30 p.m. and the appellant picked her up and at 2:45 p.m. retrieved the eldest daughter from school and cared for the children until the end of the work day. Viel stated she received written instructions in the form of a list each day from Francis and they met each morning to discuss the tasks, some of which were marked with an asterisk (*) to denote priority. The appellant stated she mentioned the lack of deductions from her cheque in the spring of 2003 but Francis refused to discuss the matter. In the summer of 2003, the appellant's daughter – born in August 1997 - rode to work with her and attended the same school as Francis' eldest daughter. In April 2004, Francis announced that Viel's pay would increase to $17 per hour and that she would be working an average of 40 hours per week. The appellant disagreed with the assumption of the Minister at subparagraph 6 l) of the Reply to the Notice of Appeal (Reply) that she could "work for others but Francis had priority over her time." Viel stated she had been informed by Francis – in December 2002 - that she should not work on a weekend at her part-time job as a sales representative for a greeting card company because the Francis family might require her services and wanted her to be available. Viel stated Francis informed her she would have to make a choice as to which job was more important. The working relationship between Viel and Francis was terminated on July 6, 2005. Viel stated she had discovered – by chance – that she was being replaced and received a cheque on termination that included about 7 days extra pay which she presumed to be in lieu of notice. The final cheque did not include any holiday pay which Viel had received when she worked for Barb's agency. The appellant applied for Unemployment Insurance (UI) benefits and a ruling was issued that she had been engaged in both insurable and pensionable employment with Francis and she received benefits on that basis. However, the benefits were discontinued in January, 2006 because the ruling was appealed and later reversed by the decision of the Minister issued on April 12, 2006. The appellant is currently employed by a home care agency and stated that during the relevant period she did not have a business bank account nor licence and did not have any business cards nor any other trappings of a commercial enterprise. She acknowledged that she was paid by Francis only for the hours actually worked.

[4] The appellant was cross-examined by Ms. Devinder Sidhu, counsel for the intervener, Francis. Concerning her status when providing services to Francis, the appellant stated she had discussed that issue with her accountant in 2003 prior to filing her income tax return for the 2002 taxation year but did not follow up on his advice to seek a ruling from Canada Revenue Agency (CRA). As a result, she filed her return and reported earnings as business income. Viel stated it was a "hard choice

to make" but she did not have a T4 slip from Francis. She identified her income tax returns for the taxation years 2002 to 2005, inclusive that were entered as the following exhibits: Exhibit I-1 – 2002 return; Exhibit I-2 – 2003 return; Exhibit I-3 – 2004 return; Exhibit I-4 – 2005 return. In the return for the 2002 taxation year, Viel reported employment income and also business income – earned from providing services to Francis - in the sum of $7,429 and claimed the amount of $100, attributable to motor vehicle expenses. In her 2003 taxation year return, the appellant reported business income in the sum of $25,702.92 and claimed total expenses in the sum of $1,523.92 as set forth in the Statement of Business Activities (Statement) included in said return. That total included the sum of $694.97 for motor vehicle expenses and the amount of $686.40 under the category "Telephone and Utilities." Viel reported that she had driven her motor vehicle 6,250 kilometres to earn income. No employment income was reported therein. In filing her return for the 2004 taxation year, the appellant reported business income in the sum of $24,962.50 and pursuant to the Statement claimed expenses of $1,737.39, including the amounts of $828.45 and $686.40 for motor vehicle expenses and telephone and utilities, respectively. According to the relevant sheet – Allowable Automobile Expenses – included in the return, she – again – drove her vehicle 6,250 kilometres to earn that business income. In her return for the 2005 taxation year, the appellant reported business income in the sum of $18,076.50 and claimed a total of $774.01 in expenses attributable to operating her motor vehicle - $320.38 - and the sum of $288.40 for Telephone and Utilities. The reported distance driven during that taxation year was 3,849 kilometres. In each of those four taxation years, the appellant claimed accounting fees – less than $85 annually - as a business expense. In the Statements included in her tax returns for the 2003, 2004 and 2005 taxation years, the appellant described her main product or service as: Home Support and stated therein that she operated under her own name from an address on Doctors Road, Nanaimo, B.C. which was the appellant's residence. Viel stated that in the fall of 2004, she began driving her own vehicle in the course of her duties and only drove the Francis family van if Francis and/or her children were passengers. She acknowledged that the $25 monthly allowance for vehicle costs was included in a cheque issued by Francis and that this sum remained constant even though the price of fuel increased. Viel stated she "loved her job" and the increased cost of fuel was not significant. The appellant was referred to a sheet – Exhibit I-5 – prepared by accountants retained by Francis - that summarized all payments made by Francis to her in each year from 2002 to 2005, inclusive. Counsel pointed out to the appellant that Francis had paid her only $4,904.76 in 2002 but the tax return showed business income in the sum of $7,429. Viel replied that the additional revenue was probably attributable to her work for the greeting card company. Counsel suggested the additional business income could be attributable to revenue generated by the appellant when providing her home support

services to other clients. The appellant stated she had not earned other income in that manner and when providing home care services to other individuals, had done so as a favour for friends and did not receive any payment in return. Counsel referred the appellant to her Notice of Appeal dated June 1, 2006. The appellant acknowledged she had no education in the field of home care beyond first-aid training. Barb – a friend – who operated an agency, had hired Viel as a home support worker and that employment permitted her to gain experience. Earlier, Viel had worked in retail, always as an employee. Viel conceded that Francis had not regarded her as an employee when she provided home support services to the Francis family during the relevant period. Viel stated she had been advised by her accountant that she was probably an employee of Francis rather than an independent contractor. She stated she made the decision to file each tax return on the basis the amount earned from Francis was business income because she wanted to keep the job which she enjoyed and – in 2003 - her daughter had started attending the same school as the eldest daughter of Francis. Viel stated she did not know how to remit income tax on a monthly or quarterly basis and that upon signing each of the tax returns for the years 2002 to 2005, inclusive, still considered she had earned the reported income in her capacity as an employee of Francis. The appellant agreed she preferred to work for Francis directly rather than through Barb's agency because she did not want to work for various people in their homes. Viel stated sometimes Francis became upset with her in relation to her performance in carrying out certain tasks. The appellant stated the initial $15 per hour rate was not negotiated but was set by Francis and she accepted it and started work on that basis. Viel identified a Home Care Providers Questionnaire (Questionnaire) – Exhibit I-6 – that she completed and returned to CRA. In responding to Q. 4 therein, the appellant – on the back of the page – wrote a lengthy explanation of her duties performed with respect to Francis and her two children, one of whom - Leah – required special care. Francis had several severe health problems to cope with on a daily basis. The appellant identified a bundle of invoices – Exhibit I-7 – dated every two weeks, beginning October 5, 2002. The invoice bearing that date included 36 hours attributable to respite for Leah, 15 hours personal care for Francis and 1 and ½ hours for private household services for a total of $722.50, including the sum of $25 for transportation costs. The appellant acknowledged that many invoices indicated more hours were devoted to caring for Leah during the relevant period but stated it had been her understanding that Francis wanted them to be prepared in that way for the purpose of obtaining some sort of tax benefit. Viel stated she agreed with Francis that for invoicing purposes she would allocate 50% of her hours for care of Leah and 50% for duties relating to the rest of the family including household tasks. The appellant identified her handwriting on each invoice but stated the wording and extent of detail provided therein was prepared with input from Francis. Viel stated the allocation of hours worked was

immaterial to her and agreed to the method directed by Francis. Counsel referred the appellant to paragraph 8 of her Notice of Appeal wherein she set out details of a daily list of tasks and chores as an example of the kind of direction and control exercised by Francis. Viel conceded she could not produce any actual lists prepared by Francis and had created that detail as an example of the content of such lists. She stated she had not helped Francis bathe but remained in the bathroom with her. In paragraph 9 of her Notice of Appeal, the appellant alleged that when Francis was in the hospital in Vancouver she "remained in complete control of my job and all my duties." Viel explained that reference by relating that Francis had telephoned her several times during the day to give instructions with regard to various matters concerning the care of her children and the operation of the household.

[5] Counsel for the respondent did not cross-examine the appellant.

[6] Corinne Francis testified she is a homemaker residing in Nanoose Bay, British Columbia. She has two artificial hips and suffers from other serious medical conditions including a chronic abdominal problem caused by Crohn's disease that at one point required her to take nourishment through a feeding tube. Francis stated her daughter – Leah – was born in April 1998, and is affected by a pervasive development disorder which is manifested by a delay in attaining speech and language skills. Leah also suffers from a sleep disorder and other medical conditions related to a syndrome present at birth. Francis identified a Disability Tax Credit Certificate – Exhibit I-8 – pertaining to Leah that was signed by Dr. Lund - her physician - on October 14, 2003. A letter from Dr. Lund – dated March 2, 2004 – sent to another physician concerning Leah's state of health was filed as Exhibit I-9. Francis stated that because of health problems, Leah needed help in many aspects of her life and the appellant provided services in that regard. Francis stated that during much of the relevant period, she also needed help to get in and out of the bathtub and with activities such as washing her hair and applying certain medicated creams and lotions to alleviate symptoms related to a skin condition. The Francis family had moved to Nanoose Bay in August 2002 and were out of contact with friends and relatives. Initially, the appellant – and several other home support workers – provided services through Barb's agency to the Francis family. Francis denied the appellant's allegation that she had requested Barb to assign Viel to her on an exclusive basis. Francis stated Viel suggested she could provide ongoing home care directly to the Francis family and eliminate the need to obtain different workers through the agency. Francis stated Viel represented she had attended a community college and was only "a couple of courses short" of receiving either a certificate or diploma pertaining to the occupation of home care provider. Francis recalled that during the course of their discussion, Viel mentioned the names of several people to whom she had provided

care and also indicated she had a young child. Francis stated that when Viel was providing care through the auspices of Barb's agency, she often referred to herself as a professional home care provider and was familiar with the language applicable to that occupation. Francis stated Viel said she was operating her own business and wanted to retain some existing clients but offered the assurance that in the event she could not attend personally at the Francis home to provide the necessary care, she would find a qualified substitute who was also in the home care business. When the discussion centred on the site of the work, Francis stated Viel mentioned that her house was too small and – knowing Francis was allergic - that she had cats. As a result, they agreed the care would be provided at the Francis residence in Nanoose Bay and that Leah's needs would have priority and the appellant would devote any remaining time to the personal care required by Francis. Francis had paid Barb's agency the sum of $17 per hour for supplying a worker. Francis stated that in the course of her discussion with the appellant, Viel offered to work for $13 per hour – if paid in cash – or for $15 per hour if payment was made by cheque. Another subject of discussion was the matter of notice of termination and pay in lieu thereof and they agreed that a two-week period was appropriate in either event. Francis recalled that during these initial discussions, Viel had indicated she wanted to be her own boss with flexibility in choosing time off from work even though she preferred to provide care to only one family. Francis stated Viel also had mentioned she wanted to be able to deduct business expenses as an independent contractor and warned Francis that if a better work situation arose she would accept it because she was not receiving any child support and needed to use the full extent of her monthly gross income for living expenses rather than have deductions taken at source. Francis stated Viel did not work some days and on occasion worked less hours than normal because she did not have day care for her own daughter. Viel drove Francis to medical appointments and took one of the Francis children to gymnastics class now and then if it was convenient. Francis stated Viel offered to work one Christmas Eve and volunteered to do shopping from a list posted on the fridge in the Francis kitchen that also detailed other tasks that needed to be accomplished including pet care. Francis stated Viel offered the explanation that she did not get along with her sister and it would be better if she reduced the amount of time spent with her own family during the holidays. Viel was fond of the Francis family dog and bathed it regularly to eliminate dirt and bacteria. The hours worked by Viel were recorded on a calendar and the appellant presented an invoice to Francis every two weeks in accordance with the request – by Francis – that Viel quantify the hours devoted to Leah's care. Francis stated Viel decided when to take holidays or other time off and did not seek any prior permission. At one point, there was a discussion between them about Francis needing additional hours of home support services each week. Francis disagreed with the assumption of the Minister – at subparagraph 6 b) of the Reply – that the appellant

was required to perform the services personally. Flowing from the discussion about the requirement for additional hours of care, Viel asked for – and received – an increase in the hourly rate to $17. Francis stated Viel prepared a personal care schedule which included tasks related to the feeding tube that occupied several hours per day. Francis denied that it was necessary to provide Viel with direction in this regard because she was competent and able to perform those tasks. Francis recalled complaining to Viel that although the dog had been bathed twice during a particular period she had not, but did not pursue the matter because she did not consider she was entitled to order Viel to assist her to bathe. Viel got along with the Francis children and performed her duties well even though she had complained at one point that a certain medication sometimes affected her ability to function. Francis was very ill during much of the relevant period due to numerous and severe medical conditions and stated she felt intimidated by Viel and believed she was in no position to negotiate – with Viel - various aspects of their working relationship. Francis was in the hospital in Vancouver in the summer of 2003 for the purpose of having a feeding tube installed. Her admittance was planned on the basis of a two-week stay during which she had to learn appropriate procedures relating to that device which required visits to numerous professionals at different locations within the hospital in accordance with a demanding daily schedule. Francis stated that contrary to the testimony of Francis and the allegations contained in the Notice of Appeal concerning the constant direction and control emanating from her – via telephone – from Vancouver, that during her hospital stay she was able to call home only three times. She did not have a telephone in her room and had to use a pay phone down the hallway. Francis stated she wanted to get back home as quickly as possible and devoted her time to learning the procedures pertaining to the feeding tube so she could be discharged from hospital at the end of the two-week period. When she telephoned home, she was assured by Viel – and accepted - that matters were being taken care of in the normal course so there was no need to give any directions to Viel. Francis stated that from time to time during the relevant period, Viel – without mentioning names – discussed situations where she had either provided her services directly to individuals or had relieved another care worker by assuming her duties. Francis stated that was not a matter of concern as she had understood from the outset that Viel was in the business of providing home care and performing related tasks to clients for which she was remunerated at a set rate per hour for hours actually worked. Francis was unable to recall any discussion with Viel regarding any advice Viel may have received from an accountant to the effect that Viel should have been treated as an employee of Francis. Francis stated any discussion concerning employment status occurred during their initial discussions prior to Viel leaving Barb’s agency. Francis stated she was confused by Viel’s concern about the insurance policy on the van since it was adequate and standard in the sense it covered

Francis as the primary operator together with other household members and any mature driver with a certain number of years driving experience. Francis currently has a home care worker - as an employee - who began working without any prior training or experience and requires supervision. The usual deductions and a Worker's Compensation Board premium are deducted from her pay cheque. In the past, the Francis family hired a nanny - as an employee - but until recently no home care worker ever provided services to the Francis family on any basis other than as an independent contractor.

[7] Corinne Francis was cross-examined by counsel for the respondent. Francis stated she welcomed any extra tasks Viel volunteered to perform. Regarding the negotiations with Viel at the outset, Francis regarded them as similar in nature to those that had taken place between her and Barb prior to obtaining the services of workers from the agency. Francis stated she had no objection to Viel providing services as an employee but this issue had not been raised in the course of their discussions. Francis stated she consulted her accountant regarding the number of hours Viel was working in reference to provincial hours of work regulations and received advice that the amount of time worked was irrelevant if Viel was providing services as an independent contractor. In late 2002, Francis obtained a Factsheet – Exhibit I-10 – dated July,2002 - from the Employment Standards Branch relevant to the issue of whether a worker was an employee or an independent contractor. Francis stated she perused the information and concluded she did not exercise sufficient control and direction over Viel to confer upon her the status of employee and that the other factors mentioned therein further satisfied her that she and Viel were proceeding on the correct basis. As an example pertaining to control and direction, Francis stated her bath day was determined by Viel according to Viel's schedule. Francis and her husband went away every two or three months for a brief respite and during their absence Viel provided care for their children and pet and managed the household. Invoices submitted by Viel – second page of bundle in Exhibit I-7 – in her own handwriting - contained entries for respite for the Francis children billed at the rate of $8.33 per hour for 48 hours during the period from October 31 to November 3, 2002 and at the rate of $15 per hour for 27 hours of respite at some point between October 20 and November 3, 2002. Francis stated she understood Viel's rate for overnight respite was $144 in addition to an hourly charge for caring for the children and a separate $30 per day fee for looking after the dog. According to the invoice dated November 29, 2002 – 4th page in said exhibit – Viel charged $8.33 per hour for 24 hours of respite over the course of two nights but on the invoice dated December 28 – on the same page – had billed Francis for 24 hours respite for Leah at the rate of $15 per hour in addition to an entry charging 5 hours of personal care for Francis at the same hourly rate. One invoice – dated October 5, 2002 – first page of

bundle – for the period between September 22 and October 5, 2002 - contained an entry for 1 and ½ hours for " private household services." Francis stated she did not question Viel's method of invoicing for her services according to various categories and paid them as presented. By July 2005, Francis decided to attempt caring for her family on her own without full-time home support and terminated the relationship with Viel according to their original agreement that a two-week notice – or pay in lieu thereof – was appropriate. Francis stated the worker who provided care after Viel - from September to December, 2005 - did not have to assist with as many medical matters particularly since the feeding tube had been removed. The new worker was an independent contractor and for a short period thereafter Francis also retained an agency that provided a wide variety of services including those delivered by a nurse aide, together with financial planning and related matters. After 3 months, Francis terminated that service as it was expensive and required her to attend several meetings with agency administrators. Afterwards, Francis stated she felt her health had improved to the point where she believed she was capable of caring for her family on her own provided she could hire a babysitter from time to time. Later, Francis hired the worker who is currently providing home care services as an employee.

[8] Corinne Francis was cross-examined by the appellant, Viel. Francis confirmed that because of an allergy to cats no personal care had been performed in Viel's residence. Regarding the increase in Viel's hourly rate from $15 to $17, Francis stated she accepted to pay that additional amount which she considered reasonable and an appropriate response to Viel's comment that more hours of work were required because of the time-consuming tasks associated with the feeding tube. Francis reiterated she had not written any lists as alleged by Viel – in testimony and in the Notice of Appeal – but acknowledged she had written some instructions for Viel to follow at some point in 2005 near the end of the working relationship. As for placing an asterisk (*) beside some items on said list, Francis stated that was done in response to Viel's complaint about blurred vision and her request that a "star" be placed beside tasks of greater importance. Concerning the need to quantify the hours of care devoted to Leah, Francis explained there was a trust fund established for Leah's care but an accurate record was required because there was a limit on the amount available for that purpose. Regarding Viel's offer to work on Christmas Eve in preparation for the holiday on the 25th, Francis stated that did not make sense to her since her family follows the European tradition of celebrating Christmas on the Eve rather than on Christmas day in accordance with North American tradition. Francis agreed that another worker – Amanda – was hired on August 4, 2005 but on the basis she was an independent contractor.

[9] The appellant did not adduce any rebuttal evidence.

[10] The appellant concurred with my suggestion that I hear submissions first from counsel for the intervenor and then from counsel for the respondent on the basis this method would better enable her to focus her own arguments with respect to the facts of the within appeals and the relevant jurisprudence applicable thereto, in support of her plea that both appeals be allowed.

[11] Counsel for the intervener submitted the evidence did not justify certain assumptions by the Minister as set forth in subparagraphs 6 b) to f), inclusive and 6 l), as follows:

> b) the Appellant was required to perform the duties personally;
>
> c) the Appellant could not hire an assistant or a replacement had she been unable to perform the Duties;
>
> d) Francis decided where, when and how the Appellant was to perform the Duties;
>
> e) Francis had the final say in the Appellant's performance of the Duties and could require the Appellant to re-do the work;
>
> f) Francis established the Appellant's rate of pay at $15.00 per hour at the beginning of the Period and later raised the per hour rate to $17.00;
>
> l) the Appellant could work for others but Francis had priority over the Appellant's time;

[12] Counsel submitted Viel had undergone a "Damascus experience" on the road to the UI office and suggested the appellant was not an unsophisticated person but someone who - with professional accounting advice - had filed 4 consecutive income tax returns on the basis she had earned income from a business operated on her own account. Counsel submitted there had been a meeting of the minds between the appellant and Francis at the commencement of the working relationship. Regarding the matter of control, counsel pointed to various aspects of the evidence that clearly demonstrated Viel had performed her duties in accordance with her own schedule and that there were no specific lists of detailed instructions posted by Francis on a regular basis as alleged by Viel. Counsel referred to evidence pointing to the provision - by Viel – of home support and care for other clients and submitted that earnings from this source were probably included in the category of other business income as reported for the 2002 taxation year. Counsel conceded the facts supported

a conclusion that the only tools and equipment required by the appellant under the circumstances were her own skills and her own vehicle.

[13] Counsel for the respondent acknowledged that many of the Minister's assumptions referred to above seemed to imply the existence of a contract of service. Counsel referred to the need to consider all the facts, particularly the behaviour of the appellant throughout the relevant period and suggested that Viel's retroactive assessment of what her status must have been at the outset is not credible. Overall, counsel submitted the appellant had not discharged the burden of proof and – therefore - both decisions of the Minister should be confirmed and both appeals dismissed.

[14] The appellant submitted the evidence supported her contention that Francis had exercised a great deal of control over the work performed and that there had been a list of specific duties posted each day and priorities had been assigned to certain tasks. Viel agreed she had left work early some days and billed only for hours actually worked. However, she asserted that she provided services to Francis solely in the context of an employee and had not been operating a home care business even though her income tax returns had been filed on that basis for reasons explained in the course of her testimony. The appellant submitted the decisions of the Minister were incorrect and that both appeals should be allowed.

[15] In several recent cases including *Wolf v.* Canada, 2002 DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue* 2006 DTC 6323. (*RWB*), *Vida Wellness Corporation DBA Vida Wellness Spa v. The Minister of National Revenue - M.N.R.)*, [2006] T.C.J. No. 570 and *City Water International Inc. v. Her Majesty the Queen* [2006] F.C.J. No. 1653 there was no issue in this regard due to the clearly-expressed mutual intent of the parties that the person providing the services would be doing so as an independent contractor and not as an employee. That is not the case in the within appeals and it is necessary that I examine the evidence to determine the intent of the appellant and Francis at the commencement of the working relationship. I will set aside that task for the moment and establish the framework for the necessary analysis of various factors demanded by the relevant jurisprudence.

[16] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – (*Sagaz*) dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent

contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning - and to the synthesis of Cooke, J. in *Market Investigations Ltd. v. Minister of Social Security,* [1968] 3 All E.R. 732 - Major, J. at paragraphs 47 of his judgment stated:

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

[17] It is important to point out that credibility of the parties will play a significant role in the course of establishing the facts in this proceeding upon which a conclusion is based. With respect to some matters, the appellant and Francis are diametrically opposed. Sometimes, there was substantial agreement on various matters and other times there were differences in their opinion of what had transpired which is not unexpected in view of the passage of time and the nature of the services provided which tended to be repetitive.

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

Level of control:

[19] The appellant in her Notice of Appeal and as referred to during her testimony attempted to paint a picture of near total dominance over her - by Francis - during the course of their working relationship. Viel testified she was under constant pressure to meet expectations and was required to conform with a precise list of duties posted daily in the kitchen of the Francis home. Although she did not have any actual lists to produce in evidence, Viel relied on the example she had created for the purposes of her Notice of Appeal and stated that was the sort of extensively-detailed instruction

and direction with which she had to cope when providing services to the Francis family. In the example of an alleged daily list, Viel included items – marked with an * for emphasis - such as “dog puke on rug – paper towel covering, hair wash for Mrs. Francis after 3:00 p.m.” followed by instructions for dinner preparation that reads like a recipe from the *Joy of Cooking.* That reconstructed list - offered by Viel as typical - included instructions about cleaning the fridge and setting rodent traps in accordance with a particular schedule based on a two or three day cycle. Those instructions seem odd if they are - as Viel alleges – designed to govern daily activities to be discussed each morning in the kitchen. As an extreme example of the sort of control alleged to have been exercised by Francis, Viel described the intensive contact between Francis and her when Francis was in hospital in Vancouver. According to Viel, Francis continued to dominate the daily activities of the household by telephoning home several times each day for the purpose of communicating detailed instructions concerning the household, her children and the sartorial maintenance of Dr. Francis. However, in paragraph 9 of the Notice of Appeal, the appellant alleged that pursuant to the direction of Francis, she had initiated the telephone calls to Francis at the hospital each morning, noon and prior to leaving work in the evening. Viel testified she felt intimidated by Francis and readily complied with her instructions throughout the relevant period.

[20] At this point, it is time for a reality check. Dealing first with the matter of alleged intimidation, that is difficult to accept. The evidence supports the view that Viel was an imposing figure, strong-willed and forceful in her methods to take care of Francis and her family. Viel was knowledgeable, capable and carried out her duties in accordance with her own schedule. Francis was very ill for much of the time and was dependent on Viel not only for personal care but to look after the children, the dog and to run the household. Francis was in a precarious and fragile state similar to that of the poor chap lying in a hospital bed with casts on limbs and tubes sticking out from various parts of his body whose visiting Pastor demanded to know if he was prepared then and there to rebuke the Devil. The fellow lifted his head off the pillow and whispered, “At this moment, I’m in no position to antagonize anybody.” Francis related the circumstances of her stay in the hospital in Vancouver. It is reasonable to accept her version of events during that two-week period during which she was able to telephone home – using a pay phone down the hall - only 3 times in order to speak to Viel who assured her all was well in the Francis household. The purpose of the hospitalization and the extent of the activity required to accomplish it within a short period would not permit the sort of telephonic communication described by Viel. Francis was occupied with her own health problems and consulted - almost continuously during each day - an array of medical professionals. There is the matter of the dispute over the van insurance which Viel took upon herself to declare as

inadequate sometime after the fall of 2004 and refused thereafter to drive that vehicle unless Francis was a passenger. Instead, Viel began using her own car during the day in the course of providing services to Francis. Francis' version of this event is that there was nothing amiss concerning the insurance coverage and she did not understand Viel's concern but accepted that Viel would no longer use the family van as she had done since starting work on September 3, 2002. It seems odd that an employee would take this position with a boss over a matter as significant as the adequacy of insurance coverage and to insist that his or her interpretation of the conditions of the policy was correct. In terms of determining the sequence of work to be done, I accept the version of events related by Francis. Viel understood her responsibilities and was capable of discharging them satisfactorily on a daily basis and could adapt her schedule as required. She undertook errands for Francis both before, during and after working hours in accordance with her own sense of convenience. Viel took days off when she chose and cut her days short if she needed to pick up her own daughter or for some other reason. She did not adhere to any particular routine within the course of a working week except to fulfill her mandate to take care – first - of the needs of Leah and then those of Francis and other family members. Where there is a conflict in the evidence created by differences arising from the testimony of Viel and Francis concerning events relating to the issue of control and direction, I prefer the version proffered by Francis because it is more reasonable and in tune with the circumstances and therefore probably occurred in the manner described. Francis testified at some length concerning the matter of the detailed lists – replete with asterisks – as alleged by Viel and explained that at one point near the end of the relevant period such a list had been prepared in detail - with *s to denote priority - in response to Viel's request because her vision was blurred from taking medication. Viel did not cross-examine Francis on that point nor did she offer any evidence by way of rebuttal. It seems to me this is an important matter when dealing with the factor of control. Viel's assertions concerning the extent of direction and control regularly exercised by Francis relied on the effect to be created by the reconstructed list of duties that was submitted as an example of the nature and extent of the strict commands emanating daily from Francis. It purported to paint Francis as a dominant, intimidating employer with a penchant for micro-management.

[21] The evidence does not support the conclusion that Viel required much direction or control while performing her duties. She had begun supplying her services while an employee of Barb's agency and attended at the Francis home on a rotational basis with other home care workers dispatched by Barb pursuant to her contractual arrangement with Francis. For the most part, Viel determined the order of the duties to be performed and decided whether a certain task would be performed on a particular day or postponed. When performing errands or driving children to and from school or

other activities or when working in the house, Viel was not supervised. She carried out her duties in a manner consistent with her calling as a professional home care support provider who knew what was required at any given point within a work week and then performed those tasks according to the time available.

Provision of equipment and/or helpers

[22] The majority of the work was carried out in the Francis family home. As a consequence, the tools and equipment necessary to provide the services were supplied by Francis. The exception is the vehicle that was used – initially – by Viel to perform errands for Francis in return for a monthly compensation of $25 intended to cover the cost of fuel. Later, the appellant used her vehicle almost exclusively for reasons I will deal with later.

Degree of financial risk and responsibility for investment and management

[23] The only financial risk that may have arisen is if Viel had been in an accident with her motor vehicle while performing her duties while driving Francis or her children or when running errands. Otherwise, there was no risk in carrying out her duties in accordance with certain specified rates.

Opportunity for profit in the performance of tasks

[24] After the fall of 2004, Viel opted to use her own vehicle to carry out her duties during the day. There was no increase in the $25 monthly fuel allowance and any additional expense caused by the ever-increasing cost of gasoline together with other ordinary vehicle operating expenses was borne by Viel. With respect to the remuneration paid to Viel, I accept the version of events as described by Francis concerning the negotiation during which the hourly rate was established. Francis testified the process was similar to the one that had taken place between her and Barb before the agency was retained to send home care workers to help Francis. When Viel's duties in respect of Francis' personal care increased to meet demands created by a particularly aggravating health problem, she asked for more money and Francis consented to an increase of $2 per hour. A review of the invoices – Exhibit I-7 – discloses that Viel billed Francis according to her own rates whether for respite, care of Leah or household tasks together with the monthly charge for transportation costs. The appellant calculated the hourly rates for her services in different ways depending on the circumstances. I do not accept Viel's evidence that the wording of those invoices was dictated and controlled by Francis. Each invoice is in Viel's handwriting

and the content of the billing, the language used therein, the detailed description of the services provided and the identity of the recipient thereof is consistent with the business practice likely to be utilized by a home care agency or service providers operating on their own account. Francis stated she paid the invoices as presented and accepted the rates for respite set by Viel and did not question the allocation of hours to certain tasks except that it was necessary for the purposes of complying with terms of a family trust to quantify the hours of care devoted to Leah in the invoices. The appellant did not charge GST in relation to her services. Although it may have been to her advantage to register for GST purposes, there was no legal obligation for her to do so because her gross business income did not exceed the sum of $30,000 per year.

[25] In *Royal Winnipeg Ballet, supra,* the issue was whether the dancers were employees or independent contractors. The Ballet Company was supported in its position by Canadian Actors' Equity Association (CAEA) as the bargaining agent for the dancers. In the course of deciding the dancers were not employees of the Ballet Company, at paragraphs 60-64, inclusive of her reasons Sharlow, J.A. – referring to the decision in *Wolf, supra,* stated:

> [60] Décary, J.A. was not saying that the legal nature of a particular relationship is always what the parties say it is. He was referring particularly to Articles 1425 and 1426 of the *Civil Code of Quebec*, which state principles of the law of contract that are also present in the common law. One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.
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> [61] I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins, J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded.
>
> [62] It is common for a dispute to arise as to whether the contractual intention professed by one party is shared by the other. Particularly in appeals under the *Canada Pension Plan* and the *Employment Insurance Act*, the parties may present conflicting evidence as to what they intended their legal relationship to be. Such a dispute typically arises when an individual is engaged to provide services and signs

> a form of agreement presented by an employer, in which she is stated to be an independent contractor. The employer may have included that clause in the agreement in order to avoid creating an employment relationship. The individual may later assert that she was an employee. She may testify that she felt coerced into signifying her consent to the written form of the contract because of financial need or other circumstances. Or, she may testify that she believed, despite signing a contract containing such language, that she would be treated like others who were clearly employees. Although the court in such a case may conclude, based on the *Wiebe Door* factors, that the individual is an employee, that does not mean that the intention of the parties is irrelevant. Indeed, their common intention as to most of the terms of their contract is probably not in dispute. It means only that a stipulation in a contract as to the legal nature of the relationship created by the contract cannot be determinative.
>
> [63] What is unusual in this case is that there is no written agreement that purports to characterize the legal relationship between the dancers and the RWB, but at the same time there is no dispute between the parties as to what they believe that relationship to be. The evidence is that the RWB, the CAEA and the dancers all believed that the dancers were self-employed, and that they acted accordingly. The dispute as to the legal relationship between the dancers and the RWB arises because a third party (the Minister), who has a legitimate interest in a correct determination of that legal relationship, whishes to assert that the evidence of the parties as to their common understanding should be disregarded because it is not consistent with the objective facts.
>
> [64] In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[26] In the within appeals, I do not have the comfort of dealing with a situation where there is uncontradicted evidence with respect to the mutual intention of the parties. Instead, I must make a finding in that regard. It must be kept in mind that Viel and Francis became acquainted during the course of several weeks when Viel was working for Barb's agency and was in the Francis home to provide services as a home support care worker. The appellant's position was that Francis wanted Barb to assign her exclusively for Francis and that Barb had refused that request. Francis denied that she had made such demand and stated she had not discussed that subject with Barb. Francis testified that Viel approached her and offered to work directly for her – on a steady basis - at the hourly rate of $15. I prefer the Francis version of the

circumstances pertinent to those initial discussions prior to Viel leaving her employment with Barb. I accept that Viel represented that she was operating a home care business on her own account and was capable of providing the services required not only because she was qualified through work experience with the agency but also because she was close to receiving academic recognition - in the home care field - from a community college. I find it reasonable that Viel discussed her desire to retain other clients and that she assured Francis that if a substitute worker was needed at some point, Viel would find a suitable replacement on a temporary basis. I am satisfied Viel wanted to be paid the gross amount of her earnings in accordance with the invoices that she prepared according to her own method. I do not accept the evidence of the appellant that there was a subsequent discussion with Francis regarding the lack of deductions from her cheque and the alleged response by Francis that it was too cumbersome to undertake the necessary paperwork to accomplish that purpose. I accept the version as related by Francis that the subject of employment status never arose except in the context of the initial discussions when Viel made it clear that her situation required that she take home the total amount billed on her invoices because she was not receiving child support and needed the money. By entering into the arrangement with Francis and eliminating Barb as an intermediary, the appellant was able to obtain steady work at an increased hourly rate. In order to achieve that result, she held herself out to Francis as someone who provided home care services as an independent contractor. One method by which original intent can be ascertained is to examine the subsequent conduct of the parties. Another is to identify any reasons one or other party may have to pursue a policy of revisionism in order to suit a current purpose. Apart from the methods by which the appellant provided her services for Francis - as noted earlier - she represented to the Minister - in filing 4 returns for the taxation years 2002 to 2005, inclusive - that she earned business income by operating a home support business. She claimed certain business expenses each year and – apparently - ignored the advice of her accountant to seek a ruling from CRA on her status with regard to the services she was providing to Francis. Viel stated the additional business income in 2002 was attributable – probably - to her work for the greeting card company and that although she had provided certain home care services to others, had done so merely as a favor and not for pay. In other cases where a worker or payor has resiled from a previous position, I have referred to the powerful compulsion that propels a person to adapt past events to fit current needs. Viel understands clearly that the matter of intention of the parties is important in these cases and purported to portray events that would cast her in the role of an unfortunate subordinate who accepted whatever largesse was distributed by Francis, her demanding and over-controlling employer. A review of the evidence pertaining to the issue of intention leads me to conclude that both parties intended that Viel would provide her services on the basis she was an independent contractor.

As mentioned earlier, the subsequent conduct by both parties - until well after termination of that relationship - was consistent with that intent. The appellant truly did have a revelation - as a result of applying for UI benefits - that was bolstered by a subsequent stream of vivid - yet subtly-nuanced visions - of a recent past chock full of significant events that she fervently wished had actually occurred.

[27] In the case of *Direct Care In-Home Health Services Inc. v. Canada (Minister of National Revenue – M.N.R.),* [2005] T.C.J. No. 164, Hershfield, J. had to determine the status of a care worker who was part of a pool of nurses upon which the payor drew in order to fulfil its contract with various agencies to provide care for certain people. With respect to the important indicia of control, at paragraphs 11 and 12 of his judgment, Hershfield, J. stated:

> [11] Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship. [See Note 3 below] However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task -- you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship. [See Note 4 below] Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker. [See Note 5 below]
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> Note 3: Wolf at paragraph 74.
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> Note 4: See, for example, D & J Driveway Inc. v. Canada (Minister of National Revenue), [2003] F.C.J. No. 1784 (F.C.A.) at paragraphs 9 and 13 and Wolf at paragraph 77.
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> Note 5: See Charbonneau v. Canada, [1996] F.C.J. No. 1337 (F.C.A.) at paragraph 10 as cited in D & J Driveway at paragraph 9.
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>
> [12] In the case at bar, the Worker was free to decline an engagement for any reason, or indeed, for no reason at all. She could leave a client and still be engaged with another more to her liking. She was free to do other work as and when she pleased. Moreover, although nursing care tasks were offered to her, there was no promise of that and she was not supervised in her performance of those tasks. Each task offered was a results oriented task from the Appellant's perspective. The fact that the Appellant could offer such tasks from time to time

and to some extent monitor performance does not militate toward a finding of an employee-employer relationship. As in D & J Driveway, where there was not a sufficient relationship of subordination between the company and drivers to warrant a conclusion that a contract of employment existed, there is not a sufficient relationship of subordination in the case at bar to warrant a conclusion that the relationship of the parties is that of employee-employer. In D & J Driveway specific delivery tasks were available to drivers who could agree or refuse to make deliveries when called upon. When drivers agreed to make a delivery no control was exercised over the way in which they carried out their duty. Similarly in Wolf, Justice Desjardins noted that a link of subordination had not been created where the worker, a free-lance mechanical engineer hired on a one-year renewable contract, was assigned tasks over which the worker was the "master". [See Note 6 below] As in these cases, I do not see the Worker, in the case at bar, as being in a subordinate relationship with the Appellant as is required to find a contract of service. That is, the control test points toward a finding of an independent contractor relationship.

Note 6: Wolf at paragraph 77.

[28] Concerning the intention of the parties, at paragraphs 25 and 26, Hershfield, J. commented:

[25] Although the parties' intentions should not be regarded as determinative, they can be helpful in a close case. [See Note 11 below] That is, if one were to conclude on a review of the evidence as a whole that this is a close case where the relevant factors point in both directions with equal force and that the mutual understandings of the parties must therefore be regarded and considered, how would this case be resolved?

Note 11: See excerpts from Wolf at paragraph 8 of these Reasons.

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[26] I have no difficulty finding that the Appellant intended to hire the Worker as an independent contractor. This much is clear from the testimony of Mr. Blais and from the terms of the Agreement. As to the intention of the Worker, I begin by noting that it is not as easily discernible as that of the Appellant. The Worker's testimony seemed to indicate that the matter did not concern her. She seemed indifferent to the classification. As much as it might be said that she never really thought of herself as an independent contractor, it cannot be overlooked that she never took on the role performed by her thinking that she was an employee. To the contrary, she took on the role knowingly agreeing to the relationship intended by the Appellant. Moreover, I am compelled to find that she must have had at least some minimal intention to operate as an independent contractor in light of the fact that she agreed to an arrangement whereby she was not entitled to any

> employee benefits whatsoever and without the apparent protection of labour laws in terms of such benefits or job security. At the hearing she evidenced no concern as to seeking relief from this state of affairs knowing full well that it was, and is, the arrangement she willingly agreed to. Her intention was and is to carry on her undertaking as required under the Agreement.

[29] In *Poulin v. Canada (Minister of National Revenue – M.N.R.)*, 2003 FCA 50, the Federal Court of Appeal considered the situation involving health care workers who provided personal care to an individual who was rendered quadriplegic in a car accident. The judgment of the Court was delivered by Létourneau, J.A. who stated at paragraphs 16 to 22 inclusive:

> [16] Furthermore, the notion of control is not necessarily lacking in the contract for service. It is generally apparent, albeit to varying degrees, as it is somewhat in the contract of employment, and sometimes to a surprising extent without necessarily distorting its nature as a contract of enterprise. For example, control in regard to the premises in general and the specific places in which the work is to be performed is exercised over general contractors and their subcontractors. The latter are also given specific instructions as to the materials and the drawings and specifications with which they must comply. Often the times and work schedules of some in relation to others are also controlled and determined to ensure the effective and harmonious operation of the construction site. The work performed by contract for services is also subject to some performance, productivity and quality controls.
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> [17] In the case at bar, Ms. Joseph provided the applicant with nursing care commensurate with her profession and its practices, without the applicant actually having any control in this regard. The care and drugs were prescribed by the physician and necessitated by the applicant's medical condition. The medical services thus rendered could have been delivered under either a contract for services or a contract of employment without the applicant really having much input, still less control, in either case.
>
> [18] As to the services supplied by the care attendants and visiting homemaker, they too may be rendered equally under a contract for services or a contract of employment. The very nature of these services means that the notion of control is not decisive. For example, if the applicant describes her duties to the visiting homemaker and indicates to her, down to the smallest detail, the household tasks she is to perform, this does not transform a clear-cut contract of enterprise that she holds into a contract of employment. As it happens, Ms. Paquette, the visiting homemaker, was employed by the agency Remue-Ménage de Gatineau, which provided this kind of services. It is true that the applicant was able to retain her services part time (every second weekend) without going through the agency in order to keep the cost of the services at a level corresponding to his limited ability

to pay. However, I fail to see how that alters the nature of the relationship between the applicant and her.

[19] Finally, the fact that the duties performed were performed according to a schedule and with payment by the hour does not necessary lead, as the Tax Court of Canada apparently thought, to the existence of a relationship of subordination between the parties. It is not uncommon for contractors, for example in plumbing, heating or electricity, to work and invoice according to established hourly rates, and, as in the case of employees, increased rates on holidays. Likewise, it is not uncommon for a client to determine the times at which the services are to be provided by the contractor he has hired.

[20] The respondent also made much of the fact that the workers had to render the services personally. I agree with Madam Justice Desjardins that the fact that a person cannot delegate his labour to someone does not necessarily mean that this person is an employee: Wolf v. Her Majesty the Queen, supra, at paragraph 80. Similarly, the fact that the person providing the services holds a diploma is not proof of employee status. It is necessary to examine the facts and the circumstances surrounding the provision of services: each case is sui generis.

[21] It is not hard to understand why, in this case, the applicant was insistent that the highly intimate and personalized medical care necessitated by his state of health be provided by the nurse with whom he had contracted and in whom he had confidence. The same comment applies to many of the services rendered by the care attendants and the visiting homemaker as a result of the applicant's neurological difficulties. The record discloses that these two workers attended to the applicant's person and his residential premises: see Applicant's Record, transcript of testimony, pages 52 and 108-09. The difficult physical condition in which the applicant found himself did not deprive him of his rights to human dignity and privacy and to his expectations in that regard.

[22] In short, I think that on the facts of this case the notions of control and relationship of subordination are at best neutral, at worst misleading. They are not terribly useful in determining the nature of the agreement between the parties.

(b) ownership of the tools needed for the performance of the work

[30] In *Parifsky v. Canada (Minister of National Revenue – M.N.R.)* 2005 TCC 84, McArthur, J. hear the appeal of a worker – Vrdoljak – whom the Minister had decided was an employee of the recipient – Parifsky - of her personal care services. At paragraph 15 of his reasons, McArthur, J. stated:

[15] In this case, Ms. Vrdoljak provided care to Mrs. Parifsky with no real control by the Appellant in this regard. Ms. Vrdoljak's hours were established based on Mrs. Parifsky's needs. Therefore, her work schedule could vary as a result. Ms. Vrdoljak's services were normally required between noon and 8 p.m., that is until

> the time that Mrs. Parifsky had to go to bed, for a total of approximately 32 hours a week at $9/hour. The total hours of service could thus vary considerably from week to week because it depended on Mrs. Parifsky's needs.

[31] After referring to a quotation from the judgment of Létourneau, J.A. in *Poulin*, *supra*, continued – at paragraphs 16 and 17 as follows:

> [16] In addition, Ms. Vrdoljak was enrolled in a full-time nursing program at that time. She was therefore free to choose how she spent her time and able to plan her own schedule based on her availability.
>
> [17] It is clear that Ms. Vrdoljak was able to decide what kind of care had to be given to Mrs. Parifsky. She was in a position where she had a significant amount of freedom over the services to be provided to Mrs. Parifsky. The Appellant, also with a precarious state of health, was in no position to give Ms. Vrdoljak instructions on how to provide care. The Appellant was only able to play a passive role in all of these events, only able to ask Ms. Vrdoljak about his wife's state of health on a daily basis.

[32] Prior to reading the reasons of Sharlow, J.A. in *Royal Winnipeg Ballet*, *supra*, one may be forgiven for having assumed that the superbly-disciplined, talented and athletic artists were employees subject to a high degree of control and direction in order to perform classical ballets for a world-renowned company. In the future, perhaps, some dancers may be so overcome by the intoxicating spirit of entrepreneurism that they will decline to execute a *jeté grand* and – instead - elect to substitute one of the six known *glissades* or – even worse – to arrest an otherwise fluid set of graceful movements with an impromptu *Arabesque*, proving yet again that "the dance" can be a risky business.

[33] Compared to the rigorous demands upon the dancers, the daily routine of the appellant in performing home care services for Francis was much less exacting and she enjoyed a significant degree of freedom and flexibility in the course of her work. She performed tasks as she saw fit in accordance with her own schedule within the framework of the overall set of services she had contracted with Francis to deliver for a specific fee.

[34] I am satisfied on an extensive analysis of the evidence adduced in the within appeals and after considering the indicia set forth in *Sagaz*, *supra*, and other relevant jurisprudence that the appellant was not providing her services to Francis as an employee but was doing so in the course of operating a home care business on her own account. I am also satisfied that the intention of the parties at the commencement

of their working relationship was that Viel would be supplying her services as an independent contractor. In my view, this finding when applied to the facts in the within appeals in accordance with the majority decision in *Royal Winnipeg Ballet*, *supra*, and subsequent decisions by the Federal Court of Appeal and other courts, supports the conclusion that both decisions of the Minister must be confirmed.

[35] Both appeals are hereby dismissed.

Signed at Sidney, British Columbia, this 4th day of June 2007.

"D.W. Rowe"

Rowe, D.J.

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