

Docket: 2008-3919(EI)

BETWEEN:

COLONIALE MAID SERVICE LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Coloniale Maid Service Ltd. 2008-3920(CPP)
on January 26, 27 and 28, 2010 at Edmonton, Alberta

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

Appearances:

Agent for the Appellant: Carole Rutwind

Counsel for the Respondent: Gregory Perlinski

AMENDED 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 **10th** day of March 2010.

“D.W. Rowe”

Rowe D.J.

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Citation: 2010 TCC 115
Date: 20100310
Dockets: 2008-3919(EI)
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AMENDED REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant appeals from two separate decisions – both dated October 14, 2008 – wherein the Minister of National Revenue (the "Minister") – except for deleting Dionne Danyk-Purcell ("Dionne") from the Canada Pension Plan (CPP) assessment on the basis she had no contributory earnings from November 1, 2006 to September 30, 2007 - confirmed earlier assessments dated November 20, 2007 - in respect of the period from November 1 to December 31, 2006 - and November 30, 2007 - in respect of the period from January 1 to September 30, 2007 - issued in respect of CPP contributions and Employment Insurance (EI) premiums relating to certain named workers listed in Schedule A attached to said decisions. The Minister decided those workers had been employed by Coloniale Maid Service Ltd. ("Coloniale or payor") under a contract of service pursuant to the relevant provisions of the *Employment Insurance Act* (the "Act") and the *Canada Pension Plan* (the "Plan"), respectively. The Appellant filed a separate appeal – 2008-3920 (CPP) – from the decision issued pursuant to the *Plan*. The agent acting for the Appellant and counsel for the Respondent agreed the two appeals could be heard together.

[2] The current appeals are in relation to the workers named in Schedule A and Schedule B of each Reply to The Notice of Appeal (“Reply”) pertaining to the specified periods in 2006 and 2007. The amount of remuneration paid to each named worker during those relevant periods is set out in Schedule C of each Reply.

[3] Ms. Carole Rutwind - agent for Coloniale - advised the Court that Dionne was the sole Officer, Director and shareholder of the Appellant corporation.

[4] Kayla Markiwsky (“Markiwsky”) testified she resides in Beaumont, Alberta, a community bordering Edmonton, and is currently employed by Coloniale. In May, 2005, she met with Dionne to discuss providing her cleaning services to Coloniale, an entity engaged – mainly – in cleaning residential properties but also some commercial premises. Markiwsky stated Dionne informed her that she would be self-employed, an independent contractor, and that payments for services rendered would be made upon receipt of an invoice. Markiwsky stated she advised Dionne when she would be available for work and named her preferred locations. She began working in May, 2005 and was employed for most of the relevant period, although she left prior to an audit by Canada Revenue Agency (“CRA”). Markiwsky stated she was trained initially by Dionne but later her work was not inspected on any regular basis by anyone from Coloniale. However, she understood that if some aspect of a cleaning job was not satisfactory, it was her responsibility to rectify the problem, failing which her payment for that job could be withheld fully or in part. Markiwsky drove her own vehicle to job sites and paid for all related expenses. She stated she was able to refuse to work at certain locations and could decline an assignment for certain reasons and believed this privilege was extended to other Coloniale workers. Although she did not do so, she understood she could provide cleaning services on her own initiative to others, provided they were not clients of Coloniale. Markiwsky stated the usual procedure was to attend at Dionne’s residence in Beaumont at 8:45 a.m. where Dionne assigned jobs to the assembled workers by handing out a clipboard to each cleaning team to which a sheet was attached which stated the name of the client, location of the residence and the composition of the members – usually two – of the team dispatched to perform the cleaning service. All cleaning supplies such as pails, knee-pads, cleaning materials, squeegees, and a vacuum cleaner - if necessary - were provided by Dionne from an inventory stored in her garage. In the event a job was running late or if it was finished early, members of the cleaning team contacted Dionne by telephone and either were provided with assistance by other workers or were dispatched to another location to help that team to finish the job. Markiwsky recalled that she broke some item at a client’s house but did not have to pay for it. She stated that when unable to work on a particular day, she contacted Dionne who obtained the services of a replacement and that she was not concerned about whether

she could hire her own substitute. Markiwsky stated she was paid by Coloniale – every two weeks, by cheque – based on an hourly rate and any gratuities paid by clients went directly to Coloniale. Prior to working for the payor, Markiwsky owned her own cell phone. The location of cleaning jobs in Beaumont were about 2 to 5 minutes apart but assignments to residences in south Edmonton required additional travel time and Coloniale paid Markiwsky – and some other workers – the sum of \$20 per month to compensate for using their private vehicles. Markiwsky stated she could not make a profit on any job or series of jobs since she was reimbursed by the hour. For the taxation years at issue, she filed her income tax returns on the basis she had earned business income as a self-employed person. However, she was not registered for purposes of the Goods and Services Tax (GST) and did not advertise her services nor did she have any telephone number apart from her personal cell phone.

[5] In cross-examination by counsel for the Respondent, Markiwsky stated that at the outset, she requested Dionne to demonstrate the best methods to clean a residence, particularly the bathroom.

[6] In response to a question from the Bench, Markiwsky stated that she and other members of the cleaning teams followed a checklist provided by Coloniale but also abided by instructions delivered by the homeowner(s) either in person or by a written note.

[7] Irina Orlova (“Orlova”) testified she is a student residing in Beaumont. She was named – incorrectly – as Irina Orlove in the decision of the Minister pertaining to the period in 2007 and that error was reproduced in Schedule B and Schedule C of each Reply. Orlova moved to Canada – from Russia – with her parents and was living in Beaumont when her Mother noticed an advertisement – by Coloniale - in the local paper and contacted Dionne. Orlova stated she met with Dionne and understood she would not be an employee when providing her services as a cleaner but would be doing so as a self-employed person. She was attending high school during the period from November, 2006 to September, 2007. Her job required her to attend at a dental clinic twice a week and to perform certain cleaning services according to instructions left by the dentist or his staff. Usually, she worked each Tuesday evening and on either a Saturday or Sunday. Any change in this schedule was made by contacting Dionne and not directly by Orlova through contact with the dentist or his staff. All cleaning supplies were provided by the clinic but Orlova purchased her own gloves. She drove her parents’ vehicle or walked the few blocks from her home to the office. Since she was able to work only on weekends or after school, Dionne did not offer her any other jobs. Orlova’s mother prepared and

submitted invoices to Coloniale based on the appropriate number of hours – and hourly rate – for each billable period. Orlova stated that when first hired by Dionne she did a practice “run” at the dental office and noted it took two hours, so she used that time as a basis to bill a total of four hours a week based on two visits. She billed those hours even if there were occasions when the dentist or his staff requested her to perform certain tasks which were completed in less than the usual two-hour period.

[8] In cross-examination, Orlova stated she never hired a replacement worker and was reimbursed at \$16 per hour and not on any flat rate. No complaints about her work were ever brought to her attention. The Tuesday cleaning job took less time because the floors did not have to be washed. Orlova stated she did not have any business telephone or business insurance. She was not a GST registrant and did not advertise her cleaning services.

[9] Dionne Danyk-Purcell testified she resides in Beaumont and that in addition to being the sole shareholder of Coloniale, is a self-employed musician. Coloniale recruited staff through verbal contacts and by running an advertisement in *Beaumont News*, the local paper. Dionne stated that when interviewing prospective workers, she made it clear that the service to be provided to Coloniale would be as an independent contractor which meant they would be responsible for paying their own income tax and would not be supervised when cleaning a residence. Dionne stated she advised potential clients during initial discussions that if she did not clean their house personally, the cleaners assigned for that task would be subcontractors of Coloniale. Dionne wrote specific client requirements on a sheet which included preferred hours for the service and instructions pertaining to the cleaning of areas such as hardwood floors or items such as mirrors. Dionne stated that most homeowners/occupants did not want to be at home while the cleaners were working so the teams were assigned times which conformed to the client’s schedule. Generally, the same team – usually composed of two persons, except for large houses which could require three – was not sent to the same house but workers could request repeat assignments to a location. Any complaints by clients were made directly to Coloniale and, although Dionne was aware of the composition of a cleaning team, she did not know which member was responsible for the error or omission. Therefore, it was the responsibility of that team to return to that residence and to rectify the problem. If another worker had to be sent to perform that service, the workers in the original team were not paid for the time required to correct their mistake. It was very rare that any item was broken but on one occasion a worker broke a vase and paid the sum of \$60 to reimburse Coloniale’s client. Dionne stated she wanted the workers to meet at the garage at her residence at 8:50 a.m., at which point she advised them of the jobs available that day and assigned teams to various locations and handed out clipboards

with attached client contracts and instruction sheets containing particular requests of certain clients, some of which were so idiosyncratic that some workers refused to clean that residence. The jobs in Beaumont took one-half day to complete whereas the Edmonton locations required a full day, including unpaid travel time. Dionne stated she is a single mother and worked alone in some instances to satisfy a specific request or as a member of a two-person team and did not act as a “boss” or supervisor. Workers arranged for their own transportation to the job site and some of them were able to work only on evenings or certain days of the week. As a result, workdays for some ended by 1 p.m. and other workers dictated the hours and days they were available due to other work commitments or child care requirements. Dionne stated she did not supervise the cleaners but each member of the team checked the work done by her co-worker. On occasion, workers cleaned Dionne's house using the standard cleaning methods applied to the residences of Coloniale clients. Dionne received a call from CRA advising her that Coloniale was the subject of a payroll audit. She contacted the accountant Coloniale had retained – at that time – who advised her to prepare a written contract to incorporate terms of the previous verbal agreement between her – as President of Coloniale – and each worker which would confirm the pre-existing status of independent contractor. She was also advised to obtain invoices from workers for services rendered and that they be requested to provide replacement invoices since some were missing due to the inadequate state of Dionne's record-keeping. Dionne stated one worker – Kimberley Chiasson (“Chiasson”) - refused to sign the written agreement when it was presented to her and was emotionally upset about the matter. Dionne stated that throughout the relevant periods in 2006 and 2007, no worker ever questioned her in relation to the lack of deductions for EI, CPP and income tax from their bi-weekly payments for services rendered. Christmas bonuses in the form of cheques were received by Coloniale and Dionne attempted to distribute portions of the total amount to workers who had cleaned in the houses that were the source of said bonuses. Neither Coloniale nor Dionne retained any of that bonus money.

[10] Dionne was cross-examined by counsel for the Respondent. Dionne acknowledged that she had trained some workers with respect to certain tasks mainly by having a new worker clean her house while observing and providing advice, if requested. Otherwise, a worker was at liberty to use her own skills and methods. Dionne stated that workers had input into where they would work - and for whom - and could suggest that a certain co-worker be assigned to form a team. She agreed that Coloniale provided most cleaning supplies until the commencement of the CRA audit after which – on the advice of her accountant – she began charging workers for supplies and tools. Dionne stated that throughout the relevant periods, any worker could use their own supplies or tools as a matter of personal preference. If a team was

running behind on a job, the workers had the right to call members of another team directly and to request assistance without contacting Dionne. On those rare occasions when some item in a household was broken or sustained slight damage, the worker involved advised Dionne who discussed the matter with the client. It was necessary on only one occasion for the householder to be reimbursed as otherwise any potential claim was waived, probably because the loss or damage was trivial. Coloniale did not “do windows” as it did not have appropriate equipment or liability insurance. Dionne stated that some workers advised her – initially – they could work only from April to September and others made it clear they could not work on certain days or during certain hours. If a worker was ill or otherwise unable to attend, Dionne located a replacement and paid that person directly with a Coloniale cheque. In the period prior to the CRA audit, no worker had hired her own substitute or assistant. Dionne agreed the remuneration was based on an hourly rate but stated that was linked to a time frame reasonably required to complete the cleaning of a particular residence. On occasion, there were more workers gathered outside Dionne’s garage in the morning than the number of jobs available so some volunteered to return home so others could be assigned the cleaning jobs. Dionne was referred to a Questionnaire – Exhibit R-1 – signed by Rutwind & Associates on behalf of Coloniale and dated May 5, 2008. The typed response – by way of attachment – at Q. 23 – pertaining to hourly rates paid to workers – indicated higher rates were paid to some workers – \$14.00 to \$14.50 – while others were paid \$11.50 or \$12.00 with the greater amount in each case being paid when the work site was in Edmonton rather than in Beaumont. Dionne stated the variations were the result of negotiations with workers based to some extent on the nature of the premises to be cleaned as some clients set a maximum amount they were willing to pay for cleaning while others paid Coloniale for whatever hours were necessary to perform the task. Dionne acknowledged that prior to the CRA audit, most workers did not submit an invoice to Coloniale and expressed her regret at not having insisted on receiving an invoice prior to issuing a cheque in payment for services rendered. However, she was otherwise occupied with a variety of other matters and the quality of bookkeeping suffered as a result. Dionne stated that some of the workers cleaned homes or had other cleaning jobs that were performed for people who had no business relationship with Coloniale. Early in the working relationship with each worker, Dionne had inquired whether GST would be added to the amount submitted to Coloniale for payment but no one had registered to obtain a number so it was not an issue thereafter. All workers – except Chiasson – signed a one-paragraph document – copies of which were attached to the response to the Questionnaire – and the title and body thereof reads as follows:

Contract for
(blank space for name)

as sub-contractor

I, (blank space for name) recognize that I am being hired as a sub-contractor and that I am responsible for filing and paying my own source deductions (CPP, E.I., and income tax). Coloniale Maid Service Ltd. does not submit source deductions on my behalf.

[11] As requested by Dionne, all documents were dated November 1, 2006 in an attempt to confirm and ratify the working status that she considered had existed since the commencement of the working relationship with Coloniale in each case. Dionne stated most workers provided replacement invoices for services previously rendered to permit her to complete her records for purposes of the CRA audit. Dionne identified an e-mail – Exhibit R-2 – dated November 5, 2007 – she sent to Brenda Hinse (“Hinse”) in which she listed the dates and amounts required to be included in invoices to be prepared by Hinse and submitted to Coloniale. Dionne identified another e-mail – Exhibit R-3 – sent to Chiasson which listed cheques paid by Coloniale to her at various times in 2007 and included an estimate of money also earned in October, apparently at the request of the CRA auditor. Dionne identified a printout – Exhibit R-4 – of amounts paid to Jacqueline McCormick (“McCormick”) and there was reference therein at an entry – dated 15/12/2006 – that she had received a bonus in the sum of \$40.00 when Dionne apportioned holiday bonus money received from clients. Dionne stated she did not command workers to appear at her house prior to 9 a.m. and if enough people were not present to handle all the jobs, she worked herself or found someone who was willing to work that day. It was not unusual for someone to quit without any prior notice. In Dionne’s opinion, McCormick had started to poach Coloniale’s clients and this led to a confrontation which resulted in the termination of their working relationship. Dionne referred to an advertisement – filed as Exhibit A-1 – in the Beaumont paper where Natalia Parsons (“Parsons”) advertised her cleaning services under the name: Sparkle Cleaning Services. To the best of Dionne’s recollection, that notice appeared about the first week or two of September, 2007. At some point, the price of gasoline had increased to more than \$1.40 and Parsons requested a contribution for “gas money” so Dionne decided to pay her the sum of \$20 per month and offered the same amount to other workers who used their own vehicles to drive themselves or other workers to job sites. Dionne stated she had purchased accounting software for her computer and was learning it on her own as she went along and had tried her best but that aspect of her business was assigned low priority because the care of her family also demanded a lot of time.

[12] In response to questions from the Bench, Dionne stated that at some point, Coloniale increased its rates to clients and the workers requested additional money which led to their hourly rates being increased and these new hourly amounts may have been included in the response to Q. 23 of the Questionnaire – Exhibit R-1. Dionne stated Coloniale paid all Workers' Compensation Board (“WCB”) premiums as required by provincial law which exempted only services provided by individuals through corporations. Most cleaning contracts were carried out within Beaumont so adverse weather conditions were not a factor although some jobs in Edmonton had to be cancelled due to bad driving conditions. The liability insurance policy obtained by Coloniale provided coverage only for liability arising from the provision of Dionne's services personally and did not cover the workers whom she considered to be subcontractors. Although it was rare, there were occasions when a job had to be cancelled due to a shortage of workers attending the morning assembly at her garage. Usually, there were enough workers to handle the demand and replacements – in Beaumont – were telephoned and could be assigned quickly to a nearby location and Dionne also worked personally when necessary to fulfil a cleaning contract.

[13] The Appellant closed its case.

[14] Amy Holstein (“Holstein”) was called to the stand by counsel for the Respondent. Holstein testified she saw the Coloniale advertisement in the Beaumont paper. Prior to providing her cleaning services to Coloniale in 2007, Holstein did not sign any written contract and was trained by Dionne with whom she worked for the first “couple of shifts.” Holstein stated the workday started at 9 a.m. and ended – usually – by 5 p.m., although some houses took longer to finish. The cleaning teams remained until the job was finished and if the task was completed earlier than projected, a team member telephoned Dionne and sometimes received instructions to proceed to another location to assist the team working there. Holstein stated there was some ability to choose work locations but the teams were required to follow the sequence of job sites as stated on the sheet attached to the clipboard. The workers assembled at Dionne's residence before 9 a.m. and obtained supplies and necessary tools. Once assigned to teams, the workers left for the work sites where the cleaning was performed without supervision. At the beginning, Holstein had to return to a house to re-do some task and cannot recall whether she was paid for that additional work. She did not use a vehicle to travel to work sites and was paid \$13.50 per hour for cleaning. She did not submit any invoice to Coloniale prior to receiving payment which was calculated in accordance with the information in the Coloniale client invoice handed out in the morning with the clipboard. Holstein stated she was not able to gain any profit from the provision of her services and could increase income only by working more hours. She did not provide her services to any other cleaning

companies nor on her own initiative. She was not registered for GST and did not advertise her services. She stated that after the CRA audit had commenced, workers began buying their own mops and buckets.

[15] Holstein was cross-examined by the agent for the Appellant. Holstein stated she obtained rides from co-workers or walked to the jobs – weather permitting – during the 7 or 8 months she worked as a cleaner for Coloniale. She was never advised by Dionne that she was forbidden to work for other cleaning services and knew that some of her co-workers had done so. Once the work was completed at a particular location, the relevant number of hours was inserted into the space provided on the Coloniale invoice which had been prepared in the name of that specific client. On occasion, Holstein declined a particular cleaning assignment which Dionne accepted and sent her to another location.

[16] Natalia Parsons – also known as Natasha – testified she read a classified advertisement in the Beaumont paper in which Coloniale was seeking cleaners to work for \$12.00 per hour. She did not sign any written contract prior to cleaning for Coloniale and received training from fellow workers on the teams to which she was assigned by Dionne. She never objected to any placement with another team member. Parsons stated the group met at Dionne's house before 9 a.m. and, if unable to attend, a worker was expected to call Dionne. Usually, the work was finished by 3 p.m. but the cleaning team had to remain until the job was complete. The locations were assigned by Dionne and Parsons was unaware whether she had the ability to refuse work at any specific residence. Parsons never encountered any dissatisfaction with her work or that of her team but was aware of situations where a client had called Dionne to complain and the matter was discussed with the assembled workers the following morning. Parsons recalled that at some point there was a general increase in the hourly wage paid to workers. Prior to receiving payment – by cheque – from Coloniale, she did not prepare any invoices and all supplies and materials were distributed by Dionne. Parsons stated there was no chance to gain a profit and there was no risk of loss in providing her services to Coloniale. For several months when the price of gasoline was excessive, she received the sum of \$20 per month from Coloniale as a contribution towards fuel purchases. In May, 2008, Parsons started her own cleaning company but during her working relationship with Coloniale did not work for others and considered she had been an employee. She was not registered with GST. After CRA had completed the audit, Parsons signed a "paper" in which she was described as a subcontractor and thereafter certain cleaning supplies had to be purchased from Coloniale. Parsons identified a Questionnaire – Exhibit R-5 – that she completed and signed on April 20, 2008. In responding to Q. 32, thereof, Parsons wrote that Coloniale informed her how many hours were

required to complete each house. However, despite any such estimate, she and other workers were paid for the actual time spent at any residence or premises. Parsons stated there was never any agreement with Dionne as to the status of the working relationship.

[17] In cross-examination, Parsons stated that any training received was from other workers whom she assumed had been requested to do so by Dionne. Parsons stated that during the initial interview, Dionne advised her that she wanted to be contacted if Parsons was unable to work on a certain day but that situation never arose. Parsons ability to speak English was somewhat limited at that point so she was accompanied by her husband. Although there was no discussion with Dionne concerning any source deductions, Parsons stated her husband mentioned later that she should have had deductions taken from her pay cheques. Parsons stated she was not familiar with the Canadian system and spoke with other workers about the matter but was happy just to have a source of revenue. She was aware that at the end of the year she would be required to calculate her total income and to pay the appropriate amount of tax. Parsons stated the allowance of \$20 per month to be used for gasoline purchases was satisfactory. Prior to the CRA audit, Coloniale supplied all mops, cleaning materials and other supplies. Other than McCormick, who at some point worked for another cleaning service, Parsons was not aware of any others who worked for other cleaning businesses or provided services privately to their own clients. She had not been informed by Dionne that she was not permitted to work for other cleaning companies or to find her own jobs.

[18] Brenda Hinse testified she resides in Beaumont and is employed as an Education Assistant. She responded to an advertisement by Coloniale – in the Beaumont paper – offering workers \$10 per hour for cleaning services. In meeting with Dionne, she was not told it was a business opportunity as opposed to employment. Dionne demonstrated certain cleaning methods with particular attention devoted to dealing with more difficult areas in a residence. Assignments were handed out by Dionne to the workers assembled prior to 9 a.m. and supplies were distributed along with special client instructions and security codes to permit entry. A team remained until the job was completed and if it was running behind, a worker called Dionne who sent other workers to help. If finished early, the reverse situation applied. Hinse stated she was not able to refuse a job and Dionne established the priority of work to be performed on any given day. Hinse stated she wanted to work with McCormick but Dionne did not agree. Once, Dionne took a brief vacation and Hinse assumed a managerial role to continue Coloniale's service to clients. Although it did not apply to her, Hinse was aware of occasions when Dionne was critical of one or more workers who were part of the morning assembly. Hinse assumed either Dionne – through Coloniale – had paid for any broken or damaged items in a

residence or the clients had waived any claim for reimbursement. Hinse did not find her own replacement worker and even though she wanted to hire her sister as an assistant, Dionne did not grant permission. She was paid – by cheque – twice a month based on the number of hours worked, multiplied by the applicable hourly rate which at one point was increased. Each clipboard handed out in the morning contained two invoices. One was left in the residence and the other was returned to Dionne at the end of the workday when remaining supplies were dropped off at her garage and the clipboard was left on the steps to her residence. Hinse used her own vehicle and received \$20 per month towards fuel purchases. She paid an extra vehicle insurance premium of \$158 because she was transporting co-workers to job sites. Hinse stated she did not supply any tools or equipment and did not have any opportunity to gain a profit nor did she incur any risk of loss. While providing her services to Coloniale, Hinse was employed as an Education Assistant in a school but did not work for other cleaning companies. Hinse stated that even though – at the beginning – Dionne informed her that she was self-employed, later she began to question that status for various reasons including the lack of control over work locations and the relationship with co-workers. She was not registered with GST and did not advertise her cleaning services. Hinse terminated her working relationship with Coloniale on October 26, 2007, at which point all workers were required to supply their own mops, buckets and supplies. Hinse completed and returned a Questionnaire – Exhibit R-6 – dated April 16, 2008 - in which she stated – at Q. 30 – that she did not submit an invoice to receive payment and that Coloniale paid for any substitute. She did not recall having had any ability to choose or refuse any particular location or cleaning job.

[19] In cross-examination, Hinse confirmed that it was clear to her during the initial interview with Dionne – in March, 2006 - that her services were to be provided to Coloniale as an independent contractor. She acknowledged that she had raised the matter with Dionne thereafter but continued to assume that source deductions would be made at some point even though none were taken from any cheque. Hinse stated her work for the school board – beginning in March, 2007 - was on a casual basis whereby she substituted for someone so when called to work at a school, she had to contact Dionne if not available to clean. Hinse stated the hourly rate paid by the school board was higher than that paid by Coloniale and she could accept work as an Education Assistant whenever the opportunity arose. Although some cleaning jobs were not completed until 3 p.m., most were done by 1 p.m. and Hinse was able to request an assignment of shorter duration if necessary to meet some other commitment, usually pertaining to her family. Any call from the school regarding the availability of work was made at 7 a.m., and if Hinse decided to accept, telephoned Dionne to advise she would not be available to work that morning. Hinse stated she

filed her income tax returns for the 2006 and 2007 taxation years on the basis she was self-employed and provided receipts to her tax preparer pertaining to the extra insurance premium, cell phone, gasoline purchases and details concerning an in-home office. Hinse stated she did not provide any tools or supplies. Although some workers left without notice, Hinse was advised – verbally – by Dionne that two weeks notice of intention to quit was required. She was not requested to provide invoices to Coloniale prior to receiving payment for services rendered but later was asked by Dionne to provide invoices to conform with a list of Coloniale cheques that were issued to her. Hinse stated she complied with the request – even though she did not understand the purpose – and when doing so, spotted certain errors in amounts and dates which she corrected in her response. Hinse stated that she merely wanted to finalize her relationship with Dionne.

[20] During re-direct examination by counsel, Hinse stated she considered it a common courtesy to drive co-workers to job sites and that her status with the school board was that of employee. She did not consider that it would be unusual for an employee to request some time off to attend to a matter concerning child care.

[21] Jacqueline McCormick testified she resides in Beaumont and works as a cleaner and a waitress. She responded to the Coloniale advertisement in the local paper seeking cleaners who would work – for \$10 an hour - between 9 a.m. and 3 p.m.. When interviewed by Dionne, she was informed that her services would be provided to Coloniale as a self-employed individual. As part of initial training – which she considered mandatory – Dionne demonstrated the best method to clean a bathroom. The workers gathered at Dionne’s residence prior to 9 a.m. when teams were assigned to jobs and supplies – and clipboards with attached sheets – were distributed. McCormick did not have small children so was able to work later than 3 p.m. in the afternoon and could help out other teams when necessary. She stated that despite her objections about cleaning a particular house, Dionne insisted she attend there and perform the work. Complaints by clients were handled by Dionne who checked on the quality of work and resolved the issue. McCormick stated she understood Dionne had deducted an amount from the cheque of a co-worker – Holstein – because of an unsatisfactory cleaning job at a residence. McCormick did not hire an assistant nor had she arranged for a substitute and was paid an hourly rate that was later increased. While providing her services, she did not submit invoices to Coloniale prior to receiving payment. Until the CRA audit, all supplies were provided by Coloniale and distributed by Dionne. McCormick drove her vehicle about 50 km per week for work purposes and received the sum of \$20.00 per month towards fuel purchases. In her view, there was no opportunity to make a profit from providing her services and the only potential for loss was “wear and tear” on her

vehicle as she did not pay for any extra liability insurance. McCormick, who also worked at a restaurant in Beaumont, stated that as time went on she began to “feel like an employee” of Coloniale. She left Coloniale in November, 2007, but later provided Dionne with backdated invoices, as requested. McCormick stated she did not receive her last cheque – for work done in October – until December 27 and had complained to the appropriate provincial government department. She identified a Questionnaire – Exhibit R-7 – that she completed and signed on April 16, 2008. She did not have a GST number during the relevant periods.

[22] McCormick was cross-examined by the agent for the Appellant. McCormick stated she worked at a bar from 5:30 p.m. onwards and so did not work for Coloniale past 4 p.m. but was always finished before then. She worked as a cleaner 3 days a week for Coloniale and did not have any other cleaning jobs. McCormick stated she wanted to work with Hinse whom she considered to be “a strong worker” but was refused by Dionne who preferred to pair an experienced cleaner with one not as capable or experienced. McCormick and other workers followed a checklist and Dionne – on occasion – attended a work site. When she was a member of a team, McCormick assumed responsibility to perform the final check of the premises. Sometimes, the householder wanted additional services performed and if that required extra time, it was noted on the invoice and she and her team member were paid accordingly. McCormick stated she filed her 2006 and 2007 income tax returns as a self-employed person and does not know if any expenses were deducted since her husband prepared the returns. She did not have any in-home office. She worked cleaning houses in Edmonton on Mondays and, although she never refused such assignments, felt she could have done so without any negative consequence except – perhaps – incurring the displeasure of Dionne. She had refused to work cleaning a certain home and Dionne had accepted that. McCormick acknowledged that at some point in 2007, she cleaned two other houses on her own. McCormick identified her signature on a document – Exhibit A-2 – which Dionne wanted her to sign as an acknowledgement that she had been providing her services to Coloniale as a subcontractor. The document was signed in October, 2007, although it was dated November 1, 2006. McCormick stated she was not aware that her last cheque from Coloniale may have been withheld because Dionne was waiting for an invoice covering that final period. McCormick agreed she had never questioned Dionne about the lack of deductions from her cheque.

[23] Kimberley Chiasson testified she responded to the Coloniale advertisement in the Beaumont paper seeking cleaning staff at the hourly rate of \$11 or \$12 per hour. During the first telephone conversation with Dionne, she was told to call back in a week and when she did so was instructed to be at the garage at Dionne’s residence

before 9 a.m.. Chiasson told Dionne she was available to work on Monday, Wednesday and Friday of each week except if her children were not in school and also that she was not available to work during the summer school holidays. Dionne's children and those of most of the other Coloniale cleaners attended the same school in Beaumont. During subsequent meetings – starting at 8:45 a.m. – Dionne handed out supplies and clipboards with invoices and a sheet indicating the sequence of jobs and the composition of the cleaning teams. Chiasson stated she refused to clean one residence due to exceptional circumstances but otherwise considered she had to comply with Dionne's assignments. As for the composition of a cleaning team, Chiasson stated she did not choose her co-workers but once requested Dionne to assign a particularly experienced person to work with her cleaning a specific house. Chiasson recalled an incident where a client had been upset with the work performed and complained to Dionne who addressed the group concerning the matter but as far she knew there were no repercussions – financial or otherwise – resulting from that complaint. Chiasson was able to abide by the schedule established with Dionne at the outset and did not hire any replacement or assistant. She was paid an hourly rate which did not include travel to a job. At one point, her salary was subject to a general increase of 50 cents per hour for all workers. She did not submit an invoice prior to receiving payment and when she used her own vehicle during a short period, received an allowance of \$20. Chiasson stated she did not have any opportunity for profit nor was there any risk of loss from providing her cleaning services to Coloniale. Her last day of work was October 31, 2007 but she received a call from Dionne on November 3, requesting that she return. A few days later, Dionne asked Chiasson to sign a document in which she agreed that she had provided her services as an independent contractor and also was handed a sheet which listed the cheques paid to her by Coloniale. Chiasson stated she requested time to reflect on the matter and to consider the significance of signing the document. Dionne advised Chiasson that as the result of an audit by CRA, she needed that document to be signed. After the audit, Dionne informed workers they were required to purchase their own supplies. Chiasson stated that throughout the working relationship Dionne acted like an employer or “boss” with respect to all aspects of the services provided to Coloniale clients.

[24] In cross-examination, Chiasson stated that when she decided to try working for Coloniale, Dionne gave her instructions and sent her to a house with two other workers where it took them 5 hours to finish cleaning. Later, as a matter of course, there was a checklist provided and sometimes it included additional instructions. Chiasson stated that most Beaumont jobs were finished by 3 p.m. but those in Edmonton took longer. Although Chiasson did not refuse to take jobs in Edmonton, she preferred to work in Beaumont. Chiasson stated that for the first three days of

work, Dionne gave her instructions and demonstrated preferred methods according to Coloniale policy. The only time Dionne inspected her work was when they had worked together as a team which was considered normal since she checked the work of all co-workers when performing a particular job. It was understood that the client had to be satisfied with the quality of the work. There was no requirement to wear a uniform and workers could wear a tee shirt and sweat pants provided their appearance was neat and tidy. Chiasson used her personal cell phone and her vehicle usage was limited. She provided her accountant with a list of pay cheques received and was advised later by Brenda Woo (“Woo”) – an employee of CRA – to report her earnings as employment income on her 2007 income tax return. Chiasson stated she did not clean any houses on her own and the only other work-related activity was to exchange child care with a neighbour. Chiasson stated she did not question Dionne about the absence of deductions from her pay cheques and it was not a matter of particular significance since she only worked for Coloniale a total of 10 weeks prior to the school summer vacation and 8 weeks thereafter. Once – at work – she became ill and Dionne was called and paramedics arrived at the job location and administered oxygen. She was sent home and received full payment for the hours allotted to that job. She did not work again at that particular house.

[25] Brenda Woo testified she has been employed by CRA for 11 years and has worked as a CPP/EI Appeals Officer since 2005. She was assigned the Coloniale file and reviewed the material therein. Questionnaires were sent out to most of the affected parties and when additional workers were located, she telephoned them and posed questions that more or less conformed to those in the printed Questionnaires. All Coloniale workers for the relevant periods – except four – were contacted. Woo identified a Questionnaire – Exhibit R-8 – received from Morgan Lapointe who provided her services to Coloniale in 2006 and 2007. Woo prepared a Report On An Appeal – CPT110 – Exhibit R-9 – and attached a Schedule “A” thereto. A Questionnaire – Exhibit R-10 – was completed and returned – with attached payroll printouts – by Sarah Burns (“Burns”) who provided services to Coloniale in 2006. Woo identified her notes on two T2020 Forms – Exhibit R-11 and Exhibit R-12 – concerning her contact with Burns and Markiwsky, respectively. Markiwsky advised Woo that she and her husband operated a siding business but she also had worked cleaning houses for Coloniale and was paid \$12 per hour. She indicated she rode with other workers to job sites and did not supply any tools or equipment and did not incur any job-related expenses. The time spent cleaning a house was recorded on the sheets/invoices provided by Dionne each morning. Markiwsky declared her Coloniale income as forming part of business income for the 2006 and 2007 taxation years. Woo contacted Lisa Longmire (“Longmire”) and recorded details in her T2020, filed as Exhibit R-13. Longmire provided her services in 2007 and informed

Woo she was paid \$13.50 per hour, increased later to \$14. She had been informed by Dionne that her status was that of subcontractor and no deductions were made from any pay cheque. Longmire informed Woo that she provided her own kneepads but all other supplies and tools were distributed by Dionne. Longmire advised Woo that she did not bid on any jobs and performed them according to the locations and sequence assigned by Dionne. When she used her own vehicle to travel to jobs she received \$20 per month. Woo referred to the relevant T2020 – Exhibit R-14 - concerning Merridee Dykstra who provided cleaning services to Coloniale between June and October, 2007. She reported her income as business income for that taxation year in accordance with instructions from Dionne received at the outset concerning her working status. She did not participate in finding clients for Coloniale and provided no tools or supplies. Woo spoke with Susan McDade (“McDade”) and details of the telephone conversation were recorded on the T2020, Exhibit R-15. According to McDade, she considered that she had been an employee of Coloniale and a request for a ruling on her status was issued by Human Resources and Skills Development Canada (“HRSDC”) which determined she was an employee of Coloniale. It was this ruling which led to an audit by a CRA Trust Examiner which resulted in the assessments being issued to Coloniale in respect of named workers for 2006 and 2007. An additional request for a ruling had been issued with respect to Chiasson. Woo spoke with Holstein and recorded in the T2020 – Exhibit R-16 – that Holstein recalled that deductions for EI and CPP had been made from two pay cheques but that these amounts were later refunded, apparently after Dionne had obtained certain accounting advice. Woo recorded notes – Exhibit R-17 - of her conversation with Chiasson. By utilizing the CRA data base, Woo gathered information which permitted her to discover the following: the taxation year reported; the method of reporting income; whether expenses were claimed; other relevant details pertaining to a specific individual. In that framework, Woo testified as follows:

Name	Year(s)	Method of Reporting	Comments
Sarah Burns	2007	Business & employment income	
Kimberley Chiasson	2007	Business income	No expenses claimed
Merridee Dykstra	2007	Business income	Not known if expenses offset
Brenda Hinse	2006	Business income	Net income lower but no expense detail
	2007	Business income	\$4,000 expenses but no

			details
Amy Holstein	2007	T4 income	Source not known
Morgan Lapointe	2006	Line 101 Employment income	Maybe no T4s filed
	2007	Line 101 Employment income	Maybe no T4s filed
Lisa Longmire	2007	Business income	No expenses claimed
Louise Markiowsky	2007	Business income – two sources	No expenses claimed
Jacqueline McCormick	N/A		No returns filed
Susan McDade	2007	Employment income	Amount more than paid by Coloniale
Natasha Parsons	2006	Not known	
	2007	Not known	
Kayla Markiowsky	2006	Business income	No expenses claimed
	2007	Business income	No expenses claimed
Christine Begin	2006	Employment income	
	2007	Employment income	
Lisa Coltman	2007	Employment income	
Rachel Eck	N/A		No return filed for 2007
Jill Ellis	2006	Business income	No expenses claimed
	2007		No data
Kristina McLean	2006	Employment income	
	2007		No data
Amanda Ryan	2006	Employment income	Only \$416.07 from Coloniale
Laura Van Walleggem	2007	Business income	No expense statement

[26] Woo stated she analyzed all the information gathered with respect to the Coloniale matter and concluded Dionne had determined the work locations and sequence, the composition of teams and provided some training to some workers.

Woo considered the factors pertaining to control and included them in her CPT110 – Exhibit R-9 – under the category: Level of Control. With respect to provision of equipment, Woo concluded that with rare exceptions involving small items, all necessary tools, supplies and equipment were provided by Coloniale. Woo's assessment of the issue relating to the ability to hire assistants or to subcontract work to others was that it had not arisen nor had it been discussed – by Dionne – with the workers and that the workers believed their personal service was required. Dionne took care of locating replacements or additional workers, as required. With respect to economic issues involved in providing the cleaning services, Woo's opinion was that the workers were not required to expend their own capital and any additional expense for fuel was offset by the payments made by Coloniale. Woo noted that any extra employment-related expenses could have been claimed by completing a Form T2200 when filing returns of income. On the material before her and having regard to information gathered subsequently, Woo decided the clients were those of Coloniale and that this business entity was responsible – ultimately – for the quality of the work. Even if a worker refused to return to a cleaning job, Dionne either sent someone to repair the deficiency or did it herself. Woo concluded the workers had no degree of responsibility for investment and management and that Dionne – as sole shareholder of Coloniale - was responsible for the operation of the business. The facts before Woo led her to decide the workers had no opportunity for profit as Dionne set the hourly rate Coloniale was willing to pay and there was little room for negotiation. There was no real risk of loss as Coloniale paid WCB premiums and was responsible for loss or damage to the house or property of clients. Woo noted that only Markiwsky had any business experience which had been gained by operating a siding business with her husband. In Woo's opinion, the rest of the named workers were not providing services on their own account even though some reported earnings from Coloniale as business income. In her CPT110 – Exhibit R-9 - Woo recommended the Minister decide that the assessments issued in 2006 and 2007 to Coloniale for CPP contributions and EI premiums in respect of named workers be confirmed, with the exception of CPP contributions for Dionne for the period November 1, 2006 to September 30, 2007, because she had no contributory earnings and – therefore – the assessment should be reduced accordingly.

[27] Woo was cross-examined by the agent for Coloniale. Woo stated that when interviewing workers by telephone, she used the Questionnaire as a guide but posed other questions depending on the responses and the circumstances pertaining to the individual. She estimated that each interview took between 20 minutes and an hour to complete. Woo stated her printouts of information relating to the returns of income filed by Hinse in 2006 and 2007 did not support her comment during the telephone interview that deductions for EI/ CPP – at some point – had been made by Dionne.

[28] Dionne was permitted to testify in rebuttal. She stated that when informed by other workers that McCormick was offering her services – at a lower rate – to existing Coloniale clients, she confronted her and was advised that those clients were unhappy with Coloniale’s service. Dionne stated McCormick went to England and had advised that her husband would pick up the final cheque. However, Dionne received accounting advice that payment should be made only in response to an invoice. On McCormick’s return to Beaumont, Dionne issued a cheque for work done in late October or early November as payment of an invoice submitted by McCormick for that period. With respect to Hinse, Dionne stated the only time she inspected her work was when they were paired as a cleaning team. Although it would have been easier if workers had found their own replacements, none had done so even when requested. During a one-week vacation, Hinse agreed to assume responsibility for handling the usual morning routine including the assignment of workers to teams. She did not receive any extra pay. During the relevant periods, Coloniale was never out of pocket for any damages caused by workers.

[29] Ms. Rutwind, agent for Coloniale, submitted that the whole of the evidence supported the proposition that payments to workers were made to them in their capacity as independent contractors who provided cleaning services. Rutwind pointed to the lack of control and supervision and the ability of a worker to refuse a particular job or to decline work for various reasons including their own personal schedule. She submitted that the flexibility afforded by being able to choose working hours – and days – and the ability to call in at the last moment – or just not show up at Dionne’s garage – on a particular day, coupled with the opportunity to elect to devote time to higher-paying employment instead of cleaning, were indicia of an independent contractor and not that of an employee. Had no worker attended at Dionne’s garage at 8:50 a.m., she would not have been able to administer any reprimand or other discipline normally associated with an employer-employee relationship. The method of assembling each morning was an efficient method to operate the business and Dionne was able to match workers to jobs available that day. The Coloniale clients set certain quality standards and the majority of workers were able to meet those demands without receiving any training from Dionne. Rutwind conceded that except for Orlova, who cleaned the dental office, almost all the tools and supplies were provided by Coloniale. She acknowledged there was not much risk of loss particularly when those using their vehicles received those \$20 periodic contributions towards fuel purchases. However, some workers were able to negotiate a higher hourly wage. Rutwind submitted Dionne had made it clear during each initial interview with a potential worker, that their services would be provided as an independent contractor and that Coloniale would not be making any usual

source deductions from their payments. The workers provided their services within that framework and did not question their status nor did anyone complain about the absence of those deductions. Many workers filed income tax returns in accord with the status of subcontractor and reported income as either business income or self-employed income. Rutwind submitted the particular nature of the business and the specific circumstances relevant to the provision of the cleaning services together with the common intention of the parties was sufficient to demonstrate the decisions of the Minister were incorrect and that the appeals should be allowed.

[30] Counsel for the Respondent submitted the evidence had established that the workers provided their services pursuant to a contract of service. The tests and indicia flowing from established jurisprudence supported the decisions of the Minister, including the category of control. Counsel referred to the testimony of workers – and Dionne – which disclosed that the cleaners assembled at Dionne’s garage at a specific time each morning where they received instructions and assignments for that day. Workers were paired up and, on rare occasions, a team was composed of three cleaners. Although some workers were able to convince Dionne not to send them to a particular residence, for the most part workers did not have a choice either as to job location or the assignment of a co-worker to their team. The worker – Hinse – had requested a particular teammate but was refused. Counsel submitted that even an employee can stand his or her ground under exceptional circumstances if they honestly cannot deal with a certain individual or situation when required to perform a particular task. Apparently, the homeowner referred to several times by different witnesses was somewhat of a legend among the workers and none of them wanted to clean her house. The evidence supported the contention that if workers finished their jobs earlier than 3 p.m., that they felt obligated to assist others so they could complete their tasks. Once jobs were done, workers went to Dionne’s house where they returned tools and supplies and dropped off the clipboards and invoices, with the number of hours of work performed for each client written in the appropriate space. Counsel referred to the testimony of workers who were trained by Dionne with respect to certain preferred methods of cleaning certain potential problem areas in a house – kitchen and bathroom – and senior workers were assigned to a team with those who were newer or less-experienced. The senior member of the team performed the final inspection and Dionne retained the ability to visit any premises to view the quality of the work and did so when there had been a client complaint. Counsel pointed out that the tools, supplies and equipment were provided by Coloniale and the only items used by workers were minor such as kneepads. Workers already owned their own cell phones and motor vehicles prior to providing services to the payor. With respect to an opportunity for profit, counsel submitted there was none as all workers were paid based on an hourly rate. The only means by

which to increase revenue was to work more hours and there was no ability to negotiate a flat rate with Dionne with respect to individual houses. A faster worker was paired with one who was less experienced and both were paid an hourly rate, although some workers may have earned about 10% more per hour than others at certain times within the relevant periods. As for the risk of loss, counsel submitted that was minimal, in view of the reimbursement paid by Coloniale for gas used in private vehicles and the potential for any other loss was not quantified in the evidence adduced by the Appellant. The only worker with a capacity for operating a business on her own account was McCormick and that involved cleaning two houses towards the end of her working relationship with Dionne. Only one worker attempted to hire her own assistant but had been refused by Dionne and the rest of the workers had not contemplated that scenario. The workers were not required to submit invoices prior to receiving payment. Counsel referred to the absence of evidence that could support the contention any of the workers named in the assessments had been providing services within the context of their own business. None were GST registrants and they did not advertise their services nor carry on in a manner consistent with operating a business. Counsel submitted the overall thrust of the evidence by the workers was that they were under the control of Dionne who was the sole owner of Coloniale. Counsel conceded the circumstances pertaining to Orlova were different in that she went directly to the dental office and all supplies were provided by that premises. However, counsel submitted the evidence established that Orlova contacted Dionne in the event of any change to the cleaning schedule and that the dentist was an existing client of Coloniale and had not been solicited by Orlova. Rather, she had been hired to provide cleaning to that specific client. Counsel submitted the decisions of the Minister were correct and the assessments in each instance ought to be confirmed.

[31] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue – M.N.R.*, 2006 DTC 6323, *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.)*, [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2006] F.C.J. No. 1653, there was a 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 here. There was no evidence that any worker opposed that status prior to providing her services. However, the testimony established that there was merely acquiescence – or grudging acceptance - by most workers in the face of that unilateral declaration of status by Dionne at the initial interview or prior to starting work. There was no written contract between Coloniale and the workers except for the document – Exhibit A-2 – that McCormick and other workers signed after

September, 2007 which was backdated to November 1, 2006. The document was created by Dionne on the advice of Coloniale's accountant – at that time – in an effort to demonstrate to the CRA auditor that the payments made to workers were in their capacity as self-employed cleaners rather than as employees. There were various reasons for workers signing that document. McCormick did so in order to receive payment – in December, 2007 – for work done at the end of October or early November as Dionne had insisted that Coloniale receive an invoice for that period. Chiasson did not sign the purported subcontractor agreement/ratification pertaining to the purported working status. Others did so to conclude their relationship with Coloniale while some complied out of loyalty or respect for Dionne with whom they had a courteous and agreeable relationship. Even in those cases referred to earlier where the parties have clearly expressed a mutual intention that the worker will provide his or her services as an independent contractor, their subsequent conduct was examined to determine if it was substantially in accord with that desired status throughout the working relationship. In the within appeals, there was no coercion on the part of Dionne to force workers to accept the purported status of independent contractor, merely a matter-of-fact bold statement. Some workers were content with that categorization and filed their returns of income accordingly. However, mere acceptance of a declaration of status by a payor and the subsequent method of reporting earned income by the worker are not determinative indicia of self-employment as the jurisprudence is clear that the parties cannot determine their status as a matter of preference or convenience through choice.

[32] In the case of *Standing v. Canada (Minister of National Revenue – M.N.R.)(F.C.A.)*, [1992] F.C.J. No. 890 Stone, J.A. stated:

... There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the Wiebe Door test. ...

[33] 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. Canada (Minister of National Revenue - 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 and 48 of his judgment stated:

47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[34] 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:

[35] There is no doubt that the nature of the enterprise carried on by *Coloniale* afforded flexibility in terms of working hours and days of the week and afforded some workers the opportunity to spend school holidays with their children and others were permitted to schedule their provision of services to *Coloniale* to accommodate employment or other activity. The advertisements placed in the *Beaumont* paper indicated cleaners were sought who would work between 9 a.m. and 3 p.m. – even for only three days a week - between Monday and Friday. The evidence established there was some training afforded to certain people who were not experienced in cleaning houses. All cleaners were provided with a checklist that set forth the standard policy of *Coloniale* together with any special instructions issued by a particular client. The overall thrust of the evidence was that workers were not able to choose either the residences to be cleaned nor the person with whom they would be paired to form a team. There were exceptional circumstances where Dionne accepted an outright, adamant refusal by one or more workers to clean a certain house but there is no doubt on the evidence that the workers were instructed to assemble at Dionne's residence each morning at around 8:45 a.m. to be assigned work at specific locations. If a cleaning team finished early or was running late, all workers who testified were clear that they felt obligated to contact Dionne and to provide

assistance to another team or to request assistance as the circumstances dictated. Dionne did carry out rare inspections but reserved the right to do so, at all times, particularly if a team had a new worker or if there had been a client complaint. The cleaners did not deal directly with the client with respect to any matters pertaining to the business arrangement in place between said client and Coloniale.

Provision of equipment and/or helpers:

[36] The evidence is clear that for most or perhaps all of the period in question, the tools, equipment, supplies and materials needed to perform the work were provided by Coloniale. The only exception was the worker – Orlova – who used supplies provided by Coloniale’s client when she cleaned the dental office. At some point, upon receiving accounting advice as a result of the commencement of a CRA audit, Coloniale began charging workers some amount for those items but the evidence did not permit a finding when that practice began although it appears to have commenced about September, 2007 and the limit of the 2007 period at issue in the within appeals is September 30. A worker was expected to notify Dionne if she was unable to work on a certain day but some did not do so. In such case, Dionne either worked personally or found a replacement. The evidence disclosed that the only attempt by a worker to hire an assistant was rebuffed by Dionne.

Degree of financial risk and responsibility for investment and management:

[37] None of the workers had any investment pertaining to the provision of the cleaning services relevant to the within appeals. The majority of workers did not use their own vehicle to travel between jobs. The ones who did so were reimbursed an amount that appeared to be sufficient to cover the cost – or at least the increased cost – of fuel during the period of particularly high prices, especially for Alberta. Most of the houses cleaned by workers were within the Town of Beaumont and were within 3-5 kilometers of each other. The cleaning jobs in Edmonton required greater travel but a \$20 payment would have purchased about 15 litres of gasoline at that time which could enable someone to drive from 120 to 150 kilometers between work locations. The workers who used their vehicles to drive themselves or co-workers from Dionne’s residence to work locations - and back at the end of the workday - did so as a matter of choice and not pursuant to any direction from Dionne. Vehicles and cell phones used for work purposes had been purchased for personal use and there was no evidence before me that would permit any work-related proportion thereof to be quantified. It is probable that expenses – if proven – for two or three workers, at most – would be minimal in relation to earned income. With the exception of Hinse, who supervised Coloniale’s operations during Dionne’s one-week vacation, any

management function exercised by workers was solely in relation to ensuring that their particular cleaning team had performed all tasks satisfactorily prior to leaving a work site. Dionne paired less-experienced workers with those with more experience or ability but no worker was tasked with the responsibility to supervise members of other teams.

Opportunity for profit in the performance of tasks:

[38] The evidence established there was no opportunity for profit in the performance of the cleaning tasks by workers at any point during the periods at issue. Each was paid an hourly rate and any bonuses received by Coloniale during the holiday season were distributed to relevant workers by Dionne as a matter of courtesy and goodwill and she did not retain any gratuities for herself or Coloniale.

[39] The central issue to be decided is whether any of the workers named in the assessments had provided her services as a person in business on her own account. None of the workers were GST registrants and only two performed cleaning services apart from those assigned by Coloniale. The evidence pertaining to McCormick is not clear but any outside cleaning work was done either at or near the end of the relevant period in 2007 or perhaps after October when a confrontation with Dionne over that issue led to the termination of her working relationship. Any cleaning business carried on by Parsons was not done until May in 2008. None of the workers advertised their services during 2006 and 2007 nor did they exhibit any indicia of commerciality in relation to their function as cleaners of residences or other premises. Orlova did not assemble with the other workers at Dionne's house during weekday mornings but the dentist whose office she cleaned was a pre-existing client of Coloniale and the hours and days of the part-time work suited her as she was a student at that time. The evidence is clear that the cleaning business was entirely that of Coloniale. There were not two separate businesses functioning – one by Coloniale and another by each worker in providing the actual cleaning service to a client – within an overall mutually-advantageous framework. In the case of *Precision Gutters Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 771, the Federal Court of Appeal found that one business concerned the manufacture of the gutters and the other arose from the physical installation.

[40] I have concluded the workers named in the assessments provided their cleaning services pursuant to a contract of service and were employees of Coloniale. The decisions of the Minister issued in respect of each assessment are hereby confirmed.

[41] Both appeals are dismissed.

Signed at Sidney, British Columbia this **10th** day of March 2010.

“D.W. Rowe”

Rowe D.J.

CITATION: 2010 TCC 115

COURT FILE NOS.: 2008-3919(EI); 2008-3920(CPP)

STYLE OF CAUSE: COLONIALE MAID SERVICE LTD. AND
**THE MINISTER OF NATIONAL
REVENUE**

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: January 26, 27 and 28, 2010

AMENDED REASONS
FOR JUDGMENT BY: The Honourable D.W. Rowe, Deputy Judge

DATE OF **AMENDED**
JUDGMENT: March **10**, 2010

APPEARANCES:

Agent for the Appellant: Carole Rutwind

Counsel for the Respondent: Gregory Perlinski

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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