Docket: 2011-1623(EI)

BETWEEN:

LOUISE C. GRAHAM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on November 21, 2011 at Vancouver, British Columbia

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

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Kristian DeJong

JUDGMENT

The appeal is dismissed and the decision of the Minister of National Revenue dated February 23, 2011 is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia this 14th day of December 2011.

"D.W. Rowe"

Rowe D.J.

Citation: 2011 TCC 565
Date: 20111214
Docket: 2011-1623(EI)

BETWEEN:

LOUISE C. GRAHAM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe D.J.

[1] The Minister of National Revenue (the "Minister") issued decisions – both dated February 23, 2011 – confirming earlier rulings that Minou Mirette Lejeune ("Lejeune or worker") was engaged in both insurable and pensionable employment with Louise Graham ("Graham") and Brennen McLean ("McLean") during the period from September 15, 2008 to June 26, 2009, pursuant to the provisions of the *Employment Insurance Act* (the "*Act"*) and the *Canada Pension Plan* (the "*Plan*"), respectively.

[2] The appeal from that decision was filed in the name of Graham only and was intended as an appeal from both decisions. In the Notice of Appeal, at the top of the typed letter dated May 20, 2011, Graham referred to the Appeals Case Number and the Rulings Case Number. In the second line of the document, Graham stated:

> … I have spent some time reviewing the summary from the team leader, CPP/EI appeals and compared to the documentation available online from CRA regarding employee or self-employed … and have determined the following: …

[3] Graham then proceeded to address the usual indicia considered in these matters. The Appeals Case Number and the Rulings Case Number quoted by Graham are identical to those at the top of the decision letters issued by the Minister on February 23, 2011.

[4] The Registry did not assign a CPP appeals number to the Graham appeal since the body of her letter did not specifically indicate that the decision issued pursuant to the *Plan* was also in dispute.

[5] The Appellant and counsel for the Respondent agreed that the Notice of Appeal and the Reply to the Notice of Appeal ("Reply") filed in the within appeal could be utilized for the purposes of an appeal from the decision issued pursuant to the *Plan*. However, if this created procedural issues and required a new Notice of Appeal and Reply to be filed, they undertook that the result in the within appeal under the *Act* would be determinative of the pensionable employment issue.

[6] Graham testified she resides in North Vancouver, British Columbia and operates – with McLean – a seafood business. Graham referred to paragraph 6 of the Reply and agreed the following assumptions were correct:

> 6. In determining that the Worker was employed in insurable employment with the Appellant during the Period, the Minister relied on the following assumptions of fact:
>
> a) the Appellant hired the Worker to provide child care services to her two young children;
>
> b) the Appellant engaged the services of "Nannies on Call" ("Nannies"), to help find a qualified nanny for her children;
>
> c) the Appellant paid a one time fee to Nannies for matching up the Appellant with the Worker;
>
> d) the fee paid to Nannies was 10% of the Worker's annual gross salary;
>
> e) the Appellant and the Worker signed an agreement (the "Agreement") prepared by Nannies outlining the relationship;
>
> f) the original Agreement indicated the Worker's schedule as Monday Wednesday and Thursday from 2:00 p.m. to 6:00 pm;
>
> g) during the course of the employment, changes to the schedule were made to adjust to the Worker's availability;
>
> …
>
> i) the Appellant was not at home while the Worker performed her duties;

j) the Workers duties were to ensure the safety and well being of the children, pick up the children from school, prepare snacks, plan and provide crafts and activities and tidying up after the children and helping with their homework;

k) the Worker also took the children to their extra-curricular activities;

…

n) the Worker was required to perform her services personally;

o) the Worker was not free to conduct personal business during scheduled working hours;

p) the Worker was paid every two weeks by cheque;

q) the Worker's rate of pay was based on industry standards and her own level of experience as determined by Nannies and the Worker;

…

s) the Worker did not receive any bonuses, vacation pay, paid vacation or any other types of paid benefits;

t) the Worker provided her own vehicle and was reimbursed at the rate of $0.52 per kilometre;

u) the Worker was paid at the rate of $19.00 per hour;

…

w) pursuant to the Agreement, the Worker was paid her regular wage when the Appellant and her children went on vacation or if the Worker was not required to work as scheduled; and

x) the Appellant had the final word on all matters relating to the care of her children.

[7] With respect to the assumption in paragraph 6(h) that the worker performed her duties at the Appellant's residence, Graham stated Lejeune's duties included picking the children up at school and driving them to and from extracurricular activities as noted on a calendar in the kitchen. Concerning the assumption in paragraph 6(l), Graham stated she did not determine Lejeune's duties nor did she issue instructions on how they were to be performed. Graham stated that contrary to

the assumption of the Minister – in paragraph 6(m) – Lejeune did not require permission for special outings which required driving to a location, provided the activity was scheduled within school hours. Graham stated the Minister was incorrect in assuming invoices had been submitted by Lejeune during the relevant period – paragraph 6(r) – as none were ever delivered nor were they required since the Short Term Family/Nanny Agreement – Exhibit A-1 – set forth the hours to be worked at the rate of $19 per hour. On occasion, Lejeune brought her own art supplies or other items to the Graham/McLean residence if she wanted the children to participate in a particular activity. Graham stated that prior to signing the agreement – dated September 15, 2008 – she had interviewed Lejeune and that the agreement had been prepared by Nannies on Call ("NOC"), a self-described boutique nanny agency. The agreement was signed by Graham, McLean and Lejeune. Lejeune agreed to provide her services for 12 hours a week at $19 per hour and was to be paid for scheduled days – even when not needed – including any vacation time taken by Graham and McLean. Lejeune was required to use her own vehicle to drive the children to and from school and other activities and was entitled to reimbursement at 52 cents per kilometer, inclusive of any repairs and maintenance costs. Graham and McLean agreed to reimburse Lejeune for all authorized expenses – approved in advance – incurred while caring for the children. The term of the agreement commenced September 15, 2008 and expired on June 26, 2009, the anticipated end of the school year. Although the school term ended earlier, Lejeune was paid for the hours on the scheduled days even though her services were not required nor provided. The agreement – on page 2 – stated, "The Nanny will be paid as an independent contractor and a T4 slip will not be issued at tax time. The Nanny (Lejeune) is responsible for her own taxes." Graham stated she knew Lejeune was providing services to another family in the mornings of those days scheduled in their agreement. Graham stated she had hired a full-time nanny when the children were younger and had remitted Employment Insurance (EI) premiums and Canada Pension Plan (CPP) contributions together with income tax withheld at source. Earlier, on two occasions, Graham had utilized the services of NOC to locate suitable individuals to provide nanny services from 8:30 a.m. to 5:30 p.m., 5 days a week. She stated she had relied on the advice from personnel at NOC that the status of Lejeune would be that of independent contractor. She assumed that to be correct since there had been information provided that Lejeune had other clients. Lejeune recorded the amount of kilometers traveled in the course of her duties and provided the total to Graham every two weeks and was reimbursed at the agreed rate. Graham stated Lejeune did not request that any deductions be taken from her pay and saw no need to do so since their agreement clearly stated Lejeune was an independent contractor and was carrying on business as a nanny/caregiver by providing her services to other clients. Graham referred to a bundle of e-mails - Exhibit A-2 –

between her and Lisa Bruce at NOC during September, 2008 prior to signing the contract (Exhibit A-1). In the course of those exchanges, several matters were discussed including kilometer rates, hourly pay, scheduling, and the need for Lejeune to be paid for scheduled hours even if not needed.

[8] In cross-examination by counsel for the Respondent, Graham stated it was important that she retain the services of a competent nanny, who had a valid driver's license and a vehicle, to care for two children – aged 8 and 5 – and pick them up at school, bring them home or take them to other activities. Initially, Graham wanted to obtain nanny services 5 days a week between 2:00 p.m. and 6:00 p.m., with some room for adjustment when required but accepted Lejeune's offer to work those hours on Monday, Wednesday and Thursday. Graham stated she did not discuss the matter of working status with Lejeune since the agreement stated she would be an independent contractor. Discussions between them held at the NOC office did not address the matter of an option whether Lejeune preferred to provide her services as an employee. Lejeune owned a Ford SUV which she used in the course of her work. Food for the children and toys were in the Graham/McLean residence and if Lejeune – who was very artistic – brought drawing materials to the house, she was not reimbursed. Despite the tender age of the children, they had homework assigned and Lejeune encouraged them to do the work and often helped them but that was not part of her agreed duties. Lejeune drove the children to soccer games and karate classes but could exercise her discretion not to take them if required by some circumstance. Graham stated she was not present so did not issue instructions on a daily basis but spoke with Lejeune at the end of the working day. Graham stated she did not recall any instance when Lejeune had called her at work to seek permission to cancel a scheduled activity for the children. Lejeune was not required to prepare dinner for the children but Graham had suggested they be fed right after school to avoid disruptive behaviour during the ride home. There was no specific instructions issued to Lejeune about certain food or treats but the point had been made during the interview at NOC that it was expected the children would be given healthy food.

[9] The Appellant closed her case.

[10] Minou Lejeune was called to the stand by counsel for the Respondent. She testified that she had been employed as a support worker at a pre-school facility but undertook research which led her to contact NOC. She submitted her resumé and was interviewed by an employee of that agency and placed on a roster of qualified child care providers. Lejeune stated that a Placement Manager at NOC listed prospective clients on a website with details of the days and hours of service required. Lejeune gave permission to NOC to have her resumé package forwarded to Graham and met Graham and McLean at NOC where they discussed their needs and provided

information concerning the children and their hobbies, interests and activities. Following that meeting, Lejeune informed NOC that she would be willing to work for Graham and McLean. The agency prepared the contract – Exhibit A-1 – and forwarded it to Lejeune who signed it as did Graham and McLean. At the beginning of the term of the contract, Lejeune worked as a respite worker in the mornings on the days she was scheduled to care for the Graham children and was also employed on other days at a Foster Home and as a part-time clerk at a retail store. In 2010, she worked as a nanny for another family, from 8:00 a.m. to 2:30 p.m., 4 or 5 days a week – where she cared for an 8-month old child. She charged $19 an hour for her services which was the rate the NOC representative had suggested was appropriate based on Lejeune's experience and qualifications. That rate was accepted by Graham and McLean. Lejeune stated the agency representative explained that a prospective nanny had the option to work either as an employee or as an independent contractor. She was informed that Graham wanted her to provide her nanny services as an independent contractor and she agreed to do so, although she did not appreciate the distinction. Lejeune stated she is currently employed as a nanny and had to declare bankruptcy due to financial problems associated with a leaky condominium. Lejeune stated she was paid by Graham every two weeks for each day scheduled in the contract but was not paid if she was ill or otherwise unable to attend, in which event, she notified NOC. The work was performed at the Graham/McLean residence or at the site of extracurricular activities. In accordance with her agreement, Lejeune was responsible for the safety and well-being of the children, provided them snacks during the drive home from school and helped them with homework. Sometimes, she was met at an activity site by Graham or McLean. The children's activities were listed on a calendar in the kitchen and Lejeune utilized the services of Google map service to obtain directions. Lejeune stated she did not use her discretion to cancel a child's activity and if she was concerned about some matter, telephoned either Graham or McLean for instructions. She recalled one occasion when their son wanted to stay home rather than attend a scheduled activity but was instructed by his parents to take him there. The snacks for the ride home from school were prepared by Lejeune using food in the residence and consisted of fruit, vegetables, grains, in accordance with instructions from Graham to abstain from providing candy and cookies. Lejeune stated she spoke with Graham every day before Graham left for work and they left notes for each other on occasion. While working as a nanny for another family – during the relevant period – Lejeune had been provided with business cards by NOC but her name was not on them. Lejeune stated she did not operate under any business or trade name and did not charge Goods and Services Tax (GST) nor did she have a business license. She did not have formal Early Childhood Education qualifications.

[11] The Appellant did not cross-examine.

[12] The Respondent closed his case.

[13] The Appellant submitted that the written contract stated clearly that Lejeune would provide her nanny services as an independent contractor. The services of NOC were utilized by both of them to work out details of their arrangement, including the hourly rate. The advice received from NOC was that the working relationship could accommodate the status of independent contractor and that was acceptable to all parties. This status seemed reasonable considering Lejeune had other sources of income as a care provider for other persons or entities during the relevant period and she was in control of her various work schedules. Lejeune provided her own vehicle to drive the children to and from school and other activities and – on occasion – provided her own art supplies for an activity. The Appellant submitted there was no control exercised over the duties performed by Lejeune who was expected to adhere to her contractual commitments.

[14] Counsel for the Respondent submitted that the circumstances of the working relationship point to an employer-employee relationship. An analysis, applying the facts to the indicia as required by the relevant jurisprudence, made it apparent the worker was not an independent contractor carrying on business on her own account. Although Graham and McLean and Lejeune accepted – in good faith – the advice of NOC and signed the agreement wherein the status of the worker was declared to be that of an independent contractor, the facts did not support that categorization and the Minister cannot be bound by that agreement.

[15] In recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *Royal Winnipeg Ballet v. M.N.R. (F.C.A.)*, 2006 FCA 87 (CanLII) ("*Royal Winnipeg Ballet"*), *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*, 2006 FCA 350 (CanLII) ("*City Water*"), 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. In the within appeal, despite the clear wording in the written agreement, the worker's position is that she relied on the advice of the agency and did not fully appreciate the distinction and did not operate a business but provided her services throughout in the context of an employee.

[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. Canada (Minister of National Revenue - M.N.R.)*, [1986] 3 F.C. 553 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.

[17] 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

[18] The nature of the services provided by the worker were such that – as a nanny – she was required to use her own skill, training, experience and judgment to care for the children in the absence of her parents. That is the whole point of retaining the services of a qualified nanny. As stated in the agreement, the first priority of the worker was to ensure the health, safety and well-being of the children. She was also required to “tidy up after the children and herself in order to maintain a tidy house.” Lejeune was expected to pick up the children after school and to return them home or to take them to another activity, wait for them, and bring them back home to supervise homework or to engage them in some activity. There was a dispute on the evidence concerning the ability of the worker to cancel a scheduled activity on her

own but it appears that situation – if it arose – was rare and not a major concern in this analysis.

Provision of equipment and/or helpers

[19] A significant tool was the Ford SUV owned by the worker. It was required to perform the services provided. Lejeune chose to use her own drawing materials and art supplies from time to time but was not required to do so and ingredients for snacks and lunches were available in the Graham/McLean residence. It was apparent the nanny service had to be provided personally by Lejeune.

Degree of financial risk and responsibility for investment and management

[20] The worker did not incur any financial risk as the agreement required her to be paid for the time scheduled whether or not she worked any or all of those hours or days, if her services were not needed. She was paid 52 cents a kilometer for driving and even taking into account the average price of gasoline during the relevant period and the probable consumption of an older model Ford SUV, that rate was sufficient to reimburse Lejeune for the cost of fuel and related expenses attributable to the time worked for Graham and McLean. Provided there was advance approval for a particular expenditure pertaining to the children's activities, the worker was reimbursed. Lejeune was not required to invest any sum to carry out her work nor was there any other worker to manage in the course of carrying out her role as a nanny.

Opportunity for profit in the performance of tasks

[21] The worker was paid $19 per hour for the scheduled hours. She could not earn any more than that and the agreement had an expiry date of June 26, 2009. Although her services were terminated somewhat earlier, she was paid for the hours she would have worked up to that date.

[22] 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. ...

[23] In the within appeal, that principle is not modified by the intervention of a third party – NOC – acting as a broker or intermediary that purported – either explicitly or implicitly – to characterize the status of Lejeune within the working relationship.

[24] In *City Water*, *supra,* Malone, J.A. set out the factual background in paragraphs 5 to 12, inclusive:

> [5] City Water is in the business of selling and renting water purification units (the Units) to businesses and residences. The Canada Revenue Agency issued a notice of assessment to City Water in respect of its 2002 and 2003 taxation years, assessing on the basis that certain of its workers were engaged in insurable and pensionable employment.
>
> [6] City Water provides its customers with two separate services: the initial installation of Units and their ongoing service and maintenance. This appeal relates only to workers who service and maintain the Units (Service Workers). Service Workers were engaged under oral contracts wherein the terms of their relationship was outlined by City Water management and agreed to by each worker before work was commenced. City Water made it clear at the outset that the Service Workers would be engaged in a self-employed contract position.
>
> [7] Service Workers performed both regular and emergency service calls to City Water customers. For regular service calls, they were provided with a list of clients who would require such service within the upcoming 30 days and were then free to schedule those calls at any time during that period. They had flexibility to plan their routes, to perform the service at their own convenience, and were not required to fulfill a fixed number of assignments in any given day or week. With respect to emergency calls, these calls were required to be done as soon as possible. Service Workers who performed emergency services were paid extra.
>
> [8] No representative of City Water came to the customer's premises to supervise or inspect the services performed by the Service Workers.
>
> [9] As agreed at the outset of their engagement, there was no vacation, overtime or sick pay, no benefits and no deductions at source. Service Workers were required to provide invoices and justify work done, hours expended and expenses claimed and were paid by the hour at various rates. They were not required to attend at the offices of City Water on a daily basis. Monthly meetings were held in Toronto in order to inform Service Workers about new products, to provide payment for work done and to allocate assignments for the upcoming month. Attendance was not mandatory.
>
> [10] Service Workers were required to have only a screwdriver and a wrench. City Water provided them with other necessities such as a pail, sponge, towels,

> water testing pills, gloves, sanitizers, glass cleaner, replacement filters, a plastic filter wrench, and a meter to test the water for its metal content.
>
> [11] Service Workers also provided their own vehicle or bicycle if working in the downtown Toronto core. Many drove extensive distances in the Greater Toronto Area and elsewhere to provide services. They incurred the cost of insurance and maintenance of their vehicles or bicycles and were reimbursed for certain expenses, such as the cost of gasoline and parking, and received a monthly car allowance for driving in excess of 100 kilometres.
>
> [12] In the City of Toronto, the workers were given a $200.00 monthly incentive bonus to avoid recall work, which was reduced by $50.00 for each recall until the $200.00 was exhausted.

[25] In reviewing the evidence, Malone, J.A. found the control test was of little weight due to the simplicity of the task carried out by the workers and stated the control aspect of the analysis pointed to a contract for services. Although City Water provided almost all the necessary equipment, the overwhelming majority of workers provided their own vehicles which were essential to the job and represented a major investment. Justice Malone held this favoured a finding that the service workers were independent contractors. There was no opportunity for profit because the workers were paid by the hour and the chance of profit was completely attributable to City Water. Even though the workers could have qualified – through hard work – for a bonus of $200.00, that was not considered as an opportunity to gain profit by someone who was operating a business. In terms of exposure to financial risk, Justice Malone found there was none since the workers were reimbursed for various expenses and paid a monthly car allowance. They did not run any risk of non-payment since they were remunerated for their work even if the customer did not pay the invoice submitted by City Water.

[26] It was necessary for Malone, J.A. to deal with the issue of intent of the parties. Commencing at paragraph 27 and continuing through paragraph 31, he stated:

> [27] In balancing the above factors, the result of the inquiry is not obvious. Therefore, it is necessary to determine what weight should be given to the intention of City Water and the Service Workers at the time of their initial engagement.
>
> [28] If it can be established that the terms of the contract, considered in the appropriate factual context, reflect the legal relationship that the parties intended, then their stated intention cannot be disregarded (see *Royal Winnipeg Ballet v. Canada (Minister of National Revenue*, 2006 FCA 87 (CanLII), 2006 FCA 87 at paragraph 61). *Royal Winnipeg* was not decided at the time the Judge rendered his decision.

[29] *Royal Winnipeg* is essentially a re-codification of the law as stated by this Court in *Wolf, supra* at paragraph 15. In that case, the issue before this Court was whether Mr. Wolf was an employee or an independent contractor. Concurring with Desjardins J.A. in the end result, but on the basis of a different analysis, Noël J.A. stated at paragraphs 122 to 124:

> … But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.
> …
> My assessment of the total relationship of the parties yields no clear result which is why I believe regard must be had to how the parties viewed their relationship.
> …
> It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding.

[30] Thus, the parties' intention will only be given weight if the contract properly reflects the legal relationship between the parties (see *Royal Winnipeg* at paragraph 81). In this case, there is no written agreement that purports to characterize the legal relationship between the Service Workers and City Water; however, there is no dispute between the parties as to what they believe that relationship to be. The evidence is that both parties believed that the workers were self-employed and each acted accordingly.

[31] In my analysis, since the relevant factors yield no clear result, greater emphasis should have been placed on the parties' intention by the Judge in this case. The Judge was required to consider the factors in light of the uncontradicted evidence, and to ask himself whether, on balance, the facts were consistent with the conclusion that the workers were persons in 'business on their own account' (see *Sagaz supra* at paragraph 3), or were more consistent with the conclusion that the workers were employees. In failing to do this, he made a palpable and overriding error on a question of mixed law and fact. Had he conducted that analysis, in my view, he could only have concluded that City Water was not the employer of the Service Workers.

[27] In the case of *Gati v. Canada (Minister of National Revenue – M.N.R.)*, [2002] T.C.J. No. 166., O'Connor J. heard the appeal involving a child care worker who was recommended by an employment agency and had training in child care. The worker

had her own car and looked after two young children in the payors' home. At the commencement of the engagement, the worker signed an agreement calling for a flat-rate payment of $500 bi-weekly without any deductions. Most of the expenses were paid for by the parents but occasionally the worker paid for lunches and other expenses. At some point early in the working relationship, the parties in that case discussed whether deductions for EI, CPP and income tax should be made and after deciding they should, later changed their minds and reverted to their original agreement. The child care services had to be provided personally by the worker but she was not under strict instructions as to the activities of the children. At paragraphs 18 to 21, inclusive, of his judgment, Justice O'Connor stated:

> **18** Although the degree of control as to the daily activities were not dictated by the children's parents, looking after young children by an experienced and educated caretaker or nanny certainly does not require that a daily routine be laid out by the Gatis. The Worker knew what her duties were, namely, caring for the children both in the house and outdoors. The principal amount of the duties were carried out in the home.
>
> **19** As to tools, the main tools were the home itself and all of its contents which were used to provide for the feeding, caretaking, sleeping, entertainment and supervision of the children. The tools supplied by the Worker were minimal. Admittedly she took her car to work and used that from time to time in taking the children out but as mentioned the main tools by far were the house and it's contents.
>
> **20** As to profit and loss, the Worker had no chance for profit nor risk of loss. She cared for the children exclusively subject to the fact that she was also caring for her own daughter. More particularly she was not running a babysitting service where people would drop their children off at the Worker's house who in such a situation would have the opportunity to take other children (which she did not in this position) and thus have a chance of profit.
>
> **21** This leads to the integration test and the question there is usually "whose business is it?" With respect to looking after children a direct comparison with a business is not appropriate. However the legal caregivers for the children are the parents and the Worker was performing that caregiving task in the place of and on behalf of the parents. Thus, in my opinion, the services of the caregiver was an integral part of the parents' duties.

[28] *Mohr v. Canada (Minister of National Revenue – M.N.R.)*, [1997] T.C.J. No. 1252 was a case with similar facts. At paragraphs 11 to 16, inclusive, Mogan J. commented as follows:

11 On the question of control, that test favours employment over independent contractor because the hours were laid down by the Appellant, the service was to be performed to the convenience of the Appellant and her husband, namely, from 7:30 a.m. to 5:30 p.m. The duties were assigned by the Appellant and had to be performed to her satisfaction both with regard to the physical care such as providing meals, cleaning the children, doing the laundry, and the emotional care of looking after the children in an atmosphere where they would feel secure, comforted and protected. There is a certain responsibility in control because in 1995, the oldest child would have been five years old and able to complain to his mother. Both Colin and Spencer could have complained to their parents by 1995 and 1996 if they were not happy or if Shelley had been treating them in an irresponsible manner. Therefore, although there was no direct hands-on supervision through the 10 hours of the day, there was a control mechanism in terms of whether the children were being cared for in a responsible, secure, safe and happy environment. On the test of control, I believe that test favours employment over Shelley being an independent contractor.

12 With regard to the ownership of the tools, my first reaction is that tools were never thought of in connection with services like this. Tools in the workplace usually relate to either hand tools, like the carpenter's hammer and saw, or a machinist's tools, like a lathe and a drill press. One does not think of tools in connection with childcare but, if the word is to be given a broader meaning, that is the properties that would permit a service to be rendered, those personal properties would be dishes and cutlery to feed the children, a stove to warm their food, toys with which they played, diapers for infant children because they are necessary items for the care of a very small child, a van to transport the children if they are to be taken on outings of any kind. Since all of these "tools" were owned by and provided by the Appellant, that test favours employment.

13 The third test is the chance of profit and risk of loss. In this regard, the Appellant argues that Shelley's opportunity either to take on additional children like Amanda, Ben and Heidi and Nicholas, or decline, is a chance for her to enhance her earnings or not. There is no question that she had that discretion with the permission of the Appellant, but I do not think that is the relevant fact in applying the test of chance of profit or risk of loss. I see no risk of loss at all because as long as the assigned duties were performed, the compensation of $50 per day would be paid. Although it was not fixed like an hourly rate, it was just as secure as any hourly wage or a daily or weekly salary that might arise in other service situations. I see the chance of profit and risk of loss as being in favour of employment because there was an assured compensation and no risk of loss. Whether Shelley was inclined to take on the services of looking after other children was up to her and the parents of the other children. It has no bearing, in my view, on the fixed permanent relationship that was established between Shelley and the Appellant.

> **14** The integration test as I indicated to the parties in argument, is not relevant in this case. Shelley was primarily the caregiver on behalf of the Appellant.
>
> **15** It is interesting how this case came up because, in my view, and I think this is clear from the evidence of the Appellant, neither she nor Shelley ever thought of this service as being insurable employment. The thought simply had not crossed their minds and would not have crossed their minds but for the fact that Shelley went to the Canada Employment Centre to find out about certain programs that might be available to her. Her inquiry caused some officer of that Centre to ask the logical question "Are you now engaged in insurable employment and what are you doing?" Once Shelley tells her story, it triggers a whole series of inquiries as to whether the service Shelley provides to the Appellant is insurable employment and, after a long process, it brings the parties to this Court.
>
> **16** I find on the law that Shelley was engaged in insurable employment. The jurisprudence states that that is so. I might say, however, that I cannot imagine that when the legislation was originally introduced in the late 1940s or revised as it has been from time to time, that up until recently anyone would have thought of the casual work of a childcare person in the home as being insurable employment, giving rise to rights to unemployment insurance. We live in a society where laws and regulations are becoming overly intrusive in the lives of cititzens. This is an area where one person who wants to expand her skills inquires about some form of assistance and triggers a whole series of ramifications, which suddenly put Shelley and the Appellant not only into an employer/employee relationship, but into one which gives rise to the need to withhold and remit unemployment insurance premiums and Canada Pension Plan contributions. It is an indication that we are an over-regulated society, but Judges do not make laws. They only interpret them and apply them to certain fact situations: what I am obliged to do in this case. Reluctantly, I hold that Shelley was engaged in insurable employment in 1995, 1996 and 1997 and the appeals are dismissed.

[29] In my assessment of the circumstances inherent in the working relationship, the relevant factors favour a finding that the parties were engaged in an employer-employee relationship. Although the agreement purported to assign the characterization of independent contractor to Lejeune – the service provider – the parties did not address the consequence of that decision and relied on advice provided by the agency. One would turn to the matter of intent where the legal tests – assigned their proper role – did not provide a clear result in the context of the total relationship. Even if this had been a close case, there was no true meeting of the minds with respect to the matter of status and the subsequent conduct of the parties, although consistent with the terms of their agreement, was inconsistent with that of an individual providing a service to others within the context of operating a business on his or her own account. The fact that Lejeune had other employment as a care

giver for adults and as a nanny and worked some shifts as a retail clerk is not equivalent to operating a business. Lejeune was a nanny hired through the auspices of an agency to perform a specified duty in accordance with her own skill and training, for an hourly rate in accordance with an inflexible schedule during the course of a fixed term. On two occasions previously, using the agency – NOC – Graham had obtained the services of a nanny on the basis of an employer-employee relationship. Lejeune had always been an employee when working as a child care worker, care giver or nanny. There was nothing in the background of either party nor any modification in the pattern of services to be provided or pertaining to remuneration or any other significant factor that should have caused them to consider that the prospective working status of Lejeune pursuant to their agreement was capable of constituting other than an employer-employee relationship. In good faith and to meet mutual needs, they accepted the advice of NOC. The line in the Paul Simon song *I Know What I Know* comes to mind: "Who am I to blow against the wind?"

[30] For the foregoing reasons, I find the decision of the Minister concerning the insurability of Lejeune's employment was correct and it is hereby confirmed.

[31] The within appeal is dismissed and as indicated at the outset, the parties undertook to be bound by this result with respect to the decision issued pursuant to the *Plan.*

Signed at Sidney, British Columbia this 14th day of December 2011.

"D.W. Rowe"

Rowe D.J.

CITATION:	2011 TCC 565
COURT FILE NO.:	2011-1623(EI)
STYLE OF CAUSE:	LOUISE C. GRAHAM AND M.N.R.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 21, 2011
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	December 14, 2011

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Kristian DeJong

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada