Dockets: 2011-2090(EI)
2011-2094(CPP)

BETWEEN:

3142774 NOVA SCOTIA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of
3142774 Nova Scotia Limited, 2012-3162(EI), 2012-3164(CPP),
2012-3165(EI), 2012-3166(CPP), 2012-3167(EI), 2012-3169(CPP), 2012-3170(EI), 2012-3171(CPP), 2012-3173(EI) and 2012-3174(CPP)
on April 18 and 19, 2013, at Halifax, Nova Scotia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant: Daniel F. Wallace
Counsel for the Respondent: Tokunbo C. Omisade

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* (the "*Act*") and section 28 of the *Canada Pension Plan* (the "*Plan*") from the decisions of the Minister of National Revenue on the appeals made to her under section 91 of the *Act* and section 27 of the *Plan* are allowed, without costs, on the basis that the worker, Shawna Bobyk, was not engaged in insurable or pensionable employment with the Appellant within the meaning of paragraph 5(1)(*a*) of the *Act*

and paragraph 6(1)(*a*) of the *Plan* during the period from September 1, 2009 to September 29, 2010.

Signed at Ottawa, Canada, this 26th day of April 2013.

"F.J. Pizzitelli"

Pizzitelli J.

Dockets: 2012-3162(EI)
2012-3164(CPP)

BETWEEN:

3142774 NOVA SCOTIA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of *3142774 Nova Scotia Limited,* 2011-2090(EI), 2011-2094(CPP), 2012-3165(EI), 2012-3166(CPP), 2012-3167(EI), 2012-3169(CPP), 2012-3170(EI), 2012-3171(CPP), 2012-3173(EI) and 2012-3174(CPP) on April 18 and 19, 2013, at Halifax, Nova Scotia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant: Daniel F. Wallace
Counsel for the Respondent: Tokunbo C. Omisade

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* (the "*Act*") and section 28 of the *Canada Pension Plan* (the "*Plan*") from the decisions of the Minister of National Revenue on the appeals made to her under section 91 of the *Act* and section 27 of the *Plan* are allowed, without costs, on the basis that the worker, John Gulbrandson, was not engaged in insurable or pensionable employment with the Appellant within the meaning of paragraph 5(1)(*a*) of the *Act*

and paragraph 6(1)(*a*) of the *Plan* during the period from December 1, 2009 to December 31, 2010.

Signed at Ottawa, Canada, this 26th day of April 2013.

"F.J. Pizzitelli"

Pizzitelli J.

Dockets: 2012-3165(EI)
2012-3166(CPP)

BETWEEN:

3142774 NOVA SCOTIA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of *3142774 Nova Scotia Limited,* 2011-2090(EI), 2011-2094(CPP), 2012-3162(EI), 2012-3164(CPP), 2012-3167(EI), 2012-3169(CPP), 2012-3170(EI), 2012-3171(CPP), 2012-3173(EI) and 2012-3174(CPP) on April 18 and 19, 2013, at Halifax, Nova Scotia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Daniel F. Wallace
Counsel for the Respondent:	Tokunbo C. Omisade

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* (the "*Act*") and section 28 of the *Canada Pension Plan* (the "*Plan*") from the decisions of the Minister of National Revenue on the appeals made to her under section 91 of the *Act* and section 27 of the *Plan* are allowed, without costs, on the basis that the worker, Stephanie Sachetti, was not engaged in insurable or pensionable employment with the Appellant within the meaning of paragraph 5(1)(*a*)

of the *Act* and paragraph 6(1)(*a*) of the *Plan* during the period from January 1, 2010 to December 31, 2010.

Signed at Ottawa, Canada, this 26th day of April 2013.

"F.J. Pizzitelli"

Pizzitelli J.

Dockets: 2012-3167(EI)
2012-3169(CPP)

BETWEEN:

3142774 NOVA SCOTIA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of
3142774 Nova Scotia Limited, 2011-2090(EI), 2011-2094(CPP),
2012-3162(EI), 2012-3164(CPP), 2012-3165(EI), 2012-3166(CPP), 2012-3170(EI), 2012-3171(CPP), 2012-3173(EI) and 2012-3174(CPP)
on April 18 and 19, 2013, at Halifax, Nova Scotia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Daniel F. Wallace
Counsel for the Respondent:	Tokunbo C. Omisade

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* (the "*Act*") and section 28 of the *Canada Pension Plan* (the "*Plan*") from the decisions of the Minister of National Revenue on the appeals made to her under section 91 of the *Act* and section 27 of the *Plan* are allowed, without costs, on the basis that the worker, Andrew Schuhmann, was not engaged in insurable or pensionable employment with the Appellant within the meaning of paragraph 5(1)(*a*)

of the *Act* and paragraph 6(1)(*a*) of the *Plan* during the period from January 1, 2010 to December 31, 2010.

Signed at Ottawa, Canada, this 26th day of April 2013.

"F.J. Pizzitelli"

Pizzitelli J.

Dockets: 2012-3170(EI)
2012-3171(CPP)

BETWEEN:

3142774 NOVA SCOTIA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of *3142774 Nova Scotia Limited,* 2011-2090(EI), 2011-2094(CPP), 2012-3162(EI), 2012-3164(CPP), 2012-3165(EI), 2012-3166(CPP), 2012-3167(EI), 2012-3169(CPP), 2012-3173(EI) and 2012-3174(CPP) on April 18 and 19, 2013, at Halifax, Nova Scotia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Daniel F. Wallace
Counsel for the Respondent:	Tokunbo C. Omisade

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* (the "*Act*") and section 28 of the *Canada Pension Plan* (the "*Plan*") from the decisions of the Minister of National Revenue on the appeals made to her under section 91 of the *Act* and section 27 of the *Plan* are allowed, without costs, on the basis that the worker, Karen Bellefeuille, was not engaged in insurable or pensionable employment with the Appellant within the meaning of paragraph 5(1)(*a*)

of the *Act* and paragraph 6(1)(*a*) of the *Plan* during the period from January 1, 2009 to December 31, 2010.

Signed at Ottawa, Canada, this 26th day of April 2013.

"F.J. Pizzitelli"

Pizzitelli J.

Dockets: 2011-3173(EI)
2011-3174(CPP)

BETWEEN:

3142774 NOVA SCOTIA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of *3142774 Nova Scotia Limited,* 2011-2090(EI), 2011-2094(CPP), 2012-3162(EI), 2012-3164(CPP), 2012-3165(EI), 2012-3166(CPP), 2012-3167(EI), 2012-3169(CPP), 2012-3170(EI) and 2012-3171(CPP) on April 18 and 19, 2013, at Halifax, Nova Scotia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Daniel F. Wallace
Counsel for the Respondent:	Tokunbo C. Omisade

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* (the "*Act*") and section 28 of the *Canada Pension Plan* (the "*Plan*") from the decisions of the Minister of National Revenue on the appeals made to her under section 91 of the *Act* and section 27 of the *Plan* are allowed, without costs, on the basis that the worker, Jerzy Wesecki, was not engaged in insurable or pensionable employment with the Appellant within the meaning of paragraph 5(1)(*a*) of the *Act*

and paragraph 6(1)(*a*) of the *Plan* during the period from January 1, 2010 to December 31, 2010.

Signed at Ottawa, Canada, this 26th day of April 2013.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2013 TCC 129
Date: 20130426
Dockets: 2011-2090(EI), 2011-2094(CPP),
2012-3162(EI), 2012-3164(CPP),
2012-3165(EI), 2012-3166(CPP),
2012-3167(EI), 2012-3169(CPP),
2012-3170(EI), 2012-3171(CPP),
2012-3173(EI), 2012-3174(CPP)

BETWEEN:

3142774 NOVA SCOTIA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] These are appeals from the decisions of the Minister of National Revenue (the "Minister") that six different Workers were determined to be in insurable and pensionable employment with the Appellant, 3142774 Nova Scotia Limited, during different periods throughout the 2009 and 2010 calendar years. With respect to the Worker Karen Bellefeuille, the period in question is from January 1, 2009 to December 31, 2010 and for the Worker John Gulbrandson the period is from December 1, 2009 to December 31, 2010. For the Workers Stephanie Sachetti, Andrew Schuhmann and Jerzy Wesecki the period in question is from January 1, 2010 to December 31, 2010 and for the Worker Shawna Bobyk the period in question is September 1, 2009 to September 29, 2010.

[2] These appeals were heard at the same time and on common evidence except to the extent the evidence of the particular Workers can relate only to their specific matter.

[3] The only issues to be decided in these matters is whether the Workers were, during their respective period above described, employed in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* and whether they were employed in pensionable employment within the meaning of paragraph 6(1)(*a*) of the *Canada Pension Plan*. In short, whether each of the Workers was in a contract of services, and hence an employee of the Appellant, or whether in a contract for services and hence an independent contractor during the relevant Period.

[4] The Appellant was a Nova Scotia corporation incorporated in 2006 and primarily carried on the business of providing cleaning and maintenance services to small and medium-size commercial and industrial clients under the operating name of Custom Building Maintenance throughout Nova Scotia. The Appellant was based in New Bedford and during the relevant Periods employed full-time employees as well as utilized the services of independent contractors; the relationship of some of which are clearly in issue in these matters.

[5] The Workers supplied their services at different locations in Nova Scotia, at the Appellant's clients' locations, with each of the Workers performing their duties at anywhere from one to three different locations. The duties of the Workers were general cleaning duties including mopping and vacuuming of floors, dusting, taking out garbage, cleaning washrooms and cleaning showers where installed.

[6] In all cases, there is no dispute that the Workers travelled back and forth from the locations to their homes using their own vehicles and were not compensated for any travel expenses. In all cases, however, it is clear the Appellant provided substantially all of the tools and equipment necessary for the Worker to perform his or her duties including the mops, brooms, vacuum cleaners and general supplies which included chemical cleaners, gloves, rags, towels and toilet paper although one Worker testified that the Appellant's clients provided its own garbage bags and paper toiletries. None of the Workers carried liability insurance although the Appellant carried insurance to cover protection from liability due to any Workers or any helpers they might use.

[7] In all cases, the Workers performed their duties at the client's premises, in most cases during the hours the specific client was closed for business. Each of the

Workers was designated a period of time on specific days to complete their duties and based on the agreement the Appellant had with its clients, the Workers had a time period within which to complete their duties ranging from a morning during specific weekdays for the Worker Bellefeuille to anytime after the close of business on Friday until the opening of business the next Monday for the Worker Schuhmann. Whether the Worker completed his/her tasks in a shorter or longer period of time than the designated allocated hours for each client did not affect the level of remuneration paid which remain fixed per location serviced.

[8] Some of the Workers held full-time jobs during their relevant period and clearly provided their services for extra money while others were not otherwise gamefully employed elsewhere although all the Workers had the flexibility to refuse to perform any cleaning contract offered to them by the Appellant and to work for such other parties during the period as they so chose; it being clear that none of the Workers was required to exclusively provide its services to only the Appellant. The length of time the Workers provided their respective services to the Appellant ranged from four to six weeks for the Workers Sachetti and Wesecki to over a year for the Workers Schuhmann and Bobyk, with the others for periods in between that range.

[9] Each of the Workers was paid a fixed amount monthly, payable semi-monthly, in respect of all the locations he or she serviced and during the relevant periods there was no deduction made for any payroll remittances, no vacation pay paid, and no medical, pension or other benefits paid or provided to the Workers. The Workers submitted no invoices to the Appellant and no GST was charged to the Appellant by any of the Workers and the evidence is that none of the Workers were GST/HST registrants nor did the level of their income from business exceed the $30,000 amount that would require them to be registrants under the *Excise Tax Act*.

[10] All the Workers testified that a representative of the Appellant accompanied them their first day or so at each client location to advise them what needed to be done there, where chemicals and supplies were stored, and what chemicals to use where, i.e., on the floor or in the showers and a suggested routine to perform the required tasks unless the tasks were so obvious no instruction was necessary such as how to sweep, mop or generally clean. It is clear from the evidence that apart from dealing with complaints or client comments or generally monthly inspections, there was no further on-site supervision of the Workers' duties, who generally worked alone, notwithstanding that a few of the Workers referred to having a supervisor. The evidence is also clear that the duties required to be performed required little skill for their ongoing performance.

[11] In the event of any deficiencies in the performance of their duties, the Workers were either required to rectify the deficiencies if they forgot to perform some elements of their duties as was the case for the Worker Sachetti or were given feedback from the Appellant as to client complaints so they could remedy the deficiencies during their next attendance. The only specific example of cleaning deficiencies other than forgotten work or client complaints about Worker performance of work to be remedied in the future above was in the evidence of the Worker Bobyk who testified she was instructed to start using a different chemical cleaner on unsealed grout in the showers of the health club she serviced to remedy what was in fact a construction defect of the client's premises discovered after the Appellant investigated a complaint.

[12] The only evidence of who bore responsibility for any damage done to the client premises by the Worker was in respect to the Worker Bobyk who was back-charged for the cost of keys she admitted to having thrown away causing the Appellant to have to change locks for its client. Other Workers testified they thought the Appellant would be responsible for damage to the client premises but agreed none had been caused so had no example of the Appellant agreeing to be so responsible. The Appellant testified responsibility would depend on the damage caused and by whom.

[13] The main disagreement between the parties and on which the evidence is inconsistent pertains to the basis for payment, the level of control and supervision and the risk of profit and loss which I will address in the context of examining the evidence in the context of the law.

<u>The Law</u>

[14] The judicial test for determining the issue of whether a worker is in a contract of services and hence an employee, or in a contract for services and hence an independent contractor, was considered by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 4 C.T.C. 139 (S.C.C.), where in paragraph 47, Major J. made it clear there was no universal test and that:

> 47 … 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.
> …

[15] In determining such question, the Supreme Court of Canada agreed with the approach of the Federal Court of Appeal in *Wiebe Door Services Ltd. v. Minister of National Revenue*, 86 DTC 553 (F.C.A.), where certain factors had to be taken into account including the level of control the employer has over the worker's activities, 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 task but stressed such factors were not an exhaustive list and there is no set formula.

[16] As set out in *Royal Winnipeg Ballet v. Canada (Minister of National Revenue – M.N.R.)*, 2006 FCA 87, 2006 DTC 6323 (F.C.A.), the Federal Court of Appeal confirmed that the intention of the parties was a factor to be considered, and agreed with *Sagaz* and *Wiebe Door* above that the label the parties ascribe to the relationship is not determinative of it. In paragraph 56 of *Royal Winnipeg Ballet*, Sharlow J.A. stated:

> 56 … There is ample authority for the proposition that parties to a contract cannot change the legal nature of that contract merely by asserting that it is something else. …

[17] Accordingly, the parties are in agreement that an objective analysis of the *Wiebe Door* factors, generally known as the four-in-one test, is necessary before any consideration of the subjective intention of the parties, if necessary, as confirmed by the Courts in many instances including in the case of *1392644 Ontario Inc. (Connor Homes) v. Canada (Minister of National Revenue – M.N.R.)*, 2013 FCA 85, [2013] F.C.J. No. 327 (QL), which stated in paragraph 37 thereof that the intention of the parties "must also be grounded in a verifiable objective reality".

[18] In this case, the Respondent acknowledges that the subjective intention of the Workers other than Shawna Bobyk and possibly Karen Bellefeuille is evidence in the written subcontractor agreements as being one of independent contractor, but, relying on the above case law, argues the *Wiebe Door* factors demonstrate that all the Workers are in a relationship of employment with the Appellant. The Appellant obviously disagrees so we continue to an analysis of the *Wiebe Door* factors.

<u>Analysis</u>

Control

[19] The strongest disagreement between the parties is in relation to this very important factor. The Respondent mainly argues that the Appellant controlled the Workers because it determined the number of hours the Workers required to perform their duties, because the Workers were required to abide by the Appellant's company policies, because the Appellant controlled the number of cleaning locations assigned to the Workers, and because the Appellant exercised or had the ability to exercise a degree of supervision over the Workers through training, evaluation and on-site visits that went beyond mere monitoring.

[20] With respect to the Respondent, I simply do not find that the evidence in these matters supports its position. Rather, I find that the position of the Appellant is strongly supported by the evidence, namely that the Appellant's degree of supervision is limited only to a monitoring function that is not indicative of an employer-employee relationship.

[21] The evidence is clear that none of the Workers had fixed hours of work. Instead, the Appellant's contract with its clients set out the day or days the cleaning was to occur and the range of time periods during which the cleaning could occur, as discussed above. Most of the Workers were required to attend at the client's location directly after the close of business on any day and complete the duties before the opening of business the next business day, with an entire weekend in between in many cases. The client in fact determined the period during which it was prepared to have the services conducted. Within that range of time to perform such services, the Workers could attend and complete their tasks during whatever hours suited them. The Workers did not punch a time clock, check-in with the Appellant at the start of any work nor check-out in any way. They had broad scope in determining the specific hours in which to supply their services and had possession of the entrance keys to let themselves in to do so. This is indicative of a relationship of independent contractor.

[22] The evidence is also that the Appellant limited the number of cleaning contracts any Worker could have to a maximum of three to limit the exposure the Appellant would have in the event any Worker did not show up or terminated its agreement. This is to me a reasonable business decision of the Appellant. Considering the evidence of the Workers was very consistent that they were free to turn down any cleaning contract offered to them by the Appellant in any event as well as provide their services to any other party and hence were not required to exclusively work for the Appellant, I cannot see any unreasonable restriction imposed on the Workers by the Appellant's maximum contract policy with the Workers that amounts to any control over the Workers in this regard.

[23] As for the Respondent's argument that the written contracts and testimony of the Appellant confirms that the Appellant's company policies are part of the contract with the Workers and that this, in itself, is indicative of an employment relationship I cannot come to that conclusion. Firstly, no policy documents were tendered into evidence that would enable me to evaluate the position of the Respondent in that regard. In fact, the only evidence regarding the company policies came from the evidence of the Workers, the Respondent's own witnesses, all of whom testified they did not recall receiving a copy of any such document, or if they did, that it pertained to policies like dealing with "what if" there were problems. The Worker Gulbrandson testified he did not get a copy of the policies but recalls they referred to what happened if he "messed up", his obligation to re-clean and take care of the equipment as well as the fact he would be back-charged if the Appellant had to get someone else to re-clean or substitute for him. The Worker Schuhmann thought he might have seen the document at one of the cleaning locations but clearly had a vague memory of the issue. The only evidence on this issue seems to point to holding the Worker responsible for the performance of its duties or that no policy documents were communicated to the Workers in the first place.

[24] As for the Respondent's argument that the Court should draw a negative inference from the fact the Appellant failed to enter the company policy documents into evidence, there was no evidence pleaded by the Respondent that it even requested any such documentation and I fail to see why the Respondent could not have led such document into evidence if it was the one relying on same. I am not prepared to draw any such negative inference one way or the other in the circumstances; particularly since the Respondent's witnesses testified as to their understanding of the documents.

[25] The Respondent's main argument is that the Appellant exercised a degree of supervision over the Workers that was determinative of control over not only

assigning the duties of the Workers but in determining "how" they performed them evidenced by the training received by the Workers, the evaluation of the Workers and on-site supervisory visits.

[26] In *City Water International Inc. v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 350, [2006] F.C.J. No. 1653 (QL), the Federal Court of Appeal, citing its earlier decision delivered by Létourneau J.A. in *Livreur Plus Inc. v. Canada (Minister of National Revenue)*, 2004 FCA 68, [2004] F.C.J. No. 267 (QL), confirmed in paragraph 18 that "the Court should not confuse control over the result or quality of the work with control over its performance by the worker responsible for doing it" and that "Monitoring the result must not be confused with controlling the worker".

[27] While there is no dispute with this principle of law, the Respondent argues that the control exercised by the Appellant over the Workers exceeds simply monitoring. Frankly, I simply cannot agree with the Respondent for several reasons.

[28] Firstly, the evidence was consistent among all the Workers that the so-called training received by the Workers amounted to no more than the Appellant sending a representative to work with the Worker for its first shift or two to ensure the Worker understood the scope of his/her duties, where the cleaning closet with supplies was and what chemicals to use for different tasks. There is no evidence of any ongoing supervision on a daily basis beyond this initial indoctrination procedure and follow-up on receiving complaints. It is also relevant that the Workers themselves testified that the level of skill necessary to perform their duties was minimal. In fact, the Worker Wesecki testified that his spouse helped him at times with cleaning and was obviously able to assist even though she obviously never received any training or indoctrination by the Appellant. The Worker Gulbrandson testified his mother–in-law assisted him on occasion without pay and was a better cleaner than him even though she obviously had no initial training or indoctrination.

[29] Secondly, while there is no dispute that the terms of the Appellant's client contracts form a part of the Subcontractors Agreement with the four Workers who acknowledged signing one and that such client contracts evidence that there would be monthly or weekly site evaluations by the Appellant's service manager to assess the cleaner, that an after-hours supervisor works with the customer service manager to keep the staff on track and give them necessary course correction or that close contact will be kept with management concerning all work performed, all of such terms do not amount to determinative proof of control. The client contract speaks to the level of service and quality control the client can expect, and, by its inclusion as a

term of at least the written contracts above referred to, that was expected of the Worker. The evidence is that the Worker was not supervised on a daily basis and that if the client complained to the Appellant, either directly or by leaving notes in the binder left at each location for the Appellant's customer representative to review, the Appellant would intervene usually by attending to deal with the Worker and suggest changes to satisfy the complaint which some of the Workers referred to as retraining. This is in my view nothing less than a measure of quality control on an as-needed basis.

[30] Finally, the Respondent also argues that the grading system utilized by the Appellant in which the client rates the Worker's performance on a scale of one to five is indicative of an evaluation of employees. The client could either enter its evaluation in the binder for review by the Appellant's customer representative or could presumably communicate it to the Appellant directly. In my view, this amounts to no more than customer feedback which is a form of monitoring. As Sheridan J. stated in *Watson (c.o.b. Bonnie's Cleaning Services) v. Canada (Minister of National Revenue - M.N.R.)*, 2005 TCC 134, [2005] T.C.J. No. 77 (QL), at paragraph 10:

> 10 … it was to be expected that Ms. Watson would "monitor" a worker's performance through feedback from clients. Rather than indicia of "control" or "supervision", it is a testament to the good stewardship that made Bonnie's Cleaning so successful. …

[31] The evidence is clear that the Appellant's representative would either check in with the Worker every week or two and otherwise rely on the customer for feedback for its quality control and issue directives for rectifying any found lapses. I cannot see how this can be elevated to the degree of supervision that would establish control of how the Worker performs his/her services; especially when little or no skill is involved.

[32] Having regard to all the evidence, I simply cannot find that the Appellant controlled the Workers in the performance of their services in such a manner as to be indicative of an employer-employee relationship. In my strong view, an analysis of the control factor indicates a relationship of independent contractor.

Tools

[33] As mentioned in the facts above, there is no dispute between the parties that the Appellant provided all the necessary tools for the performance of the Workers' services including brooms, mops, rags, chemical cleaners and a vacuum cleaner.

At first glance, it would appear that this factor would support the conclusion that the relationship was one of employer-employee. However, the Appellant has argued that the supply of the tools by it was in effect because it could use its buying power to obtain these items at lower cost as well as the fact that the provision of cleaning chemicals was necessary for it to ensure compliance with Workplace Hazardous Materials Information System for it and its clients which makes both credible and good business sense.

[34] It should be noted that each of the Workers had to supply their own transportation to each of the job locations and was not reimbursed for gas or travel expenses of any kind. This, of course, would support the conclusion the relationship was one of independent contractor as found in the *City Water International Inc.* case where the Federal Court of Appeal held that the workers would have had to provide their own bicycles or vehicles to attend at the customer locations. The Worker Sachetti testified that she sometimes got driven in a company car to assist her sister who also worked for the Appellant, but in terms of her own services to the locations she serviced she provided her own transportation. There was no evidence the Appellant paid Stephanie Sachetti to assist her sister and the evidence suggests any such services were provided to the sister and not the Appellant so such evidence is of no assistance here.

[35] I should also like to comment on the Respondent's argument that the Workers providing their own transportation to their place of work is no different to an employee finding his or her way to work each day and hence is not a factor. With respect to the Respondent, most employees report to the same place of work each day and are not generally required or have the option of working at different locations without reimbursement for any travelling required at the employer's request or without the provision of employer transportation. The Workers here were not provided any assistance for travel, regardless of whether they serviced one or more locations and the evidence is clear none of the Workers reported to the Appellant's place of business on any day other than for an initial interview before being hired or to pick up their payment cheques.

[36] In *Watson (c.o.b. Bonnie's Cleaning Services)*, Sheridan J., dealing with a similar business where the Workers were found to drive themselves to the job sites and had the majority of tools provided to them, stated at paragraph 13:

> 13 … As for the cleaning tools, it was reasonable for Bonnie's Cleaning to provide the major tools needed given Bonnie's Cleaning contractual obligations to its construction site clients, the difficulty of imposing specific equipment

> requirements on self-employed cleaners working for other clients as well as Bonnie's Cleaning clients, and Ms. Watson's own concerns of ensuring hygienic standards of delivery of cleaning services. I am of the view that in these particular circumstances, to the extent the ownership of tools has any application, it favours Ms. Watson's positions.

[37] In the cases at hand, having regard to the various cleaning requirements of different clients ranging from small offices to health clubs and the need for the Appellant to meet its Hazardous Materials monitoring requirements, as well as the fact the Appellant's inventory system was such that it kept cleaning supplies and tools on each site which it replenished periodically as well as the rather minimum tooling requirements to begin with, it appears more than sensible that the provision of tools by the Appellant can just as easily be said to favour the Appellant's position, however I would not consider this factor to be determinative in the circumstances .

Risk of Profit and Loss

[38] The Respondent takes the position that the Workers were basically paid an hourly wage and did not negotiate their remuneration, had to perform their work personally and were replaced only by the Appellant, and had no responsibility for any investment or management and hence this factor favours a finding that the Workers were employees while the Appellant argues that the Workers' compensation was fixed regardless of the hours worked, that the Workers had the right to hire helpers and replacements, had the choice as to whether to accept work or not and supplied their own vehicles and incurred responsibility for their own travel expenses.

[39] Frankly, I agree with most of the Appellant's position in these matters and find these factors also support the conclusion that the Workers were independent contractors for several reasons.

[40] The Workers all testified on a consistent basis that their compensation was based on a fixed amount per contract, paid semi-monthly. Although the Worker Sachetti suggested she was paid on an hourly basis of $10 per hour, it is clear from her testimony that she received the same amount regardless of whether she completed her duties within the estimated time or not. The Worker Wesnecki testified as well that in fact on the days his wife helped him with his contract the time for completion went from three hours to one-half hour, a significant savings in time.

[41] The evidence is that each of the Workers could reject work on any contract, as did one of the Workers when the client moved its business location to a more distant

location that the Worker chose not to continue to service due to travel time and the extra costs of same. In addition, each of the Workers could turn down work on any new contract offered to them. The evidence is also that if the client terminated the agreement with the Appellant, the contract with the Worker who serviced that client, whether oral or written, was also at an end and hence the Worker had some uncertainty as to its continued compensation. These facts are consistent with the control an independent contractor has over the work he is prepared to do as well as the level of compensation and hence profit he might gain from any work undertaken. The Workers also generally testified that they were free to work for other parties and hence could increase their profit by not only taking on more work, either from the Appellant up to three contracts or from any other party, and could utilize helpers if they so chose. As Sheridan J. confirmed in paragraph 14 of the *Watson (c.o.b. Bonnie's Cleaning Services)* case after discussing similar facts as above:

> 14 … None of this is consistent with an employer-employee relationship where a diligent employee can rely on receiving a fixed amount if she performs her duties during working hours assigned to her by the employer. Rather, such uncertainty points to a finding … as an independent contractor.

[42] The Respondent has suggested that since the Workers used only family members as helpers and did not pay them that the fact they were entitled to hire helpers should be given little weight, relying on the decision of Bédard J. in *Priority One Janitorial Services Inc. v. Minister of National Revenue*, 2012 TCC 1, 2012 CarswellNat 122. In that case, Bédard J. found that the only evidence of the use of helpers was one of the workers who used his spouse. In the cases at hand, at least two of the Workers used family members, both a spouse and mother-in-law and all of the Workers were consistent in their evidence they were allowed to use helpers and accordingly this case is distinguishable from *Priority One*. If a person in business has the flexibility to hire helpers then it seems clear to me he has the flexibility to increase his profits or reduce his losses as also found by Weisman J. in *Mediclean Inc v. Canada (Minister of National Revenue, M.N.R.)*, 2009 TCC 340, [2009] T.C.J. No. 288 (QL), who at paragraph 54 stated that "where one has the right to hire a helper or a replacement, that automatically entails the chance of profit and indeed a risk of loss".

[43] There is some dispute as to whether the Workers could hire replacements. One of the Workers testified they could hire replacement workers although the general evidence from most of the Workers is that they at most utilized family members as helpers or did not hire replacements because they were required to notify the Appellant if they were unable to attend to do their work and the Appellant provided

the replacement. Notwithstanding that most Workers may have had to follow the procedure of notifying the Appellant who provided the replacement, it is clear that if such replacement was provided, the Worker was charged an hourly rate as agreed in the written contract or oral agreement for the provision of such replacement which was deducted from the Worker's next payment. In these cases, it is irrelevant then whether the Worker was required to hire the replacement or simply be responsible for paying for one. The risk was the Worker's and such risk automatically entails the chance of profit or risk of loss as Weisman J. alluded to in *Mediclean* above.

[44] The Respondent has also argued that since the Workers were given keys and testified they were not permitted to release the keys to other parties that in fact they could not practically hire any replacements. The Respondent called as a witness a client representative who testified that she would only expect under the terms of their contract with the Appellant that any replacement would have to be a bonded employee of the Appellant. Frankly, this evidence serves to rationalize the other evidence of the Workers that the Workers were required to notify the Appellant if they could not attend and the Appellant would send a replacement which I accept as the credible evidence in respect of hiring replacements. However, as I stated above, the fact that client security protocols may prohibit a Worker from passing on a key to a replacement did not relieve the Worker from taking financial responsibility for the cost of the Appellant supplying such replacement so the Risk of Loss was still with the Worker.

[45] The Respondent has also suggested that in most cases after any complaints by clients, that the Appellant would investigate and suggest a "course correction" where the remedy to the deficiency would be carried out at the next attendance and hence there was no risk of loss to the Worker from deficient work. Frankly, since the Worker was paid the same regardless of how long it took to complete any work, it seems to me that if a Worker is required to do any remedial work next time that he or she would lose some flexibility in completing work faster or take longer to complete such work so there would still be some risk to the Worker. There is evidence that where some of the work was not performed altogether that the Worker Sachetti had to re-attend to remedy the deficiency. Accordingly, it seems to me that where the deficiency is a more serious matter, the option to simply remedy the work next time or do better after retraining was not an option.

[46] Finally with respect to this factor, the Respondent has suggested that since the Appellant provided all tools and equipment at no cost to the Workers that the Workers had no responsibility for investment or management in performing its work. As I stated earlier, the Worker had an investment in its vehicle and covered its travel

expenses as well as bore the risk of replacement workers and remedying deficient work so I find the Worker did have an investment in some tools and did have responsibility for the performance of his or her work.

[47] In my view, the Workers had both a chance of Profit and Risk of Loss having regard to the above factors as well as an investment in their enterprise which are clear indicia of commerciality and an independent contractor status.

Other Factors

[48] The Respondent has argued that since the Workers did not advertise their services, invoice the Appellant or register as a GST Registrant pursuant to the *Excise Tax Act* that there was little indicia of commerciality and hence such factors support a relationship of employment.

[49] With respect to the Respondent, the evidence is clear that most of the Workers obtained their contracts by searching for work online. This is certainly how most of the Workers came into contract with the Appellant. Most of the Workers were interested in only enhancing their other income and thus turned to the internet for leads as opposed to spending dollars on advertising which frankly makes good business sense in the circumstances. The degree of commerciality must be analysed in the context of the business; both its nature and size included, which in the case of these Workers, would suggest it would not be profitable to expend unnecessary sums to advertise.

[50] The fact the Workers did not invoice the Appellant at all is not determinative when one considers they were under a fixed contract for each location that paid them a fixed amount twice monthly, In these circumstances, it made little sense to invoice the Appellant especially when the Workers were not GST registrants due to the fact their income from such commercial activity did not exceed the $30,000 per year income threshold under the *Excise Tax Act*.

[51] These other factors are, in my view, indeterminative and so I give them little or no weight.

<u>Conclusion</u>

[52] Having regard to the above analyses, I am of the strong view that the *Wiebe Door* factors support a finding that the Workers were independent contractors, which finding is consistent with the subjective intention expressed in the written

subcontracts entered into by all the four Workers who executed such signed agreement. With respect to the two workers who do not appear to have signed a written agreement, the *Wiebe Door* factors speak for themselves in their regard and there is no need to dwelve further into the matter of the intention of the parties.

[53] The appeals of the Appellant are allowed in full, without costs.

Signed at Ottawa, Canada, this 26th day of April 2013.

"F.J. Pizzitelli"

Pizzitelli J.

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APPEARANCES:

Counsel for the Appellant:	Daniel F. Wallace
Counsel for the Respondent:	Tokunbo C. Omisade

COUNSEL OF RECORD:

For the Appellant:

Name:	Daniel F. Wallace
Firm:	McInnes Cooper Halifax, Nova Scotia
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada