2000-3668(CPP)

BETWEEN:

BETH MCMORRAN O/A MCMORRAN & ASSOCIATES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

PAULINE BAKKEN,

Intervenor.

Appeal heard on common evidence with the appeals of *Beth McMorran o/a McMorran & Associates* (2000-3667(EI), 2001-2467(EI), 2001-2468(EI), 2001-2465(CPP), 2001-2469(CPP)) and *Pauline Bakken* (2000-3669(EI) and 2000-3670(CPP)) on April 8, 9 and 10, 2002 at Edmonton, Alberta, by

the Honourable Deputy Judge Michael H. Porter

Appearances

Counsel for the Appellant:	R. Tim Hay
Counsel for the Respondent:	Margaret McCabe
Counsel for the Intervener:	R. Tim Hay

JUDGMENT

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

Signed at Calgary, Alberta, this 21st day of October 2002.

"Michael H. Porter"

D.J.T.C.C.

2000-3667(EI)

BETWEEN:

BETH MCMORRAN O/A MCMORRAN & ASSOCIATES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

PAULINE BAKKEN,

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Appeal heard on common evidence with the appeals of *Beth McMorran o/a McMorran & Associates* (2001-2467(EI), 2001-2468(EI), 2000-3668(CPP), 2001-2465(CPP), 2001-2469(CPP)) and *Pauline Bakken* (2000-3669(EI) and 2000-3670(CPP)) on April 8, 9 and 10, 2002 at Edmonton, Alberta, by

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2001-2467(EI)
2001-2468(EI)

BETWEEN:

BETH MCMORRAN O/A MCMORRAN & ASSOCIATES,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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Appeals heard on common evidence with the appeals of *Beth McMorran o/a McMorran & Associates* (2000-3667(EI), 2000-3668(CPP), 2001-2465(CPP), 2001-2469(CPP)) and *Pauline Bakken* (2000-3669(EI) and 2000-3670(CPP)), on April 8, 9 and 10, 2002 at Edmonton, Alberta, by

the Honourable Deputy Judge Michael H. Porter

Appearances

Counsel for the Appellant:	R. Tim Hay
Counsel for the Respondent:	Margaret McCabe

JUDGMENT

The appeals are allowed and the assessments are vacated in accordance with the attached Reasons for Judgment.

Signed at Calgary, Alberta, this 21st day of October 2002.

"Michael H. Porter"

D.J.T.C.C.

2001-2465(CPP)
2001-2469(CPP)

BETWEEN:

BETH MCMORRAN O/A MCMORRAN & ASSOCIATES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of *Beth McMorran o/a McMorran & Associates* (2000-3667(EI), 2000-3668(CPP), 2001-2467(EI), 2001-2468(EI)) and *Pauline Bakken* (2000-3669(EI) and 2000-3670(CPP)), on April 8, 9 and 10, 2002 at Edmonton, Alberta, by

the Honourable Deputy Judge Michael H. Porter

Appearances

Counsel for the Appellant:	R. Tim Hay
Counsel for the Respondent:	Margaret McCabe

JUDGMENT

The appeals are allowed and the assessments are vacated in accordance with the attached Reasons for Judgment.

Signed at Calgary, Alberta, this 21st day of October 2002.

"Michael H. Porter"

D.J.T.C.C.

Date: 20021021
Dockets: 2000-3667(EI)
2000-3668(CPP)

BETWEEN:

BETH MCMORRAN O/A MCMORRAN & ASSOCIATES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

and

PAULINE BAKKEN,

Intervener,

AND

Dockets: 2000-3669(EI)
2000-3670(CPP)

PAULINE BAKKEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

BETH MCMORRAN O/A MCMORRAN & ASSOCIATES,

Intervener,

AND

Dockets: 2001-2465(CPP)
2001-2467(EI)
2001-2468(EI)
2001-2469(CPP)

BETH MCMORRAN O/A MCMORRAN & ASSOCIATES,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Porter, D.J.T.C.C.

Introduction

[1] These eight appeals were heard on common evidence by consent of the parties, at Edmonton, Alberta, on the 8th, 9th and 10th days of April, 2002.

[2] The Appellants have each appealed and each intervened in the appeals of the other to this Court from the decisions of the Minister of National Revenue (hereinafter called the "Minister") confirming an assessment dated September 13, 2000 made upon Beth McMorran (hereinafter called "McMorran"), for contributions in the amount of $4,004.30 under the *Canada Pension Plan* ("*CPP*") and $7,033.72 for employment insurance premiums under the *Employment Insurance Act* (the "*EI Act*"), plus penalty and interest with respect to workers listed in Schedule "A" attached to these Reasons, for the period January 1, 1999 to December 31, 1999, including specifically with respect to Pauline Bakken for the period January 1, 1999 to November 1, 1999. McMorran had previously appealed the assessment to the Minister, who apart from some small variations, confirmed the assessment by letter of March 27, 2001 giving the following reasons:

> ...These workers were engaged under contracts of service and therefore were employees.

> Notwithstanding the above, the employment of these workers … would also be insurable and pensionable under the Placement Agency Regulations as these workers were placed in employment by you to perform services for and under the direction and control of your clients, and they were paid by you for these services.

The decisions were said to be issued pursuant to section 93 of the *EI Act* and section 27.2 of the *CPP* and were based on paragraph 5(1)(*a*) of the *EI Act*, paragraph 6(*g*) of the *Employment Insurance Regulations*, paragraphs 6(1)(*a*) and 12(1)(*c*) of the *CPP* and section 34 of the *Canada Pension Plan Regulations*.

[3] The Appellants have also appealed from the decisions of the Minister confirming an assessment dated February 6, 2001 made upon McMorran, subject again to minor variations, for the amount of $272.80 for CPP contributions and $562.97 for employment insurance premiums, plus penalty and interest with respect to the workers set out in Schedule "B" to these Reasons, for the period January 1, 2000 to September 30, 2000. Identical reasons were given by the Minister to those set out above.

[4] The material facts reveal that during the periods in question, Bakken and the other workers (collectively called the "Workers") were engaged by McMorran to demonstrate food products in Safeway and other food stores in the Edmonton area, with whom she had contracts to put on such demonstrations. The first issue is a simple one to state, namely, whether the Workers were engaged as employees under contracts ***of*** service or independent contractors under contracts ***for*** services. If the former, then they are clearly in pensionable and insurable employment. The second issue, which only arises if they are found to be independent contractors, is whether they fall within the ambit of the *Placement Agency Regulations* under the *EI Act* and *CPP*. Each of the appeals hinge one way or the other on these two issues. It can be fairly said that all the Workers are in the same situation. There are no significant differences in their respective working relationships with McMorran.

[5] I might add that in reaching my decision in these matters, whilst I have done so squarely on the basis of the evidence before me and my understanding of the law, I have given a great deal of deference to the decision of Bell J. of this Court in the case of *Sara Consulting & Promotions v. Canada (Minister of National Revenue - M.N.R.),* [2001] T.C.J. No. 773. This case to all intents and purposes deals with essentially the same situation as that before me. Indeed, many of the same workers working for McMorran, worked also in the same Safeway Meat Program as the workers in the *Sara Consulting* case. Whilst the decision in *Sara*

Consulting was not treated as a test case, the words of Bell J. could not help but reverberate through the appeal before me.

> **... However, the urge to continue to gnaw at the same bone is not unknown to the Respondent ...**

[6] It has become clear to me throughout this case that the Minister is indeed gnawing on the same bone in this matter. Teskey J. in *T.S.S. - Technical Service Solutions Inc. v. Canada (Minister of National Revenue – M.N.R.*), [2002] T.C.J. No. 101 cited *Sara Consulting* with approval and it would perhaps behove the Minister well, to now drop that bone and leave it alone.

[7] Whilst I have had to form my own view of the facts, I am mindful of the words of Bowie J. in the case of *Lord v. Canada (Minister of National Revenue – M.N.R.*), [1999] T.C.J. No. 95 :

> … I believe in the comity of judges within the same court, and the comity of courts. Our system of jurisprudence requires, so far as it is possible, that there be consistency and predictability in judicial decision-making...

[8] Absent any appeal one would hope that these types of matters are now laid to rest and other appellants will not have to undergo the economic and social stress encountered by McMorran. Counsel for the Minister, in her closing submissions, indicated that whilst this is not a test case, the powers that be in the Canada Customs and Revenue Agency, would be giving serious consideration to the result.

The Law
Contracts Of Service/For Services

[9] The manner in which the Court should go about deciding whether any particular working arrangement is a contract ***of*** service and thus an employer/employee relationship or a contract ***for*** services and thus an independent contractor relationship, has long been guided by the words of MacGuigan J. of the Federal Court of Appeal in the case of *Wiebe Door Services Ltd. v. M.N.R.,* 87 DTC 5025. The reasoning in that case was amplified and explained further in cases emanating from that Court, namely in the cases of *Moose Jaw Kinsmen Flying Fins Inc. v. M.N.R.,* 88 DTC 6099, *Charbonneau v. Canada (Minister of National Revenue - M.N.R.),* [1996] F.C.J. No. 1337, and *Vulcain Alarme Inc. v. The Minister of National Revenue* (1999), 249 N.R. 1, all of which provided useful guidance to a trial Court in deciding these matters.

[10] The Supreme court of Canada has now revisited this issue in the case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] S.C.J. No. 61, 2001 SCC 59, 274 N.R. 366. The issue in that case arose in the context of a vicarious liability situation. However, the Court recognized that the same criteria applied in many other situations, including employment legislation. Mr. Justice Major speaking for the Court, approved the approach taken by MacGuigan J. in the *Wiebe Door* case (above), where he had analyzed Canadian, English and American authorities, and, in particular, referred to the four tests, for making such a determination enunciated by Lord Wright in *City of Montreal v. Montreal Locomotive Works Ltd.*, [1974] 1 D.L.R. 161 at 169-70. MacGuigan J. concluded at page 5028 that:

> Taken thus in context, Lord Wright's fourfold test [control, ownership of tools, chance of profit, risk of loss] is a general, indeed an overarching test, which involves "examining the whole of the various elements which constitute the relationship between the parties". In his own use of the test to determine the character of the relationship in the *Montreal Locomotive Works* case itself, Lord Wright combines and integrates the four tests in order to seek out the meaning of the whole transaction.

At page 5029 he said:

> ... I interpret Lord Wright's test not as the fourfold one it is often described as being but rather as a four-in-one test, with emphasis always retained on what Lord Wright, *supra*, calls *"the combined force of the whole scheme of operations,"* even while the usefulness of the *four subordinate criteria is* acknowledged. (emphasis mine)

At page 5030 he had this to say:

> What must always remain of the essence is the search for the total relationship of the parties…

He also observed:

> There is no escape for the trial judge, when confronted with such a problem, from carefully weighing all of the relevant factors…

[11] Mr. Justice MacGuigan also said this:

Perhaps the best synthesis found in the authorities is that of Cooke J. in Market Investigations, Ltd. v. Minister of Social Security, [1968] 3 All E.R. 732, 738-9;

> The observations of Lord Wright, of Denning L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk be taken, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him.

[12] In the case of *Kinsmen Flying Fins Inc.* case, above, the Federal Court of Appeal said this:

> ... like MacGuigan J. we view the tests as being useful subordinates in weighing all of the facts relating to the operations of the Applicant. That is now the preferable and proper approach for the very good reason that in a given case, and this may well be one of them, one or more of the tests can have little or no applicability. To formulate a

> decision then, the overall evidence must be considered taking into account those of the tests which may be applicable and giving to all the evidence the weight which the circumstances may dictate.

[13] The nature of the tests referred to by the Federal Court of Appeal can be summarized as:

a) The degree or absence of control exercised by the alleged employer;
b) Ownership of tools;
c) Chance of profit;
d) risk of loss;

In addition, the Court must consider the question of the integration, if any, of the alleged employee's work into the alleged employer's business.

[14] In the *Sagaz* decision (above) Major J. said this:

> … control is not the only factor to consider in determining if a worker is an employee or an independent contractor…

[15] He dealt with the inadequacy of the 'control test' by again approving the words of MacGuigan J. again in the *Wiebe* Door case (above) as follows:

> A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.

[16] He went on to say this:

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, … ([1952] 1 The Times L.R. 101) that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and

> acceptable answer to the many variables of ever changing employment relations …" (p. 416). Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, … (Vicarious Liability in the Law of Torts. London: Butterworths, 1967), at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose…. The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[17] I also find guidance in the words of Décary J.A. in the *Charbonneau* case (above) when speaking for the Federal Court of Appeal he said this:

> The tests laid down by this Court ... are not the ingredients of a magic formula. They are guidelines which it will generally be useful to consider, but not to the point of jeopardizing the ultimate

> objective of the exercise, which is to determine the overall relationship between the parties. The issue is always, once it has been determined that there is a genuine contract, whether there is a relationship of subordination between the parties such that there is a contract of employment ... or, whether there is ..., such a degree of autonomy that there is a contract of enterprise or for services. ... In other words, we must not pay so much attention to the trees that we lose sight of the forest. ... The parts must give way to the whole. (emphasis mine)

[18] I also refer to the words of Létourneau J.A. in the *Vulcain Alarme* case (above), where he said this:

> … These tests derived from case law are important, but it should be remembered that they cannot be allowed to compromise the ultimate purpose of the exercise, to establish in general the relationship between the parties. This exercise involves determining whether a relationship of subordination exists between the parties such that the Court must conclude that there was a contract of employment within the meaning of art. 2085 of the *Civil Code of Quebec*, or whether instead there was between them the degree of independence which characterises a contract of enterprise or for services ...

[19] I am further mindful that as a result of the recent decisions of the Federal Court of Appeal in *Wolf v. Canada*, [2002] F.C.J. No. 375, and *Precision Gutters Ltd. v. MNR*, [2002] F.C. J. No. 771, a considerable degree of latitude seems now to have been allowed to creep into the jurisprudence enabling consultants to be engaged in a manner in which they are not deemed to be employees as they might formerly been. I am particularly mindful of the words of Mr. Justice Décary in that decision where he said:

> In our day and age, when a worker decides to keep his freedom to come in and out of a contract almost at will, when the hiring person wants to have no liability towards a worker other than the price of work and when the terms of the contract and its performance reflect those intentions, the contract should generally be characterised as a contract for services. If specific factors have to be identified, I would name lack of job security, disregard for employee-type benefits, freedom of choice and mobility concerns. (my emphasis)

[20] Thus, it seems to this Court that the pendulum has started to swing, so as to enable parties to govern their affairs more easily in relation to consulting work and so that they may more readily be able to categorize themselves, without

interference by the Courts or the Minister, as independent contractors rather than employees working under contracts of service.

[21] In conclusion, there is no set formula. All these factors bear consideration and as Major J. said in the *Sagaz* case (above), the weight of each will depend upon the particular facts and circumstances of the case. Many of the tests can be quite neutral and can apply equally to both types of situation. In such case, serious consideration has to be given to the intent of the parties; thus that is the task of the trial Judge.

Placement Agencies

[22] It is to be noted that the wording in the two statutory schemes (*EI Act* and *CPP)*, is somewhat different. One is therefore not necessarily inclusive of the other, although there is a certain commonality. The *Regulations* in question read as follows:

> 6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:
>
> …
>
> *(g)* employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.
>
> Section 34 *Canada Pension Plan Regulations*
>
> 34(1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual.

> (2) For the purposes of subsection (1), "placement or employment agency" includes any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration."

[23] It is to be noticed that "placement agency" or "employment agency" is defined to include certain situations in the *CPP Regulations.* That definition is not all inclusive. There is no definition of the term in the *EI Regulations.*

[24] Bonner, T.C.J. in the case of *Computer Action Inc. v. M.N.R,* [1990] T.C.J. No. 101, said that the term should be given its ordinary meaning and read in context:

> ... an organization engaged in matching requests for work with requests for workers.

[25] Teskey, T. C. J. in the case of *Rod Turpin Consulting Ltd. (c. o. b. Tundra Site Services) v. Canada (Minister of National Revenue - M.N.R),* [1997] T.C.J. No. 1052, said this:

> The Appellant argues that it is not a placement agency, but to look at it as a general contractor. This I cannot accept. General contractors usually by the terms of their contracts with clients, are responsible to the client to construct the project contracted to be constructed in a good and workmanlike manner. Herein, the only responsibility the Appellant had to Cominco was to provide qualified workers as specified by Cominco.
>
> The Appellant was acting as a placement agency in respect of this worker. The Appellant was asked to provide a journeyman electrician, which it did. It paid the electrician and charged the wages to Cominco, together with a fee for services.

[26] In the case of *Dyck v. Canada (Minister of National Revenue-M.N.R.) and Bigknife Oilfield Operating Ltd.,* [1999] T.C.J. No. 852, 1 held as follows:

> The position of the Minister is that Bigknife acted in this situation as a placement or employment agency. The El Regulation in question was changed in 1997 and thus, previous case law is not particularly helpful. However, the logic of Teskey, J. in *Rod Turpin Consulting Ltd.* [...] seems as relevant today as it was then. Bigknife was not a general contractor. It was only responsible to supply qualified personnel. There was no individual fees for the different people who were engaged, but no doubt, that was all built into the overall contract. It places Dyck, to the extent that he needed it in providing

> his services under the direction and control of Fletcher. They had the right to control his work. In my view, El Regulation 6(g) and CPP Regulation 34 do each apply in this situation.

[27] I am of the view that there is a fundamental principle to be grasped in these cases which really should simplify the question for the parties. I dealt with this in the case of *Dataco Utility Services Ltd. v. Canada (Minister of National Revenue – M.N.R.,* [2001] T.C.J. No. 372, the reasoning in which I now adopt. It seems to me that the intention or the "pith and substance" of the *Regulations* is to bring into the basket of the two social schemes set up by Parliament, those workers (whether they are employees under a contract of service or independent contractors under contracts for services), who simply contract with entity A for a fee or other recompense, to be found or placed in work (employment) with or under the direction and control of a third entity B. Thus, these workers do not contract with entity A to do any work for entity A as part of the latter's business. Further, entity A does not contract with entity B to do any work for entity B other than to provide them with personnel for which they collect a fee or other remuneration.

[28] That situation seems to me, to be absolutely and mutually exclusive of any arrangement whereby a worker is engaged to perform services for entity A in the course of the latter's business, or where entity A has a contract with entity B to perform services for entity B. In such a situation, entity A is not providing or placing personnel, but carrying out its contractual obligation to provide those services to entity B.

[29] Thus, the first question to be asked is whether the worker is performing services for entity A as part of the business of the latter, albeit part of that business may be a contract for entity A to provide a service for entity B, or whether entity A is simply acquiring personnel as its very business with no contract to undertake anything further than to pass the worker on to entity B to undertake whatever the business of entity B might be. The simple question to ask is whether entity A is under any obligation to provide a service to entity B other than simply the provision of personnel. Is entity A obligated to perform a service in some way other than simply making personnel available? If the answer is yes, it clearly has business of its own as does any general contractor on a building site and the worker is not covered by the *Regulations* under either statute. If however, the answer is no, that is, it is not obligated to carry out any service other than to provide personnel, then clearly the worker in such a situation is covered by the *Regulations* under both statutes.

[30] The question as I see it is not so much about who is the ultimate recipient of the work or services provided, as this will cover every single possible subcontract situation, but rather who is under obligation to provide the service. If the entity alleged to be the placement agency is under an obligation to provide a service over and above the provision of personnel, it is not placing people, but rather performing that service and the situation is not covered by the *Regulations.*

[31] I refer to the Federal Court of Appeal case of *Vulcain Alarme Inc. v. The Minister of National Revenue,* (1999) 249 N.R. 1 for an analogy, where the same principle is clearly set out in relation to whether a subcontractor becomes an employee in certain situations. Létourneau J.A. said this:

> ... A contractor who, for example, works on site on a subcontract does not serve his customers but those of the payer, that is the general contractor who has retained his services. The fact that Mr. Blouin had to report to the plaintiff's premises once a month to get his service sheets and so to learn the list of customers requiring service, and consequently the places where his services would be provided, does not make him an employee. A contractor performing work for a business has to know the places where services are required and their frequency just as an employee does under a contract of employment. Priority in performance of the work required of a worker is not the apanage of a contract of employment. Contractors or subcontractors are also often approached by various influential customers who force them to set priorities in providing their services or to comply with the customers' requirements.

[32] The simple facts that subcontractors contracting with entity A are required to comply with the requirements of entity B does not per se place those persons under the direction and control of entity B any more than it makes entity B a customer of those persons.

[33] I note in the *Wolf* case (above) that statutory deductions were made for Canada Pension Plan and employment insurance purposes and that although Kirk-Mayer was clearly held to be a placement agency, the decision was rendered on the basis of tax liability of the Appellant worker and no reference was made to the *Regulations* as to how the work was to be categorized for employment insurance and Canada Pension Plan purposes separate and apart from any question of liability for tax under the *Income Tax Act*. In other words, the arrangements for statutory deductions which were made under the *EI Act* and the *CPP* do not appear to have been set aside by the Federal Court of Appeal in that decision.

[34] Thus, in summary in my view, it matters not whether the situation is one of a contract ***of*** service or ***for*** services. If the worker is placed by the placement agency under the control of the client or is carrying out work, the terms and conditions of which are analogous to a contract ***of*** service for the client, albeit that the arrangement may be held to be a contract ***for*** services, such work is in my view still covered by these *Regulations* so as to bring within the social schemes established by these *Acts*, that work as both insurable and pensionable employment. If, however, entity A contracts with entity B to provide a service (other than simply providing personnel) and then sub-contracts with a worker to provide all or any of that service, for which entity A is responsible, then the worker does fall within the ambit of the *Regulations*.

The Facts

[35] In arriving at his various decisions, the Minister was said in the respective Replies to the Notices of Appeal to have relied upon the following facts (taken from file No. 2001-2468(EI), the appeal of McMorran), to which I have added in parenthesis my understanding from the evidence of the Appellants as to whether they agreed or disagreed. Those assumptions of fact are:

13(a) The Appellant is in the business of providing people for product demonstrations. **(Agreed)**

(b) The Appellant obtained contracts of product manufacturers (hereinafter "the Client") to demonstrate their products in stores. **(Agreed)**

(c) The Client established the place, date and time of the demonstration. **(Agreed to the extent that it contracted for that date, time and place with McMorran)**

(d) The Workers were hired as product demonstrators and their duties included setting up the display table at the store, portioning out the product to be sampled, offering samples, advising customers of the product, and distributing coupons. **(Agreed)**

(e) The Workers performed their services at various store locations. **(Agreed)**

(f) The Client was in contact with the stores and arranged for the work location. **(Agreed; in the Safeway Program the client owned these stores)**

(g) The client determined the time required to demonstrate each product. **(Agreed; it set the outside hours, the worker came and went very much as she chose within that time frame)**

(h) The Appellant obtained and assigned the work. **(Agreed)**

(i) The Workers did not control their own hours and days. **(Disputed)**

(j) The Workers were required to keep track of their hours and submit a product demonstration report to the Appellant. **(Agreed in part; the workers submitted a product demonstration report to the Appellant on which it was confirmed that the demonstration had taken place between certain hours, which were the hours contracted for by McMorran with the client and by McMorran with the worker.)**

(k) The Workers earned a set hourly wage. **(Agreed)**

(l) The Workers received an additional hourly amount if they provided their own appliances. **(Agreed)**

(m) The Appellant set the Workers' wage. **(Disputed; it was a matter of negotiation between McMorran and the worker in each case.)**

(n) The Workers were paid weekly by cheque. **(Agreed and disputed. The workers were paid sometime after they submitted their respective reports.)**

(o) The Workers did not invoice the Appellant. **(Agreed)**

(p) The Workers never replaced themselves or hired helpers. **(Agreed; however, the evidence revealed that they had the right to do so had they chosen to.)**

(q) The appellant was answerable to the Client. **(Agreed)**

(r) The Client provided product information sheets to the Workers. **(Agreed)**

(s) The store manager may review the Workers' work. **(Disputed)**

(t) The Appellant and/or the Client may also review the Workers' work. **(Agreed)**

(u) The Workers were required to conform to a store dress code. **(Agreed partly; in some situations there was a dress code such as in the Safeway Meat Program. In other situations, McMorran requested in the demonstrator instructions that the workers wear a tailored white blouse and black slacks, and black shoes, but not runners.)**

(v) The Workers did not provide the work location. **(Agreed)**

(w) The Client provided the product. **(Agreed)**

(x) The Workers provided their own tools such as bowls, pitchers, utensils, plates, can opener, cutting board, dish cloths, cleaning materials, and demo table. **(Agreed)**

(y) At times the Workers provided their own appliance, such as a toaster oven, for which they were paid extra. **(Agreed)**

(z) At times the Client would arrange for a special demo table or a microwave oven. **(Agreed)**

(aa) The Workers did not have a risk of loss. **(Disputed)**

(bb) The Workers did not have a chance of profit. **(Disputed)**

(cc) The Workers did not charge the Appellant GST. **(Agreed; they did not make enough money to have to have a GST number.)**

(dd) The Appellant placed the Workers in employment to perform services for the Appellant's clients. **(Disputed)**

(ee) The Workers were under the direction and control of the Appellant's clients. **(Disputed)**

(ff) The Appellant remunerated the Workers. **(Agreed)**

(gg) Wages paid by the Appellant to the Workers, for the period [the subject of these appeals] are detailed on the *Schedules* attached to and forming part of the Replies to the Notices of Appeal. **(Agreed on the basis that it was remuneration and not wages.)**

[36] There was an additional assumption of fact in the appeal of Pauline Bakken, namely:

11(e) The Appellant has worked for the payor since 1985. **(Agreed)**

[37] Evidence was given by McMorran on her own behalf. I have no hesitation whatsoever in saying that I found her to be a totally honest and credible witness. She is quite obviously a person of integrity. Some of the Workers also testified and again, whilst some of them were a little confused about the interpretation to be put upon their respective situations, all were honest and credible witnesses.

[38] To the greatest extent, the *viva voce* evidence was consistent with the assumptions of fact made by the Minister. There were a few with which McMorran disagreed. She was able to expand on them considerably, as were the other witnesses, but in essence there is little dispute between the parties over the facts, as opposed to the conclusions to be drawn from those facts.

[39] I am particularly grateful to both counsel, each of whom summarized the facts in their final submissions in a concise and admirable fashion, the Appellant's counsel in his written brief and counsel for the Minister in her cogent verbal summary.

[40] McMorran in her evidence explained that she had been the sole proprietor of this business for the last 22 years. It is not a large business, but I gather that it had been steady over the years. When she received this assessment for the year 1999, it represented 20% of her income for that year; thus it has been of serious concern to her.

[41] She explained that in her business, she negotiated contracts to put on demonstrations of samples of food in various food stores throughout Edmonton. She negotiated these contracts sometimes with the food companies themselves, or their brokers, sometimes with the stores directly such as the Safeway Meat Program, and sometimes with other demonstration agencies, such as Sara Consulting & Promotions Inc. Indeed 50% of her business in 1999 came as a result of working jointly with Sara Consulting in the Safeway Meat Program, the subject of the *Sara Consulting* case decided by Bell J. (above).

[42] In percentage terms, 25% of her time was spent doing these negotiations, which included, finding good products to sample and good locations at which to do the sampling. She would obtain all the information about the product that the customers were likely to request. She then spent the other 75% of her time arranging for Workers to carry out the actual demonstrations of the products at their respective locations which she had booked.

[43] In this latter respect, she engaged the Workers, the subjects of this case. She had a large list of people available to do the work for her, most of whom she had found by word of mouth. About 100 people did work for her over the 2-year period. She did not advertise for them. She worked out of her home office. When she booked the Workers, she gave them the name of the product and the store location. Most of them were experienced and knew what to do without any instruction. They would attend at the appropriate store at the arranged time. The store, generally speaking, knew ahead of time that a demonstration had been arranged. The Workers would contact the manager of the appropriate department, who would then make available the product in question. They took inventory at the beginning and end of each demonstration so the store knew how much product was used and was able to charge for it accordingly. The store, of course, had an interest in seeing the product promoted, so it would increase sales, as did the food producer. Thus, the manager and the Worker would liaise as to the best location for the demonstration to take place. I gleaned from all the evidence that this was not so much a matter of control, but good common sense cooperation; working together so as to be the most effective.

[44] When Workers were first engaged by McMorran, she met with them, went over the demonstration process with them, and had them sign a form of contract which varied somewhat from time to time, but in 1999 set out the following basic items (Exhibit A-1):

1. That as a self-employed person I offer my services as required.

2. That I will be paid by the hour and I am responsible for keeping records for Income Tax and Canada Pension.

3. That I will not receive any staff benefits.

4. That I am not eligible for Unemployment Insurance, as a self-employed worker.

5. That McMorran & Associates Demonstration Agency is not registered with Workers' Compensation.

6. That McMorran & Associates Demonstration Agency

   - will schedule the locations of work
   - will provide required information
   - will pay for work completed.

> 7. That I will provide completed forms, signed by a person in charge, at the location of the work, and return these forms as requested. I will carry a demo kit with required supplies: notepad, pen, tape, scissors, plus the cooking requirements for each demo.
>
> 8. That I may be required to pick up and deliver required materials or supplies.
>
> 9. That I am or will become certified in the Food Safety Handling Course.
>
> 10. That I am required to observe the McMorran and Associates Demonstration Agency Rules of Conduct and Dress Code.

[45] When signing this contract, she said that the Workers could ask any questions about it that they wanted and all of them signed it either whilst they were at her office, or took it home and returned it to her later. I gleaned from the evidence that no undue pressure was applied to the Workers in this respect. McMorran is clearly not that type of person. However, she made it clear that was the manner in which she wished to engage their services. Clearly, it was her intention to set up contracts for services with independent contractors.

[46] McMorran also provided the Workers with a list entitled “Demonstrator Instructions” (Exhibit A-2) which basically set out what was expected of them during the course of the demonstration. I see this is nothing more than setting out what they were required to do in order to meet her contractual obligations to the client, along with some standard information, which would no doubt be of assistance to new demonstrators. They were like a set of blueprints, in my view, given to a sub-contractor by a general contractor on a building site.

[47] Whilst contracts of a standard nature, such as this, have been condemned sometimes in this Court as being a sham, Mogan J. in *Shaw Communications Inc. v. Canada (Minister of National Revenue - M.N.R.)*, [2000] T.C.J. No. 314, said this:

> The tone of those words discloses the heavy hand of a large corporation which required a group of individuals to sign a standard form of document (drafted by the corporation) before they were permitted to provide services to and be paid by the corporation. The terms of the agreement were not negotiated between Shaw and any prospective owner/operator. Each prospective owner/operator was asked to sign the document as a

> fait accompli. There was no equality of bargaining between Shaw and a prospective owner/operator.
>
> The declaration of status in the owner/operator agreements is self-serving to Shaw, the drafter of the document, but the declared status of "independent contractor" is not supported by much evidence. Most of the evidence points in the direction of employment. In my opinion, the owner/operators agreements in Exhibit A-2 are collectively a camouflage or façade intended to make a group of persons appear to be independent contractors when those persons were really employees of Shaw. Those agreements offer more harm than help to Shaw's appeal herein.

It is clear in this case that this was not the same situation; it was simply the basis upon which McMorran was prepared to engage her Workers.

[48] From the evidence of the Workers in the case before me, it is clear that they understood and accepted the terms offered to them. This is not a big corporation situation and there was no imbalance in the bargaining opportunity between the parties. One Worker was uncertain as to her situation and another felt that she was an employee. I will deal with their evidence later in these Reasons. However, I am satisfied that there was no undue pressure put on the Workers. Quite simply, terms of engagement were offered to the Workers and on the whole, they were perfectly content to provide their services in this manner. Whilst I understood most of them to be somewhat unsophisticated in the field of business arrangements, I am satisfied that each had a clear understanding of how they were being engaged, as self-employed persons, to which they were agreeable.

[49] Very little, if anything, was required in the way of training. A food safety handling certificate, involving a short course in food handling, was required by the local Board of Health. The Workers appeared to have completed this course at their own expense.

[50] Once a Worker was assigned to a demonstration, she was very much left to her own resources. How she did her presentation, subject to any particular ways the store wished to adopt, was very much up to her. She brought all her own small utensils, such as a frying pan, toaster oven, spoons and spatulas, towels, can opener, plastic gloves, cutting boards, plates, dishes, soaps, pens and pencils, all of an approximate value of $300.00. McMorran did not pay for these items. Any larger equipment provided by McMorran would be invoiced directly to the client or provided by the client, such as heating ovens or larger electric frying pans. The Workers would arrange their own breaks at the store and whilst basically they were

expected to be at a store all day to do the demonstration, they very much came and went as they chose. They could also change the hours of the demonstration if they saw fit and would simply advise the manager of the department in the store accordingly. The store manager or the department manager would check in on them to make sure everything was going correctly, but I did not view this as supervision, but rather a liaison with the Worker. Similarly, McMorran might come to a store from time to time just to check in with a demonstrator. Again, I did not perceive this as an element of control, but rather a liaison visit with the Worker.

[51] McMorran was of the view that a Worker could replace herself; I felt her evidence in this respect was somewhat tenuous as the Worker would have had to find another Worker from McMorran's list and McMorran would pay the new Worker, herself. The Workers were not really free to hire their own Workers or sub-contract out the work in the true sense of that word.

[52] The Workers were clearly free to take on or refuse any demonstrations as they saw fit. They were free to make this choice and thus were in charge of their schedule. They were also free to work for other agencies at the same time as working for McMorran, and in fact, some did so.

[53] Confirmation that the demonstration had actually taken place was obtained by having the store personnel complete the demonstration report. There also had to be an accounting between McMorran and the store relative to the amount of product used in the demonstration and the Worker would carry a blank cheque from McMorran to pay for this.

[54] McMorran did not require the Workers to wear a specific uniform as was the situation in the *Sara Consulting* case. Sometimes a store would ask for consistency, such as black pants and white blouse, a bow tie, etc. It was of note that in the joint Safeway Meat Program carried out in conjunction with Sara Consulting, all the demonstrators including those engaged by McMorran, wore aprons bearing the *Sara Consulting* name. All stores required the demonstrators to wear name tags so that they could be identified. That was part of the contract with McMorran. McMorran also made the request in the Demonstrator Instructions that they wear white blouses and black pants together with black shoes. I did not see this as an element of control, but rather part of the general professional demeanour required by the clients with whom McMorran was contracting.

[55] Also of note was the evidence of McMorran, that if she was not happy with the performance of a demonstrator, she would simply not rebook that Worker. It was not a question of firing a Worker, but simply not rebooking him/her. Thus, there was no security of employment enjoyed by the Workers.

[56] It was clear from the evidence as a whole that the Workers were paid on a regular basis two weeks after they had completed their demonstrations. No deductions for taxes, employment insurance premiums or CPP contributions were made as per the contract with the Workers. Also, no GST was paid as none of the Workers were earning more than $30,000.00 per annum. There was no vacation pay and no other benefits were made available to the Workers. There were no fringe benefits or social events put on for the Workers. They were simply paid the agreed amount for the demonstrations which they put on.

[57] Whether or not the Workers used their motor vehicles to get themselves to the demonstration locations was very much up to them. A motor vehicle, however, was not a requisite for the work.

[58] The rate of pay was by the hour. The Workers negotiated this with McMorran. The more experienced Workers received more. The range appeared to be between $7.50 and $9.00 per hour. I noticed in particular that the Workers did negotiate the amount with McMorran, which varied depending upon their experience and how they were able to negotiate.

[59] McMorran carried liability insurance. The Workers did not carry their own separate insurance. I took from the evidence that if they had been employed and working under contracts ***of*** service, they would have been covered by her insurance policy for any vicarious liability (as would she), but not if they were independent contractors.

[60] McMorran stated that although in 1999 one-half of her business was involved in the Canada Safeway Meat Program in conjunction with Sara Consulting, in the ensuing year 2000, she dropped that programme as being too onerous, and worked entirely independently again.

[61] Evidence was given by Ann Lee, one of the Workers. She clearly considered herself to be a sub–contractor and was quite at ease with that situation. She had worked at Safeway for 25 years as a cashier, so she knew what both full-time and part-time employment was about. She viewed her relationship with McMorran differently. She also worked for Sara Consulting doing the same thing. She

explained how sometimes she dressed up products she was demonstrating in her own way, to make them more appealing to customers. She took on work or declined it as it suited her. She had no feeling that anyone was evaluating her work or dictating to her how she should do it. She simply collected her assignments from McMorran and went about doing her work in her own way. She reported to no one. She owned her own table as well as her own utensils. She was paid $9.00 per hour for her services. She said there was no written contract, but the witness clearly understood the arrangement into which she had entered into McMorran.

[62] Pauline Bakken gave evidence. She also considered herself to be a sub-contractor and not an employee. She had worked in the food demonstration industry for 30 years and was clearly very experienced. She had contracted previously with the Northern Alberta Diary Pool, and fully understood the difference between being an employee and an independent contractor. She also had no written agreement with McMorran. She felt she had a great deal of discretion in how she presented any particular product. She described a typical demonstration procedure very much as it had been described by McMorran. In 1999, she worked for a number of different agencies including Elections Canada and a marketing agency. She felt she was free to work for a competitor to McMorran at any time. She was free to accept offered assignments or not as she saw fit. If she did not like the location or the time, she would refuse an assignment. She felt no one dictated to her how she prepared her demonstration. She would change manufacturer's recommendations if they did not seem worthwhile to her. She was not evaluated in any way by the store. She did wear a "McMorran Associates" name tag. She was paid $9.00 per hour. She said McMorran had offered her $8.00 per hour, which she had declined, as well as $8.50 per hour before settling on $9.00 per hour. Thus, clearly she was able to negotiate her remuneration with McMorran.

[63] Monica Dijker gave evidence. She was called on behalf of the Minister. She had also been engaged to do demonstrations by McMorran in 1999. She had never worked as a demonstrator previously, thus McMorran had explained what was involved at their preliminary meeting. She signed an agreement. She said that she read it but did not know what it was. She recalls the words "self-employed", but considered she had been hired as an employee at the end of the interview. She kept track of her hours. If she used her own major appliances, she charged McMorran for their use. She felt she did not negotiate with McMorran over the amount of remuneration, but was simply told it would be $8.00 per hour. She never turned down work. She went wherever McMorran assigned her. She never arranged for somebody to stand in for her if she could not be at an assignment, but would simply phone McMorran who would find somebody to replace her. She said she

only found out later that it was open to her to arrange for somebody to stand in for her. In the Safeway Program, she would report to the meat manager upon arrival, who would tell her where to set up her demonstration and plug in her appliances.

[64] This witness also worked for Sara Consulting and in fact took the food handling course whilst working for the latter agency.

[65] She carried no insurance of her own. She wore a Sara Consulting apron and a McMorran name tag whilst working in the Safeway Meat Program.

[66] She felt that she could be "let go" if she did not do a demonstration properly and in summary, felt that she was an employee throughout. She had been self-employed in a previous situation and felt she understood the difference.

[67] Delorraine Kowalski also gave evidence. She also worked for McMorran doing demonstrations. She signed a contract. She understood that "sub-contracting" meant that she was in business for herself. She felt that demonstrators simply followed McMorran's directions, particularly in regard to following the meat manager's directions at the store. She paid for her own food handling course. She was paid every 2 weeks. She was paid $8.00 per hour. McMorran apparently offered her $7.00 per hour, and she, the witness, said $8.00 per hour, upon which amount they eventually settled. Again, this was evidence of the negotiations that took place between them. She felt she could not replace herself but would have to call McMorran to find another replacement. She was not reimbursed for driving to locations. She felt she could be fired. She would not have given any notice if she had decided to quit. She considered she was both an employee and a sub-contractor. As she said, "it was very iffy" and "you were both". She did work for other people over the same period of time. She felt she was put on contract for 6 hours at a time.

[68] Clearly, the witness was somewhat ambivalent and confused about her true situation.

[69] Kevin Kennedy, one of the meat managers in the Canada Safeway Meat Program, also gave evidence. His main concern, it seemed, was to ensure that the demonstrators were not considered to be employees of Safeway. He made it perfectly clear that he was not supervising the demonstrators. If he was not happy with what was going on, he would contact Sara Consulting, who in turn would contact McMorran if it concerned one of her Workers. He agreed he would sign the demonstration report confirming that the demonstration had taken place. He would

add any positive comments he had. He said Safeway had a dress code in effect for its employees and they set guidelines for others working in the store to follow as a dress code. He wanted every demonstrator in his store "to look professional". Overall, his evidence indicated little or no control being exercised over the demonstrators. There was liaison and an expectation to behave and look professional in a manner that befitted the store.

[70] Those are the salient facts that I draw from the evidence. Whilst I understood the confusion in the mind of Delorraine Kowalski and understood that Monica Dijker considered that she was an employee, generally speaking I was impressed by the evidence of Pauline Bakken and Ann Lee, the long-time Workers who appeared to have a very clear understanding, both of the nature of their work and the conditions under which they were being engaged. They were much more decisive in their manner and I prefer to accept their evidence where it differs from the others as to the manner in which these demonstrations were arranged and conducted.

Application of the Factors to the Evidence

[71] Although perhaps the necessity of reviewing the four-in-one test referred to in the *Wiebe Door* decision (above) has now been somewhat diminished by the decision of the Supreme Court of Canada in the *Sagaz* case (above) it is still in my mind, a useful exercise to go through. The Federal Court of Appeal considered as much in both the *Wolf* decision (above) and the *Precision Gutters* decision (above). There are obviously difficulties with each one of the aspects of this test, but they are still of assistance to a trial Judge to a greater or lesser extent, depending upon the circumstances.

[72] It must still be clearly understood that even where the parties choose to put a title to their relationship, if the true nature and substance of the arrangement does not accord with that title, it is the substance to which the Court must have regard. That legal principle has not changed (see *Shell Canada Ltd. v. Canada*, [1999] S.C.J. No. 30). Having said that, it is also fair to say that where the parties genuinely choose a particular method of setting up their working arrangement, it is not for the Minister or this Court to disregard that choice. Due deference must be given to the method chosen by the parties and if on the evidence as a whole there is no substantial reason to derogate from the title chosen by the parties, then it should be left untouched. The *Wolf* and *Precision Gutters* cases very much substantiate that proposition.

[73] In this case McMorran clearly specified to the Workers that she was intending to set up an independent contractor relationship with each of them. I accept her evidence and that of Ann Lee and Delorraine Kowalski to that effect. Such formed part of the initial discussion with each Worker, before they were engaged and was also set out in the written contracts with those with whom written contracts were in fact signed. It is true that Monica Dijker still considered herself to be an employee as did Delorraine Kowalski. Delorraine Kowalski was confused on this point, but the other Workers were clear about the terms of their engagement as independent contractors and I prefer to accept their evidence on this point.

[74] Thus, absent some reason to derogate from that choice of arrangement, such as finding that it, in essence, was a sham or in substance did not amount to a contract for services, a great deal of deference has to be given to it. Such, if it was not clear before, is now abundantly clear from the reasons given in the *Wolf* and *Precision Gutters* decisions.

[75] **Control:** As this aspect of the test has been traditionally applied, it has been consistently pointed out that it is not the actual control so much as the right to control that is important for the Court to consider. The more professional and competent a person is or the more experience they have in their field, the less likely there is to be any actual control, which creates difficulty in applying this test. Indeed as Major J. pointed out in the *Sagaz* case (above), there may be less control exercised in the case of a competent professional employee than in the case of an independent contractor. Nonetheless, it is another factor to be weighed in the balance.

[76] In this case I find there was little or no control exercised in fact over the Workers by McMorran. She entered into contracts with stores or producers to demonstrate their products on certain days at certain times at certain places. Those were not matters of control. That is the very essence of the work she contracted to perform. Her passing on to her Workers the request of her principals and the specifications of her contracts with them, was not an element of control being exercised over the Workers. It was the very essence of the work itself. Over and above that, I find from the evidence that they were very much free to go about their demonstrations as they saw fit, and indeed, they brought a certain amount of individuality to their work.

[77] Similarly, liaising with the store managers or department managers at the stores as to where exactly to set up in the premises was not a matter of control. I am satisfied that although those managers were required sometimes to sign off on a

report sheet that in fact the demonstrations in question had taken place, they did not exercise control over how the Workers went about their work. They simply dropped by out of courtesy, sometimes to see how things were going. Similarly with respect to dress codes, such as they were, these, again, were a matter of a requirement which went along with the main contract, to do a demonstration in a store in a professional manner.

[78] I notice that the Workers changed the recipes, sometimes changed their hours and very much came and went as they chose. The matter of the food handling course, in my view, was a red herring. Any professional has to have his license to carry out his occupation. This was a Board of Health requirement.

[79] Similarly, I am perfectly satisfied from the evidence that neither the store nor the food producer (the clients) exercised any control over the Workers. The evidence of Kevin Kennedy, the Safeway meat manager, was very much to the contrary. It was perfectly clear from what he said that he wanted to stay as far away from any element of control, that could possibly make him or Safeway responsible for anything that went wrong with any demonstration.

[80] I also find that McMorran did not reserve the right to control to herself. Whilst she also would drop in from time to time to make sure all was going well, she expected the Worker to be doing her professional best and was not about to interfere. She might not have re-engaged a Worker if she did not like what she saw, but there was not the slightest indication that she would interfere with the day-to-day work being done by the Worker. Again, the evidence was quite to the contrary.

[81] I am satisfied that there was little, if any, element of control reserved to or exercised by either McMorran or the clients over the Workers. This factor clearly points, in my view, to an independent contractor status as opposed to an employee situation.

[82] **Tools and Equipment:** The Workers, generally speaking, had all their own operational tools. Larger items such as ovens were provided either by the client directly, e.g. Safeway, or by McMorran who then charged her client for their use. Whilst the value of the tools owned by the Workers may not have been great, $300.00 approximately, such were not at all inconsistent with the situation prevailing in the *Precision Gutters* case (above) where Sexton J.A. said:

> I do not feel that because such tools can be used in other occupations, this means they are not important to the installers in

> this case. Because these are common tools it can always be said they are not peculiar to one business or another. Nevertheless, those tools require the expenditure of money on the part of the installers and are essential to the proper carrying out of the work of the installer."

And

> It has been held that if the worker owns the tools of the trade which it is reasonable for him to own, this test will point to the conclusion that the individual is an independent contractor even though the alleged employer provides special tools for the particular business. See *Bradford v. M.N.R.* 88 D.T.C. 1661; *Campbell v. M.N.R.* 87 D.T.C. 47; *Big Pond Publishing v. M.N.R.*, [1998] T.C.J. No. 935.

[83] The tools owned by the Workers were essential to the demonstrations which they carried out. This factor points again to an independent contractor status rather than that of an employee under a contract ***of*** service.

[84] **Chance of Profit – Risk of Loss:** I deal with these two factors under the same heading. Generally, if there is a chance of profit there is a risk of loss also in an entrepreneurial situation. To some extent the only chance of profit in this case arose with the amount of work that the Workers took on. The more they worked, the more they made, which has been traditionally held not to be true profit in the sense of this word. In the *Precision Gutters* case (above), Sexton J.A. again said:

> In my view, this ignores certain important aspects of the relationship between the installer and Precision. In particular each installer used his own judgment to decide when to work and whether to accept or decline any particular job. He was of course free to take jobs with other gutter manufacturers. The contract price, although it was not negotiated on all occasions, was nevertheless negotiated 20%-30% of the time. In my view, the ability to negotiate the terms of a contract entails a chance of profit and risk of loss in the same way that allowing an individual the right to accept or decline to take a job entails a change of profit and risk of loss. The installers were not given any set time for performance of the contract and hence efficient performance might well lead to more profits. An installer could choose to work alone or employ others to help him. Obviously, the more work he could do on his own the more profits he could make. The installer was responsible for defects in work done and had to return to repair the defects at his own expense. There was no guarantee of work from

> day to day, no guaranteed minimum pay and no fringe benefits. All of these things have led other courts to conclude that an independent contractor relationship exists. See *Société de Projets ETPA Inc. v. Minister of National Revenue*, 93 D.T.C. 510. I am therefore of the view that the Tax Court Judge erred in holding that chance of profit and risk of loss criteria favours characterization of the installers as employees." (emphasis mine)

[85] Looked at from this point of view there was an entrepreneurial aspect to the work of these demonstrators. They could accept or decline work. They negotiated or renegotiated their hourly rate from time to time. Theoretically, they could work alone or hire others to do the work for them, although this never in fact seems to have happened. Nonetheless the potential was there and along with it, the chance of profit or the risk of loss.

[86] The use of their own tools, and the cost thereof if not used prudently all weigh in here as did the opportunity the Workers had to do work for others in other agencies if their work was perceived to be being done well.

[87] All in all, I am well satisfied that there was an entrepreneurial element to these services performed by these Workers. On a business scale, that element may have been nearer the lower end of the ladder, but nonetheless it existed, in a way in which it could not exist in a regular employment situation. This aspect of the test points quite clearly, in my view, to an independent contractor status.

[88] **Integration:** This again has been found by the Courts to be a difficult test to apply. The question frequently asked is "whose business is it?" Clearly, that has to be asked from the point of view of the worker not the payor, as from the latter's point of view he is always in business. The context in which the question must be asked is whether there are one or two businesses. In other words, is the person who has engaged himself or herself to perform these services, performing them as a person in business on his or her own account. If the answer to that question is yes, then the contract is a contract ***for*** services. If the answer is no, then it is a contract ***of*** service.

[89] In my view, the very fact that there was an entrepreneurial aspect to the work performed by the demonstrators, tends to reveal that they were in business on their own account. They had no job security and no ongoing commitment to either being engaged by McMorran or provide services to her. Each demonstration was a contract standing alone that either side was free to pick up or leave as they chose. The Workers could and did accept engagements for other agencies, all during the

same period of time, that they provided services to McMorran. In my view, this test clearly points to independent contractors working under contracts ***for*** services.

[90] When I view all of these factors, when I look at the whole forest as well as the individual trees, and when I bear in mind the decision of Bell J. in the *Sara Consulting* case (above), I feel overwhelmingly compelled to the view that these Workers were independent contractors in business on their own account. The words of Bell J. ring loud and clear when he made reference to the Minister continuing to gnaw on the same bone. It is most unfortunate that the Appellant McMorran, in this case, a hardworking lady of the utmost integrity, working in a relatively small business, has been put to such expense and stress in her need to present these appeals. I have of even date dealt with another decision of the Minister in a similar situation in Regina, Saskatchewan, (*Joan Pearce o/a J.P. Class Promotions v. M.N.R.* 2000-3246 (EI) and 2000-3252(CPP)), where the Minister has again forced an Appellant to go to appeal in the face of the *Sara Consulting* decision. If I had jurisdiction to award costs against the Minister in such situation, I would have no hesitation in doing so. Unfortunately, that jurisdiction does not exist. The time has perhaps come for the Minister to say "enough is enough" and halt the necessity for these appeals. If nothing else, the pendulum seems to have swung somewhat in the *Sagaz*, *Wolf* and *Precision Gutters* cases (above) and the Minister, and those advising and representing him, need to go back to the drawing (not gnawing) board to review how these types of business arrangements are now being made in the new age of commerce at the dawn of this century. The economic need for businesses to streamline their working arrangements is becoming evermore apparent and thus the Court is seeing more and more consultant and independent contractor types of arrangements. If the Minister is of the view that these should fall within the ambit of the *EI Act* or *CPP*, he can seek to change the *Regulations* or the Statutes themselves. That is a political decision. However, to continue to put round pegs into the square holes of the existing legislation, in the face of the existing Court decisions, is becoming unacceptable.

Placement Agency Considerations

[91] In my view, the arguments of the Minister on this point have no merit whatsoever. They totally ignore the true intent of the *Regulations* to deal with placement agencies per se. In the situation at hand, McMorran is clearly not simply placing people into employment under the direct control of her clients, she is contracting with those clients to provide a demonstration service for their products. She is required to put on those demonstrations and be responsible for them, do the

accounting with respect to them and invoice the clients accordingly for her services. She is clearly providing a **service.** Furthermore, the Workers were clearly not placed under the control of her clients. Whilst, with the greatest of respect, I part company from Bell J., that independent contractors cannot be covered by the *Regulations* in question, the word "employment" being used in this context of work generally (see *R. v. Scheer Ltd.*, [1974] S.C.R. 1046), it is clear that in this case the Workers were independent contractors and were not placed under the direct control of the clients in any situation analogous to a contract of service with the clients. In my view, these *Regulations* simply do not apply.

Conclusion

[92] In the result, the appeals are allowed, the decisions and the assessments are vacated.

Signed at Calgary, Alberta, this 21st day of October 2002.

"Michael H. Porter"

D.J.T.C.C.

COURT FILE NO.:	2000-3667(EI)
STYLE OF CAUSE:	Beth McMorran o/a McMorran & Associates and M.N.R. and Pauline Bakken
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 8, 9 and 10, 2002
REASONS FOR JUDGMENT BY:	the Honourable Deputy Judge Michael H. Porter
DATE OF JUDGMENT:	October 21, 2002

APPEARANCES:

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Counsel for the Respondent:	Margaret McCabe
Counsel for the Intervenor:	R. Tim Hay

COUNSEL OF RECORD:

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COURT FILE NO.:	2000-3668(CPP)
STYLE OF CAUSE:	Beth McMorran o/a McMorran & Associates and M.N.R. and Pauline Bakken
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 8, 9 and 10, 2002
REASONS FOR JUDGMENT BY:	the Honourable Deputy Judge Michael H. Porter
DATE OF JUDGMENT:	October 21, 2002

APPEARANCES:

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For the Intervenor:		
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COURT FILE NO.:	2000-3669(EI)
STYLE OF CAUSE:	Pauline Bakken and M.N.R. and Beth McMorran o/a McMorran & Associates
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 8, 9 and 10, 2002
REASONS FOR JUDGMENT BY:	the Honourable Deputy Judge Michael H. Porter
DATE OF JUDGMENT:	October 21, 2002

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COURT FILE NO.:	2000-3670(CPP)
STYLE OF CAUSE:	Pauline Bakken and M.N.R. and Beth McMorran o/a McMorran & Associates
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 8, 9 and 10, 2002
REASONS FOR JUDGMENT BY:	the Honourable Deputy Judge Michael H. Porter
DATE OF JUDGMENT:	October 21, 2002

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COURT FILE NO.:	2001-2467(EI) 2001-2468(EI)
STYLE OF CAUSE:	Beth McMorran o/a McMorran & Associates and M.N.R.
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 8, 9 and 10, 2002
REASONS FOR JUDGMENT BY:	the Honourable Deputy Judge Michael H. Porter
DATE OF JUDGMENT:	October 21, 2002

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COURT FILE NO.:	2001-2465(CPP) 2001-2469(CPP)
STYLE OF CAUSE:	Beth McMorran o/a McMorran & Associates and M.N.R.
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 8, 9 and 10, 2002
REASONS FOR JUDGMENT BY:	the Honourable Deputy Judge Michael H. Porter
DATE OF JUDGMENT:	October 21, 2002

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