Docket: 2010-2564(EI)

BETWEEN:

ACCOUNTING BY LEANDREA TANG LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together with the appeal of
Accounting by Leandrea Tang Ltd. (2010-2566(CPP))
on February 10, 2011 at Winnipeg, Manitoba

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Bob Obirek
Counsel for the Respondent:	Larissa Benham

JUDGMENT

The appeal under the *Employment Insurance Act* with respect to the decision of the Minister of National Revenue, dated May 20, 2010, is allowed, without costs, and the decision of the Minister is varied to provide that Indu Rooprai was not engaged by the Appellant in insurable employment as determined for the purposes of the *Employment Insurance Act* at any time during the period from June 1, 2007 to October 18, 2007.

Signed at Ottawa, Ontario, this 17th day of March, 2011.

"Wyman W. Webb"

Webb, J.

Docket: 2010-2566(CPP)

BETWEEN:

ACCOUNTING BY LEANDREA TANG LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together with the appeal of
Accounting by Leandrea Tang Ltd. (2010-2564(EI))
on February 10, 2011 at Winnipeg, Manitoba

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Bob Obirek
Counsel for the Respondent:	Larissa Benham

JUDGMENT

The appeal under the *Canada Pension Plan* with respect to the decision of the Minister of National Revenue, dated May 20, 2010, is allowed, without costs, and the decision of the Minister is varied to provide that Indu Rooprai was not engaged by the Appellant in pensionable employment as determined for the purposes of the *Canada Pension Plan* at any time during the period from June 1, 2007 to October 18, 2007.

Signed at Ottawa, Ontario, this 17th day of March, 2011.

"Wyman W. Webb"

Webb, J.

Citation: 2011TCC171
Date: 20110317
Dockets: 2010-2564(EI)
2010-2566(CPP)

BETWEEN:

ACCOUNTING BY LEANDREA TANG LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant has appealed the determination made by the Minister of National Revenue that, for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*, Indu Rooprai was an employee of the Appellant during the period from June 1, 2007 to October 18, 2007.

[2] The Appellant carries on a business of providing accounting services including bookkeeping, payroll, trial balances and preparation of income tax returns. The Appellant acquired the business as of the end of May 2007. Indu Rooprai had provided services as an independent contractor to the person who had previously carried on the accounting business. The question in this case is whether Indu Rooprai was an employee or an independent contractor during the period from June 1, 2007 to October 18, 2007.

[3] The question of whether an individual is an employee or an independent contractor has been the subject of several cases. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. 61, 2001 S.C.C. 59 ("*Sagaz*"), Justice Major of the Supreme Court of Canada stated as follows:

> 46 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, supra, 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, supra, 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.
>
> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[4] In *Royal Winnipeg Ballet v. Minister of National Revenue*, 2006 FCA 87, 2006 DTC 6323, the dancers and the ballet company had a common intention that the dancers would be hired as independent contractors. The Federal Court of Appeal reviewed the relevant facts of that case as determined by the factors outlined in *Wiebe Door Services Ltd.* v. *Minister of National Revenue*, [1986] 2 C.T.C. 200, 87 DTC 5025 (“*Wiebe Door*”). A majority of the Justices of the Federal Court of Appeal concluded that the relevant facts in that case did not change the intended relationship between the dancers and the Royal Winnipeg Ballet and that the dancers were independent contractors. Justice Sharlow of the Federal Court of Appeal made the

following comments in the *Royal Winnipeg Ballet* case in writing for the majority of the Justices of the Federal Court of Appeal:

> 65. The judge chose the following factors as relevant to the *Wiebe Door* analysis (it is not suggested that he chose the wrong factors or that there are any relevant factors that he failed to consider):
>
> · The indispensable element of individual artistic expression necessarily rests with the dancers. The RWB chooses what works will be performed, chooses the time and location of the performances, determines where and when rehearsals will be held, assigns the roles, provides the choreography, and directs each performance.
>
> · The dancers have no management or investment responsibilities with respect to their work with the RWB.
>
> · The dancers bear little financial risk for the work they do for the RWB for the particular season for which they are engaged. However, their engagements with the RWB are for a single season and they have no assurance of being engaged in the next season.
>
> · The dancers have some chance of profit, even within their engagement with the RWB, in that they may negotiate for remuneration in addition to what is provided by the Canadian Ballet Agreement. However, for the most part remuneration from the RWB is based on seniority and there is little movement from that scale.
>
> · The career of a dancer is susceptible to being managed, particularly as the dancer gains experience. Dancers engaged by the RWB have considerable freedom to accept outside engagements, although there are significant contractual restrictions (the need for the consent of the RWB, and the obligation to hold themselves out as being engaged by the RWB).
>
> · Although the dancers bear many costs related to their engagement with the RWB and their dancing careers generally, the RWB is obliged to provide dance shoes, costumes, tights, wigs and certain other necessary items.
>
> · The dancers are responsible for keeping themselves physically fit for the roles they are assigned. However, the RWB is obliged by contract to provide certain health related benefits and warm-up classes.
>
> 66. The control factor in this case, as in most cases, requires particular attention. It seems to me that while the degree of control exercised by the RWB over the work of the dancers is extensive, it is no more than is needed to stage a series of ballets over a well planned season of performances. If the RWB were to stage a ballet using guest artists in all principal roles, the RWB's control over the guest

> artists would be the same as if each role were performed by a dancer engaged for the season. If it is accepted (as it must be), that a guest artist may accept a role with the RWB without becoming its employee, then the element of control must be consistent with the guest artist being an independent contractor. Therefore, the elements of control in this case cannot reasonably be considered to be inconsistent with the parties' understanding that the dancers were independent contractors.
>
> 67. The same can be said of all of the factors, considered in their entirety, in the context of the nature of the activities of the RWB and the work of the dancers engaged by the RWB. In my view, this is a case where the common understanding of the parties as to the nature of their legal relationship is borne out by the contractual terms and the other relevant facts.

[5] In *D.W. Thomas Holdings Inc.* v. *Minister of National Revenue*, 2009 FCA 371, Justice Layden-Stevenson, stated, on behalf of the Federal Court of Appeal, that:

> 5 Contrary to the appellant's assertion, Miller J. did consider the issue of intention. In keeping with the approach set out in *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, [2007] 1 F.C.R. 35 (FCA), she examined the evidence to ascertain whether it supported that intention and concluded that it did not.

[6] It is the position of the Appellant that the Appellant and Indu Rooprai had a mutual intention that she would be engaged as an independent contractor. In paragraph 8 of each Reply, the Respondent states that:

> 8. In deciding as he did, the Minister relied on the following assumptions of fact:
>
> …
>
> (k) the Appellant and the Worker both intended that the Worker be engaged under a contract for services;

[7] A contract ***for*** services would mean that the Worker performed services as an independent contractor. A contract ***of*** services would mean that the Worker performed services as an employee. By stating that "the Appellant and Worker both intended that the Worker be engaged under a contract for services" the Respondent is agreeing with the Appellant that there was a mutual intention that the Worker would be an independent contractor. As a result of the clear statement in the Reply, the Respondent was not permitted to lead evidence to contradict this admission. If, as counsel for the Respondent stated, this was a typographical error then the correct procedure would have been for the Respondent to request an amendment before the

commencement of the hearing. Counsel for the Respondent did not request an amendment to the Reply before the commencement of the hearing.

[8] In *Ritonja* v. *The Queen*, 2006 TCC 346, 2006 DTC 3140, Chief Justice Bowman (as he then was) stated that:

> [10] To permit the respondent to rely for the first time at trial on a brand new basis of disallowance would violate a fundamental rule of procedural fairness. See *Poulton v. Canada*, 2002 2 C.T.C. 2405, approved by Federal Court of Appeal in *Burton v. The Queen*, 2006 D.T.C. 6133. In *Poulton*, at pages 2408-2410, I set out my view on points raised by the Crown at the last minute against taxpayers who are not represented by counsel.
>
> [11] On the eve of trial the respondent brought motions to amend the replies to add to sections C and D a reference to paragraph 6(1)(*b*). The motion was fully argued at the commencement of trial. I denied the respondent's motions and gave fairly extensive oral reasons. I shall summarize them briefly.
>
> [12] This court and the Federal Court of Appeal have traditionally been fairly liberal in granting amendments….
>
> …
>
> [16] Why then did I not allow the amendment here as was done in the above cases? Well, there is a world of difference between large public corporations, and multinationals with batteries of senior counsel to protect them and millions of dollars at stake and small taxpayers, unrepresented by lawyers, with relatively small amounts of money in issue.
>
> [17] Procedural fairness requires that in cases governed by the informal procedure the Crown not be permitted at the 11th hour to spring a brand new argument on a taxpayer. Had the appellants known from the outset or at least a reasonable time before trial that the Crown was going to rely on paragraph 6(1)(*b*) their approach might have been entirely different and they could have called evidence to rebut the assertion that the amounts were "allowances" within the meaning of paragraph 6(1)(*b*) or that they were exempted from the operation of that paragraph by subsection 6(6). Had I granted the Crown's motions and allowed the amendment the appellants would have been entirely justified in requesting an adjournment and this would have resulted in an undue delay of these relatively small informal appeals. I cannot emphasize too strongly that it is of consummate importance that the court in the informal procedure be vigilant to ensure that the unrepresented taxpayer not be deprived of procedural fairness.
>
> [18] I quite agree that by denying the Crown's motion to amend to refer to paragraph 6(1)(*b*) I may have deprived it of what might be a very potent argument. However the Crown's loss of these appeals because it slipped up and failed to refer

> to a provision that might have helped it is not, in the scheme of things, a jurisprudential or fiscal catastrophe. What is far more important is that unrepresented taxpayers in the informal procedure be given every benefit of procedural fairness. To force them to confront the complexities of paragraph 6(1)(*b*) and subsection 6(6) on the eve of trial would do the administration of justice irreparable damage.
>
> 11 Here, the Crown did not ask for an amendment and, for the reasons given in Poulton, I would probably not have granted it. However, I do not think the Crown can be in a better position by raising an unpleaded issue at trial than it would be if it had asked for and been denied an adjournment.

[9] In *Burton* v. *The Queen*, 2006 FCA 67, [2006] 2 C.T.C. 286, 2006 DTC 6133, Justice Rothstein (as he then was) stated that:

> 14 The question of whether to allow an amendment to pleadings and if so whether a recess or adjournment is appropriate is, of course, a matter of discretion. I do not read Bowman A.C.J.T.C. to purport to lay down fixed rules for dealing with such occurrences. However I do think he was providing some guidance as to the practical considerations to be taken into account by a Tax Court judge in exercising discretion in these cases.
>
> …
>
> 17 The relevant considerations are, first, that the taxable benefits at issue are $6,348.00 for the year 2000 and $4,801.00 for the year 2001. The amounts of tax involved are of course, only a percentage of these figures -- according to the appellant about forty percent. The amounts involved therefore are relatively small.
>
> 18 Second, the matter involved taxation years that were some four and five years old at the time of trial.
>
> 19 Third, the appellant is self-represented. He was justified in expecting that the Minister's original Reply was the basis for the assessment and restricting his preparation to the statutory provisions relied upon by the Minister in that Reply. Section 6 of the Income Tax Act is drafted in a manner that contains exceptions and exceptions to exceptions and is therefore not straightforward. This is not a case in which the Minister's error in not referring to paragraph 6(1)(l) in the original Reply was self-evident and in respect of which, the appellant should have anticipated an amendment.
>
> 20 Having regard to these considerations, I would exercise my discretion to refuse to allow the amendment to add paragraph 6(1)(l) of the Income Tax Act to the Minister's Reply in the Tax Court. As the assessment of the appellant in respect of automobile expenses cannot be supported by any other provision of section 6 of the Act, the assessment cannot be sustained.

[10] In this case it appears that counsel for the Respondent was not aware that the assumption had been made that both the Appellant and the Worker had intended that the Worker would be engaged under a contract ***for*** services. No request to amend the Reply was made before the commencement of the hearing. Since this was an informal procedure case where the issue was whether a particular person was an employee or an independent contractor for a short period of approximately four and a half months, it seems to me that if the Respondent would have requested an amendment to the pleadings to withdraw this admission at the commencement of the hearing, such request would have been denied. Having failed to ask for an amendment prior to the commencement of the hearing, it would certainly not be appropriate in this case to amend the pleadings *during the hearing* to reverse an assumption on this important point. As a result, for the purposes of this case the Appellant and the Worker had a mutual intention that the Worker would perform her services as an independent contractor.

[11] In *Royal Winnipeg Ballet*, the facts related to the dancers and the circumstances of their work were not sufficient to alter the arrangement from that which was intended by the parties. Therefore it seems to me that "in keeping with the approach set out in *Royal Winnipeg Ballet*", the relevant facts in this case, as determined by the factors as set out in *Wiebe Door* and *Sagaz*, would have to more strongly indicate an employer-employee relationship than did the facts in the case of the *Royal Winnipeg Ballet* in order for Indu Rooprai to be considered to be an employee. In both the *Royal Winnipeg Ballet* case and in this case, there was an intention to create an independent contractor relationship and not an employer-employee relationship.

[12] With respect to the control factor, the evidence in this particular case was that the amount of control that the Appellant had over Indu Rooprai would have been less than the amount of control that the Royal Winnipeg Ballet had over the ballet dancers. In the *Royal Winnipeg Ballet* case, Justice Sharlow described the degree of control that the Royal Winnipeg Ballet had over the dancers as "extensive". As noted by Justice Sharlow in the above decision:

> The RWB chooses what works will be performed, chooses the time and location of the performances, determines where and when rehearsals will be held, assigns the roles, provides the choreography, and directs each performance.

[13] Indu Rooprai performed certain tasks – preparation of tax returns, payroll, etc. The following exchange took place between Indu Rooprai and counsel for the Respondent with respect to the question of how work was assigned to her:

Q How were you notified about work opportunities? How did your -- how was your work assigned to you?

A It wasn't really assigned. It would just -- if it came in and needed to be done, we didn't have employees so you have no choice, right? There's just me and Bev, and Bev didn't really do tax returns and whatnot. So that left me, so --

Q Did you have any deadlines?

A Yes, of course. They're tax returns so depending on the company's year end, three months after if they owed money, six months after if they, you know -- you have to meet the client's deadline so it depends on their year end and what you're doing. If there's payroll, 15th of every month. If it's T-2, if it's a personal tax return, obviously your deadline is April, so --

[14] In the case of *Direct Care In-Home Health Services Inc.* v. *Minister of National Revenue*, 2005 TCC 173, Justice Hershfield made the following comments in relation to control:

> 11 Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship.* **However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task -- you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship.*** Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.*
>
> 12 In the case at bar, the Worker was free to decline an engagement for any reason, or indeed, for no reason at all. …
>
> (emphasis added)
>
> (* denotes a footnote reference that was in the original text but which has not been included.)

[15] Indu Rooprai was engaged to perform certain tasks. The deadlines were dictated by the particular tasks. She was not supervised when she preformed her tasks. When the task was finished a bill would be prepared and sent to the client. This would suggest that she was an independent contractor not an employee.

[16] With respect to the ownership of equipment, the Appellant provided the computer, software and calculator that Indu Rooprai used to perform her tasks. Leandrea Tang, who owns all of the shares of the Appellant, testified. She indicated that Indu Rooprai had her own cell phone. Indu Rooprai did not address this during her testimony. It seems to me that it would be more likely than not that Indu Rooprai would have had a cell phone. In *Royal Winnipeg Ballet* the dancers bore many costs but the Royal Winnipeg Ballet was obliged to provide dance shoes, costumes, tights, wigs and certain other necessary items.

[17] It does not appear that Indu Rooprai would have been able to hire other workers to perform the tasks that she was to perform. In the *Royal Winnipeg Ballet* case, there was no discussion with respect to whether or not the dancers could hire any helpers but it would seem illogical to suggest that the dancers could hire any person to replace them in the production.

[18] With respect to the degree of financial risk/opportunity for profit, there was a significant discrepancy between the testimony of Leandrea Tang and Indu Rooprai. Leandrea Tang stated that Indu Rooprai was paid based a percentage of the amounts collected on bills rendered to the clients for whom she performed work. Indu Rooprai stated that she was paid a fixed wage based on working the same number of hours each week. The cheques that were issued to Indu Rooprai were introduced at the hearing. The following is a list of these cheques:

Date	**Amount**
June 22, 2007	$743.00
June 29, 2007	$489.50
July 5, 2007	$726.50
July 12, 2007	$700.50
July 19. 2007	$661.00
July 19, 2007	$1,800.00
August 2, 2007	$2,670.00
August 16, 2007	$697.50
August 23, 2007	$622.50
August 30, 2007	$622.50
September 6, 2007	$540.00
September 13, 2007	$330.00
September 20, 2007	$346.50

September 27, 2007	$622.50
October 4, 2007	$628.00
October 11, 2007	$534.50
October 18, 2007	$644.50
October 18, 2007	$2,700.00

[19] The following is an excerpt from the testimony of Indu Rooprai provided during her examination in chief by counsel for the Respondent:

> Q How was your pay determined?
>
> A Hourly and we got paid once a week.
>
> Q Who determined your wage?
>
> A To my knowledge, my wage for the period that we're talking about was the same as when -- prior ownership. I think it went up a little but that was due to I think Bev had spoken with Boris and we were supposed to, you know, be getting raises after tax time. So I think it did -- like, if you check the cheques maybe my wage went up a little bit but that was only because prior discussions, not with Lea.

[20] Indu Rooprai also stated that, in relation to the time that she worked, that "99 percent of the time it was 9:00 to 5:30". If 99 percent of the time Indu Rooprai worked the same number of hours each week and if she was paid an hourly wage, it seems to me that 99 percent of the cheques that she received should have been for the same amount. Only three of the 18 cheques (17%) were for the same amount - $622.50. Of particular note are the following three cheques:

Date	**Amount**
July 19, 2007	$1,800.00
August 2, 2007	$2,670.00
October 18, 2007	$2,700.00

[21] On July 19, 2007 Indu Rooprai also received another cheque for $661.00 and on October 18, 2007 she received another cheque for $644.50. She did not receive another cheque on August 2, 2007 nor did she receive a cheque for the week before or the week after August 2, 2007. If the cheque for $2,670 that was dated August 2, 2007 was for something other than the amount payable to Indu Rooprai for her services, then she would not have been paid on July 26, 2007, August 2, 2007 or August 9, 2007.

[22] Based on the testimony of the witnesses, there are two possible explanations for these cheques that were significantly larger than the other cheques. One explanation is that Indu Rooprai was paid a percentage of the amounts collected on the bills rendered for her work and significant amounts were collected before these cheques were issued. Therefore the cheques simply represented what was payable to her based on what had been collected.

[23] The other explanation was provided by Indu Rooprai. She stated that:

> Q I guess I just would like to clarify Ms. Rooprai's testimony with respect to the three cheques referred to by the appellant.
>
> So, Ms. Rooprai, are you able to tell the court what these cheques were for, if not commission or wages?
>
> A They're not for commission. I'm -- I'm -- I don't know. I don't remember exactly the nature of it but it was either back pay for rent and then I took it as a wage and I would pay the tax on it and I would give back the portion that was either for rent or something.
>
> I don't remember the 100 percent detail of it but I didn't mind to take it as my income. But this -- like, there's -- I'm not taking $1,800 home. Give it back but I believe it was a discrepancy in rent amongst previous owner, new owner, or something else.
>
> But it's not commission and it's whatever, our fault that we handled it that way and wrote on the memo line that it was such because it's not.
>
> …
>
> EXAMINATION BY THE COURT:
>
> Q Rent for what?
>
> A I don't 100 percent know the situation. I think it was rent but --
>
> Q But is the cheque made out to you?
>
> A Yes. Not rent for me. I'm not --
>
> Q But you used the word "rent". That is why I am curious as to why you used the word "rent".

A Because that's what I think it was in regards to. I don't know, maybe you could call Bev and see if she remembers but I think there was a discrepancy in who owned the building and who was operating out of the building, and that was from previous, like when Boris --

Q Why would that be paid to you?

A I don't know how to say this. Obvious, you don't want to show -- you want to show a loss that you're not collecting rent, right?

So if it comes to me, if I'm the person claiming it, like I'm the one who cashed the cheque, I give it back. But I'm not charging any rent for anything.

Q You did not own the building or nothing other just --

A No, no, no.

[24] Indu Rooprai signed two of these three cheques. She was involved in the preparation of income tax returns for clients. To accept Indu Rooprai's explanation would mean that she included amounts in her income as phantom rent for a building she did not own and that she immediately returned all or a portion of the amount to the Appellant. Her explanation of what the payments represented, as a person who prepares income tax returns for a fee, is unacceptable.

[25] I accept the explanation provided by the Appellant and I find that Indu Rooprai did have an opportunity for profit and a risk of loss as the amount that she was paid was based on what was collected in relation to the bills that were rendered to clients for whom she performed services. As well, as stated by the Appellant, if the client did not pay their bill, then Indu Rooprai was not paid for that work and therefore she had a risk of not being paid.

[26] In the *Royal Winnipeg Ballet* case, the dancers, as acknowledged by the Federal Court of Appeal, had little financial risk. With respect to the opportunity for profit, the dancers with the Royal Winnipeg Ballet could negotiate for additional remuneration, although most were paid in accordance with a predetermined scale. In *Royal Winnipeg Ballet* the dancers were allowed to accept outside engagements provided that they had the consent of the Royal Winnipeg Ballet and provided that they held themselves out as being engaged by the Royal Winnipeg Ballet. In this case, there were no such restrictions imposed on Indu Rooprai in accepting outside engagements, although she may have had little time to do so.

[27] In the *Royal Winnipeg Ballet* case, the dancers did not have any management or investment responsibilities with respect to their work with the Royal Winnipeg Ballet. In this case Indu Rooprai did have some management responsibilities as she was preparing and signing cheques.

[28] The Respondent also noted that Indu Rooprai had business cards that identified the name of the Appellant. In *Flash Courier Services Inc.* v. *The Minister of National Revenue*, [2000] T.C.J. No. 235, Justice Rowe held that the couriers were independent contractors notwithstanding that the couriers had uniforms and identification cards to identify them as being from Flash. At paragraph 21, Justice Rowe made the following comments:

> 21 In the within appeals, one can say that an outsider observing the intervenor carry out deliveries during the course of a day could reasonably conclude the business was that of Flash. However, that would be as a result of the surface arrangement between the parties. Paul had not installed a sign or otherwise placed information on the side of his vehicle to indicate he was the owner/operator. As discussed earlier, the security requirements were the main reason the intervenor - and other couriers - wore a jacket and/or shirt identiying them as being from Flash. Flash had the facilities to receive calls from customers, dispatch the drivers to make pickups and deliveries, store parcels, and to do all the administration and accounting in order to account for revenue and the proper allocation between Flash and each courier in accordance with the percentage set forth in the particular contract.

[29] In that case the couriers were found to be independent contractors.

[30] As a result, I find that the relevant facts related to the engagement of Indu Rooprai by the Appellant as determined by the factors as set out in *Wiebe Door* and *Sagaz* do not suggest more strongly an employer/employee relationship than did the facts in *Royal Winnipeg Ballet*. In this case the relevant facts related to the engagement of Indu Rooprai by the Appellant more strongly indicate an independent contractor relationship than they do an employer / employee relationship. As a result Indu Rooprai was an independent contractor and not an employee of the Appellant during the period under appeal.

[31] The appeal under the *Employment Insurance Act* with respect to the decision of the Minister of National Revenue, dated May 20, 2010, is allowed, without costs, and the decision of the Minister is varied to provide that Indu Rooprai was not engaged by the Appellant in insurable employment as determined for the purposes of the *Employment Insurance Act* at any time during the period from June 1, 2007 to October 18, 2007.

[32] The appeal under the *Canada Pension Plan* with respect to the decision of the Minister of National Revenue, dated May 20, 2010, is allowed, without costs, and the decision of the Minister is varied to provide that Indu Rooprai was not engaged by the Appellant in pensionable employment as determined for the purposes of the *Canada Pension Plan* at any time during the period from June 1, 2007 to October 18, 2007.

Signed at Ottawa, Ontario, this 17th day of March, 2011.

"Wyman W. Webb"

Webb, J.

CITATION:	2011TCC171
COURT FILE NOS.:	2010-2564(EI); 2010-2566(CPP)
STYLE OF CAUSE:	ACCOUNTING BY LEANDREA TANG LTD. AND THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	February 10, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	March 17, 2011

APPEARANCES:

Agent for the Appellant:	Bob Obirek
Counsel for the Respondent:	Larissa Benham

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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