

Docket: 2002-1379(EI)

BETWEEN:

CAMBRIAN COLLEGE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LORI LYNN BARDELL,

Intervener.

Appeal heard on common evidence with the appeal of
Cambrian College (2002-1380(CPP)) on June 26 and 27, 2003 and
March 22, 2004 at Sudbury, Ontario

Before: The Honourable Justice Gerald J. Rip

Appearances:

| | |
|-----------------------------|-------------|
| Counsel for the Appellant: | David Brady |
| Counsel for the Respondent: | Joanna Hill |
| Counsel for the Intervener: | Nini Jones |

JUDGMENT

The appeal pursuant to section 103(1) of the *Employment Insurance Act* is allowed and the decision of the Minister, on the appeal made to him under section 91 of the *Act* is varied on the basis that Lori Lynn Bardell was not engaged in insurable employment while engaged by the appellant for the period from March 18, 1996 to December 15, 2000.

Signed at Ottawa, Canada, this 30th day of August 2004.

"Gerald J. Rip"

Rip J.

Docket: 2002-1380(CPP)

BETWEEN:

CAMBRIAN COLLEGE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LORI LYNN BARDELL,

Intervener.

Appeal heard on common evidence with the appeal of
Cambrian College (2002-1379(EI)) on June 26 and 27, 2003 and
March 22, 2004 at Sudbury, Ontario

Before: The Honourable Justice Gerald J. Rip

Appearances:

| | |
|-----------------------------|-------------|
| Counsel for the Appellant: | David Brady |
| Counsel for the Respondent: | Joanna Hill |
| Counsel for the Intervener: | Nini Jones |

JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is allowed and the decision of the Minister, on the appeal made to him under section 27 of the *Plan* is varied on the basis that Lori Lynn Bardell was not engaged in pensionable employment while engaged by the appellant for the period from March 18, 1996 to December 15, 2000.

Signed at Ottawa, Canada, this 30th day of August 2004.

"Gerald J. Rip"

Rip J.

Citation: 2004TCC586

Date: 20040830

Dockets: 2002-1379(EI) and 2002-1380(CPP)

BETWEEN:

CAMBRIAN COLLEGE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LORI LYNN BARDELL,

Intervener.

REASONS FOR JUDGMENT

Rip J.

[1] This is an appeal by Cambrian College in Sudbury, Ontario from a decision of the Minister of National Revenue that the employment of Lori Lynn Bardell on two occasions (March 18, 1996 to November 1998 and from August 1999 to December 15, 2000) during the period from March 18, 1996 to December 15, 2000 constituted both insurable employment under the *Employment Insurance Act* ("Act") and pensionable employment under the *Canada Pension Plan* ("CPP"). The appellant submits that at all material times Mrs. Bardell, the intervener, was an independent contractor. The issue in these appeals, therefore, is whether Mrs. Bardell was an employee or an independent contractor.

[2] The appellant is a college of applied arts and technology and operates two licensed child-care programs. The Play 'n' Learn Day Care Center ("Play 'n' Learn") is a licensed day nursery operated on the premises of Cambrian College by its employees and Carrousel Family Child Care ("Carrousel") is a licensed private home day care agency. We are concerned with the Carrousel operation only.

[3] Carrousel is a not-for-profit organization that operates a private home childcare program under the *Day Nurseries Act* ("DNA"). It is "piggy-backed" on

Cambrian's licence. Carrousel is licensed for 40 locations and currently has agreements with 29 caregivers, called "providers". Carrousel recruits individual providers who use their homes to care for up to five children at a time. These providers are not licensed but operate their day cares under the private home day care licence of Carrousel.

[4] The appeals were heard on common evidence.

Facts

[5] The appellant called two witnesses, Ms. Francine Fox, a manager for day care programs at Cambrian and Mark Edward Oliver, the husband of a former provider.¹ The respondent called the intervener as his only witness.

Testimony of Francine Fox

[6] Ms. Fox has been an employee with the appellant since 1992. She was hired as coordinator of Carrousel and served in that capacity until May 1997, at which time she became the manager of Child Care Services. Since May 1997, she has been responsible for the administration of the Carrousel program as well as Play'n' Learn.

[7] As a licensee under the *DNA*, Ms. Fox explained, Carrousel has to ensure that providers comply with the *DNA*. The *DNA* requires, amongst other things, health and fire inspections of the caregiver's home and insurance coverage for both house and car used by the caregiver. The *DNA* also limits both the age and number of children attending a day care. In order to ensure compliance with these provisions employees of Carrousel regularly attend at the residence of a provider.

¹ The testimony of a third witness, Mary Jane Tousignant, was not considered since her evidence would split the appellant's case; also the documents that the Crown intended to produce through Mrs. Tousignant were tendered late in the trial and could have been provided earlier through Ms. Fox.

[8] The home of potential providers undergoes health and fire inspections prior to Carrousel accepting children into the home. Ms. Fox testified that these inspections are arranged by the applicant providers; however, a Carrousel agent can facilitate visits by helping the applicant fill out the required form. Ms. Fox stated that with respect to Mrs. Bardell, she faxed some basic information to the Fire Department, but the Fire Department communicated with Mrs. Bardell, as it does with all potential providers, in order to set up a time for a visit. The same procedure was implemented for the Sudbury and District Health Unit.

[9] Ms. Fox said she facilitated communications between the insured and the providers for liability insurance, but providers themselves arranged and paid for house and car insurance. Providers have liability insurance pursuant to a group policy in their names.

[10] Carrousel and the providers entered into a purchase of service agreement. This agreement sets out the responsibilities of the provider. During the period under appeal, Mrs. Bardell entered into service agreements with Carrousel to provide child care services in her home for children referred to her by Carrousel. The relevant provisions of this contract² are as follows:

A. RESPONSIBILITIES OF THE PROVIDER

1. *The Provider agrees to comply with all of the provisions of the Day Nurseries Act and with the requirements of any other regulatory body.*
2. *The Provider agrees to allow the Agency, the Ministry of Community and Social Services' licensing agent, Fire and Health Officials access to the home at any time during the operating hours of day care to ensure compliance with this agreement.*
- ...
4. *The Provider agrees to maintain a "Family Day Care Rating" acceptable to the Agency.*

² Appendices to the contract are not set out in these reasons.

5. *The Provider agrees to make available home day care for up to 5 full day equivalent children referred by the Agency as per Day Nurseries Act home capacity and classification.*
6. *The Provider agrees not to discharge a child without prior consent from Carrousel Family Child Care's Manager.*
- ...
9. *The Provider agrees to make the provision of home day care services to the clients of Carrousel Family Child Care for a minimum of 229 days a year, which excludes the following days ...*
10. *The Provider will satisfy the Agency that all persons providing back-up day care to the Provider meet licensing requirements (ie: proof of valid First Aid & C.P.R. certificate, criminal record check and up-to-date medical and immunization record).*
11. *The Provider will maintain valid certificates in first Aid and C.P.R.*
12. *The Provider and any other person 18 years of age and up normally resident in the home will have a medical certificate, proof of up-to-date immunization and a recent 2 step T.B. test from a licensed physician stating that he or she is free of communicable disease. The medical will be renewed every two years.*
13. *The Provider will contract for and maintain liability insurance in an amount acceptable to the Agency. Should the Provider choose to travel with the children in her/his vehicle, proof of a 3rd party liability insurance endorsement stating "permission to carry for compensation" is required.*
- ...
17. *... The Provider agrees to obtain a signed travel consent form from the parent for any special outings or field trips. The consent forms will be returned to the Agency at the end of the month or upon termination of childcare.*
- ...
19. *The Provider agrees to record children's attendance on a daily basis on the "Attendance Register" supplied by the*

Agency. On the last attending day of the month, the Provider will obtain verification of attendance from the parent. On the last working day of the month, once signed by the parent, the Provider will forward a copy of the attendance register to the Agency.

20. *The provider agrees to develop and maintain policies in areas of BEHAVIOUR MANAGEMENT, HEALTH AND SAFETY, PROGRAMMING and SERIOUS OCCURANCES which meet the minimum requirements of the DAY NURSERIES ACT, with the assistance and approval of the Agency (see Provider Manual for Policy samples).*

...

23. *The Provider understands that she/he is a self-employed person and will be responsible for his/her own income tax and applicable deductions. ...*

[11] Ms. Fox stated that it was her general practice to read the contract out loud and answer any questions at the time the contract was signed. Ms. Fox acknowledged that she did not read any provisions of the *DNA* to Mrs. Bardell. Ms. Fox recalled that Mrs. Bardell had worked as a backup provider in 1995 for a friend who was a provider and was aware of how providers operated. She said that she explained the implications of being self-employed and the demands of operating a successful business to Mrs. Bardell. In addition, Ms. Fox testified that Mrs. Bardell was informed of the 229-day rule, that she was expected to operate the day care 229 days per year; but the 229 days was only a guideline. Carrousel never imposed a penalty on providers who did not provide child-care services for less than 229 days a year.

[12] The contract was signed at Mrs. Bardell's apartment in the presence of Ms. Fox. Mrs. Bardell agrees that Ms. Fox read the contract out loud, Mrs. Bardell did not review the contract at the time; however, over time she did read through the contract herself. According to Mrs. Bardell the contract was not negotiable, if she did not sign it she could not work at Carrousel. Mrs. Bardell did not seek independent advice nor did she ask for that opportunity, but she complained that the opportunity was not provided.

[13] According to Ms. Fox Carrousel has providers who work during the day, the evening and even overnight. The provider chooses when she wants to provide the service.

[14] Ms. Fox explained the process by which parents and children are referred to providers. Parents usually contact Carrousel which then refers them to providers. If providers are interested, they meet with the parents and decide whether or not the child and the provider are compatible. Only when both the provider and the parent agree will the child be placed in that provider's day care. Providers may refuse a child at any time of the process, according to Ms. Fox. If a provider accepts a child but then wishes to reject the child the provider can give two weeks notice to the child's parents and Carrousel. Ms. Fox explained that two weeks notice allows Carrousel additional time to find an alternative day care for the child. In cross-examination Ms. Fox stated that although the purchase of service agreement stipulates that Carrousel's consent is required in order for a provider to discharge a child, two weeks notice to the parents and a copy of that written notice to Carrousel sufficed.

[15] If Carrousel is unable to place five children in a provider's day care, that provider may advertise the available spots and fill them with "outside children", Ms. Fox declared. She stated that the only time Carrousel would record the presence of an "outside child" is if the child was at the day care during one of Carrousel's home visits. However, during cross-examination, she conceded that providers were not allowed to have "outside children"; "outside children" had to register with Carrousel. I note the provider's service agreement with Carrousel does not prohibit "outside children"; paragraph 5 states that the provider agrees to make available day care for up to five children at a time referred by Carrousel. The question is whether the provider may have an "outside child" if Carrousel has referred less than five children to her.

[16] Ms. Fox also testified that Carrousel distributes first aid kits, fire extinguishers, and equipment such as cribs, strollers, gates, etc., to the various providers. These items are distributed on a first come first serve basis, because there are not enough for all of the providers. In order to borrow the equipment an annual fee of \$10 was charged to a provider.

[17] Carrousel provided resources to help providers with the development of their programs, but providers are solely responsible for developing and implementing the programs, Ms. Fox testified. The weekly activities and menus are the provider's decision, so long as they comply with the provisions of the *DNA*. Carrousel gives workshops to providers to ensure quality childcare. Other workshops are available through other community organizations and Carrousel promotes them via notices attached with the provider's paycheque. However, the workshops are voluntary; there is no mandatory training other than first aid and cardiopulmonary resuscitation ("CPR"). No penalties are imposed on providers who do not attend these workshops, according to Ms. Fox.

[18] In 1996 Carrousel also held monthly meetings with providers. These meetings were for communication purposes and information sharing. The monthly meetings were recommended and encouraged but not mandatory. Attendance was taken. Depending on Carrousel's budget, attendance by providers at seminars out of town was facilitated through payment of all or part of the cost by Carrousel. Mrs. Bardell attended one seminar out of town.

[19] When a provider first starts operating a daycare she is given a reference manual which Ms. Fox described as the "primary document for the operation" of its day care. Mrs. Bardell referred to the manual as the "bible". The manual describes health and sanitary practices such as hand washing, kitchen cleanliness and food preparation, diapering, food and drink, medical and dental hygiene, illness, administration of medicine, safety procedures, including fire safety, behaviour policy and setting limits, programming suggestions, available resources and consents that are to be included in a provider's file: application, reference checks, reports of fire and health authorities, inspection reports, copy of purchase service agreement and excerpts of the *DNA*, among others.

[20] A family day care rating scale manual was used by Carrousel to evaluate providers. Ms. Fox said the rating scale was standard in the industry. Once a year a home visitor from Carrousel made an unannounced visit to the provider to observe and evaluate the provider's operation. The provider is marked on approximately 32 items on the scale. The evaluation sets out the criteria of space and furnishings for care and learning, for example, space arrangement of furnishings and child-related displays; language and reasoning, which includes helping children understand and use language; learning activities, such as eye-hand coordination and music; basic care, which includes meals and snacks, rest time, toiletry and grooming; social development such as discipline; and adult needs, which includes relationship of the child with his or hers parents.

[21] A provider has a responsibility to upgrade and if the provider does not meet the minimum requirements of the *DNA*, the contract with Carrousel may be rescinded. Indeed, Ms. Fox declared, if there is non-compliance by a provider, Carrousel itself is non compliant and may lose its licence. Ms. Fox declared that Carrousel strives to ensure compliance by providers through monthly, quarterly and annual visits. Ms. Fox acknowledged that under the *DNA*, directly or indirectly, it is Carrousel who is responsible for fire prevention, programming, liability insurance and adequate childcare.

[22] Fees are established according to a list published by Carrousel, but although set by Carrousel the funder has the final say on how much to charge a parent. Carrousel keeps \$2.50 out of the fees charged to parents whereas the balance is for the provider. The \$2.50 is used to cover administration costs. When a child is absent because of vacation or sickness, a provider receives 80 per cent of the amount she normally would have received had the child been present. Mrs. Bardell acknowledged that she received 80 per cent of the amount she would normally charge when a child under her care was away. As for the non-charged days of absence, parents are allowed one day per month. Part of the \$2.50 kept by Carrousel goes to pay the 80 per cent of the amount normally received. Providers must consult Ms. Fox in order to charge less than the established rates. A provider receives payment after filling out an attendance sheet and sending it to Carrousel. Later on, fees were increased by Carrousel without input from the providers. Providers do not issue invoices to Carrousel; Carrousel determines payment from the children's attendance sheets; the attendance sheets are also used as a source to invoice parents.

[23] In order to keep their day care open at all times, providers may hire backup providers to assist with the childcare. A backup provider is an employee of the provider. The only limitation to hiring a backup provider is that the backup provider must comply with the *DNA* qualifications and requirements. As a consequence of the *DNA*, Carrousel can refuse a helper if there is no proof that all licensing requirements have been met.

[24] Ms. Fox was questioned about third party liability insurance purchased by the provider. Under the contract with Carrousel providers were required to secure \$1,000,000 of liability insurance; however, another \$1,000,000 was added by the providers to insure against child abuse. In her view, she only "arranged" for insurance for the provider but it was each provider who purchased the insurance. Cambrian "was not a party to the insurance". Ms. Fox, as manager of Carrousel, facilitated the purchase, disseminating the information to Reed Stenhouse, the insurance broker. A provider was in charge of the providers acquiring the group policy.

Testimony of Mark Oliver

[25] Mark Oliver is the husband of a former Carrousel day care provider. Mr. and Mrs. Oliver provided childcare services under a contract with Carrousel from August 1998 to August 2002. Mr. Oliver considered himself a "co-provider". Mr. Oliver worked "shift work" and was home three days a week. He claims he did 40 per cent of the work at his wife's day care.

[26] In 1998 Mr. Oliver and his wife initially wanted to start a private day care; however they had very little success in attracting clients. They found it difficult to recruit clients without actually being licensed. Parents can receive government subsidies for day care expenses only if the facility is licensed. Mr. Oliver stated that one of the main reasons for becoming a day care provider with Carrousel was because Carrousel had a licence.

[27] As with Mrs. Bardell, Mr. Oliver's client contact was established through Carrousel. Carrousel actively recruited parents and provided them with a phone number for a provider. The provider and the parents set-up an interview at the provider's home in order to see if the provider, parent and child are compatible. Mr. Oliver agreed with Ms. Fox that the decision to accept a child was exclusively his and his wife's decision and pre-placement interviews were a way for them to screen children and parents; Mrs. Bardell thought otherwise. Mr. Oliver and his wife decided to accept applicants on the basis of the ages of their own children, socialization needs, toys and equipment.

[28] Mr. Oliver testified that he and his wife had control over the daily hours of operation. Their hours of operation fluctuated over the years. In the beginning they were open Monday to Friday but as their children got older they closed Fridays. They adjusted the hours as they saw fit, approval was not sought or required, they simply called Carrousel and gave them two weeks notice.

[29] Mr. Oliver and his wife went on vacation during the summers. Their day care was closed for two to three weeks and for the rest of the summer the day care was operated through backup providers. Mr. Oliver and his wife hired, trained and paid these backup providers. Mr. Oliver stated that other than checking that the helpers met the *DNA* requirements, Carrousel had no say in the hiring of the helpers. Mr. Oliver and his wife would call Carrousel, give them the names of their helpers, and sent in their first aid certificates, police check, and medical records. Once the backup provider's services were no longer needed Mr. Oliver and his wife terminated the relationship without any input from Carrousel.

[30] Mr. Oliver explained his understanding that pursuant to the *DNA* a provider is not allowed to have more than five children on the premises and no more than two children under the age of two. A provider can have more children registered just as long as there are no more than five children with them at one particular time. In 1998 Mr. Oliver and his wife chose to provide day care services for only four children, at a later time they only provided child care for three children. In both instances Mr. Oliver and his wife chose to have less than the maximum amount allowed. Although Carrousel informed them of children on the waiting list, Mr. Oliver and his wife refused those children. Children did not have to be accepted according to Carrousel's waiting list. Mr. Oliver's nephew needed a day care; the Olivers called Carrousel and told them that they were accepting their nephew. Mr. Oliver believed he and his wife could take in other children outside of Carrousel as long as the maximum number of children at one time did not exceed five.

[31] Mr. Oliver testified that in his view he had the right to discharge a child, although he thought Carrousel's consent was required. Prior to a child being discharged he would provide the parent with two week's notice and inform them that the child was no longer welcome. (The service agreement requires written notice to discharge a child; Carrousel's consent is not required.) It was his understanding that the day care was his and his wife's business, it was in their home, they were the owners and operators, which meant they could determine who came in, who left, how long they stayed, when they came, and if they wanted to discharge them or not. He stated that this was clear to him and his wife from the onset.

[32] The car insurance was secured by Mr. Oliver and his wife personally. In regards to the liability insurance for the house, they were given a name of another Carrousel provider who had pooled together all of the providers to get a better premium. Mr. Oliver stated that he personally scheduled the visits with the Sudbury Board of Health and the Fire Department, although he could not say who contacted the Health and Fire Departments on his behalf. Mr. Oliver never read the contract signed by his wife and Carrousel. Neither did he read the parenting manual nor the *DNA*. He only read "some provisions" of the provider's manual. As a result of his employment with young offenders he was aware of what was required, he intimated.

[33] Before 2001, Mr. Oliver and his wife purchased the toys and equipment they required to run their day care. Also, on the children's birthdays, Mr. Oliver and his wife organized birthday parties for the children, at their cost.

[34] Mr. Oliver explained that weekly menus and activities were posted at the entrance of their home because the *DNA* required it. Although not a requirement by Carrousel, parental consent was always sought prior to taking the children on a car or bus ride. Finally, an employee of Carrousel inspected their house on a monthly and quarterly basis to ensure the *DNA* was respected.

[35] Mr. Oliver said he would not have continued his relationship with Carrousel if Carrousel had control over the day care's hours and demanded, for example, that his day care be open on Saturdays or evenings. Mr. Oliver did not consider himself or his wife an employee of Carrousel. At no time did Mr. Oliver send an invoice to Carrousel. He telephoned Carrousel at the middle of the month and at the end of the month, informing Carrousel of attendance. His wife, he said, received cheques from Carrousel based on the telephone calls. The attendance sheets, he said, confirmed his earlier information to Carrousel.

Testimony of Lori Lynn Bardell

[36] Mrs. Bardell signed her first purchase of service agreement on or about March 1, 1996 pursuant to which she would provide child care in her home for children referred to her by Carrousel.

[37] Mrs. Bardell testified that she expected Ms. Fox and Carrousel to tell her what the *DNA* and Carrousel's requirements were and how she could meet them. In order to assist her in complying with the *DNA* Carrousel provided her with a manual, the "bible".

[38] Prior to accepting children Mrs. Bardell had to update her medical background and undergo a police check. Mrs. Bardell, when initially providing services to Carrousel, lived in an apartment. In 1997 she moved into her house. Both her apartment and house were inspected by Carrousel, the fire prevention officer, and an officer of the Public Health Unit. Carrousel arranged all of these visits.

[39] After inspecting Mrs. Bardell's house Ms. Fox informed her that she would have to install a fire detector, erect a fence around the pool and add extra spindles on the deck. Ms. Fox also asked Mrs. Bardell to replace loose wood panels on the fence and hammer in some nails on the side entrance deck. The fire prevention officer required several changes; a fire retardant door had to be installed, drywall had to be put up and a sprinkler head had to be installed. The public health officer required her to install a thermometer in the fridge. All of these expenses were paid by Mrs. Bardell and she was not reimbursed by Carrousel.

[40] Once the changes were implemented, Carrousel started to refer parents to Mrs. Bardell. Initially she and Ms. Fox both met families interested in her day care, later on Mrs. Bardell met with parents alone. It was Mrs. Bardell's understanding that if parents wanted their child to attend her day care, it was ultimately their choice. The parent would sign an agreement with Carrousel, not with Mrs. Bardell, and Carrousel would place the child with her. Mrs. Bardell said that she was never asked whether or not a child or parent was acceptable and she felt that she was not in a position to refuse or reject a child. This contrasts Ms. Fox's evidence that both parties involved must agree. She did admit that at the time she gave birth to her first child she did request that no more children be referred to her and this request was honoured.

[41] Mrs. Bardell testified that she was unable to remove children that had been assigned to her by Carrousel. Mrs. Bardell believed her contract stated she could not remove a child without Carrousel's approval.

[42] Mrs. Bardell was paid twice a month. In order to receive payment an attendance record had to be provided to Carrousel. However, attendance sheets were filled out monthly, but in the middle of the month Carrousel's secretary would telephone her for the attendance information for the first two weeks, she would be paid based on the telephone information.

[43] If a parent was late in picking up a child and made it a habit, providers could charge a \$5 fee per 15 minutes. Mrs. Bardell said she did not need approval from Carrousel to charge this fee. She simply had to tell the parents she was charging the late fee and then inform Carrousel when she would report her hours. The parent paid the late fee to Carrousel who would then remit it to Mrs. Bardell.

[44] Any positions available, due to the absence of the children on holidays, for example, were filled with "replacement children". These children came from other providers who were on vacation or among children who were next in line on the waiting list. If the available positions were filled Mrs Bardell received 100 per cent of her regular pay, but did not receive the additional 80 per cent for the children on vacation. In July 1996, Mrs. Bardell received a "provider of the month" award for her hard work and flexibility in accepting replacement children of any age and at any time over the summer.

[45] Providers did not receive paid vacations. As summer approached Carrousel would ask the providers to complete a form advising if and when they were planning to take a vacation. During the time a provider was on vacation children under her care were placed elsewhere.

[46] Mrs. Bardell never hired a replacement to take care of the children while she was on vacation. However, at one time she did hire a helper to provide child care services while she was at medical appointments. She had to inform Carrousel of the helper's presence and the helper was required to have a medical check, a criminal record check, proof of immunization, first aid and CPR. Mrs. Bardell established the helper's hours of work. She trained and paid the helper. When she decided the helper was no longer required she terminated the relationship. She did not ask Carrousel for permission to terminate.

[47] Mrs. Bardell explained she received unannounced monthly and quarterly home visits from Carrousel employees, referred to as home visitors. The home visitors were to ensure compliance with the *DNA*. They evaluated her pursuant to Carrousel's family day care rating scale on items such as menus, activities and furnishing. In order to receive a high score on this evaluation - she received 6.96 out of 7 on one

evaluation - Mrs. Bardell followed both the criteria set out in the scale as well as in the Carrousel manual.

[48] Mrs. Bardell referred to the provider's manual for ideas on planning menus and activities. The manual required that two snacks and lunch had to be served. Mrs. Bardell admitted that she could either change the menu and activity or use exactly what was in the manual. It was her decision what foods to purchase and activities to pursue.

[49] Mrs. Bardell stated that she purchased some toys for both her own daughter and the children to whom she provided services. Both sets of toys would be mixed up and the children would play with both. Mrs. Bardell agreed that Carrousel provided a toy library and toys could be borrowed. Carrousel also provided larger equipment such as booster seats, gates and strollers.

[50] A plan of activities and a menu list for the week were to be posted on a bulletin board by the door of Mrs. Bardell's home. She also had to use the activity and menu sheets provided by Carrousel. When Mrs. Bardell wanted to take the children on a day trip she said she had to obtain written permission from the parents. Carrousel required her to perform a monthly fire drill and fill out a form accordingly. First aid and CPR qualifications had to be renewed regularly and Carrousel arranged the renewal dates. Also, pets in her home had to be vaccinated.

[51] Overall, Mrs. Bardell said her hours were regular during her years with Carrousel. Only once did she have a child that required care over and above regular hours, on Tuesdays. The rest of the time, she worked more or less Monday to Friday, between 45 and 50 hours per week, from 6:30-7:00 a.m. to 6:00-6:30 p.m. daily.

[52] Regarding income tax, Mrs. Bardell said she kept all her receipts and she sent them to her accountant who filled her personal tax return as if she was operating her own business.

[53] In November 1998, Mrs. Bardell parted ways with Carrousel. Apparently a parent had let herself into Mrs. Bardell's home while Mrs. Bardell was absent. Mrs. Bardell informed Carrousel of the incident and asked that the child be removed from her care. Mrs. Bardell stated that Carrousel informed her that she had to give notice, she could not have the child removed without notice. Mrs. Bardell felt this trespass by the parent was inappropriate and hence she ended the relationship with Carrousel.

[54] After leaving Carrousel Mrs. Bardell ran a private day care. She continued to look after three children who were with her when she operated a day care for Carrousel. Mrs. Bardell stated she ran the day care differently from when she was with Carrousel. She had verbal agreements with parents, no forms and no inspections from the city. She decided the menus and programs. In contrast with Carrousel, she decided when and how she was paid and who came to her day care.

[55] Mrs. Bardell returned to Carrousel in August of 1999 because she wanted to receive regular pay and she knew that Carrousel would provide her with clients.

[56] When she was with Carrousel, Mrs. Bardell did not advertise. She said that she distributed pamphlets for Carrousel but her phone number was not on the pamphlet. Mrs. Bardell did get calls from parents directly because of word of mouth but she believed that she was not entitled to enter into private agreements with the parents. She would refer those parents to Carrousel. When she left Carrousel in 1998, and again in 2000, she posted advertisements for her own day care.

[57] Mrs. Bardell terminated the relationship with Carrousel on December 15, 2000. Mrs. Bardell explained the events leading up to her termination. A day or two after her annual rating, Mrs. Bardell started experiencing problems with a particular child. After the first incident Mrs. Bardell just took notes; however, a similar incident occurred a day or two after and at that time she called Carrousel and asked that the child be removed from her home. According to Mrs. Bardell, Carrousel informed her that she could not just remove the child, she had to give notice and give Carrousel time to find a replacement provider. Mrs. Bardell stated that Ms. Fox recommended that she treat the three year old child as a six month old, meaning that she observe him and keep him close to her. Within a couple of days there was a third incident. Mrs. Bardell explained that she was sick at the time and had asked for some time off because of health reasons. During this time off Mrs. Bardell was unaware that the problem child had been removed from her day care. Mrs. Bardell testified that she assumed the child would continue to be in her care after her return to Carrousel. Mrs. Bardell sent Carrousel a letter informing them that she would return to provide child care services on November 20, 2000. On November 15, 2000 she received thirty-day notice of termination.

[58] Mrs. Bardell now operates a private day care centre in her home. She admits that she currently takes care of three children and that on average she has no more than five. She is also aware that the Ministry of Community and Social Services could check on her if she was reported. She stated that the children are treated the same now as they were with Carrousel. There are no changes in the utilization of her

car and she has third party liability insurance. She still has the fire and carbon dioxide detector. Mrs. Bardell testified that she has no fire extinguisher and that she does not receive any visits from either the fire or health department.

Analysis

[59] The issue of whether a person is an employee or an independent contractor recently was considered by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*³ Major J., speaking for the Court, confirmed the application of the four criteria described in *Wiebe Door Services Ltd. v. Minister of National Revenue*.⁴ Major J. stated:

47. Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra⁵. 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.

³ [2001] S.C.J. 61, 204 D.L.R. (4th) 542.

⁴ [1986] 2 C.T.C. 200, 87 DTC 5025, per MacGuigan J.A.

⁵ [1968] 3 All E. R. 732, 738-9.

[60] In *Wiebe Door*, McGuigan J.A. discussed the four tests of control, ownership of tools, chance of profit or risk and integration and adopted Lord Wright's description that it is the "combined force of the whole scheme of operations"⁶ that one must consider in determining whether a person is an employee or carrying on her own business; the four criteria are, of course, important in struggling to arrive at a conclusion. The whole of the various elements which constitute the relationship between the parties must be examined.

Control

[61] The respondent argued that according to the evidence Carrousel controlled Mrs. Bardell's work. The contract presented to Mrs. Bardell was non-negotiable. Mrs. Bardell had to accept referrals; she could not refuse a child. Mrs. Bardell was unable to unilaterally discharge children from her care; she had to provide two weeks notice. Carrousel exercised supervision, Carrousel had home care visitors that conducted monthly, quarterly and annual visits, and only quarterly visits are required under the *DNA* and its Regulations. These home visitors supervised Mrs. Bardell, reviewing the activities program and the menu. In addition they ensured that activities and menus were posted on a board provided by Carrousel.

[62] Respondent's counsel contended that Mrs. Bardell was not allowed to offer services outside of Carrousel. She could not accept private children and solicit clients on her own. She stated that factors such as Mrs. Bardell being required to display Carrousel's advertisement in her window, conduct monthly fire drills, use attendance registers, make phone calls in order to receive payment and attending mandatory monthly meetings and training sessions are all signs of the control Carrousel exercised over Mrs. Bardell. The respondent further submitted that Carrousel set the rates of pay, had enrolment schedules and contracted directly with parents, all factors of control that went well beyond the scope of the *DNA*.

[63] While it is obvious that Carrousel exercised a degree of control over Mrs. Bardell I am not satisfied that the degree of control was so overwhelming that Mrs. Bardell lost any discretion in deciding how to operate the day care. Many provisions in the contract between Mrs. Bardell and Carrousel were attempts by Carrousel to ensure the provisions of the *DNA* would be complied with on a continuing basis, that Cambrian maintained its licence and that a standard be maintained by all the providers who operated under the name of Carrousel. At the

⁶ *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R 161, 169-70.

end of the day it was Mrs. Bardell who was responsible for the success or failure of her day care.

[64] Mrs. Bardell was free to set her own hours of work. She controlled when the day care would stay open and when it would close. Mrs. Bardell testified that she made a conscious decision not to work on weekends because she considered weekends overtime. She determined whether to attend Carrousel meetings; they were not mandatory.

[65] She also had the option to choose her own vacation time and while she was on vacation she did not receive payment. Mrs. Bardell could either close the day care completely or arrange for a backup provider in the event of her vacation or absence. It was her decision whether or not she needed a backup provider. She in fact did hire a helper once. She trained that person, established the rate of pay, paid that person and terminated that relationship when she no longer needed her.

[66] Mrs. Bardell controlled her day-to-day duties. She decided how to utilize the premises and materials. She decided what programs, menus and field trips to implement within the framework provided. She bought the food for the children. She purchased arts supplies, installed the fence, smoke and carbon dioxide detectors, and drywall required to bring the home up to standard.

[67] Mrs. Bardell gave evidence that she felt she could not reject children that were referred to her by Carrousel. However, in cross-examination she did admit that the acceptance of children was a good business decision and a business necessity in order to continue to run a successful business. Mrs. Bardell was given the provider of the month award due to her flexibility in accepting children. Yet she testified that it was her understanding she could not refuse children and that other providers were also not able to refuse children. I question whether her understanding is correct. If she were compelled to accept children designated by Carrousel, why would Carrousel award her for her flexibility in accepting children? In fact she could reject children but chose not to exercise such control. It was her belief that she had to take all children referred to her; however, this does not mean she had to accept everyone.

[68] Although a home visitor would make unannounced visits, these visits cannot be taken to be akin to the supervision an employer has over an employee. The monthly visits were implemented to ensure Mrs. Bardell was complying with the *DNA* and, also, that Carrousel was compliant. As long as Mrs. Bardell complied with the various provisions of the *DNA* she was able to run her day care the way she saw fit.

[69] Control can be very subjective. A person may control one person in a way he or she cannot control another. Personality is important. In the appeal at bar the personality of the actors - Mrs. Bardell and Ms. Fox, for example – influence the degree of control. A worker with a strong or aggressive personality may be able to do things that a worker with a passive personality would hesitate to do, although entitled to do. And where the worker has a passive personality, the "employer" may take advantage of the passivity. It may be that the difference between how Mrs. Bardell operated her day care and Mr. Oliver and his wife operated their day care was due to Mr. Oliver having a more active and aggressive personality than does Mrs. Bardell. This is my observation. He seemed to have commanded more respect from Carousel than did Mrs. Bardell. To some extent Mrs. Bardell perceived a lack of control or ability to act in a certain way because she feared making the decision or preferred someone else telling her what to do. Mrs. Bardell "believed" she could not do certain things that Mr. Oliver did not hesitate to do. Mrs. Bardell delayed pursuing her right to operate in her own home in her own way until conditions became intolerable. This passivity, however, does not necessarily transform a person carrying on a business to an employee.

Ownership of Tools

[70] The respondent argued that Carrousel provided tools and equipment to Mrs. Bardell. Carrousel provided a fire extinguisher for each provider and also performed annual maintenance on these extinguishers. Carrousel provided an extensive toy library and equipment.

[71] Mrs. Bardell provided all tools and equipment necessary to take care of the children. The principal and necessary tool, the day care facility, was Mrs. Bardell's home. She did borrow toys from Carrousel's toy library as well as some equipment; however, she provided the house, car, activities, and food. She provided a helper in circumstances where she could not provide day care. Although backup providers had to meet certain requirements it was she who hired the backup. She trained her, paid her and terminated the relationship.

Chance of Profit and Risk of Loss

[72] The *DNA* imposes a restriction on the maximum number of children on the premises of the day care at a given time, whether the day care operator is an employee or carries on her own business. Section 1 of the *DNA* defines "private-home day care" as:

Temporary care for reward or compensation of five children or less who are under ten years of age where such care is provided in a private residence, other than the home of a parent or guardian of any such child, for a continuous period not exceeding twenty-four hours; (“garde d’enfants en résidence privée”)

"Private-home day care agency" is defined by the *DNA* as a:

a person who provides private-home day care at more than one location; (“agence de garde d’enfants en résidence privée”)

The *DNA* defines "day nursery" as follows:

a premises that receives more than five children who are not of common parentage, primarily for the purpose of providing temporary care, or guidance, or both temporary care and guidance, for a continuous period not exceeding twenty-four hours, where the children are,

(a) under eighteen years of age in the case of a day nursery for children with a developmental disability, and

(b) under ten years of age in all other cases,

but does not include,

(c) part of a public school, separate school or private school under the *Education Act*; (“garderie”)

Section 11.(1) of the *DNA* provides:

No person shall establish, operate or maintain a day nursery or a private-home day care agency, as the case may be, except under the authority of a licence issued by a Director under this Act.

[73] According to these provisions Mrs. Bardell is limited in her chance of profit even if she operates outside of Carrousel. Her ability to take in more than five children would depend on her obtaining a licence and hiring a certain number of providers depending on the number of children attending the day nursery. Although she was limited to a maximum of five children on the premises at one time she was free to choose which and how many children she accepted within the maximum limit.

[74] The rates of pay that Carrousel paid to a provider effective January 1, 2000 are described in the following "Fee for Services" schedule:

| CHILDREN UNDER 2 YEARS OLD | PROVIDER RATE | RATE AT 80% | Codes |
|--|---------------|-------------|-------|
| Play group: Less than 6 hours without meal | \$11.50 | \$9.20 | 1 |
| Part Day: Under 6 hours in care | \$20.50 | \$16.40 | 2 |
| Full Day: 6 to 9 hours in care | \$23.50 | \$18.80 | 3 |
| Extended Day: 9 to 13 hours in care | \$35.50 | \$28.40 | 4 |
| OVER 2 YEARS OLD | | | |
| Play group: Less than 6 hours without meal | \$11.50 | \$9.20 | 1 |
| Part Day: Under 6 hours in care | \$19.00 | \$15.20 | 5 |
| Full Day: 6 to 9 hours in care | \$21.50 | \$17.20 | 6 |
| Extended Day: 9 to 13 hours in care | \$31.50 | \$25.20 | 7 |
| SCHOOL AGE CHILDREN | | | |
| Before school only | \$5.00 | \$4.00 | 8 |
| After school only | \$8.00 | \$6.40 | 9 |
| Before and after school | \$11.50 | \$9.20 | 1 |
| Part Day: Under 6 hours in care | \$19.00 | \$15.20 | 5 |
| Full Day: 6 to 9 hours in care | \$21.50 | \$17.20 | 6 |
| Extended Day: 9 to 13 hours in care | \$31.50 | \$25.20 | 7 |

Rates of pay vary depending on the age of the child and the hours of care at the day care. A provider can maximize income by exploiting the variances in rates.

[75] The respondent submitted that Mrs. Bardell did not have a chance of profit or risk of loss. Carrousel set the pay rate; there was no room to negotiate and no ability to charge a greater amount. Counsel submitted that controlling one's expenses is not a meaningful way of calculating profit. She argued that Mrs. Bardell was guaranteed pay even when the children were absent. Counsel also argued that Mrs. Bardell was limited to a maximum number of children, even if a backup provider was hired, and hence was severely limited in her chance of profit.

[76] The Intervener's counsel submitted that increase in hours of work cannot be perceived to be a chance of profit. She relied on the following paragraph in *While-Away Security Services Inc. v. Canada*, [2001] T.C.J. No. 252, where the Court stated, at paragraph 47:

... The only chance of profit to the workers was if they were able to increase the number of their jobs; this is not inherent to independent contractors. Employees may increase their wages by working long hours, if work is available.

[77] Mrs. Bardell did have a chance of profit because she controlled the hours of her work. While it is true that Mrs. Bardell was paid a set rate per child, her profit was determined by the number of hours worked, number of children and the age of the children. She also would have increased her profit by accepting children who were charged a greater fee, for example. She could select children applying the fee schedule to her maximum advantage.

[78] Another way that Mrs. Bardell could have increased her profit was to require parents to provide food and materials such as diapers and art supplies. Mrs. Bardell was not obligated to purchase these supplies and tools. Indeed, the contract with the parent provides that the parent will supply diapers.

[79] Potentially a major risk of loss to Mrs. Bardell is from the upkeep of both her house and car. She was also liable for bodily injury to children in her home or in the car. To protect herself from loss, Mrs. Bardell secured liability insurance.

[80] Justice Desjardins, in *Wolf v. Canada*,⁷ expanded the factor of risk of loss to factors beyond financial risk, at paragraph 87:

In consideration for a higher pay, the appellant, in the case at bar, took all the risks of the activities he was engaging in. He was not provided health insurance benefits nor a pension plan by Canadair. He had no job security, no union protection, no educational courses he could attend, no hopes for promotion. The profit and risk factors were his.

[81] Mrs. Bardell was not provided with health insurance benefits by Carrousel. She had no job security, no union protection and no hope for promotion.

Integration

[82] The value of the integration test has been questioned by the Federal Court of Appeal in *Precision Gutters Ltd. v. Canada*.⁸ Nevertheless, courts have considered the test when determining the existence of an employer-employee relationship. In *Wolf, supra*, the Court of Appeal held at paragraph 93:

Both Canadair's work and the appellant's work were integrated in the sense that they were directed to the same operation and pursued the same goal, namely the certification of the aircraft. Considering, however, the fact that the integration factor is to be considered from the perspective of the employee, it is clear that this integration was an incomplete one. The appellant was at Canadair to provide a temporary helping hand in a limited field of expertise, namely his own. In answering the question "whose business is it?" from that angle, the appellant's business stands independently. Once Canadair's project was completed, the appellant was, so to speak, ejected from his job. He had to seek other work in the market place. He could not stay at Canadair unless another project was under way.⁹

⁷ [2002] 4 F.C. 396 (F.C.A.).

⁸ 2002 F.C.A. 207

⁹ *supra*

[83] In *Canada v. Rouselle et al.*¹⁰, Hugessen J. made the following comments on the integration test:

The judge did not mention the factor of "integration" as such. Clearly in light of the case law cited above, it was not essential for him to speak of it. However, if he had considered it is apparent that, from the employees' standpoint, the latter were not in any way integrated into the employer's business.

Their comings and goings, their hours and even their weeks of work were not in any way integrated into or coordinated with the operations of the company paying them. Although their work was done for the company's business, it was not an integral part of it but purely incidental to it.

[84] Mrs. Bardell was not integrated into the appellant's business. She was engaging in services as a person in business on her own account. The contract she signed described her as self-employed. There is no evidence that, at the end of the day, contradicts this description of the relationship.

Contract

[85] Ms. Fox read the contract to Mrs. Bardell every year on the date of its renewal. Over time Mrs. Bardell has read the contract herself. Mrs. Bardell was always aware that the contract between her and Carrousel was not a contract of employment but for her services in the course of her business.

[86] Justice Noël, in *Wolf*, commented on contractual intent and its significance in an employer-employee or independent contractor relationship, at paragraph 122:

... I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.

[87] Mrs. Bardell was not an employee of Carrousel. She carried on her own business. The "combined force of the whole force of operating" leads to this

¹⁰ (1990), 124 N.R. 339 (F.C.A.) at 347.

conclusion. Whether or not the day care would be successful would be solely due to the efforts of Mrs. Bardell, not Carrousel. If she was not as gifted dealing with children as she obviously is, her day care would have failed once she left Carrousel. When she did leave Carrousel she was able to continue the day care with many of the same children she had when she was with Carrousel. The business at Mrs. Bardell's home was her business.

Conclusion

[88] When I consider the "combined force of the whole scheme" of the day care operation I conclude that Mrs. Bardell was carrying on her own business during the periods in issue. Mrs. Bardell was not engaged in insurable employment under the *Act* and was not engaged in pensionable employment under the *CPP*. The appeals are allowed

Signed at Ottawa, Canada, this 30th day of August 2004.

"Gerald J. Rip"

Rip J.

CITATION: 2004TCC586

COURT FILE NO.: 2002-1379(EI) & 2002-1380(CPP)

STYLE OF CAUSE: Cambrian College v. Minister of National Revenue

PLACE OF HEARING: Sudbury, Ontario

DATE OF HEARING: June 26 & 27, 2003 & March 22, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice Gerald J. Rip

DATE OF JUDGMENT: August 30, 2004

APPEARANCES:

| | |
|-----------------------------|-------------|
| Counsel for the Appellant: | David Brady |
| Counsel for the Respondent: | Joanna Hill |
| Counsel for the Intervener: | Nini Jones |

COUNSEL OF RECORD:

For the Appellant:

Name: David Brady

Firm: Hicks, Morley

For the Respondent:

Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada