Docket: 2010-103(EI)

BETWEEN:

GAREE PRUE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

6673538 CANADA INC. DBA STRAUSS HERB COMPANY,

Intervenor.

Appeal heard on common evidence with the appeal of
Garee Prue *2010-104(CPP)* on September 28, 2010
at Vancouver, British Columbia

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

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Matthew Canzer
Agent for the Intervenor:	Karen Lofgren

JUDGMENT

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

Signed at Sidney, British Columbia this 10th day of January 2011.

"D.W. Rowe"

Rowe D.J.

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Citation: 2011 TCC 9
Date: 20110110
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REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant, Garee Prue, appealed from two decisions issued by the Minister of National Revenue (the "Minister") on January 4, 2010 pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"), wherein the Minister decided her employment with the Intervenor ("Strauss") during the period from July 4, 2008 to June 23, 2009 was neither insurable nor pensionable because the requirements of a contract of service were not met and an employer-employee relationship did not exist.

[2] The Appellant, the agent for Strauss and counsel for the Respondent agreed both appeals could be heard together.

[3] Garee Prue ("Prue") testified she was hired – by Karen Lofgren ("Lofgren") – as a product demonstrator and had previous experience in product demonstrations ("demos"). She held a Food Safety Certificate and participated in one training session which did not deal with product knowledge but was focused on setting up the tea and

coffee machine, the demonstration table and displaying printed material. There was some discussion with a Strauss representative – Nina Wang ("Wang") – about interacting with potential customers. Prue received a booklet – Exhibit A-1 – containing information about Strauss products – that was available for distribution to customers. Each product had an accompanying brochure or printed information. Prue was also provided with two large binders containing information about Strauss products including 4 types of coffee and 10 teas. Prue stated she performed her duties at approximately 30 grocery stores and pharmacies in the Vancouver metropolitan area and the adjacent region known as the Lower Mainland. Her hours of work varied from week to week. Initially, she worked two days a week but during January, 2009, worked 22 days. Prue prepared a worksheet – Exhibit A-2 – showing hours worked and money earned from Strauss from July 11, 2008 to July 6, 2009. Using her home computer, she created a form for her invoices and based on an initial hourly rate of $12 per hour – increased to $15 after the first month – submitted them by e-mail attachment for each designated pay period to the Head Office in Kamloops, British Columbia. Beginning in January, 2009, Strauss paid Prue by direct deposit. The hourly rate included travel to and from demo locations. Prue prepared a list of demos performed during the relevant period with totals for each month written – in pencil – at the right. Prue agreed that Strauss did not offer a guarantee of a specified number of hours of work per week but had inferred from conversations with persons in Strauss management that she could work two or three days a week at the outset and that the volume would increase after January 1, 2009. Prue agreed she could change her hours of work and could contact a grocery store or pharmacy directly to arrange a suitable time for a demonstration. Some locations had their own demo table but she always took the Bunn machine to make the special coffees and teas. Details of that commercial grade machine are in the information sheet filed as Exhibit A-4. Prue stated her task was to demonstrate the machine quickly and efficiently so potential customers could sample the products. Prue was not supervised in the performance of her duties and selected certain products to demonstrate which depended somewhat on store inventory or the preferences expressed by the store manager. Prue decided the duration of the demos and even though Strauss allotted 4 hours for each, sometimes Prue left early if the number of people at the location did not warrant remaining. At each demo, she attempted to distribute a minimum number – 40 – of samples. Prue stated there were occasions when she could have remained on site for the full 4-hour period and earned the sum of $20 per hour for the entire time but felt it would have been unethical to do so if no samples were being handed out to shoppers. However, most demos lasted between 3.5 and 5 hours. Prue stated she had to keep track of hours worked because that was the basis of the invoices submitted to Strauss for each pay period. Although she was able to decline work without suffering any consequences, she did not do so during the relevant period. As required by Strauss,

Prue used her own car – an economical 2000 Honda Civic – or arranged for a replacement vehicle, if necessary. Strauss provided the necessary tools and equipment involved in the product demos including a table, coffee percolator carafes, floor mat product, information brochures, cups, filters and gloves. Prue prepared a list – Exhibit A-5 – of the equipment, materials and product returned to Strauss at the end of the working relationship. If Prue required certain items for a demo, she purchased them and billed Strauss when submitting an invoice for that pay period. In addition to being paid for travel time at the hourly rate, Prue received an allowance of $20 for local demos and $50 if the location was further, such as Chilliwack. Strauss paid for Prue's Workers' Compensation Coverage ("WCB") and liability insurance pertaining to her work. Prue stated she was free to accept other work and had provided her services to another company – 3 days a week – between July and October, 2008 but was compelled to take time off as a result of suffering a heart attack. Upon returning to work with Strauss, she performed between 19 and 22 demos a month and did not need to seek other clients. Prue stated she advertised her services by contacting certain businesses and inquiring whether they required additional workers. As assumed by the Minister at paragraph 7 (dd) of the Reply to the Notice of Appeal ("Reply"), Prue acknowledged that she claimed expenses – on her 2008 tax return – associated with using her vehicle and working from her home office including motor vehicle repair, maintenance, gas, car insurance and registration, home office supplies, home insurance, cell phone, utilities, depreciation of computer, subscriptions to magazines and cost of courses to update and increase her knowledge of foods and herbs. Prue stated that based on advice from her accountant, she requested – in March, 2009 – that Strauss provide her with a written contract to formalize their working relationship. A draft agreement – Exhibit A-6 – was submitted to Prue in June and another draft – Exhibit A-7 – titled: Sub-Contractor Agreement was sent – by e-mail attachment – from the Marketing Administrator of Strauss on June 15, 2009. Prue stated she responded to that e-mail and requested time to seek accounting and legal advice. However, the working relationship with Strauss ended on June 23, 2009 before a written agreement had been signed. Prue received an e-mail from Lofgren stating her services were no longer needed and advising her she should pack up materials and ship them – pre-paid – to the Strauss office in Kamloops. Prue complied and submitted – by e-mail attachment – her final invoice for services rendered. Prue stated she understood Strauss regarded her as a subcontractor and that this characterization was consistent with her own thoughts since no source deductions had been taken from her pay at any point. She filed her income tax return for the 2008 taxation year on the basis she earned business income – from two sources – as a product demonstrator but chose to report her earnings from Strauss as employment income. Prue stated she facilitated sales of Strauss product by relaying information to the Kamloops office but did not

receive any commission. Prue stated that after the working relationship with Strauss ended, she sought advice from a Tax Services Office operated by Canada Revenue Agency ("CRA") and subsequently applied for a ruling on the insurability of her employment with Strauss. The Rulings Officer found she had been in insurable and pensionable employment and Prue began receiving Unemployment Insurance benefits. However, she ceased to file further claims once the decision of the Minister was issued on January 4, 2010. Prue stated she considered that a change in her duties – in January, 2009 – had transformed her into an employee. This perception was bolstered by the absence of any subcontractor agreement despite having requested – in March, 2009 – that one be prepared. The draft agreements – Exhibits A-6 and A-7 – were not submitted for her consideration until June and Prue was not satisfied with certain terms therein. With respect to her duties, Prue stated the pay period was revised by Strauss and she was instructed to remove out-of-date product from some store shelves, a task previously performed by workers on the Strauss payroll. Until some point in January, 2009, Prue stated she was content to provide her services as a subcontractor as she had done with various product demonstrator companies since 2006. Prue referred to an e-mail – Exhibit A-8 – dated November 25, 2008 – from Lofgren to make the point that regular Strauss employees conducted demos from time to time. Prue filed – as Exhibit A-9 – a copy of a letter from Strauss to Wang – dated March 29, 2008 to demonstrate that Wang – as a Sales Support Coordinator – was expected to perform some of those same tasks even though Wang would be an employee.

[4] In cross-examination by counsel for the Respondent, Prue stated she had been a Production Manager in a steel fabrication company and had worked as a business consultant and marketing manager earlier in her career. In those roles, she had been an employee and was aware of the difference between that status and that of an independent contractor operating her own business. Prue stated she felt there had been a lack of respect on the part of Strauss and that she was not dealt with on a business-to-business basis in the sense changes in policy or duties were undertaken unilaterally by Strauss. Prue stated she had been confronting difficult economic circumstances and – at age 63 – needed to work. She was content to provide her services to Strauss as a subcontractor but preferred – even at the outset – to acquire at some point the status of employee. Prue confirmed she was able to decline demos – ranging from 3 to 5 hours – when offered by Lofgren and that she was paid for travel time. Prue agreed she was able to use her own judgment – based on experience – to choose those working hours which would be most effective in terms of showing the products to shoppers. There was no dress code, as such, and she had obtained her Food Safety Certificate prior to working with Strauss. Prue stated Wang told her how to set up the table but no script was provided and Prue arranged the products as she

saw fit. She handed out coupons for certain products and, although there was no requirement to do so, informed Lofgren that she wanted to serve samples to at least 40 people per demo and Lofgren had no objection. Prue also had the option to pull product from the store shelves to stock her table. She confirmed that she was aware at the outset Strauss would not be making any source deductions from her pay. She acknowledged she could have worked for other companies – including any competitor of Strauss – during the relevant period. Although there was no formal discussion about her ability to hire an assistant, Prue stated she offered to find other people to work on days when she was not available but only on the understanding that any replacement workers would be paid directly by Strauss. While providing her services to other companies – since 2006 – Prue had hired a substitute demonstrator, paid that person and later billed the client company for those hours as part of her invoice. Prue had signed a contract – Exhibit A-10 – on March 2, 2006 – titled: Freelance Promotion Services Agreement whereby she agreed to provide freelance promotion services to J.M.P. Marketing Services Limited ("J.M.P.") for a period of one year. Prue stated there was a distinction between that business arrangement and the one with Strauss because it had been formalized in a 5-page agreement, signed by the President of J.M.P.. Prue stated she did not know whether Lofgren was a corporate officer of Strauss. Prue's accountant – in 2009 – suggested she clarify her working status with Strauss. Prue stated Strauss had offered to issue her a T4A slip but she refused on the basis no deductions had been made and also because Strauss had not treated her as a regular employee during the relevant period. Prue understood that following advice from the Strauss accountant, that offer was withdrawn. Prue acknowledged that in an e-mail to the Strauss office and copied to Lofgren – to which she had attached her "invoice and expense report"– she had indicated her willingness to discuss being a full-time employee "… if this is easier and helps Strauss and doesn't result in me bringing home less money." The e-mail – Exhibit R-1 – was dated June 2, 2009. Prue stated that at this point she had considered herself to be an independent contractor because there had not been any source deductions from her pay. Although Prue preferred to have the status of employee, she stated that if a subcontractor agreement had been submitted which met her approval, she would have signed it. She suspected Strauss may have delayed sending her a draft agreement because it was in the process of hiring a marketing company. Prue stated the first draft agreement – Exhibit A-6 – was short on detail and did not express clearly the intent that she provide her services as a subcontractor. The next draft – Exhibit A-7 – was titled: Sub-Contractor Agreement and she referred it to her lawyer and accountant but the working relationship with Strauss ended a week later. Prue stated that she deducted certain business expenses against income in her 2008 tax return but only against income earned from other sources. Her income from Strauss was reported as employment income as though she had received a T4 slip. However,

she had deducted certain expenses such as office supplies consumed in the course of her work with Strauss and was advised by CRA that she should obtain a Form T2200. She requested Strauss to issue one to her but it refused. Prue acknowledged that she earned the sum of $3200 in travel allowances during the relevant period and accepted that she had made a profit since her vehicle costs were less than that.

[5] Prue was cross-examined by Lofgren, agent for Strauss. Prue agreed there had been no discussions with Lofgren about an ability to hire a substitute or assistants. She agreed that she advised Head Office of a lack of inventory in a particular location and that upon discovering another demonstrator was not available, was able to offer her services as a replacement.

[6] The Appellant closed her case.

[7] Karen Lofgren testified she is the Key Account Manager for Strauss, working out of the Kamloops office. She started working for Strauss in January, 2007, and met the Appellant when she was performing a demo for another company. Strauss is a family business that originated in Austria and has endured for 8 generations. In 1980, an outlet was established in Kamloops. In 2007, Strauss launched a coffee and tea line of products and it needed to create a demonstration program to promote those products. Demonstrators were hired and many of them provided their services to other companies. To gain access to certain large chain stores, it would have required Strauss to retain the services of a national marketing company. At other locations where this was not mandatory, demonstrators or a Strauss employee or company officer – when necessary – conducted the demo. Strauss has 20 full-time employees and has engaged the services of one subcontractor. It has two plants in Kamloops which manufacture product and distribution is handled through a store at one plant. Employees receive certain benefits but are not paid for travel time when performing a demo at an outside location. Lofgren stated it is more efficient and cost-effective to retain the services of individual product demonstrators as independent contractors. Also, they are usually more experienced. Lofgren stated she did not offer to hire Prue as an employee at any point during the relevant period. Beginning in May, 2008, Lofgren's duties required her to supervise the demonstration program, and to receive orders, deliver and remove product from stores and conduct training sessions to newly-retained demonstrators. She also performed 6 demos a year at some of the 100 stores in British Columbia that carry Strauss products. Lofgren stated Prue and other demonstrators were aware there was no guaranteed income and that Prue was the first person hired under the demonstration program to promote the new coffee and tea products so their working relationship was subject to "a learning curve." Lofgren stated she was not aware of any reason for the delay in submitting a subcontractor

agreement to Prue for her approval but when Prue was not satisfied with the first version, another was prepared and sent. Lofgren stated Strauss paid premiums for WCB coverage of all subcontractors who worked as demonstrators. Since 2009, subcontractors are permitted to hire their own substitutes.

[8] Counsel advised the case for the Respondent was closed.

[9] Lofgren, agent for the Intervenor, did not call any evidence.

[10] I instructed counsel for the Respondent to make submissions first so the Appellant could understand better the nature of the case she had to meet and to become familiar with the relevant jurisprudence.

[11] Counsel submitted the intention of the parties was evident from the outset and that they acted accordingly throughout the relevant period. Counsel pointed out that Strauss was not in the product demonstration business and only became involved with that aspect of its operations because of the development of the new product lines. In his view of the evidence, there was a lack of control and supervision over the Appellant as she was able to choose her own hours, could decline work and request additional demos if other workers were not available. The Appellant was able to generate a profit from the travel allowance and could choose locations near her residence and receive the flat $20 payment. Counsel submitted it was clear Prue wanted to confirm her status as an independent contractor and had requested a written agreement to that effect. When not satisfied that the first draft had spelled out her status with sufficient clarity, Prue demanded another version which was prepared and sent for her perusal. Counsel submitted that an analysis of all the relevant indicia supported the decisions of the Minister that the Appellant had not been employed in either insurable or pensionable employment with Strauss.

[12] The Appellant submitted that she had been an employee of Strauss and had received a Ruling confirming that status. She referred to the alteration of her duties early in January, 2009 which she believed had removed her from the category of subcontractor and – thereafter – her services were consistent with work performed by other workers who were on the Strauss payroll and – as employees – were subject to source deductions and also eligible for certain benefits. Prue requested that she be permitted to submit written argument as she had not been able to research adequately the relevant jurisprudence despite attempts to do so by visiting various websites. The request was granted with the proviso that any submission had to be based on evidence adduced and that no extraneous material would be considered.

[13] Counsel for the Respondent and Lofgren – agent for the Intervenor – reserved the right to respond to the written submission by Prue.

[14] The written argument submitted by the Appellant was contained in a binder with documents at tabs 1 to 12, inclusive. Despite the admonition at the close of the hearing, the material in said binder is mostly irrelevant and purports to introduce various letters, e-mails and other material including Reasons for Determination by the Director of Employment Standards, Province of British Columbia, as they related to proceedings before that tribunal. The CPP/EI Rulings report was not presented in evidence nor was the Questionnaire or other documents referred to on the page headed List of Attachments following page 29 in the Appellant's binder. Any decision issued by the Employment Standards Branch is not relevant to the within proceedings for various reasons. The wording of this provincial legislation is different and serves a different purpose, namely, the treatment of workers by employers. The decision of the Rulings Officer was reversed by the decision of the Minister and any reference to that initial stage in the overall proceedings is irrelevant and inappropriate in the context of final argument in the within appeals.

[15] I was able to glean sufficient material from the Appellant's submission to support her argument that she was an employee of Strauss when providing her services pursuant to a contract of service during 2009. The Appellant's position is that while she accepted the role of subcontractor at the outset – because she needed work and was accustomed to that status when working as a product demonstrator for other companies – that her duties were expanded in 2009 when she began accepting and delivering orders, pulling out-of-date stock from shelves and issuing credits to stores. Prue submitted that those additional duties were required by Lofgren. With respect to the booking of demos, Prue referred to the evidence that these were arranged by Strauss and only then were certain dates offered to her. Prue considered the unilateral decision by Strauss to pay her twice a month by direct deposit was another example of control.

[16] Prue acknowledged that she used her own vehicle in the course of providing her services to Strauss but pointed out that other tools and equipment were provided by Strauss and that the company reimbursed her for any out-of-pocket expenses associated with carrying out a demo.

[17] The Appellant submitted the evidence supports her position that she had to perform the demo services personally and did not have the right to hire any substitute or replacement. Between November, 2008 and June, 2009, Prue worked only for Strauss and had no fixed overhead costs associated with providing her services.

Strauss paid for WCB coverage and liability coverage in relation to her role as a demonstrator of its products.

[18] The Appellant submitted that although there was no guarantee of work, if no demos were assigned, there would be no corresponding vehicle cost or other expenses. Since she was only charging expenses against actual business income, the less the car was used, the lower the deduction from revenue.

[19] The written response by counsel for the Respondent referred to the extraneous material contained in the Appellant's binder which I dealt with above. Counsel submitted that although Strauss directed what work had to be done – in the sense of which stores to visit and what products to demonstrate – it did not direct how the work was to be done nor did that company have the right to demand that the Appellant work on a particular day at any specific location. Prue had the ability to decline work and utilized her own standards including her decision to establish the number of samples to be offered to the public per demo without any instruction from Strauss.

[20] The written response by the agent for the Intervenor also referred to the inappropriate inclusion of material in the binder concerning those proceedings pursuant to the provincial *Employment Standards Act* and reiterated that the evidence supported a finding that both Strauss and the Appellant intended that she would provide her services as an independent contractor throughout the entire relevant period.

[21] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue – M.N.R.*, 2006 DTC 6323, *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.*), [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2006] F.C.J. No. 1653, there was a clearly-expressed mutual intent of the parties that the person providing the services would be doing so as an independent contractor and not as an employee. In other cases, there is a dispute about whether one of the parties agreed at the outset – or thereafter during the course of the working relationship – to provide services in the context of a particular status. In the within appeals, neither party addressed that issue during the relevant period. I will defer further discussion of the issue of intent and consider the various factors as required by the relevant jurisprudence.

[22] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – ("*Sagaz*") dealt with a case of vicarious liability

and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The Judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1986] 2 C.T.C. 200 and the reference therein to the organization test of Lord Denning – and to the synthesis of Cooke, J. in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 47 and 48 of his Judgment stated:

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

[23] I will examine the facts in the within appeals in relation to the indicia set forth in the Judgment of Major, J. in *Sagaz*.

Level of Control:

[24] The Appellant was not under any supervision while performing her duties as a product demonstrator. She received cursory instruction at the outset but mainly pertaining to the operation of the Bunn machine used to prepare coffee and tea samples. Prue was an experienced demonstrator and had provided her services to various companies since 2006. Her background was in business management and consulting. She was able to choose which demos to work and could decline assignments without consequence. She decided the most effective time slot to be utilized depending on various factors including probable vehicle traffic on routes near the store or pharmacy and the flow of shoppers at that location during certain hours. Prue set up her demonstration table as she saw fit and could remove product from the

store shelves, as required. Sometimes, she chose to promote certain Strauss products after consulting with the store manager. The duration of the demo was controlled by Prue in the sense she would remain longer or cut the session short depending on the number of shoppers available to sample product or to receive advice and information either from Prue directly or by way of printed material. Prue set her own goal of handing out at least 40 samples per demonstration, a decision taken on her own, based on personal experience and ethics.

Provision of equipment and/or helpers:

[25] There was no discussion between Lofgren or any other management person at Strauss about whether Prue was able to hire any assistant or substitute and the matter never arose. Prue used her own car to transport the Bunn machine and other necessary materials, supplies and equipment, all of which fit easily into the trunk of her car. If certain supplies were required, Prue purchased them and included the cost thereof in the relevant invoice submitted to Strauss. Her car or any replacement vehicle – arranged by her – was necessary not only to transport the necessary items but also to enable Prue to travel to various destinations in Greater Vancouver and throughout the Lower Mainland.

Degree of financial risk and responsibility for investment and management:

[26] The Appellant did not have any investment in Strauss nor was she exposed to any financial risk resulting from providing her services as a product demonstrator. She was covered by WCB – through Strauss – and by liability coverage, presumably for any acts or omissions arising from her activities as a demonstrator. Prue had to manage herself in the sense of operating efficiently but was not required to supervise any other workers either directly or indirectly. Prue was willing to recruit certain people to work as demonstrators but that was her idea and not derived from any communication from any corporate officer or manager at Strauss.

Opportunity for profit in the performance of her tasks:

[27] The Appellant did not have any guarantee of income. She could accept or refuse assignments and could charge for the full time allotted by Strauss for a demo. If she chose to cut it short and not bill for that portion, that was a matter of personal choice. She was paid for travelling time at an hourly rate and also received a travel allowance. She was able to choose the destination of her demo and by receiving a flat fee of either $20 or $50 for travelling and using of her vehicle, she was able to earn a profit during the relevant period because her Honda was not expensive to operate. By

keeping in touch with the activities of Strauss as it pertained to demos of the new products, Prue was able to obtain extra work upon learning that another demonstrator was either unable or unwilling to attend at a particular location. By contacting the Kamloops office, she could obtain that assignment from Strauss and generate additional revenue. Although Prue owned her own Honda prior to providing her services to Strauss, she apportioned business expenses for use of her home office and claimed expenses against overall income. Her vehicle was a source of income – and profit – under the circumstances in addition to her other compensation which was based on a hourly rate. Prue was reimbursed by Strauss for the cost of faxes, phone calls and similar costs associated with communication for purposes of her work. In her written submission, the Appellant emphasized that she had not purchased her vehicle for the purpose of providing services to Strauss and she had owned the equipment in her home office for some time and used it for other income-earning purposes as well as for personal use. The point is that Prue used her vehicle not merely to drive to and from work but in the course of her work and that it was essential to the performance of her duties.

[28] In *Thomson Canada Ltd. (c.o.b. Winnipeg Free Press) v. Canada (Minister of National Revenue – M.N.R.)*, [2001] T.C.J. No. 374, the issue before Porter D.J. was whether a carrier delivering newspapers and inserts was an employee or an independent contractor. In the course of deciding the worker was not an employee, Judge Porter considered the relevant indicia and with respect to the matter of control – at paragraph 89 – stated:

> **89** Over and above this, WFP exercised no control. The evidence did not disclose that WFP controlled the carriers by giving them any orders or instructions. On the contrary, the carriers were complete masters of the way in which (how) they provided their services. The sole requirement was that they had to be done before 6:00 a.m. and the papers had to be delivered in good condition. They were not required to wear uniforms, nor were markings required on their vehicles. The order of delivery was not specified. How they went about their respective routes was entirely up to the carriers. They were not restricted from taking competitor's papers with them at the same time. They did not have to report in at any time after collecting the papers, and in particular, when they finished their deliveries. No one imposed any control over the carriers once they left the depot with the papers or exercised any supervision over the provision of their services. They set their own schedules.

[29] Concerning the matter of tools, Judge Porter – at paragraph 95 commented:

> **95** Thus, apart from the motor vehicle, there was little provision of tools. Exclude the motor vehicle and this aspect of the test is really quite ambivalent.

> Add in the motor vehicle, and it points more to an independent contractor situation. Nonetheless, it is far from unknown for employees engaged under contracts of service to have to use their own vehicles in the course of their employment. In this case, however, it is not a question of some use of the vehicle. The use of the vehicle was fundamental to the daily services being provided by the carriers. The major investment in equipment being used to provide these services came from the carriers, and this aspect of the test on balance points to a contract for services, rather than a contract of service.

[30] In the case of *Sara Consulting & Promotions Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2001] T.C.J. No. 773, 2001 CanLII 658 (T.C.C.) (*Sara)*, Bell J. heard the appeal of a corporation that was engaged in providing market research analysis and demonstration management services to retail outlets, manufacturers, distributors and companies in the food brokerage business. At paragraphs 7 and 8 of his judgment, Bell J. recited these facts:

> **7** The Appellant contacted the Demonstrators for demonstrations to be performed on the premises of its clients. The Appellant or its clients provided the Demonstrators with instructions and procedures on how to prepare for and carry out those demonstrations. The Appellant or its clients instructed the Demonstrators as to what products to promote and how to promote them. They could supply their own table and appliances if they had those items and chose to use them in which case the Appellant would pay for the use of same. If they did not have that equipment, the Appellant provided it.
>
> **8** The Appellant or its clients provided the Demonstrators with a blank cheque or voucher, not exceeding a specified amount, with which the Demonstrators could purchase products used in a demonstration. Such purchases were supported by receipts and recorded on an expense report submitted to the Appellant. The Demonstrators, after a demonstration, submitted written reports to the Appellant. Those reports included such information as the product being promoted, the quantity of the product sold, coupons distributed, the number of customers served, customer comments, how the demonstration went, table location in the store and comments of the Appellant's client. Those reports were signed by the Demonstrators and the Appellant's clients.

[31] In *Sara,* Bell J. found the payor provided workers with guidelines, instructions and procedures but they were free to alter them. The demonstrators used their own vehicles to transport demonstration material to their own home or other business location and to the location of the demo. Ancillary items used in the course of demos were purchased by the workers and claimed through an expense claim or by means of an advance for that purpose. Although suggestions were offered by the payor, the workers did not have to adhere to them and also supplied some of their own utensils and other items including small appliances. The workers had to acquire a Food Safety

Certificate at their own expense. Each demonstrator was free to perform any service for any other company including direct competitors. The demonstrators were free to decline invitations to work at given places and times and could alter the hours of work. They had to meet certain standards of dress set by the payor. The demonstrators invoiced Sara Consulting for their services. They could negotiate the arrangements under which they worked by dealing directly with a particular client of Sara Consulting. Evidence before Bell J. established that a vehicle was a "must" because of the need to transport tools, equipment and supplies to locations under circumstances where public transportation was not practicable. The demonstrators were not reimbursed for any vehicle expenses. The parties entered into a written agreement in which the status of demonstrators was that of independent contractors but the evidence established this contract was meant to formalize an oral agreement that had been in place during the relevant period of that appeal. Bell J. referred to the case of *The Minister of National Revenue v. Emily Standing*, 147 N.R. 238 in which Stone J.A. – at page 239 - stated:

> There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the Wiebe Door test.

[32] In the course of arriving at his conclusion, Bell J. summarized the facts at paragraphs 85 to 90, inclusive, as follows:

> **85** The fact that the Appellant wanted the Demonstrators to be well equipped is not indicative of control so much as it is indicative of how both the Appellant and the Demonstrators could be successful. Murphy's evidence was quite clear that the Appellant did not want to have employees other than the fourteen or so employees described above, there being periods when there would be no work for the Demonstrators.
>
> **86** So far as tools are concerned, the Demonstrators used equipment owned by both the Appellant and themselves and they transported their own equipment to the place of work and transported the Appellant's equipment from the Appellant's store house for same. I cannot conclude on the base of ownership and use of tools, that the Appellant was an employer. A gardener, using the owner's lawnmower and implements, may well be an independent contractor.
>
> **87** As to profit and risk of loss, we know that a Demonstrator could increase income by working longer hours, not by having an increased amount of reward per hours worked unless so negotiated with the Appellant. The Demonstrator did have risk of loss by virtue of potential car expense including both repair and ordinary operating expense. This component of the test does not favour an employment conclusion.

> **88** As to integration, the importance of which test is questionable, the Demonstrator was, of course, assisting the Appellant in the conduct of its business. However, the evidence of Strachan and Morrison was clear that each was conducting her own business, admittedly not on a grand scale. It should not be assumed, a priori that the larger, paying entity be viewed as dominant and, therefore, more important in determining whether the service provider could also be in business. The question of "whose business it is" may tend to minimize the appropriate characterization of that service provider.
>
> **89** Respondent's counsel referred to Puri and Standing. They simply state that if the facts do not support the evidence of a relationship described by the parties, that relationship does not necessarily exist. That is a common sense conclusion. It is the facts that are important.
>
> **90** Respondent's counsel's characterization of the Appellant having issued "directions", not "guidelines" is not supported by the evidence.

[33] At paragraph 92, Bell J. concluded:

> **92** I have concluded that neither of the two Demonstrators who gave evidence was an employee. I accept the direction as expressed in *Shell*, that the recharacterization of legal relationships is only permissible if the label attached by the taxpayer to the transaction does not properly reflect its actual legal effect. Admittedly, this statement by the Supreme Court of Canada was in respect of tax cases. However, in the absence of clear and credible evidence that the description of a relationship is other than as agreed between arm's length parties, the description agreed upon by those parties must stand. There is no such clear and credible evidence in this case.

[34] As mentioned earlier, I will examine the evidence as is pertains to the intent of the parties.

[35] The Appellant acknowledged that from July 4, 2008 to some point in January, 2009, she considered herself as an independent contractor providing her services to Strauss in the same manner as to those other business entities for which she had done demos since 2006. Until she encountered health problems in October 2008, Prue worked for other companies at the same time as performing demos for Strauss. For some reason that was unclear in her evidence and subsequent submissions, Prue came to believe – as of January, 2009 – that she must have been an employee from that point onwards because she seemed to be performing some services also performed by regular Strauss employees. Lofgren testified that she or another person in Strauss management performed demos when and as required and that she conducted about 6 a year. The pulling of stock from shelves was routine and this ancillary function of

Prue was merely to facilitate communication with the Kamloops office about matters such as a lack of inventory or other issues as expressed by management at a particular location. I accept the evidence of Lofgren that there was never any intention on the part of Strauss that Prue would provide her services in any other capacity other than as an independent contractor. It was Prue who requested that Strauss prepare a written agreement formalizing her status as a subcontractor and when not satisfied with the first draft, requested another one be prepared to express that status unequivocally. Prue in an e-mail – Exhibit R-1 – sent to Lofgren on June 2, 2009 stated "Attached please find my invoice and expense report. Please update me about what is happening with the contract. Is there a problem? I am willing to discuss being a full time employee if this is easier and helps Strauss and doesn't result in me bringing home less money."

[36] It is apparent Prue began to engage in an *ex post facto* interpretation of events following her visit to the Tax Services Office where she received advice to the effect that she should seek a Ruling as she was probably an employee of Strauss. In confirmation, Prue received a Ruling to that effect which was operative until the Minister issued the decision whereby Prue was found not to have been engaged in either insurable or pensionable service. In instances where both parties in a working relationship have acted consistently in accordance with a perceived status it is important to take into account the motive one may have for creative revisionism. Prue's main complaint was that she felt Strauss had not dealt with her – at times – on a business-to-business basis and this added to her subsequent realization that she must have been an employee – if not for the entire period – then certainly since January, 2009. However, the evidence disclosed that Prue acted throughout as a person doing business on her own account by choosing her work, receiving a flat payment for travel and conducting business from an in-home office. She was a person well-experienced in business and had been an employee for most of her working life. There was no disparity in bargaining power nor any element of coercion present in her dealings with Lofgren or others in Strauss management. Prue accepted the role of subcontractor for the purpose of conducting the demos. It is not as though she did so out of desperation since she had been carrying on her own product demonstration business since 2006 and was dealing with two other client-companies when she began providing services to Strauss. The facts are insufficient to create a demarcation between the Appellant's conduct and demeanor before January, 2009 and thereafter until the working relationship ended in June. With respect to the conduct of Prue during the relevant period, it is evident she considered herself to be an independent contractor. She was disappointed with the purported delay on the part of Strauss in forwarding a proper written contract to formalize that status. If one expresses a willingness to "discuss" being an employee at some point in the future,

provided it is acceptable to the other party, obviously that signifies an acceptance of the current characterization of status that was – and had been throughout – consistent with the conduct of the parties.

[37] The Appellant relied on the decision in *Dempsey v. Canada (Minister of National Revenue – M.N.R.)*, 2007 TCC 362, [2007] T.C.J. No. 353. Hershfield, J. considered the appeal of a service provider who – as a chartered accountant – had entered into a written contract with the payor in which he agreed to perform auditing and professional services in relation to loans and grants made by said payor and to do so as an independent contractor who would submit invoices based on a stipulated daily rate with a maximum amount during the contract period based on a maximum number of days. Pursuant to said contract, the parties agreed the worker would be an independent contractor. The worker submitted invoices each month for the number of hours worked on each day of the month and GST was charged on the relevant amount. In the course of his analysis at paragraph 39, Hershfield, J. commented as follows:

> Analysis
>
> [39] If intentions were determinative of the status of the Appellant's engagement, there would be no doubt that his engagement would be that of an independent contractor. The Appellant not only accepted the status imposed by circumstance and organizational structure but played out the role of an independent contractor until it was no longer to his benefit to do so. He honoured the contract which defined his status by becoming a GST registrant, invoicing his time with GST set out and bidding on new contracts as existing contracts expired. He claimed business expenses on his income tax return and paid no union dues as a public servant. He had no benefits and was not part of the public service pension plan. These were all contractually established, understood and accepted by the Appellant. At the end of the day, he preferred the independent status that this contractual arrangement gave rise to, although when he lost it he seized on the opportunity to deny that which he had accepted for almost 13 years.

[38] Hershfield, J. continued as follows at paragraphs 41 – 44, inclusive:

> [41] Applying the *Wiebe Door* tests the Appellant is clearly an employee. He was engaged in a wholly subordinate position as subject as any professional employee would be to do what his manager required of him. He had no freedom as to how, when or where he performed his services. In virtually every sense he was subject to the control of his manager at WD. He was treated in almost every respect as an employee and held out as one. He did what was asked of him in the context of his position. He had to correct reports as dictated by persons above him and was subject to deadlines. The specific list of duties that the Appellant was

> contracted to do for WD was an expanding list that covered everything that WD might require of an employee in the position occupied by the Appellant and even then at the direction of his manager, the Appellant did more than the specified duties that he was contracted to perform and he was paid in the normal course for such services. The reason for that is that he was under the complete control of his manager in WD as any employee would be. If control over the worker is the relevant test, the Appellant's engagement status is employment.
>
> [42] The Appellant provided no tools in respect of the performance of his duties. All of the tools were provided by WD. If the provision of tools is the relevant test, the Appellant's engagement status is employment.
>
> [43] The Appellant worked at a fixed rate for fixed hours and had no expenses in respect of the performance of his duties. There is no more entrepreneurial risk of loss or opportunity for profit than any employee working on a fixed term employment contract basis has. That he had no job security at the end of the term of each contract and that he had to bid on each contract are compatible with a series of negotiated term employment contracts. During the term of each contract, work was done for a wage. If this is the relevant test, the Appellant's engagement status is employment.
>
> [44] All the *Wiebe Door* factors point to the Appellant being an employee. This is not a close case where the intentions of the parties can impact the status of the engagement.

[39] One must keep in mind that Strauss was not in the product demonstration business. It only retained the services of demonstrators for the purpose of promoting the new line of coffee and tea products and to provide product information about the entire catalogue of health products available to customers. Hiring demonstrators as independent contractors was not only a sensible business practice on the part of Strauss but fit the aims of those persons – like Prue – who were carrying on their own small businesses using their skills, judgment, qualifications, tools and equipment and the expertise to discharge their duty without supervision.

[40] I am satisfied both parties intended that Prue provide her services as an independent contractor and that she did so throughout the entire relevant period. The parties conducted themselves in a manner consistent with that intent. It is perplexing to comprehend how Prue thought a latent desire to become – someday – an employee of Strauss – provided that was agreeable to corporate officers – could serve as a magic device to transform her actual working status from independent contractor to that of employee, particularly by means of a retroactive characterization.

[41] Having regard to the facts in the within appeals in the context of the relevant jurisprudence, it is apparent Prue was operating as an independent contractor carrying on business on her own account.

[42] The onus was on the Appellant to demonstrate on a balance of probabilities that the decisions of the Minister were wrong. She has not done so. Both appeals are hereby dismissed.

Signed at Sidney, British Columbia this 10th day of January 2011.

"D.W. Rowe"

Rowe D.J.

CITATION:	2011 TCC 9
COURT FILE NO.:	2010-103(EI); 2010-104(CPP)
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REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
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APPEARANCES:

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