

Dockets: 2009-335(EI)
2009-336(CPP)

BETWEEN:

1772887 ONTARIO LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

HEATHER HARTON,

Intervenor.

Appeals heard on common evidence with the appeals of
Yvonne Brioux 2009-849(EI); Yvonne Brioux 2009-850(CPP);
Klara Palotay 2009-228(EI) and Klara Palotay 2009-229(CPP)
on September 21, 22, 23 and 24, 2010 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant: Jacqueline L. Wall

Counsel for the Respondent: Rita Araujo
Laurent Bartleman

For the Intervenor: The Intervenor herself

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals of 1772887 Ontario Limited (“Pi Media”) are allowed, without costs, and the decisions of the Minister of National Revenue are varied on the basis that at all

relevant times Gary Thompson, carpenter, and workers having work category designations of senior stylists, as agreed to between the Respondent and Pi Media at the hearing, were engaged by Pi Media under a contract for services. All such workers are to be treated accordingly for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*; and

For greater certainty, the appeals of Pi Media are dismissed, without costs, in respect of the workers having work category designations of assistant photographers, assistant stylists and junior stylists, as agreed to between the Respondent and Pi Media at the hearing. Such appeals are dismissed for the reasons set out in the attached Reasons for Judgment on the basis that such workers were engaged at all relevant times by Pi Media under a contract of service.

Signed at Ottawa, Canada this 7th day of April 2011.

"J.E. Hershfield"

Hershfield

Dockets: 2009-849(EI)
2009-850(CPP)

BETWEEN:

YVONNE BRIOUX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

1772887 ONTARIO LIMITED,

Intervenor.

Appeals heard on common evidence with the appeals of
1772887 Ontario Limited 2009-335(EI); 1772887 Ontario Limited 2009-336(CPP);
Klara Palotay 2009-228(EI) and Klara Palotay 2009-229(CPP)
on September 21, 22, 23 and 24, 2010 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Rita Araujo
Laurent Bartleman

For the Intervenor: 1772887 Ontario Limited
By its counsel Jacqueline L. Wall

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals are allowed, without costs, and the decisions of the Minister of National Revenue are

varied on the basis that the Appellant was at all relevant times engaged by 1772887 Ontario Limited in a contract for services.

Signed at Ottawa, Canada this 7th day of April 2011.

"J.E. Hershfield"

Hershfield J.

Dockets: 2009-228(EI)
2009-229(CPP)

BETWEEN:

KLARA PALOTAY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

1772887 ONTARIO LIMITED,

Intervenor.

Appeals heard on common evidence with the appeals of
1772887 Ontario Limited 2009-335(EI); 1772887 Ontario Limited 2009-336(CPP);
Yvonne Brioux 2009-849(EI) and Yvonne Brioux 2009-850(CPP)
on September 21, 22, 23 and 24, 2010 at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Rita Araujo
Laurent Bartleman

For the Intervenor: 1772887 Ontario Limited
By its counsel Jacqueline L. Wall

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals are allowed, without costs, and the decisions of the Minister of National Revenue are

varied on the basis that the Appellant was at all relevant times engaged by 1772887 Ontario Limited in a contract for services.

Signed at Ottawa, Canada this 7th day of April 2011.

"J.E. Hershfield"

Hershfield J.

Citation: 2011 TCC 204
Date: 20110407
Dockets: 2009-335(EI)
2009-336(CPP)

BETWEEN:

1772887 ONTARIO LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

HEATHER HARTON,

Intervenor;

Dockets: 2009-849(EI)
2009-850(CPP)

AND BETWEEN:

YVONNE BRIOUX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

1772887 ONTARIO LIMITED,

Intervenor;

AND BETWEEN:

KLARA PALOTAY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

1772887 ONTARIO LIMITED,

Intervenor.

REASONS FOR JUDGMENT

Hershfield J.

[1] 1772887 Ontario Limited (“Pi Media”) operates a commercial photography studio in Canada. As part of its operations the company hired workers on an as needed basis to supplement its full-time staff or perform required services. These workers performed services as senior stylists, junior stylists, assistant stylists, photographic assistants and carpenters.

[2] The Minister of National Revenue (the “Minister”) initially assessed Pi Media in respect of the 2004, 2005 and 2006 taxation years on the basis that these workers were engaged under a contract of service to the effect that Employment Insurance premiums and Canada Pension Plan contributions were required to have been made by Pi Media in respect of the engagement of those workers during those years. The initial decision of the Minister was appealed and varied, however the varied decision is now being appealed.¹ The basis of that decision, which affects 70 workers, is that each of them at all relevant times was engaged by Pi Media under a

¹ The original decision was made on the basis that 105 workers were engaged in contracts of service. The subsequent decision determined that only 70 workers were engaged in contracts of service. 40 of these were assistant photographers, 28 of them were stylists and two of them were carpenters.

contract of service and was an employee of Pi Media not an independent contractor.

[3] Pi Media and two of the workers, Klara Palotay and Yvonne Brioux, appealed the Minister's decision. A third worker, Heather Harton, intervened.² All three such workers, in agreement with Pi Media, took the position that they were engaged by Pi Media under a contract for services and were independent contractors.

[4] Each of Heather Harton, Yvonne Brioux and Klara Palotay appeared as witnesses at the hearing on their own behalf. Each was a senior stylist. In addition, Pi Media called the following witnesses: Gary MacLean, Director photographic operations Pi Media; Iris Simpson, senior stylist; Sarah Rodrigues, assistant and junior stylist; Jason Greci, photographic assistant; Blaise Misiek, photographic assistant; Devin Gallagher, photographic assistant, and Gary Thompson, carpenter.

[5] The Respondent called one witness, namely, an appeals officer from the Canada Revenue Agency ("CRA").

[6] The Respondent and Pi Media agreed at the outset of the hearing that the witnesses who had been engaged by Pi Media as independent contractors would be treated as representative of the category of worker to which they belonged so that the disposition of Pi Media's appeal in respect of all the workers in each category would be disposed accordingly. The appeals of Yvonne Brioux and Klara Palotay, although capable of being treated separately, were, in effect, treated as representative of their category of worker. Heather Harton, in effect, was similarly treated.

General Background

[7] Pi Media was the largest pre-press, studio facility in Canada during the subject years. Prior to the years in question, there was a consolidation of the commercial photography industry. This eliminated smaller studios and resulted in Pi Media being the largest. It did 100% of the printing and website advertising for Sears which was its largest client. Prior to the consolidation, Sears work was divided among a number of competing studios. The consolidation and Sears work resulted in Pi Media offering the most opportunity to freelancers. This was confirmed by witnesses such as Ms. Palotay who has been a stylist since 1965,

² Pi Media also intervened in respect of the appeals of Yvonne Brioux and Klara Palotay.

working as a freelance stylist since 1968. She testified that once Pi Media received all of Sears catalogue work, there was a large volume of freelance work for her there. Similarly, Ms. Brioux testified that she had been working freelance for a number of years prior to making contact with Pi Media in 2003. Regular work at Pi Media was the result of there not being many studios doing catalogue work at that time. Ms. Harton testified that operations like Sears, prior to 2003, divided their commercial photography work amongst five or six large studios in Toronto from whom she was able to get freelance styling work. As the scene changed it became increasingly apparent that Pi Media afforded her the best freelancing opportunities. The division of Sears work was also confirmed by Mr. MacLean who first commenced working with Pi Media in 1995 when Sears business was divided between 5 studios.

[8] As a studio, Pi Media provided all of the services required to prepare print advertisements for catalogues, flyers, in-store signage and websites. The services included meeting with clients. A client such as Sears communicated its instructions to Pi Media regarding the content of a catalogue by having its marketers and buyers attend the meeting with Pi Media's sales team who would promote a concept as created by Pi Media's creative team for a catalogue as conceived by Pi Media's creative team. Once a concept was agreed upon, Pi Media's creative team generated layouts, drawings and swipes that detailed the composition of the required shot including the mood, the lighting, the set and the props and producers prepared production schedules. The layouts include art instructions and set out whether the product, if clothing, would be on-figure or off-figure. An on-figure shot would involve the use of a model.

[9] Exhibits produced at the hearing demonstrated that there was a considerable amount of detail provided by Pi Media's creative team. In a sense one can describe the creative team's work as creating a virtual blueprint of the shot required. The creative information includes a swipe that helps direct the mood or feel that the design team intends to create and might even suggest the lighting treatment. The location of the shot, the products, their placement, and the props and their placement can be specifically set out. Essentially, all of the components required to complete a shot are supplied and laid out by Pi Media. The carpenter would build the set. The photo assistant and assistant stylist would get the merchandise as each may be assigned. The photo assistant would assist with setting up the lighting. The assistant stylist would press clothes and other fabric materials as required. The stylist would style the merchandise. The photographer would work with the stylist to create the desired image and take the required shots.

[10] Prior to the shoot, there would be a pre-production meeting that would include some of the stylists and photographic assistants where a particular shot would be discussed. Pi Media's art director would discuss the creative concepts and pass out the layouts, drawings and other materials detailing the required shot. Some of the senior stylists such as Ms. Brioux and Ms. Palotay said they would not attend such meetings. The photographic assistants might attend the meetings to gain knowledge regarding the photographic requirements of a shot, however, Mr. Gallagher testified that the photographer would attend more of these meetings. Regardless, everyone was given a specific visual portrayal of how the photographs were to be taken.

[11] As already noted, the team that created the actual photographs consisted of photographers, stylists, photographic assistants and carpenters.³ Stylists were categorized by Pi Media as being assistant stylists, junior stylists and senior stylists. As well, stylists had their own specialties: on-figure fashion stylists who worked with models; off-figure fashion stylists; hard-line stylists who worked on photo shoots of products; and soft stylists who styled room sets and home fashions such as bedding and drapes.

[12] As to the studios themselves, Pi Media operated two commercial photography studios in Toronto. One, on Benton Road, is a 150,000 square foot facility having 50 photography sets, a merchandise warehouse and a carpentry shop. A second facility on Lesmill Road is a 70,000 square foot facility having photography sets, a merchandise warehouse and a carpentry area. Other than location shoots all the photography was performed in one of Pi Media's studios.

[13] In the subject years, Pi Media employed about 75 persons to work in the two studios including 20 to 25 employee stylists, five to six employee photographic assistants and five employee carpenters. The freelancers worked alongside their counterparts.

[14] Pi Media's work fluctuated seasonally. The Sears fall and winter catalogue was shot in late January and February. In April to July, Sears Wish Book was shot

³ That this was the shooting "team" was not disputed by the parties; however, there were others involved, as well, such as hair stylists, make-up artists and models. These other persons appear to have had less connection to Pi Media in terms of regularity of service and interaction with Pi Media's creative team. As well, they likely did not have employee counterparts at Pi Media and may have been engaged through agencies. In any event, even though in a broader sense they might have been part of the shooting "team", they were apparently accepted as independent contractors.

and in September and October, the Sears spring and summer catalogue was shot. At other times business at the studio was slow.

[15] I turn now to review the testimony of each of the witnesses.

The Testimony of Gary Maclean (Director Photographic Operations)

[16] Mr. Maclean's testimony provided much of the background summarized above. As to his evidence regarding the working circumstances of the workers concerned with these appeals it was general, although it did provide some insight into the nature of the engagements particularly those of the more experienced workers.

[17] For example, I trusted his testimony that while the layouts were done by the design team, the experienced workers, in general, are largely hired because of their expertise and come with considerable skills. They are individuals who have been in the industry for the most part for a long time and who are able to help produce the ultimate product that would meet the approval of not only Pi Media's art directors but that of its clients, as well. As these workers were hired for their expertise, they had to perform their work personally.

[18] He confirmed that freelance workers were booked for specific projects lasting from a few days to a few weeks or a month. Generally speaking such workers, once engaged, worked regular hours although they reported in and out so that Pi Media would know who was in the building. If the studio was busy, daily studio hours would be extended from 8:30 a.m. to 5:30 p.m. to 7:00 a.m. to 7:00 p.m. The regiment of regular hours during a project was essentially required so as to keep the team of people required to work on the project available at the same times. Although the workers were generally kept busy through a typical work day, he said that if there was no work, they were free to leave. My impression, however, was that such freedom applied primarily to senior stylists who could not so readily be assigned other work. They were too specialized and were paid by the hour at a rate up to three times the hourly rate of a junior stylist.

[19] As confirmed by other witnesses, Mr. MacLean testified that all the workers entered their time in a system that was similar to time sheets. The system was called a docket max system and time was entered in relation to a specific project. This allowed Pi Media to better understand and forecast time requirements in relation to its projects and assess the profitability of a particular project. It also was relied on as a way to track hours for the purpose of calculating a worker's pay.

[20] He also testified that freelance workers could accept or decline work from Pi Media on a project by project basis. However, Pi Media could put a hold on a worker if it knew it would require assistance during a particular time. A hold is a booking whereby they hold a worker for a particular time. Freelance workers did not have to work exclusively for Pi Media but if they were put on hold, they would require Pi Media's permission to be released. If the worker was approached by another studio, the worker would then communicate with Pi Media and ask to be booked or released. Pi Media had to do one or the other. Again, based on the testimony of others, it seems clear to me that holds would only be put on senior stylists.

[21] Mr. Maclean estimated that workers on hold would only be asked to be released about 10% of the time. He estimated that Pi Media would release a hold about half the time that it was requested.

[22] He confirmed that the workers performed their duties at Pi Media's studios and on location. Pi Media's studios not only provided the space but provided the lighting, equipment and merchandise as was necessary for the wide variety of shots. The experienced workers were not instructed on what tools, equipment or materials to use to complete their work. Stylists came with their own kit which included clamps and sprays and brushes and the like. Pi Media did not provide tools or equipment to the stylists or to the assistants aside from commercial irons, steamers and ironing boards. Pi Media provided carpenters with large tools, such as an industrial table saw, that were located in Pi Media's carpentry shop. Carpenters were only expected to bring small tools such as hammers, cordless drills, a work belt and the like.

[23] Mr. MacLean testified that the freelance workers are paid a higher rate of pay than employees. They are paid an hourly or daily rate. A daily rate was charged when Pi Media utilized the services of an agency to find a stylist. The pay rates varied by level of experience. Workers with more experience could command more money. Each worker had his or her own negotiated rate. Factors that influenced the rate were budgets, production value and the experience of the worker. Workers who were paid a fixed daily rate were paid for the full day. Workers were not paid when they were on hold. Workers invoiced Pi Media every week or every two weeks or at the end of a project and were paid by direct deposit or by cheque as requested. Most workers submitted invoices to Pi Media in their own name. Workers were not paid bonuses other than an increased overtime rate of pay. They did not receive vacation pay, sick pay or other benefits from Pi Media.

[24] With respect to the intention of the parties, while he may have given the impression that the engagement of workers as independent contractors was mutual, in general terms, at least in respect of less experienced workers, I am of the view that Pi Media made the decision as to whether a worker would be offered work as an employee or independent contractor. On the other hand, with respect to senior workers, the senior stylists, I am of the view they only offered their services as independent contractors.

The Testimony of Gary Thompson (Carpenter)

[25] I will leave some of my evidentiary findings in respect of Mr. Thompson to my analysis as I find his case to be the most difficult given the conflicting influences of the degree of control over what work he could be assigned and the extent to which he was pursuing his own established business.

[26] As a carpenter, Mr. Thompson was responsible for building the sets for the photo-shoots. He was told what to build by the art director and the studio director and worked off of layouts provided by them. He was supervised by the studio manager and the general manager but did not need close supervision. The manager could also direct him to do various maintenance work. He had to ask permission if he wanted to leave early.

[27] He worked hours that Pi Media needed him to work and he followed Pi Media's policies. He did essentially the same work as performed by full-time employee carpenters except he did not have to prepare estimates of his time to complete a project.

[28] He provided his own small tools but was provided at no cost many of the tools required in his carpentry work by Pi Media. He was reimbursed for mileage if he travelled to a shoot location.

[29] Mr. Thompson, only worked for Pi Media during the relevant period. He was paid an hourly wage, which he negotiated with the general manager.

[30] He testified that it was his intention to be an independent contractor.

The Testimony of Jason Greci (Photographic Assistant)

[31] Mr. Greci's job was to assist the photographer he was working with. He was provided with layouts that detailed the work that he had to do and his hours were largely determined by the photographer he worked with. However, he did other general tasks for Pi Media as well as assist photographers. He could be assigned such additional work if he completed work that was initially assigned to him.

[32] The studio manager would assign Mr. Greci to assist a particular photographer. He had no say in the decision. Once assigned, his work would be directed by the photographer and the stylist working on the shot.

[33] He was provided with any and all tools and equipment he needed and performed the same services that were performed by assistants who were employees of Pi Media.

[34] Mr. Greci was paid an hourly rate of \$12 per hour which was the rate he was offered. Other than working additional hours, there was nothing Mr. Greci could do to earn more money.

[35] While Mr. Greci said he intended to be an independent contractor, it was Pi Media that determined the nature of the engagement based on what it was prepared to offer.

[36] Mr. Greci went to work for Pi Media because, according to his own testimony, it was a "great place to start and learn the actual business of photography". He had no other engagements during the relevant period.

The Testimony of Blaise Misiek (Photographic Assistant)

[37] Mr. Misiek became an assistant as a stepping stone to becoming a photographer in this industry.

[38] He did what he was asked to do by the photographer. He was provided with the layout and plans, the detailed work he had to do, and, he was supervised by the photographer. Like Mr. Greci, his hours were largely determined by the photographer who he was assigned to by the studio supervisor.

[39] As in the case of Mr. Greci, he could be assigned additional work if he finished a particular assignment early. There were full-time workers that were engaged as employees who performed similar work as Mr. Misiek.

[40] Pi Media provided him with all the tools and equipment he needed.

[41] He was initially paid \$12 an hour but he was given a raise to \$14 per hour effective February 1, 2005 but it was reduced slightly only a week later when he was hired as a full-time employee. During the time that he was an assistant his evidence as to whether or not he had other engagements, was vague at best.

[42] As in the case of Mr. Greci, he said he intended to be hired as an independent contractor, but again I find that it was Pi Media that determined the nature of the engagement based on what it was prepared to offer. He had no other engagements during the relevant period.

The Testimony of Devin Gallagher (Photographic Assistant)

[43] Once again as a photographic assistant, Mr. Gallagher followed the direction of the photographer. He also acknowledged to being under the direction of a stylist, with whom he might be working on a project. He was provided with detailed layouts of the work he had to do and if there were any changes to the project it was the photographer or art director who would instruct him. He was assigned to a particular photographer.

[44] He was supervised by the studio manager who also set his hours of work. He could be assigned additional work if he completed work initially assigned before the end of the day.

[45] Mr. Gallagher's day-to-day work did not change when he became a full-time employee.

[46] He was provided with all the equipment and tools he needed and was paid an hourly rate of \$12 per hour, which was a rate he was offered and accepted. He testified that he would be paid even if he was fixing a mistake that he had made.

[47] Although Mr. Gallagher said he intended to be an independent contractor, it was Pi Media that determined the nature of the engagement based on what it was prepared to offer. Mr. Gallagher worked as a contract worker up until 2005 when he became a full-time employee in August. He earned a small amount in 2004 from another source.

The Testimony of Heather Harton (Senior Stylist)

[48] Ms. Harton was a hard-line stylist. She confirmed that she received specific art instructions and layouts as to what she had to do on a particular project and for a particular shot. She would get things ready for a shot including retrieving and readying merchandise. She was not supervised but had no say as to whether or not a particular shot would be approved or whether or not it needed to be redone. She would follow instructions if there was a change notice given in respect of any shot. In general, she would follow Pi Media's instructions. She recorded her time in the data system and performed the same duties as senior stylists employed by Pi Media. In general, she followed Pi Media's general working hours and consulted with a studio manager before leaving early.

[49] She attended handout meetings where the general concepts of projects were assigned and explained. This would be the forum at which a creative direction or process was conveyed by the art directors.

[50] Ms. Harton was, nonetheless, independent in the execution of her responsibilities. It was her job to execute the layouts provided and style a shot in accordance with the creative direction conveyed to her. She was very experienced and capable of understanding and giving effect to the artistic requirements of a shot. She did not need anyone looking over her shoulder in any aspect of her work. If there were problems, she would consult with the art director.

[51] During 2004 through 2006, Ms. Harton worked regularly for Pi Media on a project by project basis. Once on a project she would have to advise a Pi Media supervisor if she could not come in. At times she worked for other studios, although that was not required when she had steady work at Pi Media. One of the studios she worked for other than Pi Media was a studio called McCrae Studios where she charged a daily rate of \$400. Still, she worked almost exclusively for Pi Media and her income came primarily from Pi Media throughout the relevant period.

[52] She was provided with a portable commercial steam iron and a professional ironing board for pressing clothes. She did, however, provide smaller styling tools as she felt necessary. She provided her own portable commercial steam iron and professional ironing board when working at McCrae Studios as they did not have suitable equipment.

[53] She had an access card to Pi Media's studio at all relevant times irrespective of whether or not she was working on a project. She submitted an invoice once a

week and was paid every two weeks by direct deposit. She did not have a business account.

[54] Ms. Harton was paid \$35 an hour. She determined that rate based on her experience and skills and the amount of steady work Pi Media provided. She said that she had other clients that she charged \$40 an hour.

[55] Ms. Harton was not required to provide her services exclusively to Pi Media but Pi Media often had a hold on her time. Even when that was not the case, as mere courtesy to them, she would notify them if she was going to work somewhere. Other studios were sometimes offered a second hold on her time.

[56] Ms. Harton could accept or decline work from Pi Media. She was not obligated to work on any project.

[57] She regarded herself as a freelance independent contractor and conducted herself as such. She got other work on the recommendation of other stylists or photographers that she knew or worked with and if she was available she would go. She had a business card and a GST registration number. She charged Pi Media GST. She claimed business income and expenses on her tax return and made CPP contributions as a self-employed person.

The Testimony of Yvonne Brioux (Senior Stylist)

[58] Ms. Brioux was a soft-goods stylist. Her testimony indicated that she was somewhat less compliant as a worker than the Respondent would have me believe. She regarded the art director's direction as being general. Even though she could not change a layout and she followed directions as to changes required, Pi Media's dependence on her expertise came through loud and clear. While she did not decide if a photograph on a particular catalogue page would be of a duvet or bed, her role was to use her creative abilities to make decisions regarding the styling of the merchandise identified by the layouts. She was not supervised in any way in respect of the performance of that aspect of her contractual duties.

[59] She had a flexible work schedule. She was a professional in all respects. She had worked on hundreds of layouts and projects of the nature that Pi Media would require her to undertake on its behalf.

[60] She would be provided with specific projects and specific dates which she could accept or not. Once a project was accepted she would record her time in the

normal fashion and comply with the normal schedules and report if she could not be there on a given day. She did not attend pre-production meetings as a rule. She would consult with the photographer and work as part of the team. She was provided with an access code to the studio which she maintained throughout relevant periods.

[61] She was provided with most of the tools that she required for the performance of her duties, although, like other stylists, she had her own styling kit. Her duties were the same as those of employed stylists.

[62] She submitted an invoice once a week. She was paid by the hour, every two weeks and funds went into a personal chequing account. She was paid \$38 per hour in 2004 and negotiated that up to \$40 per hour in 2005 and 2006.

[63] She was not required to provide her services exclusively to Pi Media. She worked primarily for Pi Media during the subject period. She testified that she had other opportunities for a significant number of shoots for other studios but that she did not take the work because she was offered more work with Pi Media. Like Ms. Harton, she was not paid overtime for additional work hours.

[64] She intended to be an independent contractor. She was a freelancer who worked when it suited her. She was not familiar with other companies such as Quebecor that had significant catalogue work in the subject years. She had essentially retired in 2002 and sailed with her husband. She refused full-time employment with Pi Media as she wanted to work when and as she pleased. She could call for work after a sailing trip with her husband or otherwise when she wanted and could work.

[65] She did not have a business card, a registered business name or a personal portfolio. She did not charge GST. She paid CPP as a self-employed person but requested income tax deductions from her cheques in order to avoid a liability at the end of the year. She received no benefits from Pi Media.

The Testimony of Klara Palotay (Senior Stylist)

[66] Ms. Palotay was a senior stylist who did off figure and soft-line styling with a specialty in styling drapes. While she received all her instructions from the layouts and swipes provided to her by the creative team, she not only did not require any supervision, but was relied on for her artistic talent to create a desired look or effect or even to suggest a particular set. She was given latitude to create a

style to show drapes and she suggested that she, or she and the photographer, were given considerable latitude to create a desired style for a shot. However, she would have to comply with a change notice. She was supplied with any required tools and sets.

[67] She was free to and did, for example in 2006, work for other studios although her primary engagements were with Pi Media. In 2004 and 2005 she did not work for any other studio. She could refuse a project and subject to the restraints of a project and the team with which she worked, she could determine her own work hours. The restraints of working with a team, however, limited such freedom. She could leave whenever the project requirements for the day were finished. She reported in if she could not make it in on a day she was scheduled to work.

[68] Ms. Palotay negotiated her rate of pay at \$35 per hour without deductions or benefits. Her time was punched in, in the same manner as a full-time employee. She had an access card throughout the subject period even though there were a considerable number of days during that period where she did not work for Pi Media.

[69] Ms. Palotay invoiced her work and charged and remitted GST although on her 2006 tax return she showed income from Qnet (Quebecor) as employment income because she was issued a T4 slip. Still, she considered herself a freelance stylist. She negotiated a pay rate of \$35 an hour – had no deductions taken from her pay and received no benefits. She maintained a personal portfolio and had a registered business name.

The Testimony of Iris Simpson (Senior Stylist)

[70] Ms. Simpson was an on-figure stylist. She acknowledged that she attended pre-production information meetings where she was shown what layouts, staging and props had been selected for a shot. The portrayals were the product of the creative team who essentially dictated the desired effect and mood. But Pi Media would largely rely on the stylist's ability to create the desired effect. The stylist would pick the particular model to reflect the desired mood: for example, "a young businesswoman: fashionable but not edgy". Ms. Simpson testified that the layout was just the guideline for the fashion shot. Her role was to exceed the client's expectations and sometimes it was her poses that were the ones chosen and printed in the catalogue.

[71] That is, it was the overall look that was generated by the art department. Execution of that look was for the stylist. She would book the hair and make-up people and could decide many of the final details of the shoot such as the models' hair styles (straight, blown etc.) and, in consultation with the photographer, their positioning which would be largely consistent with that set by the creative team or swipe. She was not subject to Pi Media's direction on how to prepare for or even schedule a shoot.

[72] Ms. Simpson invoiced Pi Media and charged GST. She had a registered business. She had her own very extensive and impressive portfolio which she sent to prospective clients to promote her services. She could decline work, was free to work with other studios and did so during the relevant period although her primary engagements were with Pi Media.

[73] Like the other stylists she performed her services for Pi Media primarily at its premises and had to perform her services personally during regular hours although she had some freedom to determine her hours. She returned her access card after each project. She had an extensive styling kit that went way beyond anything described by the others. It included props and clothing, belts, fabrics, jewellery, makeup, even a buttocks enhancer and a lot more from stain removers to irons. The list was long.

[74] She filed income tax returns as a person in business, had a home office and claimed expenses related to her kit items of over \$6,500 for supplies and props in 2004. She was paid a daily or hourly rate which she negotiated. She viewed herself as a freelance, self-employed worker.

The Testimony of Sarah Rodrigues (Assistant – Junior Stylist)

[75] Ms. Rodrigues graduated from Humber College in fashion in April 2005 and started work as an assistant on-figure stylist in May 2005. She considered herself as a freelance independent contractor although she acknowledged she was told by Pi Media that that was how she was being retained.

[76] As an assistant she did not work on the set with the stylist, the photographer or the models. She pressed clothes, retrieved and put them away and followed the direction of a supervisor, as well as the stylist she was assigned to. She testified that she received training from Pi Media during this period and shadowed a senior stylist during the last few months.

[77] Pi Media taught her how to read a layout, instructed her on how to use their data time system and how to retrieve the required clothing, props and merchandise for a shoot. She was also under the direction of the stylist to whom she was assigned and she had no say in the stylist that she was assigned to assist. Based on the testimony of one of the senior stylists, assistant stylists were pretty much there to do whatever the senior stylist asked of them.

[78] The producer at Pi Media would also provide instructions on how Ms. Rodrigues was to do her work. More generally she was supervised by Pi Media's supervisor of the fashion department on a need-to-know basis.

[79] In October, 2005 she became a junior on-figure stylist now attending pre-production meetings working on set with the models and photographer. However, she was strictly limited to doing retail weekend flyers which as she said had "a smaller book". It was her "start as a stylist". It was her first experience styling an on-figure fashion shot. She did get to work directly with the models, pinning clothes to fit, and makeup people. She said as a junior stylist that she could book a model but in consultation with an art director. She said that she could book the hair and make-up artist but admitted that she had the help of other more experienced stylists given her lack of knowledge and experience. She also testified that later, as a producer, her job was to book schedules: dealing with modeling agencies, booking models and hair and makeup artists. That being her role as producer makes me leery of accepting that she had a significant role in that area as a junior stylist although I accept that senior stylists played a big part in such decisions.

[80] As a junior stylist she said she had similar duties as a senior stylist but being less experienced she could not do catalogue work which she described as more "finicky" and since she was just starting out, "they" did not want her to start out on catalogues. There was no direct supervision once she became proficient in her work and could be assigned projects on that basis. There were occasions, however, when the supervisor was not satisfied with a shot and she would be instructed how to better style or improve it.

[81] As a junior stylist she said that she had some creative responsibilities on set and, again in that respect, saw her role as not much different than that of a senior stylist. While she made such claims, I note that her testimony was not always consistent on the extent of her ability to style a shot on her own.

[82] In September of 2006 she became a producer and continued in that capacity as a full-time employee in January, 2007. As a producer she had to book schedules

that coordinated the team of players needed to produce a required shot. She learned how to bring a layout into production. She detailed the required merchandise and backgrounds and organized everything into schedules.

[83] During the time she was an assistant and junior stylist her hours were determined by her supervisor but once assigned, when Pi Media had work for her, she performed her duties at Pi Media's studio on a regular daily 8 hour basis. She was provided with an access card which she did not return after the completion of a project. In the beginning, there were odd days when Pi Media did not need her services, but after a few months she was working regularly at Pi Media. Initially, she was earning \$9 an hour but over time her rate increased as she became more experienced and then she eventually negotiated a rate of \$14 an hour. At that time she tried to implement a day rate of \$150 but was cutback to \$14 an hour.

[84] Ms. Rodrigues was paid for the hours worked. She clocked in and out daily and normally worked regular business hours. She was instructed not to leave early when a job was done without checking in first with a supervisor who might assign additional work.

[85] Ms. Rodrigues was told that she must provide an invoice for her hours worked. She did so on a weekly basis. She was paid bi-weekly by direct deposit to her personal account. She did not charge or remit GST.

[86] She provided some small supplies such as scissors, needles and pins. The cost of these goods was roughly \$100. She received no reimbursement for any such costs. Nor was she reimbursed for her transportation costs for attending one on-location shot during the subject period.

[87] She received no benefits. She filed income tax returns on the basis of being self-employed and claimed an expense relating to supplies of some \$100 for both 2005 and 2006.

[88] Ms. Rodrigues was not told she was required to work exclusively for Pi Media or that she needed Pi Media's permission for her to work elsewhere. She earned a small amount in 2005 from another source.

[89] Ms. Rodrigues did not have a portfolio until 2006. She was not registered as a business.

Respondent's Witness

[90] The Respondent called the appeals officer who was familiar with the subject appeals. Her evidence was not challenged and appears to have been tendered to confirm that Pi Media issued T4A information slips to the workers and that the income was declared. The CRA Trust Examiner having determined that the workers were engaged as employees deleted the T4As and issued T4s.

The Submissions of Appellants and Intervenor

[91] The Appellant asserts that each of the workers was engaged during the subject period to perform their services as a person in business for their own account. This is the central question as set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*⁴

[92] The Appellant also cites *Wolf v. Canada*⁵ where it was noted at paragraph 93 that in answering the question “Whose business is it?” that the provision of a temporary helping hand in a limited field of expertise recognizes that the worker’s business might stand alone, independently. There is an inference in the paragraph that such workers could stay as independent contractors for each project that was underway by the enterprise that consistently engaged them and still be an independent contractor who would seek other work in the market place once each such project was completed. It is asserted that the workers in the case at bar fit this very description.

[93] It is acknowledged that in *Sagaz Industries*, the tests in *Wiebe Door Services Ltd. v. M.N.R.*⁶ are applied and that in making the determination as to whose business it is, control over the workers’ activities will always be a factor. However, it is noted in *Sagaz Industries* that it bears repeating that all factors considered in *Wiebe Door* are a non-exhaustive list and that there is no set formula as to their application. “The relative weight of each will depend on the particular factors and circumstances of the case”.⁷

⁴ [2001] 2 S.C.R. 983.

⁵ [2002] F.C.J. No. 375 (C.A.).

⁶ 87 DTC 5025 (F.C.A.).

⁷ At paragraph 48.

[94] As to the question of control, the court is reminded that it is rare for a person to give out work and not ensure that the work is performed in accordance with one's requirements and at the locations agreed upon. Monitoring the result must not be confused with controlling the worker. Where a specialist is engaged to create a desired, specified result, it is not an indication of subordination "which is a fundamental requirement of an employee – employer relationship".⁸

[95] The Appellant emphasizes that the evidence supports that each of the freelance workers had a business distinct of that of Pi Media. Pi Media carries on business of providing pre-press services required to prepare advertisements. Assistant stylists provide merchandise, preparation and pressing services; junior and senior stylists provide styling services for on-figure fashion photography, off-figure photography, hard-line photography (products and home fashion), or photography of room sets or drapes. Photographic assistants provide services to prepare sets and merchandise and assist photographers to photograph the merchandise for catalogues and other advertising media. Carpenters provide carpentry services to build sets, furniture and props required to display merchandise to be photographed for catalogues.

[96] With respect to the stylists, the Appellant argues that junior and senior stylists were not told how to style the clothing on models, the off-figure fashions, the sheets and duvets on beds in room sets or the drapes on the set. The artistic expression of a creative concept through the styling rested with the junior and senior stylists alone. The evidence confirmed that although there was some monitoring by the creative director and shots were ultimately approved by the client, there was no supervision or control exercised by Pi Media to suggest that it was in charge of the shoot. Dictating how the shot was to be presented and monitoring the quality of the end product did not constitute direction, supervision or control over the work performed by the stylists.

[97] The Appellants' assertions go further in suggesting that no one from Pi Media supervised the assistant stylists when they prepared and pressed the merchandise for a shoot. It is asserted that the simplicity of tasks performed by the worker should not be considered when determining whether the worker is in a subordinate relationship with the payer.

[98] The Appellant also discusses a line of cases dealing with the question of what constitutes "carrying on a business". Essentially this line of argument was to distinguish cases where it was found that an undertaking was not a business when

⁸ *Direct Care In-Home Health Services Inc. v. Canada*, [2005] T.C.J. No. 164 at paragraph 11.

it was just pursuing training. It was submitted that assistant stylists and photographic assistants were not engaged in “pre-start up” activities to prepare for being in business in the future but rather they were gaining experience in their business by seamlessly moving from position to position. It is argued that they were engaged in self-educational activities while being economically productive in the conduct of a business.

[99] With respect to carpenters, it is asserted that the freelance carpenters who Pi Media engaged were very similar to the circumstances of the carpenter in *Panache Fine Cabinetry v. M.N.R.*⁹ who was found to be an independent contractor.

[100] The Appellants go on to consider chance of profit and risk of loss and argue that the ability to negotiate contract rights can and should be taken as reflecting, and there is authority for finding that such ability reflects, a chance of profit, if not a risk of loss. Since all the parties were free to accept or decline work, such decision making factor would constitute a chance for profit as well. Further it was argued that a choice to work primarily or solely for Pi Media was simply the result of the consolidation of the industry.

[101] As to intentions of the workers, needless to say the Appellants cite *Wolf*, and *The Royal Winnipeg Ballet v. M.N.R.*,¹⁰ and argues that the evidence supports the conclusion that all of the workers had the common intention with Pi Media to work as independent contractors.

[102] With respect to *The Royal Winnipeg Ballet*, in particular, the Appellants rely on the distinction made in that case in respect of dancers whose artistic expression was not found to suffer from the argument that dancers were assigned roles and whose performances were choreographed and directed in considerable detail. Their special talent to provide the required artistic expression diminished the impact of the control exercised over them by the directors and choreographers who represented the ballet company. The dancers were still independent contractors. The dancers had some chance for profit because they were free to negotiate with the ballet company. The dancers had the right to accept other engagements that did not conflict with their engagement with the dance company.

⁹ [2008] T.C.J. No. 385.

¹⁰ 2006 DTC 6323 (F.C.A).

[103] The comparison with that case continues. Notwithstanding that the dance company supplied dancers with the necessary items for a performance, the dancers had their own rehearsal wear, orthopedic devices and other incidental items. The provision of such tools, albeit less consequential relative to the supplies supplied by the dance company, was still sufficient to be given weight in support of the position that the dancers were independent contractors.

[104] The Appellants' submissions also responded to each of the Respondent's assumptions made in the Replies to the Notices of Appeal. However, I do not find it necessary to review those responses. Also, the Appellants submitted a reply to the Respondent's written submissions but again I do not feel it is necessary to review those responses. As well, I note that Ms. Brioux made a submission to the Court; however, such submission for the most part was an attempt to raise new evidence and, in any event, offered no insight into matters that I might properly consider in respect of her appeal.

The Respondent's Submissions

[105] The Respondent acknowledges that the workers were not full-time workers and that they could work for other payers when not engaged by Pi Media. Still, the Respondent does not regard the engagements as casual and argues that even if they are, they are insurable and pensionable as it was not "employment of a casual nature other than for the purpose of the employer's trade or business".¹¹ That is the statutory provision that excludes certain engagements as insurable employment or pensionable employment.

[106] Subsection 5(2) of the *Employment Insurance Act* ("EIA") provides:

Excluded employment

5(2) Insurable employment does not include

(a) employment of a casual nature other than for the purpose of the employer's trade or business;

[107] Subsection 6(2) of the *Canada Pension Plan* ("CPP") provides:

¹¹ See *Employment Insurance Act*, S.C. 1996, c.23 at paragraph 5(2)(a). See also *Canada Pension Plan*, R.S.C. 1985, c. C-8 at paragraph 6(2)(b).

Excepted employment

6(2) Excepted employment is

(b) employment of a casual nature otherwise than for the purpose of the employer's trade or business;

[108] Such excluded engagements are discussed in *Roussy v. Canada*.¹² In that decision, the Federal Court of Appeal distinguishes work that is transitory in nature or having unpredictable work schedules, which is casual employment, from engagements where the worker is being hired for specified hours for a definite period or on a particular project until it is completed which is not casual. Short periods of employment, if they are definite and specific, where the presence and commitment of the employee during the period is not vague or transitory are not periods of casual employment. It is asserted that none of the workers in the subject appeals are engaged in work of a casual nature.

[109] As well, it is asserted that there is no evidence that the workers ever performed services “other than for the purposes of the employer's trade or business”.

[110] The Respondent also relies on the decision of Justice Archambault in *Dynamex Canada Corp. v. M.N.R.*¹³ In that decision Justice Archambault thoroughly canvasses the nature of the employment relationship and cites a variety of sources in addressing that question. One reference relied on by the Respondent was to an author quoted by Justice Archambault at paragraphs 17 and 18 who noted that although self-styled independent contractors are entitled to sell their services to the world at large, the fact that they work entirely or substantially for one employer would suggest that they are really employees. It is asserted that all of the workers in the subject appeals fit this category of worker.

[111] The Respondent also prepared a chart showing what each witness who testified at the hearing earned or filed as being their total business or other employment income. Pi Media accounted for more than 90% of most of the workers total reported business or other employment income.

¹² [1992] F.C.J. No. 913 (F.C.A.).

¹³ [2010] 3. C.T.C. 2233 (T.C.C.) at paragraph 12.

[112] Recognizing that the central question that must be addressed before reliance can be placed on the casual worker provisions in determining whether or not a worker was an independent contractor, the Respondent addressed that question by reference to the common law as set out in *Wiebe Door* and *Sagaz Industries*. I will deal with such arguments under traditional headings.

Pi Media's control over the Workers

[113] It is argued that control is demonstrated by the payer having the right to direct the manner of doing the work even if that right was not exercised. The Respondent asserted that the detailed written and visual instructions found in the layouts, art instructions, swipes and more, were required to be followed by all the workers and demonstrated Pi Media's right to control that which was to be done, the way it shall be done, the means to be employed in doing it and the time and place where it shall be done. These instructions were sufficiently detailed as not to allow any material input by the workers in terms of the final result and any examples of such input were indulgences that did not alter Pi Media's right to control the worker.

[114] Even senior stylists were provided detailed instructions. It was asserted that the fact that such highly skilled workers did not require supervision once they were assigned their work does not alter Pi Media's ultimate right of control over them.¹⁴ If the detailed instructions called for a model sitting, the stylists could not style the shot with the model standing. The Respondent also relied on there being no evidence denying that an art director could direct how a specific shoot was to be completed.

[115] It was submitted that the workers' ability to decline to work on a project is no different than any other part-time or temporary employee declining a shift that they were not scheduled to work. However, once they accepted the shift they were controlled by Pi-Media.

Pi Media provided the essential tools and equipment

¹⁴ The Respondent cited *Gagnon v. M.N.R.*, 2006 TCC 66 at paragraph 14 per Bowie J.; affirmed 2007 FCA 33 at paragraph 7 per Létourneau J.

[116] Pi Media provided the workers, at no cost to them, the sets, merchandise, construction materials, models, irons, steamers, stationary power tools, paging equipment and the like. The workers provided few if any tools.

Workers had no chance of profit or risk of loss

[117] The Respondent argued that none of the workers had a substantial investment in a business. There was no risk of loss. It was submitted that the workers were not entrepreneurs.

[118] They accepted, or in some cases negotiated, a daily or hourly rate but they could do nothing to earn more than work additional hours or days. Being able to obtain a better hourly rate for themselves in a negotiation was submitted not to be reflective of a chance of profit. As noted by Justice Bowie in *Gagnon v. M.N.R.*:¹⁵ “That, however, is not entrepreneurship; it is simply a reflection of the different values of different people in the labour market”.

[119] There was no reward based on anything other than the hourly or daily rate paid. The Respondent argued that any artistic initiative that a worker provided was to enhance the profit of Pi Media. There was no reward or chance of profit for any business of the worker when the worker’s skill had an added value. For example, when Ms. Palotay spoke of initiating a set design idea, it saved Pi Media money and enhanced its profitability, not her own. It was submitted that her work enhancing Pi Media’s business was indicative of her work being on account of Pi Media’s business not her own.

Intention

[120] Respondent argues that intentions are not determinative in this case and that stated intentions cannot displace the clear results of the tests that are set out in *Wiebe Door* and *Sagaz Industries* which determine the true nature of a relationship.

It is Pi Media’s business

[121] The Respondent asserts that none of the workers were running a business. It was submitted that any of the indicia of separate businesses were not sufficient to support a finding that any of the workers had a business or that they were working on their own account in the performance of their services. Of note is a reference to

¹⁵ 2006 TCC 66 at paragraph 18; affirmed 2007 FCA 33.

*Gartry (W.C.) v. Canada*¹⁶ where Justice Bowman (as he then was) noted that attention must be paid to when a business starts. The Respondent suggests that some of the workers here have an intention to learn a craft which precedes starting a business.

Onus of Proof

[122] Lastly, it was pointed out that the initial onus was on the Appellants to disprove the assumptions made by the Minister. The Respondent in reliance on the assumptions made in respect of the assessments asserts that the burden in respect of that onus has not been discharged.

Analysis

[123] There is little doubt that the workers in this case are not casual workers. The regularity of the work they performed for Pi Media and that they were engaged or offered work on a regular project by project basis dictates a finding that they were not. Therefore the exclusions in paragraphs 5(2)(a) of the *EIA* and 6(2)(b) of the *CPP* are not applicable. That takes me to consider these appeals as guided by the traditional tests for determining whether an engagement is one of service or one for services.

[124] Both Counsel provided written submissions that provided a very detailed and thorough review of the evidence, focusing on aspects that are required to be weighed in determining whether an engagement is entered into under a contract of service or a contract for services. However, at the end of the day, the testimony of each witness cannot be assessed purely on the basis of checking off a list of each aspect of an engagement that might be considered in making that determination particularly where one is asked to make a finding that would apply to a representative category.

[125] As my analysis will hopefully illustrate, the exercise is more about determining what factors must be given the most weight in this case.

Senior Stylists

[126] I am inclined as a starting point to suggest that the workers that have made the best case are the senior stylists. In spite of the Respondent's reliance on the

¹⁶ [1994] 2 C.T.C. 2021 (T.C.C.) at paragraph 16.

commonalities of indicia of employment shared by these workers such as Pi Media's provision of tools and artistic direction, all four senior stylists who testified impressed me as being very much their own boss. That they performed their work with many of the earmarks of employed workers, such as recording their time, working normal hours, advising when they were leaving and (except Ms. Rodrigues) having access cards even when they were not working on a project, did not weigh heavily in the formulation of my view that they were each engaged in their own business and working for their own account in a contract for services with Pi Media.

[127] Earning all or most of their income from one client is not a factor to be given much, if any weight, in this case either. The industry in which they worked imposed this. Pi Media was one of the few if not, practically speaking, the only game of its type in town during the subject period. That does not undermine a finding that they all had the skill and experience to have a very credible entrepreneurial basis for carrying on their own business and that each conducted themselves as any business person would in similar circumstances.

[128] They owned all the tools they needed to own to carry on their business. They worked regular hours on projects as the nature of the projects required. They entered time on a data system by project to allow attributing costs associated with particular projects. That it was used to track billable hours is no employment tag at all in a case like this. As to following direction, they followed direction much like any professional person, performing artist or independent tradesperson, with a marketable skill, would and they did so in an entrepreneurial manner. If they had sufficient business they registered for, collected and remitted GST. They had portfolios as they may have felt necessary to market their contractor services. They were no less independent contractors by having one client whose business was served by their services than Pi Media would be by serving the business needs of one client – such as Sears.

[129] I would assign to each of them the benefit of each others' testimony as reflective of the conditions and nature of their engagement. They were not required to go to pre-production meetings although most did. They followed layouts and swipes but had the liberty to stage the required shots using their own artistic flare. They were retained because of their skill to get the shot right, without retakes, to the satisfaction of their client, Pi Media. No one could tell Ms. Palotay exactly how to display a drape once she was told the desired look. Ms. Simpson was clearly relied on to pick and present a model that would convey the desired look.

[130] While the rigours and training of a professional ballet dancer are very different and may exceed that demanded of stylists, the comparison that Pi Media's counsel makes with the case of *The Royal Winnipeg Ballet* is not inappropriate in the case of senior stylists.

[131] Further, I fully accept that each of the senior stylists took on projects as and when and with whom they saw the best opportunity to earn income with an entrepreneurial boldness that says: "I'm sailing this week, find another contractor".

[132] To conclude my findings, with respect to senior stylists, I will very summarily comment on the traditional factors considered in cases such as these.

[133] As to the provision of tools, the nominal need for the workers in this case to have tools of their own is of little import. That will often be the case when what one sells is a talent that can be exploited without a significant investment in tools and where the industry norm for clients of such workers is to provide the necessary tools including the location where the work is to be preformed.

[134] As to risk of loss, the absence of a need for a worker to make a large investment in tools also reflects itself in a relatively small capital investment which explains one aspect of the modest risk of loss in this case. As well, the apparent lack of liability for mistakes is, ultimately, of little import since the cost of rectifying a mistake, the cost of re-doing a photo session, is not problematic given its rarity due to the skills of the talented senior people whose combined input consistently produce the desired result in the array of shots produced at a given session.

[135] As to chance for profit, I am satisfied that the rates of pay negotiated by the senior stylists for services to be performed by them are consistent with such rates, hourly or daily, being considered as their chance for profit in a true business and entrepreneurial sense. That will almost always be the case where the industry norm dictates that the chance of profit for independent contractors is limited to negotiating a better hourly or daily rate and taking on more hours of work where it can be found. I have absolutely no doubt, based on their testimony and the varying rates of pay, that each of the senior stylists negotiated their rate of compensation in an entrepreneurial manner as contractors working on their own behalf.

[136] As to control, as emphasized above, I am not troubled by the degree of control Pi Media's art department have over senior stylists. It carries little weight measured against the entrepreneurial aspects and freedoms enjoyed by them as

persons pursuing their own businesses. Similarly, I find that their entrepreneurial independence impacts my view of the relevance of the intentions of the parties in this case. The senior stylists were not under the thumb of Pi Media when the terms of their contractual dealing were, from time to time, project by project, being set. I dare say, as a group, it is my impression that they would refuse to consider an employment engagement. Their endeavours were established as businesses and the intention to enter into a contract for services was mutual.

[137] There is nothing about the terms of engagement, such as having stylists on hold, that speak to a finding of employment. Indeed, keeping a person who has agreed, in respect of a particular time period, to be on hold, on a pay or release basis, only serves in this case to underline their independent status.

[138] I see no reason to elaborate further. There is nothing in the authorities relied on by the Respondent that dissuade me from my finding that the senior stylists are independent contractors. Accordingly, the separate appeals of Ms. Brioux and Ms. Palotay are allowed. Similarly, the appeals of Pi Media as they relate to persons identified by the Respondent and Pi Media as senior stylists, including Ms. Harton and Ms. Simpson are allowed.¹⁷

Assistant Stylists and Assistant Photographers

[139] The assistant photographers and assistant stylists can be readily disposed of with similar conviction, but with a different result.

[140] The common testimony of the assistant photographers is that they provide no tools, have no say as to which photographer they are assigned to assist, they follow directions of Pi Media supervisors or art directors or its contractor agents the photographers and senior stylists and are subject to being assigned general tasks. They work under supervision. They are not paid to produce an end result and have no real say in their rate of pay. They are paid to perform tasks that are a necessary part of Pi Media's business.

[141] The terms of their engagement were determined wholly at the instance of Pi Media. Any pretence of these individuals having indicia of having their own business was just that, a pretence. Indeed as a group, they offered little even in the

¹⁷ Schedule B to the Respondent's written submissions lists senior stylists.

way of mere trappings that might suggest any of them carried on business for their own account or had any other clients to speak of.

[142] That they only worked when there were projects for them to work on, and that they could work elsewhere is, in their case, only indicative of their being casual workers subject to the casual workers provision of the subject enactments as argued by the Respondent. As well, these workers are little more than apprentices who are included in the sphere of insurable and pensionable employment.¹⁸

[143] These are clearly individuals who have come to Pi Media to learn a craft, to have hands-on training in a studio environment and watch, assist and work with others so as to develop marketable skills. As Mr. Greci said, Pi Media is a “great place to start and learn the actual business of photography”. Being an assistant photographer at Pi Media was, as Mr. Misiek said, a stepping stone to becoming a photographer in this industry.

[144] As found by Justice Archambault in *Charron v. M.N.R.*¹⁹ in the context of a graduate student performing research for a professor:

Although traditionally the contract of apprenticeship seems to have existed between tradesmen, I do not think that for the purposes of the Act its scope should be limited to this kind of activity. A young scientist can learn his trade from contact with experienced researchers just as an apprentice electrician can from a master electrician. ...

[145] While I acknowledge that the Respondent did not rely on there being an apprenticeship in this case and that the parties themselves did not enter into a contract of apprenticeship, the analogy speaks loudly, in my view. Further and more to the point in respect of an argument that the Respondent did make, which was that the assistants, being in the initial phase of learning a marketable skill, were at a stage preceding starting a business, I see no reason not to import authorities that considered the question of when a business exits. Such cases are in the context of reasonable expectation of profit. Their reasoning, in my view, is not materially distinguishable from that required when considering when a source of

¹⁸ See subsection 5(1)(a) of the *EIA* and the definition of “employment” in subsection 2(1) of the *CPP*.

¹⁹ [1994] T.C.J. No. 47 at paragraph 14.

income might be considered a business source. For example, in *Price v. Canada*²⁰ I noted that expenses incurred pre-start-up are personal. Similarly, pursuit of one's prospective career is not yet a business. A supervised workplace that offers a worker training while performing a subservient role more likely than not reflects the role of an employee engaged in assisting an employer's business. Applying the "whose business is it?" test in *Sagaz Industries* then, in such a case, will only rarely give room for a finding that the worker is an independent contractor. No such room exists here in the case of the assistant photographers.

[146] This is not even a close case that would allow me to consider the intentions of the parties. However, were intentions relevant, I would find that I am not satisfied on the evidence that the intentions were mutual. An employer cannot impose independent contractor status on temporary workers. I am satisfied on the evidence, in this case, that that is what happened, in this case, with these workers.

[147] Nothing here distinguishes the case of assistant stylists from that of assistant photographers. Ms. Rodrigues was the only witness in this category. She went right from College in April, 2005 to Pi Media in May as an assistant stylist where she did nothing on-set: just assisting the stylist by retrieving, pressing and lining up clothes and returning them when a shot was completed. She was trained to read layouts, instructed how to perform tasks and was supervised and directed by a supervisor, a producer and senior stylists. She was in a subordinate position and was clearly on a training path to be part of the Pi Media team. I will say more on that under the next heading "Junior Stylists" but in any event my findings and conclusions in respect of assistant stylists as represented by Ms. Rodrigues are that their situation in every relevant way is essentially the same as that of the assistant photographers and that they are no more independent contractors than are those workers.

Junior Stylists

[148] Again, Ms. Rodrigues was the only witness in this category. As I said, she went right from school to Pi Media as an assistant stylist where she did nothing on-set.

²⁰ [2001] T.C.J. No. 524 at paragraph 10. See also *McClure et al v. M.N.R.*, 88 DTC 1504 and *Cunningham v. Canada*, [1998] 1 C.T.C. 3125.

[149] Within 5 months she became a junior stylist working now on-set doing strictly flyers. As she said: “It was kind of my start as a stylist.” She was styling fashion shots – something she admitted she had never done before. She could book a model but only in consultation with an art director which is to say she could make the telephone call that booked the model. She acknowledged that there were times when she had to be instructed on how to better style a shot. By the time she was a junior stylist she was working regularly for Pi Media earning \$14 per hour and could be given additional work. This does not reflect the level of expertise and independence enjoyed by senior stylists. The difference speaks loudly.

[150] A year later she became a producer, still as a so-called freelancer, for some three months at which point, in January of 2007, she became an employee of Pi Media working as a producer for another year when she became an employed stylist, a position she still holds today.

[151] I have no idea how typical Ms. Rodrigues is of junior stylists nor do I profess, on the basis of the evidence, to have an understanding of how this classification of worker is particularly helpful. For a relatively short period she is given more responsibility in a less demanding area and then quickly is advanced to yet another position with very modest increases in pay. Throughout this period, she has few, if any, indicia of having her own business.

[152] She became a full-time employee in less than two years after being exposed to various aspects of Pi Media’s business. It is said that she, like the others, received no formal training. However, I cannot avoid the view that the evidence supports the finding that Ms. Rodrigues was being groomed to be a well-rounded employee. She accepted these moves as she had no particular business of her own. That there were no other studios around that needed junior stylists was not the reason she was not taking other engagements. She was pre-occupied with a near full-time, with pay, training program with Pi Media while assisting it in its business.

[153] Taking on a different office designation as a “junior” stylist that came with different assignments and responsibilities in her case does not reflect the same level of business autonomy as reflected, on the evidence I have heard, by the designation “senior” stylist. On the evidence before me, the comparison pales.

[154] Put another way, I am not satisfied that Ms Rodrigues was experienced enough to warrant my accepting, on her say so, that she was operating a stylist’s business for her own account. While as a junior stylist she may well have had more

responsibility than as an assistant, I am not satisfied that she was not in a subservient position. None of the *Wiebe Door* tests would indicate that she engaged in anything other a contract of service, serving the business of Pi Media.

[155] This is not a close case. However, were intentions relevant, I would find that the situation of Ms. Rodrigues did not change when she became a junior stylist. Her purported status as an independent contractor was imposed on her. Mutuality was mere compliant adherence of a status Pi Media sought to unilaterally impose on a temporary worker being prepared for full-time employment.

Mr. Thompson – Carpenters

[156] The case of the carpenter is more difficult. If I accept the Respondent's view of the evidence of Gary Thompson, he is a casual worker engaged for the purpose of Pi Media's business. If I accept the Pi Media's view of his evidence, he is an independent contractor.

[157] Mr. Thompson described his function as building sets. Prior to starting work at Pi Media in about 2004 he had worked for some four years for several other enterprises including Morris Studios as a freelance contractor doing carpentry. Prior to that, he had managed, as an employee, a cable company building custom cables. Once he decided to try carpentry in about 1999 he registered his business under the name GT Maintenance Services and promoted it as offering carpentry and maintenance services. He had business cards that he used to promote his business and got work by word of mouth as well. At Morris Studios he built sets and at another place he built tables and shelves in its shipping/receiving area. He was engaged at Morris Studios for a period of over a year and during periods he was not engaged there, he found other jobs. He listed four other enterprises to which he provided carpentry services in addition to Morris Studios all on an independent contractor basis. For example at a company that he referred as Enviroguard, he built countertops for water dispensers. Some engagements were based on an hourly rate which varied between \$18 and \$24 an hour depending on what he could negotiate. Some jobs he bought the materials and charged for material and labour. As to the labour component, it might be by the hour or just be based on a fair price for the work. Some jobs had a fixed price for a particular product built. He delivered invoices for his work on his own invoice forms in the name of GT Maintenance Services. His invoices to Pi Media were also in his business name and exhibits of 2005 and 2006 invoices show a 7% tax added with no GST registration number shown. He testified he collected and remitted GST. Deposits went to his business account.

[158] As to the rate of pay at Pi Media it was on an hourly basis. He worked the hours he was needed. He testified he negotiated a \$20 per hour rate with Mr. Maclean. He received no benefits. He filed income tax returns reporting his income as business income and claimed related expenses including a home office expense. His work was similar to that of carpenters employed by Pi Media however, unlike employed carpenters, he was not required to do any office work such as preparing reports or providing estimates.

[159] He was told what to build by the studio manager or art director and was provided a layout. Sets had a standard layout and the industry had a way of doing things in constructing sets. For example, a corner set had two temporary walls to be joined and secured. Pi Media had a flooring system. He would lay it down as instructed: for example, diagonal or otherwise. His work was supervised to some extent. He was provided with the heavy tools such as a bench saw and a compressor for air powered tools. He provided his own fully supplied tool belt. He paid for any damage to his tools. He needed permission to leave early and was given odd building maintenance jobs not directly related to his carpentry work building sets. In this sense, he was in a very subordinate position. He was shuffled about to do whatever maintenance work was required such as fix windows and doors that did not shut or close properly. As to his work schedule, he made himself available as needed. There were gaps as Pi Media's business was slow but there was really no other work for him during the subject period so his availability was not an issue.

[160] Applying the *Wiebe Door* tests from the perspective of the *Sagaz Industries* directive of determining in whose business he was engaged, there is no clear answer, in this case, in my view. The one factor that troubles me is the extent of subordination to which he is subject. I am not referring to the set building. I am referring to the maintenance work he was required to do as a regular part of his job description. While I have the impression it was not the major function he played, he was required to perform such role as requested. The question then is whether that is sufficient to support a finding that the work he performed was not the work of GT Maintenance Services. He was performing his services for his own account, only if the work he performed was part of the services GT Maintenance Services provides.

[161] In considering this issue, my initial inclination was to weigh the degree of subordination as illustrative of the true nature of the relationship. Was he a self-styled independent contractor entitled to sell his services to the world at large but

who in fact worked entirely or substantially for one employer during the subject period in a subordinated position suggesting that he was an employee? Was his presence at Pi Media only serving the purposes of Pi Media as opposed to those of GT Maintenance Services? Answering these questions in the light of a troublesome subordination issue, might well have permitted a finding that Mr. Thompson was an employee.

[162] However, offsetting this inclination, was the evidence of the *bona fides* of GT Maintenance Services. His business card, which I find was no prop but rather was a genuine reflection of a business that he promoted as such since 1999, describes the business as “Carpentry/Home Repairs”. Being told by a steady client to fix doors and windows is what GT Maintenance Services does. To have essentially one client due to slow economic times to whom you are more beholden because of such conditions does not change that reality. While not part of the experienced artistic team that enjoyed artistic freedom, I am satisfied that he was working for his own account in this case as he was, in my view, primarily performing a function that was part of his own business.

[163] Further, acknowledging this as a close call, I find that intentions of the parties must be given weight in this case. Mr. Thompson was not put in the position by Pi Media of having to accept independent contractor status. I am satisfied that it was a totally mutual intention giving effect to the true nature of the relationship.

[164] Accordingly, I find him to have been engaged in a contract for services.

Conclusion

[165] The appeals of Pi Media are dismissed in respect of the individual workers having, as agreed to between the Respondent and Pi Media at the hearing, work category designations of assistant photographers, assistant stylists and junior stylists. Such workers have been found to have been engaged at all relevant times by Pi Media under a contract of service. All such workers are to be treated accordingly for the purposes of the *EIA* and the *CPP*. The appeals of Pi Media, Yvonne Brioux and Klara Palotay are allowed on the basis that at all relevant times individual workers having work category designations of senior stylists, as agreed to between the Respondent and Pi Media at the hearing, were engaged by Pi Media under a contract for services. All such workers are to be treated accordingly for the purposes of the *EIA* and the *CPP*.

Signed at Ottawa, Canada this 7th day of April 2011.

"J.E. Hershfield"

Hershfield J.

CITATION: 2011 TCC 204

COURT FILE NOS.: 2009-335(EI); 2009-336(CPP)

STYLE OF CAUSE: 1772887 ONTARIO LIMITED AND M.N.R.
AND HEATHER HARTON

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 21, 22, 23 and 24, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice J.E. Hershfield

DATE OF JUDGMENT: April 7, 2011

APPEARANCES:

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CITATION: 2011 TCC 204

COURT FILE NO.: 2009-849(EI); 2009-850(CPP)

STYLE OF CAUSE: YVONNE BRIOUX AND M.N.R. AND
1772887 ONTARIO LIMITED

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 21, 22, 23 and 24, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice J.E. Hershfield

DATE OF JUDGMENT: April 7, 2011

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CITATION: 2011 TCC 204

COURT FILE NO.: 2009-228(EI); 2009-229(CPP)

STYLE OF CAUSE: KLARA PALOTAY AND M.N.R. AND
1772887 ONTARIO LIMITED

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 21, 22, 23 and 24, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice J.E. Hershfield

DATE OF JUDGMENT: April 7, 2011

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