Docket: 2010-1033(EI)

BETWEEN:

STUART SMITH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

COLDEN HOLDINGS LTD.,

Intervenor.

Appeal heard on common evidence with the appeal of
Stuart Smith *2010-1034(CPP)* on December 7, 2010
at Nanaimo, British Columbia

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

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Matthew Canzer
Agent for the Intervenor:	Denis Collins

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 14th day of January 2011.

"D.W. Rowe"

Rowe D.J.

Docket: 2010-1034(CPP)

BETWEEN:

STUART SMITH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

COLDEN HOLDINGS LTD.,

Intervenor.

Appeal heard on common evidence with the appeal of
Stuart Smith *2010-1033(EI)* on December 7, 2010
at Nanaimo, British Columbia

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

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Matthew Canzer
Agent for the Intervenor:	Denis Collins

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 14th day of January 2011.

"D.W. Rowe"

Rowe D.J.

Citation: 2011 TCC 20
Date: 20110114
Dockets: 2010-1033(EI)
2010-1034(CPP)

BETWEEN:

STUART SMITH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

COLDEN HOLDINGS LTD.,

Intervenor.

REASONS FOR JUDGMENT

Rowe D.J.

[1] The Appellant – Stuart Smith ("Smith") – appealed from two decisions issued by the Minister of National Revenue (the "Minister") on February 10, 2010 wherein the Minister decided Smith was not employed under a contract of service with Colden Holdings Ltd. ("Colden") during the period from October 1, 2007 to August 14, 2009 and was not engaged in either insurable or pensionable employment pursuant to the provisions of the *Employment Insurance Act* ("*EIA*") and the *Canada Pension Plan* (the "*Plan*"), respectively.

[2] All parties agreed both appeals could be heard together.

[3] Smith testified he resides in Campbell River, British Columbia and – in June, 2007 following discussions with Denis Collins ("Collins") – President of Colden, began driving truck one and one-half days every second week. He was remunerated based on 45% of the revenue produced by operating a 5-ton truck in the course of picking up loads at a warehouse and delivering them to various sites which were

occupied – primarily – by businesses in the Campbell River area. Smith stated he was paid once per month and each night completed the necessary paperwork to provide details of the deliveries made that day. The Colden office undertook the calculations necessary to produce the final amount of revenue to which Smith was entitled but his own appreciation of the numbers enabled him to ascertain with a high degree of precision the amount he was earning each day. Colden had a contract with Comox Valley Freight ("Freight") whereby it agreed to make certain deliveries as dispatched by Freight. Smith stated Collins agreed he could work for two other truckers – one or two days for Sean and three-weeks for Bob – in July or August, 2007. Smith made the deliveries and received 45% of the gross revenue of each of those trucks but Colden deducted the sum of $45 for the monthly cost of the Mike Phone system installed in the cab. Smith stated Collins informed him that – starting in 2008 – this same amount would be deducted from Smith's earnings produced by the truck he drove. Smith stated he did not agree since he had his own cellular telephone and did not require any other communication device to perform his deliveries satisfactorily. Smith stated Colden owned the truck and paid all costs associated with its operation. With respect to his status as a service provider, Smith stated he had operated his own courier business for 6 years and was under the impression it was not possible to make deliveries as a subcontractor unless he owned the vehicle. He did not have a business licence during the relevant period and was not a registrant for purposes of the Goods and Services Tax ("GST"). Smith stated he informed Collins that he would not work as a subcontractor. His pay cheques were made out in his own name and deposited into a personal account at the bank. Smith stated he was able to refuse a delivery only if he considered the load to be unsafe. When he required a replacement driver on two or three occasions, he informed Collins who arranged for one. Smith did not hire any helpers except he had allowed a man – Al – to ride with him when making deliveries to Gold River. Smith did not pay Al but bought him some meals and loaned him small sums of money – not more than $20 – on occasion. However, one day Collins saw Smith driving the truck with Al as a passenger and informed him that no other occupant was permitted due to the strict requirements of the Colden liability insurance policy. Smith stated that as of July 15, 2008, an agreement between Comox Valley Distributors – successor to Freight – and United Steelworkers Union Local 1-363 ("Union") came into effect which he believed applied to drivers like him and others even though he was not a member of the Union. Smith stated Colden did not take any deductions from his pay during the relevant period nor did it issue him with a T4 slip for the 2007 and 2008 taxation years. Smith stated he had "a couple of conversations" with Collins about his working status but was not placed on the Colden payroll. He stated that he continued to work under the same conditions because he needed the job. Beginning in January or February, 2008, Colden began deducting the monthly fee for the Mike Phone and also for the Workers'

Compensation Board ("WCB") premium attributable to Smith and remitted it on his behalf. During the entire working relationship, the remuneration paid to Smith was based solely on 45% of the revenue generated by him operating the Colden truck on any given day. (There is one cheque in Exhibit R-2 that where 40% appears on the memorandum line but that is probably an error.) Smith washed the truck a few times, paid for the cost personally and did not seek reimbursement. Smith stated he was waiting for a transformation to status of employee following the Union agreement which he was certain included him and other replacement drivers. However, he did not speak to a Union representative until after he quit driving for Colden on August 14, 2009. Smith stated he was on standby to be called by Colden between 7:30 a.m. and 4:30 p.m. every second Saturday. At one point in July, 2009, he worked 5½ days in a week because another driver had been injured. On average during the relevant period, Smith earned about $3,000 per month. Smith stated "Collins kept bugging me for a receipt" and recalled signing a piece of paper to comply with that request.

[4] In cross-examination by counsel for the Respondent, Smith described the basis for calculating revenue earned by the truck which took into account factors such as weight, distance, and any extra charges arising from a residential or off-road delivery. There was no pay for waiting time. Before it was purchased by Colden, Smith knew that particular 5-ton truck had generated revenue of approximately $12,000 per month for the previous owner and that Freight – or its successor company – had agreed to pay a minimum of $5,000 per month to Colden. Counsel referred Smith to a photocopy of a document – Exhibit R-1 – which had been completed in the name of Stu's Contract Driving – in which certain sums – $18,387.59 in total – are listed for each month between January and June, 2008, as having been received from Colden. Smith identified a bundle of photocopied cheques – Exhibit R-2 – issued on the account of Colden at the Bank of Nova Scotia in Campbell River. Counsel pointed out that the word "contract" was written on memorandum line at the bottom left on a dozen or more cheques. Smith acknowledged that particular description and that others stated "contract trucking" or "contract driving" or "contract wages" followed by a notation of "40%" or "45%" were present when the cheques were issued to him. Smith stated that in July, 2008 he became aware that the Union had entered into an agreement which included Colden and that Collins had signed it on behalf of his corporation. According to Smith's understanding of the terms of said agreement, replacement or part-time drivers had to be paid an hourly wage. Smith conceded that prior to this event occurring in July, 2008, he had not discussed with Collins his working status nor the lack of source deductions for Employment Insurance, ("EI") premiums or Canada Pension Plan ("CPP") contributions. Smith recalled Collins saying he would "probably have to pay more" to him and other part-time drivers as a result of that new Union agreement. However, Collins did not agree that Smith would

become an employee of Colden. Smith stated the dispatching of deliveries began at 8:00 a.m. and a warehouse worker was assigned loads to the various trucks. The forklift operator was an employee of Freight and used that machine to load materials and equipment scheduled for delivery. Once a delivery was completed, Smith returned to the warehouse to pick up another load. Freight handled all dispatch but Smith could choose a route and assign priorities to deliveries unless one of them had been identified by the dispatcher as urgent. Smith acknowledged that a month or more might pass without having any contact with Collins. He agreed that there were no discussions about his ability to hire a helper and understood he could not hire a substitute driver. Smith stated that when he drove truck for Bob and Sean that each of them paid him directly based on 45% of the revenue generated by the truck. Smith stated he recorded his income each month on a calendar and although there was no agreement with Collins about his working status with Colden, considered himself to be a driver/employee. He could not recall the manner of reporting the income earned by driving for the two other truckers, Sean and Bob as he had driven for Sean only one day.

[5] Collins, agent for the Intervenor did not cross-examine.

[6] The Appellant closed his case.

[7] Collins was called to the stand by counsel for the Respondent. He testified he is President of Colden and works as a truck driver. Collins stated he met with Smith – who had been referred by a mutual friend – and discussed with him the opportunity to drive a Colden truck part-time and to be paid 45% of the revenue earned by the truck. Collins stated that he informed Smith from the beginning of the working relationship that Colden required a receipt every month – for accounting and tax reasons – to acknowledge the amount paid for his services. At some point, Smith provided a statement – Exhibit R-1 – in his own handwriting, using the name “Stu’s Contract Driving.” Collins stated the business name used by Smith did not matter to him but had suggested that the word “contract” or similar description should be written on the memorandum line of each pay cheque to describe the nature of their working relationship. Collins stated there was no discussion with Smith about deductions for EI, CPP or income tax. On the few occasions when Smith could not drive on a certain day, Collins usually drove because Colden owned only one truck which was under contract to Freight. He confirmed that Smith was not permitted to hire a substitute driver without permission and could not use the Colden truck to make deliveries for any entity other than Freight. Collins stated he used Colden to purchase the truck in an effort to liberate himself from the flooring and carpet business which had occupied his working life for many years. However, he is still

engaged in that enterprise. Collins stated he discussed leasing the truck to Smith but that did not come to fruition for several reasons including advice from the company lawyer that the process was too complicated. He and Smith discussed the feasibility of Smith purchasing the truck for $25,000 and receiving an assignment of the contract between Colden and Freight. Prior to speaking to Smith, Collins had obtained confirmation from the Manager of Freight that Smith could provide his services as an owner/operator. Collins stated his understanding of the Union agreement which came into effect in July, 2008 was that it applied only to drivers defined therein as "spare drivers" and that Smith was providing driving services on a full-time basis in accordance with a regular schedule. Collins stated he spoke to a Union representative and was informed Colden could retain the services of non-Union drivers and that the arrangement whereby the drivers earned 45% of the gross revenue of the truck was acceptable. When Smith quit, Collins took over driving the truck to fulfil Colden's contractual obligation to Freight.

[8] Counsel closed the case of the Respondent.

[9] The agent for the Intervenor did not adduce any evidence.

[10] Counsel for the Respondent submitted that although the Appellant and Collins did not agree on the issue of intention at the hearing of the within appeals, that a review of the evidence would support a finding that the intent from the outset was that Smith was to provide his driving services to Colden as an independent contractor. No source deductions were made from the payments of the invoices Smith submitted which were based on 45% of the gross revenue of the truck he was operating. The statement of funds received from Colden – Exhibit R-1 – was prepared by Smith in response to repeated requests from Collins for corporate accounting purposes. The dispatching of trucks was undertaken by Freight as agent for Colden pursuant to the contract between those entities and – sometimes – there was no contact between Smith and Collins for as long as one month. No one supervised the Appellant in the course of his duties and he chose his delivery routes and the order of deliveries unless one had a priority designation. Although Smith did not do so, he could have driven for a competitor of Colden but could not have used the Colden truck. Smith could take time off but was not permitted to hire a helper or obtain the services of a substitute driver without the permission of Collins. Counsel acknowledged that the truck was the main equipment required and that all costs associated with its operation were borne by Colden. In terms of risk of loss and chance of profit, counsel submitted that while there was no risk of loss, *per se*, there was no guarantee of income and Smith had to devote a block of his time to Colden without knowing how much he could earn since his revenue was linked to the gross

amount produced by using the Colden truck. With respect to the matter of intention of the parties, counsel submitted that was clear not only at the outset but throughout the working relationship. The Appellant only changed his mind when he became convinced that he should be paid an hourly rate and – therefore – automatically become an employee of Colden as a result of an agreement between Union and Freight's successor. Counsel submitted the decisions of the Minister were correct and ought to be confirmed.

[11] The Appellant conceded that he had been content to work under the arrangement from October 1, 2007 until some point in 2008 when Colden began deducting a monthly fee from his pay for use of a Mike Phone. Thereafter, Smith's position was that he had to continue providing his services on the same basis because he could not afford to quit. From his perspective, he should have become an employee of Colden after the Union agreement had become effective in July, 2008.

[12] Collins did not make any argument on behalf of Colden.

[13] 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.

[14] 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:

[15] The Appellant was an experienced driver and did not require supervision. The Colden truck was loaded and dispatched by Freight in accordance with its contract with Colden. Smith carried out his duties during the course of the day to satisfy requirements of the deliveries. Although he had to remain in contact to receive communications from the dispatcher, he was not required to report back to the terminal between deliveries or otherwise account for his time. Smith was able to choose the most appropriate routes and to make deliveries in the most efficient sequence. The fact that Collins did not have contact with Smith for relatively long periods would not be particularly significant if the evidence had demonstrated that control had been assigned to Freight pursuant to the terms of a contract and Freight had required Smith to conform with various policies such as wearing a uniform, checking in and out of the warehouse, communicating his whereabouts on a regular basis, signing out at the end of the day and so on. That was not the case in the within appeals.

Provision of equipment and/or helpers:

[16] The Appellant was required to perform his services personally and was not permitted to hire an assistant or to arrange directly for a substitute driver. Collins instructed him to desist from taking along an acquaintance when making deliveries. All the equipment necessary to carry out the deliveries was provided either by Colden – owner of the truck – or by Freight which operated the warehouse and supplied the forklift, pallets, and a worker to load the trucks.

Degree of financial risk and responsibility for investment and management:

[17] The Appellant did not run any financial risk except that he had no guarantee of income over the course of any particular period, although he had devoted that block of time to Colden, which depended on deliveries being assigned to its truck and driver by Freight. Smith had no investment in Colden and was not required to discharge any duties associated with management.

Opportunity for profit in the performance of his tasks:

[18] As referred to earlier, the Appellant's revenue was tied to the gross revenue of the truck he was driving. Because of his experience in the delivery/courier business he knew – more or less – from details on the waybills/delivery sheets how much he had earned at the end of each day based on the appropriate percentage of either 40% – the rate stated in a cheque dated 15/11/2007 in Exhibit R-2 – or 45% thereafter. To some extent, he could choose routes and make his deliveries in an efficient manner which would enable him to return to the warehouse and pick up another load before another truck and driver had returned. However, that is theoretical and unlikely to have made any significant difference in revenue. The Appellant was aware that his driving services were remunerated only on the basis that he would receive a fixed percentage of the revenue generated by the single Colden truck which it operated under contract with Freight. Smith was acquainted with the previous owner of that truck and knew that it had produced revenue of approximately $12,000 per month when under contract with Freight to make deliveries in the Campbell River area.

The issue of intent:

[19] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853 ("*Wolf*"), *The Royal Winnipeg Ballet v. The Minister of National Revenue*, 2006 DTC 6323 ("*Ballet*"), *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*, [2006] F.C.J. No. 1653 there was no issue in this regard due to the 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. That is not the case in the within appeals since the Appellant maintains there should have been a transformation in his working status imposed by a Union agreement subsequent to July 18, 2008 and that he had become dissatisfied with the existing working arrangement when Colden began deducting a monthly fee for a Mike Phone at some point early in 2008. This issue, while irritating, did not compel Smith to take any action or to voice discontent over the existing business arrangement with Colden. Smith had operated his own courier/delivery business for 6 years and was knowledgeable in matters concerning the ability of that particular 5-ton truck to generate revenue as a result of its owner operating pursuant to a contract with Freight. He had assigned the business name of Stu's Contract Driving to describe his personal skill of driving truck and had earned revenue by driving for Bob during a 3-week period and one or two days for Sean – both owner operators – on the basis he received 45% of the gross revenue of their trucks.

[20] There was no evidence adduced concerning that Union agreement which could enable me to ascertain whether it was applicable to the working relationship of the Appellant and Colden that had existed since June 2007. The Appellant testified he was covered by that 2008 agreement and should have been automatically enrolled as a member of the Union and that Colden was obligated thereafter to remit monthly dues by deducting same from his pay – now as an employee – based on the hourly wage of $19 established by the agreement. Collins testified he did not accept Smith's assertion that the agreement relating to replacement drivers applied to Smith in light of the circumstances of their working relationship up to that point and met with Union officials to explain the profit-sharing mechanism in place to remunerate Smith. Following a breakdown in negotiations for the purpose of either leasing or selling the truck to Smith so he could continue making deliveries for Freight, and upon Smith withdrawing his driving services, Collins took over operating the Colden truck.

[21] It is less work for the trial judge when the parties agree on the characterization of their purported status. Then, the outcome depends on whether the facts surrounding the working relationship support that status as the law is clear the parties are not free to choose it merely by describing it as such. (See: *Standing v. Canada (Minister of National Revenue – M.N.R.) (F.C.A.),* [1992] F.C.J. No 890.)

[22] There are other cases when the issue of intent was never raised during the working relationship and must be determined based on an examination of all the circumstances. In the within appeals, there was a conflict with respect to a portion – subsequent to July 18, 2008 – of the relevant period. I am satisfied on the evidence that Smith and Collins – on behalf of Colden – intended throughout the entire relevant period that Smith provide his driving services on the basis he was an independent contractor entitled to receive a fixed percentage of the revenue generated by the truck by delivering loads for Freight. Having made this finding, the relevant jurisprudence is equally applicable as though the parties had clearly expressed their mutual intent – in writing or otherwise – so as to eliminate any dispute at trial.

[23] In *Ballet, supra,* the issue was whether the dancers were employees or independent contractors. The Ballet Company was supported in its position by Canadian Actors' Equity Association ("CAEA") as the bargaining agent for the dancers. In the course of deciding the dancers were not employees of the Ballet Company, at paragraphs 60-64, inclusive of her reasons Sharlow, J.A. – referring to the decision in *Wolf, supra,* stated:

> [60] Décary, J.A. was not saying that the legal nature of a particular relationship is always what the parties say it is. He was referring particularly to Articles 1425 and 1426 of the *Civil Code of Quebec*, which state principles of the law of contract that

are also present in the common law. One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.

[61] I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins, J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded.

[62] It is common for a dispute to arise as to whether the contractual intention professed by one party is shared by the other. Particularly in appeals under the *Canada Pension Plan* and the *Employment Insurance Act*, the parties may present conflicting evidence as to what they intended their legal relationship to be. Such a dispute typically arises when an individual is engaged to provide services and signs a form of agreement presented by an employer, in which she is stated to be an independent contractor. The employer may have included that clause in the agreement in order to avoid creating an employment relationship. The individual may later assert that she was an employee. She may testify that she felt coerced into signifying her consent to the written form of the contract because of financial need or other circumstances. Or, she may testify that she believed, despite signing a contract containing such language, that she would be treated like others who were clearly employees. Although the court in such a case may conclude, based on the *Wiebe Door* factors, that the individual is an employee, that does not mean that the intention of the parties is irrelevant. Indeed, their common intention as to most of the terms of their contract is probably not in dispute. It means only that a stipulation in a contract as to the legal nature of the relationship created by the contract cannot be determinative.

[63] What is unusual in this case is that there is no written agreement that purports to characterize the legal relationship between the dancers and the RWB, but at the same time there is no dispute between the parties as to what they believe that relationship to be. The evidence is that the RWB, the CAEA and the dancers all believed that the dancers were self-employed, and that they acted accordingly. The dispute as to the legal relationship between the dancers and the RWB arises because a third party (the Minister), who has a legitimate interest in a correct determination of that legal relationship, whishes to assert that the evidence of the parties as to their common understanding should be disregarded because it is not consistent with the objective facts.

> [64] In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[24] In concurring reasons, Desjardins, J.A. – at paragraph 71 – stated:

> [71] The determination of whether or not the parties have entered into a contract of employment for the purpose of the EI or the CPP has proven over the years to be a difficult and somewhat perilous exercise as the jurisprudence of our Court demonstrates. I would not deprive the common law judge of the possibility of being made apprised of the intention of the parties so as to test such intention against objective factors and the surrounding circumstances of the case when he makes the final determination.

[25] At paragraph 80, Desjardins, J.A. commented:

> [80] Given the above case law, I see no compelling reason why the common law judge, who embarks on the difficult task of determining whether a contract is one of service or for service, should be deprived of the possibility of adverting to as many criteria and indicia as may reasonably be recognized in order to assess the true nature of the relationship governing the parties.

[26] Based on a finding of mutual intent at the outset that Smith provide his services as an independent contractor, a review of the subsequent conduct of the parties discloses it was consistent with that initial intent. In earlier times, it was usual for the driver to provide the truck – or truck and trailer – and other items as the main equipment. However, the increased cost of acquiring an appropriate unit and operating it in the face of pervasive national and international competition and complex governmental regulation has transformed the occupation considerably. Today, the provision of driving services can be regarded as a viable business carried on by individuals on their own account like any other where the delivery of a particular skill or service, if not the sole basis for the enterprise, constitutes the core.

[27] I decided the case of *A.L.D. Enterprises Inc. v. Canada (Minister of National Revenue) – M.N.R.*), [2007] T.C.J. No. 36 in which the payor had entered into a written contract with two drivers who operated his trucks on long hauls. The payor

was responsible to all costs associated with operating the trucks and each of the workers was paid on the basis of work performed according to invoices submitted. The drivers were not reimbursed for meals or other expenses nor were they entitled to any benefits and did not have source deductions taken from their pay. They had certain delivery deadlines to meet because of the perishable nature of the goods being transported but could choose their own schedule, routes, meal times and rest periods. There was no supervision with respect to the driving function and the drivers had no opportunity for profit except by taking more trips. At paragraph 47 of my judgment, I commented as follows:

> 47 In the within appeals, I reiterate there is no doubt about the good faith of the parties. The drivers – Parks and Bellemare – wanted to provide their services within the context of operating their own business. Parks had never provided his services to ALD in any other context whether driving truck or carrying out construction/renovation projects for ALD or other customers. Bellemare had driven for another company as an independent contractor and was adamant that status continue when driving for ALD. He and Parks both thought working as an independent contractor provided a sense of freedom - in conformity, perhaps – with the erstwhile perception of long-haul truckers as Knights of the Open Road.

[28] In *Dewdney Transport Group Ltd. v. M.N.R.*, 2009 TCC 569, the payor appealed on the basis a driver making deliveries pursuant to a contract with Canada Post was an independent contractor as stated clearly in their written agreement. The worker supported that contention. I heard that case and at paragraphs 29 and 30 stated:

> [29] Turning to the facts in the within appeals, there is no doubt the parties wanted Grewal to provide his services as an independent contractor and that the current contract perpetuated this status which had been specified in an earlier agreement. The lack of control was similar to that in the *A.L.D.* case and Grewal's opportunity for profit required him to deliver more packages. He did not have any risk of loss and the only management function he exercised was to arrange for a replacement driver from the pool of Transport contractors. One significant point is that Transport earned its revenue by delivering items for Canada Post pursuant to its contract and was remunerated on a piece basis. The drivers earned 70% of the gross fee collected by Transport provided the delivery was made using a van owned by Transport. Therefore, the ability of Grewal and Transport to generate additional revenue was dependent on an increased number of items to be delivered from the Maple Ridge Centre to various destinations. The relationship between Grewal and Transport was somewhat unusual as they were able to function as though on automatic pilot without need for supervision or even communication on a regular basis. The parties functioned according to the intention expressed in the written contract even though some of the terms therein were not relevant to Grewal's performance because his services related only to Canada Post and not to any other Transport customers.

> [30] The jurisprudence is clear that one must not decide these cases on the basis that a majority of the traditional factors tend to favour a particular status. One must guard against relying strictly on a finding of preferred status in each analysis of those factors as such compartmentalization in the absence of taking into account the total substance of the evidence can produce an erroneous result. The lack of control in the within appeals is a significant force which supports the view Grewal was an independent contractor. On the other hand, he did not have any financial risk. He played a role in managing his important part of the Centre delivery operation by ensuring his loads of mail were delivered in a timely manner even if that required him to arrange for a replacement driver. He had no investment in Transport and his ability to earn more money was tied to the number of items delivered. Due to the peculiar limits of the activity carried on by Grewal, it is not difficult to accept that he was providing his services to Transport on his own account. There was no need for him to have acquired the usual trappings of commerciality in order to generate revenue. Grewal was content to enter into a written contract which – pursuant to clause 8.1 - permitted either party to terminate the agreement – without cause – by giving 30 days notice of such intent. Notwithstanding the escape clause, the working relationship of the parties has endured for several years.

[29] In the two cases referred to above, there was no dispute as to the intention of the parties and that relieved me of the duty to ascertain intent. However, once a finding on that issue was made in the within appeals, there is no difference and the intent of the parties assumes its proper place within the framework of the requisite analysis of the evidence in the context of the relevant jurisprudence.

[30] Having regard to the facts in the within appeals and applying the relevant jurisprudence, I conclude the Appellant has failed to demonstrate that the decisions of the Minister are incorrect and both are hereby confirmed. Both appeals are dismissed.

Signed at Sidney, British Columbia this 14th day of January 2011.

"D.W. Rowe"

Rowe D.J.

CITATION:	2011 TCC 20
COURT FILE NOS.:	2010-1033(EI); 2010-1034(CPP)
STYLE OF CAUSE:	STUART SMITH AND M.N.R. AND COLDEN HOLDINGS LTD.
PLACE OF HEARING:	Nanaimo, British Columbia
DATE OF HEARING:	December 7, 2010
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	January 14, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Matthew Canzer
Agent for the Intervenor:	Denis Collins

COUNSEL OF RECORD:

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