Docket: 2009-1060(EI)

BETWEEN:

DEWDNEY TRANSPORT GROUP LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Dewdney Transport Group Ltd. 2009-1061(CPP)
on September 18, 2009 at Vancouver, British Columbia

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

Appearances:

Agent for the Appellant:	N. S. Jaswal
Counsel for the Respondent:	Holly Popenia

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the decision of the Minister of National Revenue dated January 8, 2009 is varied to find that:

- Sukhminder Grewal was not employed in either insurable or pensionable employment with Dewdney Transport Group Ltd. from January 1, 2007 to June 26, 2008.

Signed at Sidney, British Columbia this 5th day of November 2009.

"D.W. Rowe"

Rowe D.J.

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Date: 20091105
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REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant, Dewdney Transport Group Ltd. ("Transport" or "Dewdney") appealed from two decisions – both dated January 8, 2009 – issued by the Minister of National Revenue (the "Minister") pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*") wherein the Minister decided the employment of Sukhminder Singh Grewal ("Grewal" or "worker") from January 1, 2007 to June 26, 2008 was both insurable and pensionable because he was engaged under a contract of service and was considered an employee of Transport.

[2] The Appellant was represented by an agent - Narinder Jaswal ("Jaswal") - and he and counsel for the Respondent agreed both appeals could be heard together.

[3] Jaswal testified he is President and sole Director of Transport which carries on the business of mail delivery for Canada Post and a courier service for other customers. He purchased a corporation – 12 years ago - that operated a transport business and changed that company's name since it would be operating in municipalities where references to Dewdney were common. Transport had a 5-year mail delivery contract with Canada Post and had entered into a written contract –

dated April 30, 2007 - with Grewal pursuant to which Grewal agreed to provide his services as an independent contractor for a term of five years. Jaswal stated the agreement – Exhibit A-1 – was a standard contract used by Transport in the course of its business and that Grewal provided his delivery services in accordance with Schedule I, page 9 of the contract and had done so since 2001 under similar terms in an earlier written agreement. Jaswal stated Grewal attended at the Canada Post Delivery Centre ("Centre") at Maple Ridge, British Columbia and performed deliveries of bags and parcels for which he billed Dewdney by recording the transactions on a daily sheet - titled Independent Contractor's Log Book – which also served as an invoice. A sample sheet/invoice was filed as Exhibit A-2 and the amount billed thereon was $50.50. Jaswal stated he paid Grewal once per month and produced a photocopy of a typical cheque stub – Exhibit A-3 – dated 31/08/2009 – indicating the amount paid was $1,307.70 without any deductions for Employment Insurance (EI) premiums, Canada Pension Plan (CPP) contributions or income tax. Jaswal stated Grewal still provides the same service to Transport as during the relevant period and the system of invoicing by Grewal and the method and frequency of payment by Transport is the same. Jaswal stated Transport and Canada Post had entered into a contract concerning the Centre at Maple Ridge, pursuant to which certain duties had to be performed which required the services of 5 drivers, none of whom were considered by Jaswal to be employees of Transport on the basis the service provided was pursuant to a written contract wherein each had agreed to be an independent contractor. The contract with Canada Post required Transport to deliver mail to the Whannock/Albion facility and to deliver packages of mail that weighed more than 3 pounds - 1.35 kilograms - and Transport billed Canada Post at a certain rate for each item delivered by Grewal and the other drivers. Jaswal stated he saw Grewal infrequently during the relevant period as there was no need to do so unless some unusual event had occurred. Jaswal estimated Grewal worked from 8:00 a.m. to about 1:00 p.m. – depending on the volume of deliveries – and the speed with which the task could be completed on a particular day. Jaswal agreed with the assumptions of the Minister – at paragraphs 5 (l), (m), (n), (q), (r), (s) and (t) of the Reply to the Notice of Appeal ("Reply") as follows:

l) the Appellant did not keep track of the Worker's hours of work;

m) the Appellant allowed the Worker to take the delivery van home and to use it to go to work;

n) the Payor covered all expenses associated with purchase and operation of the van;

q) Canada Post was responsible for resolving customer complaints;

r) under the terms of the contract, the Worker was free to hire subcontractors;

s) the Worker was free to work elsewhere during the Period outside of his regular hours with the Appellant; and

t) the Worker did not carry any insurance to cover himself in the performance of his duties for the Appellant.

[4] Jaswal did not agree with the assumption - at paragraph 5(o) - that Grewal had to report to Transport if he was unable to work as he had the option of finding his own replacement driver from the pool of other Transport workers and did not need to obtain prior permission. Jaswal stated there was no special coverage in any insurance policy taken out by Transport pertaining to any damage to items occurring in the course of Grewal's deliveries. Jaswal's duties required him to deliver bags of mail to certain "green boxes" at the end of a street and he used a key to place the bags inside where they were collected by the Letter Carrier for delivery along his or her route. The contract with Canada Post did not require Transport to deliver to any destinations on rural routes but they did perform a service known as Combined Urban Services Delivery. Jaswal referred to the invoice – Exhibit A-2 – and explained it indicated Grewal had delivered a total of 30 bags on August 4, 2009 and 15 additional items for a total of 45 which – at $.90 per piece – amounted to $40.50 to which was added the $10.00 flat fee for the run to Whannock/Albion for a total of $50.50. Typically, Grewal billed Transport between $1,000.00 and $1,800.00 per month - depending on the season - and his earnings were greater in the period before Christmas which produced increased volumes of mail. Although he was not familiar with precise details of the work performed daily by Grewal or the other drivers who provided their services to Canada Post pursuant to their contract with Transport, he estimated Grewal could deliver up to 50 bags in an hour because as many as 9 could be dropped off at a single location. Jaswal stated he did not know how many hours of work Grewal had worked to earn the amount billed in any invoice. Jaswal stated that when Grewal was directed by someone at the Centre to carry out a particular delivery service, the relevant details were recorded by him on the daily sheet/invoice and Transport used that information to bill Canada Post according to an applicable rate set forth in their contract. During the relevant period, the services provided by Grewal were solely for the benefit of Canada Post and he did not undertake any deliveries to private customers of Transport. Jaswal described the overall operation as "smooth and efficient" in accordance with a sheet of instructions and guidelines which formed part of the contract between Canada Post and Transport.

[5] Jaswal was cross-examined by Counsel for the Appellant. Jaswal stated the contract between Transport and Canada Post included certain terms and conditions pertaining to performance but there were no specific delivery standards pertaining to time. The contract did not include any door-to-door delivery as that was performed by Letter Carriers. Jaswal stated Grewal worked Monday through Friday but was not aware of any start or end times as Transport only relied on the daily sheets/invoices to calculate payment due to him at the end of each month based on the rate per item and the flat rate for delivery to a specific location. Jaswal stated the remuneration to Grewal and others was always based on a piece rate and could not recall a time when Grewal or any other delivery person contracted to Transport was paid an hourly wage - whether $10.00 or some other amount - as counsel had suggested. During the relevant period, remuneration was based on the piece rate of 70% of the gross fee paid by Canada Post to Transport as stated in the contract - Exhibit 1 – at page 10. If Grewal or any driver used his or her own vehicle, Transport had a policy whereby it paid a higher percentage of the gross delivery fee to compensate for such usage. The cargo vans used by Grewal and other drivers who made deliveries for Canada Post carried signage stating the vehicle's owner was "Dewdney Transport Group Ltd., a Canada Post contractor." Jaswal stated the fee arrangement of 70% was arrived at through negotiation with the drivers and that all remuneration - whether paid by Canada Post to Transport or by Transport to any sub-contractor - was based on piece rate or a flat rate for a special delivery. Transport paid premiums to Workers' Compensation Board for coverage of the drivers. Jaswal stated he was not aware whether a person – Darnell - had played any role in supervising Grewal or in finding a replacement if Grewal was unable to work. Jaswal stated that sometimes a driver had hired a replacement without his knowledge. He was not aware of any complaints or disputes arising from Grewal's performance or that of other drivers and assumed such matters would have been handled by Canada Post. There was no contact between any Transport drivers and any residential mail recipients as the mail delivery undertaken by them was either to the green boxes or to a Canada Post facility and any complaints would originate from a Letter Carrier or other Canada Post employee. Counsel referred Jaswal to Schedule 1, (b) at page 9 of the contract which required Grewal – as Contractor – to "Be available to perform delivery services for Dewdney at the times, dates and places as Dewdney may stipulate." Jaswal stated the contract had been designed to apply also to the courier service component of the business operated by Transport and had not been modified to cover those agreements with individuals – such as Grewal – who provided delivery services exclusively to Canada Post, even though each of them could have performed other deliveries. Jaswal acknowledged that - at clause 7.1 of the contract - Transport had the right to assign certain areas to a contractor but stated that term applied only to the courier services provided to other customers and not to Canada Post. In paragraph (f) of Schedule I,

there was a reference to a requirement that a Contractor notify Dewdney of any disputes or discrepancies arising from any deliveries. Jaswal stated this wording was intended to apply to those delivery services performed for customers – generally in the private sector – but not for Canada Post. However, clause 2.3 of the contract applied to all components of the business and permitted Grewal and others to employ – at their own expense – such assistance as deemed necessary to perform services under the agreement and Dewdney agreed it did not have the ability to "control, direct or supervise the Contractor or the Contractor's assistants or employees in the performance of those services." Jaswal stated the practice followed where a replacement driver had assumed responsibility for deliveries on a certain day or period was for Transport to review the daily sheets/invoices submitted and to note the volume of deliveries. Remuneration was calculated on that basis and payment was made directly to the replacement driver who was one of the 5 drivers who provided the same or similar service to Canada Post. Jaswal stated that because the contract with Canada Post required all vans used by Transport to be current - 3 years or newer – the drivers could purchase - upon termination of their contract – the particular vehicle used for their deliveries and one driver had exercised that option. Any driver/contractor could use his own vehicle whether performing services for the benefit of Canada Post or other customers and this occurred during the Christmas season when Transport did not have enough vans to handle the volume of business. Jaswal stated that when drivers used their own vehicles, an increased rate was negotiated and even Grewal had used his own vehicle on occasion which he noted on the particular daily sheet/invoice. Jaswal stated there were no delivery time limits imposed on Transport by Canada Post and that all operations were performed from the Centre at Maple Ridge. Over the course of 12 years, no problems pertaining to any deliveries had been brought to his attention and if some had arisen, he assumed they had been resolved by Canada Post management. In Jaswal's view, everyone involved in the Centre's operation understood the mandate was to "move the mail" even when challenged by unusual conditions such as excessive traffic, blocked roads due to accidents, road construction, detours or bad weather conditions.

[6] Jaswal closed the case for the Appellant.

[7] Grewal was called to the stand by counsel for the Respondent. Grewal testified he resides in Maple Ridge and has been a driver for Transport since 2005. Just as he had done throughout the relevant period, he uses a cargo van to deliver bags of mail to green boxes for collection by Letter Carriers and bulk mail to Canada Post customers such as schools, real estate offices or any other recipient when the bundle of mail exceeds 3 pounds. He attends at the Centre at 8:00 a.m. and delivers bags to between 2 and 5 green boxes for collection by Letter Carriers. He works Monday

through Friday and each working day occupies 5 or 6 hours. Grewal stated, “I know my job, same thing every day” and that there was no need for any instruction by anyone at Transport. The first delivery or “run” of the day is the same and he delivers bags to certain green boxes after which he returns to the Centre and picks up additional bags for a second run to a different area. If there is a need for a third or fourth run, those deliveries are to other designated locations. The mail is sorted at the Centre by each Letter Carrier according to his or her route which is identified – by colour - on a map. Grewal is the only Transport worker at the Centre for purposes of the first run but 3 or 4 other Transport drivers carry out other deliveries after completion of that first run. He did not know whether other entities also provided a similar service to Canada Post operating from the Centre. Grewal recorded the pieces delivered by completing the daily sheet/invoice – Exhibit A-2 – and entered the trip from the Centre to the Whannock/Albion Post Office for which he billed the sum of $10.00. This trip was the first duty carried out each morning but was not designated as the “first run” which was performed between 9:00 a.m. and 9:45 a.m. and involved transporting mail bags to the green boxes. Grewal retained the daily sheets/invoices until the end of each month when he delivered them personally to Jaswal. He was paid – by cheque – once per month. Concerning the piece rate of 90 cents per item, Grewal stated he understood this was the amount paid to the former driver on that route and accepted the contract with Transport based on that sum and never was paid at an hourly rate. Grewal referred to the entry in the space marked “Extra” on the sample sheet/invoice – Exhibit A-2 – and explained the number – 15 - therein indicated he had delivered 15 bundles of mail – each exceeding 3 pounds – in addition to the other items recorded. The usual daily delivery of such bundles ranged from 10 to 20. Grewal stated he paid his CPP premiums when filing his annual income tax return and thought he had paid his own replacement driver at some point during his working relationship with Transport. In any event, he arranged – personally - for his own replacement, as required, by speaking with his fellow Transport drivers and had never encountered any problem. Grewal stated that during the 5 or 6 years he has been performing the same duties from the Centre, he is unaware of any complaint arising from his work and any minor issues were resolved between him and the particular Letter Carrier. He did not carry any liability insurance covering any aspect of his delivery work for Transport. Grewal understood that when his contract with Transport expired, he had the option to buy the van he drove every day to make his deliveries. He did not incur any expenses except for clothing and food and did not have any investment or equity in Transport. He did not have a business license and was not a registrant for purposes of the Goods and Services Tax (“GST”) since his annual gross was less than the threshold for mandatory registration even when his income from delivering pizza – with his own vehicle – was included.

When working for the pizza business, the deliveries occupied only a small amount of his time because his main duty there was to make pizzas.

[8] Grewal was cross-examined by Jaswal who referred him to a letter – Exhibit A-4 – dated October 16, 2008 – signed by P. Sandhu employed by the Individual Sources and Benefits section of Canada Revenue Agency. The letter confirmed that Grewal's 2005 and 2006 income tax returns were reassessed to relocate reported income to the category of self-employment income and to advise that he was required to pay CPP contributions. Grewal stated that during the relevant period, all income earned pursuant to the contract with Transport was reported as self-employed income.

[9] The agent for the Appellant submitted the parties intended Grewal to provide his services as an independent contractor and that he had done so without any problem for many years. There was no control exercised over Grewal in the course of his duties and he had the option to use his own vehicle and to negotiate a higher percentage of the gross fee paid by Canada Post to Transport for delivery of various items.

[10] Counsel for the Respondent submitted the evidence did not support the view that Grewal was operating a business on his own account. There were no usual indicia of commercial activity and the evidence established Grewal was a part-time van driver who was paid according to a piece rate. Counsel submitted the Appellant had failed to demonstrate the Minister was incorrect in deciding Grewal was an employee working under a contract of service and that the decision should be confirmed.

[11] In the within appeals, I am satisfied there was a clearly expressed intention by Grewal and Jaswal – on behalf of Transport – that Grewal provide his services as an independent contractor as specified in the written contract. Grewal stated he was aware of the piece rate paid to the former driver and was satisfied with that amount and assumed the contractual obligations to make deliveries for the benefit of Canada Post and subsequently renewed that agreement by signing the current 5-year contract – Exhibit A-1 – dated April 1, 2007. As stated by Jaswal in his testimony, the contract was a standard one used by Transport whether the individual contractor was engaged solely in duties relating to Canada Post or involved in the wider aspect of the overall business which provided courier service to other customers.

[12] 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. Minister of National Revenue*, [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 45 to 48, inclusive, of his judgment stated:

> 45 Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, ... ("Enterprise control: The servant-independent contractor distinction" (1987), 37 U.T.L.J. 25, at p. 29) sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An “enterprise risk test" also emerged in La Forest J.'s dissent on cross-appeal in London Drugs where he stated at p. 339 that "[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents.”
>
> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, ... ([1952] 1 The Times L.R. 101) that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations..." (p. 416). Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, ... (Vicarious Liability in the Law of Torts. London: Butterworths, 1967) at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose ... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

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

[13] I will examine the facts in relation to the indicia set forth in the judgment of Major, J. in *Sagaz.*

Level of control:

[14] The testimony of both Jaswal and Grewal is clear that there was no daily supervision exercised by Transport over the manner in which the delivery duties were performed. There were long periods when Jaswal did not have any contact with Grewal and there was no requirement that Jaswal grant permission for a replacement driver to assume Grewal’s duties on any particular day or days and often only discovered a substitution had taken place when examining the daily sheets/invoices at the end of the month. Jaswal decided to pay the substitute driver directly in accordance with details on the sheets/invoices because that replacement driver was someone who was regarded by him as a contractor pursuant to a written agreement with Transport. Grewal accepted that he had to attend the Centre early each morning to carry out the required work and that it was important the mail bags be transported promptly to the green boxes so the Letter Carriers could commence delivery on their assigned routes. There was no reporting requirement and no complaints needed to be resolved by Jaswal within the context of the contract between Transport and Canada Post. Pursuant to the contract between Grewal and Transport, Grewal agreed to comply with certain terms and conditions as set forth in Schedule 1, many of which did not apply specifically to the duties performed by him for Canada Post. The facts in the within appeals are not like those in some cases where control over a worker has been assigned to the actual recipient of the services pursuant to a type of secondment.

Instead, Grewal knew what had to be done and carried out those duties efficiently and without supervision.

Provision of equipment and/or helpers:

[15] Grewal had the option of using his own vehicle and did so infrequently, probably during the busier Christmas season when Transport did not have enough vans. There was no evidence that he had done so during the relevant period nor was there any specific reference to the remuneration per piece in such event. Jaswal testified that a higher rate "could be negotiated" which would have been based on the driver/contractor receiving a percentage higher than the regular 70% of the gross fee otherwise payable pursuant to the contract. Under the terms of said contract, Grewal had the right to hire a helper at his own expense and Transport agreed it would not control, direct or supervise any such assistant or employee in the performance of the required duties. As mentioned earlier, when required, Grewal arranged for a replacement driver from within the pool of other Transport drivers. It was convenient for Jaswal to pay that person directly – by adding it to the regular cheque – based on details provided on the relevant daily sheet(s)/invoice(s) recorded by the substitute driver and submitted in the usual manner.

Degree of financial risk and responsibility for investment and management:

[16] Grewal did not have any financial risk nor was he required to bear any responsibility for anyone other than himself in performing his duties.

Opportunity for profit in the performance of tasks:

[17] The only way Grewal could increase his revenue was to deliver more items which occurred during the extended Christmas season when his income increased to approximately $1,800.00 per month compared to $1,000.00 - and up - in accordance with some fluctuations in delivery volume during the rest of the year. Grewal had no control over the volume and merely continued to perform his usual routine to the best of his ability in the face of varying traffic or weather conditions. According to Grewal's evidence, his duties occupied 5 or 6 hours a day and the most efficient performance would allow him – at best – only an extra hour to earn additional revenue by working at the pizza outlet where he used his own vehicle to make some deliveries. Grewal had the option to use his own vehicle while carrying out his contractual duties for Transport but there is no basis for finding this choice would have generated additional net revenue.

[18] In the case of *Standing v. Canada (Minister of National Revenue – M.N.R.)(F.C.A.)*, [1992] F.C.J. No. 890 Stone, J.A. stated:

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

[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 *("Vida Wellness")* 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 clarity of intention is also applicable to the within appeals.

[20] Subsequent to the decision in *Wolf, supra,* the issue before the Federal Court of Appeal in *Ballet* was whether the dancers performing for that world-renowned ballet company were employees or independent contractors. The Royal Winnipeg Ballet ("RWB") 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 RWB, at paragraphs 60-64, inclusive of her reasons Sharlow, J. A. 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, wishes 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.

[21] In concurring reasons, Desjardins, J.A. – at paragraphs 71 and 72 – 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.

[72] As demonstrated by Sharlow, J.A., if the intention of the parties is uncontested, save by third parties, as in the case at bar, the common law judge has nevertheless the responsibility to "look to see" if the terms used and the surrounding circumstances are compatible with what the parties say their contract is. The common law judge must make sure that what the parties say they have agreed upon is in fact what is contained in the contract they have signed.

Desjardins, J.A. continued at paragraphs 79-81 inclusive as follows:

[79] In the case at bar, it is the nature of the contract which must be determined, through an analysis of its terms in light of the fourfold test, namely the level of control, the ownership of the equipment, the degree of financial risk and the opportunity for profit.

[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.

[81] The Tax Court judge erred in law, in my view, when he said that the intention of the parties could only be used as a tie-breaker (paras. 31 and 82 of his reasons). I accept Sharlow, J.A.'s analysis, at para. 64 of her reasons, that what the Tax Court judge should have done was to take note of the uncontradicted evidence of the parties' common understanding that the dancers should be independent contractors and then consider, based on the *Wiebe Door* factors, whether that intention was fulfilled. In so doing, she relied, at para. 61 of her reasons, on a long line of cases of this Court as expressed by Stone, J.A. in *Standing v. Canada (Minister of National Revenue* -- M.N.R.), (1992), 147 N.R. 238, which I reformulated in *Wolf v. Canada*, [2002] 4 F.C. 396 at para. 71, when I said that the parties' intention will be given weight only if the contract properly reflects the legal relationship between the parties.

Because the *Wolf* decision involved a contract in which the law of Québec applied, Desjardins, J.A. added:

[82] For the purpose of disposing of this case, I need not decide whether the words "the intention of the parties" have conceptually the same extension in the common law systems as in the civil law of Quebec. This matter can only be decided on a case by case basis.

[22] Justice Miller heard an appeal subsequent to *Ballet*. In the case of *Vida Wellness* he considered the work situation of six massage therapists whom the Minister considered to have been engaged in both insurable and pensionable employment notwithstanding each worker had entered into a written agreement in which it was stipulated they were independent contractors. In the course of reviewing the facts, Justice Miller noted that all workers had spent thousands of dollars and a significant number of hours training in order to obtain the necessary qualification to perform their work. The therapists were remunerated based on a rate varying between 27.5% and 47% of the fee received by Vida Spa from the client. They could earn a commission as a result of selling spa products. If the workers showed up for a shift and there were no customers, no remuneration was paid to them. They were entitled to retain cash tips but had to pool tips paid through credit cards. The workers were able to schedule their shifts three or four times a year for three or four months at a time and Vida Spa operated two shifts per day. Workers could work - or not - as they chose and were able to provide their services to other massage therapy businesses provided they did not solicit those customers to switch their patronage from Vida Spa. The payor in *Vida Wellness* provided tables, linens, oils and workers were required to wear black pants and shirts in order to provide consistency. Justice Miller referred to certain risks inherent in the performance of their duties and at paragraph 11 stated:

> 11 Ms. Hegedus and the workers described some inherent risks in providing massages. Particular attention had to be paid to massages of pregnant women, avoiding certain parts of the body and even avoiding certain oils. Similarly, if a customer displayed any pre-existing condition or contra-indication the workers would proceed cautiously. For these reasons, it was important that the workers obtain a fairly detailed medical history prior to providing a massage. The workers were required by their governing body to carry insurance. Vida did not pay for the workers' coverage.

[23] After referring to the relevant jurisprudence including *Wolf, Sagaz and Ballet, supra*, Miller, J. – at paragraph 18 of his reasons stated:

> 18 Following this approach, was there a clear understanding between Vida and the workers as to the nature of the contract? Yes, there was. There was a written agreement which stated unequivocally the workers were independent contractors. Yet, a clear statement of intention alone is not determinative. For example, if the parties to a contract simply want to avoid the employer making source deductions, they insert a provision stipulating the worker is an independent contractor and is responsible for looking after his or her own source deductions. This is evidence of an intention that the employers not make source deductions: it is not evidence of an independent contractor relationship. In this case, however, I am satisfied the parties' intention to create a contract of independent contractor is

> clear. The Respondent argued that there was not so much a clear intent to be independent contractors, as there was an indifference to their status. There was no evidence to suggest any of the workers would have preferred employment status. They all knew what was being offered, appeared to have understood the implications (for example, no minimal wage) and certainly willingly signed an agreement proclaiming their independent contractor status. While the circumstances do not reflect an insistence by the worker on the independent contractor status (except perhaps for Ms. Frame), they do reflect something more than indifference.

[24] Justice Miller then began analyzing the various factors of control, risk of loss, chance of profit and ownership of tools in order to determine whether said factors were consistent with the stated intention of the parties that the workers supply their services as independent contractors. In my view, paragraph 20 of his judgment is extremely important because it addresses the problem that can occur by looking through the wrong end of the telescope. Miller, J. commented:

> 20 It is important to distinguish at the outset between the identifying elements of employee versus independent contractor, as opposed to the results of the finding of employee or independent contractor. For example, in attempting to identify the difference between employed massage therapists and those massage therapists opting for independent contractor status, Ms. Hegedus suggested the following:
>
> - employee received 4% vacation pay;
> - employee received time and one-half on statutory holidays; and
> - employee was entitled to severance.
>
> These, however, are differences arising as a result of being an employee. They are not factors that go to identifying an employment relationship. The identifying factors are those I have listed earlier.
>
> 21 How fine the line can be between employment and independent contractor cannot be any better demonstrated than by this situation. The workers can choose to take the benefits that flow from employment, or reject them for the benefits that flow from being self-employed. That choice, willingly agreed to by Vida, cannot be ignored for purposes of the analysis. Indeed, it sets the stage for the analysis.

[25] Miller, J. considered the element of control to be consistent with the relationship the parties had agreed to and while he put little emphasis on the ownership of tools, found that factor was no more consistent with employment than with the status of independent contractor. With respect to the chance of profit, Miller J. found there were a number of things a Vida Spa worker could do to maximize earnings including double shifting or refusing to take shifts during slow times and to

promote an ensuite or deep tissue massage for which the worker to retain the extra fee without sharing with Vida Spa. As well, the massage therapists could promote the sale of products and earn commission and could avoid providing services to customers whose medical coverage paid a lesser fee than that ordinarily charged by Vida Spa. Dealing with the factor concerning the risk of loss, Miller, J. - at paragraphs 28-31, inclusive – stated:

> 28 A business loss can arise in at least three ways; first, the business' ordinary expenses outstrip the business' regular income; second, there can be a catastrophic event arising from harm done by the operation of the business; and third, the source of business income can dry up.
>
> 29 The workers did incur some expenses, for example, cellular telephone, updating and training (including the cost of courses offered by Vida itself), and insurance. It is unlikely though that such expenses would surpass their income, although for a particularly slow period with few or no customers, there may have been some slight risk. Recall, no customers – no remuneration.
>
> 30 The possibility of risk from causing harm however was very real. The witnesses explained the potential danger of treating pregnant women or those with pre-existing conditions. Results can be harmful to the point of being lethal. For this reason, the workers were required by the governing body to carry insurance. Vida did not cover the workers' insurance. It was their responsibility.
>
> 31 Finally, the possibility of losing Vida as a source of income was also very real. There was no security. The contract could be terminated on two weeks' notice for any reason, with no remuneration. I would characterize these circumstances as accepting a significant risk of loss consistent with someone in business on his or her own account.

[26] At paragraph 32, Justice Miller concluded:

> 32 Reviewing the traditional factors in light of the parties' understanding of the nature of their contract has satisfied me that the contract does accurately represent the legal relationship of a contract for services. The workers intended to be and were independent contractors.

[27] In the case of *A.L.D. Enterprises Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2007] T.C.J. No. 36 (“*A.L.D.*”), I heard the appeal of the payor which had entered into a written contract with two drivers who operated the Appellant’s trucks on a long-haul basis. The facts in that case relevant to an analysis in the within appeals were as follows:

…

3. All trucks displayed the name of the Appellant. The refrigerated trailers that were hauled by the trucks displayed the name of either the Appellant or Dairyland. [All NAPs, para. 3]

4. The Appellant at all material times engaged drivers to drive the trucks. [All NAPs, para. 4]

5. David Parks and Rémi-Paul Bellemare (the "Workers") were engaged and paid by the Appellant, and performed services for the Appellant. [All NAPs, para. 6]

6. Each of the Workers was responsible for obtaining and maintaining the main tool of his trade, namely, a Z-endorsed Class A driver's licence. [All NAPs, para. 7(c)]

7. The Workers' only reporting requirement was pursuant to the *Hours of Work Regulations* under the *Highway Traffic Act* (Ontario). Under those regulations all truck drivers, whether independent contractors or employees, are required to prepare daily logs, and forward the logs and supporting documents to the motor vehicle owner (i.e., the Appellant). The regulations also require the motor vehicle owner to keep all of the daily logs and supporting documents for six months at the owner's principal place of business. [All NAPs, para. 7(d)]

8. The Workers had certain delivery deadlines because they were transporting perishable goods. However, within those product-determined deadlines, the Workers determined the manner in which they would make each delivery: their own schedule, which routes to take, meal times, and rest periods. [All NAPs, para. 7(e)]

9. Each of the Workers was paid by the Appellant based on work performed, that is, pick-ups and deliveries that he did. The Appellant made payment only following receipt of an invoice from each of the Workers. Each of the Workers issued his invoices at irregular intervals and for varying amounts, depending on the work he performed. If he did not work, for whatever reason, he was not paid. [All NAPs, para. 7(i)]

10. The Workers were not reimbursed by the Appellant for meals or any of their other expenses. The Appellant was responsible for paying for fuel and maintenance for the truck and/or trailer, and liability insurance on the loads was carried by the Appellant. [All NAPs, para. 7(g)]

11. The Workers were not entitled to any vacation, statutory holiday, sick leave, disability pension or other benefits from the Appellant. The Appellant did not deduct employment insurance ("EI"), CPP contributions or income tax

> from the Worker's remuneration. The Workers did not receive T4 slips. [All NAPs, para. 7(i)]
>
> ...

[28] In *A.L.D.*, 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.
>
> 48 With respect to the element of control, there was no supervision of their driving function or any other aspect of their duties during the course of the various trips they accepted. Certainly, there was less control over their performance than that exercised in relation to the RWB dancers. The drivers did not have an opportunity for profit like the massage therapists in Vida nor did they have a real risk of loss as a result of carrying out their duties. They did not need to carry out any management functions nor hire helpers in order to drive the ALD tractor and trailer from A to B to C and back nor did they provide tools of any consequence.
>
> 49 Without the *RWB* decision, I would not have considered the clear intention of the parties to have been as compelling, particularly within the context of the combined effect of the other factors. However, the drivers in the within appeal were unwavering in their pursuit of the desired status of independent contractor and there was no subsequent material deviation in their conduct nor on the part of the employer. The parties acted throughout in conformity with their stated intention and there were no unusual circumstances arising within the course of the working relationships that damaged – let alone obliterated - the effect of their original agreement.

[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.

[31] This has been one of those close cases but the impact of the decisions referred to herein as applied to the facts have led me to conclude these appeals must be allowed. The decisions of the Minister are hereby varied to find that:

Sukhminder Grewal was not employed in either insurable or pensionable employment with Dewdney Transport Group Ltd. from January 1, 2007 to June 26, 2008.

Signed at Sidney, British Columbia this 5th day of November 2009.

"D.W. Rowe"

Rowe D.J.

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