Docket: 2011-1514(EI)

BETWEEN:

TITANS FURNACE CLEANING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Titans Furnace Cleaning Ltd. *2011-1516(CPP)*
on September 15, 2011 at Edmonton, Alberta

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

Appearances:

Counsel for the Appellant:	Stephanie A. Wanke Desiree Ryziuk
Counsel for the Respondent:	Gergely Hegedus

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 20th day of October 2011.

"D.W. Rowe"

Rowe D.J.

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Citation: 2011 TCC 496
Date: 20111020
Dockets: 2011-1514(EI)
2011-1516(CPP)

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Respondent.

REASONS FOR JUDGMENT

Rowe D.J.

[1] The Appellant, Titans Furnace Cleaning Ltd. ("Titans") appealed from two decisions issued by the Minister of National Revenue (the "Minister") on February 10, 2011 pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*") wherein the Minister decided Wade Martin Clark ("Clark") was engaged in both insurable and pensionable employment with Titans during the period from June 25, 2009 to May 15, 2010 on the basis he was employed pursuant to a contract of service.

[2] Counsel for the parties agreed both appeals could be heard together.

[3] Norton Earl Dodds ("Dodds") testified he resides in Edmonton, Alberta and is a certified Air Cleaning System Technician. Titans was established in December, 2008 and is in the business of furnace and duct cleaning. Dodds operates his own business – Daffy's Duct Cleaning Ltd. – and utilizes it to provide services to Titans. Dodds – as a Technician – cleans ventilation systems and Titans is retained from time to time by insurance companies or businesses providing restoration services when there has been damage caused by fire or flood. Titans also provides workers to an oil company to perform cleaning at an oil site and does duct cleaning at schools and

hospitals. The company owns a Peterbilt truck on which special equipment is mounted that is capable of performing the type of cleaning required in large jobs such as at a hotel fire site in south Edmonton where competitor companies were present with their equipment and workers. The Peterbilt unit can perform robotic cleaning to ensure the ventilation system of a building – such as a hospital - is free from dirt, mold and other forms of contamination. The robot is equipped with a camera which permits an inspection of the interior of the system. Dodds stated the Titans telephone number is called – day or night – by customers who require duct cleaning services as a result of fire or other disasters. Often, Titans is contacted by Belfor (Canada) Inc., operating as Belfor Restoration Services, ("Belfor"), an entity often retained by an insurance company to provide workers at a site where damage has resulted. Dodds stated he worked with Clark at times during the relevant period including on a job at a school in Fort St. John, British Columbia that took 10 days. Clark also worked on the hotel job site in south Edmonton where Titans supplied 4 or 5 workers, all of whom invoiced Titans for their services. Titans billed the client restoration company which – in turn – included these amounts in its invoice to the particular insurance company. In total, there were 30 workers from several different duct cleaning companies on that jobsite. Titans also performs residential work cleaning ducts and furnaces and – on average – does 4 jobs per day. Most of the work is attributable to contacts provided by one of the larger restoration companies and a job might also entail cleaning up after a dryer fire or a flood. Titans undertakes the duct cleaning work as part of its strategy to obtain larger jobs from these companies. Titans had an office and the company procedure was to issue a "job ticket" which described the nature and location of work to be performed the following day. Workers attended at the office and could choose a job that they were willing to perform. Dodds stated all workers – including Clark – understood that they were providing their services to Titans as subcontractors and were required to invoice Titans for their services every two weeks. Dodds evaluated the proficiency of workers from time to time, as required, and advised the President of Titans accordingly. Dodds stated that he interviewed Clark, who had 20 years experience in operating a carpet cleaning truck. During their conversation, Clark advised he wanted to be paid for a minimum of 8 hours per day – at $18 per hour – whether he worked because he did not want his income to fluctuate due to a lack of jobs on a particular day. Dodds stated some workers charged a flat fee per day for their services. Sometimes, a job was cancelled by a homeowner, and when residential cleaning services were performed, Clark may have worked between 2 and 6 hours on a particular day and was free thereafter to do whatever he chose. Jobs on industrial sites generally occupied 8 hours per day. Dodds stated workers arrived with their own skill set and Titans provided no training. However, they were evaluated and assigned work to match their abilities. Workers could refuse a job and some did so for various reasons. Dodds stated Clark took time

off due to health problems encountered by his spouse. When a worker was absent, Titans substituted another worker from the roster. Dodds had intended to work with Clark on a job expected to take 10 days – including a 24-hour drive – at the Watson Lake Hospital in Yukon but Clark advised he would not accept that assignment so another worker was contacted. Titans did not offer any company benefits and did not pay vacation pay nor any overtime if the worker had agreed to provide services for a flat fee. Titans guarantees its work and on one occasion, Dodds had to return to a job site on his own time – and expense – to correct a problem. Usually, any defect was relatively trivial such as not having noticed a register inside a closet or having to relight a pilot light. Workers had their own cell telephones and contacted the residential customers concerning matters such as scheduling service times, methods of entry and related matters. Dodds stated that 5 or 6 hours a day was usually sufficient to perform the necessary cleaning jobs but some workers took a lunch break or coffee breaks and used a full day. Titans scheduled jobs that would not occupy more than 8 hours. Titans owned two trucks in addition to the Peterbilt which had a value of $150,000. Workers required some hand tools such as pliers, wrenches, screwdrivers and – usually – brought their own in a tool box but sometimes they borrowed tools from Dodds or another worker. They also provided their own steel-toed boots, hard hat, mask, eye-protection, and safety vest. On an industrial job site, it was normal for Belfor or another restoration company to provide hard hats to workers. Titans also had hard hats available for workers, if required. If a client requested it, workers were provided with a shirt or coveralls displaying a Titans logo but some had their own coveralls. Dodds identified a series of invoices – Exhibit A-1 – pertaining to services provided by Clark to Titans during the period from June 25, 2009 to March 19, 2010. The invoices were prepared by Dodds because Clark lacked proficiency in writing but Clark signed each one. Invoices were prepared to cover each actual period of two weeks and not merely on the 15th and 30th of each month. Dodds stated the invoices were not backdated as it was necessary for an invoice to be submitted to Titans in order that a worker receive payment. Except for the invoice covering the period from March 1 to March 14, 2010, all others were in the same amount – $1440.00 – based on 80 hours work at $18.00 per hour. Dodds was referred to a letter – Exhibit A-2 – dated June 1, 2010 – on Titans letterhead which was signed by Glenda Rossouw, ("Glenda") – Manager of Titans – and by Clark, which stated Clark had worked as a subcontractor for Titans until May 14, 2010 and that no taxes were deducted from his pay nor was he entitled to any vacation pay or other amount except the final payment due in the sum of $720.00. Dodds stated this letter was probably signed at the office of an accountant acting for Titans. Subsequent to the Ruling issued by Canada Revenue Agency ("CRA") Titans advised its workers that if they wanted to provide services to the company, they had to become employees and not subcontractors. Dodds stated that within the industry some companies that

perform a considerable amount of residential cleaning services have regular employees on a payroll but many larger jobs undertaken for restoration companies are performed by workers who are independent contractors.

[4] In cross-examination by counsel for the Respondent, Dodds stated the owner of Titans – Winston Rossouw ("Winston") – resided in Ontario but the company had an office in Edmonton and a yard and shop where trucks, filters, jacks, and other tools were stored. The office had a desk, computer and other equipment and supplies, and Dodd's spouse – Glenda – performed administrative and secretarial work, including invoicing clients and issuing job tickets. Dodds had his own computer but Titans provided a cell phone. At the office, there was a box which contained information about impending jobs which were obtained from various sources – including insurance companies – via e-mail, fax or by contacting the website. Glenda was able to access the Titans e-mail account from home and transmitted information to Dodds' cell phone. All Titans workers had a key to the office and yard. Sometimes, only Dodds, Clark and another person worked for Titans but other occasions required as many as 30 workers and 5 or 6 workers had provided their services over a particular two-month period. Dodds acknowledged that on a business card – Exhibit R-1 – he was described as: Operations Manager of Titans. Dodds stated that as part of his arrangement with Titans, he represented the company when dealing with workers, customers and third parties and that he wanted to become a shareholder in that corporation. He billed Titans for services provided in carrying out his role as Operations Manager. Dodds interviewed Clark and informed him that Titans required workers to be subcontractors and not employees. Dodds recalled the discussion took place at a fast-food restaurant – famous for its Root Beer – after which Clark stated he would have to discuss the proposal with someone at home whom Dodds assumed was Clark's spouse. Dodds stated that after Clark had worked at Titans for a while, he and Clark had discussed certain expenses that Clark could deduct from gross revenue earned from Titans. Dodds stated that customers could contact a particular worker directly if not satisfied with the work performed and that individual was required to re-attend on his own time to rectify the problem. Titans provided Shell Oil credit cards to workers to purchase fuel used in the trucks which were essential for the performance of the work. Titans paid for all maintenance on the vehicles and equipment. Dodds stated it is normal within the industry to pay service providers on an hourly basis and each worker had his own invoice book. However, it appeared Clark had difficulty to read and write so Dodds prepared the invoices – Exhibit A-1 – and cheques were issued to Clark in payment thereof. From time to time, Winston was in Edmonton but Glenda responded to inquiries for services from prospective customers and assigned jobs to workers. She also dealt directly with representatives of insurance companies. The workers' hours were not recorded and

Clark was paid 8 hours per day whether he worked as few as 4 or as many as 10. No worker shared in profits of Titans nor did they receive any bonuses. Clark did not add Goods and Services Tax ("GST") to his invoices. Titans had a shop where the trucks were stored and each worker had a key to the yard gate. Each truck was equipped with a Global Positioning System (GPS).

[5] Andres Sanchez ("Sanchez") testified he is a Duct Cleaning Technician and provides services to Titans pursuant to a written contract – Exhibit A-3 – dated September 17, 2010 – which is outside the period relevant to the within appeals. Sanchez stated he responded to an advertisement in a newspaper because he had some experience in duct cleaning and also worked as a general purpose cleaner for other businesses. Titans advised him of available jobs the day before they were scheduled and he could either accept or reject any assignment. Sanchez charged Titans a flat rate of $160.00 per day and invoiced for his services every two weeks. While working for Titans, Sanchez had other jobs – as a janitor – which he performed on a part-time basis since the duct cleaning services usually occupied less than 8 hours per day. He chose his own working hours and had not been recalled by any Titans customer to correct any problem. For using his own cell phone to contact customers, Dodds, Glenda, or others in the course of providing his services, he billed Titans $100.00 per month. Sanchez stated that he had rejected a job in Yukon because he did not want to be away from Edmonton for an extended period. Sanchez always worked with another person, and one of them was assigned to rig out the truck while the senior worker – a qualified Technician – performed the cleaning. Workers were paired with another person who either had more – or less – experience to provide a balanced team. Sanchez had some tools and safety equipment and when he borrowed tools from Titans, was required to sign a form in which he agreed to accept responsibility for any loss or damage.

[6] In cross-examination, Sanchez stated he had never worked with Clark. When providing services to Titans, he was provided with the name and address of the customer and the time to arrive at the job site.

[7] Wade Martin Clark testified he delivers parts for a trucking company. He responded to a newspaper ad placed by Titans and went to an interview where he spoke with Dodds. Clark stated there was no discussion about working status and that he told Dodds he wanted to be paid $18.00 per hour for driving the truck to service duct and furnace systems in residences and commercial buildings. Although he had worked for several duct-cleaning businesses, he had never operated his own business. Some days, he worked for 4 hours and – at first – Dodds picked him up and drove him to the job. Clark stated he had the key to the Titans shop and yard and went to the office every morning to pick up the paperwork which had information about the

jobs. Rarely, was he given a specific deadline to finish a job but received instructions about the location and an estimate of the amount of time needed to complete the task. Clark stated he did not want to work for anyone else while providing service to Titans and was not permitted to use the Titans truck for his own purposes. He wore a uniform every day comprised of some combination of a shirt, hoodie or T-shirt with a Titans logo. He also handed out business cards advertising Titans, similar to the one filed as Exhibit R-1. Titans provided the necessary truck, equipment and tools and paid for all related expenses. The tools required to perform the work – such as screwdriver, pliers, socket set – were provided by Titans and were located in a toolbox in the truck. Clark went with Dodds to perform inspections and used a pay-as-you-go cell phone card for work purposes and received some payment from Titans to cover this cost of business use. Clark identified a photocopy – Exhibit R-2 – of a pay cheque payable to him personally. He received the sum of $1440.00 every two weeks even if he had not worked on certain days due to lack of demand. Referring to Exhibit A-1 – Clark stated he signed an invoice – at the Titans office – when Dodds handed him a pay cheque. When working at a customer's residence or place of business, a co-worker – Marty – collected the fee. At the beginning, Clark worked on a school project and also at the site of a fire-damaged hotel but on residential jobs Dodds or Marty worked with him. Clark stated he did not have any liability for work performed by him and Dodds or Marty dealt with the client directly if a problem had arisen. Clark had no business licence and was not registered for purposes of GST. He was aware that no deductions had been taken from his pay cheques. With regard to the letter – Exhibit A-2 – Clark stated he felt compelled to sign it so he could receive his pay cheque and end his relationship with Titans. He had attended school only to Grade 4 and cannot read nor write much beyond that level.

[8] In cross-examination, Clark stated he met Dodds at a restaurant and was informed there was not enough current demand to provide him with a full-time job. Clark stated he told Dodds he would not work as a subcontractor or on commission. He denied that he had told Dodds that he had to check with his spouse about his working status before starting work at Titans. The first job was at a school in Fort St. John and subsequently there was more work available but Clark received payment for 8 hours per day even if he did not work that long, or at all. Clark acknowledged the invoices referred to "sub-contractor hours worked" but had not noticed that wording for the first "few months." Clark did not know whether wearing a uniform was mandatory since Marty sometimes did not wear one but Clark had 3 shirts, a T-shirt, hat and hoodie, all identifying him as a worker for Titans. Clark agreed it is common in the industry for companies to issue clothing or items to workers that display a logo, printed advertising message or slogan. Clark stated he did a lot of residential work and when approached – by Dodds – about a job in Whitehorse,

Yukon, inquired, “How long?” to which Dodds replied, “Too long for you” but did not provide any other explanation. Clark stated he had not refused any job and when he needed time off, he asked permission, which was granted. There was no inspection by Titans of work done at any residence and he did not fill out a time sheet. If he finished early, he stayed at the shop and performed duties such as washing the truck. He did not sign an invoice to receive his first cheque but later signed several – at the same time – even though he had already received payment for the periods covered by those invoices. Although he had not requested any payment for usage of his cell phone, Dodds – twice – handed him $20 cash as reimbursement. With respect to the letter – Exhibit A-2 – Dodds stated he signed it to finalize the matter and to receive final payment for his work. About 6 months after starting at Titans, he had started looking for another job. Within a month after leaving Titans, he found his present employment and had not applied for Unemployment Insurance benefits in the interim. He recalled discussing the topic of certain expense deductions with Dodds but always considered that he was an employee throughout the entire period. He recalls a Questionnaire that was completed by his “roommate.” Clark stated he has friends who operate their own businesses and understands that some workers are subcontractors. He acknowledged that each pay cheque had the word “sub-contract” written on the memorandum line.

[9] In re-direct examination, Clark stated he would not have worked as a subcontractor and had asked for “pay stubs” once or twice but did not receive any response. He knew he did not have his own truck or tools and was not operating his own business. Clark stated that in the course of a working career of 40 years, he has always been an employee.

[10] Counsel for the Appellant submitted that although Clark’s preference may have been to work pursuant to a contract of service, he had provided his services to Titans as a subcontractor on the basis that he receive a guaranteed amount regardless of hours worked. Counsel conceded it was not helpful to have based the daily guarantee on an hourly rate – multiplied by 80 hours in each two-week period – but this arrangement was acceptable to Titans as it required workers to perform services locally, mainly at residences. Counsel submitted that Dodds had made it clear to Clark at the outset that he would not be an employee of Titans. Clark was an experienced truck operator and was not subject to inspection of his work nor was he compelled to meet any deadlines. He was also able to refuse work and did so. Clark – like other workers – was expected to provide his own tools apart from the specially-equipped truck. Counsel submitted Titans was operating in accordance with a new business model which was akin to that of a broker that brought parties together to

achieve a result. By retaining the services of independent contractors, clients could be satisfied by ensuring workers were available to perform the required services.

[11] Counsel for the Respondent submitted that Clark received a guaranteed income whether he worked a full day, or at all. He reported to work each day and was assigned jobs using the specialized, expensive truck and equipment owned by Titans. Clark did not incur any expenses or hire any helpers and did not have any chance of profit nor any risk of loss. Counsel submitted the evidence demonstrated there had been no common intention at the outset that Clark provide his services as an independent contractor and that their conduct throughout the working relationship was consistent with an employer-employee relationship. Therefore, the decisions of the Minister were correct.

[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. 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.

[13] 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:

[14] Clark was an experienced truck driver and had previous experience operating equipment used to clean ducts and furnaces. He worked with at least one other person on residential cleaning jobs and with several others when attending an industrial job site. He was not subject to supervision nor inspections and – unless he was working with Dodds – was the senior worker. Clark took the position that he was required to seek permission to take days off and could not – and did not – refuse any jobs. He reported to work at the Titans office and for some portion of the relevant period was picked up at his residence and driven to work by Dodds.

Provision of equipment and helpers:

[15] The essential piece of equipment was the specially-equipped truck operated by Clark. Clark used small tools provided by Titans which were located in a tool box inside the truck. Titans provided him with various articles of clothing with the Titans name/logo displayed thereon and he chose the appropriate item depending on the circumstances. He returned the clothing when he left. Clark worked – usually – on a two-person crew in accordance with company policy by which Dodds or Glenda assigned workers to particular jobs. Clark did not hire his own helper nor choose his co-worker. Clark had his own pre-paid cell phone which he used both personally and for work.

Degree of financial risk and responsibility for investment and management:

[16] Clark did not have any risk of loss. Even if he worked only a few hours a day, he was paid for 8 hours at $18.00 an hour. If there was no work available, he was paid for that day and the arrangement with Titans incorporated a guarantee that he would be paid for 80 hours every two-week period regardless of actual hours worked. Clark had no investment in the truck or equipment or other items used in the course of carrying out the work and Titans paid for fuel, insurance, maintenance and all other expenses. Any other expenses such as those incurred when working away from Edmonton were paid by Titans. Clark had not expected any reimbursement for using his cell phone for work but accepted a total payment of $40.00 from Dodds to cover the estimated cost of minutes attributable to business calls. Clark was not required to exercise any management function to carry out his tasks.

Opportunity for profit in the performance of his tasks:

[17] Clark did not have any opportunity for profit. He was not entitled to any bonus or commission arising from performing services for Titans. Although expressed by an hourly rate, the guaranteed floor also served as a ceiling. Provided he presented himself for work, he could not earn less than $1440.00 every two weeks nor was there any opportunity to earn more.

[18] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue – M.N.R.*, 2006 DTC 6323, *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.*), [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2006] F.C.J. No. 1653, there was a clearly-expressed mutual intent of the parties that the person providing the services would be doing so as an independent contractor and not as an employee. In the within appeals, there is a conflict in the evidence on this issue. Dodds' version is that Clark was informed during the interview at the restaurant that he would be providing his services as a subcontractor even though Titans was willing to guarantee income based on 80 hours – at $18.00 per hour – to be paid every two weeks. Dodds stated that Clark wanted time to reflect on the proposal and to consult with his spouse which – presumably – he did and then accepted the Titans offer. Clark testified he had made it abundantly clear that he was not interested in any working relationship where he would be dependent on earning a commission or other arrangement which carried with it the potential for his income to fluctuate depending on the amount of revenue Titans was able to generate from the residential duct cleaning sector of its business. Unfortunately, Clark was functionally illiterate and had not operated any business nor did he wish to do so since he had been an employee for various business entities over the course of 40 years. There was no written contract and the letter – Exhibit A-2 – purporting to confirm – retroactively – a pre-existing relationship of payor and independent contractor, was signed by Clark under circumstances where he wanted to finalize his relationship with Titans, receive his final payment, and move on to seek work elsewhere. I do not attribute any weight to this document in support of the proposition that there was an intent by Clark to provide his services as an independent contractor at the time of his initial engagement. Throughout the relevant period, Clark received payment based on the guaranteed amount, except for the period from March 1 to March 14, 2010 when it was $100.00 less because he took some time off. Dodds testified Clark was not paid unless he had signed an invoice which Dodds prepared for him. Clark's version is that he received his initial cheque without submitting any invoice and that he had signed several of them at the same time after having already been paid.

[19] Counsel for the Appellant relied on the decision of Boyle J. in *Domart Energy Services* Ltd. v. *The Minister of National Revenue*, 2007 TCC 585 (*Domart)*. In that case, the worker carried on business under the name Grubbs Oilfield Services. At paragraphs 4 to 13, inclusive, the facts were stated as follows:

> 4 In servicing its oilfield rental business' clients, Domart Energy uses two picker trucks. Picker trucks are large, expensive trucks that have a boom crane mounted on them suitable for delivering and picking up machinery and equipment of the type and size that it rents out. One of Domart Energy's picker trucks is owned by it and the other is retained by it from an arm's length third party, McCallum Trucking Ltd. McCallum Trucking provides to Domart Energy the operator of the picker truck which it provides. Picker trucks are expensive pieces of equipment costing in the $400,000 range.
>
> 5 Prior to the period in question, Domart Energy employed a private operator for the picker truck that is owned by it. However, when its employed picker operator left, Domart Energy had difficulty finding a new employee to take the job despite its advertising and recruiting efforts.
>
> 6 Mr. Wilfrid Flanagan approached Mr. Pavlis to offer the services of Mr. Flanagan's business, Grubbs Oilfield Services, to operate Domart Energy's picker truck. Mr. Pavlis was familiar with Grubbs Oilfield Services and with Mr. Flanagan's predecessor business Skookum Inc. through which Mr. Flanagan had operated previously. Domart Energy had been a client of both Skookum and Grubbs Oilfield.
>
> 7 Grubbs Oilfield Services carried on a number of transport-related services for businesses in the oilfield exploration and development sector. In addition to operating picker trucks, Grubbs Oilfield Services provided pilot trucking services or piloting as well as hotshotting services. Pilot trucking, or piloting, involves providing the lead small truck and driver or the rear small truck and driver that accompany large, slow or dangerous transports. Grubbs Oilfield Services provided pilot trucking services to Domart Energy regularly, about twice a month, during the relevant period. When providing piloting services, Grubbs Oilfield Services provided both the pilot truck and operator. Hotshotting involves making small trucks available to make immediate deliveries to the oilfield of replacement parts and accessories needed for the leased equipment. Domart Energy did not use Grubbs Oilfield for hotshotting as it had other arrangements in place. Grubbs Oilfield had a rate sheet that set out the rates and terms for its piloting, hotshotting and picker operating activities. Mr. Flanagan made a copy of this available to Mr. Pavlis for purposes of their discussion. Mr. Flanagan was insistent to that he was not interested in being Domart Energy's employee but that Grubbs Oilfield was willing to provide the services as a contractor. Grubbs had its GST number,

clearance letter for workers' compensation, and its own liability insurance and provided these documents to Domart Energy.

8 Domart Energy was aware that Grubbs Oilfield had other clients and that Grubbs would not be able to take each picker operator job offered. Grubbs had the option to refuse work when called and Mr. Flanagan did.

9 Domart Energy has been able to replace Grubbs Oilfield Services and Mr. Flanagan with an employed picker operator since the period in question.

10 Mr. Flanagan obtained and maintained his own Class 1 driver's license required to operate a picker truck. Mr. Flanagan was a Certified Journeyman Crane and Hoisting Equipment Operator which means he had the required provincial operator license permitting him to operate the picker. These credentials were maintained by Mr. Flanagan on his time and at his expense. In addition, Grubbs Oilfield/Flanagan maintained the statutory log books for the picker truck and for the crane.

11 Grubbs Oilfield/Flanagan also bore the cost of highway traffic infractions. It was not standard in the industry for a driver to be responsible for tickets and fines in the way that Grubbs Oilfield Services had agreed to be.

12 Domart Energy agreed to pay Grubbs Oilfield Services $45 per hour for Mr. Flanagan's picker operator time. This significantly exceeded the hourly rate of $35 it had previously paid its employed picker operators and that it was offering to potential employee candidates. There was no written contract. Mr. Pavlis was clear that, from their discussions, the increased rate reflected the fact this was a contract rate and there would be no overtime, etc. paid. While Domart Energy's strong preference was for an employed picker truck operator, Mr. Pavlis on behalf of Domart Energy did expressly agree with Mr. Flanagan that this picker truck operating would be done as part of Grubbs Oilfield Services business.

13 Domart Energy did not pay Grubbs anything additional for meal or hotel expenses, holiday pay, sick leave or any other benefits. Domart Energy's employees, including its employed picker operators, did enjoy a benefits package. Domart Energy paid the invoice received monthly from Grubbs Oilfield at the agreed rate together with GST.

[20] In subsequent paragraphs, Justice Boyle noted there was no set schedule for the work and Flanagan was called – on occasion – for same-day work, although he also called the office to see if there was work available. The worker was not required to report for work and the times of the jobs were established by the clients and the worker was able to select his routes, and could take breaks at his discretion. When another person was needed to carry out the work on the picker truck, that individual was an employee of Domart Energy.

[21] At paragraphs 21 and 22 Boyle J. continued as follows:

> 21 Before turning to these criteria and considering them in the facts of this case, I should note that it is both abundantly clear and conceded by the Crown that Mr. Flanagan does indeed carry on a business under the name Grubbs Oilfield Services. The Crown's position is that the work Mr. Flanagan does as picker operator for Domart Energy is within the context of a separate employment relationship. They do not dispute that the piloting work Mr. Flanagan's business does for Domart Energy is done in the context of the Grubbs Oilfield Services business Mr. Flanagan carries on. Nor does the Crown dispute that Mr. Flanagan's Grubbs Oilfield Services does piloting and hotshotting work, and perhaps other picker operator work, for persons other than Domart Energy as part of its business. This aspect makes this particular case quite different from many of the reported cases in this area and from most of the authorities referred to by the Crown. In essence, the Crown's position is that Mr. Flanagan's picker operator work constituted a separate employment activity from his piloting work performed for Domart Energy in the same period and from his services provided to others in the period. The contra view to the Crown's position would be that Domart Energy was merely one of Grubbs Oilfield Services' best and largest customers in the period in question.
>
> The intent of the parties:
>
> 22 It is clear in this case that both parties intended the relationship to be that of independent contractor. Mr. Flanagan carried on business as Grubbs Oilfield Services and, prior to doing picker operating work for Domart Energy, did other work for them and did work for other customers. Mr. Pavlis on behalf of Domart Energy testified that, while he would have preferred to be able to hire Mr. Flanagan as an employed picker operator, at Mr. Flanagan's insistence Domart Energy knowingly and intentionally agreed to enter into an independent contractor relationship with Mr. Flanagan's business Grubbs Oilfield Services instead.

[22] After analyzing the traditional indicia referred as adopted by the Supreme Court of Canada in *Sagaz,* supra, Boyle J. – at paragraph 29 – concluded as follows:

> 29 Based on the evidence in this case I am satisfied that the provision of picker truck operator services was an integral part of the Grubbs Oilfield Services business carried on by Mr. Flanagan. There is no factual or legal basis to justify treating those services used by Domart Energy as separate from Grubbs Oilfield's overall business activities and characterizing them as being in the nature of the employment of Mr. Flanagan by Domart Energy. This is a case of Mr. Flanagan providing the services to Domart Energy in the course of an already established business of his own. As set out in *Market Investigations,* this makes it an easier case in which to apply the relevant tests.

[23] The case of *Lang v. Minister of National Revenue,* 2007 CarswellNat 2998 involved workers engaged in duct cleaning. At paragraphs 35 to 40, inclusive of his judgment, Chief Justice Bowman, after an extensive review of the jurisprudence and applying it to the particular facts stated:

> 35 I turn then to the question of the status of the people hired to do the duct cleaning. Despite the temptation to use Sir Wilfred Greene's method I shall endeavour to apply as best I can the principles to be deduced from the Federal Court of Appeal's decisions.
>
> 36 I have considered this case on the basis of four alternative hypotheses. They all lead to the same conclusion.
>
> (a) Intent is determinative (*Royal Winnipeg Ballet*).
> (b) *Wiebe Door* is all that is needed and intent need not be considered (*Sagaz, Wiebe Door* and *Precision Gutters Ltd.*).
>
> (c) The *Wiebe Door* test does not point conclusively in any direction and so intent is a tie-breaker (*Wolf* and *City Water International Inc.*).
>
> (d) Common sense, instinct and a consultation with the man on the Clapham omnibus.
>
> 37 If the law did not permit me to look at anything but the *Wiebe Door* test, standing by itself, then I would have to say that it pointed more to independent contractor than employee. There was no supervision and no control. The workers were picked and told to go to a particular house. If mistakes had to be corrected the workers had to go back at their own expense and correct their mistakes. They had a chance of profit and bore the risk of loss. They got paid a percentage of the fee paid to Dun-Rite. If Dun-Rite did not get paid neither did they. If Dun-Rite got plenty of orders their chances of increased income were commensurately enhanced. If Dun-Rite chose not to hire a worker he simply was not hired. If they did a good job their chances of getting hired for the next job were enhanced. Ownership of tools points in neither direction. The appellants supplied the vacuum equipment and the van and the workers supplied the small tools.
>
> 38 If intent is determinative clearly the workers were independent contractors. (*Royal Winnipeg Ballet*) Both the appellants and the workers who were called as witnesses regarded themselves as independent contractors. This is evident from their oral testimony and from the fact that no employee benefits, no vacation pay, and no job security were provided. The workers had to wait around until they were contacted by the appellants or Monty Hagan. They could accept or decline the job and they could take other jobs. They had no assurance that they would be hired by Dun-Rite and they had no guarantee of being hired again after the

> particular jobs for which they were hired were completed. These factors bring them within the considerations enunciated by Décary J.A. in *Wolf*.
>
> 39 If we regard intent as merely a tie-breaker (as stated in Noël J.A.'s judgment in *Wolf* as well as in Malone J.A.'s decision in *City Water International Inc.*), the same result would apply even if the *Wiebe Door* tests pointed unequivocally in neither direction. While the law does require me to look at the *Wiebe Door* test it does not prevent me from looking beyond it in order to determine the true relationship between the parties. If the *Wiebe Door* test yielded an inconclusive result, a consideration of the parties' intent clearly tips the scales toward an independent contractor relationship.
>
> 40 If I were to rely solely on my own instincts and common sense I would say that quite apart from the *Wiebe Door* test, quite apart from intention, workers who are called on to clean the ducts of a couple of houses, paid a portion of the fee and then sent on their way do not by any stretch of the imagination look like employees.

[24] Returning to the facts in the within appeals, it is evident Clark was not carrying on an existing business on his own account. He did not have any licence nor was he registered for purposes of collecting GST. He did not advertise his services to third parties. He did not incur any liability in the course of providing his services. He did not have a chance of profit nor did he run a risk of loss unlike the workers in *Lang* who did not get paid unless Dun-Rite collected from the client. Unlike the situation in *Precision Gutters Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, 2002 FCA 207, I cannot find there are two businesses operating here, one on the part of Titans and the other by Clark. In the *Precision* case, the Federal Court of Appeal held the gutter installers were independent contractors operating their own installation business and that Precision Gutters operated another business as the manufacturer and that it negotiated contracts with the customers, collected the fees, delivered the product to the job site and issued payment to installation crews, either to one person who paid the rest of the crew, or to multiple workers, but only after the appropriate invoice(s) had been submitted. In the within appeals, the duct cleaning business belonged to Titans and there was no separate function performed by Clark that was sufficiently distinct to permit it to be identified as another business entity. The clients were clients of Titans and it owned the expensive truck and equipment. Throughout, Clark identified himself as a Titans worker by wearing the clothing provided to him and by distributing business cards to advertise the services provided by Titans. Pay cheques were payable to him personally. There is no evidence that Clark undertook any activity or pursued any course of action consistent with carrying on his own duct cleaning business.

[25] The Appellant has failed to demonstrate there was any intent on the part of Clark that he provide his services as an independent contractor. In terms of utilizing "instincts and common sense", it is highly improbable that Clark with his limited literacy skills would accept the status of subcontractor when his goal was to secure regular employment that enabled him to earn a regular, fixed, amount rather than to be subject to fluctuations in income because of insufficient revenue generated by Titans from residential duct cleaning. He did not want to work on any commission basis. It is clear what Titans wanted and it was determined that Clark fit into its new business model in the manner – apparently – applicable to the worker – Sanchez – who signed a written contract and was content to provide his services as an independent contractor based on receiving payment at a flat daily rate. He also provided some tools and managed his time so he could work at other janitorial jobs to increase his income. Although it took some time for the picture to emerge from the testimony, it appears Dodds provided his duct cleaning services to Titans through his own corporation – the cleverly-named Daffy's Duct Cleaning Ltd. – and may have billed for his services as Operations Manager through that company. Titans was owned by Winston, Dodd's brother-in-law and his spouse – Glenda – worked for Titans and handled many of the administrative and dispatching duties. Writing the words "subcontract" or "subcontractor" on the memorandum line of cheques does not constitute confirmation of the status of a working relationship. There is no doubt that Clark needed work and was content to receive the guaranteed income every two weeks. He testified that – once or twice – he inquired about receiving "pay stubs" and had discussed with Dodds the potential for deducting certain expenses from his duct cleaning income. What they might have been under these circumstances is better left to the imagination of someone engaged in creative tax return preparation. The conduct of the parties throughout was inconsistent with that of a business-to-business relationship and was consistent with that of an employer and employee.

[26] Based on the evidence and applying the relevant jurisprudence, I conclude that the decisions of the Minister are correct and both are confirmed. Both appeals are hereby dismissed.

Signed at Sidney, British Columbia this 20th day of October 2011.

"D.W. Rowe"

Rowe D.J.

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COURT FILE NOS.:	2011-1514(EI) and 2011-1516(CPP)
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