Docket: 2003-2081(EI)

BETWEEN:

MOHAMMAD SHOKRI-GHASABEH
O/A SHOKRI ENTERPRISES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together with the appeal of *Mohammad Shokri-Ghasabeh, o/a Shokri Enterprises* (2003-2082(CPP))
on December 17, 2003 at Vancouver, British Columbia,

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

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Bruce Senkpiel

JUDGMENT

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

Signed at Vancouver, British Columbia, this 10th day of February 2004.

"D.W. Rowe"

Rowe, D.J.

Citation: 2004TCC132
Date: 20040210
Docket: 2003-2081(EI)
2003-2082(CPP)

BETWEEN:

MOHAMMAD SHOKRI-GHASABEH
O/A SHOKRI ENTERPRISES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The appellant (Shokri-Ghasabeh) appealed from a decision issued by the Minister of National Revenue (the "Minister") on April 3, 2003, wherein the Minister varied two assessments dated December 6, 2002, cancelled an amount in respect to a specific worker – Sodabeh Mosaed - but otherwise confirmed said assessments with respect to the remaining workers listed in Schedule A attached to each Reply to the Notice of Appeal (Reply) filed in each appeal.

[2] The Minister assessed the appellant for amounts pertaining to employment insurance (EI) premiums and Canada Pension Plan (CPP*)* contributions on the basis each worker had been employed under a contract of service with the appellant – operating as Shokri Enterprises – and was, therefore, engaged in both insurable and pensionable employment pursuant to the relevant provisions of the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*"*)*, respectively.

[3] The appellant and counsel for the respondent agreed the two appeals could be heard together.

[4] The appellant testified he is a businessman residing in Vancouver, British Columbia and – as a sole proprietor – operated a tow truck business under the

trade name Shokri Enterprises (Enterprises). In 1999, he purchased his first truck and, at the end of 2001, acquired additional trucks and hired some drivers. The appellant had entered into a business arrangement with a corporation - All-Track Transport Ltd. - which operated a towing business under the name Busters Towing (Busters) whereby he would supply the trucks and drivers and Busters would provide marketing, management and administration, including all the bookkeeping with respect to revenues. The appellant and Busters agreed to share revenue on the basis the appellant would receive 65% of all revenue generated by his trucks – and drivers – while functioning under Busters' business umbrella. Busters had 55 trucks and the appellant owned 5. In accordance with their arrangement, Busters kept track of all revenue and regularly issued the appellant a cheque for his 65% share of the revenue generated by his own vehicles. The appellant stated he was responsible for all expenses related to his trucks although each driver paid for certain specialized equipment such as a cell phone, maps, radio apparatus, pagers, tools to enter locked cars, hand tools and costs associated with individual marketing strategies carried out on their own initiative. From the revenue derived from Busters, the appellant shared that amount with the individual driver who had operated a particular truck during a specific shift. From the total revenue generated by each truck and driver, 35% was retained by Busters in accordance with the agreement it had with the appellant. Thereafter, the appellant retained 35% and the balance of 30% was paid to the relevant driver. The appellant insured each truck and named – specifically – a driver as the principal operator of that unit. The arrangement between him and the drivers - with respect to damage claims caused by towing a vehicle - required a driver to pay for damage up to the limit of the deductible portion of the insurance policy which amount varied between $300 and $1,000. The appellant stated some drivers had one claim per year while others might have been required to pay some amount of compensation once or twice a month. Busters employed a manager who was in charge of adjusting damage claims and the insurance company – Insurance Corporation of British Columbia (ICBC) - undertook adjusting of larger claims. The appellant provided a Shell credit card – issued in his own name - to each driver and Busters supplied uniforms bearing its own logo. Training was undertaken by either the appellant or Busters and required a trainee to devote 400 hours - as an unpaid volunteer – during which period he or she would ride with an experienced tow truck operator who had been certified by Busters as a qualified trainer. After learning the business, a driver would join the pool of drivers available to operate a tow truck for the appellant - and/or another owner working with Busters - when the opportunity arose. In addition to tow trucks, Busters owned two heavy trucks which were used for larger towing jobs. The appellant stated each of the ordinary tow trucks was assigned a particular schedule and some might be operated during a single shift while others worked two shifts and required two drivers. Because of the opportunity for increased

revenue, the appellant preferred to have more of his trucks assigned a double shift but Busters had the sole right to designate a truck as either a single or double shift and had the right to insist that all the trucks owned by the appellant – but bearing the Busters' logo and telephone number - were maintained in good mechanical condition. Shokri-Gasabeh stated most trucks were not older than 4 or 5 years and the ongoing, regular maintenance remained his responsibility, although each driver had to undertake a pre-trip inspection of fluid levels and brakes. The appellant's drivers were authorized to take a truck directly to a repair shop - pre-approved by him - and the costs could be charged to an established account or – if relatively inexpensive – would be paid by the driver who was reimbursed by the appellant. The appellant stated the business arrangement with Busters and – in turn - between him and the drivers was informal but the overriding requirement was that any driver operating one of the appellant's trucks had to be approved by Busters. The appellant agreed with the assumptions of the Minister as set forth in subparagraphs 7(d), (e) and (f) of the Reply wherein the Minister relied on the fact that Busters dispatched the workers to work 10-hour shifts, 5–6 days per week. Although Busters owned the radio frequency, the appellant owned the radios installed in his trucks but some drivers purchased their own scanners – at a cost of $250 plus batteries – in order to listen to police and fire department radio transmissions concerning the location of certain accidents and the perceived need for the attendance of one or more tow trucks. Busters dispatched drivers on a rotation basis but the appellant stated the drivers were able to go "where the action is" in accordance with their own information received from their own sources. As an example, some drivers had an arrangement with the owners/managers of certain buildings to tow away – automatically – unauthorized vehicles found in the building's private parking lot. A driver could be called or paged directly and, if he spotted a vehicle parked in a fire lane or blocking an exit, would remove the offending vehicle immediately and tow it to one of the four or five storage yards maintained by Busters. Thereafter, Busters would invoice the City of Vancouver for having provided that service. In each instance where a driver had obtained work through his own efforts, the billing and collection was administered by Busters and the amount generated was subject to the revenue split as described earlier. In the course of 9 years in the tow truck business, the appellant stated he had observed that some drivers were also owners and had entered into a partnership with Busters while other workers were just drivers performing their services in the course of a three-way business arrangement between Busters, the truck owner and themselves. Shokri-Gasabeh stated the industry operates on the basis of verbal agreements and the drivers are always remunerated in accordance with a revenue-sharing arrangement that may vary between 28%-35% of gross earnings of a truck depending on individual negotiations. Sometimes, a night shift driver would be paid 35% of gross revenue – if a certain level is reached - while other drivers - during the

day - will receive the industry average of 30% of the amounts invoiced by Busters in respect of that shift. In accordance with his arrangement with Busters, the appellant agreed Busters could discipline – and even discharge - any of his drivers – directly - without consultation. On the other hand, if an owner fired a driver, and that person was not otherwise *persona non grata* with the management at Busters, the driver would be permitted to drive for another tow truck owner operating under Busters' business umbrella. The appellant stated the average truck generated approximately $10,000 per month per 10-hour shift. By way of example, if that amount was earned during the month of November, then the driver would receive an advance of $1,000 on the first day of December. On December 15, a calculation would be performed to determine the total revenue generated by a particular truck – and driver – during November and the appellant would issue a cheque to the driver for his 30% share, less the amount of the advance. The corporation - operating as Busters – had contracts with the City of Vancouver pursuant to which Busters would receive a call and respond by dispatching the next driver in rotation to attend the scene. However, in the event of an emergency, the dispatcher – who keeps track of the general location of the drivers through ongoing radio communication - would direct the nearest truck to attend. The appellant stated some drivers waited in the Busters' yard until dispatched, some remained at the site of the last job completed and others drove around looking for work. Customers paid for towing services by cash, credit card or by charging the towing fee to an existing account with Busters. In the event Busters accepted a bad cheque, it suffered the loss but if a driver had taken the NSF cheque in payment, he had to pay the relevant amount to Busters even though all cheques taken in payment for services were always payable to Busters. A charge to a credit card was accomplished by the customer having provided the number of the card to the dispatcher who obtained authorization from the card issuer prior to accepting the towing job and sending out a truck. Drivers carried credit card machines in the truck capable of obtaining an imprint of the card and the customer would sign the charge slip. Fees were charged in accordance with a schedule set by Busters which were based on an initial hook-up charge of $35 plus $2 for every kilometer travelled thereafter. A discount of up to 20% - or a flat-rate fee – could – occasionally - be offered to a customer provided there was a valid business purpose and it was approved – either in advance or subsequently ratified - by both the appellant and Busters. Turning again to the matter of hiring drivers, Shokri-Ghasabeh stated that drivers tended to work for an owner who could offer a particular shift because Busters assigned a shift to a particular truck and not to the operator thereof. Drivers must have security clearance and cannot carry any person in the truck who had not been approved as a driver or a trainee. If a driver is unable to work, the truck will sit idle unless another driver can be found from the pool of available, qualified operators. The appellant stated all the drivers providing their services to him -

through Busters - were content with the revenue-sharing arrangement and that he had personal knowledge that 5 or 6 of his drivers filed their income tax returns on the basis they were self-employed. The appellant agreed the risk of loss to drivers was slight but reiterated they did incur some work-related expenses. He acknowledged the drivers also used their cell phones for personal reasons. He stated he was familiar with the business methods employed by another Vancouver tow truck company whereby the drivers' revenue share was subject to deductions for EI, CPP and income tax but the amount paid to those drivers was based on 28% of gross revenue - rather than the usual industry average of 30% - in recognition of the extra bookkeeping and administration required. The appellant added that - in this example - there were no owner-operators since all trucks were company-owned. The appellant filed - as Exhibit A-1 – a sample of revenue statements prepared by Busters with respect to his five trucks.

[5] Counsel for the respondent did not cross-examine the appellant.

[6] The appellant submitted the industry practice followed by him in entering into a revenue-sharing arrangement with Busters and – subsequently – with the drivers of his own trucks was consistent with the wishes of all parties concerned who had acted consistently throughout on the basis they were entrepreneurs sharing revenue in accordance with an agreed formula.

[7] Counsel for the respondent submitted the established jurisprudence supported the decision of the Minister in that the facts clearly pointed to the existence of an employer-employee relationship between the appellant and the drivers of his trucks.

[8] 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. 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 45 to 48, inclusive, of his judgment stated:

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".

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.

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.
>
> 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.

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

Level of control:

[10] As a consequence of the verbal agreement existing between the appellant and Busters, the drivers of the appellant's tow trucks were subject to the control exercised by the designated management personnel at Busters. The trucks – and drivers – were dispatched in accordance with a rotation system devised by Busters and a particular shift – whether single or double – was assigned to a truck itself as opposed to a driver. The dispatchers were aware of the general location of the drivers during their shifts and the drivers were required to perform their duties personally and were prohibited from carrying any other person in their vehicle unless it was another driver - approved by Busters – or an individual undergoing training in accordance with the system instituted by Busters. The drivers wore uniforms displaying Busters' logo. A driver could be disciplined or fired by Busters and an owner would have to find another driver from the pool of qualified drivers that had been approved by Busters.

Provision of equipment and/or helpers

[11] As mentioned above, the only helpers permitted were those trainees approved by Busters. The evidence was clear that a driver was not able to hire a substitute to assume his duties unless that individual was already a driver - approved by Busters – and, therefore, part of the pool of drivers available to be called into service by any truck owner having a business arrangement with Busters. The main equipment

required for the performance of the drivers' duties was the radio-equipped truck. Some drivers used personal cell phones or had purchased pagers, scanners or additional radio equipment but that was not required by the appellant – or Busters – and was a matter of personal choice. In the same vein, some drivers owned specialized hand tools which were useful in carrying out certain aspects of the overall task of operating a tow truck.

Degree of financial risk and responsibility for investment and management

[12] During the course of his testimony, the appellant stated there was very little financial risk accruing to any of the drivers. The appellant had an agreement with Busters whereby he received 65% of the gross revenue generated by his trucks. Thereafter, each driver received his share which was based on 30% of the gross amount earned by that truck during his shift. All expenses associated with operation of the trucks were borne by the appellant. In the event a driver paid for a small repair from his own pocket, that amount was reimbursed by the appellant. The appellant testified there was a system in place at Busters whereby certain damage claims made by a customer – arising out of a towing job – were adjusted - in-house – by an employee of Busters up to the limit of the deductible under the ICBC insurance policy on the particular tow truck involved. Apparently, some drivers paid claims as often as once or twice per month while others rarely had any claims assessed against them. As for management, no driver had any supervisory duties in respect of any other drivers or service providers nor did they have any responsibility for managing the assets owned by the appellant nor did they have to be concerned with maintenance other than checking fluid levels and the state of the brakes prior to starting each shift. Unless a driver had accepted a cheque from a customer without having obtained authorization from the Busters dispatcher, he still received his 30% share of the amount earned through his efforts even if the cheque was later dishonoured.

Opportunity for profit in the performance of tasks

[13] Because of the revenue-sharing method utilized to compensate drivers for their work, there was no real opportunity for them to profit in the performance of their tasks. There was some ability to obtain work through their own efforts in marketing their services but all revenue obtained as a result was still funnelled through the Busters' billing system and the driver's share was the same as if the call had been put through to Busters in the first instance. The fees were established directly by Busters or as a result of any contracts Busters had entered into with the City of Vancouver or other corporations or entities to provide towing service on a fee-for-service basis over

the lifetime of a particular contract. Drivers received instructions from the dispatcher and – barring exceptional circumstances – were required to respond to a call only in accordance with the rotational system in force at Busters. All vehicle expenses were paid by the appellant so there was no room to eke out an extra profit through efficient stewardship of the tow truck during a particular shift, as might be the case had the drivers been assessed a flat-rate rental charge to use the truck as part of an overall revenue-sharing agreement with the appellant.

[14] In the case of *Minister of National Revenue v. Emily Standing*, [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 ...

[15] In the case of *West Direct Express Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2003] T.C.J. No. 73, Porter, D.J.T.C.C. decided a case involving an individual providing courier services to the corporate market in Calgary. At paragraph 14 of his reasons, Judge Porter commented:

> I am further mindful that as a result of the recent decisions of the Federal Court of Appeal in *Wolf v. Canada*, [2002] F.C.J. No. 375, and *Precision Gutters Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [2002] F.C.J. No. 771, a considerable degree of latitude seems now to have been allowed to creep into the jurisprudence enabling consultants to be engaged in a manner in which they are not deemed to be employees as they might formerly have been...

[16] Turning to the within appeals, I accept that the appellant and his drivers were satisfied with the revenue-sharing system used to compensate them for their work and that some drivers filed income tax returns on the basis they were self-employed. The appellant testified that the 30% share of revenue paid to the drivers was consistent with the industry average and, in his 9-year experience in the towing industry, had known of only one other towing business where drivers were treated as employees. In doing so, that company had reduced the drivers' percentage share of gross revenue from 30% to 28% to account for the administrative burden associated with that status. During his time in the towing business, the appellant stated that all revenue-sharing agreements have been verbal whether between the towing company and the owner of the trucks - who in some cases also may be the operator – or a truck owner and his drivers. In his view, the industry operates informally – more or less

through a form of partnership and/or three-way consensus in accordance with industry-wide practices - and the resultant business mechanism functions smoothly for the benefit of all parties concerned.

[17] There have been several other reported cases dealing with this issue. In *Hamblin (c.o.b. Mike's Towing) v. Canada (Minister of National Revenue – M.N.R.)*, [2003] T.C.J. No. 324, Judge Porter - Tax Court of Canada – held that the tow truck drivers were employees. Judge Porter found that even though the workers responded to dispatched calls, they were able to trade shifts among themselves, worked with little supervision and could take calls on their own provided they were not working other dispatched calls. In that case, the owner of the trucks also provided other equipment including two-way radios and beepers. However, Judge Porter was not satisfied that – overall – the drivers were providing their services within the context of performing their tasks as persons in business on their own account. The owner of the trucks was handling all of the billing for services rendered and the trucks borne the name of Mike's Towing.

[18] In the case of *Abram's Towing Services (Windsor) Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2000] T.C.J. No. 494, Judge MacLatchy - T.C.C. – decided tow truck drivers were employees in circumstances where the appellant owned the trucks and major items of equipment. The trucks bore the logo of the owner and the driver earned 40% of the amount earned by the truck during its shift. However, the amount of gas used by the worker, health benefit contributions and any amount of damage done to the truck - or to a vehicle owned by a customer - was deducted from that gross sum. In that case, there was a written agreement between the owner and the drivers pursuant to which Abram's Towing could terminate the agreement "at any time it deems necessary for the total well being of the Company". After determining those drivers to be subject to a substantial degree of control and direction and having considered other factors, Judge MacLatchy – at paragraph 18 – stated:

> This Court must look at the whole scheme of arrangement in light of the evidence before it, not just a particular part thereof. In this instance, the business was that of the Appellant. The Worker was only a part of it. The Worker was not operating his own business: he had no clientele of his own; he had no other customers; he did not advertise his own business and seek employment with others. No matter how artfully the Appellant may have tried to be with his driver agreement, he did not create the Worker to be a subcontractor.
> ...

[19] I heard the case of *Always Towing Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2000] T.C.J. No. 674 which had facts similar to the within appeals except that – like *Abram's Towing, supra,* and *Hamblin (c.o.b. Mike's Towing), supra*, there was a two-way rather than three-way revenue-sharing agreement. In those cases, the towing company owned the trucks and dealt directly with the drivers in respect of sharing revenue rather than through an intermediary business entity such as the sole proprietorship – Shokri Enterprises – operated by the appellant in the within appeals. At paragraph 31, I referred to the relevant facts as follows:

> In the within appeal, the trucks were the subject of what appears to be an informal leasing arrangement between Rick Martin, his father and the corporation - ATI - equally owned by them. The premises from which the business operated and the tools, equipment and ability to carry out the necessary repairs and maintenance were owned and/or leased by ATI. The ability to purchase fuel at a bulk rate was the result of a contract entered into between ATI and the supplier. The contracting out of the dispatch function to Norplex was undertaken by ATI management, although Monique Martin had performed the task until 1996. The number called by a potential customer was answered by Norplex - on behalf of ATI - and all advertising and listings in directories indicated the towing business was that of ATI or Always depending on the time period. When the intervener lost his driving privileges, ATI responded by removing the corporate truck from Pitre's premises and promptly assigned another driver to operate it. Bidding for the contract with the City of Saskatoon - on an annual basis - was done by the appellant. From the moment someone called the relevant number seeking the assistance of a two truck, the infrastructure established by ATI and its predecessor came into play and a driver was dispatched through a mechanism arranged and paid for by the appellant. The driver performed the task and - more often than not - charged a fee for service previously fixed by ATI. Even if the driver used discretion to charge an additional amount, that revenue was still shared on the basis of a 65% - 35 % division and - significantly - that included all money earned by a driver even when flagged down, called privately, or otherwise contacted to perform a towing job without the customer having gone through the dispatcher. The drivers turned in the required paperwork and their share of the gross revenue was calculated by Monique Martin who then issued a cheque. This procedure is not consistent with an independent contractor invoicing a customer and is more in tune with a worker handling in timesheets or an employee being remunerated on a commission or piece-work basis handing in the requisite information so that payment can be tallied by the employer.

[20] In the course of my reasons for judgment in *Always Towing*, I also referred to extracts from my earlier decisions in other cases, as follows:

> [35] In the case of *Information Communication Services (ICS) Inc. v. M.N.R.*, [1998] T.C.J. No. 1120, - 97-839(UI) and 97-841(UI) - I held the drivers of vehicles involved in a delivery service within a specified industry were independent contractors. In that case, the drivers owned their own vehicles, there was very little control over their daily activity and there was a chance of profit and risk of loss. Most important, however, in the ICS case was the body of evidence leading to the conclusion the workers were operating a business on their own account including registration for GST, filing income tax returns on the basis of being a self-employed person and hiring replacement drivers to handle the assigned route. Another significant factor in that case was the purported employer did not have any corporate establishment or presence in the area where the services were being performed and had to rely on third party common carriers to transport product from Vancouver to Nanaimo on Vancouver Island where the drivers then proceeded to carry on with delivery of the parcels to the intended recipients. There was also the opportunity for the drivers to charge a fee for delivery of items between customers of ICS on the route without any involvement, whatsoever, of ICS.
>
> [36] In a recent judgment - *Flash Courier Services Inc. v. M.N.R.*, [2000] T.C.J. No. 235, dated April 14, 2000, I found a courier to be an independent contractor in accordance with the facts specific to that appeal. In that case, the worker - an experienced courier - had come to Flash Courier with his own van and equipment and had been operating previously on the basis that he had been in business for himself. I found the worker had paid for his own Workers' Compensation Coverage (WCB) in accordance with an account he had established with that agency and to have been totally responsible for the expense side of his business. (In the within appeal, counsel for the appellant advised the Court ATI had not paid WCB coverage for the drivers.) When the income-earning vehicle or machine is wholly owned by the driver/operator - thereby exposing that person to risk of loss - and potentially affecting the opportunity for profit by permitting an increased percentage of total revenue due to a vehicle's manner of operation and/or special characteristics, then the situation has been changed significantly and often - in combination with other factors - can produce a different result.

[21] In *Blues Trucking Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 675, I decided that two oilfield-service truck drivers were employees. In the course of those reasons, I referred to two of my earlier decisions – one of which concerned tow truck drivers. At paragraph 18 I commented as follows:

> In the case of *F.G. Lister Transportation Inc. v. M.N.R.*, 96-2163(UI), ..., dated June 23, 1998, I dealt with the case of long-haul truck drivers and found they were employees working pursuant to a contract of service. Because most of these cases can turn on an apparent slight difference in facts, in the *Lister* decision, at paragraph 13, I commented as follows:
>
> > I now find myself in the position of being required to point out the differences in the facts in the within appeal and those in two other decisions issued by me in which I held the drivers were independent contractors. In the case of *Lee (c.o.b. D & A Transport) v. M.N.R.* [1995] T.C.J. No. 426 I held the driver of a long-haul transport truck to have been an independent contractor. In that case, the driver had registered his business for purposes of the Goods and Services Tax, maintained a business bank account and had filed income tax returns on the basis of being self-employed. In *Lee*, the appellant had earlier been an employee of the payor and had agreed to alter the working relationship and there was clear evidence he could have hired another driver to work for him on long-hauls thereby generating a profit. As well, in *Lee*, it came down to choosing between two versions of circumstances surrounding a working relationship and the choice did not favour the worker. I also held the tools of the trade were the personal skills of the driver as a qualified person capable of hauling a loaded trailer over long distances. That finding was in the context of the driver operating a business under the trade name, Rick's Driving Services, having a bank account under that name and otherwise doing business with third parties on that basis. Income tax returns had been filed on the basis the worker was a self-employed person.
> >
> > In another decision of mine, *Metro Towing Ltd. v. M.N.R.* [1991] T.C.J. No. 717, I found a tow-truck driver to have been an independent contractor. In that case, while there was a high degree of control

> over the worker, he had leased the vehicle and all of the equipment needed to carry out his task and bore all of the costs, including insurance, relating thereto. That driver also had a substantial risk of loss arising from the operation of that vehicle in the event he was not able to generate sufficient gross revenues which fluctuated on a monthly basis, as did, to a lesser extent, his costs of operation. In that case, like *Lee, supra*, the worker had earlier been on the regular payroll and had decided to enter into a new arrangement whereby he was the lessor of a truck and certain equipment and would be entitled to receive 30% of gross towing revenue arising from jobs which were dispatched by Metro Towing Ltd. The evidence in the *Metro Towing Ltd.* appeal disclosed that other tow-truck drivers operated through a limited company or a partnership arrangement...

[22] In the within appeals, the appellant – pursuant to his verbal contract with Busters – permitted Busters to direct, supervise, train, discipline – and even fire – any of his drivers. In the case of *Camion Holdings Inc. v. Canada (Minister of National Revenue - M.N.R.)*, [1999] T.C.J. No. 311, at paragraph 9, I stated:

> ...If an employer loans out an employee to another person or entity or – in fancier terms – pursuant to a secondment, permits the worker to perform services for another and agrees day-to-day management of that person can be undertaken by the recipient of the service, that, without a whole lot more, does not mean the employer is still not exercising control. ...

[23] The appellant testified there was an agreement between himself and Busters and the drivers concerning the method of adjusting damage claims arising from the operation of a particular truck during a shift. The same sort of system was in place in the *Always Towing, supra*, case and I commented as follows:

> [29] ... The drivers were not subject to any potential for loss except if they caused damage to a customer's car and there was no evidence that had ever been relied on by ATI. In any event, if the status of the workers is truly that of employees, then any such deduction for causing damage while in the course of performing the job or any other method of imposing penalties would be in violation of provincial legislation concerning employment standards.

[24] I return to the central question - as referred to by Major, J. in *Sagaz, supra* - which is to determine whether any worker provided his services to the appellant on the basis he was in business on his own account. In the course of his testimony, the appellant characterized himself as a "middleman" between Busters and the drivers. There is no doubt he was in business for himself pursuant to his arrangement with Busters. He owned the trucks and bore all the expenses and the risk of loss including reduced revenue if a truck sat idle for one or more shifts. In that event, he had ongoing expenses associated with his overall business operation involving the ownership of 5 trucks, all of which were subject to his contract with Busters. The appellant received 65% of the gross revenue derived from the operation of his 5 trucks and Busters provided all marketing, management, dispatch and accounting functions together with the physical facilities including 5 storage yards. The next level of revenue-sharing occurred between the appellant and the drivers of his trucks. At this point, there is a profound difference in the working relationship because they did not own the trucks nor major pieces of equipment and were not responsible for any of the expenses associated with either the actual operation of the trucks driven by them or any collateral costs associated with the overall business. The drivers named in the EI and CPP assessments were merely drivers earning revenue in accordance with a precise business infrastructure established by Busters and the appellant and were remunerated according to a formula that governed the division of revenue generated through their efforts. The facts in the within appeals support a finding that there were two distinct businesses involved, one on the part of Busters and another on the part of the appellant (see: *Precision Gutters Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 771). However, those facts do not permit me to conclude there was any additional business being operated by any driver of a truck owned by the appellant. The fact that all participants – Busters, the appellant and the drivers - were content to function within the particular business structure and to share revenue in accordance with a specific formula does not permit them to assign - to the drivers - a working status that is at odds with the established jurisprudence.

[25] In accordance with the foregoing reasons, both decisions issued by the Minister are confirmed and both appeals are hereby dismissed.

Signed at Vancouver, British Columbia, this 10th day of February 2004.

"D.W. Rowe"

Rowe, D.J.

CITATION:	2004TCC132
COURT FILE NO.:	2003-2081(EI) and 2003-2082(CPP)
STYLE OF CAUSE:	Mohammad Shokri-Ghasabeh o/a Shokri Enterprises and M.N.R.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 17, 2003
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	February 10, 2004

APPEARANCES:

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COUNSEL OF RECORD:

For the Appellant:

Name:

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