QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2013 SKQB 21**

Date: **2013 01 18**
Docket: Q.B. No. 1296 of 2012
Judicial Centre: Saskatoon

BETWEEN:

THE DIRECTOR OF LABOUR STANDARDS
(on behalf of Tomas Sabau)

APPELLANT

- and -

ACANAC INC., MELVIN COHEN, DON CAVANAGH
and LES LORINCZ

RESPONDENTS

Counsel:

Meghan R. McAvoy — for the appellant
Gerald Matlofsky — for the respondents

JUDGMENT — R.S. SMITH J.
January 18, 2013

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[1] The Director of Labour Standards (hereinafter the "Director"), on behalf of Tomas Sabau (hereinafter "Sabau"), appeals under s. 62.3(1) of *The Labour Standards Act*, R.S.S. 1978, c. L-1 (hereinafter the "*Act*") seeking to overturn the decision of the adjudicator T.F. (Ted) Koskie, which set aside an April 16, 2012 wage assessment by the Director pertaining to Sabau.

[2] Mr. Koskie found that Sabau was an independent contractor and not an employee and thus the wage assessment of the Director was negated. The respondents,

Acanac Inc., Melvin Cohen, Don Cavanagh and Les Lorincz (hereinafter collectively "Acanac") join issue with the Director and assert that Mr. Koskie's decision was both reasonable and correct in its conclusions.

[3] The Director's single ground of appeal is:

> 1. The Adjudicator erred in law in finding that Mr. Sabau was an independent contractor and not an employee pursuant to clause 2(d) of the Act, and that he was therefore not entitled to the protections and benefits of the Act.

The Record

[4] There was a preliminary skirmish on the issue of the record of the appeal. Section 62.3(4) provides:

> (4) The record of an appeal consists of:
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> (a) the wage assessment or a decision of the director pursuant to subsection 62.4(2.1);
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> (b) the notice of appeal served on the registrar of appeals;
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> (c) the written decision of the adjudicator;
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> (d) the notice of motion commencing the appeal to the Court of Queen's Bench; and
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> (e) in an appeal to the Court of Appeal, the decision of the Court of Queen's Bench and the notice of appeal to the Court of Appeal.

[5] The materials submitted by the Director included all of the above as well as the exhibits considered by Mr. Koskie at the adjudication. The respondents argue that

as “exhibits” are not referenced in s. 62.3(4), they should not be part of the record before the Queen’s Bench.

[6] The procedural debate was rendered moot when counsel for the Director advised that she was prepared to proceed without reference to the exhibits. However, counsel for the Director made it clear that this should not be regarded as a general concession but merely an accommodation for this case alone. In short, the agreement that the exhibits are not part of the record is of no precedential value.

Background

[7] Acanac is a corporation based in the Province of Ontario and provides VOIP (Voice over Internet protocol) and high-speed Internet services. VOIP refers to communication protocols and methodologies involved in the delivery of voice communications over the Internet.

[8] Sabau worked for Acanac commencing in September 2009 until the end of August 2010. He subsequently claimed that he was an employee within the meaning of s. 2(d) of the *Act*. Acanac’s response was and is that Sabau was an independent contractor.

[9] Sabau learned about a possible position at Acanac through an Internet advertisement. He applied for a position and after exchange of some e-mails, had a telephone interview during which Acanac advised him of the rate of pay - $10.00 an hour to start.

[10] Sabau was offered and accepted the position, essentially a technical

representative, and at that time was given training. The training was relatively minimal and involved:

1. How to meet and greet callers;
2. Use of the software that gave access to Acanac's system and billing database; and
3. Use of Acanac's clock system.

[11] Sabau was not given a script to use and there was no other training on how to handle calls. Acanac was relying on Sabau's technical strength to assist customers who were having problems accessing Acanac's system. From time to time Acanac managers would listen in on calls and could provide advice and assistance, if they considered it necessary.

[12] Sabau was given the option of choosing from two shifts (morning or afternoon). Sabau initially chose the morning shift and after approximately two months, began working double shifts, which was his option. Sabau worked from home using his own computer and a modem supplied by Acanac.

[13] In order to provide his technical service, Sabau would "clock in" using Acanac's system so as to connect to its server. He would then sign out for coffee, lunch, washroom breaks and the like. Sabau had the ability to consult with other technical representatives online and they would make collective decisions about when to take breaks.

[14] If Sabau wanted time off, he would ask the Acanac manager on duty and generally he was accommodated although sometimes his time off was delayed.

[15] An average call to a customer who was having difficulty accessing Acanac's system would last five to ten minutes. The calls were subject to being monitored and if it took longer than that for Sabau to help a customer, he would often get a message from the manager inquiring if he needed assistance. Sabau reported his time to Acanac by completing time sheets. Acanac initially paid Sabau $10.00 an hour but it was subsequently increased to $11.00 an hour and then $12.00 an hour. Sabau testified that he had no GST number and did not charge GST - he did not think he needed to.

[16] Acanac did not give performance reviews, however from time to time technical representatives online would collectively review their performances at the end of each shift.

[17] Sabau acknowledged that he never asked for nor received T4s from Acanac. He did invoice them for his time which had at the end of the invoice: "Thank you for your business." He had no explanation as to why he used that term; he simply copied the invoice of another representative.

[18] During the material time, Sabau filed income tax returns which described his income as business income.

[19] Contrary to the evidence of Acanac, Sabau indicated he was unaware that he could subcontract his work or that it was ever a topic of discussion with Acanac. Sabau agreed that Acanac showed flexibility with hours of work, never asked him to purchase tools, and he paid for his own expenses associated with his work.

[20] Sabau conceded that Acanac never gave him detailed procedures and checklists, nor did he submit payments for EI and GST. Sabau could work from any

location he chose as long as there was no background noise.

[21] Trevor Kay testified on behalf of Acanac. He indicated that if a technical representative like Sabau wanted a vacation, Acanac required two weeks' notice. He allowed there was no training for technical work, but contractors were given a quick rundown on how to use the system.

[22] Work for the technical representatives came from a global queue that contractors answered. There was no protocol for answering, just who was next in line. Mr. Kay indicated that it was the contractor, specifically Sabau, who decided if the problem was solved with the customer he was dealing with. It was possible for clients to complain about the technical representatives. There was no negative feedback received with respect to Sabau. Managers had access to call logs. If contractors were consistently on long calls, that might show something was wrong and they needed coaching by Acanac representatives.

[23] Sabau does acknowledge that he did sign an *independent contractors agreement* ("ICA"). It is undated and the evidence is unclear as to when it was signed. In addition, the ICA provided for a fixed period of employment, but the end date was not filled in.

[24] Sabau testified that he was told that if he did not sign the ICA, he would be fired. Acanac representatives denied that. Suffice it to say the evidence surrounding the ICA was vague.

[25] Paul Louro, one of the founders of Acanac, testified that the technical representatives' names were known to the people they were dealing with. Thus, technical

representatives, or contractors had an opportunity to enhance their reputation online. Mr. Louro argues the representatives could "grow their business".

[26] At the end of the relationship between Sabau and Acanac, Sabau complained to the Director. An assessment was conducted and the Director determined that Acanac owed Mr. Sabau, as an employee, the sum of $6,625.13. The calculation has not been challenged. The issue and debate at the adjudication, and again on appeal, are whether Sabau was an employee as contemplated under s. 2(d) of the *Act*.

Standard of Review

[27] The Director asserts that the appropriate standard of review for questions of law and jurisdiction on appeals pursuant to s. 62.3(1) of the *Act* is correctness. This was recently confirmed by the Court of Appeal in *Saskatchewan (Director of Labour Standards) v. DJB Transportation Services Inc.*, 2010 SKCA 50, 318 D.L.R. (4th) 174, at para. 34:

> 34 ... the Chambers judge was correct in determining the Adjudicator was required to correctly interpret and apply the governing legislation and his failure to do so amounts to an error of law. ... the standard of review is correctness.

[28] It should be noted that in *DJB Transportation*, the debate was one of calculation of overtime pay under the *Act*. Both parties conceded that the complainants were employees.

[29] Counsel for the Director takes the somewhat innovative stance that she will, for the purposes of argument, not contest, and in fact concede, that the findings of fact

made by the Adjudicator, Mr. Koskie, were correct. She posits that where Mr. Koskie went wrong was in taking those findings of fact and intersecting the case law and statutory rules touching on the issue of determining whether someone is an employee or an independent contractor. The Director's counsel argues that as she is only raising the issue of legal interpretation with the law, specifically the *Act*, that it follows the scope of review must be correctness.

[30] Counsel for the respondents, not surprisingly, have a considerably different position with respect to standard of review. The respondents invoke the observations of Baynton J. in *Baird v. Lawson* (1996), 146 Sask.R. 273, [1996] S.J. No. 443 (QL) (Q.B.), where the court opined:

> [23] ... However it is a question of fact, not law, whether the evidence in a given case establishes if an employer-employee relationship exists. *Halsbury's Laws of England* (3d) vol. 25, para. 871. The appellants' right of appeal is limited by s. 62.3(1) to a question of law or jurisdiction. It is not a valid ground of appeal that the adjudicator's findings of facts are incorrect. Even where appeals can be made on grounds of mixed fact and law (such as under *The Small Claims Act*), the appeal court is not entitled to substitute its own view of the evidence for that of the trier of fact. It can only intervene if the findings of fact are not reasonably supported by the evidence (often termed a "palpable and overriding error").

[31] In sum, the respondents' counsel asserts that I have very narrow authority to hear debate over the adjudicator's findings. Both parties invoke the reasoning in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, as being a guide for the court to come to the correct conclusion with respect to the standard of review.

[32] A more recent case reiterating the statement that the determination of an employee-employer relationship is a question of fact is found in *Group Medical Services v. Director, Labour Standards Branch (Sask.)*, 2007 SKQB 345, 303 Sask.R. 168. Although determining the question is one of fact, the court also considered a related question: Did the adjudicator correctly apply the test? The court noted at para. 5:

> [5] With respect to the particular question which is to be addressed in this decision - whether a person is an "employee" within the meaning of the *Act* - Barclay, J., in *Youngblut et al. v. Jim & Jaklen Holdings Ltd. et al*. (2002), 226 Sask.R. 61; 2002 SKQB 463, considered the standard of review and the distinction between questions of fact and questions of law:
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> > "[10] Although the respondents have asserted that an adjudicator's decision of whether or not an employer-employee relationship exists is a matter of fact that should only be interfered with if patently unreasonable, it is clear that the factors to be considered in making such a determination are part of a legal test. Courts and academic commentators alike have struggled over the years to articulate the legal framework for determining whether a certain person or entity is an employer, and in what circumstances. See for example, *Montreal (City) v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161 (P.C.), *Baldwin v. Erin District High School Board and Lyons* (1962), 36 D.L.R. (2d) 244 (S.C.C). Thus, if an adjudicator has not correctly applied the law to the facts as she or he has found them, her or his determination that a certain person is or is not an employer may be subject to review by this Court. As Baynton, J., pointed out in *Baird v. Lawson*, supra, at 279:
> >
> > > '[21] ... The nature of a business arrangement or relationship between the parties must be determined as a matter of fact from other established facts in accordance with legal guidelines laid down by the common law ... .'

> Thus, whether the adjudicator correctly applied the legal test, is a question of law. If the adjudicator has correctly applied the law as to whether the person is an employer, then her finding on the evidence that there was no such relationship must stand, unless it is patently unreasonable."
>
> [Emphasis added]

[33] There is other jurisprudence which touches on the issue of determining an employee-employer relationship and the appropriate standard of review.

[34] In 2010, the Manitoba Court of Appeal in *Knights of Columbus v. Boisjoli*, 2010 MBCA 110, [2011] 3 W.W.R. 250, concluded that the standard of review for this question is reasonableness. In this case, a decision of the Manitoba Labour Board under the *Employment Standards Code*, S.M. 1998, c. 29, was challenged for its characterization that the applicant was an independent contractor, not an employee:

> 6 To sum up, it cannot be doubted that the decision whether someone is an employee or an independent contractor is, in the end, context-driven. While guidelines or lists of helpful criteria can be of assistance, ultimately the decision in each case will depend on its own particular facts.
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> 7 The standard of review to be applied on an appeal is a factor to be considered on the leave application if a question of law has been identified. This is because it has obvious relevance when considering whether the applicant's argument has a realistic prospect of success. Applicant's counsel argued that the standard is correctness since questions of law were at issue, referring to this court's decision in *Nygard International Partnership Associates v. Michalowski*, 2005 MBCA 96, 195 Man. R. (2d) 301 (Man. C.A. [In Chambers]) at para. 14, where it was held that in the circumstances of a similar, but not identical, application for leave under the *Code*, there was likely a lower degree of deference due to the Board's decision. However, this court, upon appeal (2006 MBCA 115, 208 Man. R. (2d) 159 (Man. C.A.)), determined that the standard of review on two of the principal

> issues before the court was reasonableness. More importantly, the subsequent landmark decision of the Supreme Court in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), makes it abundantly clear, in my opinion, that the decision of the Board is entitled to considerable deference and that the standard of review in this instance is reasonableness. In reaching my conclusion that the reasonableness standard applies, I note in particular that the Board is an experienced expert tribunal operating in this instance within the four corners of its own statute. The narrow (but undoubtedly important to the applicant) decision for the Board was one that it is required to decide in the course of its ordinary responsibility; in other words, the question fell squarely within the area of its expertise.
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> …
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> 10 Thus, the Supreme Court of Canada has made it plain that the reasonableness standard, when applicable, applies to both facts and the application of the law.
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> 11 In his motion brief, and before this court, the applicant argued that three errors of law had been committed by the Board. Firstly, counsel asserted that the Board failed to properly analyze its own statute; in particular, the meaning of the words "employee" and "employer." In the result, the Board had abrogated its duty. The simple answer to this submission is that the Board, as its reasons make clear, was fully aware of the difficult task before it. Given the lack of a definition of "independent contractor" in the *Code*, the Board was required to look at common law tests, which it did. It is evident from the reasons for decision that the Board committed no error in moving expeditiously to the question before it (one with which it was well familiar), rather than specifically addressing every detail of the applicant's argument.
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> [Emphasis added]

[35] In *Dynamex Canada Inc. v. Mamona*, 2003 FCA 248, 228 D.L.R. (4th) 463, dealing with a referee's decision under the *Canada Labour Code*, R.S.C. 1985, c. L-2, about the existence of an employee-employer relationship, the Federal Court of Appeal concluded that the standard of review is reasonableness:

> [45] In my view, the determination of the referee as to the common law principles applicable to the determination of the status of a person as an employee should be reviewed on the standard of correctness. I reach that conclusion, despite the privative clauses, because it is a question of law of a kind that is normally considered by the courts, and is not a question that engages the special expertise of a referee. However, the manner in which those principles are applied to the facts, which is a question of mixed law and fact, should be reviewed on the standard of reasonableness. Thus, if the referee's reasons disclose no error of law, and the conclusion is reasonably supportable on the record after a somewhat probing examination, the decision will stand.
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> [Emphasis added]

[36] Later, the Federal Court of Appeal again confirmed this standard of review on this question in *Public Service Alliance of Canada v. Canada (Attorney General)*, 2009 FCA 6, 385 N.R. 180, although this time it was a finding of who is an employee under the *Royal Canadian Mint Act*, R.S.C. 1985, c. R-9:

> 6 The judge found that the determination made by the officer required that she applied the definition of "employee" in sections 17 and 18 of the RCMA to the facts and circumstances governing the work accomplished by the appellants. This involved a mixed question of law and fact reviewable according to a standard of reasonableness: see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 53; *Dynamex Canada Inc. v. Mamona*, [2003] F.C.J. No. 907, 2003 FCA 248, at paragraph 45; *Estwick v. Canada (Attorney General)*, [2007] F.C.J. No. 1158, 2007 FC 894, at paragraph 80; *Cohen v. Canada (Attorney General)*, [2008] F.C.J. No. 845, 2008 FC 676, at paragraphs 15 and 20. The judge made no error when he applied that standard to a review of PWGSC's decision.

[37] Taken together, I must decline the Director's counsel's invitation to impose a standard of review of correctness. Respectfully, I regard the case law as well settled that

in debates concerning employer-employee relationship, the standard of review is one of reasonableness.

Legislative Régime

[38] Clause 2(d) of the *Act* defines employee as:

> (d) **"employee"** means a person of any age who is in receipt of or entitled to any remuneration for labour or services performed for an employer.

[39] Clause 2(e) of the *Act* defines employer as:

> (e) **"employer"** means any person that employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who either:
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> (i) has control or direction of one or more employees; or
>
> (ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees.

[40] Section 4 establishes to whom the *Act* applies. Subsection 4(1) states:

> (1) Subject to subsections (1.1), (2), (3) and (4) and to the regulations, the provisions of this Act apply to the Crown in right of Saskatchewan and to every employee employed in the Province of Saskatchewan and to the employer of every such employee.

[41] Subsection 4(1.1) of the *Act* specifically provides for the inclusion of those who work from home. It states:

> (1.1) Without limiting the generality of subsection (1) but subject to the exemptions prescribed in the regulations, this Act applies to employees who work at home.

[42] Section 60 of the *Act* authorizes the Director to issue a wage assessment. That section provides:

> 60(1) Without limiting the generality of section 82, in this section and in sections 61 to 62.4, **"wages"** includes overtime, annual holiday pay, public holiday pay, pay in lieu of notice, monetary losses described in subsection 33(4) and transportation costs described in subsection 44(2.5).
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> (2) The director may issue a wage assessment:
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> > (a) against an employer where the director has knowledge or has reason to believe or suspects that an employer has failed or is likely to fail to pay wages as required by this Act; or
> >
> > (b) against a corporate director where the director has knowledge or has reason to believe or suspects that the corporate director is liable for wages in accordance with section 63.

[43] Section 6 provides for the requirement of overtime pay, s. 39 for the payment of public holiday pay, and ss. 33 and 35 for the payment of annual holiday pay. It is pursuant to these sections that the Director issued the wage assessment, the calculation of which was not challenged by Acanac.

Analysis

[44] I have benefited from a recent article by Peter Neumann and Jeffrey Sack,

eText on Wrongful Dismissal and Employment Law, 1st ed., Lancaster House, Updated: 2012-11-16 (CanLII), <http://canlii.org/en/commentary/wrongfuldismissal/>, which reviewed recent case law, many of which are detailed hereafter.

Touchstone Authorities

[45] The leading test in Canadian common law jurisprudence for determining whether an employer-employee relationship exists was set out by the Federal Court of Canada in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, [1986] 5 W.W.R. 450 (F.C.A.). *Wiebe Door* was cited with approval by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. Justice Major, for the Court, summarized the test as follows at paras. 46-48:

> 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 ... I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, … [Atiyah, P. S., *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:
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> …
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> 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*, ... [*Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pages 737-38]. 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. [Emphasis added]

[46] Further, in *Wiebe Door*, MacGuigan J.A. comments at page 559 that:

Perhaps the earliest important attempt to deal with these problems [inadequacies of the "control test"] was the development of the entrepreneur test by William O. (later Justice) Douglas, "Vicarious Liability and Administration of Risk 1" (1928-29), 38 Yale L.J. 584, which posited four differentiating earmarks of the entrepreneur: control, ownership, losses, and profits. It was essentially this test which was applied by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), at pages 169-170:

In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior. ...

[Emphasis in original]

[47] The Supreme Court of Canada in *Sagaz Industries, supra*, has endorsed the elements of the fourfold test in setting out the correct approach to determining the existence of an employment relationship. Writing on behalf of the Court, Justice Major stated at para. 47:

> 47 ... there is no universal test to determine whether a person is an employee or an independent contractor ... 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] In *Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87, 264 D.L.R. (4th) 634, the Federal Court of Appeal added another dimension by holding that the intention of the parties can be more important than the *Wiebe Door* test suggests, saying that:

> [64] ... it seems ... 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. ...

[49] Rather than just focussing on intention, some courts, in determining employee status, will examine the actual conduct of the parties and related evidence with respect to their relationship. As observed by Geoff England, Innis Christie & Roderick

Wood, *Employment Law in Canada*, 4th ed., looseleaf (Markham: Butterworths, 2005), at para. 2.21:

> 1. ... no matter what "test" is used, superficial inconsistencies and *de jure* contractual descriptions of the nature of the relationship will not be determinative of the matter for employment law purposes: what counts is how the relationship works "on the ground", having regard to the totality of the evidence, not what appears on paper. ...

See for example: *HMI Industries Inc. v. Santos*, 2010 QCCA 606, [2010] Q.J. No. 2579 (QL), at para. 5; *Pennock v. United Farmers of Alberta Co-Operative Ltd.*, 2006 ABQB 716, 54 C.C.E.L. (3d) 239; varied on other grounds, 2008 ABCA 278, 296 D.L.R. (4th) 239; see also: *Dynamex Canada Inc. v. Mamona*, *supra*, at para. 52; *Sagaz Industries Canada Inc.*, *supra*, at para. 49; *Walden v. Danger Bay Productions Ltd.*, [1994] 6 W.W.R. 138, 114 D.L.R. (4th) 85 (B.C.C.A.), at paras. 35-38; and *Alberta Permit Pro v. Booth*, 2007 ABQB 562, [2008] 2 W.W.R. 505, at para. 12; aff'd *Alberta Permit Pro v. Booth*, 2009 ABCA 146, [2009] 6 W.W.R. 599.

[50] A similar "overarching" general test to the "entrepreneur" or "fourfold" test is the "organization" or "integration test": *Wiebe Door*, *supra*, at para. 10; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra*, at paras. 40-43. This test can be traced to *Stevenson Jordan and Harrison, Ltd. v. MacDonald and Evan*, [1952] 1 *Times L.R.* 101 at 111 (C.A.), wherein Denning L.J. stated:

> One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

[51] The organization test was approved by the Supreme Court of Canada in *Co-Operators Insurance Association v. Kearney*, [1965] S.C.R. 106, 48 D.L.R. (2d) 1 at 112, where Spence J. for the Court quoted with approval the following passage from John G. Fleming, *The Law of Torts*, 2nd ed. (Sydney: Law Book Co., 1961), at pages 328-29:

> Under the pressure of novel situations, the courts have become increasingly aware of the strain on the traditional formulation [of the control test], and most recent cases display a discernible tendency to replace it by something like an 'organization' test. Was the alleged servant part of his employer's organization? Was his work subject to co-ordinational control as to 'where' and 'when' rather than 'how'?

[52] Applied in isolation, however, the organization test can lead to "as impractical and absurd results as the control test." *Wiebe Door, supra*, citing A.N. Khan, "Who is a Servant?" (1979), 53 *Austr. L.J.* 832, at page 834. Thus, as noted by the Supreme Court of Canada in *Sagaz Industries, supra*:

> 42 ... If the question is whether the activity or worker is integral to the employer's business, this question can usually be answered affirmatively. For example, the person responsible for cleaning the premises is technically integral to sustaining the business, but such services may be properly contracted out to people in business on their own account (see R. Kidner, "Vicarious liability: for whom should the 'employer' be liable?" (1995), 15 *Legal Stud*. 47, at p. 60). As MacGuigan J.A. further noted in *Wiebe Door*, if the main test is to demonstrate that, without the work of the alleged employees the employer would be out of business, a factual relationship of mutual dependency would always meet the organization test of an employee even though this criterion may not accurately reflect the parties' intrinsic relationship (pp. 562-63).

[53] While finding the organization test useful if properly applied, MacGuigan J.A. in *Wiebe Door* ultimately preferred Lord Wright's test in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161, [1946] 3 W.W.R. 748 (P.C.) (the "entrepreneur" or "fourfold" test):

> Professor Atiyah, [*Vicarious Liability in the Law of Torts*, London: Butterworths, 1967], at pages 38-39, ends up with Lord Wright's test from the *Montreal Locomotive Works* case, as he finds it more general than Lord Denning's, which he sees as decisive in only some cases.
>
> I am inclined to the same view, for the same reason. I interpret Lord Wright's test not as the fourfold one it is often described as being but rather as a four-in-one test, with emphasis always retained on what Lord Wright, *supra*, calls "the combined force of the whole scheme of operations," even while the usefulness of the four subordinate criteria is acknowledged.
> ...

[54] Having benefited from the above authorities, I am inclined to apply the fourfold test of control, ownership of tools, chance of profit and risk of loss. I consider and acknowledge that the intention of the parties is relevant but I also accept that "on the ground" conduct may be more determinative of the true relationship.

[55] Given the online nature of the relationship between the parties, I will consider the organization of the company to the extent that it informs the analysis of the fourfold test. Finally, I consider the critical question is whether Sabau was in business on his own account or not.

Independent Contractors Agreement ("ICA")

[56] It is worthwhile, at this juncture, to address the impact of the ICA. The

arbitrator clearly considered the existence of the ICA, although it did not figure significantly in his analysis. That is the correct approach.

[57] I regard it as well settled that the existence of such an agreement is not conclusive in and of itself. More to the point, the evidence respecting the agreement was, at best, incomplete, as were some specific terms in the agreement. In *Warren v. 622718 Saskatchewan Ltd.*, 2004 SKQB 346, 252 Sask.R. 290, Wilkinson J. opined as follows:

> [14] The Federal Court of Appeal, in *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553; 70 N.R. 214 (F.C.A.), explored the distinction between the status of "independent contractor" and "employee" saying that an agreement as to status is not determinative of the relationship between the parties and a court must carefully examine the facts in order to come to its own conclusion. The best synthesis found in the authorities suggests that the fundamental test to be applied is this: "is the person who has engaged himself to perform the services performing them as a person in business on his own account?" There is no exhaustive list of considerations, and no strict rules exist as to the relative weight each consideration should carry. Control will have to be considered, as well as who provides the equipment and the helpers, what degree of financial risk is undertaken, what degree of responsibility is assumed for investment and management, what opportunity exists for profit, and is the individual already established in a business of his own?
>
> [15] The declaration of status by agreement of parties to a contract certainly had little weight in the eyes of tax authorities or other regulatory government agencies. It is a principle declared in the oft-quoted statement of Viscount Simon in *Inland Revenue Commissioners v. Wesleyan and General Assurance Society*, [1948] 1 All E.R. 555, at page 557:
>
> > "It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan

> if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it. ..."

This statement by Viscount Simon was adopted by the Federal Court of Appeal in *Perini Estate v. Canada*, [1982] C.T.C. 74; 40 N.R. 74; 82 D.T.C. 6080 (F.C.A.), when Le Dain, J.A., stated at page 6082:

> "It is elementary, of course, that the name given by the parties to an amount payable pursuant to clause (v) of paragraph 1.3 of the agreement is not conclusive of its nature. See *Commissioners of Inland Revenue v. Wesleyan & General Assurance Society*, 30 T.C. 11, at 16 and 25. ..."

[58] The British Columbia Court of Appeal in *Walden, supra*, at para. 38, stated the rule succinctly: "The total relationship of the parties transcends that which is formally set out in the written contract governing the parties."

[59] The adjudicator notes the following at para. 40:

> [40] I cannot be certain from the evidence when the ICA was signed. However, I am not persuaded on the evidence that it was signed under a threat of dismissal. Though I do not believe Sabau gave a great deal of thought to the content of the ICA before he signed it, I do find on the evidence that its content confirmed the basic terms of his engagement. This was reflected in Sabau's subsequent conduct.

[60] The law is well settled that the presence of an independent contractors agreement will not rule the day in terms of decision. Clearly the adjudicator

acknowledged its presence but in my view he did not give it any considerable weight.

[61] In the end, for the purposes of my analysis, it is the actual facts of the operating arrangement between Sabau and Acanac that will determine the conclusion, not the ICA.

[62] An examination of the fourfold test to the facts is appropriate.

Control

[63] As noted by MacGuigan J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, *supra*, at para. 6:

> The traditional common-law criterion of the employment relationship has been the control test, as set down by Baron Bramwell in *Regina v. Walker* (1858), 27 L.J.M.C. 207 at 208:
>
> > It seems to me that the difference between the relations of master and servant and of principal and agent is this: — A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.

[64] The Supreme Court of Canada provided a similar articulation of the "control test" in *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605, 17 N.R. 593 at 613 (quoting André Nadeau in *Traité pratique de la responsabilité civile délictuelle*, at page 387):

> ... the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the

manner in which to carry out his work.

[65] Courts have recognized certain inadequacies with the control test as a means of determining the existence of an employment relationship. In *Wiebe Door Services Ltd.*, for example, MacGuigan J.A. stated at pages 558-59:

> ... A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.

[66] The level of control the employer has over a worker's activities will always be a factor as indicated by the Supreme Court in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., *supra*, at para. 47. But other factors to be considered include:

> 47 ... 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.

[67] On the issue of control, Acanac states in its brief at para. 36:

> 36) ... Contrary to what was stated by the [Director] it was **not** the nature of on line work done from a distance that indicated a

> lack of control. Rather it was the nature of high tech and specialised technical knowledge based work or artistic endeavour then that was indicia of inability to supervise and control by the payer, notwithstanding distance. ...

[68] I take it from the above that Acanac's position is that Sabau was engaged in specialized work and there was essentially no control over his work product. The adjudicator for the most part agreed with that submission.

[69] The Director complains that the adjudicator used an overly simplistic analysis. The Director suggests the proper approach to be undertaken is a recognition that in the new technology world, the globalization of online work should not be used as an indicia of lack of control.

[70] Geographic distance does not demonstrate a lack of control. Acanac did provide Mr. Sabau with an orientation and then essentially turned him loose to address the troubleshooting calls that came into the Acanac system. However, there was monitoring.

[71] Acanac's evidence is that if any particular technical representative was taking too long solving a problem, they would engage the representative with a view to coaching. In short, if the technical representative was consistently taking too long to solve a troubling-shooting problem, they would be tutored so that they could perform their functions in a manner more satisfactory to Acanac.

[72] The Director argues that the critical elements in the relationship were Acanac's ability to coach, teach, control and if necessary fire Mr. Sabau. The fact that Mr. Sabau did not require much coaching does not lead to the conclusion that there was

a lack of control by Acanac in the relationship.

[73] Mr. Sabau could not set his own rate of pay. Acanac determined that. Mr. Sabau had to request holidays on two weeks' notice. Mr. Sabau's work was monitored. The clients that phoned in were not Mr. Sabau's clients, they were Acanac's customers. The Director maintains that when viewed clearly, the badges of control were present.

Ownership of Tools

[74] An examination of the "ownership of tools" is a long-standing conceptual element to be considered by the trier of fact in determining whether or not there is employee status. In my view, that task is rendered problematic in an industry that operates at a distance and online. The analysis on this topic must be consonant with new types of industries or employment spawned by the Internet.

[75] In this case, Acanac quite properly points out that it supplied Sabau with virtually nothing other than access to its system. Sabau brought everything else to the table, namely his computer and his skills. Acanac reasons that that being the case in the debate over ownership of tools, the decision falls squarely in its favour.

[76] Respectfully, I think a more exacting approach is warranted. The true "tool" here was Acanac's system. It was Acanac's system that opened up Mr. Sabau's opportunity to engage callers coming in through the system through the 1-800 number seeking assistance. I would respectfully submit that arguably, to the extent there is a tool here as between employer and employee, the tool is the Acanac system. The adjudicator, of course, was of a different view.

Chance of Profit/Risk of Loss

[77] The Director's position on these elements is summed up neatly at paras. 54 to 56:

> 54. It is the Director's position that the Adjudicator erred in his analysis of the opportunity for profit and risk of loss factor. On the facts as found, it is clear that Mr. Sabau had neither an opportunity for profit nor a risk of loss.
>
> 55. The ability to profit financially from one's own abilities, skills and effort is essential to the concept of self-employment. Conversely, if unsuccessful, there is a risk of loss. In this case, Mr. Sabau was paid the exact same rate regardless of his ability or effort. There was no financial incentive or gain to be realized from handling difficult calls or handling extra calls, and there was no corresponding financial loss for his failure to do so.
>
> 56. In *Warren* [*Warren v. 622718 Saskatchewan Ltd*., 2004 SKQB 346, 252 Sask.R. 290], the Court considered the opportunity for profit factor in determining whether the Plaintiff was an employee or an independent contractor. The Plaintiff had been paid a base monthly salary. However, he was also able to earn additional amounts as commission, and was eligible for a "long-term incentive" which consisted of a share allotment of 1% of the company's equity after each year of employment, to a maximum of 5% [paras. 5 and 6]. In applying the facts to the law, Justice Wilkinson stated:
>
> > [22] ... The plaintiff assumed no financial risk, in fact the terms of engagement guaranteed his base salary regardless of commissions generated. The chance of profit existed in a restricted sense, in the form of the long-term incentive, but not in the wider sense that is generally considered in the analysis. **In answering the fundamental question, namely was the plaintiff in business for himself, the answer must be no.** [Emphasis of Director]

[78] Both Acanac and the adjudicator focussed on the fact that Mr. Sabau could have subcontracted his work and taken on his own employees or his own independent contractors. Mr. Sabau indicated he did not know that it was available for him to arrange for subcontractors.

[79] It is important to note that it was Acanac, not Mr. Sabau, that set the pricing, if any, for his technical expertise. Again, the people phoning in were Acanac's customers, not Mr. Sabau's.

[80] Being mediocre in terms of offering technical assistance to Acanac's clients would not affect Mr. Sabau's payment. He was subject to some monitoring but typically was only monitoring if the length of the calls took too long. Of course, if clients complained, what Mr. Sabau would be subject to is a termination of his relationship from Acanac. In short, his only risk of loss was a loss of his position.

[81] Acanac suggests that Mr. Sabau could control his own profit because he could essentially work as many hours as he wished.

[82] On the issue of chance of a profit, it seems to me to be critical to note that Mr. Sabau was an hourly paid employee. If he was particularly efficient or effective in handling calls, he had no financial gain from that talent. Acanac replies that if his expertise was widely accepted, he would develop an "online persona" that could operate to his benefit. What is uncertain is whether that fact could reasonably be characterized as an "opportunity for profit".

[83] The Director also complains that the adjudicator appeared to forget that the *Act* is remedial legislation and thus should be interpreted in a matter consonant with the

policy objective of the *Act*, in short, to be interpreted broadly to protect the interests of workers. In particular, the *Act* specifically indicates it exists to protect home workers.

[84] Examining the true state of affairs makes it clear that the only "opportunity for profit" Mr. Sabau had was the ability to work as many hours as he wished. In my view, working double shifts *ad infinitum* is not a conceptual equivalent of "chance for profit" or "risk of loss".

[85] The adjudicator found that Sabau's chance of profit laid in his ability to choose how much he wished to work and subcontract. I note the subcontracting option must be in the context that Sabau originally earned $10.00 an hour (later $12.00). To suggest that those constitute a chance for profit does not withstand the scrutiny of a clear-eyed reconsideration.

Conclusion

[86] In addressing the fourfold test and, more to the point, in determining the debate in this matter, it is necessary to view the totality of the relationship between Sabau and Acanac from an "above the forest" perspective. Respectfully, as I have outlined, the arbitrator's findings do not coincide with the facts of the relationship, nor do they fully address the nature of "tools". In that context and on a focussed examination of the true nature of the components of the relationship between Sabau and Acanac, the analysis leads inexorably to the conclusion that Sabau was, in real terms, an employee of Acanac.

[87] Therefore, I conclude, respectfully, that the adjudicator did not reasonably determine that Mr. Sabau was an independent contractor. His conclusions are not consonant with the facts before him and the law pertaining to same. In short, the decision

is not reasonable and thus reviewable by the court.

[88] Accordingly, I allow the Director's appeal and the wage assessment of April 16, 2012 of $6,625.13 is hereby reinstated.

[89] There will be no order as to costs.

J.
R.S. SMITH