

IN THE MATTER OF A HEARING PURSUANT TO SS.
62.1 AND 66.2 OF *THE LABOUR STANDARDS ACT*,
R.S.S. 1978, c. L-1 (AS AMENDED)

BETWEEN:

GEWORSKY'S PAINTING & DECORATING,

APPELLANT,

- and -

JEROME OUELLETTE and SONNY CARON,

RESPONDENTS
(COMPLAINANTS)

ADJUDICATOR'S DECISION
February 13, 2012

T. F. (TED) KOSKIE, B.Sc., J.D.

Date of Hearing: January 17, 2012

Place of Hearing: Conference Room #9.1, 9th Floor
122 - 3rd Avenue North
Saskatoon, Saskatchewan

Representatives: No one appearing for the Appellant

Maureen Ooms, Senior Labour Standards Officer, for the Respondents
(Complainants), Jerome Ouellette and Sonny Caron

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I. INTRODUCTION

[1] This is an appeal by Geworsky's Painting & Decorating ("Geworsky") of Wage Assessment No. 4440 (the "Assessment") issued pursuant to section 60 of *The Labour Standards Act*, R.S.S. 1978, c. L-1 (as amended) (the "Act") by the Director of Labour Standards (the "Director") on October 5, 2011.

[2] The Assessment directed Geworsky to pay:

- a) \$2,455.16 to Jerome Ouellette ("Ouellette"); and
- b) \$4,682.07 to Sonny Caron ("Caron").

II. PRELIMINARY MATTERS

[3] I convened this hearing at 9:30 a.m., the appointed time. Maureen Ooms, Senior Labour Standards Officer, was present. Ms. Ooms advised she represented Ouellette and Caron. Both Ouellette and Caron were also present. No representative of Geworsky was present.

[4] Ms. Ooms provided me with a sworn document—dated January 17, 2012—from Geworsky. The document says:

I, Angie Geworsky, owner of Geworsky's Painting, do hereby submit Affidavits for the adjudication that will take place at 9:30 am on Tuesday, January 17, 2012, in room 9.1 of the Sturdy Stone building. I understand that the evidence that I am submitting will not hold with same weight as if I were in attendance.

I am unable to attend the hearing due to having to travel to Manitoba due to a family emergency.

I also remit a certified cheque in the amount of \$500.00 to perfect my appeal of the wage assessment, and ask that the hearing proceed in my absence, but that the Affidavit evidence be considered.

I am aware of the changes in the quantification of the employee's claims due to an error in calculation, and agree with the changes that have been made.

[5] The Affidavits referenced in the document were Affidavits of:

- a) Angela Geworsky, sworn January 17, 2012;
- b) Desmond Schultz, sworn January 16, 2012; and
- c) Brady Allen Klassen, sworn January 16, 2012.

[6] Ms. Ooms informed me that Angie Geworsky was either in the building or returning to it. I asked Ms. Ooms to speak with Ms. Geworsky and encourage her to appear before me and provide particulars of the "family emergency" referenced in her document. I asked Ms. Ooms to advise Ms. Geworsky that I was prepared to hear argument for an adjournment that would allow for her to appear and give evidence personally. I adjourned the hearing to give Ms. Ooms the time to find and speak with Ms. Geworsky.

[7] After approximately 45 minutes, I reconvened this hearing. Ms. Ooms reported to me that she personally met and spoke with Ms. Geworsky and that she:

- a) did not want to ask for an adjournment; and
- b) declined to attend this hearing.

[8] I decided to proceed with the hearing in the absence of a representative of Geworsky.

[9] There were no preliminary objections on constitutional or jurisdictional grounds.

[10] I asked Ms. Ooms what her position was with respect to Ms. Geworsky's request that I consider the Affidavits tendered. Ms. Ooms indicated that she did not object to that request. However, Ms. Ooms took the position that while I could consider the Affidavits, I should give them little weight. Ms. Ooms based her position on the fact that she would not have the benefit of cross examining the deponents to the Affidavits.

[11] I decided to enter the Affidavits as Exhibits. I agree with Ms. Ooms that I cannot give the content of the Affidavits the same weight as evidence that would be or could have been tendered by *viva voce* testimony.

[12] Ms. Ooms indicated that incorrect rates of pay were used when calculating the Assessment. With respect to:

- a) Ouellette, his rate of pay was calculated entirely at \$16.00 per hour, but should have been reduced in mid-December 2010 to \$14.00 per hour and then raised to \$15.00 per hour in mid-January 2011; and
- b) Caron, his rate of pay was calculated entirely at \$20.00 per hour, but should have been raised to \$21.00 per hour in mid-January 2011.

[13] Ms. Ooms took the position that section 62.2(1)(a)(ii)(A) of the *Act* gives me authority to vary the amounts claimed in the Assessment and invited me to vary the claim with respect to:

- a) Ouelette to \$2,037.21; and

b) Caron to \$5,178.87.

[14] Ms. Ooms tendered audit sheets and claim breakdowns to support these numbers. She also tendered an Affidavit of Service of not only those audit sheets and claim breakdowns, but an explanatory letter.

[15] In light of the material filed by Ms. Ooms and Ms. Geworsky's acknowledgment that she is "aware of the changes in the quantification of the employee's claims due to an error in calculation" and her agreement with the changes that have been made, as a preliminary ruling, I will treat the Assessment as varied to direct Geworsky to pay:

a) \$2,037.21 to Ouellette; and

b) \$5,178.87 to Caron.

III. THE DISPUTE

[16] Ouellette and Caron maintain they were not paid for overtime, public holidays, annual holidays and some hours worked.

[17] Geworsky maintains it has paid for all hours worked and that it does not owe pay for overtime, public holidays and annual holidays.

[18] Geworsky takes the position Ouellette and Caron were subcontractors, as opposed to employees, and are therefore exempt from the *Act*.

IV. FACTS

A. EVIDENCE OF APPELLANT

[19] In her Affidavit, Angela Geworsky says:

a) she was the sole owner/operator of Geworsky;

b) Geworsky is a painting company;

c) she knew Caron personally since approximately mid-year 2004 and had a friendly relationship with him from then until he ceased working for Geworsky in March 2011;

d) she started receiving regular texts from Caron in the beginning of 2010;

e) in those texts, Caron told her how depressed and suicidal he was, that he needed work

- and wondered if she could give him some work;
- f) she told Caron for the first couple of months that she did not have any work to sub out at the time;
 - g) she finally agreed to give Caron some sub trade work in April 2010 as she felt sympathy towards him as he had been a friend since 2004;
 - h) she gave Caron sub trade work from April to mid-May 2010;
 - i) she did not call Caron for any more sub contract work until mid September, 2010;
 - j) at the time when she called him for further work, the same arrangement was agreed upon;
 - k) she had a verbal agreement with Caron that he would be hired as a sub trade and would be fully responsible for his own deductions;
 - l) she had many conversations with Caron in relation to a stucco business he owned the year prior;
 - m) Caron asked her if he could use her work van to transport a mixer so that he could complete a contract that he had for a job;
 - n) she was witness to Caron leaving the job site at approximately noon the following day with her work van that he was using to transport the mixer for a contract he was going to complete;
 - o) she was involved in conversations wherein Caron informed her that he had other contracts that he was completing for other contractors;
 - p) she was approached by Caron in regards to hiring someone he knew as a sub-trade;
 - q) Caron described this person as Ouellette, who was a very hard worker and very quick to catch on to the various trades;
 - r) Caron informed her this person was his cousin;
 - s) after meeting with Ouellette, with Caron present, she decided to try Ouellette as a sub trade;
 - t) she used Ouellette as a sub trade from October 8, 2010, to January 31, 2011;

- u) she discussed with Ouellette that he would be responsible for his own deductions as he was being hired as a sub trade;
- v) in the presence of Caron, Ouellette agreed verbally;
- w) she had discussed with both Caron and Ouellette that they would be paid certain amounts based on certain jobs they would be doing during specific periods of time, that is, a two week period, meeting all deadlines necessary;
- x) she factored into the figures of what was paid to both Caron and Ouellette the cost of renting her equipment to complete the jobs;
- y) she never asked or requested Caron or Ouellette to work any holidays;
- z) she has personal knowledge that both Caron and Ouellette left job sites at various times to take care of whatever personal or professional business they may have had;
- aa) she ceased to call Caron after March 30, 2011, as his quality of work had deteriorated;
- ab) she did not give Caron notice, as he was hired as a sub trade and, as he was self-employed, she was not required to give him notice;
- ac) she received a phone call from Ouellette on January 31, 2011, during which he stated that he would not be returning to work and did not give her any notice as this was not required as he was hired as a sub trade and was self-employed;
- ad) she discussed further with Ouellette why he was no longer interested in working for her and he informed her that he could no longer work with Caron on any jobs as he was fearful of him;
- ae) Ouellette further stated that Caron had on numerous occasions verbally and physically abused and threatened him on the job as well as off; and
- af) she had been informed by Brady Klassen, who has also done work for Geworsky and has worked with both Caron and Ouellette, that he was witness to loud verbal fighting wherein Caron threatened Ouellette.

[20] In his Affidavit, Desmond Schultz says:

- a) he has completed work for Geworsky over the years 2009 and 2010;
- b) he worked with Caron while completing work for Geworsky in 2010;

- c) he was at all times fully aware that any deductions for taxes, etc. were his responsibility to take care of and would not be deducted by Geworsky as he had been hired as a sub-trade;
- d) he was witness to and involved in several conversations with Angie Geworsky, where this was discussed;
- e) while doing work for Geworsky, he was never asked or required to work any holiday;
- f) he was paid well for the work that he completed for Geworsky; and
- g) he had personal conversations with Caron wherein he stated that he owned his own company and was self-employed prior to doing work for Geworsky.

[21] In his Affidavit, Brady Allen Klassen says he:

- a) has completed work for Geworsky over the years 2008, 2009, 2010 and 2011;
- b) worked with Caron and Ouellette while completing work for Geworsky in 2010 and 2011;
- c) was at all times fully aware that any deductions for taxes, etc. were his responsibility to take care of and would not be deducted by Geworsky;
- d) was witness to and involved in several conversations with Angie Geworsky, where this was discussed with both Caron and Ouellette;
- e) was witness to Caron and Ouellette stating that they understood and agreed to these terms of pay;
- f) had several personal conversations with Caron wherein he stated that he owned his own company and was self-employed prior to doing work for Geworsky and that he had to check into obtaining a GST number as he was approaching his limit allowed for self-employment prior to charging GST;
- g) had several conversations with Caron wherein he discussed other sub contract work that he was completing at the same time he was doing work for Geworsky; and
- h) was witness to Caron coming and going from jobs as he pleased for coffee breaks, or to leave to take care of other business he had during the work day.

B. EVIDENCE OF RESPONDENTS (COMPLAINANTS)

[22] Ouellette testified:

- a) he commenced employment with Geworsky on October 13, 2010, and his last day was January 28, 2011;
- b) he heard about the job through Caron;
- c) he was interviewed by Rick Klassen and Angie Geworsky;
- d) when hired, no written contract was signed, but he neither asked for nor agreed to a sub contract;
- e) he was initially paid \$16.00 per hour, which was decreased to \$14.00 per hour in December 2010, and then increased to \$15.00 per hour in January 2011—all decisions made by Geworsky without consultation;
- f) he was paid his final wages with a cheque that subsequently bounced—this cheque has not been replaced;
- g) he did not invoice Geworsky for his work;
- h) he was paid by cheque and sometimes cash, every two weeks—a practice determined by Geworsky without consultation;
- i) Geworsky determined his hours of work, which were normally 8:00 a.m. to 4:30 p.m.;
- j) Geworsky determined when he took his breaks;
- k) though he had other duties, his work generally involved prepping houses for painting—something Geworsky trained him to do;
- l) Geworsky decided what work he would do, his priorities, time frames and his specific tasks;
- m) Geworsky would determine if additional help was required and would arrange for and pay for same;
- n) Geworsky supervised his work either personally when on site or other wise several times a day by text or telephone;

- o) Geworsky kept track of his time;
- p) if he was sick, he reported that to Geworsky;
- q) Geworsky owned, supplied and maintained all tools;
- r) Geworsky obtained and supplied all materials;
- s) Geworsky paid for any damage at their job sites;
- t) Caron drove him to job sites in vehicles owned by Geworsky;
- u) Geworsky paid for all vehicle expenses;
- v) he had no responsibility for insurance, office expense and bad debt;
- w) with respect to Angela Geworsky's Affidavit, he:
 - i) admits meeting with Ouellette, but denies she ever said anything about being retained as a sub trade;
 - ii) denied being hired as a sub trade;
 - iii) denies she discussed with him that he would be responsible for his own deductions as he was being hired as a sub trade or that he agreed to same;
 - iv) he denies she had discussed with him that they would be paid certain amounts based on certain jobs they would be doing during specific periods of time;
 - v) denies getting any bill or accounting for the cost of renting equipment to complete jobs;
 - vi) denies leaving job sites at various times to take care of whatever personal or professional business he may have had;
 - vii) admits calling her on January 31, 2011, to advise he would not be returning to work and but denies saying he did not need to give her any notice as this was not required as he was hired as a sub trade and was self-employed;
 - viii) admits he advised her he was no longer interested in working for her and but denies he informed her that he could no longer work with Caron on any jobs as he was fearful of him; and

- ix) denies that Caron had verbally and physically abused and threatened him on the job as well as off;
- x) with respect to Brady Allen Klassen's Affidavit, he:
 - i) denies he was at all times fully aware that any deductions for taxes, etc. were his responsibility to take care of and would not be deducted by Geworsky;
 - ii) denies he had any conversations with Angie Geworsky where this was discussed and;
 - iii) denies he agreed to these terms;
- y) he did not work for anyone else during the time he was employed by Geworsky; and
- z) he lost his records in a flood, but based on records supplied by Geworsky, from October 13, 2010, to January 28, 2011, he:
 - i) worked 654 hours;
 - ii) was paid \$10,145.00;
 - iii) was not paid for overtime;
 - iv) was not paid for public holidays; and
 - v) was not paid for annual holidays.

[23] Caron testified:

- a) he commenced employment with Geworsky on September 27, 2010, and was fired March 30, 2011;
- b) before commencing employment with Geworsky, he worked at a golf club;
- c) on several occasions, he asked Angie Geworsky for work and she eventually offered him a job;
- d) when hired, no written contract was signed, but he neither asked for nor agreed to a sub contract;
- e) he was initially offered \$18.00 per hour, but was paid \$16.00 per hour;

- f) his wage was subsequently increased to \$18.00 per hour in October 2010, then to \$20.00 again in October 2010 and then to \$21.00 in January 2011—all decisions made by Geworsky without consultation;
- g) he did not invoice Geworsky for his work;
- h) he was paid by cheque and sometimes cash, every two weeks—a practice determined by Geworsky without consultation;
- i) Geworsky determined his hours of work, which normally started at 8:00 a.m.;
- j) Geworsky determined when he took his breaks;
- k) he started as a prepper—something Geworsky trained him to do;
- l) he later began painting—again something Geworsky trained him to do—and eventually became a foreman;
- m) other duties included waking up and picking up other employees, getting coffee, driving people around and taking garbage to the dump;
- n) Geworsky decided what work he would do, his priorities, time frames and his specific tasks;
- o) Geworsky would determine if additional help was required and would arrange for and pay for same;
- p) Geworsky supervised his work either personally when on site or other wise several times a day by text or telephone;
- q) Geworsky kept track of his time;
- r) if he was sick, he reported that to Gewaorsky;
- s) Geworsky owned, supplied and maintained all tools;
- t) Geworsky obtained and supplied all materials;
- u) Geworsky paid for any damage at their job sites;
- v) Geworsky supplied all vehicles and paid for all vehicle expenses;

- w) he had no responsibility for insurance, office expense and bad debt;
- x) he did not bid jobs;
- y) he did no budgeting;
- z) he did not handle complaints;
- aa) he lacked any authority to make any substantial decisions regarding the business;
- ab) he could not hire, fire, schedule or discipline employees;
- ac) he was in no way responsible for a budget of any kind;
- ad) he did not trouble shoot, or handle complaints or concerns from the owners of the sites where he and the other workers were painting;
- ae) he was required to work over his noon hour break periods;
- af) he was never provided a pay stub;
- ag) he was not provided with a breakdown of his pay;
- ah) he was not provided with a T-4;
- ai) he was not provided with a Record of Employment (commonly called a separation slip) when his employment terminated;
- aj) he kept a record of the hours he worked in a " day timer " and based on same and records supplied by Geworsky, from September 27, 2010, to March 30, 2011, he:
 - i) worked 1,119 hours or, if you include noon breaks, 1,176.5 hours;
 - ii) was paid \$22,083.50;
 - iii) was not paid for overtime;
 - iv) was not paid for public holidays; and
 - v) was not paid for annual holidays;
- ak) with respect to Angela Geworsky's Affidavit, he:

- i) says Rick Klassen is also an owner/operator of Geworsky;
- ii) denies sending regular texts to her, but admits asking for work from time to time;
- iii) denies telling her he was depressed and suicidal;
- iv) denies talking about and agreeing to sub trade work and says he would never agree to same;
- v) says she gave Caron sub trade work from April to mid-May 2010;
- vi) says that, although he has worked in the stucco field, he has no stucco business and has never owned a stucco business;
- vii) asked her if he could use her work van to transport a mixer only as a favour to a friend;
- viii) denies having any conversations wherein he informed her that he had other contracts that he was completing for other contractors;
- ix) approached her to hire Ouellette as an employee, not as a sub-trade, and Ouelette never agreed in his presence to be engaged as a sub trade;
- x) denies discussed and agreeing to be paid certain amounts based on certain jobs they would be doing during specific periods of time;
- xi) was always paid by the hour;
- xii) denies getting any bill or accounting for the cost of renting equipment to complete jobs;
- xiii) says Geworsky did ask that he work holidays;
- xiv) except when transporting a mixer on one occasion, denies he left job sites at various times to take care of whatever personal or professional business he may have had;
- xv) denies the quality of his work had deteriorated;
- xvi) denies verbally and physically abusing and threatening Ouellette on the job as well as off; and

- xvii) denies loud verbal fighting with and threatening Ouellette;
- al) with respect to Desmond Schultz's Affidavit:
- i) he did not get along with Desmond Schultz;
 - ii) Desmond Schultz is a friend of Rick Klassen and Angela Geworsky;
 - iii) he says he was not employed by Geworsky during the time of his claim;
 - iv) he denies he was aware that any deductions for taxes, etc. were his responsibility to take care of and would not be deducted by Geworsky as he had been hired as a sub-trade;
 - v) he says while doing work for Geworsky, he was asked and required to work holidays; and
 - vi) he did not have personal conversations where he stated that he owned his own company and was self-employed prior to doing work for Geworsky;
- am) with respect to Bradley Allen Klassen's Affidavit, he:
- i) denies he was aware of or agreed that any deductions for taxes, etc. were his responsibility to take care of and would not be deducted by Geworsky and denies being involved in any conversations with Angie Geworsky concerning same;
 - ii) denies having a conversation with him wherein he stated that he owned his own company and was self-employed prior to doing work for Geworsky and that he had to check into obtaining a GST number as he was approaching his limit allowed for self-employment prior to charging GST;
 - iii) denies having conversations with him wherein he discussed other sub contract work that he was completing at the same time he was doing work for Geworsky; and
 - iv) except for the one instance already referenced, denies coming and going from jobs as he pleased for coffee breaks, or to leave to take care of other business he had during the work day.

V. DECISION

A. LAW

[24] The relevant provisions of the *Act* are as follows:

2 In this Act:

(a) "annual holiday pay" means an amount of money to which an employee is entitled pursuant to subsection 33(1) or section 35;

...

(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;

(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:

(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;

...

(l) "pay" means remuneration in any form;

...

(l.2) "public holiday pay" means an amount of money to which an employee is entitled pursuant to section 39;

...

(q) "total wage", in respect of any period of employment of an employee, means all remuneration that the employee is paid or is entitled to be paid by his employer, whether or not payment is actually made during that period of employment, in respect of the labour or services that he performs for his employer during that period of employment, and includes:

(i) sums deducted from such remuneration for any purpose whatever;

(ii) remuneration in respect of overtime work that he performs for his employer during that period of employment;

(iii) remuneration in respect of any annual or special holiday that his employer permits him to take during that period of employment;

(iv) the cash value of any board or lodging received by the employee as part payment of wages during that period of employment;

...

(r) "wages" means all wages, salaries, pay, commission and any compensation for labour or personal services, whether measured by time, piece or otherwise, to which an employee is entitled;

...

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

...

6(1) Subject to sections 7, 9 and 12, no employer shall, unless he complies with subsection (2), require or permit any employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week.

(2) Subject to sections 7 and 9, an employer who requires or permits an employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week shall pay to that employee wages at the rate of time and one-half for each hour or part of an hour in excess of eight hours in any day, or 40 hours in any week, during which he requires or permits the employee to work or to be at his disposal.

...

10(1) Where in any week there is a public holiday mentioned in Part VI:

(a) subsections 6(1) and (2), and section 7, shall be read with the substitution of the word "32" for the word "40" wherever it occurs in those provisions; and

(b) in calculating the time worked by an employee in any such week, no account shall be taken of any time worked by him on the public holiday or of any time during which he was at the disposal of his employer during the public holiday.

(2) Where section 9 applies and where in any week during the period of weeks prescribed by the director under section 9 there is a public holiday mentioned in Part VI, the total number of hours that the employee is required by his employer to work or to be at his disposal over the period of weeks, without being paid wages at the rate of time and one-half, shall be reduced by eight hours and the employer shall pay to the employee wages at the rate of time and one-half for each hour and part of an hour that the employee works, or that he is at the disposal of the employer, in excess of the working hours as reduced by this subsection and for the purpose of this subsection, in calculating the total number of hours worked by an employee over any such period of weeks, no account shall be taken of any time worked by him on the public holiday or of any time during which he was at the disposal of his employer during the public holiday.

...

- 33(1) An employee is entitled to receive annual holiday pay in the following amounts:
- (a) if the employee is entitled to an annual holiday pursuant to clause 30(1)(a), three fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday;

...

35(1) If the employment of an employee terminates, the employer of the employee shall, within fourteen days after the effective date of termination, pay to the employee the annual holiday pay to which he or she is entitled pursuant to this Act.

(2) If the employment of an employee terminates, the employee is entitled to annual holiday pay calculated in accordance with section 33 with respect to all total wages earned by the employee with respect to which the employee has not previously been paid annual holiday pay.

(3) Subsection (2) applies whether or not an employee has completed a year of employment.

...

39(1) The minimum sum of money to be paid for a public holiday or for another day designated for observance of the public holiday by an employer to any employee who does not work on that day:

- (a) where the employer pays to the employee the employee's regular wages for the period that includes that day, is equal to those wages;

- (b) in any other case, is the amount A calculated in accordance with the following formula:

$$A=W/20$$

where W is the total of the wages earned by the employee during the four weeks immediately preceding the public holiday, exclusive of overtime.

(2) The minimum sum of money to be paid for a public holiday or for another day designated for observance of the public holiday by an employer to any employee who works on that day is the total of:

- (a) the amount to which the employee would be entitled pursuant to subsection (1) if the employee did not work on that day; and

- (b) the amount of wages, calculated at a rate that is 1.5 times the employee's regular rate of wages, for the time worked.

(3) For the purposes of this section, where an employee takes an annual holiday during the four weeks immediately preceding a public holiday, "wages" includes the amount of annual holiday pay that is payable with respect to any annual holidays actually taken during that period.

B. ANALYSIS

[25] Ouellette and Caron maintain Geworsky has not paid all wages owed to them. They also maintain Geworsky has not paid them any overtime, public holiday pay or annual holiday pay. Geworsky disputes the former, but does not contest the latter. Geworsky maintains Ouellette and Caron are subcontractors, not employees, and, hence, not entitled to the latter pay.

[26] Ms. Ooms referred me to *Montreal (City) v. Montreal Locomotive Works Ltd.*¹ Speaking for the Judicial Committee of the Privy Council, Lord Wright considered four criteria—control, ownership of tools, chance for profit and risk of loss—when determining whether a worker was an employee or a subcontractor.²

[27] Ms. Ooms also referred me to *Jacques v. 96955 Saskatchewan Ltd. (The Drapery Shoppe)*.³ There, Harabinsky, J. referenced a fifth criterion—the organization test.⁴ In essence it asks what business does the company provide, how the person fits into the organization, what work he or she does and how it fits with the service the business provides.

[28] I accept these criteria are appropriate to apply in the appeal at hand.

[29] With respect to “control” :

- a) Geworsky unilaterally varied rates of pay for Ouellette and Caron;
- b) Geworsky unilaterally determined the manner in which Ouellette and Caron would be paid—that is, by cash or by cheque, and how often;
- c) Geworsky had full control over Ouellette’s and Caron’s work—every day, Geworsky controlled the W5—who would do the work, what work would be done, why the work would be done, when the work would be done and where the work would be done;
- d) Geworsky directed Ouellette and Caron on how work was to be done;
- e) Geworsky, not Ouellette and Caron, bid jobs;
- f) Geworsky trained Ouellette and Caron and covered the cost of same;

¹[1946] 3 W.W.R. 748 (P.C.)

²*Ibid.*, at para. 17

³[1984] S.J. No. 952 (Q.B.)

⁴*Ibid.*, para 36

- g) Geworsky required Ouellette and Caron to report their activity several times a day;
- h) Ouellette and Caron did not fill out time sheets and were not even in control of how many hours they would get paid for;
- i) Geworsky decided what hours and duties were payable; and
- j) Ouellette and Caron were required to report if they were not going to be able to come to work for whatever reason.

[30] All of the above are indicators of control and although Ouellette and Caron may have been able to make the small everyday decisions that all employees must make during a workday, the direction for their work and the control over their work belonged to Geworsky, not Ouellette and Caron.

[31] With respect to "ownership of tools" :

- a) Geworsky owned all tools and equipment;
- b) Geworsky had the responsibility for the upkeep, maintenance and replacement of all of the tools and equipment;
- c) Geworsky or its customer, not Ouellette and Caron, supplied all of the materials needed for all jobs; and
- d) Ouellette and Caron used Geworsky's vehicles and were not responsible for the gas, vehicle insurance, maintenance or upkeep of same.

[32] Ouellette and Caron owned no tools and used no materials or vehicles that they themselves had to provide.

[33] With respect to "chance for profit and risk of loss" :

- a) generally, if one is a subcontractor, there must be a chance that a profit will be made, or the possibility for loss;
- b) neither Ouellette nor Caron made any capital investment;
- c) Geworsky covered the cost of damage to equipment and materials, work that had to be redone, liability insurance, guarantees for time frames and assumed final responsibility for the quality of the work and all of the costs associated with the work carried out by Ouellette and Caron; and

- d) Ouellette and Caron simply showed up for work, did what they were told to do and received an hourly rate of pay.

[34] Ouellette and Caron had no money invested in association with their work, and therefore could realize no profit, or experience any loss. A person who does the work should receive some benefit beyond a wage—for example, a profit—if they are to be seen as something other than an employee. This was not the case for Ouellette and Caron.

[35] With respect to “organization” :

- a) Geworsky is in the business of painting and decorating and the work they contract to do is mainly prepping and painting
- b) Ouellette and Caron were painters and preppers;
- c) While their work was an integral part of Geworsky’s business, if we ask the question, “whose business is it?,” it is clear that Ouellette and Caron were not in business on their own account, but that they were working as employees for Geworsky.

[36] Ouellette and Caron had no control over what duties they were to do, how they were to do them, where they were to do them, when they were to do them, what hours they were to work or for which they were paid, or the amount and manner in which they were paid. They owned no tools, supplied no materials, used Geworsky's vehicles, and had no capital investment of any kind into the painting and prepping work that they did. They were hired by a painting company to do painting, and thus were an integral part of the business.

[37] I therefore find Ouellette and Caron were employees.

[38] I must now address whether Ouellette and Caron have been paid properly.

[39] Sections 6(1) and 6(2) of the *Act* state the basic rule that employees can only be required to work or be at an employer's disposal for eight hours per day and 40 hours in a week at their regular rate of pay. If an employee works over 8 hours per day, or over 40 regular hours in a week, those hours must be paid at the overtime rate of time and ½ the employee's regular rate of pay. In weeks during which there is a public holiday, overtime is paid after 32 regular hours worked in a week. A week is defined as running from midnight Saturday to midnight the next Saturday.

[40] In Ouellette's case, although he does not agree with the hours that the employer has recorded him as having worked, he was not able to provide any particulars other than that which was provided by Geworsky. Ouellette was paid his final wages with a cheque that subsequently bounced. This cheque has not been replaced. Therefore, Ouellette is owed all wages for the final

pay period. In other pay periods, if he worked over 8 hours per day or over 40 hours per week, he was not paid time and ½, but simply straight time for all hours worked. He would therefore be owed the additional ½ time for all overtime hours worked.

[41] In Caron's case, he did keep track of all hours he worked or was at the employer's disposal each day, with the exception of the hours he spent driving employees home after work. For that, the Assessment added ½ hour per day. I find that is reasonable. Caron testified that he performed duties other than painting for Geworsky, and these hours have not been taken into account when he was paid. For instance, he had to arrive at the employer's home, wake up their son and ensure that he got up and got ready for work. He then had to drive employees to the job site with the company vehicle, and work all day, then drive them home again after work. This is time spent at Geworsky's disposal, and should be paid for either at straight time, or at time and ½, as the case may be, depending on how many hours Caron had already worked on any particular day.

[42] Caron testified that he was required to be at Geworsky's disposal every lunch break. He explained he had to do various tasks, such as cleaning up their yard, running errands, running their kids, and was never paid for this time. The initial Assessment with respect to Caron had subtracted ½ hour for lunch each day, but added ½ hour each day starting in January 2011 for his time spent driving employees home. Based on the evidence, I find that it is reasonable to add back the ½ hour subtracted for lunch each day. This is a more accurate representation of the hours that Caron actually spent performing duties for Geworsky.

[43] Although Caron was a foreman, he lacked any authority to make any substantial decisions regarding the business. He could not hire, fire, schedule or discipline employees, he was in no way responsible for a budget of any kind, and did not trouble shoot, or handle complaints or concerns from the owners of the sites where he and the other workers were painting. These are the criteria that previous adjudications have found are used to determine if an employee is a manager.⁵ Caron did not perform duties that were entirely of a managerial nature, and therefore he would not be exempted from overtime. Although he was a supervisor, he was not a manager, and is therefore entitled to overtime.

[44] Section 39 of the *Act* addresses an employee's entitlement to Public Holiday Pay. There are ten public holidays in Saskatchewan each year, and all employees are entitled to regular public holiday pay, which is paid at 1/20th of the employee's previous four weeks' earnings. If an employee works on a public holiday, then he is entitled to premium holiday pay, that is, time and ½ his normal rate of pay for any hours worked on the holiday itself. The premium public holiday pay is payable in addition to the regular public holiday pay, not instead of it. Ouellette and Caron are entitled to public holiday pay.

⁵ *Carl Włodarczyk v. Windsor Playwood Ltd.* (Act Adjudication, January 9, 2001)

[45] Sections 2(q) and 33(a) of the *Act* provide that annual holiday pay is calculated at 3/52nds of an employee's total gross wages. All employees are entitled to annual holiday pay, and section 35 of the *Act* provides it is payable within 14 days of an employee's last day of work. Geworsky did not pay any annual holiday pay to either Ouellette or Caron. It is owing at a rate of 3/52nds of their total gross earnings for their full periods of employment.

[46] I find that from October 13, 2010, to January 28, 2011, Ouellette:

- i) worked 541.5 regular hours and 112.5 overtime hours;
- ii) was entitled to \$8,363.50 for regular wages and \$2,607.75 for overtime pay;
- iii) was entitled to \$330.48 for regular public holiday pay and \$216.00 for premium public holiday pay;
- iv) was entitled to \$664.48 for annual holiday pay; and
- v) had a total entitlement to \$11,517.73, but was only paid \$10,145.00, leaving a deficiency of \$2,037.21.

[47] I find that from September 27, 2010, to March 30, 2011, Caron:

- i) worked 923 regular hours and 253.5 overtime hours;
- ii) was entitled to \$18,602.00 for regular wages and \$7,677.00 for overtime pay;
- iii) was entitled to \$655.85 for regular public holiday pay and \$600.00 for premium public holiday pay;
- iv) was entitled to \$1,588.55 for annual holiday pay; and
- v) had a total entitlement to \$29,123.40, but was only paid \$22,083.50, leaving a deficiency of \$7,039.90.

VI. AWARD

[48] The appeal is denied.

[49] I find that Ouellette and Caron are employees of Geworsky within the meaning of the *Act*.

A. WAGES

[50] The Assessment is varied to reflect that the amount of:

- a) \$2,037.21 is owing to Ouellette; and
- b) \$7,039.90 is owing to Caron.

B. INTEREST

[51] Geworsky shall pay interest on the sums set forth with respect to:

- a) Ouellette from January 28, 2011; and
- b) Caron from March 30, 2011;

at the rates prescribed by Section 31 of *The Labour Standards Regulations, 1995*, c. L-1, Reg 5, being the rates published pursuant to section 4 of *The Pre-judgment Interest Act*.

Dated at Saskatoon, Saskatchewan, on February 13, 2012.

T. F. (TED)KOSKIE, B.Sc., LL.B.,
ADJUDICATOR

NOTICE

The parties are hereby notified of their right to appeal this decision pursuant to section 62.3 of *The Labour Standards Act*, R.S.S. 1978, c. L-1 (as amended), which reads as follows:

- (1) An employer, a corporate director, an employee named in a wage assessment or a decision of the director pursuant to subsection 62.4(2.1) or the director on behalf of employees may, by notice of motion, appeal a decision of the adjudicator on a question of law or of jurisdiction to a judge of the Court of Queen's Bench within 21 days after the date of the decision.
- (2) An employer, a corporate director, an employee named in a wage assessment or a decision of the director pursuant to subsection 62.4(2.1) or the director on behalf of employees may, with leave of a judge of the Court of Appeal, appeal the decision of a judge of the Court of Queen's Bench on a question of law or of jurisdiction to the Court of Appeal within 30 days after the date of the decision.
- (3) Unless otherwise ordered by a judge of the Court of Queen's Bench, or in the case of an appeal taken pursuant to subsection (2), a judge of the Court of Appeal, enforcement of the decision of the adjudicator or the decision of the judge of the Court of Queen's Bench is not stayed by the appeal.
- (4) The record of an appeal consists of:
 - (a) the wage assessment or a decision of the director pursuant to subsection 62.4(2.1);
 - (b) the notice of appeal served on the registrar of appeals;
 - (c) the written decision of the adjudicator;
 - (d) the notice of motion commencing the appeal to the Court of Queen's Bench; and
 - (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.