Docket: 2017-161(EI)

BETWEEN:

RENEE JOHNSON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

THE BUTLER DID IT INC.,

Intervenor.

Appeal heard on common evidence with the appeal of Renee Johnson, 2017-162(CPP), on July 11 and 16, 2018 at Toronto, Ontario.

Before: The Honourable Justice Pierre Archambault

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Rini Rashid
Counsel for the Intervenor:	Stephanie J. Kalinowski Frank Cesario

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JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue dated November 24, 2016 is vacated on the basis that the appellant held insurable employment with the payer, The Butler Did It Inc., during the period from January 1, 2015 to November 28, 2015.

Signed at Ottawa, Canada, this 22nd day of October 2018.

"Pierre Archambault"

Archambault J.

2017-162(CPP)

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Appellant,

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Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Rini Rashid
Counsel for the Intervenor:	Stephanie J. Kalinowski Frank Cesario

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JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is allowed and the decision of the Minister of National Revenue dated November 24, 2016 is vacated on the basis that the appellant held pensionable employment with the payer, The Butler Did It Inc., during the period from January 1, 2015 to November 28, 2015.

Signed at Ottawa, Canada, this 22nd day of October 2018.

"Pierre Archambault"

Archambault J.

Citation: 2018 TCC 201
Date: 20181022
Docket: 2017-161(EI)
2017-162(CPP)

BETWEEN:

RENEE JOHNSON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

THE BUTLER DID IT INC.,

Intervenor.

REASONS FOR JUDGMENT

Archambault J.

[1] Ms. Renee Johnson is appealing (**EI appeal**), pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 (***Act***), a decision of the Minister of National Revenue (**Minister**). By her decision dated November 24, 2016, the Minister confirmed the rulings officer's decision, made on June 2, 2016, that Ms. Johnson was self-employed when she performed her services for The Butler Did It Inc. (**payer** or **BDI**) during the period from January 1, 2015 to November 28, 2015 (**relevant period**). A similar appeal (**CPP appeal**) was made pursuant to the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

[2] BDI, through its attorney, filed a Notice of Intervention on March 20, 2017 in each of the EI and the CPP appeals.

I. THE ISSUES

[3] The issue in the EI appeal is whether Ms. Johnson was employed in insurable employment with BDI throughout the relevant period. As the issues are

essentially the same in both appeals, it was agreed that the decision rendered in the EI appeal will apply in the CPP appeal.

II. ASSUMPTIONS OF FACT BY THE MINISTER

[4] In her Reply to the Notice of Appeal, the respondent set out the assumptions of fact on which she relied in making her decision:

> 13. In making [her] Decision, the Minister relied on the following assumptions of fact:
>
> (a) the Payer operated a business which provided staffing for catered events within the Toronto area; (admitted[1])
>
> (b) the Payer provided qualified personnel such as bartenders and servers to its clients (the "Clients"); (admitted)
>
> (c) the Payer is a registered corporation, located in Toronto, Ontario; (no knowledge)
>
> (d) the Payer has been operating since 1989; (no knowledge)
>
> (e) on January 1, 2012 the Payer amalgamated with 1508658 Ontario Inc.; (no knowledge)
>
> (f) the individuals who controlled the day-to-day operations of the Payer were:
>
> (i) James Nienhuls—President;
>
> (ii) John Sowden—Vice President;
>
> (iii) David Smith—Director of Operations; and
>
> (iv) Sean Bruno—Scheduling Operations Manager; (admitted)
>
> (g) the Payer employed 10 to 12 full time employees in its administrative offices; (no knowledge)

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[1] These statements were made by Ms. Johnson. BDI admitted all the assumptions made by the Minister. In fact, BDI provided its services also outside the Toronto area, in particular, in the Niagara Falls area.

(h) the Payer had a roster of approximately 830 workers who were retained on an as-needed basis to provides [*sic*] services to the Clients; (no knowledge)

Appellant

(i) the Appellant was hired by the Payer as a banquet server; (admitted)

(j) the Appellant was hired under a written agreement with the Payer on April 21, 2015; (no knowledge)

(k) the Appellant's duties included:

(i) setting up tables; (no knowledge)

(ii) serving food and beverages; and (admitted)

(iii) tearing down; (admitted)

(l) the Appellant performed her duties at the Payer's Clients' venues which included hotels, banquets, conferences etc.; (admitted)

(m) the Appellant determined how to do the job; (denied)

(n) the Appellant provided her services according to her own availability; (admitted)

(o) the Appellant was not required to complete a set number of hours with the Payer; (denied)

(p) the Payer provided optional training to the Appellant; (admitted, but the word "optional" is denied)

(q) the Appellant was not paid for the optional training; (admitted, but the word "optional" is denied)

(r) if the Appellant accepted the optional training, she would receive a raise, after a few shifts; (admitted, but the word "optional" is denied)

(s) the Appellant could perform her services for any other payer; (denied)

(t) the Appellant was not supervised by the Payer; (denied)

(u) where there was a supervisor at an event, the Appellant received details such as timing of the course of events over the evening; (admitted)

(v) the supervisors at the events would not direct or control how the Appellant performed her services; (denied)

(w) the Appellant's initial rate of pay was $14.00 per hour; (admitted)

(x) the Appellant had the ability [to] negotiate for a higher rate of pay; (denied)

(y) the Appellant invoiced the Payer on a monthly basis; (denied)

(z) the Appellant was paid on a monthly basis; (admitted)

(aa) the Appellant was paid by cheque; (admitted)

(bb) the Appellant was not provided with any benefits from the Payer; (admitted)

(cc) the Appellant was not entitled to vacation pay or paid vacation; (admitted)

(dd) the Payer contacted the Appellant by email when work assignments were available; (admitted)

(ee) the Appellant had the ability to refuse or to accept a work assignment; (admitted)

(ff) the Appellant was required to advise the Payer if she was unable to work a scheduled shift or event; (admitted)

(gg) the Appellant could subcontract her work out to another individual; (no knowledge)

(hh) the Appellant provided her own uniform, corkscrew, lighter, note pad and pen; (admitted)

(ii) the Appellant's uniform consisted of black dress pants, socks, shoes and a classic dress shirt; (admitted)

(jj) the Appellant was responsible for the replacement of her tools and equipment; (admitted)

(kk) the Appellant was responsible for obtaining her "Smart Serve" certification; (admitted)

(ll) the Appellant did not incur any significant expenses; (admitted)

(mm) the Payer intended to hire the Appellant as an independent contractor; and (denied)

(nn) the Payer issued a T4A slip to the Appellant for the Period. (admitted)

III. FACTUAL BACKGROUND

A. BDI

(1) Mr. John Sowden, VP

[5] Mr. Sowden (BDI's vice-president and one of its shareholders) testified on BDI's behalf. He has been in the hospitality business for 40 years. He started very young as a worker in a fast-food restaurant chain doing dishwashing; he went to college and obtained a diploma as a food and beverage manager. After his studies, he occupied the position of general manager in several restaurants. He even opened one of his own, which he operated for eight years.

[6] He has been working for BDI for the last 15 years. He started as an operations manager. He confirmed that BDI has been in business for 29 years. He is still close to the operations aspect of the business, as evidenced by the fact that he attends approximately 100 events per year, which represents two or three times a week.

(2) BDI's business as described on its website

[7] "BDI provides services to people or organization that wants to stage events or receptions such as weddings, corporate parties and so on. BDI provides the staffing required for such events". In her book of documents,[2] Ms. Johnson produced some of the pages from the BDI website, which she printed out on April 20, 2017.

[8] On pages 1 and 2 of Tab 6, it is stated:

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[2] Exhibit A-1 at Tab 6.

> . . . For over 20 years, we have been staffing events for Toronto's top caterers, venues, event planners and private functions. Our commitment to customer service and communication has earned us the distinction as Toronto's finest **event and hospitality staffing firm**. We treat each function as a unique affair, putting together a team of experienced service professionals to meet and exceed the specific needs of each event.
>
> OUR SERVICES
>
> . . .
>
> The **Butler Did It** staff are distinguished by their level of **professionalism**. All our staff go through our *Standards of Professional Service*^{TM} program. We build our event staff teams from among a pool of the finest hospitality professionals.
>
> Our supervisors and Head Waits are **Food Safety certified**, and all our staff are Smart Serve certified, **covered** by WSIB and fully insured—ensuring responsible alcohol service and protecting you and your guests.
>
> Once you make a request for staffing, a sales representative will work with you to determine the exact staffing needs for your function.
>
> [Underlining added.]

[9] During his testimony, Mr. Sowden confirmed that it is BDI that pays the premiums to the Workplace Safety Insurance Board (**WSIB**) for all of its employees and the butlers at a cost of approximately $70,000 per year. In addition, BDI has an insurance policy that covers its third-party liability up to an amount of $10 million, for which it paid $20,000 in 2017. The amount may have been slightly lower in 2015.

[10] The professional staff is described on the website as follows:

> Our Service Professionals
>
> Supervisor
>
> OUR SERVICES
>
> A **Supervisor**[3] is your direct liaison with the Butler team and is responsible for:

[3] In bold characters in the text.

> contacting the client before the event…
>
> Wait Staff Support Staff Head Wait Bar Staff Culinary

[Underlining added.]

[11] Reproduced below are some of the testimonials posted on the BDI website. An event manager provided the following testimonial:

> "Firstly, you went completely above the call of duty to assist us with the unforeseen issues we experienced, and this was extremely impressive and very much appreciated. Secondly, Michael and the other two team members were by all reports absolutely amazing on site. They really stepped in at the last minute to make the event a great success."

[Emphasis added.]

Another client, an event coordinator, wrote:

> "We'd like to thank you for all your help during our Staff Holiday Party. The event went flawlessly and we couldn't have done it without your support! Thank you again for supplying us with some amazing staff. Your team have been incredible to work with!"

[Emphasis added.]

Another client wrote as follows:

> " . . . Christian, was an absolute pleasure to work with and took all the pressure off of my shoulders! He **managed** his staff impeccably and what a wonderful staff we had! Thank you so much again and it was so appreciated."

[Underlining and bold emphasis added.]

Another testimonial states:

> " . . . It was a great success and it was due in large part to your exemplary staff. I wanted to pass along my sincere thanks for the level of service your staff have exhibited . . ."

[Emphasis added.]

Yet, another reads:

> "As a wedding and event designer, one of the most important elements of running a successful, seamless event is reliable, courteous staff. The Butler Did It provides exceptional services with professionalism and flare [*sic*] . . ."
>
> [Emphasis added.]

And still another client wrote:

> "With so many events happening in one year it was reassuring to know that all staffing needs, from large, high-end functions to small, home dinner parties would be staffed with professional, courteous, responsible and reliable personnel. It continues to be a pleasure to work with you and your team and I would like to thank you for all of your help this past year . . ."
>
> [Emphasis added.]

(3) BDI's business as described by Mr. Sowden

(a) The clients

[12] Mr. Sowden described BDI's business as filling staffing needs of different organizers of receptions, such as caterers and event planners, and of venues such as hotels (Ritz Carlton and the Hilton), restaurants, the Scotiabank Convention Centre, Maple Leaf Sports & Entertainment venues, golf and country clubs, the Royal Ontario Museum and the Art Gallery of Ontario. BDI is involved with all kinds of different events, such as weddings, the Rogers Cup tennis tournament, the Toronto International Film Festival and events for various corporate clients. He described BDI's high season as being from May to June and from September to December. The company could meet staffing needs for events for anywhere from five guests to five thousand. However, the average is between 500 and 1,000. Generally, the staffing for such events is provided at a ratio of 1 to 15. So for an average gathering of 750 guests, there would be one supervisor and 2 head waiters and a wait staff of approximately 50 to 60 butlers. BDI paid its supervisors at an hourly rate of $20 to $25.

[13] I asked Mr. Sowden to provide a copy of a typical contract with BDI's clients. Such a document could not be provided. However, Mr. Sowden explained that BDI would bill its clients at an hourly rate of approximately $22 to $23 for

each of its butlers and supervisors. In addition to the hourly rate, the clients could be billed for the transportation costs of the staff provided.

(b) The administrative staff

[14] During the relevant period, BDI had ten permanent and two part-time management employees.

(c) The butler staff

[15] The number of workers BDI hired for staffing events was approximately 600 in the relevant period and today it hires approximately 800. They are recruited by advertising on its website and by word of mouth. Candidates are invited to an open house at which they are screened.

[16] Mr. Sowden described the profile of its workers as being students and persons, such as actors and actresses, in the process of establishing themselves in a more permanent activity. He estimated that 50% of his staff was made up of students.

[17] He stated that some of these students would be working for other agencies to fill up the hours during which they were available. However, no such workers testified to corroborate this statement. In addition, Mr. Sowden testified that some of BDI's workers were incorporated. However, again, no one testified, and no documentation was introduced, to this effect. On the other hand, Ms. Johnson testified that she did not know of anyone who would have been incorporated.

[18] According to Mr. Sowden, the butlers were always told they were going to be treated as independent contractors. Almost everyone working as butlers for BDI preferred to be treated as such in this "gig economy", to use his expression. That way, the butlers would be entitled to write off their expenses for tax purposes. Besides Ms. Johnson, no other butler testified at the hearing.

(d) The assignments

[19] In his cross-examination by Ms. Johnson, Mr. Sowden recognized that the assignment process was controlled by BDI, more specifically by BDI's scheduling manager, who would decide which position at a particular function would be filled by a particular butler: for example, whether Ms. Johnson would perform her services as a waitress or as a coat check attendant. However, regardless whether

one acted as a coat check attendant, a server or a bartender, the remuneration would be the same.

[20] Mr. Sean Bruno, an administrative employee, is the person in charge of scheduling operations. Mr. Sowden indicated that approximately 80,000 shift assignments are done every year. The assignments of butlers are usually scheduled three months ahead of time by email. Each butler is asked to confirm his or her availability for the event. The butlers on the roster are not required to accept all assignments offered them, nor is BDI required to offer a minimum number of assignments.[4] However, butlers who refuse too many risk being taken off the roster. Should there be a last-minute problem, butlers who have accepted an assignment are required to use an emergency phone line to inform BDI.

[21] If for a particular event 100 butlers were required, 105 would be assigned because, in BDI's experience, there is always a certain number of butlers who do not show up. He also acknowledged that, should all the assigned butlers appear for the event, BDI would pay their remuneration.

[22] If a particular butler cannot make it, that butler does not have an obligation to find a substitute. If the butler recommends one, that replacement has to be approved by BDI.

(4) BDI's business as described by BDI's lawyers in the Notice of Intervention

[23] I believe that the expression "staffing referral service" used by BDI's lawyers in their Notice of Intervention to describe the business is misleading. The impression that one gets on reading these words is that the business of BDI consists only in referring butlers to its clients, who would then hire them. Generally, BDI does not limit its services to providing staff: it also provides the supervisory staff necessary for the work to be executed. Some of its clients are described as catering companies and event planners. It would thus appear that these catering companies are subcontracting a portion of their services to BDI, which will execute the tasks of carrying the food and the drinks from the bar and from the kitchen to the tables of the guests. So it is more accurate to say that BDI provides

---

[4] See Exhibit I-2, paragraph 1c of the Independent Contractor Agreement (**BDI Agreement**).

banquet serving services to its clients' guests at the events, although it does not provide the equipment, such as the plates, the cutlery and the glasses.

B. Ms. Johnson's general background and education

[24] Ms. Johnson was 46 years old during the relevant period. While in Calgary, she obtained a certificate in administrative secretarial work at "Career College".[5] After she moved from Calgary to Toronto, she could not find work, so she enrolled in a two-year paralegal program at Humber College. After graduating from Humber, she was not able to find work as a paralegal. She had intended to establish a business in that field, but it was difficult to do so because she needed to build up a clientele.

C. The hiring by BDI

(1) The open house

[25] While looking for job opportunities, Ms. Johnson saw on the Internet an invitation to attend an open house organized by BDI, which was looking to hire servers and bartenders. She accepted in June 2014 an offer by BDI to work as a banquet server.

[26] At the interview, which took place at the open house, she met Mike Nickerson, whom she described as an operations manager, and Mr. David Smith, who is described as director of operations in paragraph 13(f) of the Reply to the Notice of Appeal.

(2) Ms. Johnson's experience as a worker in the hospitality business

[27] During the aforementioned interview, she described her work experience as a waitress and bartender. She would carry plates when working as a waitress. In her testimony, Ms. Johnson described her experience in the restaurant and bar business. She mentioned that she had been a volunteer bartender at the Muhtadi International Drumming Festival, which takes place once a year in Toronto and lasts two days. In her résumé,[6] filed by BDI, she states that she has been a volunteer at that festival since 2007. So in 2015 it would have been for eight years.

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5 Exhibit I-1, Tab 6.

6 Exhibit I-1, Tab 6.

At the time of the BDI open house, she had also been doing work for a small agency called Server, Servers and Shakers since October 2011, preparing food and vegetable trays, heating and serving food for guests, serving appetizers and alcohol, washing dishes and cleaning the preparation area. She testified that this would occur two or three times a year, usually at the residences of the agency's clients. These would have been six hour events.

[28] In addition, Ms. Johnson worked in truck stop restaurants as a waitress during her summer vacations and for a few months during her school year when she was a teenager in Calgary. She also worked for Wendy's and McDonald's.

(3) The hiring agreement

[29] Ms. Johnson testified that she was never told at the open house or at the initial orientation which followed that she was being hired as an independent contractor. However, she acknowledged that she was told there would not be deductions at source from her remuneration. She also stated that she did not sign any written contract in June 2014 when she was first hired by BDI.

[30] To Mr. Sowden's knowledge, Ms. Johnson never complained to BDI about being treated as an independent contractor or about the fact that there were no withholdings at source for 2014 and 2015.

(a) The sign-off sheet

[31] During her cross-examination, Ms. Johnson discussed the document appearing in Exhibit I-1, Tab 5, which is described as the "Sign Off Sheet". In this document, Ms. Johnson states that she understands the conditions for working for 1508658 Ontario Inc. (an entity which is assumed by the Minister, according to paragraph 13e) of the Reply to the Notice of Appeal, to have been amalgamated with BDI in 2012). The sign-off sheet appears to be a document taken from a website because it says that "[b]y checking the box below and typing your name into the Sub-Contractor Signature box, you are confirming that the above statements are true. You agree that by typing your name, you are electronically signing this document." However, on the document filed, there are handwritten check marks next to "I agree".

[32] Ms. Johnson recognized her signature in the disclaimer box bearing the heading "Disclaimer and Hardcopy Signature", in which it is indicated that "[b]y signing below, I agree that I have read and agreed to the terms and conditions of

the following forms that I have filled and signed". One of the forms is an Independent Contractor Agreement next to which there is a handwritten check mark in the "I agree" box, and next to that the date "Jun, 10th/14" is entered by hand. Ms. Johnson recognized her signature, but she denied having checked the boxes and written the dates appearing in that disclaimer box. In all likelihood, this was done by Ms. Christine Latimer who was described by Mr. Sowden and in emails filed in Exhibit A-1 as the people manager and whose job was to take care of the hiring process.

[33] In Ms. Johnson's mind, by signing her name she only agreed that she was being hired seasonally at the rate of $14 per hour. It should also be stated that the sign-off sheet states the following in item number 2: "I will submit a monthly invoice by the 5th of each month for all shifts worked in the previous month." Ms. Johnson also testified that she had looked for the written independent contractor agreement that she had allegedly read and signed but had been unable to find such a document.

(b) The Food Handlers Agreement

[34] A copy of an independent contractor agreement (**Food Handlers Agreement**) between The Food Handlers (**Food Handlers**) a division of The Butler Did It Inc., and Ms. Johnson, dated April 21, 2015, was produced as evidence. This agreement is signed only by Ms. Johnson. At paragraph 5 of the agreement, it is stated that the subcontractor—this is how Ms. Johnson is described—is not an employee of the contractor (Food Handlers). Although she signed this agreement, Ms. Johnson testified that she never actually worked for Food Handlers. The work for this company would have involved being in the kitchen helping a chef by doing such chores as peeling potatoes, cleaning vegetables and doing the dishes. In the present case the payer is BDI and not Food Handlers.

[35] Ms. Johnson acknowledged that she read the agreement before signing it and realized that she was described as an independent contractor and not as an employee. However, she said she had received that document by email and that she signed it because she needed a job. She had been in school for two years and social services does not pay rent. She was in a difficult situation and had to work for her living. She sent the document back by email. So it was out of necessity that she signed it. In addition, she did not obtain legal advice with respect to the agreement.

(c) Culinary Butler Application Form

[36] Another document which was also signed by Ms. Johnson on April 21, 2015 is entitled The Culinary Butler Application Form.[7] On this form, it is indicated that Ms. Johnson heard about The Culinary Butler from Mike Nickerson. It is interesting to read on page 2 of the document the applicant's acknowledgement "that I will attend the information and orientation session as a condition of being a subcontractor." On the form, Ms. Johnson indicates that she is available on Thursdays and Saturdays after 2 p.m. and for evening shifts. She also checked the box for full-time availability (at least four shifts per week). It should be noted that part-time availability is described as at least one to three shifts per week. Occasional availability is described as being at least one shift per month. In this document, Ms. Johnson indicates that she has food handling certification and a Smart Serve card, and that she has experience in banquet/catering service, restaurant service and stations. Even if she did make this application, Ms. Johnson never worked for The Culinary Butler division.

(d) BDI Agreement

[37] When Mr. Sowden testified, he filed a typical written agreement, the BDI Agreement between BDI and its workers.[8] It resembles the Food Handlers Agreement signed by Ms. Johnson. However, he was not able to produce the agreement between Ms. Johnson and BDI. When I asked Mr. Sowden the purpose of section 3 of the agreement, which states that the term of the agreement is one year, considering that under section 4 it could be terminated at any time on written or verbal notice. The witness was not able to explain this.

(e) The missing guidelines

[38] Ms. Johnson was not aware what the Standards of Professional Service Guideline referred to in paragraph 1.f(i) of both the Food Handlers Agreement and BDI Agreement was. Mr. Sowden acknowledged in his testimony that the Guideline was a 15-page document attached to the agreement. However, he did not bring it to court and he could not produce it during his testimony.

(f) The remuneration

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7 Exhibit I-1, Tab 1.

8 Exhibit I-2.

[39] According to Ms. Johnson, she did not and could not negotiate her hourly rate of $14. That was all decided by BDI. Mr. Sowden insisted that the butlers could come at any time and discuss a raise in their remuneration even though Ms. Johnson did not do so.

[40] Although BDI clients do not normally pay tips to the butlers, if any were offered, they would be distributed among the staff. The usual circumstance in which this could happen is at a private function. Ms. Johnson also confirmed that the BDI workers were not allowed to ask for tips. In Exhibit A-1, Tab 23, there is an email discussing the distribution of tips. During her testimony, Ms. Johnson said that this sort of distribution occurred only in the context of one outside festival held once a year. She only got $100 for that event, although she had expected that the workers would have received a lot more.

[41] According to Ms. Johnson, the minimum hourly wage at the time for workers in Ontario was $10 or $11 while waiters would receive a lesser amount under the Ontario minimum wage standard. However, she acknowledged that waiters would usually be entitled to gratuities.

[42] She also confirmed that there was no contractual relationship between her and the venue or the clients serviced by BDI.

D. Training by BDI

[43] When Ms. Johnson was hired at the open house, she was told that she had to attend what she described as a training session. She also received an email[9] telling her to attend what BDI described as orientation on Tuesday, June 10, 2014. The email is entitled "Welcome to the Butler Did It Seasonal Team" and signed by Christine Latimer from "The People Department" of BDI, which looks like a euphemism for Human Resources Department.

[44] This document states that there is to be a "**Uniform approval (mandatory)—**ONE HOUR PRIOR to the Orientation start time", and that uniform sale and approval will end 15 minutes before the orientation start time. It adds that the orientation "begins PROMPTLY and last 3 hours. Latecomers will not be permitted."

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9 Exhibit A-1, Tab 3.

[45] The email describes the orientation attire as follows:

> Plain black long-sleeved dress shirt.
>
> Note: Also bring White Dress Shirt (same criteria as Black Dress Shirt)
>
> Plain, black wide tie
>
> Plain, black dress pants (no cotton / denim, not tight fitted)
>
> Black polishable dress shoes (no runners / ballet flats)
>
> Black plain Vest (No Shiny back, No Buckle, Plain) (Preferably purchased through us at Orientation as it is difficult to get approved)
>
> Items available at **Orientation Uniform Sale**: **Shirts: $18.00 (+tax), Vest . . . $27.00 (+tax), Tie: $10.00 (+tax) via Cash, Visa, and MasterCard.**

[Underlining added.]

[46] Ms. Johnson testified that she brought her own clothes and did not purchase them through BDI. However, her uniform had to be approved.

[47] The email describes what it means to be a seasonal hire: "Season ends July 31st, 2014 Rate of pay: $14.00". It also advises that the following missing documents are "required" for the orientation: Smart Serve Card, three references and confirmation that Ms. Johnson has completed the "Ministry of Labour Health and Safety for Workers Online Training".

[48] In order to obtain a Smart Serve card, Ms. Johnson had to watch a one-hour video presentation and pass the test which is included in the one-hour video presentation. This card allows a worker to serve alcohol and is a requirement of the Ministry of Health in Ontario. Relying on his own experience in obtaining such a card many years before the relevant period, Mr. Sowden testified that the video lasted two hours and that those viewing it would be told about the limits as to the amount of alcohol that a server can offer to a particular guest, about a guest's capacity to drink based on the guest's size and, in the case of a woman, depending on whether she is pregnant. The cost of that Smart Serve card is approximately $40 and this is a one-time expense. The card does not have to be renewed every year or at other intervals.

[49] One has also to watch a one-hour video presentation on work safety, with regard to chemicals, for example. Ms. Johnson got her Smart Serve card in 2006 for the Drumming Festival and obtained the work safety certificate in 2014 at the request of BDI.

[50] The orientation session was given by Michael Nickerson and David Smith. At the session, they described the butlers' duties and the three types of service to be provided. They taught the servers how to attach the tablecloth to a table, how to set up the table, how to fold napkins, how to arrange the plates, the glasses and the utensils, how to approach a guest, i.e., on which side guests were to be served.

[51] The first type of service is French service. This involves carrying up to three plates in one hand. According to Ms. Johnson, during such service all the servers work as a team and enter the room in procession following the team leader or supervisor. The supervisor directs the servers regarding the table for which each is to be responsible.

[52] The second type is called simultaneous service. During such service, the servers stand with one plate in each hand between two guests at the table—at which 10 to 12 persons are normally seated—and all the servers present the plates at the same time at the signal of the team leader.

[53] The third type is called banquet trays, which means that one server carries the plates on a tray and deposits the tray on a table near the guest table and another server takes the food from the tray to the guest. After the server has brought the tray to the table, he or she returns to the kitchen for the other trays. While they are in the kitchen, a person described as an expeditor informs the servers about the different plates on the trays.

[54] In the email at Tab 4 of Exhibit A-1, the BDI server and bartender staff are told about additional "[u]pcoming 2.0 / 3.0 / 4.0 Orientations" with BDI. These additional sessions were to last between one and half and two hours. Each orientation entitles the server to a 50 cent hourly increase in remuneration. However, a minimum number of assignments is required between these so-called orientation sessions. Furthermore, the email states that if a person attends a particular orientation more than once, that person will receive only one 50 cent increase for that orientation. This document is signed by Christine Latimer.

[55] According to Mr. Sowden, these orientation sessions were abandoned after 2015 because, in his view, they were not working.

[56] Further training is offered by BDI to its workers on an ad hoc basis, as illustrated by the following email[10] from the bookings department dated January 29, 2016, and dealing with available shifts. It is stated in that email:

> This is just a quick note that we are looking to fill a few more spots tomorrow at the Metro Toronto Convention Centre . . . at 4pm. This is a Banquet Tray Dinner Service so you need to be comfortable with Banquet Trays. If you would like to practice we have spot [*sic*] set up in our office for you to drop by and practice (please ask for available drop in times if you would like to utilize this practice).
>
> [Emphasis added.]

[57] There is another example in an email[11] of March 10, 2016. The servers working for BDI are being informed by the bookings department about the launching of a new scheduling platform called Next Crew to provide a faster way for the staff to receive the latest booking requests for shifts. The email states:

> . . . In this fast moving market we are doing all that we can to provide you with alerts of openings in a way that you can respond to with ease.
>
> We have already pre-loaded your basic information into Next Crew. All you need to do is log into the link below and update your profile. . . .
>
> . . .
>
> We have attached step by step procedures on how to update your profile once you log in. Please take the time to update your profile so that we have accurate information on file. We are asking that you update your profile before March 25th.
>
> If you would like "live" support with updating your profile we have set up weekly tutorial sessions in the office. You can drop by the office any Tuesday from now until March 25th between the hours of noon and 4pm and someone will be available to help you. If these times are not convenient for you please give us a call and we will arrange an alternate time.
>
> [Emphasis added.]

Attached to the email is a PDF file entitled "NC Step by step instructions".

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10 Exhibit A-1, Tab 14.

11 Exhibit A-1, Tab 25.

E. Work during relevant period

(1) Duration of work

[58] Although the relevant period is from January 1, 2015 to November 28, 2015, Ms. Johnson testified that in 2015 she really only worked as a server from June to November. In 2014, she was hired in June and, contrary to what was indicated in the welcome email, she continued working past July 31 up until the end of December.

(2) Direction and supervision

(a) Reporting at the beginning of the assignment

[59] At the beginning of a reception, the servers were to report to a BDI supervisor or team leader who would normally make a roll call to ensure that all the servers were present. There would be a sheet on which the server would sign in to confirm the date and the server's time of arrival and then sign out at the end of the evening. On June 16, 2015, someone from the BDI accounting department asked Ms. Johnson for her "sign-out time for Friday night at the ROM".[12]

[60] During a particular reception, the representative of the venue or the client would normally talk to the supervisor, who would then inform his team leaders as to the client's expectations. Sometimes, the venue would delegate to BDI full responsibility for conducting the reception.

[61] The assignment received by email ahead of time from the BDI bookings department would have specified the position the worker would hold at the event in question, i.e., bartender, server or coat check attendant. It was also BDI that decided which venues and how many shifts were offered to its workers.

[62] At the event, the supervisor or the team leader would specify in greater detail the task to be performed by the worker. If the circumstances warranted it, the supervisor could decide to change the position that had been assigned to the worker in the email.

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12 Exhibit A-1, Tab 12.

[63] Depending on the size of the reception, whether a wedding or a corporate party, the staff provided by BDI would be composed of 50 to 60 servers divided into teams of five or six servers, each team generally being led by a team leader. Mr. Sowden indicated that when you are serving 750 guests all the food must be served within a time frame of 15 to 25 minutes. As one can imagine, it requires a lot of people and a lot of coordination to achieve this result.

(b) Work during an event

[64] Ms. Johnson testified that the servers were supervised by the supervisor and/or team leaders. The role of the supervisor was to direct what duties were to be performed by each member of the staff, and the team leader was responsible for the direct supervision of the service at the table. The team leader would remind the servers if they did not follow the protocol that they had been told to follow for a particular reception.

[65] Furthermore, if there were any problems during a particular shift, the worker had to report to the team leader. At one point, Ms. Johnson was yelled at by a representative of a venue and she informed her team leader that she would not be returning to work. She was informed by a representative of BDI that it would investigate this incident because it was BDI's policy not to accept any harassment from clients or from representatives of venues.

[66] Mr. Sowden testified that the team leader would also be involved in serving guests. Therefore, he or she was not in a position to really supervise the butlers. This statement was contradicted by the testimony of Ms. Johnson, who said that they followed the orders and the directions of the team leader. I am convinced that if a particular butler did not set up the tables in the proper way, that butler's team leader would tell the butler how to do it.

(c) Permission required to leave an event

[67] Ms. Johnson confirmed that breaks had to be approved by the team leader. She could not take a break or go home at the end of the evening without the team leader's approval. She confirmed that in one instance, when the client had requested that the butlers stay longer than the time agreed to by BDI, the team leader told Ms. Johnson that she had to stay because the client was paying and they had to do what the client wanted.

(d) Examples of written directives given by BDI to its workers

[68] There were numerous written directives given to Ms. Johnson with respect to the various events at which she performed her services. The directives are in the form of emails from the BDI bookings department. The first,[13] dated November 20, 2015 at 5:09 p.m., states:

> Please sign in with your supervisor at the catering office at the south west corner of the building. Please note that the subway doesn't start running until 9AM so please plan your trip accordingly. There are multiple bus options available. If you need help mapping your TTC trip please visit www.myttc.ca.
>
> Friendly reminder from the booking department. You are confirmed. Bring a lighter, corkscrew and pen to every job.

[Emphasis added.]

At the bottom of this email, under the heading "ATTIRE", is written "BLACK BISTRO VEST". And the position assigned to Ms. Johnson is "COAT CHECK".

[69] Mr. Sowden acknowledged that there were two types of attire that the butlers could wear: either a black bistro or white bistro. The wearing of one or the other would often be a requirement set by the organizer of the event. Mr. Sowden confirmed that the butlers would be required to have a pen, a pad, a corkscrew and a lighter (**small tools**) that they would have to pay for themselves. The same applied for the uniforms.

[70] In a similar email,[14] dated October 1, 2015 at 4:08, for a VIP wedding event to take place on October 3, 2015, it is stated: "[i]f you are taking the bus please be at our office . . . at 12:30PM. Please arrive dressed and ready. Bring a snack and water as it's a long bus ride. You also get 4 hours of billable travel time for this event. If you are driving there is no actual address, but please follow [these] directions". [Emphasis added.] At the end of the directions, it says: "Park there and Hal will come and collect the team." There is in addition a "friendly reminder" about bringing the small tools, and it is specified that "black bistro vest" attire is required and that the assigned position is "wait/coat check".

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13 Exhibit A-1, Tab 8.

14 Exhibit A-1, Tab 9.

[71] Similarly, in an email,[15] dated October 18, 2015 at 4:04 p.m., for an event on October 20, 2015 at the Ritz-Carlton, it is stated: "must bring photo ID". In addition, the email says:

> Please arrive 10 minutes BEFORE your scheduled start time as you will need extra time to sign in with security. Enter through the unmarked silver door on the West side of the RBC Dexia building right beside the Ritz-Carlton. Follow the stairs down to the security to sign in. Once you are signed in please WAIT AT SECURITY until someone comes to get you. YOU MUST ARRIVE DRESSED IN YOUR FULL UNIFORM – DO NOT CHANGE ON SITE. Attire and grooming standards at this venue are closely monitored. Your uniform must be clean and pressed. Shoes must be polished. The client does not

[15] Exhibit A-1, Tab 10.

> allow facial hair of any kind—if you have facial hair please call the office right away. Hair must be neat, tidy, and tied back. No jewellery is allowed. *** PLEASE BRING GOVERNMENT-ISSUED I.D. TO ENT."

[Underlining added.]

There is again the "friendly reminder" about the small tools. With regard to attire, there is the following: "WHITE BISTRO VEST (MEN MUST BE CLEAN SHAVEN)". The position assigned to Ms. Johnson is "wait".

[72] There is another similar email,[16] dated June 11, 2015 at 8:42 p.m., for an event to take place on Saturday, June, 13, 2015. The email states: Enter AGO [Art Gallery of Ontario] from the front entrance. The AGO is fragrance free. Please arrive DRESSED AND READY with minimal baggage. Please wait in the corridor behind the Café and lets [*sic*] be quiet while we wait to be picked up, reminder seating is for guests. [Underlining added.] And there is again the "friendly reminder" about the small tools. The attire is described as being "black bistro vest" and the position assigned to Ms. Johnson is "wait".

[73] On September 23, 2015, the bookings department is emailing to Ms. Johnson stating that "this may be the original time you had but there have been a number of changes and we just want to make sure everyone has the right time."[17] This was an event involving David Foster to be held on September 26, 2015. The attire was stated to be "black bistro vest" and Ms. Johnson was directed to bring ID. The position assigned to her was "wait".

[74] In an email[18] dated November 12, 2015 respecting an event to be held on Saturday, November 14, 2015, Ms. Johnson is reminded to pay the driver $5 one way and $8 for a round trip. The attire for that event was black bistro. On November 10, 2015, the bookings department of BDI wrote to Ms. Johnson regarding an event for November 12, 2015:[19] "Lockers are provided at this venue *** please bring your own lock ***. We suggest to bring minimal personal items. If you are taking the bus, please be at our office for 4:15AM. Coffee and continental breakfast will be provided. Please let us know if you will be taking the bus. There will be a draw for a 250$ Visa gift card for those who worked this

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16 Exhibit A-1, Tab 11.
17 Exhibit A-1, Tab 18.
18 Exhibit A-1, Tab 19.
19 Exhibit A-1, Tab 20.

event." [Emphasis added.] There is the usual "friendly reminder" about the small tools, and the attire is stated to be "black bistro". The position assigned to Ms. Johnson is "wait".

[75] In an email[20] from the bookings department dated October 23, 2015, all the staff is being informed of events to take place in Niagara Falls from October 25 to October 27 and on November 2, 3 and 12. The staff is reminded that "if you are available to help with rides we have drivers incentives of $25 per person in your car."

(e) Disciplinary reports

[76] According to Ms. Johnson, the team leader would make reports about the workers' performance. She acknowledged that she had never seen such a report, but said she was aware that a report was written for one worker for her misbehaviour in dealing with her team leader. That worker had apparently on one occasion talked back to the team leader. That is when Ms. Johnson learned that a report was being made for every shift. Mr. Sowden acknowledged that the team leaders might send feedback to the management team on the performance of the butlers, including whether the butlers were punctual or wore the right uniform.

[77] When asked whether she had ever been disciplined, Ms. Johnson mentioned an event with respect to which a problem had occurred. Having tried to coordinate her transportation to an event with a person in whose car she was supposed to ride, she ultimately had to cancel her shift at the event at the last minute because the place at which she was to meet that person appeared to Ms. Johnson to be a hazard to her safety. An investigation was carried out by Sean Bruno and Mike Nickerson to get both workers' side of the story. Ms. Johnson claimed that she lost three shifts as a result of not showing up in those particular circumstances.[21]

(3) Number of assignments per week

[78] Usually, Ms. Johnson only worked three shifts or assignments per week, each lasting approximately ten hours and sometimes thirteen. For the rest of her time, she was looking for regular office work. She actually found one job with the

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20 Exhibit A-1, Tab 21.

21 See Exhibit A-3. See also Tab 24 of Exhibit A-1.

government. That job started in November 2015, which corresponds to the end of her work for BDI, but it lasted only a few months.

[79] Ms. Johnson said that besides her three shifts for BDI she did no work for any other staffing agencies. She also confirmed that if a worker refused too many assignments that worker's name would be dropped from the database or the worker could receive fewer assignments, even though, according to the BDI Agreement, a worker could decline any assignment made by BDI.

[80] Mr. Sowden gave the following explanation for adopting such a course of action. Students were refusing assignments because they had started a career in their field of interest and actors were receiving a more steady flow of income from their artistic activities. The presence of their names in the BDI database was a source of operational inefficiency.

(4) The remuneration process

[81] Ms. Johnson was paid on a monthly basis according to the hours that she worked. She provided her hours to BDI using a template in an Excel spreadsheet prepared by BDI, although BDI had already received that information from the supervisor/team leaders, who were making roll calls and having each worker complete a sign-out sheet for every assignment. On this spreadsheet, Ms. Johnson would indicate the name of the client, the date on which the services were provided to the client, the order number, her time in and her time out, her travel time (when relevant), her total hours and her rate of remuneration. In his testimony, Mr. Sowden indicated that the template prepared for invoicing was not necessarily used by the butlers. He indicated that some of the butlers prepared their own invoices.

[82] Ms. Johnson was told by BDI how to submit her invoice as well as how to advise them of her availability for future shifts. For instance, for any shift worked in a month, the invoice sheet must be completed and emailed to the accounting department by the 15th of the following month.

[83] In her cross-examination by BDI's attorney, Ms. Johnson testified that although the spread sheet is called a contractor's monthly invoice, it was not an invoice from her: she was only reporting her hours. Had she been a subcontractor,

she said, she would have charged a lot more than $14 an hour. In her view, there was no way one could make a profit at $14 an hour.[22]

[84] In Ms. Johnson's view, working for BDI was not an opportunity for her to make a profit or to get work on her own at venues other than those serviced by BDI. First of all, she did not have the staff to fulfil the needs of the different hotels and other venues. In addition, there is a non-competition clause in the BDI Agreement.[23]

[85] On all the spreadsheets which she used to report her hours, no GST/HST was charged. Ms. Johnson confirmed that she was not registered for HST purposes.

[86] The T4As issued to Ms. Johnson by BDI show a total remuneration of $4,063.31 for 2014 and $7,952.25 for 2015.[24]

(5) Banquet equipment

[87] Usually, the glasses and plates would not be provided by BDI, but by the venue or by the client or would be obtained from a rental company. Ms. Johnson testified that servers drop glasses or plates and that she never heard of such servers being asked to reimburse the cost of these objects.

[88] Mr. Sowden acknowledged that if there was such breakage, the workers would not be required to pay for it. He said that that was the responsibility of the company renting the equipment and that their fees took into account such risk.

(6) WSIB Employer's Report of Injury/Disease

[89] Ms. Johnson pulled a chest muscle on November 14, 2015 when, in trying to lift a banquet tray, she experienced a sharp pain. BDI filed an Employer's Report of Injury/Disease, WSIB Form 7.[25] An employer is required to fill out such a form when an employee/worker gets hurt on the job. On that form, which appears in Tab

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22 See Tab 7 of Exhibit I-1 for these monthly reports, starting with the one for the period ending on June 30, 2014. However, not all the reports appear to have been filed since the total remuneration for each year (2014 and 2015) shown on the filed reports is less than the remuneration shown on the T4A.

23 See paragraph 11 in Exhibit I-1, Tab 2.

24 See Exhibit I-3.

25 Exhibit A-1, Tab 2.

2 of Exhibit A-1, the name of BDI is entered in the "Employer Information" section. The form was not modified to replace "Employer Information" with "Contractor Information". Ms. Johnson is described as being a waiter. The description of the business activity of BDI provided in section B, the employer information section, is "event staffing". In section C, "Accident Illness Dates and Details" the accident is stated to have been reported to the "Bookings/Dept Scheduler". This form was signed by David Smith as Director of Operations. There is on page 3, where the name of Mr. Smith appears, a "Base Wage/Employment Information" section. In the first part of this section, the worker can be described as "casual/irregular", "seasonal" or "contract". Mr. Smith checked only the "contract" box. In the same part of the section, the "owner operator or (sub) contractor" box is left unchecked. The regular rate of pay indicated is $15.50 per hour. Finally, above the name of Mr. Smith, it is stated that it is an offence to deliberately make false statements to the Workplace Safety and Insurance Board. The form includes, on the same page, the following declaration: "I declare that all of the information provided on pages 1, 2 and 3 is true."

[90] Ms. Johnson was informed that BDI had a joint health and safety committee. It was her understanding that if an employer has more than 50 employees such a committee was required under the *Employment Standards Act.* To reach that level, BDI had to include its roster of 600 butlers.

(7) Risk of butlers not being paid

[91] Mr. Sowden testified that there was a potential risk of a butler not being paid if the client was not satisfied with the services provided. However, it was not clear that anything would be subtracted from the remuneration of the particular butler. He acknowledged that the amount of the fee that the client had agreed to pay to BDI might be subject to reduction. There was no evidence that there was any reduction in the case of Ms. Johnson.

IV. ANALYSIS

A. The issues and relevant law

[92] The issue that this Court must decide in the EI appeal is whether Ms. Johnson was engaged in "insurable employment" with BDI during the relevant period. Insurable employment is defined in subsection 5(1) of the *Act* as follows:

> 5(1) Subject to subsection (2), insurable employment is

> (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> [Emphasis added.]

[93] So the issue is whether Ms. Johnson provided her services pursuant to a contract of service (also called a **contract employment**) or a contract for services (also called an **independent contractor agreement**). Only employment under the former would qualify as insurable employment in the present case. As the expression "contract of service" found in section 5 is not defined in the *Act*, reference must be made to the law of the province governing the relationship between the parties pursuant to section 8.1 of the *Interpretation Act* of Canada[26].

[94] Here the contract was entered into in Ontario and therefore reference must be made to the law of that province in determining what a contract of employment is. Given that there is no legislation of general application such as the *Quebec Civil Code*, we must resort to the common law applicable in Ontario. The common law approach is to review the facts in order to determine whether we have a contract of employment or an independent contractor agreement. The two leading cases that illustrate this approach are the Supreme Court decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] 2 S.C.R. 983 (per Major J.) (***Sagaz***) and the Federal Court of Appeal decision in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (per MacGuigan J.A.) (***Wiebe Door***).

B. The common law principles

(1) The two-step approach

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[26] Section 8.1 provides as follows:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> [Emphasis added.]

[95] In my view, my colleague Justice Campbell Miller provides an excellent summary of the current state of the law in *Morris Meadows Country Holidays and Seminars Ltd.* v. *Canada (Minister of National revenue)*, [2014] T.C.J. No. 139(QL), 2014 TCC 191[27] (***Morris Meadows***):

> *(a) Employee v. Independent Contractor*
>
> 30 The oft-cited starting point for the employee versus independent contractor discussion is the Supreme Court of Canada's comments on the subject in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*:
>
> > 47. Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person **in business** on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
> >
> > 48. It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.
>
> 31 The Federal Court of Appeal in *1392644 Ontario Inc. o/a Connor Homes v. Minister of National Revenue* massaged this approach with its review of recent jurisprudence as to the role of intention in the analysis, a factor not mentioned by the Supreme Court of Canada. The Federal Court of Appeal offered the following:
>
> > 37. Because the employee-employer relationship has important and far reaching legal and practical ramifications extending to tort law (vicarious liability), to social programs (eligibility and financial

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[27] Footnotes are omitted and the emphasis is mine. It is interesting to note that the facts of *Morris Meadows* have a lot of similarity to the facts of this appeal. In that case, the waitresses were treated as employees. If I am not mistaken, this precedent was provided by counsel for the Respondent and not by counsel for the Intervenor.

contributions thereto), to labour relations (union status) and to taxation (GST registration and status under the *Income Tax Act*), etc., the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole subjective discretion of the parties. Consequently, the legal status of independent contractor or of employee is not determined solely on the basis of the parties[’] declaration as to their intent. That determination must also be grounded in a **verifiable objective reality**.

38. Consequently, Wolf and Royal Winnipeg Ballet set out a two step process of inquiry that is used to assist in addressing the central question, as established in Sagaz and Wiebe Door, which is to determine whether the individual is performing or not the services as his **own business** on his own account.

39. Under the **first step**, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

40. The **second step** is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in TBT Personnel Services Inc. v. Canada, 2011 FCA 256 (CanLII), 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the Wiebe Door factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties[’] intent as well as the terms of the contract may also be taken into account since they colors [*sic*] the relationship. As noted in Royal Winnipeg Ballet at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in Wiebe Door and Sagaz has been in fact met, i.e[.] whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.

41. The central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person **in business** on his own account. As stated in both Wiebe Door and Sagaz, in making this determination

> no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances. Nevertheless, the specific factors discussed in Wiebe Door and Sagaz will usually be relevant, such as the level of control over the worker's activities, whether the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity of profit in the performance of his tasks.

[Emphasis added.]

(2) Definition of contract of service

[96] The main issue in *Sagaz* was whether that company could be held vicariously liable for tortious conduct of its consultant, American Independent Marketing Inc. (AIM). The Supreme Court stated in this regard: "Based on policy considerations, the relationship between an employer and independent contractor does not typically give rise to a claim in vicarious liability."[28][Emphasis added.] Major J., speaking for the Court, found that although "[t]here is some evidence to suggest that Landow and AIM were employees of Sagaz".[29] "[o]n the totality of the evidence, I agree with the trial judge that AIM was in business on its own account."[30] In those circumstances, Major J. adopted an approach similar to that of MacGuigan J.A. in *Wiebe Door*. This approach focuses on what distinguishes an employee from an independent contractor. MacGuigan J.A. preferred the general test applied by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.,*[31] which emphasizes "the combined force of the whole scheme of operations," to the "integration" or "organization" test used by Lord Denning.

[97] In my view, it would be useful to define what a contract of service is so as to better apply the approach—including the fourfold test known as the "entrepreneur

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28 Par. 3 of *Sagaz*.

29 Par. 50 of *Sagaz*. There is no discussion of the issue of whether a company could be an employee of another company. Some legal scholars believe that the employee must be a natural person. See my article "Contract of Employment: Why Wiebe Door Services Ltd. Does Not Apply in Quebec and What Should Replace It", published in the Second Collection of Studies in Tax Law (2005) in the collection entitled *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Department of Justice Canada, 2005 (**my article**), at note 31, for a list of these scholars and the case law.

30 Para. 57 of *Sagaz*.

31 [1947] 1 D.L.R. 161 (P.C.), cited at pp 559-60 of *Wiebe Door.*

test"[32]—described in *Sagaz* and *Wiebe Door* and better understand its scope. In *Ready Mixed Concrete (South East), Ltd. v. Minister of Pensions and National Insurance,* [1968] 2 QB 497 at 515-17, [1968] 1 All E.R. 433 at 439-41 (***Ready Mixed***), MacKenna J. offers the following definition and enlightening analysis:[33]

> I must now consider what is meant by a contract of service.
>
> A **contract of service** exists if these three conditions are fulfilled. **(i)** The servant agrees that, in consideration of a **wage** or other remuneration, he will provide his **own work** and skill in the performance of some service for his master. **(ii)** He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's **control** in a sufficient degree to make that other master. **(iii)** The other provisions of the contract are **consistent** with its being a contract of service.
>
> . . .
>
> As to (i). There must be a **wage** or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his **own work and skill**. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him
>
> As to (ii). **Control** includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether **the right** exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.
>
> > "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."—*Zuijs* v. *Wirth Brothers Proprietary, Ltd*. [(1955), 93 C.L.R. 561, 571]
>
> To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way **by implication**.

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32 Par. 39 of *Sagaz*.

33 See also *Dynamex Canada Corp. v. Minister of National Revenue,* 2010 TCC 17, [2010] T.C.J. No. 14(QL), [2010] 3 C.T.C. 2233, at para. 17 et seq. (***Dynamex***).

The third and negative condition is for my purpose the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.

(i) A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a **building contract**. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.

(ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a **contract of carriage**.

(iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is **one of service**. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.

(iv) A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a **contract of service**. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.

(v) The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a **contract of service** because the second part imposes obligations of a different kind: *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance*. [[1963] 1 W.L.R. 441, 451, 452; [1963] 1 All E.R. 864]

I can put the point which I am making in other words. An obligation to do work **subject to the other party's control is a necessary**, though not always a sufficient, **condition** of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.

[Emphasis added.]

[98] This UK decision, like others,[34] shows that the right of control is an essential characteristic of a contract of service.[35] This is consistent with the dicta of the Supreme Court of Canada in *Sagaz*, in particular with the following in which Major J. discusses the policy considerations that come into play for the purpose of applying vicarious liability:

> **33** The most common relationship that attracts vicarious liability is that between employer and employee, formerly master and servant. This is distinguished from the relationship of an employer and independent contractor which, subject to certain limited exceptions (see Atiyah, *supra*, at pp. 327-78), typically does not give rise to a claim for vicarious liability. . . .
>
> **34** What is the difference between an employee and an independent contractor and why should vicarious liability more likely be imposed in the former case than in the latter? This question has been the subject of much debate. The answer lies with the **element of control** that the employer has over the direct tortfeasor (the worker). If the employer does not control the activities of the worker, the policy justifications underlying vicarious liability will not be satisfied. See Flannigan, *supra*, at pp. 31-32:

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34 See for example the following United Kingdom Chancery Division decision cited in *Canadian Legal Words and Phrases* (LexisNexis Quicklaw): *University of London Press, Limited v. University Tutorial Press Limited*, [1916] 2 Ch. 601 at 610-611 per Peterson J:

> . . . In *Simmons* v *Heath Laundry Co*. . . . Fletcher Moulton L.J. pointed out that a **contract of service** was not the same thing as a **contract for service**, and that the existence of direct control by the employer, the degree of independence on the part of the person who renders services, the place where the service is rendered, are all matters to be considered in determining whether there is a contract of service. As Buckley L.J. indicated in the same case, a contract of service involves the existence of a servant, and imports that there exists in the person serving an obligation to obey the orders of the person served. . . .
>
> [Emphasis added.]

35 For an example of a part-time worker who was considered an employee by the Federal Court of Canada, see *Rosen v. The Queen*, 76 DTC 6274 (F.C.T.D.) This worker was a full-time civil servant working as a lecturer in the evenings at two universities and a college, with little control being exercised. So this person was "employed" in different jobs. This case was commented upon in Marc Noël, "Contract for Services, Contract of Services—a Tax Perspective and Analysis", 1977 Conference Report, Canadian Tax Foundation, pp. 712–37.

> This basis for vicarious liability discloses a precise limitation on the scope of the doctrine. If the employer does not control the activities of the worker it is clear that vicarious liability should not be imposed, for then insulated risk-taking [by the employer] does not occur. Only the worker, authorized to complete a task, could have affected the probability of loss, for he alone had control in any respect. Thus, because there is no mischief where employer control is absent, no remedy is required.

> **35** Explained another way, the main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harm (*Bazley*, *supra*, at para. 29). Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was **in business** on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs **by efficient organization and supervision**. Each of these policy justifications is relevant to the **ability of the employer to control** the activities of the employee, justifications which are generally deficient or missing in the case of an independent contractor. As discussed above, the policy justifications for imposing vicarious liability are relevant where the employer is able to control the activities of the employee but may be deficient in the case of an independent contractor over whom the employer has little control. . . .
>
> [Emphasis added.]

[99] The concept of contract of service (employment contract) having been clarified, the distinction between this contract and a contract for services (independent contractor agreement) must be made by following the approach described by Major J. in *Sagaz*:

> **47 . . .** 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.[36]

[Emphasis added.]

(3) The role of the Court

[100] One more common law principle has to be discussed before reviewing the facts. It has to do with the judicial process. In Canada, we have inherited the English common law tradition in which this process is described as the adversary system, as opposed to the inquisitorial system. We find the following definitions in *Black's Law Dictionary* (10th ed.):

> **adversary system.** (1936) A procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker
>
> **inquisitorial system.** (18c) A system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry. • This system prevails in most of continental Europe, in Japan, and in Central and South America.

[Emphasis added.]

[101] The adversary system is founded on the belief that the parties and not judges are best positioned to advance their case and that the truth will emerge from the clash of the evidence presented by each party in front of a passive judge. However, experience has shown that this is not necessarily so. Many countries have embarked on a review of this judicial process to find ways to improve it. This has occurred not only in Canada[37], but also in England[38] and other common law jurisdictions such as Australia.

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36 Par. 47 and 48 of *Sagaz*.

37 Canadian Bar Association, "A New Vision—Civil Justice in the Twenty-First Century" in *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (1996), chapter 3, and Ontario Civil Justice Review, "The Modern Civil Justice System: What Will It Look Like in 10 Years?" in First Report (March 1995), chapter 1, section 1.9, online: https://www.attorneygeneral.jus.gouv.on.ca/english/about/pubs/cjr/firstreport/overview.php.

[102] For instance, the *Law Reform Commission of Western Australia* undertook in 1997 a major review of its criminal and civil justice system. Many people had raised concerns about the efficiency of the adversary system, and there was a trend towards more judicial intervention in the trial process in both criminal and civil matters. The Honourable Mr. Justice D. A. Ipp, of the Supreme Court of Western Australia, presented to the Australian Bar Association in 1994 a paper in which he stated:[39]

> Society, I suggest, is no longer content with the proposition that litigation is a pure "affair of the parties" and the judge is a passive referee having no power—or, de facto, being extremely reluctant—to control the conduct and unfolding of the litigation. Community values are inexorably moving towards more active judging. In many western nations, it is now accepted that judges have a duty to assist litigants. There is a trend towards increased judicial powers and an attenuation of the traditional adversary theory. This development is often justified as necessary to increase the efficiency of judicial administration—making it the judges' task to assure a swift and orderly progress of the litigation. Another important justification is the acceptance of judicial **responsibility to find the objective "truth"**, that being essential to the achievement of justice.
>
> . . .
>
> Inquisitorial procedure is becoming far more the norm in administrative tribunals, and, generally, the adversary system has come under sustained pressure.
>
> [Emphasis added.]

[103] Given this situation, the Commission reviewed the advantages and disadvantages of the adversarial system in civil litigation. In one of the consultation papers, we find this interesting analysis:

> The **actual history** of the adversarial system reveals that the connection between adversarial processes and civil disputes is not as intimate or long-standing as some suppose. Adversarial processes in civil matters crystallised only in the nineteenth century, following

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38 Lord Woolf, *Access to Justice - Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

39 See D. Ipp, "Judicial Intervention in the Trial Process*"* (1995), 69 *Australian Law Journal* 365 at 367. Footnotes are omitted.

the spread of an adversarial spirit from eighteenth century criminal procedure which was intermingled with procedural reforms between 1852 and 1875.[40] . . .

. . .

High level definitions, or at least descriptions, of the **adversarial system** abound, such as that of the Lord Denning in *Jones v The National Coal Board*. They are all to the effect that the judge is a passive and neutral umpire who cannot descend into the arena for fear of having her or his judgment clouded (and decisions overturned on appeal). The parties choose the issues to be tried . . . and the evidence to be adduced. The judge, and occasionally still in civil matters the jury, decides which of the parties' cases to prefer. . . .

In contrast, according to the orthodox account, in the **inquisitorial system** the judge (who is trained from law school to be a judge) has the carriage of a case from the outset and decides which issues and evidence are most relevant. The case develops over a series of hearings and may never culminate in a 'trial' in the sense that common lawyers understand it. The parties' advocates assist the court and put their clients' cases, when permitted, but the judge runs the trial. As the name of the system implies, the court conducts an inquiry and is not confined to deciding between the submissions of the opponents.

. . .

. . . The adversarial system is said to be the most efficient means of arriving at approximate truth because it harnesses the power of self-interest on each side to unearth the best evidence. Similarly, the best legal arguments are thought to emerge from the clash of advocates' submissions on the law. . . .

At a high level of generality and for periods during the last two centuries, the **orthodox** account above may have been sustainable. On a closer enquiry, the accuracy of the **factual premises** and the coherence of the justifications today are **greatly weakened**.[41]

. . .

The supposed efficiency of the adversarial system in fact-finding and high quality legal argument is itself crucially dependent **upon each side being able to fund a lawyer** or legal team to roughly the same extent, and upon each side's lawyer being **competent**, expeditious and **ethical**. Ethics become relevant because, inter

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40 Western Australia Project 92 (Review of the Criminal and Civil Justice System in Western Australia) Consultation Papers, Vol. 1 at p. 24, available on the Internet: https://www.lrc.justice.wa.gov.au/P/project_92.aspx. Footnotes are omitted.

41 Ibid. at p. 25.

> alia, the court embarks on virtually no fact-finding of its own, and so the supply of accurate information depends upon the lawyers **not actively concealing** damaging material or relevant legal authorities and on them spotting the other side's **passive omission** to proffer it. There is now considerable concern about the **unfairness** resulting from the incapacity of many people to afford lawyers who exhibit these qualities of competence, promptness and ethics.[42]

[Emphasis added.]

[104] Peter Murphy in his *Practical Approach to Evidence* (Shrewsbury: Blackstone Press Limited, 1980, at page 1) gives this instructive example to illustrate the orthodox common law approach with regard to the passive role of judges in court. A frustrated judge in an English court asked a barrister, who had objected to his opponent tendering documentary evidence which appeared relevant to the case but inadmissible in law, "Am I not to hear the truth?" "No, your Lordship is to hear the evidence", replied counsel.

[105] In its final report in Project 92, the Law Reform Commission of Western Australia stated:[43]

> 6.2 . . . Many of the public submissions we received characterise the focus of the adversarial system as being on winning cases rather than **truth or justice**. . . . we believe that the complaints and concerns about the existing adversarial system need to be taken seriously. We believe the changes we recommend will alleviate part of the frustration expressed by some who made submissions asking us to abandon the adversarial system.

[Emphasis added.]

[106] I prefer to the 1936 orthodox definition of the adversary system the more modern description given in a discussion paper of the Australian Law Reform Commission:[44]

> 2.25 In broad terms, an **adversarial system** refers to the common law system of conducting proceedings in which the parties, and not the judge, have the **primary**

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42 Ibid. pp. 27 and 28.

43 Review of the criminal and civil Justice System in Western Australia—Final Report, September 1999, https://www.lrc.justice.wa.gov.au/_files/P92_FR.pdf, at pp. 45-46.

44 *Review of the Federal Civil Justice System*, Discussion Paper 62: Review of the Federal Civil Justice System http://www.austlii.edu.au/au/other/lawreform/ALRCDP/1999/62.html.

> responsibility for defining the issues in dispute and for investigating and advancing the dispute. The term "inquisitorial" refers to civil code systems in which the judge has such primary responsibility. "Inquisitorial" also connotes an inquiry where the decision maker investigates a matter. . . .
>
> 2.26 Notwithstanding variation between these models, in civil matters at least, there is a significant **degree of convergence of the practices** in common law and civil code countries. . . .

[Emphasis added.]

[107] The Western Australia Law Reform Commission also makes the following statement which raises doubt that the orthodox definition of the adversary system adequately describes the reality of the common law adversary system and which gives one reason to believe that the approaches of the two great legal systems have more in common than we think:[45]

> 6.4 . . . Historically the judiciary played a far more active role in the courts of equity than in common law courts. Judicial powers may have existed but been under-utilised, or utilised by some courts more than others. Tribunals rather than courts now handle a significant number of cases. Tribunals generally rely on inquisitorial rather than adversarial procedures. . . . There also is increasing use in the courts of pre-litigation ADR. . . . The impact of the growing number of **self-represented litigants** is also having a significant impact on the adversarial system . . . .

[Emphasis added.]

[108] The problems described in 1999 in Australia also existed in Canada in 90s and still exist today. Over the years, this Court, like many other Canadian courts, has adopted measures characteristic of the inquisitorial system such as those adopted in Australia and other countries, thus giving a greater role to judges in the handling of cases before them in order to alleviate the problems resulting from cases not advancing fast enough. Now judges do not leave to the parties sole responsibility for advancing the dispute, unlike the approach in the orthodox adversary system. For instance, under the leadership of former Chief Justice Couture, the Tax Court adopted the status hearing procedure to ensure that appeals before this Court would advance in a more efficient manner. Over the years, this Court has been increasingly involved in case management: ordering

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[45] Western Australia final report, *supra* note 43, at p. 46.

settlement conferences and so on. This is the new way of doing business. Each legal system is borrowing the other system's better practices in order to achieve better delivery of justice! So it is not surprising to hear that there is a convergence of the two great legal systems.

[109] Canadian courts have also recognized the existence of a greater role for judges in eliciting the true facts in the investigation process during a hearing so that justice is done. My colleague Hogan J. wrote the following in *General Electric Capital Canada Inc. v. The Queen*:[46]

> 227 . . . In any event, comparing a judge to **a sphinx** has been outdated for some time now. Judicial silence is no longer considered to guarantee impartiality and neutrality in the decision-making process. In 1985, Lamer J. (as he then was) observed in *Brouillard also known as Chatel v. The Queen*:[241]
>
> > 17 ... it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge **may intervene** in the adversarial debate, but also believe that it is sometimes essential for him to do so for **justice in fact to be done**. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.[47]
> >
> > 241 [1985] 1 S.C.R. 39 (LexUM) (*Brouillard*).
>
> 228 This **modern trend** is based on the understanding that the principal role of a judge is to discern the truth. Not all litigants can afford to hire the best counsel or, for that matter, afford any representation. Accessibility to the courts has been restricted by costs which have increased substantially. Rinfret J. of the Québec Court of Queen's Bench, now the Québec Court of Appeal, described the **two opposing theories** as follows:
>
> [UNOFFICIAL TRANSLATION]
>
> The question to be posed is indeed the following: **What does "justice" consist of?**

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46 2009 TCC 563, [2009] T.C.J. No. 489(QL), 2010 DTC 1007, [2010] 2 CTC 2187.

47 This is a decision of the Supreme Court of Canada in a criminal matter. In his reasons, at par. 18, Lamer J. referred to the decision of Lord Denning in *Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.) mentioned at par. 103 above in an excerpt from one of the Western Australia Law Reform Commission's Project 92 consultation papers.

> Must a judge, without a word, listen to testimony, hear arguments, and limit himself to reaching a decision solely based on the evidence and arguments the parties are willing to submit?
>
> Must a judge, realizing that counsel inadvertently, through lack of inability [s*ic*], or ignorance, has forgotten to produce evidence or to present an argument, deliver a judgment he knows to be inequitable to the parties?
>
> Must the client suffer the consequences of the clumsiness of his counsel?
>
> Some would answer in the affirmative; they believe the judge must rely strictly and rigorously on what was presented and that counsel, not the judge, is master of the hearing.
>
> Conversely, the **alternate theory demands** that the only master of the hearing be the judge, leaving him to direct the proceedings in the best interests of justice. To achieve this, the judge must inquire about all facts, even those which, for one reason or another, a party might have omitted to submit to the court. He must raise questions of law, even if these have not been submitted to him, **provided that,** in each case, he gives the parties or their counsel the chance to be heard on these issues.
>
> The law or justice is not a matter of surprises or technicalities.
>
> It is a judge's **duty** to shed as much light as possible on the question, to correct the situation, and to make up for the clumsiness or the ignorance of counsel, should this be required. This is how I understand "justice".
>
> However, a judge must not act in such a way as to cause the parties to lose their vested rights, and the judge, by the exercise of his discretion, will ensure the protection of those rights.[242]
>
> 242 Poulin c. Laliberté, [1953] B.R. 8, at pages 9 and 10.
>
> 229 The judge has liberty to intervene in the proceedings in the interest of truth, provided he gives both parties full latitude to address the points raised by his questions. . . .

[Emphasis added.]

[110] In *La preuve civile*, 2nd edition (Cowansville (QC) : Les Éditions Yvon Blais Inc., 1995), at pages 117 and 118, Professor Jean-Claude Royer writes:

> [TRANSLATION]

> The courts have usually followed the interventionist theory expressed by Mr. Justice Rinfret. That doctrine supports achieving better justice, **even when detrimental to the** accusatorial and **adversarial system of trial**. It is also more in line with modern social ideas inspired by a more objective conception of the law, which has resulted in a legislative evolution aimed at increasing the judge's role.

[Emphasis added.]

[111] So the law is always in a state of development; such is the story of the common law.

[112] I should point out that, contrary to the appeal in *Brouillard*, the present appeal is not a criminal matter, but an administrative law case heard in a specialized court that is not an administrative tribunal but whose jurisdiction is limited to appeals raising fiscal issues. One of the parties is always the same: the Minister of National Revenue. The rules of evidence—which play an important role in criminal matters, where the freedom of the accused is often at issue should he or she be convicted—are not applied as strictly. In fact, in appeals governed by this Court's informal procedure, the judge has wide discretion in the application of the rules. See subsection 18.15(3) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

[113] The "duty to shed as much light as possible on the question" is as important, if not more so, in cases such as this one, where one of the parties, Ms. Johnson, cannot afford to be represented by a lawyer while the respondent is represented by counsel from the Department of Justice and the intervenor, BDI, by a team of two lawyers, as it is in any other. For the last 25 years, the number of appeals by self-represented litigants has remained very high in informal procedure appeals before this Court and in a very significant number of general procedure appeals. This Court must occasionally even grant permission to corporations to be represented by one of their officers because they cannot afford the lawyers' fees.

[114] However, a judge's role is not to become counsel for a self-represented party. As mentioned above, in an adversary system, it is the parties who have the primary responsibility to produce all the relevant facts. The judge's role is to discover the true facts and apply the relevant law in order to resolve the issue in a fair and impartial way for all the parties. As we have seen in the Supreme Court of Canada decision of *Brouillard*, a judge may be required to ask questions, otherwise an injustice may be committed. If a judge sticks to this role, keeps an open mind to the very end in considering the issues raised by all the parties, treats the witnesses with courtesy and politeness and gives the parties full latitude to address the points

raised by his questions, he should not be perceived as losing his neutrality. He is only doing his job properly.

[115] Lastly, I believe that common law judges working in an adversary system have as much integrity as a civil law judge working in an inquisitorial system and as great an ability to remain impartial in their quest for the truth and in delivering justice.

[116] So let us apply these principles to the facts of this case.

C. Application to the facts

(1) The intention of the parties

(a) Written agreement

[117] The first step is to determine whether there is a written contract that describes the intent of the parties and, more generally, sets out the terms and conditions agreed to. Here, according to Ms. Johnson, there was no such written contract when she was hired by BDI in June of 2014 and when she resumed her assignments in June of 2015. The only contract was between her and Food Handlers, which is a different entity than BDI, and Ms. Johnson did not even work for Food Handlers. That agreement is dated April 21, 2015. No signed agreement between Ms. Johnson and BDI was entered into evidence by BDI's only witness. Only the BDI Agreement, which is an unsigned agreement, was introduced. Ms. Johnson does not remember seeing it, although on the sign-off sheet which she signed there is a statement that she has read and agreed to the terms of the BDI Agreement.

(b) The conduct of the parties

[118] When she was hired in June 2014, Ms. Johnson was never told either at the open house or at the initial orientation that she was to be treated as an independent contractor and not as an employee. However, she acknowledged that she was told that no deductions at source would be made for income tax, for contributions to employment insurance, and so on. In addition, she submitted monthly subcontractor's invoices, although no HST was being charged by her. She did not register under the *Excise Tax Act* or under provincial legislation so as to publicize the fact that she was carrying on a business in Ontario.

[119] It is true that BDI was not withholding deductions at source and this is consistent with its intention to hire Ms. Johnson as an independent contractor. However, whether such deductions at source were required depends on whether the butlers, of which Ms. Johnson was one, were in law true employees. If they were not, there was no requirement to withhold deductions. However, if they were, then BDI had no choice but to make source deductions.

[120] From the evidence as a whole, it can be concluded that BDI clearly intended to hire Ms. Johnson as a self-employed person/independent contractor and not as an employee. However, its conduct was not completely consistent with that intention. For instance, on the Employer's Report of Injury/Disease, (WSIB Form 7) concerning Ms. Johnson, BDI indicates that it is an employer, and in filling out that form Mr. David Smith, Director of Operations, did not indicate that Ms. Johnson was a subcontractor. Furthermore, BDI paid the WSIB premiums and the general insurance premiums to protect itself from potential vicarious liability for all its butlers. There is no evidence that Ms. Johnson contributed to the WSIB or had personal insurance coverage for BDI's banquet serving activities.

[121] No such clear conclusion can be made about Ms. Johnson's intention. It cannot be said that she intended to act as an independent contractor. Although, I believe she knew, if not at the time of her hiring and at her initial orientation, then at least later on when she started to submit the invoices and realized that no deductions at source were being made, that BDI's intention was to treat her as an independent contractor. However, I believe her when she says that she accepted this situation out of necessity because she needed the money to pay her rent and other living expenses.

[122] Ms. Johnson's conduct is consistent with her being someone who entered into a contract of adhesion.[48] BDI had a staff of approximately 600 butlers in 2015 (which increased to more than 800 in the following years). These workers were mostly part-time workers, mainly students (50%) and other precarious workers. There is no evidence that the terms of the agreement were modified on a case-by-case basis after negotiations between BDI and its butlers. Ms. Johnson got her pay raise according to BDI's policy, i.e., after working the required number of shifts and attending the required orientation sessions.

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[48] For an illustration of the use of the concept of contract of adhesion in a common law jurisdiction, see *Douez v. Facebook, Inc.*, [2017] 1 S.C.R. 751, 2017 SCC 33.

[123] In addition, there are self-serving statements in the BDI Agreement intended, it seems, to be used in arguing BDI's case before the relevant authorities. For instance, if BDI contracts for a job of less than 4 hours, the worker will "recognize a profit of 0 to 4 hours". The use of the word "profit" is odd. It is an accounting concept describing the net result after deducting expenses and allowances from gross revenues. What a contractor receives for his/her services is a fee. You don't pay profit to such a contractor. It is quite evident to me that BDI adopted deliberate planning to ensure that it would not have to contribute under the *Act* or under social programs such as the Canada Pension Plan.

[124] So we do not have a clear situation where both parties agreed voluntarily to the terms of the BDI Agreement.

(2) The objective reality

[125] It is in this context that we must move to the second step of the approach and determine whether there is an objective reality that sustains the subjective intent of at least BDI. As mentioned above, this step would have been required even if Ms. Johnson had clearly intended to sign a contract for services and not a contract of service. This approach is followed not only in the Canadian common law provinces, but also in other Commonwealth countries and the United States, and in civil law jurisdictions such as Quebec and France.[49]

(a) Circumstantial evidence

[126] Applying the rules of evidence, it is useful to refer to both direct and circumstantial evidence to determine whether the relationship was one of employer-employee or that of client-independent contractor. As seen above in *Ready Mixed*, a right (power) of control is a "necessary . . . condition of a contract of service". This right can be discovered "by implication" or by "presumption of fact", or in other words, by circumstantial evidence. Let us start with circumstantial evidence, which is often the only evidence available to the courts.

(i) Number of clients

[127] The first fact that strikes me in this particular case is that Ms. Johnson was only working as a waitress for one payer, i.e., BDI. Normally, when one carries on

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[49] See section 1.1.3 of my article "Comparative employment law".

a business as an independent contractor one is offering services to a number of clients. This is what BDI does: it has numerous clients to which it offers its butler services. These clients include event organizers, hotels and caterers, as illustrated by the testimonials quoted above. The price for providing such services is negotiated between BDI and its numerous clients.

[128] For clarity's sake, it is important to state that these clients are BDI's clients and not Ms. Johnson's. First, there is no contractual relationship between her and these clients. Her only contractual relationship is with BDI. Second, there is a non-competition clause in section 11 of the BDI Agreement, which states that the subcontractor cannot provide her services to clients of BDI for a period of 12 months after termination of the agreement. So this clientele is part of the goodwill and other intangibles of BDI. It was BDI that could profit from the clientele and not Ms. Johnson. She was only entitled to her salary for the hours that she worked for BDI.

[129] All of this is consistent with Ms. Johnson's understanding that she was just an employee. To her mind, BDI controlled the market of the big venues in Toronto and therefore it would not have been possible for her to work for those venues directly. In any event, after doing her three shifts, which would have given her close to 30 hours for the week, Ms. Johnson was looking to find permanent employment for the rest of the week. She was not trying to increase her profits from an alleged banquet-serving business by finding new clients.

[130] More generally, when someone operates a restaurant or a plumbing business or provides professional services, as in the case of a dentist or an optometrist, one is offering services to numerous clients. Therefore, it is more likely that one is being hired as an employee if one only works for one person, an employer, and that one is being hired as an independent contractor when one provides one's services to numerous clients. Indeed, the right to control and supervise the worker is more likely to exist and be exercised in the former situation than in the latter. The latter is more consistent with carrying on a business. The worker in such case is not subject to control and supervision by the clients, except to the extent that they are making sure they are getting what they are paying for. This is illustrated in the *Morris Meadows* case, decided by my colleague Miller J., with respect to the work performed by the primary cleaner, who was considered an independent contractor because she had several clients.

(ii) Number of employees

[131] Similarly, the fact that a worker has many persons working for him/her is more consistent with a situation in which one is carrying on a business. This is the case with BDI, which recognizes that is has several employees working in its administration and in the management of its operations. In addition to the sales representatives dealing with clients, there is the assignment manager and the human resources manager, who deal with BDI's staff of some 600 butlers. It is BDI that has the opportunity to make a profit by charging $22 to $23 an hour for each of its butlers that it uses to provide its services to its clients and by paying those butlers between $14 and $16 an hour.

[132] Ms. Johnson had no employees and this is more consistent with her being an employee. She could only earn her salary for each hour that she worked, like an employee. Unlike BDI, she had no opportunity for profit. It should be added that she did not have an obligation to find a replacement whenever she could not attend an event after having accepted an assignment. Her only obligation was to notify BDI. She therefore did not run the risk of having to assume the financial cost of finding a replacement. This risk was assumed by BDI, which would assign 105 butlers to an event when only 100 were needed. By experience, BDI knew that some butlers would not show up and it, not Ms. Johnson, would assume the cost of those five additional butlers. It was BDI that carried on the business, not Ms. Johnson. When she did not show up for an event, she did risk incurring a loss in that she simply did not earn a salary, as is the case with many employees who do not work for employers that provide benefits such as paid sick leave.

(iii) No substantial investment in capital assets and no working capital

[133] BDI has an office in which it has office furniture and equipment such as a phone and a computer system and where its administration staff works. Some, if not all, of the training is done at the BDI office. That is where the open house occurred. In order to operate its business, BDI requires tools such as a computer to run a database containing all the information about its roster of butlers and an email system to communicate with the butlers in order to meet its clients' needs. One assumes that it has working capital to operate this business on a day-to-day basis. This is consistent with BDI carrying on a business. The more assets (tools, equipment, etc.) one possesses for the purpose of one's activities, and, in particular, the more costly those assets are, the more consistent is the possession of the assets with the carrying on of a business. The converse, on the other hands is more consistent with the fact that the activities constitute employment.

[134] For instance, if a construction worker is providing his own expensive equipment, such as bulldozer, it is less likely that there is an agreement pursuant to which this worker would allow a payer to control how he is to operate his machinery and, accordingly, the more likely it is that he is carrying on a business because, in addition, he is assuming all the financial risk of owning, operating and maintaining this equipment.

[135] Ms. Johnson's activities did not require any substantial capital investment and working capital. Indeed, there is no evidence that she had any capital. The main thing she provided was her labour which is what an employee provides. The other requirements for her work were minimal: a pen and a pad, a corkscrew, a lighter, pants, shirts, a tie and a vest. Where a worker does not provide any tools or equipment or, if he/she does, only does so to a minimal extent, that is more consistent with the existence of an employment relationship than the carrying on of a business. This is why MacKenna J. in *Ready Mixed* stated that when a labourer who works for a builder is required to provide some simple tools and accepts the builder's control, the contract is one of service.

[136] The cost of advertising and other similar operational expenses, such as the cost of business cards, are other indicia that one is carrying on a business. We do not have any such expenses in the case of Ms. Johnson.

(iv) Invoicing template

[137] Another indication that Ms. Johnson was acting as an employee is the fact that for the so-called invoices that were submitted by her for the calculation of her remuneration she used a worksheet template that had been developed by BDI. In my view, this procedure is unusual. An independent contractor does not rely on its clients to prepare such a template. A contractor (such as a dentist, an optometrist, a restaurateur, or a plumber) will prepare his or her invoice using his or her own template. What was done in Ms. Johnson's case is more consistent with the worker being an employee of BDI than with her being a true independent contractor.

[138] It is important to note that Ms. Johnson was not registered under the *Excise Tax Act* and she did not have a GST/HST number that appeared on the so-called invoices.

[139] What was the real purpose of having this invoice filled out by Ms. Johnson? BDI had all the information about the hours that she had worked because its representative—the supervisor or team leader—made the roll call at the events and

each butler was required to sign the presence sheet on which was entered his/her time in and time out.

[140] In addition, Ms. Johnson stated during her testimony that had she been an independent contractor she would have charged a lot more than $14 an hour for her services. That hourly rate is more consistent with the rate paid to an employee than the rate charged by a business providing hospitality services. BDI was carrying on such a business and was charging approximately $23, that is, 164% more than Ms. Johnson was being paid. BDI was making a gross profit of approximately $9 per hour on Ms. Johnson's work. So the one that had the opportunity to make a profit was BDI and not Ms. Johnson.

(b) Direct evidence of control and supervision

(i) Attendance at training sessions

[141] In addition to the circumstantial evidence mentioned above, there is direct evidence which shows that BDI was exercising its right of control over Ms. Johnson's work. The first proof of such control is the requirement by BDI that its workers attend orientation/training sessions so that they would be properly trained for the work they were being hired to perform. In the advertising on its website, BDI boasts: "All our staff go through our Standards of Professional Service™ program".[50]

[142] In paragraph 1.f of the BDI Agreement, there is a requirement that the butlers meet all the conditions of the Standards of Professional Service Guideline. When questioned about this standards guideline, Mr. Sowden confirmed that it would have been attached to the agreement. However it was not introduced in evidence with the agreement itself. Mr. Sowden indicated that the guideline was a 15-page document.

[143] This document would have been important for determining the scope of the obligations that the workers had to fulfil and I asked Mr. Sowden to provide it to the Court. However, his lawyer subsequently advised the Court that the people in the office that could have retrieved this document were on holiday. I therefore draw a negative inference from the failure to produce this important attachment to the BDI Agreement. It prevents the Court from fully determining the true nature of

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[50] See Exhibit A-1, Tab 6.

the contract. I assume that this document would have supported Ms. Johnson's view that she was an employee.[51]

[144] BDI was offering many different training sessions. In order to be hired, one had to attend the first training session, called an orientation session. During the training sessions, the wait staff would be told how to do their job, for instance: how serviettes should be folded, how tablecloths should be placed on tables, how to set up the tables, where each particular utensil had to be placed around the plates, where the glasses were to be put, on which side one should approach guests in order to deposit the plates in front of them.

[145] The approach adopted by BDI to give its staff an incentive to attend additional training sessions was to make salary increases dependent upon attendance at three additional orientation sessions after a certain number of assignments. Other training sessions were also offered, such as one on how to use the new scheduling software Next Crew.

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[51] For a similar approach, see *Enns* v. *M.N.R.*, 87 DTC 208, 210:

> Neither the former accountants nor Mr. Wright were called. It would have been of considerable assistance to the Court to have heard their testimony particularly as to any instructions given to them by the applicant with respect to the Notices of Assessment which the applicant must have known would follow the filing of his 1978 and 1979 returns. If such evidence was available to the applicant then it was in my view incumbent upon him to present it to the Court.
>
> In *The Law of Evidence in Civil Cases*, by Sopinka and Lederman, the authors comment on the effect of failure to call a witness and I quote:
>
> > In *Blatch v. Archer*, (1774), 1 Cowp. 63, at p. 65, Lord Mansfield stated:
> >
> > > "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."
> >
> > The application of this maxim has led to a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.
> >
> > [Emphasis added.]

[146] One normally does not see such training being offered by a client to an independent contractor such as a plumber, a dentist, an optometrist or a restaurant operator. When clients hire independent contractors, they expect them to have all the necessary training to perform their services. Therefore, here, Ms. Johnson was being treated as an employee by BDI.

(ii) Dress code

[147] Another directive evidencing control being exercised over Ms. Johnson is the requirement for future butlers to attend an orientation session at which control was exercised through the imposition of clothing requirements for the performance of the butler's services at the various events. Ms. Johnson, like the other waiters, was required to wear a uniform approved by BDI: plain black-long sleeved dress shirt or a similar white one, plain black wide tie, plain black dress pants (no cotton/denim, not/tight-fitting, black polishable dress shoes (no runners/ballet flats) and a plain black vest (no shiny back, no buckle). In addition, BDI suggested that certain items of clothing be purchased through BDI "as it is difficult to get approved". In the case of Ms. Johnson, she opted to purchase her own clothing, but she had to get it approved. So Ms. Johnson was not free to carry on her activities as she saw fit, as an independent contractor would generally do. However, it makes sense for an employer such as BDI to ensure that its butler staff is dressed the same way so as to make a very favourable impression of professionalism on its clients' guests.

[148] It should be added that, as we saw in the assignment emails, butlers, such as Ms. Johnson, were told how they should be dressed by BDI for every event: sometimes in black, sometimes in white. Many times, these directives went even further: they required that the butlers be clean shaven and that their hair be neat, tidy and tied in the back, and they specified that no jewellery was allowed.[52]

(iii) The when and the where

[149] It was stressed by BDI that Ms. Johnson had the right to refuse an assignment. I don't find anything unusual in this fact given that the BDI butlers are part-time workers who are mainly students and other precarious workers. They

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[52] Such things have been taken into account in other cases, such as those involving letter and parcel delivery workers: Dynamex and Fedex workers for instance. See *Dynamex*, *supra* note 33, at par. 81.

have other activities to take into account, such as their studies and activities unrelated to the hospitality activities. An employer that does not offer full-time employment cannot expect its part-time employees to be always available any time it needs their services. For an example of employees (nurses working for an agency) having similar conditions of employment, see *Hôpital Santa-Cabrini v. The Queen*, 2015 TCC 264, [2015] T.C.J. No. 203(QL), in particular paragraph 18. (**Hôpital Santa-Cabrini**).

[150] If an employer were hiring employees for 40 hours per week, one would expect that employer to have more control over the hours of those employees. So the right to refuse an assignment is not incompatible with the existence of an employer-employee relationship.

[151] Here, however, once a butler accepted an assignment, it was BDI that decided where the butler was to go, at what time the butler was to be there, which door the butler was to use to enter the venue, which corridor to use and where to wait before being allowed to enter the reception hall. As we have seen above, BDI could change the time at which a particular activity would take place. BDI went as far as to make transportation arrangements, sometimes at its own expense. It would give directives as to where and when the butlers were to be picked up. BDI also gave instructions to the butlers as to how they were to behave while waiting to enter the room where they would be working. BDI told them whether they were required to remain silent and whether they were allowed to sit on the chairs.

[152] Furthermore, it was BDI that decided when the butlers could take a break during an event and when they were allowed to leave at the end of the event.

(iv) Control and supervision during events

[153] Control and supervision were being exercised by BDI over the performance of the services it provided. On its website, BDI states that it offers “professional event staff” covered by WSIB and fully insured and that “a **supervisor** is your direct liaison with the Butler team”.

[154] Contrary to what is alleged in the notice of intervention drafted by BDI’s lawyers, BDI did not carry on a staffing referral service business, which I understand to mean the business of referring a particular client to workers who can then be hired by the client, as waiters and waitresses, for instance. This is also what professional associations such as provincial law societies would do, i.e., provide to

members of the public the names of lawyers who can be hired to provide their professional services.

[155] Nor did BDI operate as an agency for the placement of workers who would be performing their services under the control of BDI's clients, as was the case in *Hôpital Santa-Cabrini*. According to the information provided on BDI's website and in the testimony of both Ms. Johnson and Mr. Sowden, BDI provides butler services, under its supervision, to different caterers, event organizers and venues. In one of the testimonials quoted above, an event organizer congratulates BDI for its supervisor's work in "manag[ing] his staff". Ms. Johnson testified that a supervisor and team leaders supervise the work of the butler staff serving the guests of BDI's clients. Mr. Sowden confirmed that BDI pays its supervisors between $20 and $25 per hour.

[156] He stated that the team leaders are also providing services to its clients' guests and do not supervise the butlers. However, I find Ms. Johnson's version more credible. As Mr. Sowden testified, a gathering of 750 guests attending a particular event must be served in a short period of time of approximately 15 to 25 minutes. For a team of approximately 50 to 60 butlers to achieve this goal, it is necessary that there be someone in charge to supervise these butlers' work, to tell them what to do, where to do it, how to do it and when to do it, i.e., when to start, when to take a break and when to leave. You cannot have 50 or 60 independent contractors each deciding these matters. By the very nature of the work to be performed, one has to direct, control and supervise those who serve the guests. It has to be teamwork, as with players in professional sports, who provide their services to hockey, soccer, baseball or basketball teams. These players are employees of these professional clubs. If it were otherwise, there would be chaos.[53]

[157] On the other hand, it is normal that BDI would not have had to repeat a lot of directives to its workers who performed repetitive duties that did not change from one event to another. They did not have to be told every time how to fold the napkins and how to place the tablecloth. The same would apply to waiters and waitresses working as restaurant employees. However, the person in charge for BDI, namely, the supervisor, would have the power to give such directives should that be required.

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[53] See *Nichols v. The Queen*, 2009 TCC 334, at par. 23, referred to in the Respondent's written submissions in reply to the Appellant's written submissions.

[158] Once it obtained a particular contract for staffing an event, BDI would make all the arrangements to assemble its team of butlers, would instruct them on what to wear and how they should look, would ensure their presence at the venue, would sometimes make transportation arrangements, and would tell the butlers what to do. It could even change the task assigned to a butler. For instance, although Ms. Johnson may have initially agreed to provide her services as a coat check attendant, BDI could decide at the event that she would act instead as a banquet server. So BDI managed the workers during the event to ensure cohesion, prompt service and, in the end, a successful event.

(v) Disciplinary reports and a secure environment

[159] Evidence of control being exercised is also to be seen in the fact that BDI received reports from its supervisors/team leaders about the performance of its butlers, and disciplinary measures were taken when a problem occurred. Ms. Johnson was disciplined for not working at an event after she had agreed to do so: she lost three assignments after an investigation by BDI.

[160] BDI also provides a secure environment for its butlers, taking measures such as protecting them from harassment.

(c) The risk of loss

[161] The other criterion that is often used in common law jurisprudence to determine whether one is an employee or in an independent contractor is the risk of loss or opportunity to make a profit. These two indicia are characteristic of a person carrying on a business. An employee does not bear the risk of losses such as those which would result from damage caused to third parties. As we saw in *Sagaz*, these risks are borne by a business. In the case of Ms. Johnson, it is obvious that the risk of loss was almost non-existent. She was being paid monthly for her work. She testified that if she dropped a glass she was not asked to pay its replacement cost. If she dropped a cup of very hot coffee on a guest, the potential liability resulting therefrom would be taken care of by BDI's insurer, and if she dropped it on herself, the WISB would cover it. So it was BDI that assumed the risk, not Ms. Johnson. It was BDI that paid for the WISB and other insurance coverage: $70,000 for the former and $20,000 for the latter.

[162] The only expenses that Ms. Johnson incurred in performing her services were normally for travelling to the venues in the Greater Toronto Area. During her cross-examination, Ms. Johnson acknowledged that she may have had to pay for

some gas for her carpool transportation to venues. Exhibit A-1, Tab 19 shows that she paid $5 one way and $8 for a round trip when working at events in the Greater Toronto Area.

[163] It is not unusual for employees to incur such costs. That is what most employees do in order to report to their employer's place of business. However, for travel to remote locations such as Niagara Falls, these costs and even the expense of the worker's remuneration for their travelling time would generally be borne by BDI, which, not surprisingly, would charge them to its clients.

[164] Nor is it unusual for employees to pay their clothing costs and the cost of small tools. People wearing a suit at the office are not reimbursed for its cost. It is quite unusual, however, for employees to have to pay for the pens and pads they use when working at the office, but this is not necessarily true for restaurant serving staff. In any event, the cost of a pen, a pad, a corkscrew and a lighter is not significant enough to influence the nature of the contractual relationship given that it is unlikely to result in a loss for this employment activity.

(d) Opportunity for profit

[165] In terms of opportunity for profit, I agree with Ms. Johnson when she states that had she been an independent contractor she would have charged a lot more than $14 an hour to clients such as hotels or any private facilities at which she would have carried on business activities. Someone carrying on a business would normally have personnel working for the business, but this was not the situation in the present case. Therefore the possibility of making a profit here was not real. The only remuneration that Ms. Johnson got was for her labour. She could not even ask for gratuities from BDI's clients. Like any other employee, the more hours she worked, the more money she made. Her total remuneration for 2014 was $4,063.31 and for 2015, it was $7,952.25. This looks more like the wages of a part-time worker than a profit from a business. In addition, this is not what is meant when we refer to opportunity for profit as a factor for distinguishing between an employer-employee relationship and independent contractor status.[54] Therefore, this criterion does not indicate that Ms. Johnson was carrying on a business as an independent contractor.

(e) Integration test

[166] In my view, another indication that Ms. Johnson was an employee is the fact that the core business of BDI is event staffing. In order to be carrying on this business, BDI requires workers to provide that service. This is an essential element of its business operations. Therefore, the work of Ms. Johnson was truly integrated into the business of BDI. BDI has managers who interview people for hiring, personnel managers to organize orientation and training sessions for the personnel being hired and booking managers to communicate with the staff to ensure their presence at events.

[167] If we look at it from the point of view of the worker, as suggested in the two leading cases, I do not see how the integration test can be seen as indicative of Ms. Johnson being an independent contractor given that all her work was being performed under the direction and control of BDI. She was being told where to go, when to go and what to wear: she could not leave at the end of an event without the

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54 See Geoffrey England, *Employment Law in Canada*, 4th ed. Vol. 1, loose-leaf (Markham, Ont.: LexisNexis, 2005), Chapter 2, paragraph 2.13 et seq., cited in *Dynamex* (*supra* note 33), at par. 17 and 18.

approval of her supervisor or team leader; she could not take a break during the evening without the permission of her supervisor or team leader.

(f) Overall assessment

[168] Finally, at the end of his examination, I asked Mr. Sowden what differences there were between the treatment of the butlers by BDI and the treatment of bartenders, waiters and waitresses working for a restaurant, a hotel or different other venues. Mr. Sowden had operated his own restaurant for a period of eight years. None of his explanations would be relevant in distinguishing an employee from an independent contractor. He never said that BDI's banquet servers would have greater freedom to choose the way in which to do the job, to choose the means of performing it, and so on than a waiter/waitress employed in a restaurant. So there were no relevant real differences between the work of his butlers and the work of a waiter employed by a restaurant.

[169] He answered that restaurants and other venues operate year-round while the work performed by BDI was more seasonal. In addition, the events that were organized were short-term events whereas restaurants are open every night in the same location, although Mr. Sowden did agree that events could occur on an annual basis. He also stated that no events are similar to a restaurant operation. The difference is that a business like BDI is more an ambulatory than a sedentary operation. He also pointed out that staffing agencies such as BDI would require greater flexibility from their staff.

[170] I am not convinced that this is necessarily the case. Waiters and waitresses working for restaurants do not necessarily work full time and I imagine flexibility would also be required in those circumstances. One could even consider that waiters working for staffing agencies would require more supervision than regular waiters employed in a restaurant because the latter would have better knowledge of what they have to do on a regular basis.

[171] In summarizing the approach described above, I will say, borrowing a formula used by one of my former colleagues: "I can recognize an employee when I see one." Another former colleague of mine put it in more metaphoric terms in

stating that if a two-legged creature with feathers waddles like a duck, quacks like a duck and looks like a duck, it must be a duck.[55]

[172] Here, when we look at the overall course of conduct of BDI and Ms. Johnson, we see that Ms. Johnson worked for one payer, like an employee, that she was paid a remuneration of $14 to $15 an hour, like an employee, that she was being told what to do, like an employee, she was being told where to go, like an employee, that she was being told how to do her work, like an employee, that she was being supervised, like an employee. Therefore, Ms. Johnson must have been an employee.

[173] To answer the key question enunciated in *Sagaz*, i.e., whether the person who has been engaged to perform the services is performing them as a person **in business** on his own account, it is clear that Ms. Johnson was not carrying on any business on her own account. She was only working on BDI's account when performing her tasks at the functions for which BDI provided staffing services. She did so in the same way as any employee of a similar business. She did not act as an independent contractor because she was not free to perform her services as she saw fit. In order for BDI to successfully provide its services to its clients, it has to supervise and control the work of its team of butlers. It would not work to have 50 or 60 independent contractors in the room free to perform their services as they please. This is not the same as contracting out to one person a particular task such as office cleaning done during the night when all the managerial staff is gone.

V. CONCLUSION

[174] So, in the end, the objective reality does not sustain the subjective intent of BDI. Ms. Johnson has succeeded in establishing that she was working pursuant to a contract of service and was engaged in insurable employment during the relevant period.

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55 See Judge Mogan in *Sanford v. Canada*, [2000] T.C.J. No. 801 (QL) at par. 17, [2001] 1 C.T.C. 2273. See also the US Court of Appeal decision in *Estrada et al. v. Fedex Ground Package System, Inc.*, 154 Cal. App. 4th 1; 64 Cal. Rptr. 3d 327; 2007 Cal. App. Lexis 1302; 154 Lab. Cas. (CCH) P60, 485, cited in *Dynamex* (*supra* note 33) at par. 29-31 where the same duck metaphor was used.

[175] For all these reasons, the appeal of Ms. Johnson is allowed and the Minister's decision is modified: Ms. Johnson was engaged in insurable employment during the relevant period.

Signed at Ottawa, Canada, this 22nd day of October 2018.

"Pierre Archambault"

Archambault J.

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