

WCAT Decision Number: WCAT-2011-01602
WCAT Decision Date: June 28, 2011

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 110689-A

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. S096590
Murray Robert Judson, by his Litigation Guardian, Robert Judson v. Dr. Kurt Konrad Samer

Applicant: Dr. Kurt Konrad Samer
(the “defendant”)

Respondent: Murray Robert Judson,
by his Litigation Guardian, Robert Judson
(the “plaintiff”)

Representatives:

For Applicant: David W. Pilley
HARPER GREY LLP

For Respondent: Vahan A. Ishkanian
Barrister & Solicitor

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Introduction

- [1] The plaintiff, Murray Robert Judson, underwent back surgery on June 19, 2009 at the Cambie Surgery Centre. It appears that the plaintiff was deprived of oxygen during his surgery, resulting in a severe anoxic brain injury which left him severely disabled. The defendant, Dr. Kurt Konrad Samer, was the anaesthesiologist during the plaintiff's surgery. The defendant claims that the plaintiff's 2009 surgery was causally related to the plaintiff's injury at work on June 2, 2006, when he was employed by Huckleberry Mines Ltd.
- [2] Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury or death. This application was initiated by counsel for the defendant on April 1, 2011. A transcript has been provided of the examination for discovery of the defendant on March 1, 2011. The legal action is scheduled for trial commencing on September 6, 2011.
- [3] Huckleberry Mines Ltd. and Cambie Surgeries Corporation were invited to participate in this application as interested persons. No reply was provided by Huckleberry Mines Ltd. By letter of May 16, 2011, Cambie Surgeries Corporation confirmed that it was not participating in this application.
- [4] The defendant provided a submission on May 2, 2011 (with Dr. Samer's affidavit of May 2, 2011). The plaintiff provided a submission on May 19, 2011. The defendant provided a rebuttal on June 10, 2011, together with Dr. Samer's further affidavit of June 9, 2011. The plaintiff was given an opportunity to provide a final reply to this new evidence, and provided a submission on June 18, 2011.

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[5] Written submissions have been provided by the parties to the legal action. The background facts are not in dispute, and this application does not involve any significant issue of credibility. I find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Issue(s)

[6] A determination is requested concerning the status of the defendant at the time of the plaintiff's surgery on June 19, 2009.

Jurisdiction

[7] Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Workers' Compensation Board, operating as WorkSafeBC (WCB or Board), that is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

Status of the plaintiff, Murray Robert Judson

[8] By letter of April 11, 2011, plaintiff's counsel requested that WCAT provide an expedited decision regarding the status of the defendant ("leaving all other issues to another day if necessary"). WCAT agreed to this request. No submissions have been provided concerning the status of the plaintiff. Accordingly, no determination is provided concerning the status of the plaintiff at this time.

[9] The following information under this heading is provided for background purposes only. This information does not involve any findings, and is subject to further review in the event a determination is requested concerning the status of the plaintiff.

[10] By affidavit of April 15, 2011, Robert Judson, the plaintiff's father, states:

5. On June 19th, 2009 at the age of 43 years, Murray underwent elective back surgery at Cambie Surgery Centre in Vancouver. While the surgery was a success, Murray did not wake up following the surgery. While it was expected that he would be released

within a day of the surgery, instead he was in a deep coma for weeks and has been in a hospital or care institution ever since.

...

7. As a result of this brain injury, and in spite of extensive rehab, Murray now requires extensive care. He has cognitive deficits and is unable to manage his financial affairs. He can make noises but cannot speak, and communicates through a word board and through non-verbal communication. He cannot stand on his own. He currently is in a care home in Kelowna and requires significant support and assistance.

- [11] By letter dated April 1, 2011, the defendant summarized its position regarding the plaintiff as follows:

On June 2, 2006, Mr. Judson slipped and fell while exiting a shower in a bunkhouse facility while at work for Huckleberry Mines Ltd., striking the back of his head on the wall and floor, resulting in a "stiff neck". Mr. Judson was admitted to the Bulkley Valley District / Smithers Hospital for observation. The diagnosis was "post concussion syndrome and whiplash cervical spine". Specifically, he complained to his treating physician of pain at C7 radiating into his upper back. Following that injury Mr. Judson filed a claim with Worksafe BC, claim number [...]. He remained off work until Saturday, June 24, 2006.

Dr. Samer takes the position that the surgery referred to above was necessitated by the slip and fall at work in 2006.

- [12] The plaintiff's employer, Huckleberry Mines Ltd., was registered with the Board as an employer at the time of the plaintiff's June 2, 2006 accident. The plaintiff's claim for an injury on June 2, 2006 was accepted by the Board for wage loss and health care benefits. The plaintiff did not contact the Board concerning this claim subsequent to June 2006. In particular, there was no contact between the plaintiff and the Board regarding his back surgery on June 19, 2009. The plaintiff did not advise the Board of his planned surgery or seek a reopening of his 2006 claim. Accordingly, there was no consideration or adjudication by the Board as to whether the plaintiff's June 19, 2009 surgery would be authorized or accepted as resulting from his June 2, 2006 work injury.

- [13] The defendant advises that it plans to adduce medical opinion evidence with respect to the cause of the plaintiff's neck/back pain condition, which necessitated the surgery that was performed on June 19, 2009 with Dr. Samer as the attending anaesthesiologist. The defendant seeks determinations that the plaintiff was a worker within the meaning

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of Part 1 of the Act, and that the further injury suffered by the plaintiff at the time of his surgery on June 19, 2009 arose out of and in the course of his employment within the scope of Part 1 of the Act.

Status of the defendant, Dr. Kurt Konrad Samer

- [14] The defendant, Dr. Samer, gave evidence at an examination for discovery on March 1, 2011. He also provided affidavits on May 2, 2011 and June 9, 2011. The relevant evidence is primarily contained in his affidavit of May 2, 2011.
- [15] Cambie Surgical Centre is operated by Cambie Surgeries Corporation (collectively "Cambie"). Cambie is a private surgical clinic, with six operating rooms and six overnight beds. Dr. Brian Day and Dr. Peter Gropper were and are shareholders of Cambie.
- [16] Dr. Samer obtained his medical degree in 1975, and completed his anaesthesia residency in 1983. He is a fellow of the Royal College of Physicians and Surgeons of Canada, in the specialty of anesthesiology (June 7, 1983).¹ From 1983 until 2002 he practiced anaesthesia and critical care medicine through the Campbell River and District General Hospital. In May 2002 he moved to Vancouver and began a locum practice in anaesthesia.
- [17] In May 2003, Dr. Samer saw an advertisement (in the Canadian Journal of Anesthesia) for an anaesthesiologist position at Cambie. The advertisement stated:

Anaesthesiologist position available in Vancouver, British Columbia. **Cambie Surgery Centre (CSC) is seeking a full or permanent part time anaesthesiologist....** The facility is currently undergoing an extensive expansion, which will be complete in July 2003. The expanded facility will have 6 operating rooms and 7 overnight stay beds. **Until now, anaesthesiology services have been provided by anaesthesiologists who primarily work at other institutions, but our expansion mandates that, in addition, we must now appoint one or two permanent consultants.** Candidates must hold an acceptable specialist certification in anesthesiology and must be eligible for a licence to practice in British Columbia. The position entails no on-call requirements and terms of remuneration are negotiable, possibly including a combination of fee-for-service and or salary....

[emphasis added]

¹ The Directory of Fellows is accessible on the Internet at: http://rcpsc.medical.org/dof/index_e.php.

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[18] Dr. Samer applied for this position. In a letter sent by e-mail on May 24, 2003 to Dr. Samer, Dr. Brian Day, Cambie's medical director, advised:

This is to confirm that, subsequent to our discussions, you have accepted the position of Consultant Anaesthesiologist at Cambie Surgery Centre (CSC), effective July 1st 2003.

You will be working in the capacity of an independent contractor, and will bill fee for service for your professional activities. We anticipate that your annual income will be at the level we discussed, or higher. As our "full-time" anaesthesiologist, you will have priority in scheduling yourself for those sessions you wish to take. You will decide upon the length and scheduling of your own vacation time...

MSP [Medical Services Plan] and RCMP [Royal Canadian Mounted Police] billings will be your own responsibility, as will WCB until such time as the WCB determines that they want an inclusive facility fee (anticipated within the next year).

Private patients will be billed for you, through our accountant, and we generally use BCMA [British Columbia Medical Association] rates for non residents and a negotiated, somewhat lower than BCMA rate, for cosmetic patients. Dental anaesthesia is billed at MSP rates and we supplement that by a daily amount which is presently \$500.00.

...

Administrative chores should be minor, but will be re-imbursable at a mutually agreed hourly rate, and we may (by mutual agreement) decide to negotiate a fixed monthly stipend if that works better.

[emphasis added]

[19] By letter dated May 28, 2003, Dr. Samer wrote to Cambie stating he was pleased to accept the position of full-time Consultant Anaesthesiologist at Cambie as of July 1, 2003.

[20] There was no set or predetermined tenure to Dr. Samer's position at Cambie. He anticipated the possibility of continuing to work there until his retirement.

[21] Dr. Samer did not provide any equipment or materials for the provision of anaesthetic services. The equipment, drugs, and surgical gowns were all provided by Cambie. The only piece of equipment owned by Dr. Samer was his own stethoscope, which he chose

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to use for hygienic reasons. All patient charts, including portions relating to anaesthetic care, were kept and stored by Cambie.

[22] In order to operate as a private surgical clinic, Cambie was required to obtain certification from the British Columbia College of Physicians and Surgeons Non-Hospital Surgical Facilities Accreditation Committee. Dr. Samer was required to maintain his qualifications as an anaesthesiologist licensed to practice medicine in British Columbia. As well, Cambie required all medical staff to take the Advanced Cardiac Life Support course at least every two years.

[23] Because Dr. Samer's administrative duties took relatively little time and because he was happy overall with his relationship with Cambie, he did not seek or receive remuneration from Cambie for the administrative services he provided (although he was entitled to do so).

[24] Occasionally, Cambie would cancel a slate of surgeries for an entire day. Dr. Samer's agreement with Cambie required Cambie to pay him for such cancelled days. However, because these cancellations were infrequent and he was generally happy with his role at Cambie, Dr. Samer did not seek or receive remuneration for cancellations.

[25] The surgical slate and operating room to which Dr. Samer was assigned were determined by Cambie. In his examination for discovery, Dr. Samer advised (Q 9):

The surgical lists that we do at Cambie or did at that time were assigned by the booking clerk, and she would assign us in advance to one room or another.

[26] Dr. Samer advised that he was the only full time anaesthesiologist at Cambie (Q 11 to 12). He explained (Q 11):

Part-time there was William Penz, who worked almost full-time, and there were probably half a dozen others who worked intermittently on an as-needed basis.

[27] With respect to the anaesthetic equipment, Dr. Samer advised (Q 19):

Most of the equipment that was at Cambie when I arrived was the equipment that was present on that date, June 2009. It was purchased by I believe the executive director, Lorraine Varner, by and large. Equipment that was purchased subsequent to that, the decisions were also made by mainly Lorraine Varner with some input from myself. And it was

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maintained through an arrangement with the biomechanical engineers department at VGH [Vancouver General Hospital].

- [28] During the period Dr. Samer worked at Cambie, he went on three leaves of absence. He did not receive remuneration while on the leaves of absence, but returned to full-time work at Cambie after each leave.
- [29] Patients having their surgeries at Cambie chose their surgeon, but not their anaesthesiologist. Dr. Samer would meet the patient for the first time on the day of surgery. Occasionally, if Dr. Samer anticipated the possibility the patient might want or need to contact him after leaving Cambie, he would provide the patient with a business card containing his name and the Cambie logo. These business cards were provided to Dr. Samer for this purpose by Cambie, and at Cambie's expense.
- [30] From approximately July 1, 2003 until 2007, Dr. Samer received his remuneration personally. In 2007, his accountant recommended that he incorporate for tax purposes. Dr. Samer described the advantages of incorporating as being "[t]o pay less income tax, have more disposable income" (Q 45).
- [31] Dr. Samer incorporated a company called Dr. Kurt Samer Inc., of which he was the sole shareholder. He registered Dr. Kurt Samer Inc. with the College of Physicians and Surgeons of British Columbia. Subsequently, all remuneration for Dr. Samer's services at Cambie was paid to the company and he received his income from the company.
- [32] Dr. Samer did not register the company with the Board, as he did not have any employees and felt it did not make sense for him to pursue registration. He explained (Q 49):

It was my understanding that medical offices in general were encouraged to register with the board, but I believe anaesthesiologists are a unique situation, being not having any employees, and it didn't make much sense to pursue that.

- [33] Dr. Samer described his billing arrangements as follows (Q 52):

The workload on a patient basis was mainly three different categories: MSP, WCB and private paying patients. Patients covered under MSP I billed directly to MSP. Patients covered under WCB, I billed MSP [sic]. Private paying patients, which were patients from out of province, patients who elected to have their surgery paid for privately, cosmetic procedures that were not covered by MSP, I billed Cambie directly and they paid me. And I was also paid by Cambie for any administrative work that I did in

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terms of reviews, any kind of quality assurance review of other anaesthesiologists' work or unusual incidents, time spent with equipment.

[34] With respect to his administrative work, Dr. Samer further explained (Q 53):

The agreement was that I was to bill them on an hourly basis. And in terms of actually billing them, I initially kept track of some of those hours, but I actually never billed Cambie for any of them even though it was an agreement that I could do so.

[35] With respect to his WCB billings, Dr. Samer advised that these were made electronically through an online billing system to WCB (Q 56).

[36] Dr. Samer has provided particulars regarding his earnings from 2007 to 2009 at Cambie, and the sources of these payments. On a percentage basis, these averaged as follows: WCB – 52%, private – 32%, MSP – 14%, RCMP – 2%, Insurance Corporation of British Columbia – less than 1%, out-of-Province insurers – less than 1%. In 2007, his earnings were in excess of \$550,000.00, and in 2008 his earnings were in excess of \$440,000.00.

[37] Some patients were private patients, in the sense that they paid for the surgical services themselves. Often these were cosmetic surgeries. Dr. Samer's remuneration for anaesthetic services associated with such surgeries came directly from Cambie. Dr. Samer advised, at paragraph 35 of his May 2, 2011 affidavit:

For part of my tenure at Cambie, my remuneration for such surgeries was provided based on the time the surgeries took. However, for the latter part of my tenure at Cambie, I was paid for these procedures on a procedure by procedure basis.

[38] Several months after joining Cambie, Dr. Samer was approached by a representative of another private surgical centre, False Creek Surgical Centre (False Creek), and asked to provide anaesthetic services at that centre occasionally when he was not providing them at Cambie. He agreed to this request. Typically, he worked at False Creek one to three days a month, on days or during afternoons when Cambie was not operating. False Creek and Cambie had a generally cooperative arrangement. For example, if one clinic ran short of certain supplies, the other clinic would typically provide some of its supplies on request. Dr. Samer would have stopped working at False Creek had Cambie asked him to do so. Dr. Samer described his work at False Creek as follows (Q 71):

Q If you're working full-time at Cambie, how do you have the time to work at False Creek?

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A The workload at Cambie was variable. It would sometimes only be three days a week, sometimes four days a week. Sometimes a day would end at noon. And on occasion they would have a manpower problem at False Creek. They would contact me and say, can you come down at the end of the day late in the afternoon to help us out. And that's what I basically did. Might be once or twice a month. I did not work at any other facility during my time at Cambie.

[39] Dr. Samer's work at False Creek provided a minor part of his income. He did not bother to advise False Creek that he had incorporated, and continued to receive remuneration from it personally (Q 63 to 65). He advised that he did not bill any work at False Creek in June 2009 (Q 67):

...There was only billing I believe on half a dozen occasions between January and about April.

[40] Dr. Samer was planning to have back surgery in July 2009. He continued working at Cambie for a few days after the plaintiff's surgery on June 19, 2009. Then, Ms. Varner and Dr. Gropper suggested he should take time off earlier than he had planned. Dr. Samer agreed and anticipated returning to work at Cambie after his recovery (on September 14, 2009). Before his anticipated return to work, Dr. Day asked to meet with him. Dr. Samer met with Dr. Day, Dr. Gropper and Ms. Varner. Dr. Day advised Dr. Samer that Cambie was terminating its relationship with him. Dr. Samer believed he was entitled to remuneration as a result of the termination. At the conclusion of the meeting, an agreement was reached about the remuneration Dr. Samer would receive. No details have been provided to WCAT concerning this agreement.

[41] By memorandum dated April 12, 2011, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that Cambie Surgeries Corporation, account number 564896, had been registered with the Board since at least 1996 and was registered at the time of the plaintiff's surgery on June 19, 2009. There was no record of a registration with the Board by Dr. Kurt Konrad Samer. In a further memorandum dated May 6, 2011, the analyst advised that there was similarly no record of a registration in the name of Dr. Kurt Samer Inc.

[42] The defendant provided submissions regarding the factors set out in policy at AP1-1-3 of the *Assessment Manual*. The defendant submits that the general principles in AP1-1-3 should be applied to determine the true legal relationship. At paragraph 99, the defendant argues that the issue of incorporation is of evidentiary value only when considering the issue of whether a person operating in an industry under the Act is a worker, or an independent contractor, in relation to the people for whom he works. Thus, when considering the relationships of people to the person or company for whom

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they are working, the question of whether these people are workers, or whether the group is an independent contractor, must be determined independently of whether the group has incorporated. The defendant cites *WCAT-2005-05297* (summarized as noteworthy on the WCAT website) in this regard. That decision cited the reasoning on this point contained in *Decisions No. 138* and *255* of the *Workers' Compensation Reporter*.

[43] The plaintiff cites the policy at AP1-1-4 of the *Assessment Manual*, which provided:

(c) Principals of corporations or similar entities

As the incorporated entity is considered the employer, a director, shareholder or other principal of the company who is active in the operation of the company is generally considered to be a worker under the *Act*. A spouse, child or other family member of a principal or a shareholder for whom earnings are reported for income tax purposes is considered to be active in the business and a worker.

If a sole, active principal of a limited company is injured at a time when the company was not registered as an employer with the Board, the principal will not be considered a worker at that time and a claim by the principal or his or her dependents will be denied. For the same reason, a claim from one of several principals of a company that was unregistered at the time of the injury, or in the case of fatality, his or her dependents, will be denied unless the evidence indicates that the principal was not personally responsible for the failure to register.

[44] The plaintiff cites *WCAT-2006-01747, Simpson v. Silver et al.*, which found that Dr. Stewart was the responsible principal of an unregistered company and that he was functioning in a fashion similar to that of an independent operator who had failed to obtain coverage for himself. That decision found that Dr. Stewart was not a worker within the meaning of Part 1 of the *Act*. That decision found that the policy concerning a responsible principal of an unregistered company did not merely prevent the payment of a claim for compensation by the responsible principal, but also concerned their status under the *Act*. *WCAT-2006-01747* further found that this policy would apply equally to a plaintiff or a defendant.

[45] The plaintiff submits that the fact that Dr. Samer had incorporated is determinative. Dr. Samer's situation stands on the single footing of the policy regarding incorporated entities that have only one member, one income earner, no employees, and who choose to not register with WCB. The plaintiff submits, in the alternative, that Dr. Samer received remuneration from several sources, and suffered losses in income by taking leaves without pay, by deciding not to bill for administrative duties and

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cancelled days, and paying for his own medical expenses. He had full control over the services he provided. Even if he had not incorporated, he would still be an independent operator because the relevant factors weigh in favour of independence.

- [46] The defendant cites *WCAT-2009-00442*, which concerned the status of a defendant “consultant occupational therapist” with Progressive Rehab Inc. (Progressive Rehab). The defendant’s contract indicated that he was an independent contractor, and he filed his income tax returns as a self-employed person. Progressive Rehab did not provide benefits such as medical or dental, and did not make statutory deductions. The WCAT panel concluded that the defendant was a worker. The WCAT panel reasoned, in part:

Turning to the major test, which is the question of whether the defendant had an existence as an independent business separate from his relationship with Progressive Rehab, the evidence indicates that he did not have a separate existence as a business. The defendant’s work was fully integrated into the operations of Progressive Rehab. Although he could have sought clients outside of his work with Progressive Rehab, he did not do so. He worked continuously and indefinitely for Progressive Rehab. He did not have any clients of his own. He provided assessments for the clients of Progressive Rehab and he received a monthly cheque from Progressive Rehab for the services he provided, regardless of whether Progressive Rehab collected the fee from their client. He did not hold himself out as being independent. Although he did not wear a uniform or have a decal on his vehicle, his business cards were Progressive Rehab cards which were provided to him by the company.

The defendant’s flexibility in terms of setting the hours in which he was available to work is not typical of employment relationships but it does not offset the extent to which the defendant was dependent on Progressive Rehab for his work.

I have also noted that Progressive Rehab did not deduct income tax or make any of the other standard deductions that would normally be made by an employer. In addition, Progressive Rehab did not provide for vacation pay. Although these are all incidentals of an employment relationship, **that the parties may not have complied with obligations associated with an employment relationship does not alter the character of a relationship that is fundamentally an employment relationship.**

[emphasis added]

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[47] The defendant also cites *WCAT-2007-03606*, which noted:

Counsel also cites the text, *Workers' Compensation in Canada (2nd Edition)*, in which Professor Ison states that the most cogent indicator of whether a relationship is one of employment is whether the person works exclusively or almost exclusively for another.

[48] Dr. Samer submits that he was not a business enterprise doing work independently of Cambie. He did not hold out his services to patients generally, or to other surgical facilities. Rather, he worked almost exclusively for Cambie, and his work was inextricably tied to and dependent on Cambie.

[49] The fact that Dr. Kurt Samer Inc. was incorporated, and that the payments from Cambie were made to the company rather than the plaintiff personally, is a factor suggesting that the defendant was not a worker of Cambie. However, the policy at AP1-1-4 uses the term "generally," in providing that a principal of the company who is active in the operation of the company is generally considered to be a worker under the Act. *Decision No. 138*, "Re the Employment Relationship," 2 W.C.R. 143, provided that incorporation is not determinative in relation to such questions.

[50] *Decision No. 138* was retired from policy effective January 1, 2003, in connection with the retirement of *Workers' Compensation Reporter* decisions for the purpose of reducing the number of sources of policy. Although not policy, I find the reasoning in that decision remains compelling. *Decision No. 138* reasoned at page 147 (in addressing the status of tree-planters engaged in reforestation work):

One point that has been raised in discussion is the significance of incorporation. It is important to bear in mind here two separate questions.

1. Whether a person operating in an industry under the Act is a worker, or an independent contractor, in relation to the person or people for whom he works.
2. Whether an independent contractor is under the compulsory coverage provisions of the Act, or is covered only on application for optional protection.

Incorporation has crucial significance on the second question, but is only of evidentiary value on the first.

If the Board treated incorporation as being critical on the first question, it would open the door to serious abuse. Any employer who could persuade a category of workers to incorporate could then

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engage the company on a contract for services and evade the obligations of an employer under the Act. Thus when we are considering the relationship of people to the person or company for whom they are working, the question of whether those people are workers, or whether the group is an independent contractor, must be determined independently of whether the group has incorporated.

After a decision has been made that a business enterprise is an independent contractor, incorporation is then crucial on the nature of the coverage. If it is an incorporated business, all principals of the company are treated as employees of the company, and are therefore workers under the Act. But if it is unincorporated, the principal is treated as the employer and anyone that he hires is treated as a worker. The worker is covered by compulsory coverage, but the employer is only covered himself if he applies for and is granted optional protection.

[emphasis added]

[51] In *Decision No. 255*, "Re Registration of Labour Contractors as Employers," 3 W.C.R. 155, the Board cited the passage quoted above from *Decision No. 138* and concluded:

The Commissioners still accept the validity of this statement of principle. However, as in the case of individual applicants, applications by corporations for registration as employers are usually made bona fide in respect of properly registrable businesses. Only in a minority of cases is incorporation used as a method of avoiding an employer's obligations under the Act. **It is, therefore, reasonable for the Board to accept applications by corporations at face value unless there are circumstances which indicate that a full investigation should be made. In the latter case, the applicant's position will be determined by the principles laid down in *Decisions 32 and 138* and this directive rather than by virtue of its status as a corporation.**

[emphasis added]

[52] Although *Decision No. 255* was similarly retired from policy effective January 1, 2003, I find this reasoning aptly describes the relationship between the policies at AP1-1-3, AP1-1-4 and AP1-1-7 of the *Assessment Manual*. In this case, there was no application for registration by Dr. Kurt Samer Inc., and the status of Dr. Samer is appropriately determined by reviewing all of the factors relevant to determining whether the relationship between him and Cambie was one of employment or one between two independent firms.

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[53] My conclusion in this regard is supported by the specific guideline provided in policy at item (4) of AP1-1-3, which states that parties who would be considered independent firms include:

Incorporated companies unless there are circumstances indicating that the principals of the corporation are workers rather than independent firms. If such circumstances exist, a full investigation will be made and the applicant's position determined in accordance with the policies in this *Manual*.

[54] This interpretation is further reinforced by the guidance contained in Practice Directive 1-1-3(A), "Status – Distinguishing between a worker and an independent operator," effective May 1, 2010. That practice directive did not exist in 2009 and its applicability in this case is therefore subject to question. However, to the extent it may represent a detailed statement of both past and current practice, it may have some relevance. At paragraph 62, the practice directive cites the decision of the British Columbia Supreme Court in *Jacobs v. Harbour Canoe Club Inc.*, 1999 CanLII 3642, [1999] B.C.J. No. 2188. That decision reasoned:

10 A review of decisions in wrongful dismissal cases indicates that, in determining whether an employer/employee relationship exists, courts have looked beyond the formal terms of employment agreements to examine the actual nature of the relationship. For example, in situations where an individual has incorporated a personal services corporation and an employer pays that corporation, the individual has, nevertheless, been held to be an employee entitled to maintain an action for wrongful dismissal against that employer: see *Bird et al. v. Warnock Hersey Professional Services Ltd.* (1980), 25 B.C.L.R. 95 (S.C.) and *MacPhail v. Tackama Forest Products Ltd.* (1993) 86 B.C.L.R. (2d) 218. (S.C.).

[55] The practice directive states:

63. Thus, **when an individual has incorporated and the individual himself or herself provides services through the corporation, the fact of the incorporation does not preclude a finding that the individual is a worker of another entity. The general principles in AP1-1-3 should be applied to determine the true legal relationship.** In so doing, the key question to be considered is this: if it were not for the corporation, would there be a contract of service between the entity contracting with the corporation and the individual? By and large, such a contract of service will exist

collaterally to the formal agreement between the entity contracting with the corporation and the corporation.

64. Where the indicia, other than those which are directly associated with remuneration, evidence that the individual acts under a contract of service with the entity contracting with his or her corporation, the corporation may not be allowed to register.
[emphasis added]

[56] Accordingly, the determination of Dr. Samer's status requires a review of all the evidence in connection with the applicable policies, and the fact of incorporation is not determinative. The reasoning in *Jacobs* provides useful guidance, in any event, whether or not the practice directive is applicable.

[57] Dr. Samer began providing services to Cambie on or around July 1, 2003, and did not incorporate until 2007. His incorporation appears to have been for tax planning purposes, and did not otherwise impact his relationship with Cambie. For the reasons set out above, I consider it appropriate to begin by considering all of the other criteria regarding the nature of this relationship.

[58] The defendant cites the decision of the New Brunswick Court of Appeal in *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (2001), 201 D.L.R. (4th) 450, (C.A.) leave to appeal denied, [2001] S.C.C.A. No. 425. In *Joey's*, the court addressed an appeal from a decision by the Appeals Tribunal of the Workplace Health, Safety and Compensation Commission in New Brunswick. Sections 99(1) and 250(1) of the Act provide that the Board and WCAT are not bound by legal precedent. However, the criteria contained in policy at AP1-1-3 of the *Assessment Manual* are largely similar to the common law tests for determining whether there is a relationship of employment. Accordingly, regard may be had to court decisions concerning the application of these tests.

[59] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, (2001), 204 D.L.R. (4th) 542, the Supreme Court of Canada reasoned:

46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan, supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38,

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that what must always occur is a search for the total relationship of the parties:

[I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a [page1005] contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

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.

[emphasis added]

[60] In this decision, I will apply the policy in the *Assessment Manual* which was in effect in June 2009. Policy at AP1-1-3 provided, under the heading "General principles," that in distinguishing an employment relationship from one between independent firms, there is no single test that can be consistently applied. The policy identified the relevant factors to be considered as including the nine points used as sub-headings below as (i) to (ix). Policy at AP1-1-3 concluded by noting that the major test, which largely

encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done. As noted, I have considered the factors set out at AP1-1-3 under the sub-headings below:

(i) *whether the services to be performed are essentially services of labour*

[61] Dr. Samer was a highly qualified professional. It is evident that his services were essentially services of labour (whether paid on an hourly basis, or on a piecework basis for acting as the anaesthesiologist in relation to particular surgeries). He did not supply any materials.

[62] Policy at AP1-1-5 concerning workers provided, in part:

Workers include individuals not employing other individuals and who fall into the following categories:

- individuals paid on an hourly, salaried or commission basis;
- individuals paid on commission or piecework where the work is performed in the employer's shop, plant or premises;
- individuals paid commission, piecework or profit sharing where they are using equipment supplied by the employer;

[63] The plaintiff submits that remuneration for Dr. Samer's services was analogous to piece work, which amounted to the provision of independent services as an independent business enterprise to several organizations.

[64] The plaintiff's provision of services were performed on Cambie's premises, and were services of labour for which payment was made on an hourly or piecework (procedure by procedure) basis. I find that this factor points to an employment relationship.

(ii) *the degree of control exercised over the individual doing the work by the person or entity for whom the work is done*

[65] As a qualified specialist, Dr. Samer exercised sole responsibility for providing anaesthetic care to patients. He made all decisions about the anaesthetic care for each patient under his care. No one from Cambie told him how to perform his professional

duties. However, I accept Dr. Samer's evidence that this says more about the speciality of anaesthesiology than it does about his relationship with Cambie. This is consistent with the reasoning of the court in *Joey's*:

76 In classical terms, "control" is defined by reference to four aspects: (1) power to direct the thing to be done; (2) the means by which it will be done; (3) the way it will be done; and (4) directing the time and place it shall be done: see *Ready Mixed Concrete (South East) Ltd. v. Min[ister] of Pensions and National Insurance, supra*. **The modern law, however, eliminates the third aspect and instead emphasizes control in the sense of directing the residual "when and where" of the work, as opposed to the manner of its completion. The elimination of the third criterion is necessitated by the fact that today professional employees and other highly skilled workers exercise a great deal of discretion in deciding how tasks are to be performed. The employer is more concerned with assigning tasks and their date of completion than with the way in which results are achieved:** see *Wiebe Door Services Ltd. v. Minister of National Revenue, supra*, at paras. 6 & 7.

[emphasis added]

- [66] In related matters, however, Cambie exercised control. Dr. Samer's working hours depended on Cambie. He could only provide anaesthetic services on days and at times when Cambie was operating. Dr. Samer's evidence was that the surgical lists were assigned by the booking clerk, and she would assign him in advance to one room or another. Cambie also had control over the surgical facility. It was responsible for ensuring the cleanliness of the facility. If necessary, Cambie had authority to discipline any members of staff who were engaged in unsafe practices. As well, Cambie required all medical staff to take the Advanced Cardiac Life Support course at least every two years.
- [67] Dr. Samer also acknowledges that there was an occasional exception to the degree of autonomy he exercised with respect to anaesthetic care. When it came to his attention that a particular patient had health problems which might make his or her anaesthetic care of greater risk than normal, he was expected to bring these concerns to the attention of Cambie's management even if he felt the risk could be managed appropriately at Cambie. In some of these cases, Dr. Day or someone else in Cambie's management would decide if the patient was not suitable for surgery at Cambie and should have this done at a hospital with greater resources.
- [68] I find that the weight of the evidence on this factor points to a relationship of employment.

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(iii) *whether the individual doing the work might make a profit or loss*

[69] Dr. Samer was essentially working on a fee-for-service basis. He did not otherwise share in Cambie's profits. He did not invest any capital. While he garnered substantial earnings, there appears to have been little opportunity for profit or loss in terms of variation from the defendant's normal earnings based on the number of hours worked.

[70] The plaintiff points out that Dr. Samer suffered, by choice, losses of income in two respects. He did not bill Cambie for administrative work, or for cancelled days, although he was entitled to do so.

[71] Dr. Samer's earnings related directly to the amount of work he performed, and his remuneration was certain. The amount of potential earnings he waived in relation to administrative work, or for cancelled days, appears to have been relatively minor in relation to his overall earnings. On balance, I consider that the evidence regarding this factor points to a relationship of employment.

(iv) *whether the individual doing the work or the person or entity for whom the work is done provides the major equipment*

[72] Cambie provided all equipment and materials used by Dr. Samer in his practice of anaesthesiology at Cambie (apart from his stethoscope). This factor points to a relationship of employment.

(v) *if the business enterprise is subject to regulatory licensing, who is the licensee*

[73] Dr. Samer was required to maintain his qualifications as an anaesthesiologist licensed to practice medicine in British Columbia. Cambie was required to obtain certification from the British Columbia College of Physicians and Surgeons Non-Hospital Surgical Facilities Accreditation Committee. I consider that this factor is neutral.

(vi) *whether the terms of the contract are normal or expected for a contract between independent contractors*

[74] The terms of the May 24, 2003 letter to Dr. Samer from Cambie were somewhat contradictory. The letter specified that he would be working in the capacity of an independent contractor. Dr. Samer would do his own billing, apart from private patients who were billed by Cambie. However, it is apparent that this was intended to be a permanent full-time position at Cambie. It was also initially anticipated that the WCB would move to an inclusive facility fee. Given that the WCB ultimately represented 52% of Dr. Samer's billings, and private patients represented 32% of his billings, this meant that it was contemplated that 84% of his billings would be performed by Cambie. However, the WCB did not move to an inclusive facility fee, and Dr. Samer continued to

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bill WCB, MSP and the RCMP. There was no notice period specified for either party wishing to end the contract, and no provisions setting out what would constitute a breach of the contract.

[75] I find that the evidence on this point is mixed.

(vii) who is best able to fulfill the prevention and other obligations of an employer under the Act

[76] As Cambie had control over the facility, it was in a better position to ensure workplace safety regarding training and supervision with respect to safe work practices and conditions. This factor would support viewing Cambie as the employer.

(viii) whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons

[77] Dr. Samer worked at Cambie on a full-time basis for approximately six years. He was absent only for leaves of absence and, presumably, vacations. He anticipated the possibility of staying at Cambie until retirement. His work at the False Creek Surgical Centre was in the nature of "moonlighting" on a limited part-time basis when his services were not required at Cambie.

[78] In *Joey's*, the court addressed the significance of the regularity or exclusivity of the working relationship as follows:

87 The traditional employment relationship is one in which an employee works for only one employer. In recent times the ability of workers to obtain both full and part-time work or multiple part-time jobs does not detract from the fact that the parties are engaged in employment. This is because the employer invariably exercises direct control or supervision over the employee at a fixed business location.

88 By contrast, **the classical notion of an independent contractor is a person moving from one job site to another to complete an assigned task and who is available to anyone who will pay for his or her services. This is why it is conceptually difficult to accept that an independent contractor can work full-time for one principal.** In recent times, the classical notion has been overtaken by the phenomenon of the self-employed providing needed services within the confines of their own homes. **If, however, a worker is tied to one "employer" it becomes more difficult to sustain the independent contractor classification. This is particularly so where the terms of engagement impose an obligation on the worker to be available at specified times.** Once

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again the concept of "control" wiggles its way into the legal equation. This is the "when" part of the "when and where" notion of control discussed earlier.

89 For example, if a driver is required to work a total of 64 hours over six days, and on a continuing basis, it is delusional to think that he or she will be classified as an independent contractor: see *Cerasoli v. Canada (Minister of National Revenue)*, supra. **If, as a matter of fact, a driver works full-time (e.g. 35 hours per week) for one firm, the proper inference is that an employment relationship exists. I subscribe to the view that even if a worker retains the right to work for others, but in practice works substantially for one employer on an ongoing basis, the proper inference is that an employment relationship exists:** see *Roussel v. Prairie Implement Manufacturers Assn.* (1992), 44 C.C.E.L. 243 (Sask. Q.B.) and *Brown v. Western Legal Publications* (1997), 36 C.C.E.L. (2d) 138 (B.C.S.C.). To the extent that *Erb v. Expert Delivery Ltd.*, supra, conflicts with this understanding, that case should not be followed.

[emphasis added]

[79] Dr. Samer's situation was unusual, in that he billed his services separately to a range of payors such as MSP, WCB, and the RCMP as well as Cambie in relation to work done on a private patient basis. An alternative analysis would be that he was offering his services as an anaesthesiologist to a range of clients and as such should be considered independent. Apart from the arrangements for billing, however, there appears to have been little contact between Dr. Samer and the payors. The patients themselves did not select the anaesthesiologist who would be involved in their surgery. The various payors were liable to provide coverage for such services, but do not appear to have played any active role in obtaining Dr. Samer's services. It appears somewhat artificial, therefore, to characterize Dr. Samer as working intermittently and for different persons (in the context of his full time position at Cambie).

[80] I consider, therefore, that the evidence supports a conclusion that Dr. Samer was engaged continually and indefinitely for Cambie.

(ix) *whether the individual doing the work is able or required to hire other persons*

[81] Dr. Samer was not able to hire other persons. This factor weighs in favour of Dr. Samer being a worker. In *Joey's*, the court reasoned:

93 One of the relevant factors that is consistently identified in the jurisprudence is the ability of workers to sub-delegate assigned work by retaining, for example, a substitute driver. **It is an inherent right of an**

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independent contractor to delegate performance of the work to others. By contrast, it is an accepted and essential feature of any employment relationship that work assigned to an employee requires personal performance. This is not to say that the law has developed to the point that the right to sub-delegate work automatically excludes classification as an employment relationship. There are exceptions, but they are not plentiful and, as best I can see, have no application to cases such as that under consideration: see Employment Law in Canada, supra, at Chapter 2, para. 2.20 and cases cited therein.

94 If the agreement between a driver is such that there is an express prohibition against sub-delegation of work, the proper inference is that it must be an employment relationship. Once again, the notion of "control" comes into play. However, **if it is agreed that the worker has an unfettered right to use a replacement or substitute worker, the proper inference shifts to the understanding that he or she is an independent contractor. Lack of control is expressed in the indifference as to who actually does the work so long as it is completed.** Furthermore, I would go so far as to say that it would take compelling reasons to override that inference. The belief that an employee may be granted the right to substitute a replacement worker, not approved by the employer, flies in the face of accepted principles.

95 Finally, there is an indeterminate group of cases in which the parties agree that the worker's right of substitution is subject to the other party's approval. The fact that approval is required is evidence of employer control. The fact that the worker can effect a substitution is consistent with an independent contractor relationship.

[emphasis added]

[82] Regard may also be had to factors beyond those set out in AP1-1-3. In *Joey's*, the court also took into account the purpose of the legislation:

98 Finally, it is necessary to deal with the application of the "mischief rule" or "purposive approach" to classification of working relationships. Bluntly stated, this factor applies on the understanding that **most legislative schemes that distinguish between employees and independent contractors are directed at providing needed benefits to employees. Therefore, it is understandable that the law should lean towards classification as an employee, at least in those cases where conventional analysis leads to an indeterminate conclusion.** Everyone is aware that it is to the benefit of employers to outsource work

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traditionally undertaken by employees and this is the mischief that decision-makers must consider.

99 The adoption of economic measures that promote employer efficiency are well known. In recent times, the out-sourcing of work traditionally undertaken by employees is commonplace. Employers of independent contractors are no longer obligated to contribute to the national pension scheme, as well as federal and provincial insurance schemes - employment insurance and workers' compensation, respectively. Nor are employers required to provide independent contractors with traditional employee benefits, including supplementary health and disability insurance, let alone access to a private pension scheme. At the same time, non-unionized workers classified as independent contractors are ineligible to receive the statutory protections prescribed by minimum employment standards legislation. For these reasons, courts and tribunals carefully scrutinize working relationships with a view to ensuring that employers are not exploiting workers who have one of two options - either accept the work or find alternative employment if it exists.

100 It is true that some workers willingly accept the financial risks to which independent contractors are exposed if work is no longer available. There are advantages to carrying on business for oneself. For example, there are tax write-offs not available to employees and the remuneration received as an independent contractor may enable the self-employed to make adequate provision for retirement and other insurance type benefits. In short, not all workers are opposed to classification as independent contractors and for good reason.

101 The real task is to isolate those cases in which the employer is effectively exploiting workers, that is, cases in which no discernible advantage accrues to those whom the employer has labeled "independent contractor". Perhaps it is not surprising that very few classification cases involve highly skilled workers or home-based entrepreneurs. Much of the jurisprudence has been concerned with the legal status of those possessing a driver's license and a vehicle. Presumably, persons falling within the first category are better able to look after their own economic interests than those who come within the second. This is why the purposive or mischief factor or approach cannot be ignored.

[emphasis added]

[83] In this case, Dr. Samer was a highly skilled and highly paid professional. As such, he was not in a position of economic inequality, at risk of being exploited. He could benefit from certain advantages to carrying on business for himself, for tax planning purposes. The level of remuneration he received would enable him to make adequate provision for retirement and other insurance-type benefits. The evidence regarding this last factor supports a finding of independence.

[84] The policy at AP1-1-3 further states:

No business organization is completely independent of all others. It is a question of degree whether a party to a contract has a sufficient amount of independence to warrant registration as an employer. Many small parties may only contract with one or two large firms over a period of time. Yet they are often independent of the person with whom they are contracting in significant respects. For example, they must seek out and bid for their own contracts, keep their own books and records, make income tax, unemployment insurance and Canada Pension Plan deductions. They also retain the right to hire and fire their own workers and exercise control over the work performed by their workers. These factors must be considered.

[85] Thus, the policy expressly contemplates that a person may be independent even though the person is only contracting with one or two large firms over a period of time. Dr. Samer had to keep his own books and records in respect of the majority of his billings (that is, apart from private patients). He also had to deal with any statutory deductions, as Cambie treated him as an independent operator. However, Dr. Samer did not need to seek out and bid for his own contracts. He met the patients for the first time on the day they were scheduled (by Cambie) for surgery. He did not hire or fire any workers.

[86] In *Joey's*, the court also referred to the "business indicia factor":

96 Case law also focuses on indicia that the worker is carrying on business for himself or herself. **In the ideal case, the independent contractor is one who provides services to numerous clients and markets his or her services to the public on a full-time basis. In such cases, it is obvious that a business is being operated.** Within this context, the independent contractor falls within the informal classification of the "self-employed". However, the reality is that in many cases there are few business indicia that workers are carrying on business for themselves. As often as not, the independent contractor is one who offers his or her services on a part-time basis while retaining full-time employment. Thus, one should not expect to find evidence of workers

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actively promoting their businesses through traditional marketing techniques. In cases such as that under appeal such evidence is always lacking. Marketing is not a realistic option for those with a "one vehicle fleet" used to deliver pizza.

97 In some cases, the lack of indicia that a worker is carrying on business on his or her own account may be attributable to restrictions that the employer has placed on that worker. The ability of one party to promote his or her business may be diminished by the ability of the other party to exercise greater control over the terms and conditions of the working relationship. **One example is workers that are required to present themselves to the public as employees. It should come as no surprise if such workers were classified employees. If someone is told to dress and act like an employee, the control factor points in the direction of an employment relationship.** This is certainly true of those who are required, or voluntarily choose, to wear a company uniform. The same holds true for drivers required to market the business of their principal by placing advertisements on the formers' vehicles. **The legal reality is that if you are carrying on business in the name of another it is difficult to promote your own. It is also difficult to accept that you are carrying on business for yourself.**

[emphasis added]

- [87] The evidence is mixed on this point, in that Dr. Samer sent his own bills to MSP and WCB and other agencies. However, the fact that Dr. Samer was provided with business cards by Cambie bearing its logo, meant that patients using Dr. Samer's services would likely have believed they were dealing with an employee of Cambie.
- [88] Dr. Samer further explained that sometimes at the time of surgery it would not be clear to him as to the basis on which work would be billed. This would often entail talking to Cambie's accountant in order to clarify whether the work was to be billed privately or to MSP (Q 76 to 78). This further supports a conclusion that the practical realities with respect to Dr. Samer's practice of anaesthesiology did not entail clients purchasing his services directly from him.
- [89] The May 24, 2003 letter to Dr. Samer from Cambie specified that he would be an independent operator. Accordingly, the expectations of Cambie and Dr. Samer were that there was no employment relationship. Their arrangements regarding billing and statutory deductions were based on this understanding. However, policy at AP1-1-3 provides:

The Board, for the purposes of the Act, has the exclusive power under section 96(1) to determine status. The Board's jurisdiction cannot be

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excluded by private agreement between two parties, whether the agreement does this expressly, or indirectly by labelling the parties as independent operators (who would therefore be independent firms). The Board makes its own judgment of their status, having regard to the terms of the contract and the operational routines of the relationship. However, decisions made by the Board are for workers' compensation purposes only and have no binding authority under other statutes.

- [90] Accordingly, the labels used by the parties are not determinative.
- [91] Policy at AP1-1-1 states that an independent firm performs work under a contract, but has a business existence under the contract independent of the person or entity for whom that work is performed. Apart from the fact that Dr. Samer's billings were made separately, there is little to show that he had any separate business existence from Cambie.
- [92] I consider that the evidence regarding Dr. Samer's status is mixed. On the one hand, the parties were in agreement that he was an independent contractor, and Dr. Samer was in a position to pursue certain tax planning strategies on that basis. On the other hand, he was engaged in a permanent full-time position, in which his work was provided by Cambie, for approximately six years prior to the June 19, 2009 surgery. I consider that Dr. Samer's functioning in a full-time permanent position at Cambie weighs heavily against a finding of independence. This was not a situation in which Dr. Samer advertised his services as an anaesthesiologist, and he was retained by the MSP, WCB, RCMP and other clients. Rather, Cambie advertised a full-time permanent position with it, and Dr. Samer was the successful applicant for that position. Patients arranged for their surgery through Cambie, and the provision of Dr. Samer's services as an anaesthesiologist appear to have been essentially incidental to such arrangements between the patients and Cambie.
- [93] In connection with the "major test" identified in AP1-1-3, I am not persuaded that Dr. Samer existed as a business enterprise independently of Cambie. On balance, I find that the weight of the evidence supports a conclusion that Dr. Samer was a worker of Cambie.
- [94] In view of my conclusion based on the general guidelines at AP1-1-3, I do not consider it necessary to address the specific guidelines under that policy, or the policy at AP1-1-7 concerning labour contractors. I do note, however, that one of the specific guidelines provides that a personal service corporation will not be considered an independent firm. I consider that Dr. Kurt Samer Inc. was a personal service corporation, as it did not employ any worker other than Dr. Samer, and if it was not incorporated, Dr. Samer would clearly be a worker of Cambie (on my primary analysis set out above).

[95] In reaching this conclusion, I have considered an alternative analysis. If Dr. Samer's billing arrangements were viewed as showing that he was performing work for multiple different clients, he could be viewed as a service industry firm entering into two or more contracts simultaneously under a specific guideline in AP1-1-3. Alternatively, if his status was viewed as indeterminate under the policy at AP1-1-3, the labour contractor definitions in AP1-1-7 could be applied, and Dr. Samer could be characterized as being a labour contractor on the basis that he was contracting service to two or more firms on an ongoing simultaneous basis. In particular, this definition could be met based simply on his provision of services to Cambie and False Creek, without taking into account the other payors. As Dr. Samer was not registered with the Board, a finding that he was a labour contractor would normally lead to the conclusion that he was a worker of Cambie, in any event. However, the specific guideline in AP1-1-3(b)(4)(i) provides that if, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation. Dr. Samer's incorporation could thus be recognized as the employer on that basis. This interpretation would appear to reflect the intentions of the parties, in relation to their characterization of Dr. Samer as an independent contractor. Dr. Samer's failure to register the company with the Board could then be interpreted as meaning that he was neither a worker nor an employer within the meaning of Part 1 of the Act at the time of the June 19, 2009 surgery. However, as set out above, I consider that the analysis of Dr. Samer's status must begin by addressing the factors at AP1-1-3, and that the weight of the evidence on those factors leads to a conclusion that he was a worker of Cambie.

[96] Accordingly, I find that at the time the plaintiff's cause of action arose, June 19, 2009, Dr. Samer was a worker within the meaning of Part 1 of the Act.

[97] It is evident that Dr. Samer was performing his work duties as an anaesthesiologist during the plaintiff's surgery on June 19, 2009. I find that any action or conduct of Dr. Samer, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act.

Conclusion

[98] I find that at the time of the plaintiff's surgery on June 19, 2009:

- (a) the defendant, Dr. Kurt Konrad Samer, was a worker within the meaning of Part 1 of the Act; and,
- (b) any action or conduct of the defendant, Dr. Kurt Konrad Samer, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act.

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[99] The parties may advise the WCAT appeal coordinator if they wish to proceed with an application for a determination of the plaintiff's status.

Herb Morton
Vice Chair

HM:gw

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

MURRAY ROBERT JUDSON, by his Litigation Guardian,
ROBERT JUDSON

PLAINTIFF

AND:

DR. KURT KONRAD SAMER

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Defendant, DR. KURT KONRAD SAMER, in this action for a determination pursuant to section 257 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT
at the time the cause of action arose, June 19, 2009:

1. The Defendant, DR. KURT KONRAD SAMER, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. Any action or conduct of the Defendant, DR. KURT KONRAD SAMER, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of June, 2011.

Herb Morton
Vice Chair

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

MURRAY ROBERT JUDSON, by his Litigation Guardian, ROBERT JUDSON

PLAINTIFF

AND:

DR. KURT KONRAD SAMER

DEFENDANT

SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
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