WCAT **Workers' Compensation Appeal Tribunal**

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WCAT Decision Number: **WCAT-2012-00414**
WCAT Decision Date: **February 13, 2012**

Panel: Herb Morton, Vice Chair
Julie C. Mantini, Vice Chair
Andrew Waldichuk, Vice Chair

WCAT Reference Number: 092701-A

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. S084915
Gabrielle Carteris v. Central Myth Pictures Ltd., Joe Broido, Harvey Khan, Porchlight Entertainment Inc., Front Street Pictures Inc., Porchlight Distributions Inc., Porchlight Worldwide Inc., Penelope Buitenhuis, Adrian Hughes, Adam Sliwinski, Jaye Gazeley, Brett Armstrong, Marc Stevenson, Costa Vassos, Patrick Weir, Edward Hardy, ABC Company 1, ABC Company 2, John Doe 1, John Doe 2

Applicants: Central Myth Pictures Ltd., Harvey Khan, Front Street Pictures Inc., Penelope Buitenhuis, Adrian Hughes, Adam Sliwinski, Jaye Gazeley, Brett Armstrong, Marc Stevenson, Costa Vassos, Patrick Weir, Edward Hardy ("defendants")

Respondents: Gabrielle Carteris
(the "plaintiff")

Joe Broido, Porchlight Entertainment Inc., Porchlight Distributions Inc., Porchlight Worldwide Inc.
("defendants")

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Introduction

[1] The plaintiff, Gabrielle Carteris, was the female lead actor in a made-for-television movie called *Past Tense*. On February 7, 2006, she acted in a scene that involved a "bad guy" holding her in a "headlock" and dragging her down a staircase. It was known as the choke scene. The defendant Adrian Hughes played the "bad guy." The scene was filmed in the City of Langley, B.C. The plaintiff claims that she was injured during the filming of the choke scene.

[2] The defendant, Harvey Kahn[1], is a film producer and director of the defendant Front Street Pictures Inc. On or around February 7, 2006, he was the president, sole director, and sole shareholder of the defendant Central Myth Pictures Ltd. (Central Myth), a single-purpose company created for the production of the film. He was the producer of the film.

[3] Central Myth contracted for the services of the plaintiff and the defendants Penelope Buitenhuis (as a director) and Brett Armstrong (as a stunt coordinator) through their respective "loan-out companies": Gabco Productions Inc., Penny Films Ltd., and Strong Arm Enterprises Ltd. Central Myth contracted the services of the defendant Adrian Hughes directly. Central Myth was registered as an employer with the Workers' Compensation Board, operating as WorkSafeBC (WCB or Board), when the film was made.

[1] The December 23, 2008 Statement of Defence identifies the correct spelling of this defendant's name as Harvey Kahn (rather than Khan).

[4] The defendants Porchlight Entertainment Inc., Porchlight Distributions Inc., and Porchlight Worldwide Inc. are California companies which contracted with Central Myth to distribute the film outside of North America. The defendant, Joe Broido, was a senior vice president of Porchlight Entertainment Inc. These defendants are referred to as the "distribution defendants."

[5] 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 certifications 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 applicants on October 27, 2009. The WCAT chair appointed a three-member (non-precedent) panel under section 238(5) of the Act to hear this application.

[6] Transcripts have been provided of the examinations for discovery of the plaintiff on June 18, 2010, and of the defendant Harvey Kahn on June 17, 2010. Affidavits have also been provided: Gabrielle Carteris (undated), Harvey Kahn (May 10, 2011 and September 15, 2011), Penelope Buitenhuis (May 5, 2011 and October 17, 2011), Brett Armstrong (June 9, 2011) and Adrian Hughes (June 2, 2011 and December 12, 2011). Written answers to interrogatories were provided by the plaintiff on May 29, 2009 on behalf of Gabco Productions Inc. Gabco Productions Inc. (Gabco) is not participating in this application, although invited to do so. The legal action is scheduled for trial commencing on October 1, 2012.

[7] Written submissions have been provided by the parties to the legal action. This application involves issues of law and policy and does not involve any significant issue of credibility. We find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Preliminary Matter

[8] The applicants request determinations regarding the status of the plaintiff and four key defendants: Central Myth, Penelope Buitenhuis, Adrian Hughes and Brett Armstrong. Counsel for the "distribution defendants" advised that determinations of their own status were not being requested until a determination is obtained concerning the status of the plaintiff and the "key defendants." If further determinations are required, an opportunity for further submissions will be provided subsequent to this decision, before any further issues are addressed in a supplemental decision.

Issue(s)

[9] Determinations are requested concerning the status of the plaintiff and four defendants (Central Myth, Penelope Buitenhuis, Adrian Hughes and Brett Armstrong) at the time of the choke scene on February 7, 2006.

Jurisdiction

[10] 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 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, Gabrielle Carteris

[11] The plaintiff submitted a provisional application for workers' compensation benefits, dated May 4, 2006, for injuries sustained on February 7, 2006. She advised that she resided in a suburb of Los Angeles, California. She identified Gabco as her employer and stated that she was working as an actor in the film industry. She reported that she suffered physical and emotional trauma during the filming of a movie fight scene. Central Myth provided an employer's report of injury. It indicated that the plaintiff was employed on a contractual basis. The plaintiff's claim was suspended as she did not elect to claim compensation.

[12] The plaintiff provided the following evidence during her examination for discovery on June 18, 2010. Gabco was originally incorporated in California in 1991, and operated as her loan-out company through to 2006 (Q 15 to 15). The plaintiff provided four reasons for having a loan-out company (Q 17):

> One is for pension purposes, one is for tax purposes, one is for protection in terms of nobody would sue me personally as an artist so that it would affect my family, and one is also for privacy….

[13] Gabco's sole function was contracting out the plaintiff's acting services. It had no other business functions (Q 19 to 21). The plaintiff was the president, secretary and treasurer of Gabco (Q 27). She was the sole officer, principal, shareholder and employee of Gabco (Q 29 to 35). All of Gabco's income was generated by the plaintiff's acting services, and all of its expenses were associated with her acting (Q 36 to 39). Gabco had not registered with "workers' compensation" in British Columbia or in California (Q 40). The negotiation of the terms for the contract for her acting services was carried out between her manager (Laina Cohn[2]) and Central Myth (Q 55 to 57, 75, 118 to 120). Lindsay Chag, the casting director in California, initially contacted the plaintiff's manager (Q 75 to 78). A first document (memo) set out the initial terms of the agreement, and this was followed by a more comprehensive document or contract (Q 79). The plaintiff signed the contract as president of Gabco, and personally under the heading "Inducement" (Q 91 to 92).

[14] The plaintiff and Gabco did not purchase private insurance or register for workers' compensation. The plaintiff stated (Q 67):

> Q Okay. Well, let me ask you, did you understand prior to commencing filming on the project that Central Myth would obtain insurance coverage, including Workers' Compensation coverage that would provide coverage to you in the event you were injured while filming?
> A Whenever I work, whoever I work for I believe is there to protect me so whatever is needed. I don't know what they need to do, but I'm under the impression that they are taking care of me.

[15] At question 103, the plaintiff described her work activities prior to her involvement in this film as follows:

> …Like the movie I worked on just before – I was in Canada working, so I actually – even though I'm contracted to do the film, because I'm an independent contractor I also do voice work or whatever, so I was allowed to leave the job because I wasn't in a scene, I'd say can I have an hour off to go to do a voice-over job, so sometimes I work multiple jobs at one time.

[2] The website Lainacohnmgmt.com shows the spelling of her name as Laina Cohn (as shown at question 51 of the plaintiff's examination for discovery).

[16] As a matter of practice, it was not uncommon for the plaintiff to leave filming projects for certain periods of time to do other work. She would only do this with the approval of the producer of the film on which she was working, based on its shooting schedule (Q 121 to 123).

[17] The plaintiff's choice of wardrobe for a particular scene was a collaborative process (Q 237). During the filming of *Past Tense*, the plaintiff furnished pajamas for the shooting of a scene. The producers agreed that she would use her own pajamas for the scene (Q 240 to 243). The plaintiff also had some input with respect to her makeup, the lighting on the set, and what lenses were used on the camera (Q 261). Occasionally, she brought her own makeup person with her, but not while filming *Past Tense* (Q 263 to 264).

[18] The plaintiff's contract with Central Myth contained a day off for her daughter's birthday. The plaintiff stated (Q 162):

> …This was my daughter's birthday, and I said that I couldn't do this job unless I had those days off to be there for her birthday.

[19] The plaintiff provided a signed affidavit, which was marked as having been sworn or affirmed before a commissioner for taking affidavits in British Columbia. However, this affidavit was undated and the referenced exhibits were not attached (but were contained at Tabs 1 and 5 to 11 of the plaintiff's submissions). Notwithstanding the lack of a date, we accept that the contents of the affidavit represent the plaintiff's sworn evidence, or at least her signed statement.

[20] The plaintiff said in her affidavit that in February 2006 she was an American performer registered with the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA). The plaintiff also described Gabco's activities as including the following:

> 15. Gabco is a Loanout Company which is responsible for contracting my services to producers and productions companies.
>
> 16. Gabco retains a bookkeeper and other contractors.
>
> 17. Gabco retains the services of a voice agent, Jeff Danis, who at the time of the Incident worked through the office of International Creative Management (ICM).

…

19. As an agent, Mr. Danis seeks out and bids for voice over contracts and completes contract negotiations on behalf of Gabco for voice over work to be performed by me. Mr. Danis is paid a commission for the work that he secures for Gabco. Consequently, Mr. Danis generates revenue for Gabco.

…

21. Gabco also retains the services of a talent manager, Lana Cohen, who at the time of the Incident worked through the office of Evolution Entertainment. Lana Cohen seeks out and bids for contracts and completes contract negotiations on behalf of Gabco. Lana Cohen is paid a commission for the work that she secures for Gabco. Consequently, Ms. Cohen generates revenue for Gabco.

22. Gabco also retains the services of an acting coach, Marshall Arts, and personal trainer, John Hilton.

23. Gabco also retains the services of a bookkeeper, Ms. Sonja Frederick. Ms. Federick [*sic*] is not related to Ms. Carteris and has a separate office in Santa Monica, California. Ms. Frederick is paid monthly through Gabco.

24. Gabco receives all payments in relation to the acting and voice over services I provide on Gabco's behalf. Gabco is also paid all residuals for the use of past performances and sales of DVDs from the TV show 90210.

[21] A copy of a nine-page memorandum of agreement between Central Myth and Gabco, dated February 1, 2006, has been provided. Gabco was to be guaranteed compensation of $45,000.00 in U.S. funds, upon execution of the agreement and successful completion of a medical examination by the plaintiff. The compensation was to cover the plaintiff's services on three consecutive weeks (18 consecutive work days; 12-hour work days of production plus two free days and any overtime; two travel days,

one week for hair/makeup/wardrobe and rehearsal; and two post-production days). The agreement also covered the plaintiff's screen credit:

> Single card on-screen in main titles; first position among all cast members; same size, type and duration on screen as all other cast members.

[22] The agreement provided for the provision of two first class round-trip air tickets from Los Angeles to Vancouver. An addendum on page 10 provided for a third such ticket.

[23] The agreement provided for exclusive transportation to and from the airport, as well as transportation to and from the set locations with "above-the-line" personnel only. The plaintiff was provided with a private hotel room and private dressing room as well as a *per diem* of $100.00 Canadian per day. The agreement further stipulated:

> PREMIERES
>
> Artist shall be provided with two (2) tickets to major festivals in which the Picture is featured and to the premiere of the Picture if a special event is arranged for the premiere.

[24] The agreement provided that during the production term, Gabco "shall ensure that Artist's services shall be exclusive to the Picture." Neither Gabco nor the artist could assign the agreement or any of the artist's obligations under the agreement. The producer was not obligated to use the artist's services.

[25] A BC Company Summary for Central Myth shows that it was incorporated on June 22, 2005. By affidavit of May 10, 2011, Harvey Kahn stated that on or around February 7, 2006, he was the president, sole director, and sole shareholder of Central Myth, a single-purpose company created for the production of a motion picture to be entitled *Past Tense*. He was the producer of the film. Central Myth retained all of the cast and crew for the film. Central Myth contracted the services of the plaintiff through her loan-out company. In his experience as a film producer, he did not differentiate between cast and crew who provided their services through loan-out companies and those who provided their services by contracting directly. Central Myth's registration with the Board was intended to provide coverage for all of the cast and crew working on the film, including the plaintiff. Central Myth provided (through renting, purchasing or otherwise arranging for) all of the major equipment that was used in the production of the film, including camera equipment, lighting equipment, vehicles, furniture, set decorations, props and wardrobe. Central Myth also provided the locations, script,

budget and shooting schedule for the film. Central Myth had final decision-making authority with respect to all aspects of the film. The plaintiff was retained personally, through her loan-out company, and she was to provide her services exclusively to Central Myth during the production of the film. She could not hire or subcontract other people to do her work.

[26] In a further affidavit sworn on September 15, 2011, Kahn stated that the plaintiff was flown to Vancouver from Los Angeles at Central Myth's expense to play the lead role in the film. Because the film was produced on a tight budget, the shooting schedule was very tight. Central Myth needed to have complete control over the plaintiff's schedule. The plaintiff needed to be available for 12-hour work days, during three consecutive weeks, to shoot the film. If the plaintiff was not involved in the shooting of a particular scene, she would have been permitted to go to her trailer to relax but not to leave the vicinity of the set. In playing her role, the plaintiff had some creative and artistic discretion, but only within the confines of the script, the sets and locations, the other actors and the vision of the director (all provided by Central Myth). The plaintiff could exercise creative and artistic discretion when playing her role in the film, but this could only be done with the blessing and approval of the film's director.

[27] The $45,000.00 in compensation that was to be paid to Gabco was planned to be part of the overall payroll for the film. The "reportable payroll" used as the basis for Central Myth's reportable payroll for Board premiums included payments to all individuals and loan-out companies, including Gabco. Central Myth paid premiums to the Board to cover all cast and crew working on the set of the film, including the plaintiff. Central Myth did not withhold taxes when making payments to Gabco for the plaintiff's services. However, it paid "Fringes" for her in the form of a 14.8% contribution to the SAG Pension, Health and Welfare Plan.

[28] An affidavit was provided by Penelope Buitenhuis, film director and director of Penny Films Ltd., sworn on October 17, 2011. She advised that she was providing services as a film director to Central Myth for the production of the film. She stated:

> 4. As an actor playing the lead role in the Film, Ms. Carteris had some artistic licence in how she played that role. As an actor playing the "bad guy" role in the Film, Mr. Hughes had some artistic licence in how he played his role.

5. However, the artistic licence given to both Ms. Carteris and Mr. Hughes had to fit within my vision of the Film as a whole, and my vision for the particular scene that was being shot, as agreed to with the Film's producers.

[29] Buitenhuis further advised that any artistic licence that the plaintiff exercised in playing her role required approval from Buitenhuis and the film's producers.

[30] At the time of the incident on February 7, 2006, the policy set out in item AP1-1-3 of the *Assessment Manual*, entitled "Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms," set out several "general principles." It stated that in distinguishing an employment relationship from one between independent firms, there is no single test that can be consistently applied. The policy listed nine factors to be considered (addressed under separate headings below as (a) to (i)). It further stated:

> **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.**
>
> 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.
>
> Some regard must also be paid to the structure and customs of the particular industry involved. Where an industry makes much use of the contracting out of work, this should be recognized as a factor in considering applications for registration as employers by parties to contracts in those industries.
>
> [emphasis added]

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[31] The policy at item AP1-1-3 of the *Assessment Manual* also contained certain "specific guidelines." These included:

> Parties who would be considered independent firms include:
>
> …
>
> (4) 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*. **Two common situations where corporations will not be considered independent firms are where:**
>
> **(i) the corporation is a personal service corporation, (A personal service corporation for this purpose is one where no worker other than a principal active shareholder is employed, and if the firm was not incorporated, the principal active shareholder would clearly be a worker**. If, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation.); …
>
> [emphasis added]

[32] We note, at this juncture, that we interpret item AP1-1-3 as first requiring consideration of the general principles set out in the policy. If the person's status is still indeterminate, consideration is then given to the specific guidelines contained in the policy. The specific guideline under (4) provides, in any event, that incorporated companies will be considered independent firms 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*." We read the reference to the "policies in this *Manual*" as referring to the policies concerning status determinations in general, rather than to the specific guideline. As well, we read the subsequent reference to "[t]wo common situations where corporations will not be considered independent firms" as being examples of situations in which such a conclusion may be reached, rather than requiring such a conclusion for all cases.

Accordingly, in the case of an incorporated company with no workers other than the principal active shareholder, consideration must first be given to whether the firm meets the criteria for being considered an independent firm under the general principles set out in item AP1-1-3.

[33] The applicants cite *WCAT-2006-01131* as being instructive regarding the application of this policy. In that case, the appellant was the sole principal and shareholder of an incorporated company through which he provided services to a variety of film production companies. As stated in the underlying Review Division decision (*Review Decision #26276)*, the appellant provided lighting services to a variety of film production companies. The appellant reported that his wife worked as a bookkeeper for him on a part-time basis, earning less than $10,000.00 per year. While working on a film set, the appellant tripped on a wire and suffered a knee injury. The appellant contended that his wife should not be considered a worker, as she provided a bookkeeping service to the worker only and this arrangement was for income splitting purposes. The WCAT panel found that the exception for personal service corporations did not apply, because the appellant employed his wife. As another worker was employed, the appellant was considered to be independent rather than being a worker (as a personal service corporation). The applicants submit that in this case, Gabco was a personal service corporation with no worker other than the plaintiff, and that the plaintiff was a worker of Central Myth. Accordingly, as the applicants argue, the plaintiff comes within the terms of the exception from the general policy that incorporated companies are considered independent firms (as a personal service corporation which did not employ any other worker).

[34] The plaintiff cites a 1994 decision of the British Columbia Court of Appeal (BCCA) in *Walden v. Danger Bay Productions Ltd.*, [1994] B.C.J. No. 841, 114 D.L.R. (4th) 85 (*Walden*). That decision concerned two actors (Chan and Walden) who were injured in 1985 and 1986 on the set of a television series, Danger Bay. Danger Bay was an ongoing television series that filmed several episodes per year and which went from year to year. The actors' roles were of an ongoing nature. An insurance contract stated that it did not apply to any employee of Danger Bay. The insurance company denied coverage to the two actors on the basis that they were employees of Danger Bay. A trial judge found that the two actors were not employees. Upon appeal, the facts as found by the trial judge were summarized by the BCCA in paragraph 33 as follows:

> **33** The facts found by Mr. Justice Wilkinson in the case under appeal can be summarized:

(a) that with regard to control the real relationship was . . . "one of co-operation or at least attempted co-operation, not unilateral direction";
(b) that in fact the actors actually sought and achieved other work or departures from the filming schedules;
(c) that there was both a chance of profit and a risk of loss to the actors;
(d) that under the ownership of tools test, the characteristics of the actors and their skills in using these characteristics were the property of the actors;
(e) that with regard to "exclusivity" each actor was able to carry out other engagements both during the 16 or 22 weeks of filming and outside of that period.

[35] The BCCA quoted from the reasons of the trial judge as follows (in paragraph 29):

> He stated his conclusions in the following passage of his reasons for judgment:
>
> > 1) The case for Guardian is at its highest in the terminology of the written contract between the producers and the actresses. It uses the terms "employ," "employee," and "employee for hire." I am satisfied, however, that these terms are used either as indicating the party referred to, to stress the point of lack of ownership of the actor in the intellectual property of the work being produced, or are subject to admissible evidence of the practical or real relationship between the parties.
> >
> > 2) Control has been the test of longest standing. **It is particularly difficult to define or measure, in my view, when some form of art is at the centre of the relationship. Art must by its nature be somewhat unique. Witnesses for Danger Bay gave evidence of the degree of success that could be achieved by the performer in fostering her career, and the producer in achieving a successful artistic work. Both wished to be "successful" in their long-term goals. There was testimony of the efforts of the performers here to**

maintain their characters in the series which they were trying to develop, whether by way of input into wardrobe, script, or camera time. On some occasions this was overdone and not justified, but the production people attempted to heed the requests. Regardless of the wording of the contract, the producers acknowledged that attempting to exert ultimate control over the way in which a particular scene was played might well result in a bad or wooden performance and not achieve the goals of either party. In my view, the real relationship was one of co-operation or at least attempted co-operation, not unilateral direction.

If control is looked at from the standpoint of "when and where" rather than "how," there is a dichotomy between the words of the contract and practice. The contract called for this control to be in the hands of the producer but in fact the evidence was that the actresses actively sought and achieved other work or departures from schedules. The producers sought to accommodate them for lesser or greater periods. These included a period of up to one month in the middle of shooting in one case for Walden, and when Wong [sic] was injured, accommodation was made both for her absence and occasional return.

3) There was a chance of profit under the arrangements with ACTRA, the performers' organization, and by the terms of the contracts between the actresses and the producer. There was no apparent risk of loss in the contracts. Again, this perspective is skewed towards looking at the matter from the standpoint of the producer. **From the performers standpoint, the particular part is but one step in the career path. The degree of success achieved by her in the role may be just as important or more so to her career than to the series Viewed in this way, there is both a chance of profit and a risk of loss for the actress.**

4) The ownership of tools is a traditional test although it may not be appropriate in this context. **Guardian stresses that sets, equipment, and wardrobe were all the property of the producers.** It seems to me that the former two are necessary for all the performers and the entire work; the latter was subject to a right of consultation. I **feel it would be appropriate to view the characteristics of the performers as more significant**. We heard that the producers have a view of the production as a whole and its characters. Presumably they attempt to fill the roles with actors who have the appropriate appearance and characteristics. **It would seem inappropriate to fill the role of a grandmother with a young athletic male in most instances. If the actors were employees, would it even be legal to seek persons of a certain age or sex? There is as good a case for defining such characteristics as age or sex as the tool of an actor's trade as the wardrobe used. Obviously there will be skills employed by the actor or actress in using their characteristics and their part to best advantage. In the sense set out above, the "tools" are the property of the actor.**

5) I have discussed the "integration" test and comments on it. In my view, some actors are an integral part of a performance and some parts are integral to the career of a performer. The evidence was that filming could be done around performers but that it causes a greater or lesser amount of inconvenience. I have not found the test to be particularly helpful in my inquiry. If it is an attempt to assess the "importance" of the retained person, it would have the effect of making the most routine job holder or employee more likely to be considered an independent contractor than those most important and able to contract independently, and those most important and able to contract independently considered as employees.

> 6) I feel that full-time use of services and exclusivity are more likely in the case of employees, but as with other tests, by no means conclusive. In this case the actresses were able to and did carry out other engagements and sought other engagements, both during the 16 or 22 weeks of filming and outside that period. Claims of exclusivity were minimal, and in the case of Chan, she had a minor continuing role in another series. Both actresses had agents who negotiated contracts on their behalf.
>
> 7) The "specified result" test, as I understand it, indicates that independent contractor status is more likely in the case of an agreement to achieve a specific result than to provide services generally. In my view the actresses here were doing so rather than providing services.
>
> I have considered the cases cited by Guardian. Most deal with specific aspects of statutory or other interpretations as do those of the plaintiff. The case of MacKenzie (supra) [MacKenzie v. Jevco Insurance Management Inc. (infra)] is on point as to the subject matter, (Exclusion "e") but dealt with a stunt double to whom most of my findings would not apply.
>
> On the whole of the evidence I am not satisfied the defendant has discharged the onus on it of establishing employment, and the tests set out above, applied to this case, indicate otherwise.
>
> [emphasis added]

[36] The BCCA also cited (at paragraph 35) a passage from the trial judge's reasons, which stated:

> Put simply, time may show that the Danger Bay series was but a small step in the development of a career path by Chan and Walden rather than they being some part of the organization of Danger Bay.

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[37] At paragraph 40, the BCCA reasoned:

> **40** Further, with regard to the facts relating to employer control, I consider that the learned trial judge applied the correct legal principles to this factor particularly in para. 2 quoted on pp. 13-14 of these reasons. The control test is no longer considered the only or conclusive test but still merits serious consideration (Montreal v. Montreal Locomotive Works Ltd. et al. at 169 and Wiebe Door Services Ltd. at 203). The working relationship between the producers and the actors demonstrated that the true level of control exercised by Danger Bay was not significant, particularly with respect to the very services which were the subject of the contract, that is, acting. **The contractual documents reserved to the producer the ability to schedule, within certain parameters, but control was subject to limits both in respect to the global scheduling of the services and the day-to-day scheduling of those services. In my opinion, Danger Bay could not exercise the kind of daily scheduling authority that an employer would typically exercise with respect to an employee.**
>
> [emphasis added]

[38] The Court of Appeal dismissed the appeal.

[39] The applicants submit that it would be an error for WCAT to rely on *Walden* in this determination. The *Walden* decision is based on the common law factors regarding what constitutes a relationship of employment versus a relationship between independent contractors. WCAT's determination requires consideration as to whether a person is a worker under the Act. The Board and WCAT have their own policy factors to be considered in this regard.

[40] Sections 99(1) and 250(1) of the Act provide that the Board and WCAT are not bound by legal precedent. We agree that the common law authorities must be treated with caution in determining status under the Act. To a large extent, however, the factors identified as relevant in the common law context are the same or similar to those which apply under the Act. We consider that the common law authorities may thus provide useful guidance. At the same time, the policies may provide particular guidance in the workers' compensation context and WCAT is bound to apply a policy which is applicable. For example, in some cases the application of the policy at AP1-1-7

concerning labour contractors may lead to a different result. The policy at AP1-1-3 of the *Assessment Manual* 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 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.

[41] Larson's *Workers' Compensation Law*, Lexus Nexus Mathew Bender Online (Larson), provides a reasoned explanation as to why the determinations of status at common law and under workers' compensation legislation may differ. In Chapter 60, Larson states:

> **The term "employee" is defined by most statutes to include every person in the service of another under any contract of hire, express or implied. Judicial application of this definition to workmen's compensation status problems generally follows the tests worked out by common law distinguishing servants from independent contractors for vicarious liability questions. However, a recognition of the difference between compensation law and vicarious liability in the purpose and function of the employment concept has been reflected both in statutory extensions of the term "employee" beyond the common-law concept and in a gradual broadening of the interpretation of the term to bring within compensation coverage borderline classes for whom compensation protection is appropriate and practical.**
>
> [emphasis in original]

[42] At §60.04[2], Larson explains:

> [2] Compensation Versus Common-Law Purpose
>
> The source of most of the difficulty in adopting bodily the common-law definition of servant for compensation purposes can now be easily explained, in terms of the above analysis: *The basic purpose for which the*

definition is used in compensation law is entirely different from the common-law purpose.

The “servant” concept at common law performed one main function: to delimit the scope of a master’s vicarious tort liability. This tort liability arose out of detailed activities carried on by the servant, resulting in some kind of harm to a third person. The extent to which the employer had a right to control these detailed activities was thus highly relevant to the question whether the employer ought to be legally liable for them. If I ship a load of goods on a truck, having the right to control the speed and manner of the driving, and if the speed or manner of driving figures in the accident, there is an obvious connection between the right to control that detail and the final liability; while if I turn my goods over to Parcel Delivery Service, I have nothing whatever to say about the details of their performance and therefore should have no liability if an accident comes about because of negligence as to one of these details. True, I am liable for the employee-trucker even if he exceeds the speed which I commanded him to observe, but note that I had the right to control the speed, and if I was unable to exercise it effectively that is no concern of one who is injured by an activity under my control.

By contrast, compensation law is concerned not with injuries *by* the employee in his detailed activities, but with injuries *to* him as a result not only of his own activities (controlled by the employer as to details) but of those of co-employees, independent contractors and other third persons (some controlled by the employer, and others not). To this issue, the right of control of details of his work has no such direct relation as it has to the issue of vicarious tort liability. So, to continue the example of a truck driver, if I regularly, year in and year out, engage an individual trucker to transport logs from my woods to my lumber mill, which is an integral part of my lumbering operation, paying him or her by the load, and reserving no right of control over the details of his work, it is quite possible that this person is as appropriate a subject for compensation protection as any worker that could be found. The driver is taking a regular and continuous part in the manufacture of my product; the work is hazardous; the rate of pay is such that the driver cannot be expected to bear the cost of industrial accident; and his or her place in the industrial process is not

> such that the risk of injury could otherwise be distributed. In every respect the driver is the kind of worker for whose benefit the compensation act was thought necessary. Should he or she be deprived of compensation because of the vicarious-liability requirement of control of the details of the work?

[43] 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 (*Joey's*), the New Brunswick Court of Appeal found that a purposive approach in determining status under the Act may further the purposes of the Act:

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

[44] In *Joey's*, the Court of Appeal further reasoned:

> **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.

[45] The decision in *Walden* is of particular interest as it concerned the status of actors. However, the facts in that case were somewhat different, as the television series went from year to year and there were limitations on Danger Bay's scheduling rights over the actors. The decision in that case may be distinguished on that basis. Further, the decision concerning the actors' status was for the purpose of determining entitlement under an insurance contract, rather than for the purpose of determining status under the Act.

[46] Prior to 1994, "player, performers and similar artists" were expressly excluded from coverage under the Act. Prior to January 1, 1994, section 2(2) of the Act provided:

> …this Part does not apply to
>
> (a) persons whose employment is of a casual nature and who are employed otherwise than for the purposes of the employer's trade or business;
> (b) **players, performers and similar artists**;
> (c) outworkers
> (d) members under 19 years of age of the employer's family, or his spouse; and
> (e) employers with no place of business in the Province who temporarily carry on business in the Province but do not employ a worker resident in the Province.
>
> [emphasis added]

[47] These exemptions were removed from the Act pursuant to the January 1, 1994 amendments aimed at providing universal coverage to workers (apart from those exempted by order of the Board). Effective January 1, 1994, section 2(1) provided:

> This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the board.

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[48] A leading case regarding status determinations, in the context of determining the scope of a company's vicarious liability, is the Supreme Court of Canada (SCC) decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] 2 S.C.R. 983, (2001), 204 D.L.R. (4th) 542 (*Sagaz*). The SCC reasoned at paragraphs 46 to 48:

> **46** In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. 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, 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]

[49] We have considered the nine factors listed in the policy at AP1-1-3 of the *Assessment Manual* as follows (taking into account the parties' submissions on these points):

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

[50] As the plaintiff deposed in her affidavit, "[t]he nature and direction of filming is artistic, organic and collaborative in nature." The applicants acknowledge that the plaintiff had some creative and artistic discretion over the way she was to play her role. The applicants submit that the plaintiff provided skilled labour within a framework that was entirely organized and controlled by Central Myth.

[51] The plaintiff did provide her own pyjamas for one scene. We consider that the provision of such materials was merely incidental in nature. In general, the plaintiff was not providing materials. We find that her services as an actor were essentially services of labour.

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

[52] Given the tight shooting schedule and the short time period involved (18 days), we find that Central Myth exerted near complete control over the plaintiff's work time during the period covered by the contract, including things associated with the daily shooting of the film: her call times and set locations. At the same time, however, we note that the plaintiff was in a position to negotiate for some personal time during this period. The addendum to the contract between the plaintiff and Central Myth provided that the producer agreed to release the artist on the evening of February 7, 2006 and required her to be back on the morning of February 9, 2006, and to release the artist on the evening of February 14, 2006 and required her to be back on the morning of February 16, 2006. Accordingly, the plaintiff had sufficient bargaining power to negotiate two personal days during the shooting schedule.

[53] In addition, we note the plaintiff's evidence regarding her input with respect to makeup, the lighting on the set, and what lenses were used on the camera. This evidence demonstrates the plaintiff had a degree of control.

[54] We accept the applicants' evidence that ultimate control rested with Central Myth. We further agree, however, with the trial judge's reasoning in *Walden* regarding the difficulty in evaluating "control" in relation to an artistic endeavour. The premiums paid to obtain the services of star performers relate to aspects of their acting abilities which they bring to a role. Moreover, we accept that the plaintiff had a degree of creative and artistic discretion in playing her role in the film, subject to the director's approval. Accordingly, the evidence is mixed on this point.

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

[55] The plaintiff's compensation was fixed. Gabco was guaranteed payment of $45,000.00, even if Central Myth decided not to use the plaintiff's services (subject to payment of commission to Laina Cohn and related expenses). In that sense, there was little opportunity for profit or loss. However, we agree with the reasoning of the trial judge in *Walden* that an actor's performance in a particular role may be just one step in the actor's career path. Accordingly, there is an opportunity for profit or loss in respect of the performance of an actor, to the extent this includes the success or failure of the film, the public reaction to the actor's performance in the film, and the effect of these on the actor's career. This is reinforced by the fact that the plaintiff's contract with Central Myth made provision for her in the film's screen credits, listing her in first place among all the cast members. As such, we find that the plaintiff, by acting in *Past Tense*, was subject to a high risk of profit or loss.

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

[56] Central Myth provided all the major equipment necessary to the making of the film (such as camera equipment, sets and script). However, in *Walden*, the trial judge characterized the actors' personal characteristics as being the tools of the actor's trade and as being the property of the actor. In the case of a well-known actor, it may also be considered that they bring their reputation and drawing-power to a film. This is supported by the provisions of the contract giving Central Myth licence to use the artist's name, likeness, voice and biography for the purposes of advertising the film. It is also consistent with the contractual provision giving the plaintiff the right, for all gallery and setup photographs, to disapprove of 50% of the photographs in each setup in which she appears alone and up to 75% of the photographs in each setup in which she

appears in a group. This also ties in with the plaintiff's evidence that she occasionally brought her own makeup person to film sets. The plaintiff's appearance/look is one of the "tools of the trade." We appreciate, however, that this analysis seems somewhat strained in referring to these features as major equipment.

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

[57] Presumably Central Myth had to obtain certain business licences. It also registered with the Board as an employer. The plaintiff was a member of the SAG and AFTRA (in the United States). We do not consider this factor significant to our decision.

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

[58] Central Myth did not withhold any amount for income taxes in relation to the plaintiff. We consider that this is indicative of Central Myth treating the plaintiff as an independent contractor rather than an employee. The fact that the contract was made between two incorporated companies is a possible indicator of independence. As well, the guarantee of payment of $45,000.00 in compensation, even if Central Myth did not proceed with shooting the film, is an unusual provision and more in keeping with a contract between independent contractors than a contract of employment. The contractual provision for tickets to major festivals in which the film is featured and to the film's premiere if a special event is arranged is more in keeping with a contract between independent contractors than a contract of employment.

[59] The applicants claim that the contractual relationship between Gabco and Central Myth can be distinguished from the general information in *The Indie Producer's Handbook: Creative Producing from A to Z* by Myrl A. Schreibman, upon which the plaintiff relies. However, the applicants' argument does not persuade us that Gabco's contractual relationship with Central Myth was a significant departure from film industry standards.

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

[60] Though there is some evidence that the plaintiff had a say in her own safety during the filming of the choke scene – by requesting that a weapon not be used – we find that Central Myth, which was responsible for making the film, was in a better position to fulfill the prevention and other obligations of an employer under the Act.

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

[61] The plaintiff has provided documentation to show that she was paid for voice-over work by ICM on the following days: January 18, 24 and 30, 2006; February 6, 15 and 27, 2006; and March 1, 2006. The plaintiff submits that, in practice, she would have been free to work on other projects, provided a request to work on another project did not interfere with the film schedule.

[62] According to the applicants, the fact that the plaintiff received payments on these dates does not provide evidence as to when the work was done. They argue that there is no evidence of the plaintiff having performed other work during the shooting of the film, and she was contractually bound to provide her services exclusively to Central Myth during the shooting of the film (clause 9 of the Memorandum of Agreement). We accept the applicants' submissions in this regard, in relation to the time period during which the film was being shot.

[63] We further note, however, that the contract between Central Myth and the plaintiff was limited to three weeks. When a longer time frame is used, it is clear that the plaintiff was working intermittently and for various persons. This is supported by her use of both a voice agent and a manager to negotiate such work, and the range of companies for which she did voice-over work. As well, the plaintiff's evidence was that during the filming of a movie just prior to the shooting of *Past Tense*, she was permitted to leave the job to do voice-over work. We consider that the range of work done by the plaintiff, and the shortness of the time period for which her services were retained by Central Myth, supports a conclusion that she was an independent contractor.

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

[64] Gabco retained the services of other persons in support of her acting career. These included a voice agent (Jeff Danis), a manager (Laina Cohn, Evolution Entertainment), an acting coach (Marshall Arts), a personal trainer (John Hilton) and a bookkeeper (Sonja Frederick). It does not appear that any of these persons were hired by Gabco as employees.

[65] In terms of the plaintiff's acting work, she was precluded from assigning her duties under the contract. Clause 12 provided:

> …Neither Lender or Artist may assign this Agreement or any of Artist's obligations hereunder or in respect of the Picture.

---

[66] Clause 18 of the contract entitled Central Myth to injunctive relief to ensure the plaintiff's personal completion of her obligations under the contract. As the applicants argue, the plaintiff could not have retained any other person to fulfill the contract between Gabco and Central Myth. Clause 18 stated:

> INJUNCTIVE RELIEF: Artist's services and the rights granted to Producer by Lender are of a special, unique, unusual, extraordinary and intellectual character giving them a peculiar value, the loss of which cannot be adequately compensated in any action at law. A breach hereof by Lender or Artist shall cause Producer irreparable injury and Producer shall be entitled to injunctive and other equitable relief to secure enforcement of this Agreement….

[67] We consider that this last factor weighs in favour of an employment relationship.

[68] The main factors supporting a finding of independence are (c), (f) and (h). The main factors supporting a finding of an employment relationship are (a), (d) and (i), and perhaps (b) as well. The evidence regarding (e) and (g) is either neutral or not significant in this case.

[69] Policy at AP1-1-3 states that the major test, which largely encompasses the factors addressed at (a) to (i) above, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done. 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, and keep their own books and records.

[70] In written answers to interrogatories, Gabco advised (#28) that the terms of the contract between Gabco and Central Myth were generally similar to those contained in other contracts for the provision of services from 2001 to 2006 with other production companies.

[71] Viewed narrowly, the evidence regarding the extent of control exercised by Central Myth in relation to the shooting of the film would tend to support the characterization of the plaintiff as a worker. We consider, however, that it is necessary to view the evidence broadly, in evaluating whether the plaintiff existed as a business enterprise independent of Central Myth. Having done so, we find that the evidence as a whole supports such a conclusion. The plaintiff was an actor, and this film, which was being shot over three weeks, was just one engagement in her career as an actor. A

number of factors point to the plaintiff existing as a business enterprise independent of Central Myth: the fact that she worked under the guise of a corporation, her use of an agent and a manager to obtain ongoing work, and the very limited duration of her engagement by Central Myth. Furthermore, in our view, the contractual provision about the manner in which the plaintiff's name was displayed in the film credits is consistent with her participation in this film being part of her business enterprise.

[72] Based on the general principles set out in item AP1-1-3, we find that Gabco was operating as an independent firm. We consider, therefore, that it is not necessary to proceed to address the specific guidelines in AP1-1-3.

[73] In the event our reasoning on this first point is in error, we have also proceeded with an alternative analysis, based on the policy at AP1-1-7 concerning labour contractors. This policy provided:

> Labour contractors include proprietors or partners who:
>
> - have workers and supply labour only to one firm at a time;
> - **are not defined as workers, do not have workers, or do not supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis**; or
> - may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual.
>
> [emphasis added]

[74] The plaintiff's discovery evidence, which we accept, was that it was common for her to do voice-over work, with the approval of the producer, during breaks in the shooting schedule for a movie (although this did not occur during the shooting of *Past Tense*). We consider that a determination of the plaintiff's status at the time of the incident on February 7, 2006 requires consideration of her work-related activities for some period of time leading up to that incident, rather than being limited to the short time frame relating to her work on *Past Tense*. We find that the plaintiff's work activities involved the contracting of her services to two or more firms on an ongoing simultaneous basis. Accordingly, the plaintiff would meet the definition of the term "labour contractor."

[75] If the plaintiff's status were to be determined on the basis of the "specific guidelines" under AP1-1-3, rather than the general principles, then regard must be had to the final sentence under (4):

> If, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation.

[76] Applying this specific guideline would mean that since the plaintiff meets the definition of a labour contractor, Gabco would not be considered a personal service corporation, and it would therefore be considered an independent firm. Accordingly, we reach the same conclusion under both lines of analysis.

[77] While not necessary to our decision, we note with interest the practice directives of the Board which were issued in May 2010. Practice Directive 1-1-3(B), "Status – Specific occupations," was issued by the Board effective May 1, 2010 (attached at Tab 26 of the applicants' rebuttal submissions). It was not in existence at the time of the filming on February 7, 2006, and, therefore, may be considered inapplicable. However, its opening paragraph provides:

> 1. This practice directive is a codification of established evidentiary presumptions for determining an individual's status as an independent firm in specific circumstance and industry.

[78] The plaintiff submits that while the incident that is the subject of this determination occurred in 2006, "the principles upon which the practice directive was release [*sic*] pre-date the Incident." The plaintiff submits the practice directive may be used as a guideline. The applicants have also provided submissions regarding the application of the practice directive as a guideline.

[79] The reference to a "codification" suggests that the practice directive may have involved a recording of what may have been the prior unwritten or undocumented practices of the Assessment Department of the Board. In that sense, it may not be untoward to take into account the information set out in the practice directive. In any event, practice directives do not constitute policy and are not binding on WCAT. Reference may be had to the reasoning in them, even if they are not applicable. As noted above, both the plaintiff and the applicants have provided submissions regarding the application of Practice Directive 1-1-3(B) concerning "Performers."

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[80] The practice directive provides the following general "interpretive guidelines":

> 2. An independent operator – as that term is used in the *Workers Compensation Act* and described in Board policy – exists as a business enterprise independently of the service recipient under a particular contract. Generally, this requires that the individual be in business for herself; hold herself available to the general public to perform services; and be free from control and direction in the performance of services, both under the particular contract and in fact. The analytical framework for distinguishing between a worker and an independent operator are presented in *Practice Directive 1-1-3(A)*.
>
> …
>
> 5. *Assessment Manual Item: AP1-1-3(a)*'s direction that "[s]ome regard must also be paid to the structure and customs of the particular industry involved" recognises that status determination is contextual; and requires that a decision-maker consider, among other matters, whether a master-servant relationship – which is the pith of the "contract of service" referred to in section 1 of the *Act* – is applicable in a particular industry or circumstance.
>
> 6. Through long-established practice, the Assessment Department has recognized that a set of facts unique to a particular industry may infer that an individual exists as a business enterprise independent of a service recipient in that industry. **In the main, each of the sets of facts below is a rebuttable presumption: that is, if in a particular industry the relevant set of facts is established, a Board officer should find that the "service provider … has a sufficient degree of independence to be an independent operator," unless the presumption is refuted.**
>
> [footnotes deleted]

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[81] The practice directive provides specific guidance regarding the occupation of performers at pages 5 and 6 as follows:

> ***V PERFORMERS***
>
> 20. A performer is an entertainer who performs by, *inter alia*, acting, rendering music, or performing a skill or ability for an audience.
>
> 21. **A performer will be presumed to be an independent operator if the consideration and weighing of the following "performer factors" results in a finding that the underlying contract is more indicative of a contract for service. As always, no one single factor is determinative, nor do all factors need to be present to establish the nature of the relationship.**
>
> [emphasis added]

[82] The practice directive lists a range of factors to be considered in relation to performers:

> WHETHER THE PERFORMER:
>
> - **provides her services for a specific engagement or consecutive engagements of limited and determinate duration**
> - **sets or negotiates the fee for engagement , without any requirement of, or provision for, statutory withholdings**
> - **dictates the conditions of the engagement, for example set up, security arrangements, transportation requirements, and food and beverage provisions**
> - retains the right to exercise artistic control over the elements of the performance
> - Is neither required to nor paid to attend rehearsals
> - **has a number of engagements with different persons during the course of a year**
> - can arrange the time, place and nature of performances
> - has an investment in the equipment utilized in the performance
> - **retains the services of an agent on a continuing basis**
> - can select or hire employees or helpers, fix their salary, direct them or dismiss them
> - **operates under the guise of a corporation and is the principal of that corporation**

THE CONTRACT OF ENGAGEMENT:

- is entered into substantially before the date or dates of performance
- includes provision for ownership of the copyright of the performance

[emphasis added to denote factors met in this case]

[83] The plaintiff has provided submissions regarding the application of Practice Directive 1-1-3(B) to the circumstances of this case, commencing at paragraph 150. A rebuttal submission was provided by the applicants concerning Practice Directive 1-1-3(B), commencing at paragraph 103. We have added bolding to those factors listed above which we consider are met, and left unbolded those factors which we do not consider are met in relation to the plaintiff. With respect to the third point, the applicants acknowledge that the plaintiff did not dictate any of the conditions of her engagement, but rather negotiated with Central Myth through Gabco for certain transportation and accommodation provisions, and these requests were accommodated. We consider that the evidence supports a finding that this criterion is met, albeit in only a limited fashion.

[84] On balance, we consider that on a judgment basis the range of factors which are met in this case favours a finding that the relationship between Central Myth and Gabco was one between two independent firms, and that the plaintiff was not a worker of Central Myth.

[85] We also note that Practice Directive 1-1-3(A), “Status – Distinguishing between a worker and an independent operator,” effective May 1, 2010, states that AP1-1-3 provides a “hierarchical analytical framework.” As the framework is hierarchical, a conclusive determination at any stage determines status. Accordingly, if a conclusion is reached based on the general principles, then it is not necessary to proceed to address the specific guidelines in AP1-1-3. This is consistent with our approach set out above in which we found that the plaintiff’s status could be determined on the basis of the general principles in AP1-1-3 rather than proceeding to address the specific guidelines. In particular, it reinforces the point that the starting point for consideration cannot be the specific guidelines. As mentioned above, however, we have noted the current practice directives without relying upon them for the purposes of our decision, since they did not exist at the time of the incident in 2006.

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[86] Upon consideration of the foregoing, we find that the plaintiff was retained as an employee of Gabco (an independent firm) rather than as an employee of Central Myth. Policy at AP1-1-4 in the *Assessment Manual* further provides:

> **(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*….
>
> 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.

[87] Gabco was not registered with the Board at the time of the incident on February 7, 2006. We accept that the plaintiff, as the sole officer, principal, and shareholder of Gabco, was responsible for Gabco's failure to register with the Board. Accordingly, we consider that she was acting as an independent operator, rather than as a worker. We find, therefore, that the plaintiff was not a worker within the meaning of Part 1 of the Act at the time of the February 7, 2006 incident. It therefore follows that any injuries suffered by the plaintiff did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Status of the defendants

[88] In view of our conclusion regarding the status of the plaintiff, it does not appear necessary to address the status of any of the defendants. However, if any further certification remains necessary, a supplemental certificate may be requested.

Conclusion

[89] We find that at the time of the February 7, 2006 incident:

(a) the plaintiff, Gabrielle Carteris, was not a worker within the meaning of Part 1 of the Act;

(b) any injuries suffered by the plaintiff, Gabrielle Carteris, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Herb Morton
Vice Chair

Julie C. Mantini
Vice Chair

Andrew Waldichuk
Vice Chair

HM:gw

NO. S084915
VANCOUVER REGISTRY

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:

GABRIELLE CARTERIS

PLAINTIFF

AND:

CENTRAL MYTH PICTURES LTD., JOE BROIDO, HARVEY KHAN, PORCHLIGHT ENTERTAINMENT INC., FRONT STREET PICTURES INC., PORCHLIGHT DISTRIBUTIONS INC., PORCHLIGHT WORLDWIDE INC., PENELOPE BUITENHUIS, ADRIAN HUGHES, ADAM SLIWINSKI, JAYE GAZELEY, BRETT ARMSTRONG, MARC STEVENSON, COSTA VASSOS, PATRICK WEIR, EDWARD HARDY, ABC COMPANY 1, ABC COMPANY 2, JOHN DOE 1, JOHN DOE 2

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, CENTRAL MYTH PICTURES LTD., HARVEY KHAN, FRONT STREET PICTURES INC., PENELOPE BUITENHUIS, ADRIAN HUGHES, ADAM SLIWINSKI, JAYE GAZELEY, BRETT ARMSTRONG, MARC STEVENSON, COSTA VASSOS, PATRICK WEIR and EDWARD HARDY, 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, February 7, 2006:

1. The Plaintiff, GABRIELLE CARTERIS, was not a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. Any injuries suffered by the Plaintiff, GABRIELLE CARTERIS, did not arise out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of February, 2012.

_____

Herb Morton
Vice Chair

_____

Julie C. Mantini
Vice Chair

_____

Andrew Waldichuk
Vice Chair

NO. S084915
VANCOUVER REGISTRY

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:

GABRIELLE CARTERIS

PLAINTIFF

AND:

CENTRAL MYTH PICTURES LTD., JOE BROIDO, HARVEY KHAN, PORCHLIGHT ENTERTAINMENT INC., FRONT STREET PICTURES INC., PORCHLIGHT DISTRIBUTIONS INC., PORCHLIGHT WORLDWIDE INC., PENELOPE BUITENHUIS, ADRIAN HUGHES, ADAM SLIWINSKI, JAYE GAZELEY, BRETT ARMSTRONG, MARC STEVENSON, COSTA VASSOS, PATRICK WEIR, EDWARD HARDY, ABC COMPANY 1, ABC COMPANY 2, JOHN DOE 1, JOHN DOE 2

DEFENDANTS

SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
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