BRITISH COLUMBIA **WCAT** ***Workers' Compensation Appeal Tribunal***

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898

Noteworthy Decision Summary

Decision: WCAT-2006-01932 **Panel**: Herb Morton **Decision Date:** May 2, 2006

Section 257 Certification to Court – Whether doctor employer at time surgery performed – Policy item #111.40 of the Rehabilitation Services and Claims Manual, Volume II – Decision 169 Workers' Compensation Reporter

Section 257 Certification to Court. The guidance formerly provided in policy item #111.40 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) and Decision 169 of the *Workers' Compensation Reporter* with regard to the determination of employer status in a section 257 application is no longer available with the deletion and retirement of the policy and Decision. However, the reasoning can still be considered in the absence of any new policy.

The plaintiff suffered a back injury while at work on October 3, 2002. His claim for workers' compensation benefits was accepted by the Workers' Compensation Board (Board). The medical treatment for his work injury included surgery on January 2, 2003. In his legal action, the plaintiff alleges negligence by the doctor in the performance of this surgery. Pursuant to section 257 of the *Workers Compensation Act* (Act), counsel for the plaintiff asked the Workers' Compensation Appeal Tribunal to make a determination as to whether the doctor was an employer at the time of the plaintiff's surgery.

At the time of the plaintiff's surgery on January 2, 2003, policy at item #111.40 of the RSCM II, under the heading "Certification to Court", provided that a party to a section 11 (now section 257) determination cannot claim to be an independent operator when the obligations of an employer under the Act are being considered, and then claim to be an employer in respect of the same time period when there subsequently appears to be some advantage in that position. That policy derived from Decision 169 which was retired effective January 1, 2003. The policy in item #111.40 was deleted and is not applicable to decisions made on or after March 3, 2003. Accordingly, it would not apply to this initial adjudication of the defendant's status. The reasoning in the policy and Decision 169 can, however, still be considered in the absence of any new policy.

The panel concluded that the doctor was functioning like an independent operator who was not registered with the Board, and that the doctor was not an employer within the meaning of Part 1 of the Act.

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WCAT Decision Number: **WCAT-2006-01932**
WCAT Decision Date: **May 2, 2006**

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 042000-A

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. S042452
Thomas Ferguson v. Dr. John C. L. Sun

Applicant: Thomas Ferguson
(the "plaintiff")

Respondent: Dr. John C. L. Sun
(the "defendant")

Representatives:

For Applicant: Morris C. Soronow
MORRIS C. SORONOW

For Respondent: W. J. McJannet
HARPER GREY LLP

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WCAT Decision Date: **May 2, 2006**
Panel: Herb Morton, Vice Chair

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. S042452
Thomas Ferguson v. Dr. John C. L. Sun

Introduction

The plaintiff suffered a work injury on October 3, 2002. His claim for workers' compensation benefits was accepted by the Workers' Compensation Board (Board). The medical treatment for his work injury included surgery on January 2, 2003, performed by the defendant, Dr. John C. L. Sun. In his legal action, the plaintiff alleges negligence by Dr. Sun in the performance of this surgery.

At the time of the surgery, Dr. Sun shared a medical office with two other neurosurgeons. One of the neurosurgeons had registered with the Board as the employer of the office staff doing work for the three neurosurgeons. Dr. Sun had also incorporated as Dr. John C. L. Sun Inc. This company paid a share of the office expenses, including the WCB premiums on the salaries of the office staff. It is argued on behalf of Dr. Sun that he and the two other physicians were the employers of the office staff.

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 plaintiff on July 15, 2004. A transcript has been provided of the September 30, 2005 examination for discovery of Dr. Sun. Written submissions have been provided by the parties to the legal action, which were initially completed on January 24, 2006. The plaintiff's employer is not participating in this application, although invited to do so. By memo dated September 19, 2005, a lawyer in the Board's Legal Services Department advised that the Board had authorized this action and retained plaintiff's counsel to pursue this action.

The legal action is scheduled for trial on February 7, 2007. An expedited decision was requested by February 7, 2006, to allow one year for trial preparation. On January 31, 2006, I invited comments from the Board's Assessment Department concerning the novel issues raised in this application. A memo dated February 6, 2006 was provided

by the manager, Assessment Policy. This was disclosed to counsel for comment, and additional submissions were received on March 10 and 16, 2006.

I find that the issues in this application are primarily ones involving law and policy, and that the application may be considered on the basis of the written evidence and submissions without an oral hearing.

Issue(s)

The contested issue is whether the defendant physician was an employer at the time of the plaintiff's surgery.

Jurisdiction

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 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.

Status of the Plaintiff

The plaintiff, Thomas Ferguson, was employed as a paramedic (advanced emergency medical assistant). On October 2, 2002, he suffered a back injury while lifting a patient. He underwent a right L4/5 discectomy on January 2, 2003, performed by Dr. John Sun. The plaintiff subsequently required a repair of a puncture of his left iliac artery. The plaintiff's October 2, 2002 injury, his surgery on January 2, 2003, and the subsequent surgical repair of his left iliac artery, were accepted by the Board as compensable under his workers' compensation claim.

By submission dated October 28, 2005, plaintiff's counsel cites *WCAT Decision #2005-04416-ad* in *Welch v. Rose*, dated August 23, 2005. Counsel agree that the plaintiff's injuries arose out of and in the course of his employment. I adopt the analysis in the cited decision. In any event, the plaintiff's initial injury at work on October 3, 2002, and his subsequent surgery on January 2, 2003, were both subsequent to June 30, 2002. Even if the policy changes in *Volume II* of the *Rehabilitation Services and Claims Manual* (RSCM) made by the January 20, 2004 resolution of the board of directors (*Resolution No. 2004/01/20-01*, "Re: The Status of Treatment Injuries,"

20 WCR 1) were limited to injuries on or after June 30, 2002, the new policy would apply in this case.

I find that at the time of his surgery on January 2, 2003, the plaintiff was a worker within the meaning of Part 1 of the Act, and his injuries arose out of and in the course of his employment.

Status of the Defendant

The defendant, Dr. John Sun, gave evidence in an examination for discovery on September 30, 2005. He graduated from medical school in 1995. He was accepted into a residency in neurosurgery at the University of British Columbia, which he completed in 2001. While completing his final year of residency, he was asked by two practicing neurosurgeons in Victoria, Drs. Cameron and Bennett, to join with them.

Dr. G. Stewart Cameron Inc. had established a neurosurgery practice on Fort Street in Victoria in 1994. The office was owned by Dr. Cameron. A registration was maintained with the Board since approximately 1996 by Dr. G. Stuart Cameron Inc., account number 500978. T4 slips were issued for the office staff by Dr. G. Stuart Cameron Inc.

Dr. Richard T. Bennett later began renting space from Dr. Cameron, and conducting his neurosurgical practice from these premises on Fort Street. Prior to Dr. Sun commencing practice, the following had occurred:

- two medical office assistants had been hired by Dr. G. Stewart Cameron Inc. (Margaret Brendon and Donna Dean);
- office management was performed by Dawn Cameron, the wife of Dr. Cameron;
- the premises owned by Dr. Cameron were renovated to accommodate a third doctor;
- as of July 1, 2001, the office arrangement which Dr. Sun joined was fully operational; and,
- Dr. Sun did not contribute to the capital costs incurred in setting up his office.

Dr. Sun commenced practicing as a neurosurgeon on July 1, 2001, in space rented from Dr. Stewart at the Fort Street offices. Dr. Sun used his own billing number. Payments from the Medical Services Plan were initially made to Dr. Sun, and after November 22, 2001 were made to Dr. John C. L. Sun Inc. Prior to that time, Dr. Sun had never been in business and had never employed anyone.

When Dr. Sun joined Drs. Cameron and Bennett, an account was set up with the Royal Bank of Canada and each physician contributed $5,000-$6,000 for the initial expenses. From then on, Drs. Sun, Cameron and Bennett were each billed monthly for their share of the office expenses, which they would pay into the bank account.

A copy has been provided of the "Co-Tenancy Agreement" dated February 7, 2002, between Dr. G. Stuart Cameron Inc., Dr. R. T. Bennett Inc. and Dr. John C. L. Sun Inc. A copy has also been provided of the January 16, 2002 resolution of the Board of Directors of Dr. C. L. Sun Inc. to approve the entering into of the co-tenancy agreement.

Dr. Sun's understanding was that he would be involved in the running of the office, and that each physician would have control over the way the office was run. He understood that he would share in any expenses (secretarial, new equipment and supplies, and general overhead). The medical office assistants worked for all three neurosurgeons, and if Dr. Sun required one of them to work overtime for him, he dealt directly with them.

After Dr. Sun's practice became busier, it became evident that another medical office assistant was needed. Dawn Cameron interviewed various candidates. Anne Moon was interviewed by Dawn Cameron and hired on a temporary basis pending approval by all three physicians. All three doctors were in agreement with hiring Ms. Moon, and with the hourly rate that Dawn Cameron proposed that she should be paid.

In his examination for discovery, Dr. Sun stated (at Q 35-37):

> Q The arrangement that Dr. Sun concluded with Drs. Cameron and Bennett. What was the arrangement?
>
> A That I would join their practice and to be involved in the running of the office, the way it was run from – you have three people who have different ways of running the office. So my way may not be the same as his but I would have control over that.
>
> I would share in the expenses, both secretarial, new equipment, supplies, just general overhead. And that I would run the office as I wanted to run it and have the control over the secretaries as they do have the control over the secretaries in their way they run the office. Because we have three neurosurgeons who all do things differently. I may want to have my letters a certain way, and obviously I have control over that. I may not do things the way – the same way that Dr. Cameron and Bennett did, but I had full control over that. And so that was the understanding right from the beginning, right from day one.
>
> Q I take it that you didn't bring any staff with you when you joined Drs. Cameron and Bennett?
>
> A I had no staff.

Q Okay. The staff that you were going to use at this office arrangement, those were provided by Cameron and Bennett?

A They were present, yes.

Dr. Sun was happy with the work of the office staff. When a concern arose regarding the volume of work, the three physicians decided amongst themselves to employ a third secretary to handle the reception (Q 44). Dr. Sun also proposed upgrading their computer equipment and obtaining Internet access. He wanted to use the computer to view images online rather than having to go to the hospital (Q 83). The three physicians discussed this and decided to proceed with this (Q 44). Dr. Sun's share of the office expenses increased from one-third to 45%, due to the volume of work he was performing (Q 48). Dr. Sun had not seen any T4's (Q 52). His perspective was that he paid the wages to the three secretaries who were itemized on his shared account (Q 52). Dr. Sun characterized the three physicians as functioning as "a democratic process," in which the three of them were co-employers of the staff (Q 56). Dr. Sun's understanding was that he contributed to the employer's portion of income tax, holiday pay, CPP and UIC (Q 60). Every shared expense was mutually divided (Q 62). Dr. Sun was reimbursed for a depreciated share of his cost of purchasing the computer equipment when he left the office (Q 84).

Dr. Sun advised (at questions 252-254):

A ...I had full control of how they serviced me – full.

Q And obviously none of over how they service the other two doctors.

A No. That was not my business.

Q And that's what makes you say they were your employees?

A Absolutely. If I wanted something done a certain way, they would do it a certain way.

Dr. Sun advised that they were accommodating to the holiday requests by staff. He stated: "So when they wanted holidays, they were granted it, and so I never felt I needed to say that you can only take holidays at this point" (Q 257). Dr. Sun further advised (Q 259):

Q How much time do you think you would spend a month on discussing office matters with the other two doctors?

> A In a month? We may not. Maybe once. But I managed my office the way I wanted to manage it and they managed their office the way they wanted it. So there was never any conflict between the way I managed it and how they managed it, although it could be quite different because the secretaries knew that I wanted it that way, so they did things the way I wanted it; whereas when the other neurosurgeon would want it a different way, it would not conflict with what they do for me. So there was no time to ever have that conflict. There's no reason to have that conflict.
>
> Our discussions were simply: How can we reduce overhead? How do we make the office more efficient? It was never, "Oh, you know, she's doing this and I don't want her to do this." It was – you know, we had control over the way the secretaries worked for each individual.

At question 260, Dr. Sun further advised:

> They were awesome, they worked hard and they were efficient. There was no reason for me to approach them about further training or reprimanding them in any way. I was pleased to pay the bonuses.

Dr. Sun pointed out that he had ten years of training regarding the diagnosis, treatment and management of patients, and zero training on running an office (Q 280).

Dr. Sun left this office on April 1, 2005. Ms. Moone stayed an extra month after Dr. Sun's departure, and Dr. Sun paid her wages even though he was not in the office so that she could inform his patients of his address change.

Dr. Sun treated the plaintiff between November 26, 2002 and May 21, 2003. He performed an L4/5 discectomy on the plaintiff on January 2, 2003. Dr. Sun's medical services were billed to and paid for by the Board.

An affidavit has been provided by Dawn Cameron, office manager, sworn on December 6, 2005. She advises that Dr. Sun was originally responsible for one-third of the office expenses until December 31, 2002, and starting in January 2003 he was responsible for 45% of the office expenses as his practice was busier than that of Drs. Cameron or Bennett. Each month, she prepared a statement of the expenses for the operation of the office, which were divided among Drs. Cameron, Bennett and Sun. The payments shown as having been made to the Receiver General included the employers' share of all employees' employment insurance benefits, CPP contributions, and federal and provincial income tax. Drs. Cameron, Bennett and Sun also paid their share of the WCB employers' remittance.

The monthly statement of expenses did not include a salary for Dawn Cameron. By affidavit sworn on December 6, 2005, Dr. Cameron advised:

> My wife Dawn Cameron and Maureen Bennett, the wife of Dr. R. T. Bennett both work as billing clerks and are paid individually by us through our professional corporations. In addition to the billing responsibilities, Dawn Cameron serves as office manager while Maureen Bennett manages the call schedule for all four neurosurgeons practising in Victoria.

Dr. Cameron further stated in paragraph 5:

> It has been brought to my attention now that the T4s issued for Margaret Brendon, Donna Dean, and Anne Moon for 2002, 2003 and 2004 were issued in the name of Dr. G. Stuart Cameron, Inc. Notwithstanding the form of the T4s, only my share of the payments of the salaries and associated deductions of the employees referred to in the preceding paragraph have been claimed as an operating expense in the filing of my and now G. Stuart Cameron, Inc. tax returns. I did not instruct anyone to issue the T4s in the present form. Had I directed my mind to the issuance of the T4s, I would have changed them to add Dr. Bennett and then Dr. Sun to reflect the fact they were also employers. Given that I have practised out of this office since 1973, I assume that the T4s have been issued in my name all along, and I am not aware of why the system was not changed when Dr. Bennett and Dr. Sun joined….

By affidavit sworn on December 6, 2005, Margaret Brendon, medical office assistant, stated that she considered all three doctors to have equal authority over her position as one of the staff in the office and to have equal authority to supervise or direct all aspects of her work. A similar affidavit was provided by Donna Dean, medical office assistant.

By affidavit sworn on December 6, 2005, Dr. Bennett advised that from the time Dr. Sun joined the practice, Dr. Bennett always believed Dr. Sun to be a co-employer, along with Drs. Cameron and Bennett, of the medical office assistants (Margaret Brendon and Donna Dean). Dr. Bennett advised:

> Dr. Cameron and I practised with Dr. Sun between July 1, 2001 and March 31, 2005. Through the years, the three of us have met, as needed, to discuss the running of our office. Matters of office policy and procedures were always discussed among us and decisions made were based on mutual agreement, and we have always acted on a basis of consensus and as equals.

Counsel for the defendant submits that Drs. Cameron, Sun and Bennett were the co-employers of the office staff. The plaintiff's lawyer submits Dr. Sun was a tenant in a collegial packaged office arrangement operated by Dr. Cameron (and his wife, Dawn Cameron, office manager).

By memo dated January 31, 2006, I requested comments from the Board's Assessment Department. The memo outlined some of the background information. The questions posed, and comments provided by the manager, Assessment Policy, were as follows (with amended ordering and numbering):

> I would be interested in receiving comments as to how the Assessment Department would have addressed the foregoing, had all the information now available been presented to the Assessment Department in 2003.
>
> (a) Would the Assessment Department have concluded that there was a new business being operated by the three limited companies?
>
> The Assessment Department would not have "concluded that there was a new business being operated by the three limited companies"; for, given the then and current practice, such a determination would not have been required to be made.
>
> Given the then and current practice, if the facts had been known to the department in 2002 or 2003, the following would have been the most likely outcome:
>
> a) Each of Dr. G. Stuart Cameron Inc., Dr. R. T. Bennett Inc., and Dr. John C. L. Sun Inc. would have been required to register with the Board, report assessable payroll for its respective principal, and remit assessment on such payroll.
>
> b) The Board would have turned its mind to whether 'Cameron Bennett Sun' was a partnership employing workers.
>
> c) If it was determined that 'Cameron Bennett Sun' was not a partnership, 'Cameron Bennett Sun' would nevertheless – for administrative efficiency and otherwise – have been required to register with the

Board, report assessable payroll for the practices' office staff, and remit assessments on such payroll.

(b) Would all three physicians have been required to pay premiums on their earnings as principals of limited companies?

At all applicable times, each of Dr. G. Stuart Cameron Inc., Dr. R. T. Bennett Inc., and Dr. John C. L. Sun Inc. would have been required to report assessable payroll for its respective principal and remit assessment on such payroll.

(c) Would the Assessment Department have considered that the existing legal arrangements (i.e. in which the registered employer was Dr. Cameron Inc.). represented a viable election as to how the parties intended to operate, and that they could continue in that fashion if they chose?

It is probable that the department would not have so determined but would have instead undertaken the process described . . . above.

(d) In that event, would Dr. Sun and Dr. Bennett be viewed as proprietors who were not required to register with the Board or pay WCB premiums on their earnings?

As each of Dr. Sun and Dr. Bennett was the active principal of his respective corporation, the department would not have viewed either of them as a proprietor who was not required to register with the Board or pay premiums on his earnings.

(e) Alternatively, even if Dr. R. T. Bennett Inc., and Dr. John C. L. Sun Inc., had no other employees, would they both have been required to register and pay WCB premiums on the earnings of their principal (Dr. Bennett or Dr. Sun)?

At all applicable times, each [of] Dr. G. Stuart Cameron Inc., Dr. R. T. Bennett Inc, and Dr. John C. L. Sun Inc. would have been required to register with the Board, report assessable payroll for its respective principal, and remit assessments on such payroll.

The policy manager further advised that the Board had no information as to whether workers' compensation premiums were paid in relation to the earnings of Dr. Bennett or Dr. Sun in 2003. He advised:

> The Board's records only indicate that Dr. R. T. Bennett Inc. (Workers' Compensation Board account no. 507321) paid assessment premiums of $214.21 on a payroll of $69,100 in 2003.
>
> In contrast, the Board's records indicate that Dr. G. Stuart Cameron Inc. (Workers' Compensation Board account no. 500978) paid assessment premiums of $639.17 on a payroll of $163,890 in 2003. (Parenthetically, and anomalously, the Board's records also indicate that Dr. G. Stuart Cameron Inc. paid assessment premiums of $158.40 on a payroll of $52,800 in 2001.)
>
> [emphasis in original]

At the time of the plaintiff's surgery on January 2, 2003, policy at item #111.40 of the RSCM provided in part, under the heading "Certification to Court":

> The Board has determined that a party to a Section 11 determination cannot claim to be an independent operator (and not an employer) when the obligations of an employer under the Act are being considered, and then claim to be an employer in respect of the same time period when there subsequently appears to be some advantage in that position.
>
> There are several examples in our legal system of the principle being applied that a person cannot disclaim or fail to meet her or his obligations under a statute and at the same time claim its benefits. That principle has no application where a statute otherwise provides. Nor is it in any event a principle of universal application. But where a statute does not otherwise provide, it is a principle that is sometimes applied where the adjudicating tribunal finds it consistent with the policy objectives of the Act, and in other respects appropriate.

That policy derived from *Decision No. 169* of the *Workers' Compensation Reporter* (2 W.C.R. 262), which was retired effective January 1, 2003. As it was retired the day prior to the plaintiff's surgery on January 2, 2003, *Decision No. 169* is not applicable in this case.

Policy at RSCM item #111.40 was deleted effective March 3, 2003, as a result of *Resolution 2003/01/21-01* of the board of directors ("Re: Consequential Policy Amendments in Regard to the *Workers Compensation Amendment Act (No. 2), 2002* of

the Board"). With respect to the application of these policy changes, the policy resolution stated:

> 5. This resolution is effective on March 3, 2003 and the new policies and policy changes apply to all decisions made on or after that date.

The policy resolution stated that it applied to all decisions made on or after March 3, 2003. Accordingly, it would apply to initial adjudications involving this issue on or after March 3, 2003. As this decision involves an initial adjudication of the defendant's status, the policy change (involving the deletion of RSCM item #111.40) is applicable. Accordingly, the policy at RSCM item #111.40 is not applicable, even though it was the policy in effect at the time of the plaintiff's surgery.

In sum, as *Decision No. 169* was retired effective January 1, 2003, and as RSCM item #111.40 was repealed effective March 3, 2003 (in connection with all decisions made on or after March 3, 2003), the content of those two former policies is not applicable in connection with my decision.

Counsel for the defendant has provided copies of court decisions in support of his arguments that there can be more than one employer and that it is not determinative if one party is registered or pays assessments. In *Sinclair v. Dover Engineering Services Ltd*., (1987) 11 B.C.L.R. (2d) 176, the British Columbia Supreme Court considered a wrongful dismissal action brought by Sinclair. Sinclair was an engineer who ostensibly worked for one company (Dover) but was paid by a second company (Cyril). When Sinclair was dismissed he sued both companies. Dover no longer had any assets, and Cyril denied liability on the basis that Sinclair had contracted for employment with a single entity (Dover). The trial judge found both companies were jointly and severally liable:

> The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January of 1973. The defendants argue that an employee can only contract for employment with a single employer and that, in this case that single entity was obviously Dover.
>
> I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting, and tax considerations.

There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

The fact that such a determination requires the Court to lift the corporate veil ought not to be regarded as a serious objection to such an approach. In Bagby v. Gustavson International Drilling Co. Ltd. et al. (1980), 24 A.R. 181, the Alberta Court of Appeal did just that, relying upon and adopting a passage supporting such a practice from Harris, Wrongful Dismissal, at p. 105. A similar approach was followed by Miller, J. in the New Brunswick Queens Bench, Trial Division, in Sullivan v. Mack Maritime Limited et al. (1982), 39 N.B.R. (2nd) 298, although there is no specific discussion of the point in that judgment.

In Manly Inc. et al. v. Fallis (1977), 2 B.L.R. 277, a case involving an alleged breach of a fiduciary obligation, the Ontario Court of Appeal dismissed an appeal from a finding of liability, where the breach could only have been proved by lifting the corporate veil so as to demonstrate the relationship between the two plaintiff companies. At p. 279, the following appears from the judgment of Lacourciere, J.A.

> This is a case where the Court is not precluded from lifting the corporate veil and, in effect, regarding the closely related respondent companies as essentially one trading enterprise, in the interests of the affiliated companies, in a circumstance where the refusal to do so would allow the appellant to escape the consequences of his breach of a fiduciary trust.

> Applying the same principles to the facts of this case, it can be seen that Mr. Goudal has at least an equal, if not a controlling, interest in both Dover and Cyril. Even though he is not the president of Dover, he is obviously a driving force behind both companies. The fact that he chose to organize the affairs of these related companies so that the plaintiff apparently worked for one while being paid by the other, should not be allowed to operate to the detriment of the plaintiff, who is now employed by neither, and who seeks only the proper redress for which the law provides. I am satisfied that the two defendants should be held jointly and severally liable for whatever damages may properly be due the plaintiff as a result of the termination of his employment on January 31st, 1985.

The British Columbia Court of Appeal dismissed an appeal (*Sinclair v. Dover Engineering Services Ltd*., (1988) 49 D.L.R. (4th) 297). The Court of Appeal reasoned in part:

> The trial judge reviewed the role performed by Mr. Sinclair for the defendant company in this way:
>
> > "In practical terms the arrangement between Cyril and what I shall call the other "Goudal interests" had the following results. For 12 years the public who did business with Dover would clearly have been led to believe that the plaintiff was an employee of that company. He offered and provided engineering services to the public in the name of Dover. All invoices for work done by him were sent out on Dover's letterhead. All of his correspondence to clients was sent out under the letterhead of Dover. He had business cards which suggested that he represented Dover.
> >
> > On the other hand, he was paid by Cyril, which held itself out as his employer to those who would be interested to know. All income tax, unemployment insurance and Canada Pension Plan payments were deducted and remitted to the federal Government by Cyril as his employer. Workmens Compensation Board payments were similarly deducted and remitted provincially. Cyril entered into group insurance programmes and contracted with B.C. Medical Insurance Services and C.U. & C., all for the plaintiff's benefit, holding itself out in each case as his employer.

> Naturally, T-4 slips were issued by Cyril as the plaintiff's employer. When what amounted to two months' severance pay was offered to the plaintiff, it was in the form of a cheque drawn on the bank account of Cyril. When his employment ended, the plaintiff was given a Record of Employment form, for U.I.C. purposes, showing Cyril to have been his employer."
>
> ...
>
> In my opinion, all of the circumstances of this case clearly support the inference that the plaintiff was employed under a contract of service with Cyril Management Ltd. and Dover Engineering Services Ltd., both of which exercised control over Mr. Sinclair and his affairs. This arrangement, with which the plaintiff, Mr. Sinclair, acquiesced, was devised because of the various beneficial aspects to the employer companies. They cannot, in my opinion, now deny its existence or the responsibility which it imposes upon them respecting their employee and the notice to which he is entitled upon dismissal. I would dismiss the appeal.

Counsel for the defendant also cites *Appeal Division Decision #2002-3030* dated December 2, 2003 (*Downs v. Lee*). In that case, the Appeal Division panel reasoned in part (at page 30):

> The actions of the Assessment Department with regard to the defendant's application to register as an employer do not preclude the Appeal Division from considering and making a determination of the defendant's status under section 11. In a section 11 determination, the Appeal Division is required to examine the matter anew, and make its own determination irrespective of any prior determination by a Board officer. It is a question of whether the weight of the evidence supports a conclusion that the defendant was an employer within the scope of Part 1 at the time that he performed the surgery on the plaintiff.
>
> According to the definition of employer in section 1 of the *Act* Dr. Lee is an employer if he had an employee at the time of the surgery. Whether he meets this definition is a question of fact.
>
> [reproduced as written]

The Appeal Division panel cited the recent decision of the Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)* [1997] 1 S.C.R. 1015, as indicating that the indicia relevant to determining an employer-employee relationship included the selection process, hiring, training, discipline, evaluation, supervision, assignment of

duties, remuneration and integration into the business. The Appeal Division panel noted (at page 32):

> Dr. Allan states that he was advised sometime in the summer of 2001 that he had not been invoicing the defendant for the Board assessments paid on Karen Wood's salary and he later found out in November or December 2001 that he had also not been invoicing the defendant for the employer's share of unemployment insurance benefits and CPP contributions. He says that he would have charged the defendant for half of those expenses since he has always considered the defendant to be Karen Wood's co-employer. He states that since he has now discovered these errors he intends to submit invoices to the defendant for those expenses dating back to January 1, 1998.

The Appeal Division panel concluded (at page 34):

> In view of the factors described in the Pointe-Claire case the evidence on the whole is that the defendant had very little control over Karen Wood's duties and the wages that she would be paid. Furthermore, it was assumed that the defendant would use her services unless there was too much work for one secretary. This evidence, when viewed in the light of factors such as power of selection of the employee, payment of wages, control over the method of work and the right of suspension, argues against an employer/employee relationship. The defendant's failure to pay any share of the contributions which must be paid by an employer is consistent with Karen Wood not being his employee as is his failure to issue T4 slips for her wages. There is very little in all of this that would support a finding that the defendant was an employer.

In the present case, there is considerable evidence to support characterizing Dr. Sun as an employer. The "Co-Tenancy Agreement" concerning the bank account, and associated monthly statements of shared expenses, provide verification of the financial contributions of each physician to the various office expenses. These included WCB premiums, staff salaries, Hydro, property taxes, and payment to the Receiver General (including employment insurance and CPP contributions, and federal and provincial income tax).

There is merit to the opposing positions of both counsel. On one approach, the three physicians may be viewed as carrying on a partnership together, which employed workers. A registration was in place with the Board, and assessment premiums were paid on the earnings of the workers. All three physicians contributed to the payment of these premiums, as one of the recorded items on their monthly expense statements. There was no intent to avoid meeting their obligations under the Act to make such payments to the Board. Accordingly, the fact that the registration with the Board was in

the name of Dr. G. Stewart Cameron Inc. alone, should be disregarded. Legal support for looking to the true nature of the relationship, even if this involves piercing the corporate veil, is provided by the court decision in the *Sinclair* case. Additionally, the manager, Assessment Policy, has advised that if all the background facts had been known to the Board at the time, the Assessment Department would likely, for administrative efficiency, have required 'Cameron Bennett Sun' to register with the Board, report assessable payroll for the practices' office staff, and remit assessments on such payroll (i.e. whether or not 'Cameron Bennett Sun' was characterized as a partnership). This opinion supports a conclusion that 'Cameron Bennett Sun' was in fact the employer at the time in question.

There is, as well, considerable support in past decisions for treating a lack of registration by an employer as not affecting the determination of the employer's status under the Act. *Appeal Division Decision #93-0336*, "Out-of-province Employer: Compulsory Industry", 9 W.C.R. 705, reasoned at page710:

> Thus, the defendant Bow Ridge was an employer in B.C. in a compulsory industry under the *Act*. The fact that Bow Ridge failed to register after December 31, 1989 does not change that conclusion. Since Epp continued to be a "worker" in B.C. for Bow Ridge, then Bow Ridge continued to be an "employer" in B.C.
>
> I appreciate the apparent unfairness of that conclusion — that Bow Ridge could fail to remain registered as an employer in B.C. and pay no assessments in B.C., and yet be entitled to the protections found in Section 10 of the *Act*. However, the *Act* and the policy of the Board are clear. An employer in a compulsory industry in B.C. is an employer under the *Act* whether or not it is registered — otherwise the protection of its workers under the *Act* would be uncertain. An employer who fails to register is subject to certain penalties, but no exception is made in the *Act* or Board policy regarding the Section 10 protections. That is, there is nothing that allows an employer who fails to register to be found to be an employer for the purposes of assessments and penalties but not for the purposes of Section 10. An employer under Part 1 of the *Act* is an employer for all of Part 1.
>
> Therefore, on the material submitted, I find that, at the time of the motor vehicle accident, the defendant Bow Ridge was an employer engaged in an industry within Part 1 of the *Act*. Furthermore, since the alleged negligence occurred when one of its workers was operating one of its vehicles, I find the conduct of the employer, or its servant, which caused the alleged breach of duty of care arose out of and in the course of employment within Part 1 of the *Act*.

The Appeal Division decision has been followed in a number of subsequent decisions. *WCAT Decision #2004-02742-ad-Supplemental* dated June 30, 2004 commented in obiter:

> Contrary to the plaintiff's submissions, lack of registration does not mean that an employer is not an employer. In *Appeal Division Decision #93-0336* a panel determined that an employer still had employer status even if it was not registered.... That decision has been cited in a number of Appeal Division decisions. In *Appeal Division Decision #2003-0182* I expressly accepted the analysis in *Appeal Division Decision #93-0336*. I continue to accept that analysis.
>
> Of course, status is contingent on the entity, registered or not, actually being an employer….

WCAT Decision #2004-04112-ad, dated July 30, 2004 (flagged as a "noteworthy" decision on WCAT's internet site), provided the following analysis regarding the significance of a failure to register with the Board:

> Subsequent to *Decision #93-0336*, the Board amended RSCM I policy #111.40, "Certification to Court", to add the following two paragraphs in late 1994. These paragraphs lent support to the plaintiff's argument that a party's status as an employer is contingent on it having assumed the responsibilities commensurate with the status it seeks:
>
> > The Board has determined that a party to a Section 11 determination cannot claim to be an independent operator (and not an employer) when the obligations of an employer under the Act are being considered, and then claim to be an employer in respect of the same time period when there subsequently appears to be some advantage in that position.
> >
> > There are several examples in our legal system of the principle being applied that a person cannot disclaim or fail to meet her or his obligations under a statute and at the same time claim its benefits. That principle has no application where a statute otherwise provides. Nor is it in any event a principle of universal application. But where a statute does not otherwise provide, it is a principle that is sometimes applied where the adjudicating tribunal finds it consistent with the policy objectives of the Act, and in other respects appropriate.

Policy #111.40, however, was deleted effective March 3, 2003, as a result of Resolution 2003/01/21-01 of the board of directors of the Board. Because the resolution specifically states that this policy change applies to all decisions made on or after March 3, 2003, I conclude that policy #111.40 does not apply to my decision.

The first quoted paragraph of policy #111.40 is drawn from Decision 169, a 1975 commissioners' decision published at 2 *WCR* 262. Although Decision 169 has now been retired, it had the status of a policy of the predecessor of the board of directors of the Board at the time of the MVA [motor vehicle accident]. In Decision 169, a defendant sought a section 11 determination that he was an employer within the scope of Part I of the Act at the time of a fatal MVA. The defendant proprietor did not have anyone in his service at the time of the MVA. He had in the past, however, hired temporary, short-term workers from time to time for small jobs. Based on the zero payroll return which he had submitted to the Board indicating he had no workers that year, the Board's assessment department had not levied any assessments against him for workers for the year of the MVA. In effect, based on the defendant's representations, the Board had concluded he was not an employer during that year.

When he was later sued as a defendant related to the MVA, he claimed to have been an employer, and sought to submit a revised payroll report to the Board. The commissioners concluded that the defendant could not now change his position and claim to have been an employer under Part 1 of the Act when there subsequently appeared to be some advantage in that status. They stated that it would be contrary to the policy and purposes of the Act to consider the evidence recently adduced by the defendant relating to his engagement of casual help. They determined that the Board should not reopen its earlier decision that the defendant was not an employer during the year in question.

Appeal Division Decision #99-1912 concluded that Decision 169 did not stand for the proposition that employer status was unavailable in a section 11 determination when an employer was not registered with the Board. The panel limited the application of Decision 169 to its particular facts, i.e. the party seeking a determination that it was an employer had previously made an express representation to the Board denying employer status, on which the Board had relied, and it was unclear whether or not the proprietor was in fact an employer at the time of injury.

> Other decisions (e.g. *Appeal Division Decisions #2000-1740* and *#2001-2255*) have suggested that Decision 169 may stand for the broader proposition that even if a defendant were in fact an employer at the time of injury, if the defendant failed to meet his obligations to register in that period, the Board will not make a determination of his status that will give him the benefit of immunity from a civil suit.
>
> After considering the alternative interpretations of Decision 169, I adopt the restricted interpretation set out in *Decision #99-1912*, which limits Decision 169 to its unique facts. I do so because the definition of employer in section 1 of the Act is very broad, and makes no reference to registration as a prerequisite to employer status, and section 2(1) states in absolute terms that Part I of the Act applies to <u>all employers, as employers</u>, except where exempted by order of the Board. I note that the current form of section 2(1), creating a scheme of universal coverage (subject to exemption by Board order for exceptional industries or occupations), was enacted in 1993, eighteen years after Decision 169.
>
> I conclude that Decision 169 does not apply on the facts of this case. I find that the clear language of sections 1 and 2 regarding the application of Part 1 of the Act to an employer is not displaced by Decision 169 in a case such as this where the party clearly meets the section 1 definition of an employer, and has made no active representation to the Board regarding its employer status which would estop it from now asserting a change in its status in the context of a section 11 determination.
>
> I therefore conclude that the fact that Ms. Case had not registered with the Board as an employer at the time of the MVA does not affect her legal status as an employer under Part 1 of the Act. I find that the defendant Ms. Case was an employer engaged in an industry within the meaning of Part 1 of the Act on February 24, 2000.
>
> [emphasis in original, footnotes removed]

In the present case, *Decision No. 169* was retired prior to the plaintiff's surgery, and is therefore not applicable.

An alternative analysis would involve giving greater effect to the fashion in which the parties constructed their legal relationships. Each of the three physicians was incorporated. Accordingly, each company was required to register with the Board, and to pay assessments on the earning of its principal. Dr. Sun and his company had failed to meet this obligation.

Effective January 1, 2003, policy at AP1-1-4 in the *Assessment Manual* provided as follows:

> **(a) General**
>
> An employer is a person or entity employing workers. The employer may be a sole proprietor, a partnership, a corporation, or another type of legal entity. An employer may also be an independent contractor who employs workers or a labour contractor who employs workers and elects to be registered as an employer. An employer is an "independent firm" for purposes of Item AP1-1-3.
>
> ...
>
> **(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. The term "principal" covers persons who would be proprietors or partners in the business if the business were not incorporated.
>
> [emphasis added]

The policy formerly set out in *Decision #335*, "Re Principals of Limited Companies," 5 WCR 101, similarly held:

> …The general rule followed by the Board is that a worker's claim is not prejudiced by the fact that his employer has not complied with his obligation to register. However, since a company can only act through its principal, it was felt that the claimant in the situation in question, unlike most claimants, had to accept some personal responsibility for the failure to register. If the corporate form of the business were ignored, the

> claimant was really an independent operator who had failed to obtain coverage for himself. It would be unfair to allow him to receive the benefits of the Act without meeting his obligations. The Board, therefore, concluded that, except in unusual circumstances, claims from principals of small unregistered companies or their dependants should be denied.

Appeal Division Decision #2000-0684 reasoned, at paragraph 31:

> ...in our view, the decisions of the former commissioners provide policy guidance in a general sense. Although the issue before the former commissioners was related to claims from principals of unregistered companies, we are satisfied that Decision No. 335 also provides guidance in relation to the status of such principals under subsection 10(1). We interpret Decision No. 335 as meaning that the principal of an unregistered company (who is responsible for the failure to register) is not a worker for the purposes of sections 10 and 11.

The reasoning of the majority in *Appeal Division Decision #2000-0684* has been followed in subsequent decisions of both the Appeal Division (*Appeal Division Decision #2001-1217, "*Status of Principals of Unregistered Companies (No. 2)," 17 WCR 559, and *#2002-1563/1564*) and WCAT *(#2004-02270*, *#2004-02568*, *#2004-03077*, *#2004-04553*, *#2004-05552,* and *#2005-05297*).

Dr. Sun may be viewed as responsible for the failure of Dr. John C. L. Sun Inc. to register with the Board. Dr. Sun was, in effect, acting in similar fashion to a sole proprietor or independent operator, notwithstanding the obligation to register his company with the Board. Accordingly, Dr. Sun was not a worker within the meaning of Part 1 of the Act.

A question for consideration is whether, having failed in his obligation to register with the Board, Dr. Sun should be accorded the status of an employer (i.e. as occurred in the situations addressed in *Appeal Division Decision #93-0336* and in *WCAT Decision #2004-04112-ad*). The question may be posed as to why the legal relationships established by the parties should not be respected by the Board. At the time of the plaintiff's surgery on January 2, 2003, Dr. G. Stewart Cameron Inc. was registered with the Board as the employer of the office staff. Dr. G. Stewart Cameron Inc. issued T4 slips to the staff as their employer.

As set out above, the policies formerly contained in RSCM item #111.40 and *Decision No. 169* no longer apply. I do not consider, however, that this precludes me from reviewing the reasoning set out in those former policies. In the absence of any new policy to take the place of these former policies, I consider that I may still examine the reasoning in those former policies as a form of bare legal argument (which has no

effect as policy). In the absence of another applicable policy, I may still consider whether the reasoning in the former policy has any persuasive effect.

This is not a situation where there is a clear relationship of employment between Dr. Sun and the office staff, which must be recognized notwithstanding the lack of registration by Dr. Sun or his company. The scenario described by plaintiff's counsel, of Dr. Sun being a tenant in a collegial packaged office arrangement operated by Dr. Cameron, is also a viable one. In its registration with the Board, and its issuance of T4 slips to the office staff, Dr. G. Stewart Cameron Inc. represented that it was the employer. Giving effect to the legal relationships created by the parties, as represented to the world, has the benefit of promoting greater certainty. Of course, it is open to the Board or WCAT to conclude that these representations did not accurately describe the realities of the situation, and to reach a different conclusion.

The fact remains that Dr. Sun and his company did not register with the Board as an employer. *Appeal Division Decision #93-0336* acknowledged the apparent unfairness of its conclusion that a company could fail to remain registered as an employer in B.C. and pay no assessments in B.C., and yet be entitled to the protections found in section 10 of the Act. However, the panel found this result was necessary, as otherwise the protection of its workers under the Act would be uncertain. In the present case, however, giving effect to the registration with the Board by Dr. G. Stewart Cameron Inc. does not create any uncertainty regarding the protection of its workers under the Act.

Dawn Cameron, office manager, prepared the monthly invoices for Drs. Cameron, Bennett and Sun, detailing their share of the office expenses. Were Drs. Cameron, Bennett and Sun functioning as a partnership, any wages of the office manager would normally be paid by the partnership. Dr. Cameron advises that his wife, Dawn Cameron, was paid individually by him through his professional corporation. I infer from this that Dr. Sun made no direct contribution to any wages received by the office manager. While a small detail, this aspect of the evidence tends to support the arguments of the plaintiff.

The evidence concerning the "control" exercised by Dr. Sun is equivocal in nature. The fact that the office staff performed the work which they did for him in the fashion he directed, and the fact that he had no involvement in the work they did for the other physicians, does not provide strong evidence he was their employer. It would not be unusual for support staff to take direction from the person they were performing the work for, whether or not that person was their employer. Similarly, the fact that the physicians operated on the basis of mutual consensus in making decisions regarding the running the office is equally consistent with a situation of ensuring that the co-tenant was satisfied with the basis on which the office was functioning. Part of Dr. Sun's monthly payment was for the office space which he rented, which was owned by Dr. Cameron.

I accept the position advocated by counsel for the defendant as being one which would be viable under the Act. I further agree with the reasoning in *Appeal Division Decision #2002-3030*, with respect to an appeal tribunal's authority to determine the status of a party at a particular point in time, based on the weight of the evidence (in the context of the applicable policies).

On balance, however, I find persuasive the argument of plaintiff's counsel that Drs. Sun, Bennett and Cameron should be judged by their actions (of maintaining a registration with the Board in the name of Dr. Dr. G. Stewart Cameron Inc.), rather than on the basis of what, several years after the fact, they claim were their intentions (to be joint employers). I appreciate that this argument harks back to the reasoning in the policy formerly contained at RSCM item #111.40 and *Decision No. 169*. Although those policies have been repealed, I consider that the reasoning still has some persuasive effect (i.e. as a legal argument, to be assessed on its merits, in the absence of a new policy to require some different analysis). I find that Dr. Sun was functioning in like fashion as an independent operator, who was not registered with the Board. Although he bore a share of the cost of the WCB premiums paid in relation to the wages of the office employees, I find that he paid this expense as a tenant in a collegial packaged office arrangement rather than as one of their employers. I am not persuaded that the registration with the Board by Dr. G. Stewart Cameron Inc. should be disregarded in the circumstances of this case. Given the equivocal nature of the evidence to support a finding that Dr. Sun was an employer, I consider it appropriate to give some weight to the fashion in which these arrangements had been represented to the Board. Had Dr. John C. L. Sun Inc. met its obligation to register as an employer, it would have availed itself of the protections afforded an employer under the Act. While it is open to me to conclude that some different interpretation better fits with the circumstances which existed on January 2, 2003, on balance, I am not persuaded that such a conclusion is warranted. I am not satisfied, on a balance of probabilities, that Dr. Sun was an employer within the meaning of Part 1 of the Act.

For the reasons set out above, I find that at the time of the plaintiff's surgery on January 2, 2003:

- the defendant, Dr. John C. L. Sun, was not a worker within the meaning of Part 1 of the Act;
- the defendant, Dr. John C. L. Sun, was not an employer engaged in an industry within the meaning of Part 1 of the Act; and,
- any action or conduct of the defendant, Dr. John C. L. Sun, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Conclusion

I find that at the time of the plaintiff's surgery on January 2, 2003:

(a) the plaintiff, Thomas Ferguson, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Thomas Ferguson, arose out of and in the course of his employment within the scope of Part 1 of the Act;

(c) the defendant, Dr. John C. L. Sun, was not a worker within the meaning of Part 1 of the Act;

(d) the defendant, Dr. John C. L. Sun, was not an employer engaged in an industry within the meaning of Part 1 of the Act; and,

(e) any action or conduct of the defendant, Dr. John C. L. Sun, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Herb Morton
Vice Chair

HM:gw

NO. S042452
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:

THOMAS FERGUSON

PLAINTIFF

AND:

DR. JOHN C. L. SUN

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, THOMAS FERGUSON, 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 the action arose, January 2, 2003:

1. The Plaintiff, THOMAS FERGUSON, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, THOMAS FERGUSON, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, DR. JOHN C. L. SUN, was not an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

4. The Defendant, DR. JOHN C. L. SUN, was not a worker within the meaning of Part 1 of the *Workers Compensation Act*.

5. Any action or conduct of the Defendant, DR. JOHN C. L. SUN, which caused the alleged breach of duty of care, 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 May, 2006.

_____

Herb Morton
VICE CHAIR

NO. S042452
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:

THOMAS FERGUSON

PLAINTIFF

AND:

DR. JOHN C. L. SUN

DEFENDANT

SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
150-4600 Jacombs Road
Richmond, BC V6V 3B1
FAX (604) 664-7898
TELEPHONE (604) 664-7800

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BRITISH COLUMBIA **WCAT** ***Workers' Compensation Appeal Tribunal***

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898