2000-88(EI)
2000-89(CPP)

BETWEEN:

EUGENE MARCOUX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard with the appeals of Roumen Milev (2000-92(EI), 2000-93(CPP)), Mukesh Mirchandani (2000-60(EI), 2000-61(CPP)), and Hussam Bawa (2000-116(EI), 2000-115(CPP)) on August 28 and 29, 2001 by

The Honourable D.G.H. Bowman, Associate Chief Judge

Appearances

Counsel for the Appellant:	Douglas C. Hodson, Esq. Crystal Taylor
Counsel for the Respondent:	Elaine Lee

JUDGMENT

It is ordered that the appeals from the decisions of the Minister of National Revenue under the *Employment Insurance Act* and the *Canada Pension Plan* be dismissed and the decisions be confirmed.

Signed at Ottawa, Canada, this 16th day of November 2001.

"D.G.H. Bowman"

A.C.J.

2000-92(EI)
2000-93(CPP)

BETWEEN:

ROUMEN MILEV,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard with the appeals of Eugene Marcoux (2000-88(EI), 2000-89(CPP)), Mukesh Mirchandani (2000-60(EI), 2000-61(CPP)), and Hussam Bawa (2000-116(EI), 2000-115(CPP)) on August 28 and 29, 2001 by

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Counsel for the Appellant:	Douglas C. Hodson, Esq. Crystal Taylor
Counsel for the Respondent:	Elaine Lee

JUDGMENT

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Signed at Ottawa, Canada, this 16th day of November 2001.

"D.G.H. Bowman"

A.C.J.

2000-60(EI)
2000-61(CPP)

BETWEEN:

MUKESH MIRCHANDANI,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard with the appeals of Roumen Milev (2000-92(EI), 2000-93(CPP)), Eugene Marcoux (2000-88(EI), 2000-89(CPP)), and Hussam Bawa (2000-116(EI), 2000-115(CPP)) on August 28 and 29, 2001 by

The Honourable D.G.H. Bowman, Associate Chief Judge

Appearances

Counsel for the Appellant:	Douglas C. Hodson, Esq. Crystal Taylor
Counsel for the Respondent:	Elaine Lee

JUDGMENT

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Signed at Ottawa, Canada, this 16th day of November 2001.

"D.G.H. Bowman"

A.C.J.

2000-116(EI)
2000-115(CPP)

BETWEEN:

HUSSAM BAWA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard with the appeals of Roumen Milev (2000-92(EI), 2000-93(CPP)), Mukesh Mirchandani (2000-60(EI), 2000-61(CPP)), and Eugene Marcoux (2000-88(EI), 2000-89(CPP)) on August 28 and 29, 2001 by

The Honourable D.G.H. Bowman, Associate Chief Judge

Appearances

Counsel for the Appellant:	Douglas C. Hodson, Esq. Crystal Taylor
Counsel for the Respondent:	Elaine Lee

JUDGMENT

It is ordered that the appeals from the decisions of the Minister of National Revenue under the *Employment Insurance Act* and the *Canada Pension Plan* be dismissed and the decisions be confirmed.

Signed at Ottawa, Canada, this 16th day of November 2001.

"D.G.H. Bowman"

A.C.J.

Date: 20011116
Dockets: 2000-88(EI), 2000-89(CPP), 2000-92(EI),
2000-93(CPP), 2000-60(EI), 2000-61(CPP),
2000-116(EI), 2000-115(CPP)

BETWEEN:

EUGENE MARCOUX, ROUMEN MILEV,
MUKESH MIRCHANDANI, HUSSAM BAWA,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Bowman, A.C.J.

[1] These appeals are from decisions by the Minister of National Revenue that the appellants, all of whom are psychiatrists, were employed in insurable and pensionable employment by four different Saskatchewan District Health Boards (the "SDHBs") for the purpose of the *Employment Insurance Act* and the *Canada Pension Plan*. The appeals of all four appellants were heard together by Beaubier J. of this court. After hearing the evidence and reserving judgment he concluded that the Minister's decisions were correct and dismissed the appeals.

[2] The appellants appealed to the Federal Court of Appeal. In a brief oral judgment delivered from the bench the Federal Court of Appeal allowed the appeal, set aside the decision of Beaubier J. and referred the matter back to the Tax Court of Canada for a redetermination by a different judge. Desjardins J.A., speaking for a unanimous court, stated that the redetermination should be

> by a different judge on the basis of the record as constituted and any other evidence that the parties may wish to tender.

[3] In light of their brevity the reasons for judgment by the Federal Court of Appeal are reproduced in their entirety.

> [1] We feel that this application for judicial review of a decision of Beaubier J. of the Tax Court of Canada must succeed.
>
> [2] We find that Beaubier J.T.C.C., at pages 15 and 16 of his reasons, quoted from *Wiebe Door Services Ltd. v. Minister of National Revenue* (87 D.T.C. 5025 at 5027) a statement from the Tax Court judge with respect to the integration test which was later rejected by MacGuigan J.A. on behalf of the Federal Court of Appeal.
>
> [3] We are, therefore, not satisfied that Beaubier J.T.C.C. properly directed himself in the law. There is clear evidence of this error of law at page 16 of his reasons when he stated:
>
> > [...] Without the psychiatrists, the District clinic could not offer psychiatric services in the premises.
>
> [4] We are also comforted in this view by his reference, in paragraph 8 of his decision, to the objective perception of a patient or the public as a means of determining the legal nature of the relationship between psychiatrists and the Board for whom they were performing services. This is an irrelevant consideration that he took into account and we are not sure that it did not affect or colour his decision.
>
> [5] For these reasons, the application for judicial review will be allowed with costs, the decision of the Tax Court judge will be set aside and the matter will be referred back to the Tax Court of Canada for a redetermination by a different judge on the basis of the record as constituted and any other evidence that the parties may wish to tender.

[4] An initial question has to do with the manner in which I am to carry out the direction of the Federal Court of Appeal. I begin by asking the question "What is the record as constituted"? The word record has a variety of meanings depending on the context in which it is used. One definition which appears with some frequency in American cases cited in *Words and Phrases* (West Publishing Co.) is the following:

> A record, in judicial proceedings, is a precise history of the suit from its commencement to its termination, including the

> conclusion of law thereon, drawn up by the proper officer for the purpose of perpetuating the exact state of facts.

[5] In *Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338, Lord Denning said at p. 352:

> What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings: see Blackstone's Commentaries, Vol. III, at p. 24. But it must be noted that, whenever there was any question as to what should, or should not be, included in the record of any tribunal, the Court of King's Bench used to determine it. It did it in this way: When the tribunal sent their record to the King's Bench in answer to the writ of certiorari, this return was examined, and if it was defective or incomplete it was quashed: see *Apsley's* case, *Rex* v. *Levermore*, and *Ashley's* case, or, alternatively, the tribunal might be ordered to complete it: *Williams* v. *Bagot* and *Rex v. Warnford*. It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction; and also the document which contained their adjudication. Thus in the old days the record sent up by the justices had, in the case of a conviction, to recite the information in its precise terms; and in the case of an order which had been decided by quarter sessions by way of appeal, the record had to set out the order appealed from: see *Anon*. The record had also to set out the adjudication, but it was never necessary to set out the reasons (see *South Cadbury (Inhabitants)* v. *Braddon*, *Somerset (Inhabitants)*), nor the evidence, save in the case of convictions. Following these cases, I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision.

[6] This seems to have been Lord Denning's view in *Baldwin & Francis v. Patents Tribunal*, [1959] 2 All E.R. 433 at page 445.

[7] Lord Denning was, of course, dealing with *certiorari* to quash for error on the face of the record. It would seem inconceivable that error on the face of the record could be determined without seeing the order and the reasons of the tribunal. It is there that the error would most likely be seen.

[8] The meaning of record was discussed at some length by Griffiths L.J. of the Queen's Bench Division in *R v. Crown Court at Knightsbridge, ex parte International Sporting Club (London) Ltd and another*, [1981] 3 All E.R. 417. He held, not surprisingly, that in *certiorari* proceedings the record included not only the formal order but the oral reasons of the court below. At pages 421-422 he said:

> But before the Divisional Court can exercise its supervisory jurisdiction it must be able to see what the error of law is said to be. A document to which anyone would naturally expect it to look must surely be that which records the reasons given by the court or tribunal for its decision, in this case the transcript of Judge Friend's judgment.
>
> In the collective experience of the members of this court and the very experienced counsel appearing before us it has been the practice of the Divisional Court under the presidency of successive Lord Chief Justices over the last four decades to receive the reasons given by a court or tribunal for its decision and if they show error of law to allow certiorari to go to quash the decision. The court has regarded the reasons as part of the record. They are sometimes referred to as a 'speaking order'.

[11] In *Farrell v. Workmen's Compensation Board*, 26 D.L.R. (2d) 185 at pages 196 and 201, the British Columbia Court of Appeal held that the "record" in a *certiorari* proceeding did not include the evidence before the Board.

[12] It will be apparent from the above cases — and they are only a sampling — that there is no consensus among courts concerning what is meant by "record". However for purposes of a *certiorari* proceeding the record may very well be the reasons but not the evidence. This does not however answer the question what the Federal Court of Appeal meant when it referred to "the record as constituted". I presume it meant the transcript and the exhibits, because it refers to "any other evidence that the parties may wish to tender". This phrase presupposes that the record should include the evidence that is already before the court.

[13] The more difficult question is whether the "record" in the context of the judgment of the Federal Court of Appeal includes Beaubier J.'s reasons. One might state, perhaps overly simplistically, that since it is Beaubier J.'s decision that is being appealed from I should not look at it. The matter is, however, not susceptible of so facile a solution.

[14] The Federal Court of Appeal has a certain limited jurisdiction in applications for judicial review under section 28 of the *Federal Court Act*. Subsection 28(2) provides:

> Sections 18 to 18.5, except subsection 18.4(2), apply, with such modifications as the circumstances require, in respect of any matter within the jurisdiction of the Court of Appeal under subsection (1) and, where they so apply, a reference to the Trial Division shall be read as a reference to the Court of Appeal.

[16] Since the Federal Court of Appeal has power to hear appeals from the Tax Court of Canada under paragraph 28(1)(*l*) of the *Federal Court Act* it has the same powers as the Trial Division and the same grounds of review on application to that court for judicial review from other judgments. Subsections 18.1(3) and (4) set out those powers and grounds:

> (3) On an application for judicial review, the Trial Division may
>
> > (*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
> >
> > (*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
>
> (4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> > (*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
> >
> > (*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
> >
> > (*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

> (*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> (*e*) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (*f*) acted in any other way that was contrary to law.

[17] The Federal Court of Appeal has referred the matter back to this court for redetermination on the record as constituted and any other evidence that the parties may wish to tender. I mention in passing that the only additional evidence put in before me was tendered by the Crown. It was the testimony of an income tax assessor who testified that the rules for deductibility of expenses in computing income from a business were different from and broader than those that applied in computing income from employment, in which the deductibility of expenses is covered by section 8 of the *Income Tax Act* rather than by general commercial principles which are implicit in section 9 by the use of the word "profit". The statement is unquestionably true but it is of little assistance in determining whether an individual is engaged under a contract of service or a contract for services.

[18] Am I entitled or obliged to take into account the reasons and the findings of fact of Beaubier J.? I am not so presumptuous as to think that I am entitled to sit in appeal on the judgment of Beaubier J., nor do I think that the Federal Court of Appeal intended to confer such a power on me. Indeed it could not.

[19] It follows that I may not ignore the findings of fact of Beaubier J. It is obvious that the Federal Court of Appeal found no error of fact in the judgment of Beaubier J. as envisaged by paragraph 18.1(4)(*d*). I must assume therefore that its judgment is based on paragraph 18.1(4)(*c*). If I were entitled to ignore Beaubier J.'s findings of fact it would mean that I could substitute my findings of fact for those of Beaubier J. even though his findings, after hearing the testimony of the witnesses, were based on the evidence, were not based on no evidence and were not capricious or perverse. If I could do that based on the evidence before Beaubier J. and without rehearing all of the evidence it would be more than the Federal Court of Appeal could do under section 28 of the *Federal Court Act*.

[20] In *Chan v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 685, Rothstein J., then a member of the Trial Division, said at paragraph 26:

> Subsection 18.1(3) does not vest me with the jurisdiction to make findings of fact which the tribunal appealed from should have made. The matter must be referred back for redetermination. In Xie v. The Minister of Employment and Immigration, Court file A-1573-92, a March 3, 1994 unreported decision [Please see [1994] F.C.J. No. 286], I expressed, at page 9, the view that when referring a matter back, it may be possible, in an appropriate case, to issue directions in the form of a "directed verdict":
>
> > While the Court does have jurisdiction to refer a matter back for redetermination in accordance with such directions as it considers appropriate, it seems to me that the Court should only issue directions to a tribunal in the nature of a directed verdict, where the case is straightforward and the decision of the Court on the judicial review would be dispositive of the matter before the tribunal. While such cases undoubtedly will arise, as a general rule, the Court should leave to tribunals, with their expertise in the matters over which they have jurisdiction, the right to make decisions on the merits based on the evidence before them.

[23] The Federal Court of Appeal in *Canada (Attorney General) v. Jencan Ltd. (C.A.)*, [1998] 1 F.C. 187 said at paragraphs 54 and 55:

> 54 Subsection 18.1(3) does not vest this Court with the jurisdiction to make the decision that the Deputy Tax Court Judge ought to have made. Rather, the matter must be referred back for redetermination. See Nuttall v. Canada (Minister of National Revenue – M.N.R.); Thibaudeau v. M.N.R.; and Chan v. Minister of Employment and Immigration. While this Court may refer the matter back with specific directions as to disposition, this approach must be limited to the most straightforward of cases. In Xie v. Minister of Employment and Immigration, Rothstein J. stated:
>
> > While the court does have jurisdiction to refer a matter back for redetermination in accordance with such directions as it considers appropriate, it seems to me that the court should only issue directions to a tribunal in the nature of a directed verdict, where the case is straightforward and the decision of the court on the judicial review would be dispositive of the matter before the tribunal. While such cases undoubtedly will arise, as a general rule, the court

> should leave to tribunals, with their expertise in the matters over which they have jurisdiction, the right to make decisions on the merits based on the evidence before them.
>
> 55 This is not a case where the evidence on record is so clear that the only possible conclusion is that the worker and the respondent should be deemed to be at arm's length, or where the sole issue to be decided is a pure question of law which will be dispositive of the case. Sitting in judicial review, I am unable to say that the Minister's determination under subparagraph 3(2)(c)(ii) that the worker and the respondent would not have entered into a substantially similar contract of service was, or was not, supportable on the evidence before the Deputy Tax Court Judge. This is a question that the Deputy Tax Court Judge ought to have answered when he found that some of the Minister's assumptions of fact had been disproved by the evidence. Accordingly, I would allow the application for judicial review, set aside the decision of the Deputy Tax Court Judge, and I would refer the matter back to the Tax Court of Canada for a new hearing before a different judge in a manner consistent with these reasons.

[25] Here the Federal Court of Appeal has referred the matter back to this court for redetermination on the record as constituted and any other evidence the parties may which to tender, and without any specific direction of the type envisaged by Rothstein J.

[26] I am not to re-hear the case. I am to redetermine it on the record. The Federal Court of Appeal does not have the power, on the basis of the record, to substitute its findings of fact for those of the trial judge. I do not believe that it seeks to confer on me a power that it does not itself possess.

[27] I must therefore determine on the record what the legal result would be if I excise from my thinking what the Federal Court of Appeal evidently thought were errors of law in the judgment of Beaubier J.

[28] Beaubier J.'s errors of law, according to the Federal Court of Appeal, are the following.

[29] He quoted from the first Tax Court's judgment in *Wiebe Door Services v. Canada*, the passage cited in the Federal Court of Appeal's judgment in that case (87 DTC 5025) in which the Tax Court referred to the integration test. That is true. However immediately after that quotation he cited at length the decision of

MacGuigan J.A. in *Wiebe Door* in which he also discussed integration as simply one part of the "four-in-one test".

[30] After quoting at length from MacGuigan J.A., Beaubier J. said at pages 18-19:

> The quotation from Khan stating that "clearly superintendence and control cannot be the decisive test when one is dealing with a professional man" is a crucial problem in this case. That is why each psychiatrist indemnifies the District against malpractice in his contract.
>
> [7] On the evidence, when one of the Appellants was working under his sessional contract he worked, except when working in a jail, in facilities operated by the Payor. His appointments were made by the staff of the Payor. His assistant staff was paid by or through the Payor. Like an hourly worker, his recorded hours of work were remunerated by the Payor. While they did not say so, the references by the psychiatrists to the fact that they wanted other staff available when seeing patients, whether they be psychiatrists or other persons, relates to the current problems of liability and complaints that seem to pervade various professions; nonetheless this need means that District clinic staff of one kind or another have to be available when patients are seen.
>
> [8] Looked at objectively, by a patient or some other person in the community, the psychiatrists, when working pursuant to their sessional contracts, appeared to be employed as part of the clinic business and their work was done as an integral part of the clinic business. They were not performing these services as persons in business on their own account. Rather they were performing them as integral staff of the clinics who were their Payors. Therefore, the appeals are dismissed.

[31] Was his error in law in quoting from the Tax Court judgment in *Wiebe Door* without explicitly stating that he was contrasting it with what MacGuigan J.A. said and whose judgment he was clearly following and relying on? I shall try to avoid whatever error he committed by saying with reference to the quotation by Beaubier J. from the decision of the Tax Court: "The Tax Court judge in *Wiebe Door* obviously placed undue reliance on the integration test, which has been relegated to an insignificant rôle, as is evident from the judgment of MacGuigan J.A."

[32] I think that was what Beaubier J. was saying, but evidently he did not say it explicitly enough.

[33] The next error said by the Federal Court of Appeal to have been committed by Beaubier J. was when he said

> Without the psychiatrists, the District clinic could not offer psychiatric services in the premises.

(he said "in their premises" but this is not material).

[34] This, according to the Federal Court of Appeal is "clear evidence of this error in law". The Federal Court of Appeal did not indicate how what is clearly a statement of fact — and one that is certainly supported by the evidence — constitutes an error of law. What I presume they are saying is that in making this statement of fact Beaubier J. must have been thinking of the integration test . If I say "a veterinary clinic cannot function without veterinarians", I am stating the obvious. I am not stating a conclusion of law and I am certainly not indicating anything about whether the veterinarians that work at the clinic are employees or independent contractors.

[35] The third and last error of law found by the Federal Court of Appeal appears in paragraph 4 of the Federal Court of Appeal's reasons:

> [4] We are also comforted in this view by his reference, in paragraph 8 of his decision, to the objective perception of a patient or the public as a means of determining the legal nature of the relationship between psychiatrists and the Board for whom they were performing services. This is an irrelevant consideration that he took into account and we are not sure that it did not affect or colour his decision.

[36] I agree that how a member of the public visiting the clinic might see the relationship — assuming he or she gave it a moment's thought, which I doubt — is *nihil ad rem*. Whether this consideration influenced Beaubier J. is something that I need not determine. It is, however, an easy enough matter simply to ignore the observation.

[37] I have read the reasons for judgment of Beaubier J. and the transcript. The case was fully and expertly reargued before me by senior and experienced counsel. With the possible exception of the comment about how the public might perceive the relationship — an observation that is both conjectural and irrelevant — there is nothing in the reasons for judgment of Beaubier J. that is not supported by the evidence.

[38] What I think the Federal Court of Appeal meant me to do was to redetermine the legal result, based on the record as constituted, and any further evidence that the parties choose to tender but not to substitute my findings of fact for those of Beaubier J.

[39] Not substituting my findings of fact for those of Beaubier J. presents no particular problem for me because I agree with them.

[40] Beaubier J. framed his findings of fact around the assumptions contained in the Minister's Replies to the Notices of Appeal. This is a sound practice in tax and other appeals to this court where the initial onus rests on the appellant to "demolish" the Minister's assumptions in the assessment. In *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, Madam Justice L'Heureux-Dubé summarized the law with regard to the onus of proof in tax litigation, speaking for the majority of the Supreme Court of Canada she stated at paragraph 92:

> It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd. v. Minister of National Revenue*, [1966] S.C.R 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Pallan v. M.N.R.*, 90 D.T.C. 1102 (T.C.C.), at p. 1106. The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and **the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment** (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.
>
> [Bold emphasis added]

[41] I believe that it is helpful to briefly reiterate the relevant findings of fact of Beaubier J., which are based on the evidence on which I am relying on for the purpose of this judgment:

1. By statute the province of Saskatchewan is divided into health service districts. SDHBs administer all provincially funded public health services in the districts, including the psychiatric services provided by the appellants.

2. Each of the appellants contracted with a SDHB to supply psychiatric services to patients (the "Sessional Contracts").

3. Two of the appellants were recruited from abroad and public funds paid their transportation to Saskatchewan on the condition that they work for the SDHB for five years or reimburse the SDHB for their relocation costs.

4. The two appellants who were recruited from abroad were required to provide an undertaking that they had contracts for employment in Canada for five years when they applied for landed immigrant status.

5. The Sessional Contracts provided that all statutory payments including income tax, Canada Pension and GST were the responsibility of the appellants.

6. The Sessional Contracts provided that the appellants work a set number of four-hour time blocks (the "Sessional Units") per year. However the evidence at trial indicated that each appellant responded to demand or worked the number of Sessional Units they desired and billed the SDHBs accordingly.

7. The appellants were each paid a set fee per Sessional Unit, plus a fee for standby duty. The rate of the set fee varied among the appellants. The rate was not based on performance. The rates related to the individual appellant's negotiation skills and the demand in the particular SDHB.

8. Each of the appellants billed their SDHB monthly and was paid monthly.

9. The SDHBs provided fully furnished offices, clinic staff and supplies at no cost to the appellants (the "SDHB Clinics").

10. The appellants' appointments with SDHB patients were booked by the clinic staff. If a patient requested a particular psychiatrist the staff made the appointment as requested. However, each appellant controlled the hours in which they saw patients.

11. If a SDHB patient did not show up for a scheduled appointment the appellants were nevertheless paid for the time booked. This was not the case under the fee for service contracts with the SDHBs. Under the fee for service contracts a psychiatrist was not paid if a patient missed an appointment.

12. The appellants did not work set hours from 8:30 a.m. to 5:00 p.m., Monday through Friday as set out in the Sessional Contracts. The appellants worked on weekends or in the evenings. Some of them devoted time during the week to other areas of their practice including fee for service work. Some of the appellants did locums elsewhere in the province, in other parts of Canada or abroad during the term of their contracts with the SDHBs.

13. The appellants did not see fee for service and other private patients in the SDHB Clinics.

14. The districts did not have first call on the appellants' time. Each appellant allocated their time between treating SDHB patients, their other areas of practice and personal interests as they saw fit.

15. The appellants arranged for replacement doctors to work in the SDHB Clinics, when necessary. However the replacement doctors billed the SDHBs directly.

16. The SDHBs did not provide any direction to the appellants on:

    a. how SDHB patients should be treated;
    b. how much time should be spent with each SDHB patient; or
    c. how many SDHB patients each appellant should treat.

17. The appellants were not supervised or disciplined by the SDHBs. Like all psychiatrists in the province they were monitored by the Saskatchewan College of Physicians and Surgeons.

18. The appellants were reimbursed for some expenses. They were however not reimbursed for their cars, parking, cellular phones, travel between the District Clinics and the hospitals and jails where they also treated SDHB patients. Liability insurance, licence fees and continuing medical education required to maintain their licences were the responsibility of the appellants.

[42] The Minister assumed that the appellants did not have a "chance of profit or risk of loss". This is a mixed question of fact and law. The statement was accepted as correct by Beaubier J. although he acknowledged that if any of the appellants failed to bill sufficient Sessional Units the unreimbursed expenses could result in a business loss for a particular year. Given the relatively small amount of expenses

for which the appellants were not reimbursed compared to the amounts that they billed the SDHBs the risk of loss from this activity was minimal and more theoretical than real. The total expenses claimed by some of the appellants were in large measure attributable to the fee for service business carried on by them independently of the work they did under contract with the various SDHBs.

[43] Although Beaubier J. did not specifically mention this in his findings of fact, the evidence establishes that although the appellants did not receive work related benefits of the type that a public servant on salary would receive, such as membership fees, licensing fees, medical and disability benefits and paid leave, they received a pay component in lieu of such benefits. In the case, for example, of Dr. Milev the additional amount was between $10,000 and $15,000.

[44] The leading case in Canada dealing with the question whether a worker is an employee or an independent contractor is the Federal Court of Appeal decision in *Wiebe Door*. In *Wiebe Door,* the Tax Court judge employed a four-part test to determine that the appellant was engaged in insurable employment. The four-part test used by the Tax Court judge involved analyzing the evidence using the following four factors to determine whether the employee in question was working under a contract for services or a contract of service, the former indicating they were engaged in insurable employment:

1. the degree or absence of control, exercised by the alleged employer;
2. ownership of tools;
3. chance of profit and risk of loss; and
4. integration of the alleged employee's work into the alleged employer's business.

[45] The appellant in *Wiebe Door* alleged that use of the integration test was an error of law unless the alleged employee was a highly skilled professional. In *Wiebe Door* the Federal Court of Appeal took the opportunity to reconsider the elements of the four-part test. MacGuigan J.A., speaking for a unanimous court, approved the test set out by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd. et al* [1947] 1 D.L.R. 161 (P.C.), which included the elements of control, ownership of tools, and chance of profit and risk of loss, stating at page 5028:

> Perhaps the earliest important attempt to deal with these problems was the development of the entrepreneur test by William O. (later Justice) Douglas, Vicarious Liability and the Administration

of Risk (1928-9), 38 Yale L.J. 584, which posited four differentiating earmarks of the entrepreneur: control, ownership, losses, and profits. It was essentially this test which was applied by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161, 169-70:

> In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. *In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior*. ...

Taken thus in context, Lord Wright's fourfold test is a general, indeed an overarching test, which involves "examining the whole of the various elements which constitute the relationship between the parties." In his own use of the test to determine the character of the relationship in the *Montreal Locomotive Works* case itself, Lord Wright combines and integrates the four tests in order to seek out the meaning of the whole transaction.

[46] MacGuigan J.A. went on to consider the "integration test" which was first set forward by Denning L.J. in *Stevenson, Jordan and Harrison, Ltd. v. MacDonald and Evans,* [1952] 1 T.L.R. 101, where he stated at page 111:

> One feature which seems to run through all the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

[47] MacGuigan J.A. made an analysis of the judicial consideration of and academic commentary on the integration test. He concluded at page 5030:

> Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright addressed the question "Whose business is it?"
>
> Perhaps the best synthesis found in the authorities is that of Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732, 738-9.[3]
>
> > The observations of Lord Wright, of Denning L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk be taken, what degree of responsibility for investment and

> management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him.

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[3] This test has been widely cited. For example, it was referred to by all three Court of Appeal judges in *Ferguson v. John Dawson & Partners (Contractors) Ltd.*, [1976] 3 All E. R. 817, and the two majority judges, *supra*, at pp. 824, 831, each described it as "very helpful."

[48] In *Wiebe Door*, the Federal Court of Appeal determined that the Tax Court judge had erroneously applied the integration test and accordingly they set aside the judgment. In the present case, if I understand the Federal Court of Appeal's judgment correctly, they considered that Beaubier J. may have placed undue emphasis on the integration test, which evidently the Federal Court of Appeal considered to be an error of law.

[49] The question now is does the integration test continue to be one part of the four-in-one test in *Wiebe Door*. It is, as MacGuigan J.A. implied in *Wiebe Door*, a rather unhelpful test and one that is at best difficult to apply in cases of this type. An independent contractor may be as integral a part of someone else's business as a person who is unquestionably an employee. I used the example of a veterinary clinic above. The veterinarians are unquestionably an integral part of the clinic's business, but they could as easily be independent contractors as employees. No doubt the integration or organization test had a useful role in the evolution of the law relating to the liability of hospitals for negligent acts of doctors but it has outlived its usefulness. I take it from the decision of the Federal Court of Appeal in this case that any reliance upon the integration test is an error in law. The relegation of the integration (or organization) test to an insignificant role is a welcome and long overdue development in this area of the law.

[50] This trend is evident in the United Kingdom as well. In the 1992 Fourth Edition Reissue of *Halsbury's Laws of England*, Volume 16, paragraph 3 contains the following passage.

> **3. Characteristics of the relationship.** There is no single test for determining whether a person is an employee; the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. This may sometimes produce a fine balance with strong factors for and against employed status.
>
> The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contributions; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration.
>
> The way in which the parties themselves treat the contract and the way in which they describe and operate it is not decisive; and a court or tribunal must consider the categorisation of the person in question objectively. Thus a person could have been described as self-employed during the currency of the engagement but upon its termination claim to have been in fact an employee for the purpose of claiming unfair dismissal, though such a course of action would have unfortunate taxation implications.
>
> In a case of what is frequently referred to as 'atypical employment', such as temporary or casual work, sporadic work or homeworking, it may be appropriate, when deciding upon the employment status of an individual subject to such a regime, to consider whether there is sufficient mutuality of obligations to justify a finding that there was a contract of employment.

[54] I shall not reproduce the two pages of footnotes. What they establish is that none of the so-called "traditional" tests can be taken as determinative and that a variety of factors, including the four mentioned in *Wiebe Door* must be considered in the context of the totality of the relationship.

[55] Ownership of tools is a test that may be useful when dealing with certain types of employee but it is not particularly helpful in the 21st century where highly trained professional employees may provide their own tools, such as computers, yet they are nonetheless employees. Psychiatrists traditionally have no or, in any event, few tools.

[56] The same observations are true of the control test. Where we are dealing with professionals such as doctors or lawyers the control test is not meaningful. In the case of psychiatrists the doctor patient relationship is such that it would be impossible to find any element of control regardless of the relationship.

[57] So far I have said that the integration or organization test should not be used, and that the ownership of tools or control tests are of little or no assistance. What then is left? The chance of profit or risk of loss part of the four-in-one test may be of some assistance. I do not think the psychiatrists have any significant chance of profit or risk of loss. They could perhaps increase their income by working longer hours, but this is limited. Their risk of loss is minimal. The SDHBs provided all support staff and the facilities in which the psychiatrists worked. The support staff booked the SDHB patients' appointments and the doctors were paid regardless of whether the patient attended the appointment or not. Doctors who contracted under a fee for service arrangement were not paid for missed appointments.

[58] In *Chernesky (c.o.b. Nipawin Help Centre) v. Canada*, [2000] T.C.J. No. 704, Rip J. concluded that a group of physicians employed by a medical clinic were carrying on business on their own account and were therefore employed by the clinic under a contract for services and not engaged in insurable employment. In *Chernesky* the Minister cited Beaubier J.'s decision in the present case and asserted that the physicians in *Chernesky* were engaged in analogous employment to that of the appellants in the present case. As such the Minister contended that the physicians in *Chernesky* were working under a contract of service. Rip J. distinguished the employment situation of the physicians in *Chernesky* from that of the appellants in the present case, stating at paragraphs 31 and 33:

> 31 Counsel for the respondent argued that the facts in the appeals at bar are similar to those in the appeal of Mirchandani et al. v. M.N.R., a decision of Beaubier T.C.J. In Mirchandani, contract psychiatrists were hired to work at the clinics operated by their local Health Districts in Saskatchewan. The psychiatrists operated in a similar manner in terms of the work schedule, performing their services at clinics, making hospital rounds and providing on-call

> services; they were subject to a small degree of control by their payor, as in the appeal at bar. The payor provided all the tools, equipment and staff in the clinic with the Health Districts providing the same in the hospitals. The psychiatrists were required to provide their own vehicle and malpractice insurance and were paid no benefits. The method of remuneration differed from the facts at bar in that the psychiatrists were paid on the basis of four-hour blocks of time, the number of which varied significantly from psychiatrist to psychiatrist, rather than a guaranteed minimum salary. Judge Beaubier determined that the psychiatrists were employees.
>
> ...
>
> 33 In the case at bar, unlike Mirchandani, supra, one third of all fees billed by the Workers was used by the clinic to pay expenses of the clinic. The Workers are, in fact, helping to pay the expenses of running the Centre. In Mirchandani the psychiatrists were paid a fixed remuneration for a four-hour block of time and were paid whether or not the patients ultimately attended at a session. In the case at bar the Workers' pay was calculated on the basis of a fee for service. If a patient did not show up at an appointment, I would infer that the Worker did not get paid.

[59] I agree with Rip J.'s conclusion that the failure to contribute to the expenses of running an office, fixed remuneration for a four-hour block of time and payment regardless of whether or not the patients attended appointments distinguishes the employment situation of the appellants in the present case from the physicians in *Chernesky*. I also believe that these factors are important in determining whether the appellants in the present case were employed under a contract of service or a contract for services.

[60] If one steps back from a minute examination of the four-in-one test and asks what is the "combined force of the whole scheme of operations", to use Lord Wright's phrase as quoted by MacGuigan J.A., it is impossible to conclude that the psychiatrists who were working for the different health districts were in business on their own account. They were skilled employees, providing medical assistance to patients on behalf of their employers, the respective SDHBs, under a contract of service. They provided their services in their employer's premises and their employer provided all support staff, furniture and any other equipment needed. The appellants were paid a fixed remuneration for a four-hour block of time and were paid for appointments regardless of whether the patients attended the appointments or not.

[61] One additional point merits comment. Beaubier J. set out the contract of Dr. Milev and the Regional District Health Board. It appears that this was substantially representative of all the similar contracts signed by the appellants. He did not state what effect, if any, the wording of the contract had on his conclusion. The law is clear that the manner in which the parties describe the relationship is not determinative. Nonetheless the terms of the contract cannot be entirely ignored. They form part of the overall picture in characterizing "the combined force of the whole scheme of the operations". No single clause in the contract can be said to predominate or to tip the scales incontrovertibly in either direction. It is true that clause 4 states that the physician will be responsible for statutory payments, such as income tax. This is not inconsistent with a contract for services, but it is a very slight indicator and should not be permitted to overshadow everything else. The other clauses, such as the provision for the number of Sessional Units and the rate of remuneration are more consistent with an employment relationship. I mention the contract to indicate that I am not ignoring it but I would not wish to leave the impression that it weighs particularly heavily in my conclusion.

[62] I agree with the conclusion reached by Beaubier J. but have expanded somewhat on the reasons without relying upon those portions of his reasons that the Federal Court of Appeal saw as errors of law.

[63] The appeals are dismissed.

Signed at Ottawa, Canada, this 16th day of November 2001.

"D.G.H. Bowman"

A.C.J.

COURT FILE NOS.:	2000-88(EI), 2000-89(CPP), 2000-92(EI), 2000-93(CPP), 2000-60(EI), 2000-61(CPP), 2000-116(EI), 2000-115(CPP)
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