LRB File Nos. 137-14, 026-15 & 101-15

IN THE MATTER OF AN APPEAL OF WAGE ASSESSMENT NUMBER 6645 PURSUANT TO SECTION 62(1) OF *THE LABOUR STANDARDS ACT*, R.S.S. 1978, c. L-1, AS AMENDED (THE "*LSA*") AND SECTION 2-75 OF *THE SASKATCHEWAN EMPLOYMENT ACT*, S.S. 2013, c. S-15.1, AS AMENDED, (THE "*SEA*")

AND IN THE MATTER OF A HEARING PURSUANT TO SECTION 62.1 OF THE *LSA* AND SECTION 4-2 OF THE *SEA*

LABOUR RELATIONS BOARD
AUG 05 2015
RECEIVED
SASKATCHEWAN

BETWEEN:

10119093 SASKATCHEWAN LTD., o/a Toppers Bar and Grill, and ZHONG CHENG,

APPELLANTS,

AND:

GEORGE SELIMOS,

RESPONDENT (COMPLAINANT).

ADJUDICATOR'S DECISION
August 5, 2015

T. F. (TED) KOSKIE, B.Sc., J.D.

Representatives: Zhong Cheng, for himself and the Appellant, 101193093 Saskatchewan Ltd.

George Selimos, for himself

Randy Armitage, Employment Standards Officer, for the Director of Employment Standards

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I. INTRODUCTION

[1] This is an appeal[1] (the "Appeal") by Zhong Cheng ("Cheng") and 101193093 Saskatchewan Ltd. ("Toppers") of Wage Assessment No. 6645[2] (the "Assessment") issued pursuant to section 2-74 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (as amended) (the "*SEA*") by the Director of Employment Standards (the "Director").

[2] The Assessment directed Cheng and Toppers to pay two thousand six hundred and twenty-eight dollars and eight cents ($2,628.08) to George Selimos ("Selimos").

[3] The Labour Relations Board selected me to hear and determine the Appeal.

II. FACTS

[4] Toppers is a Saskatchewan body corporate with registered office situate at Davidson, Saskatchewan. It carries on the business of, *inter alia*, a restaurateur. Cheng is the sole shareholder, director and officer of Toppers.[3]

[5] Selimos first met Cheng in July 2013. He testified he replied to an advertisement Cheng placed on Kijiji. Though nobody tendered a copy of the advertisement, it appears same sought someone to either purchase or lease a restaurant business (the "Business") carried on by Toppers in Davidson, Saskatchewan.

[6] Cheng testified that Selimos initially expressed an interest in leasing the Business, but soon changed his mind. Cheng therefore began to look for someone "new" to lease the Business. He eventually found a person who actually operated the business "for a while." That arrangement ended and Cheng began looking again for

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[1] Exhibit G-2, Notice of Appeal

[2] Exhibit G-1, Wage Assessment No. 6645

[3] Exhibit E-1, Saskatchewan Corporate Registry Profile Report

someone to either purchase or lease the Business.

[7] Cheng testified that he again spoke with Selimos. He says Selimos agreed to help Cheng find someone to either purchase or lease the Business. In return, Cheng said he agreed to pay Selimos a commission. It appears nothing happened for virtually the balance of 2013.

[8] In December 2013, Cheng and Selimos again had discussions. Selimos testified these discussions initially explored the potential of forming a business partnership with Cheng and/or Toppers. He further testified that they "decided not to do that." He says they:

a) decided Selimos would "come on as management" instead;

b) did not sign a contract;

c) did not discuss salary–but Selimos assumed he would receive minimum wage; and

d) agreed Toppers would additionally provide Selimos housing and restaurant meals.

[9] Cheng testified to quite a different version of what occurred in December 2013. He testified Selimos approached him in early December and told him he was willing to lease the Business. Cheng said Selimos advised his plan was to have a friend join him in operating the business, but that he wished to "start by himself" to see if the Business can support two people. Cheng says:

a) the discussion then turned to Selimos' ability to finance the Business and, particularly, buying inventory;

b) it was at this point they began to discuss a partnership as an alternative; and

c) they agreed to form a partnership.

[10] Cheng tendered the following e-mails[4] that he maintains evidence that agreement:

> On Tuesday, December 10, 2013 12:59:23 AM, George S <gselimos41@gmail.com> wrote:
>
> John,
>
> I have thought about everything.
>
> I am willing to accept your offer for partnership & help with your Sister & Brother in law, based on some conditions.
>
> 1) Equipment all fixed (pizza oven, freezer ,leaking floor)
>
> 2) House rented as discussed
>
> 3) Signed contract for us both detailing our duties to company & each other.
>
> 4) If Restaurant property sold while I am there I will receive $10,000 payment from sale.
>
> 5) If Sublease Restaurant & Bar to someone I will receive $5,000 from deposit of new tenant.
>
> 6) Start Date December 27th
>
> Please think about everything & let me know.
>
> Regards,
> George
>
> ---
>
> From: George S <gselimos41@gmail.com>
> To: Sask 93093 <sask93093@yahoo.ca>
> Sent: Saturday, December 28, 2013 7:58:55 PM
> Subject: Proposal
>
> John, If You agree we can begin 1st of January.
>
> If you agree I can send you copy of Food Wine & liquor menu as well as new promotions I have completed & developed for Toppers.
>
> Please let me know your answer by Monday the latest.
>
> Here is my proposal.

[4] Exhibit C-1, E-mail thread

- 1 Year Term Renewable every year if mutually agreed
- We will Profit share 60/40
- Gas costs for my vehicle related for Toppers to be paid by business.
- No Salary for me but You will provide house or apartment including utilities
- I will work every day but I may require 1 or 2 days off occasionally.
- My personal meals will be covered while I am at restaurant.
- I will have promotional account for special guests/occasions & people I deem necessary to promo drinks or food for. Promotional account not to exceed $1000.00 retail value per month ($250 cost)
- I will Train your sister & brother in law for Professional Restaurant & kitchen business but I cannot guarantee Leo (we will talk about this)
- Bank Deposits & any money received from any Restaurant or Bar sources will be seen by me & I will have a copy of these records.
- We will review monthly sales figures together to determine profit
- If We Lease Toppers I will Receive the 1 full rent deposit from the new lease agreement as payment for my services & my exit fee.
- If We sell Toppers Business or Land I will Receive 5% of Gross sale price as payment for my services & my exit fee.

[11] Cheng testified that Selimos subsequently prepared and sent an agreement to him. He said they did not sign this agreement, but it reflected the agreed upon terms. He did not tender a copy of the agreement at the hearing, saying he thought he could not do so because it was not signed. Both Selimos and Armitage appeared to have copies of this agreement, but also did not bring same to the hearing. Cheng said he would subsequently forward it to me. Selimos and Armitage did not object to his doing so. Cheng has filed the agreement[5] (the "Document") with me. It bears noting the Document is entitled "General Service Agreement." It does not purport to create a partnership. In fact, quite to the contrary, paragraph 15 specifically provides:

> The Service Provider and the Customer acknowledge that this Agreement does not create a partnership or joint venture between them, and is exclusively a contract for service.

[5] Exhibit C-2, Unsigned and undated "General Service Agreement"

In addition, the Document provides:

Services Provided
1. The Customer hereby agrees to engage the Service Provider to provide the Customer with services (the "Services") consisting of:

- General management Agreement to include:

  Menu Creation, Promotions creation & implementation, Hiring & Firing of Employees

  Product ordering including food, liquor & dry goods.

  Kitchen Supervision & some cooking duties. Some Bartending Duties.

  Supervision, Direction & management of all employees regarding Restaurant & lounge duties & activities.

. . .

Compensation
7. For the services rendered by the Service Provider as required by this Agreement, the Customer will provide compensation (the "Compensation") to the Service Provider of $1.00 per month.

8. The Compensation will be payable on a monthly basis, while this Agreement is in force.

Additional Compensation
9. In addition to the Compensation, the Service Provider will be entitled to the following additional compensation for performing the Services:

- 40% of the gross profit each months sales

  Accommodation & Meals Provided

  Gas Expenses for business related travel

  If Restaurant property is sold from George Selimos efforts while I am there I will receive 5% payment from the sale price.

  If George Selimos leases the Restaurant & Bar to someone from his efforts I will receive $5,000 from deposit of new tenant.

Provision of Extras
10. The Customer agrees to provide, for the use of the Service Provider in providing the Services, the following extras:

- 93093 Saskatchewan Ltd. will provide the Restaurant & bar known as Toppers in good working condition inclusive of all Restaurant Kitchen & bar equipment & furnishings.

. . .

Additional Clauses
17. **Responsibilities**

> 93093 Saskatchewan Ltd. will be responsible for:
>
> All Staff Payroll & Expenses
>
> Any & All taxes related to Toppers Restaurant & Bar
>
> All Utility Costs Including Gas, Electricity, Water, Telephone & Television.
>
> All Maintenance & repair related costs for the operation of Toppers
>
> Insurance for building & Business
>
> Payment of all Food, Beverage & Dry goods suppliers.

[12] Selimos testified he commenced his duties on January 7, 2014, and continued with same until March 1, 2014. Cheng did not dispute these dates.

[13] Selimos sad he carried out what he described as "normal management duties." He said they comprised:

a) hiring employees;

b) menu design; and

c) day to day operations.

He says he performed these duties as an employee, not a business partner.

[14] Cheng did not dispute Selimos' duties. However, he continued to maintain Selimos performed same as a business partner. Besides referencing the e-mails above noted, he also referenced the following e-mails[6] to support his position:

> On Feb 7, 2014 2:43 PM, "Sask 93093" <sask93093@yahoo.ca> wrote:
>
> I wish there was profit from Jan.
>
> Unfortunately ... I will send you the file.

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[6] *Ibid.*

From: George S <gselimos41@gmail.com>
To: Sask 93093 <sask93093@yahoo.ca>
Sent: Friday, February 7, 2014 3:39:01 PM
Subject: profit sharing

Please let me know the amount you will give me. I don't expect much but I need something.

Regards,
George

From: George S <gselimos41@gmail.com>
To: Sask 93093 <sask93093@vahoo.ca>
Sent: Friday, February 7, 2014 5:18:53 PM
Subject: Re: profit sharing

John.

If there is no profit why do you not accept my offer of rent. At least this way you will have a profit every month.

George

On Sat, Feb 8, 2014 at 8:36 AM, Sask 93093 <sask93093@yahoo.ca> wrote:

There is no profit in Jan, I am hoping there will be starting from Feb.

But looking at the bills, I am worried.

It's just a month, but seems the team can't work well together, and you start asking for rent or leave ....

Very frustrated ...

From: George S <gselimos41@gmail.com>
To: Sask 93093 <sask93093@yahoo.ca>
Sent: Saturday, February 8, 2014 12:44:33 PM
Subject: Re: profit sharing

Yes you are right.

There are many problems with the "team"

I have discussed this with you before ,

More frustrating for me as I am here, but I will stay on as I promised you until the end of Feb & continue to train Mark & Jeff the menu, at the end of Feb depending on if there is any profit I we can make a decision. I am trying to get along with the Team but Leo is very clever in causing problems among the team & making it look like it is my fault. He is very dangerous, but I think you know that already.

Regards,
George

On Mon, 2/17/14, George S <gselimos41@gmail.com> wrote:

Subject: Re: Staying on further
To: "Sask 93093" <sask93093@yahoo.ca>
Received: Monday, February 17, 2014, 2:21 AM

OK John,

I understand end of months profit very well, I have ran & owned several Casinos, nightclubs & restaurants ..... .

[15] Cheng testified he did not see or treat Selimos as an employee. He said if he had, he would have obtained various information like a social insurance number. He further said he was of the view Selimos believed the same. He said throughout the period in question, Selimos never called himself an employee and never said he wanted to be an employee.

[16] Selimos tendered a document showing:

a) he worked 280 regular hours;

b) he worked 246 overtime hours;

c) one eight-hour public holiday he did not work.

Cheng neither disputed nor tendered any evidence to challenge these numbers.

[17] Selimos testified that from January 7, 2014, to March 1, 2014:

a) he was not engaged in any other employment or business;

b) he had no ownership or investment interest in Toppers or any real and personal property owned by it;

c) his name was not associated with Topper's liquor licence;

d) Toppers paid the employees;

e) he ordered supplies, liquor and food, but same were paid for by Toppers;

f) his name was not on any accounts rendered to Toppers and he was not responsible for and did not personally pay for any debts of the business; and

g) deposits and other accounting were attended to by Cheng.

[18] Cheng testified he was of the view Selimos was engaged in other business activities. He said Selimos made "many" long distance telephone calls from the restaurant. It was his view there would be not be a "restaurant" reason for same and, therefore, they must relate to an outside business. Selimos disagreed. He said any long distance charges would only have related to the Business. It is worthy of note that Cheng did not tender any bills to give specifics of the telephone calls he was referencing.

[19] Cheng did not take issue with the balance of Selimos' testimony enumerated in paragraph 17 hereof. However, he explained:

a) the partnership was for the business, not Toppers' property or assets; and

b) he held a 60% interest in the partnership and it made sense for him to exercise control because of his majority position.

He said none of the items in enumerated in the balance paragraph 17 detracted from the partnership business relationship. He went on to say Selimos used his own funds and had access to and did use funds from the cash register to make purchases. Selimos denied that.

III. DISPUTE

[20] The Appellants presented no evidence with respect to and did not challenge the calculation of the Assessment.

[21] Simply stated, the issue here is whether Selimos is an employee within the meaning of section 2(d) of *The Labour Standards Act* ("*LSA*").

IV. DECISION

[22] I rule that Selimos is an employee of Toppers.

[23] I find as a fact that Selimos earned $2,800.00 in wages.

[24] I rule that Cheng and Toppers additionally owe Selimos $4,149.04, comprising the following:

a) $3,690.00 for overtime pay;

b) $80.00 for public holiday pay; and

c) $379.04 for annual holiday pay.

[25] I find as a fact that Toppers paid no wages, overtime pay, public holiday pay and annual holiday pay to Selimos.

[26] I find as a fact that Toppers supplied $420.00 in food and $2,600.00 in accommodation to Selimos, totaling $3,020.00. I find this sum is deductible from the amount owing from Cheng and Toppers to Selimos.

[27] The appeal is dismissed.

[28] I vary the Assessment to reflect $3,929.04 owing to Selimos.

[29] Cheng and Toppers shall pay interest on the sum owing from June 13, 2014, at the rates prescribed by Section 40 of *The Employment Standards Regulations*, c. S-15.1, Reg 5, being the rates calculated pursuant to section 113 of *The Enforcement of Money Judgments Act* and section 10 of *The Enforcement of Money Judgments Regulations*.

V. REASONS

A. *ACTS & REGULATIONS*

[30] The relevant provisions of the *LSA*, with the corresponding provisions of the *SEA* are as follows:

LSA	*SEA*
Interpretation 2 In this Act:	**Interpretation of Part** 2-1 In this Part and in Part IV:
(a) "annual holiday pay" means an amount of money to which an employee is entitled pursuant to subsection 33(1) or section 35;	(u) "vacation pay" means an amount of money that is payable to an employee pursuant to section 2-27;
. . .	. . .
(d) "employee" means a person of any age who is in receipt of or entitled to any remuneration for labour or services performed for an employer;	(f) "employee" includes: (i) a person receiving or entitled to wages; (ii) a person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee; (iii) a person being trained by an employer for the employer's business; (iv) a person on an employment leave from employment with an employer; and

(v) a deceased person who, at the relevant time, was a person described in any of subclauses (i) to (iv);

but does not include a person engaged in a prescribed activity;

(e) "employer" means any person that employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who either:

(i) has control or direction of one or more employees; or

(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;

(g) "employer" means any person who employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who, in the opinion of the director of employment standards, either:

(i) has control or direction of one or more employees; or

(ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;

(l.2) "public holiday pay" means an amount of money to which an employee is entitled pursuant to section 39;

(r) "public holiday pay" means an amount of money that is payable to an employee pursuant to section 2-32;

. . .

. . .

(r) "wages" means all wages, salaries, pay, commission and any compensation for labour or personal services, whether measured by time, piece or otherwise, to which an employee is entitled;

(v) "wages" means salary, commission and any other monetary compensation for work or services or for being at the disposal of an employer, and includes overtime, public holiday pay, vacation pay and pay instead of notice;

. . .

. . .

Application of Act

4(1) Subject to subsections (1.1), (2), (3) and (4) and to the regulations, the provisions of this Act apply to the Crown in right of Saskatchewan and to every employee employed in the Province of Saskatchewan and to the employer of every such employee.

(1.1) Without limiting the generality of subsection (1) but subject to the exemptions prescribed in the regulations, this Act applies to employees who work at home.

(2) Part I of this Act does not apply to an employee who performs services that are entirely of a managerial character.

Application of Part

2-3(1) This Part applies to all employees and employers in Saskatchewan other than:

(a) subject to subsections (2) and (3) and to the regulations made pursuant to this Part, those employees whose primary duties consist of actively engaging in farming, ranching or market gardening activities; and

(b) those employees or employers, or categories of employees or employers, excluded in the regulations made pursuant to this Part from all or portions of this Part.

(3) Subject to subsection (3.1), this Act does not apply to an employee employed primarily in farming, ranching or market gardening.

(3.1) For the purposes of subsection (3), the following are deemed not to be within the meaning of farming, ranching or market gardening:

(a) the operation of egg hatcheries, greenhouses and nurseries;

(b) bush clearing operations;

(c) commercial hog operations.

(4) Parts I, V and VI of this Act do not apply to teachers as defined in section 2 of The Education Act, 1995.

. . .

Observance of public holiday
10(1) Where in any week there is a public holiday mentioned in Part VI:

(a) subsections 6(1) and (2), and section 7, shall be read with the substitution of the word "32" for the word "40" wherever it occurs in those provisions; and

(b) in calculating the time worked by an employee in any such week, no account shall be taken of any time worked by him on the public holiday or of any time during which he was at the disposal of his employer during the public holiday.

(2) Where section 9 applies and where in any week during the period of weeks prescribed by the director under section 9 there is a public holiday mentioned in Part VI, the total number of hours that the employee is required by his employer to work or to be at his disposal over the period of weeks, without being paid wages at the rate of time and one-half, shall be reduced by eight hours and the employer shall pay to the employee wages at the rate of time and one-half for each hour and part of an hour that the employee works, or that he is at the disposal of the employer, in excess of the working hours as reduced by this subsection and for the purpose of this subsection, in calculating the total number of hours worked by an employee over any such period of weeks, no account shall be taken of any time worked by him on the public holiday or of any time during which he was at the disposal

(2) For the purposes of clause (1)(a), the following are deemed not to be within the meaning of farming, ranching or market gardening:

(a) the operation of egg hatcheries, greenhouses and nurseries;

(b) bush clearing operations;

(c) commercial hog operations.

(3) Section 2-68, Division 5 and section 2-87 apply to an employee employed primarily in farming, ranching or market gardening.

. . .

of his employer during the public holiday.

. . .

Annual holiday to which employee is entitled
30(1) Every employee to whom this Act applies is entitled:

(a) subject to clause (b), to an annual holiday of three weeks after each year of employment with any one employer;

(b) to an annual holiday of four weeks after the completion of ten years of employment with one employer and after the completion of each subsequent year of employment with that employer.

Remuneration payable to employee in respect of annual holiday
33(1) An employee is entitled to receive annual holiday pay in the following amounts:

(a) if the employee is entitled to an annual holiday pursuant to clause 30(1)(a), three fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday;

(b) if the employee is entitled to an annual holiday pursuant to clause 30(1)(b), four fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday.

(1.1) With respect to an employee who is entitled to an annual holiday pursuant to section 30 but who does not take that annual holiday, the employer shall pay to the employee the employee's annual holiday pay not later than 11 months after the day on which the employee becomes entitled to the annual holiday.

(2) Where an employee takes his holiday in one continuous period, the annual holiday pay payable to the employee shall be paid to the employee by his employer during the period of

. . .

Annual vacation periods and common date
2-24(1) Every employee is entitled:

(a) subject to clause (b), to an annual vacation of three weeks after the completion of each year of employment with an employer; and

(b) to an annual vacation of four weeks after the completion of 10 years of employment with an employer and after the completion of each subsequent year of employment with that employer.

(2) An employer may use a common date for calculating vacation entitlement of all employees but only if the common date does not result in a reduction of any employee's rights pursuant to this Subdivision.

. . .

Vacation pay
2-27(1) An employee is to be paid vacation pay in the following amounts:

(a) if the employee is entitled to a vacation pursuant to clause 2-24(1)(a), three fifty seconds of the employee's wages for the year of employment or portion of the year of employment preceding the entitlement to the vacation;

(b) if the employee is entitled to an annual vacation pursuant to clause 2-24(1)(b), four fifty seconds of the employee's wages for the year of employment preceding the entitlement to the vacation.

(2) With respect to an employee who is entitled to a vacation pursuant to section 2-24 but who does not take that vacation, the employer shall pay the employee's vacation pay not later than 11 months after the day on which the employee becomes entitled to the vacation.

(3) The employer shall pay vacation pay to the employee in an amount calculated according to the length of vacation leave taken:

(a) at the employee's request, before the employee takes the vacation; or

fourteen days immediately preceding the commencement of the holiday period.

(3) Where an employee has given his employer notice under clause (c) of subsection (1) of section 31 that he desires to take his annual holiday in a manner other than in one continuous period, the annual holiday pay payable to the employee in respect of each of the several portions in which the employee desires to take his holidays shall be paid to the employee by his employer during the period of fourteen days immediately preceding the commencement of each portion of the holiday respectively.

(4) Where an employee has scheduled a period as an annual holiday at a time agreed to by the employer and the employer does not permit the employee to take the annual holiday as scheduled, the employer shall reimburse the employee for any monetary loss suffered by the employee as a result of the cancellation or postponement of the annual holiday.

Procedure when public holiday occurs during annual holiday

34 Where one or more public holidays as defined in Part VI of this Act occur during the period of any annual holiday that an employee has been permitted by his employer to take under this Act:

(a) the period of that annual holiday shall be increased by one working day in respect of each such public holiday; and

(b) the employer shall pay to the employee, in addition to the annual holiday pay that the employee is entitled to receive, the wages that he is entitled to be paid for each such public holiday.

Termination of employment

35(1) If the employment of an employee terminates, the employer of the employee shall, within fourteen days after the effective date of termination, pay to the employee the annual holiday pay to which he or she is entitled pursuant to this Act.

(2) If the employment of an employee terminates, the employee is entitled to annual holiday pay calculated in accordance with section 33 with respect to all total wages earned by the employee with respect to which the employee has not previously been paid annual

(b) on the employee's normal payday.

(4) An employer shall reimburse the employee for any monetary loss suffered by the employee as a result of the cancellation or postponement of the vacation if:

(a) the employee has scheduled a period of vacation at a time agreed to by the employer; and

(b) the employer does not permit the employee to take the vacation as scheduled.

(5) A monetary loss mentioned in subsection (4) is deemed to be wages owing and this Part applies to the recovery of that monetary loss.

When public holiday occurs during a vacation

2-28 If one or more public holidays set out in section 2-30 occur during the period of any vacation that an employee has been permitted by the employer to take pursuant to this Part:

(a) the period of that vacation must be increased by one working day with respect to each public holiday; and

(b) the employer shall pay to the employee, in addition to the vacation pay that the employee is entitled to receive, the wages that the employee is entitled to be paid for each public holiday.

Payment of vacation pay on ending of employment

2-29(1) If the employment of an employee ends, the employer shall pay to the employee the vacation pay to which the employee is entitled pursuant to this Part within 14 days after the day on which the employment ends.

(2) If the employment of an employee ends, the employee is entitled to vacation pay calculated in accordance with section 2-27 on the wages earned by the employee with respect to which the employee has not previously been paid vacation pay.

holiday pay.

(3) Subsection (2) applies whether or not an employee has completed a year of employment.

Interpretation
38 In this Part "public holiday" means New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, Saskatchewan Day, Labour Day, Thanksgiving Day, Remembrance Day or Christmas Day.

Public holiday pay
39(1) The minimum sum of money to be paid for a public holiday or for another day designated for observance of the public holiday by an employer to any employee who does not work on that day:

(a) where the employer pays to the employee the employee's regular wages for the period that includes that day, is equal to those wages;

(b) in any other case, is the amount A calculated in accordance with the following formula:

$$A = \frac{W}{20}$$

where W is the total of the wages earned by the employee during the four weeks immediately preceding the public

(3) Subsection (2) applies whether or not an employee has completed a year of employment.

Public holidays
2-30(1) In this section:

(a) "Family Day" means the third Monday in February;

(b) "Saskatchewan Day" means the first Monday in August.

(2) For the purposes of this Part, the following are public holidays in Saskatchewan:

(a) New Year's Day;
(b) Family Day;
(c) Good Friday;
(d) Victoria Day;
(e) Canada Day;
(f) Saskatchewan Day;
(g) Labour Day;
(h) Thanksgiving Day;
(i) Remembrance Day;
(j) Christmas Day.

(3) In this Part, a reference to a public holiday is a reference to one of the days mentioned in subsection (2) or to a day substituted for that day in accordance with section 2-31.

. . .

Public holiday pay
2-32(1) An employer shall pay an employee for every public holiday an amount equal to:

(a) 5% of the employee's wages, not including overtime pay, earned in the four weeks preceding the public holiday; or

(b) an amount calculated in the prescribed manner for a prescribed category of employees.

(2) For the purposes of subsection (1), an employer shall include in the calculation of an employee's wages:

(a) vacation pay with respect to vacation the employee actually takes in the four weeks preceding the public holiday; and

(b) public holiday pay in an amount

holiday, exclusive of overtime.

(2) The minimum sum of money to be paid for a public holiday or for another day designated for observance of the public holiday by an employer to any employee who works on that day is the total of:

(a) the amount to which the employee would be entitled pursuant to subsection (1) if the employee did not work on that day; and

(b) the amount of wages, calculated at a rate that is 1.5 times the employee's regular rate of wages, for the time worked.

(3) For the purposes of this section, where an employee takes an annual holiday during the four weeks immediately preceding a public holiday, "wages" includes the amount of annual holiday pay that is payable with respect to any annual holidays actually taken during that period.

. . .

Wage assessment

60(1) Without limiting the generality of section 82, in this section and in sections 61 to 62.4, "wages" includes overtime, annual holiday pay, public holiday pay, pay in lieu of notice, monetary losses described in subsection 33(4) and transportation costs described in subsection 44(2.5).

(2) The director may issue a wage assessment:

(a) against an employer where the director has knowledge or has reason to believe or suspects that an employer has failed or is likely to fail to pay wages as required by this Act; or

(b) against a corporate director where the director has knowledge or has reason to believe or suspects that the corporate director is liable for wages in accordance with section 63.

required pursuant to subsection (1) if another public holiday occurs in the four week period mentioned in clause (1)(a).

(3) If an employee works on a public holiday, an employer shall pay the employee the total of:

(a) the amount calculated in accordance with subsection (1); and

(b) for each hour or part of an hour in which the employee is required or permitted to work or to be at the employer's disposal:

(i) an amount calculated at a rate of 1.5 times the employee's hourly wage; or

(ii) an amount calculated in the prescribed manner for a prescribed category of employees.

. . .

Wage assessments

2-74(1) In this Division, "adjudicator" means an adjudicator selected pursuant to subsection 4-3(2).

(2) Subject to subsection (4), if the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this Part, the director may issue a wage assessment against either or both of the following:

(a) the employer;

(b) subject to subsection (3), a corporate director.

(3) The director of employment standards may only issue a wage assessment against a corporate director if the director has knowledge or has reasonable grounds to believe or suspects that the corporate director is liable for wages in accordance with section 2?68.

(4) The amount of a wage assessment that the director of employment standards may assess is to be reduced by an amount that the director is satisfied that the employee earned or should have earned during the period when the employer or corporate director was required to

pay the employee the wages.

(5) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (4).

. . .

Wage assessment

60(1) Without limiting the generality of section 82, in this section and in sections 61 to 62.4, "wages" includes overtime, annual holiday pay, public holiday pay, pay in lieu of notice, monetary losses described in subsection 33(4) and transportation costs described in subsection 44(2.5).

(2) The director may issue a wage assessment:

(a) against an employer where the director has knowledge or has reason to believe or suspects that an employer has failed or is likely to fail to pay wages as required by this Act; or

(b) against a corporate director where the director has knowledge or has reason to believe or suspects that the corporate director is liable for wages in accordance with section 63.

(3) The director shall issue a wage assessment against an employer where:

(a) the director has served a third party demand;

(b) the third party has paid money to the director in response to the third party demand;

(c) the director has not already issued a wage assessment against the employer in accordance with subsection (2); and

(d) there is no agreement pursuant to clause 55(2)(a).

(4) Where the director has issued a wage assessment pursuant to subsection (2) or (3), the director shall cause the wage assessment to be served on the employer or corporate director named in the wage assessment and on each employee who is affected by the wage assessment.

. . .

Wage assessments

2-74(1) In this Division, "adjudicator" means an adjudicator selected pursuant to subsection 4-3(2).

(2) Subject to subsection (4), if the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this Part, the director may issue a wage assessment against either or both of the following:

(a) the employer;

(b) subject to subsection (3), a corporate director.

(3) The director of employment standards may only issue a wage assessment against a corporate director if the director has knowledge or has reasonable grounds to believe or suspects that the corporate director is liable for wages in accordance with section 2 68.

(4) The amount of a wage assessment that the director of employment standards may assess is to be reduced by an amount that the director is satisfied that the employee earned or should have earned during the period when the employer or corporate director was required to pay the employee the wages.

(5) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (4).

(6) If the director of employment standards has issued a wage assessment pursuant to subsection (2), the director shall cause a copy of the wage assessment to be served on:

(a) the employer or corporate director named in the wage assessment; and

(b) each employee who is affected by the wage assessment.

(5) A wage assessment must:

(a) indicate the amount claimed against the employer or corporate director;

(b) direct the employer or corporate director to:

(i) pay the amount claimed within 21 days after the date of service of the wage assessment; or

(ii) commence an appeal pursuant to section 62; and

(c) in the case of a wage assessment issued pursuant to subsection (3), set out the amount paid to the director by the third party.

(6) The director may, at any time, amend or revoke a wage assessment.

. . .

Decision of adjudicator
62.2(1) . . . [T]he adjudicator shall:

(a) either:

(i) dismiss the appeal and confirm the amount claimed in the wage assessment or confirm the decision of the director pursuant to subsection 62.4(2.1); or

(ii) allow the appeal and:

(A) vary the amount claimed in the wage assessment;

(B) revoke the wage assessment; or

(C) revoke the decision of the director; and

(b) provide written reasons for the decision to the registrar of appeals.

(2) The adjudicator:

(7) A wage assessment must:

(a) indicate the amount claimed against the employer or corporate director;

(b) direct the employer or corporate director to, within 15 business days after the date of service of the wage assessment:

(i) pay the amount claimed; or

(ii) commence an appeal pursuant to section 2-75; and

(c) in the case of a wage assessment issued after money has been received from a third party pursuant to a demand issued pursuant to Division 4, set out the amount paid to the director of employment standards by the third party.

(8) The director of employment standards may, at any time, amend or revoke a wage assessment.

. . .

Decision of adjudicator
4-6(1) Subject to subsections (2) to (5), the adjudicator shall:

(a) do one of the following:

(i) dismiss the appeal;

(ii) allow the appeal;

(iii) vary the decision being appealed; and

(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

(2) If, after conducting a hearing, the adjudicator concludes that an employer or corporate director is liable to an employee or worker for wages or pay instead of notice, the amount of any award to the employee or worker is to be reduced by an amount that the adjudicator is satisfied that the employee earned or should have earned:

(a) may award interest at a rate prescribed in the regulations; and

(b) shall not award costs against any of the parties.

(3) On receipt of the decision from the adjudicator, the registrar of appeals shall promptly serve a copy of the decision on the director, the appellant and:

(a) on each employee who is directly affected by the decision; or

(b) where the appellant is an employee, on the employer or corporate director

. . .

Directors of corporation liable for wages
63(1) Notwithstanding any other provision in this Act or any provision in any other Act, the directors of a corporation are jointly and severally liable to an employee of the corporation for all debts due for services performed for the corporation, not exceeding six months' wages, while they are the directors.

(1.1) For the purposes of this section, "debts

(a) during the period when the employer or corporate director was required to pay the employee the wages; or

(b) for the period with respect to which the employer or corporate director is required to make a payment instead of notice.

(3) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (2).

(4) If, after conducting a hearing concerned with section 2-21, the adjudicator concludes that the employer has breached section 2-21, the adjudicator may exercise the powers given to the Court of Queen's Bench pursuant to sections 31.2 to 31.5 of The Saskatchewan Human Rights Code and those sections apply, with any necessary modification, to the adjudicator and the hearing.

(5) If, after conducting a hearing concerned with section 2-42, the adjudicator concludes that the employer has breached section 2-42, the adjudicator may issue an order requiring the employer to do any or all of the following:

(a) to comply with section 2-42;

(b) subject to subsections (2) and (3), to pay any wages that the employee has lost as a result of the employer's failure to comply with section 2-42;

(c) to restore the employee to his or her former position;

(d) to post the order in the workplace;

(e) to do any other thing that the adjudicator considers reasonable and necessary in the circumstances.

. . .

Corporate directors liable for wages
2-68(1) Subject to subsection (2), notwithstanding any other provision of this Act or any other Act, the corporate directors of an employer are jointly and severally liable to an employee for all wages due and accruing due to the employee but not paid while they are corporate directors.

(2) The maximum amount of a corporate

due for services performed for the corporation" means all remuneration payable by an employer to an employee pursuant to this Act and, without limiting the generality of the foregoing, includes wages, annual holiday pay, public holiday pay and pay in lieu of notice.

director's liability pursuant to subsection (1) to an employee is six months' wages of the employee.

(3) Subject to subsections (4) and (5), a corporate director's liability pursuant to this section is payable in priority to any other unsecured claim or right in the corporate director's property or assets, including any claim or right of the Crown.

(4) The payment priority set out in subsection (3) is subject to section 15.1 of *The Enforcement of Maintenance Orders Act, 1997.*

(5) A corporate director who is an employee of the corporation is not entitled to the benefit provided to employees by subsection (3).

. . .

Effect of Act on other Acts, agreements, contracts and customs

72(1) Nothing in this Act or in any order or regulation made under this Act affects any provision in any Act, agreement or contract of service or any custom insofar as it ensures to any employee more favourable conditions, more favourable hours of work or a more favourable rate of wages than the conditions, the hours of work or the rate of wages provided for by this Act or by any such order or regulation.

(2) Where any provision in this Act or in any order or regulation made under this Act requires the payment of wages at the rate of time and one-half, no provision in any Act, agreement or contract of service, and no custom, shall be deemed to be more favourable than the provision in this Act or in the order or regulation if it provides for the payment of wages at a rate less than the rate of time and one-half.

(3) Any provision in any Act, agreement or contract of service or any custom that is less favourable to an employee than the provision of this Act or any order or regulation made under this Act is superseded by this Act or any order or regulation made under this Act insofar as it affects that employee.

. . .

More favourable conditions prevail

2-7(1) In this section, "more favourable" means more favourable than provided by this Part, any regulations made pursuant to this Part or any authorization issued pursuant to this Part.

(2) Nothing in this Part, in a regulation made pursuant to this Part or in any authorization issued pursuant to this Part affects any provision in any other Act, regulation, agreement, collective agreement or contract of services or any custom insofar as that Act, regulation, agreement, collective agreement, contract of services or custom gives any employee:

(a) more favourable rates of pay or conditions of work;

(b) more favourable hours of work;

(c) more favourable total wages; or

(d) more favourable periods of notice of layoff or termination.

(3) Without restricting the generality of subsection (2), if an employer is obligated to pay an employee for time worked on a public holiday or pay an employee overtime, no provision of any Act, regulation, agreement, collective agreement or contract of service and no custom that provides for the payment of wages for work on a public holiday or for overtime at less than 1.5 times the employee's hourly wage shall be considered more favourable to an employee.

. . .

Agreements not to deprive employees of benefits of Act
75(1) No agreement, whether heretofore or hereafter entered into, has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Act.

(2) This Act applies to agreements made in or out of Saskatchewan with respect to service or labour performed in Saskatchewan.

. . .

Agreements not to deprive employees of benefits of Part
2-6 No provision of any agreement has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Part.

[31] The relevant provisions of *The Partnership Act*,[7] as amended (the "*TPA*") are as follows:

Definition
3(1) Partnership is the relation that subsists between persons carrying on a business in common with a view of profit.

(2) The relation between members of any company or association who constitute a body corporate under any law in force in Saskatchewan is not a partnership within the meaning of this Act.

Rules for determining existence
4 In determining whether a partnership does or does not exist, regard shall be had to the following rules:

1 Joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;

2 The sharing of gross returns does not of itself create a partnership, whether the persons sharing the returns have or have not a joint or common right or interest in the property from which or from the use of which the returns are derived;

3 The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business and in particular:

(a) the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(b) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

[7] R.S.S. 1978, c. P-3

(c) a person, being the surviving spouse or child of a deceased partner and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such;

(d) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing, and signed by or on behalf of all the parties thereto;

(e) a person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

B. ANALYSIS

[32] I have set out the various provisions of the *LSA* and *SEA* that relate to the matters at issue herein. The *LSA* was repealed effective April 29, 2014, and replaced with the *SEA*. The *LSA* was the governing legislation in effect during the time at issue in this Appeal. However, I am satisfied that both my analysis and conclusions in this matter would be the same, regardless of which legislation applies.

1. PARTNERSHIP

[33] I will first address the question of whether Selimos carried out his duties in a partnership, business arrangement with Cheng.

[34] There is no question agreement had been reached for Selimos to work at Toppers. Cheng argues Selimos' e-mail of December 10, 2013,[8] proves he did so in the capacity of a partner. He specifically references the words "I am willing to accept your offer for partnership." Cheng goes on to argue that Selimos' references in subsequent e-mails to profit-sharing bolster his argument. Basically, he argues same points more toward a partnership than it does an employer/employee relationship.

[8] *Supra*, footnote 4

[35] Selimos does refer to partnership in his first e-mail. However, I am of the view this e-mail is consistent with Selimos' testimony of initial discussions with Cheng that explored the potential of forming a partnership.

[36] Selimos does not refer to "partnership" in any subsequent e-mails. He does refer to "profit sharing." However, profit sharing of its own does not infer a partnership.[9] Many other relationships can involve profit sharing. I see none of the other trappings of a partnership.

[37] A significant piece of evidence is the Document[10] filed by Cheng. Though neither dated nor signed, Cheng says it is a document that reflects the terms agreed upon with Selimos. First, that Document is framed as a "service" agreement, not "partnership" agreement. Second, paragraph 15 of the document specifically provides that no partnership is created. This is Cheng's document and evidence. He is not entitled to impeach it. This may be a moot point, however, because I am satisfied there is no evidence capable of doing so.

[38] On the evidence, I am not satisfied any partnership between Selimos and Cheng ever came to fruition.

2. INDEPENDENT CONTRACTOR

[39] Paragraph 15 of the Document[11] provides:

> In providing the Services under this Agreement it is expressly agreed that the Service Provider is acting as an independent contractor and not as an employee.

[40] Cheng maintains the Document reflects the terms agreed upon with Selimos.

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[9] *Supra*, footnote 7

[10] *Supra*, footnote 5

[11] *Ibid.*

If the document does not create a partnership, the next question is whether it establishes that Selimos was an independent contractor, not an employee.

[41] Cheng says the Document sets out the terms of his agreement with Selimos. Selimos does not say that. Regardless, it is capable of being one piece of the puzzle. Even if one were to accept Cheng's position, I cannot rely on the Document's bare statement that Selimos is an independent contractor as determinative of the issue.

[42] In considering this matter, I am guided by the recent decision in *The Director of Labour Standards* v *Acanac Inc et al.*[12] Therein, Smith, J. provides the following thorough review of the common law jurisprudence on the subject:

> [45] The leading test in Canadian common law jurisprudence for determining whether an employer-employee relationship exists was set out by the Federal Court of Canada in *Wiebe Door Services Ltd.* v. *M.N.R.*, [1986] 3 F.C. 553, [1986] 5 W.W.R. 450 (F.C.A.). *Wiebe Door* was cited with approval by the Supreme Court of Canada in *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. Justice Major, for the Court, summarized the test as follows at paras. 46-48:
>
> > 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor ... I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, . . . [Atiyah, P. S., *Vicarious Liability in the Law of Torts*, London: Butterworths, 1967], at p. 38, that what must always occur is a search for the total relationship of the parties:
> >
> > . . .
> >
> > 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, ... [*Market Investigations, Ltd.* v. *Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pages 737-38]. The central question is whether the person who has been engaged to perform the services is performing them as **a person in business on his own account**. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by 2013 SKQB 21 (CanLII) the worker, and the worker's opportunity for profit in the performance of his or her tasks.

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[12] 2013 SKQB 21

> 48 It bears repeating that the above factors constitute a nonexhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case. [Emphasis added]

[46] Further, in *Wiebe Door*, MacGuigan J.A. comments at page 559 that:

> Perhaps the earliest important attempt to deal with these problems [inadequacies of the "control test"] was the development of the entrepreneur test by William O. (later Justice) Douglas, "Vicarious Liability and Administration of Risk 1" (1928-29), 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.*, [1947] 1 D.L.R. 161 (P.C.), at pages 169-170:
>
> 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. ... [Emphasis in original]

[47] The Supreme Court of Canada in *Sagaz Industries*, *supra*, has endorsed the elements of the fourfold test in setting out the correct approach to determining the existence of an employment relationship. Writing on behalf of the Court, Justice Major stated at para. 47:

> 47 ... there is no universal test to determine whether a person is an employee or an independent contractor ... The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[48] In *Royal Winnipeg Ballet* v. *M.N.R.*, 2006 FCA 87, 264 D.L.R. (4th) 634, the Federal Court of Appeal added another dimension by holding that the intention of the parties can be more important than the *Wiebe Door* test suggests, saying that:

> [64] ... it seems ... wrong in principle to set aside, as worthy of no

> weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence. ...

[49] Rather than just focussing on intention, some courts, in determining employee status, will examine the actual conduct of the parties and related evidence with respect to their relationship. As observed by Geoff England, Innis Christie & Roderick Wood, *Employment Law in Canada*, 4th ed., looseleaf (Markham: Butterworths, 2005), at para. 2.21:

> 1. ... no matter what "test" is used, superficial inconsistencies and *de jure* contractual descriptions of the nature of the relationship will not be determinative of the matter for employment law purposes: what counts is how the relationship works "on the ground", having regard to the totality of the evidence, not what appears on paper. ...

See for example: *HMI Industries Inc.* v. *Santos*, 2010 QCCA 606, [2010] Q.J. No. 2579 (QL), at para. 5; *Pennock* v. *United Farmers of Alberta Co-Operative Ltd.*, 2006 ABQB 716, 54 C.C.E.L. (3d) 239; varied on other grounds, 2008 ABCA 278, 296 D.L.R. (4th) 239; see also: *Dynamex Canada Inc.* v. *Mamona*, *supra*, at para. 52; *Sagaz Industries Canada Inc.*, *supra*, at para. 49; *Walden* v. *Danger Bay Productions Ltd.*, [1994] 6 W.W.R. 138, 114 D.L.R. (4th) 85 (B.C.C.A.), at paras. 35-38; and *Alberta Permit Pro* v. *Booth*, 2007 ABQB 562, [2008] 2 W.W.R. 505, at para. 12; aff'd *Alberta Permit Pro* v. *Booth*, 2009 ABCA 146, [2009] 6 W.W.R. 599.

[50] A similar "overarching" general test to the "entrepreneur" or "fourfold" test is the "organization" or "integration test": *Wiebe Door*, *supra*, at para. 10; *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, *supra*, at paras. 40-43. This test can be traced to *Stevenson Jordan and Harrison, Ltd.* v. *MacDonald and Evan*, [1952] 1 Times L.R. 101 at 111 (C.A.), wherein Denning L.J. stated:

> One feature which seems to run through 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.

[51] The organization test was approved by the Supreme Court of Canada in *Co-Operators Insurance Association* v. *Kearney*, [1965] S.C.R. 106, 48 D.L.R. (2d) 1 at 112, where Spence J. for the Court quoted with approval the following passage from John G. Fleming, *The Law of Torts*, 2nd ed. (Sydney: Law Book Co., 1961), at pages 328-29:

> Under the pressure of novel situations, the courts have become increasingly aware of the strain on the traditional formulation [of the control test], and most recent cases display a discernible tendency to replace it by something like an "organization" test. Was the alleged servant part of his employer's organization? Was his work subject to co-ordinational control as to "where" and "when" rather than "how"?

[52] Applied in isolation, however, the organization test can lead to "as impractical and absurd results as the control test." *Wiebe Door*, *supra*, citing A.N. Khan, "Who is a Servant?" (1979), 53 Austr. L.J. 832, at page 834. Thus, as noted by the Supreme Court of Canada in *Sagaz Industries*, *supra*:

> 42 ... If the question is whether the activity or worker is integral to

> the employer's business, this question can usually be answered affirmatively. For example, the person responsible for cleaning the premises is technically integral to sustaining the business, but such services may be properly contracted out to people in business on their own account (see R. Kidner, "Vicarious liability: for whom should the 'employer' be liable?" (1995), 15 Legal Stud. 47, at p. 60). As MacGuigan J.A. further noted in *Wiebe Door*, if the main test is to demonstrate that, without the work of the alleged employees the employer would be out of business, a factual relationship of mutual dependency would always meet the organization test of an employee even though this criterion may not accurately reflect the parties' intrinsic relationship (pp. 562-63).

[53] While finding the organization test useful if properly applied, MacGuigan J.A. in *Wiebe Door* ultimately preferred Lord Wright's test in *Montreal* v. *Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161, [1946] 3 W.W.R. 748 (P.C.) (the "entrepreneur" or "fourfold" test):

> Professor Atiyah, [*Vicarious Liability in the Law of Torts*, London: Butterworths, 1967], at pages 38-39, ends up with Lord Wright's test from the Montreal Locomotive Works case, as he finds it more general than Lord Denning's, which he sees as decisive in only some cases.
>
> I am inclined to the same view, for the same reason. I interpret Lord Wright's test not as the fourfold one it is often described as being but rather as a four-in-one test, with emphasis always retained on what Lord Wright, supra, calls "the combined force of the whole scheme of operations," even while the usefulness of the four subordinate criteria is acknowledged.

[43] I intend to consider the matter in the manner Smith, J. outlined as follows:

> [54] Having benefitted from the above authorities, I am inclined to apply the fourfold test of control, ownership of tools, chance of profit and risk of loss. I consider and acknowledge that the intention of the parties is relevant but I also accept that "on the ground" conduct may be more determinative of the true relationship.
>
> [55] Given the . . . nature of the relationship between the parties, I will consider the organization of the company to the extent that it informs the analysis of the fourfold test. Finally, I consider the critical question is whether Sabau was in business on his own account or not.

a. CONTROL

[44] In Acanac, Smith, J. had this to say about control:

> [63] As noted by MacGuigan J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, *supra*, at para. 6:
>
> The traditional common-law criterion of the employment relationship has

been the control test, as set down by Baron Bramwell in *Regina* v. *Walker* (1858), 27 L.J.M.C. 207 at 208:

> It seems to me that the difference between the relations of master and servant and of principal and agent is this: – A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.

[64] The Supreme Court of Canada provided a similar articulation of the "control test" in *Hôpital Notre-Dame de l'Espérance* v. *Laurent*, [1978] 1 S.C.R. 605, 17 N.R. 593 at 613 (quoting André Nadeau in *Traité pratique de la responsabilité civile délictuelle*, at page 387):

> ... the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work.

[65] Courts have recognized certain inadequacies with the control test as a means of determining the existence of an employment relationship. In *Wiebe Door Services Ltd.*, for example, MacGuigan J.A. stated at pages 558-59:

> ... A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.

[66] The level of control the employer has over a worker's activities will always be a factor as indicated by the Supreme Court in *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, *supra*, at para. 47. But other factors to be considered include:

> 47 ... whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[45] Cheng argues Selimos was "in charge." He said:

a) Selimos made all of the major decisions, including:

i) setting the menu;

ii) managing inventory;

iii) hiring, firing and controlling the schedules of employees; and

iv) advertising; and

b) besides working within the defined framework of making the business profitable, Selimos basically did what he wanted to:

i) with no one managing his activities; and

ii) without detailed direction on procedure.

[46] Cheng did acknowledge, however, that he maintained substantial financial control over the Business. He said this was because income from the business was deposited into Toppers' bank account. He clearly ensured Selimos had no access to same.

[47] On the other hand, the Director argues:

> The ownership and financial control was maintained by Mr Cheng. Mr Selimos was not in business for himself, but he was a component or part of Mr Cheng's business. Based on the evidence Mr. Selimos operated Topper's Bar and Grill on behalf of Mr Cheng, in a managerial capacity, not as a business partner.

[48] On the issue of control, the evidence points to Selimos carrying out the duties one would expect of a manager. Cheng has not persuaded me the evidence points to control consistent with what is expected for an independent contractor.

b. OWNERSHIP OF TOOLS

[49] In *Acanac*, Smith, J. had this to say about ownership of tools:

> An examination of the "ownership of tools" is a long-standing conceptual element to be considered by the trier of fact in determining whether or not there is employee status.

[50] The Director argues:

> All aspects of the business are owned by Mr. Cheng, which includes, the business name, building contents and bank accounts.

He argues Selimos owns no tools. Consequently, he argues this issue must be resolved in Selimos' favour.

[51] On the other hand, Cheng argues:

> He joined the partnership with the experience, expertise he claimed on the restaurant and bar business. He used his own experience, expertise to make profit. There is no specific tools and equipment for this part (he always owns his soft skill and experience). Meanwhile he was also responsible for 40% of all expense on equipment and maintenance; all these are used to calculate the net profit.

[52] I find Cheng's argument to be simplistic and miss the point. It begs the question of ownership.

[53] I prefer and accept the Director's argument.

c. CHANCE OF PROFIT & RISK OF LOSS

[54] On this point, the Director argued:

> All aspects of the business are owned by Mr. Cheng, which includes, the business name, building contents and bank accounts. Mr Selimos's name was not on any of these and therefore he had no liability for the business and no risk of loss.

[55] On the other hand, Cheng argues:

> 16. As partner, Selimos took risk from performance of business; his income came from net profit of the business. He wrote many times in email that No Wages for him. He would make more money if the business went well, as he expected and claimed he was able to.
>
> 17. While running Toppers, he also tried to sale or lease it, so that he could make commissions from the transaction.

> 18. In summary, he is the person controlled financial sales and expense, and he caused huge damages to the business which I am still suffering.

[56] In *Acanac*, Smith, J. referenced for following decision proffered therein by the Director:

> In *Warren* [*Warren* v. *622718 Saskatchewan Ltd.*, 2004 SKQB 346, 252 Sask.R. 290], the Court considered the opportunity for profit factor in determining whether the Plaintiff was an employee or an independent contractor. The Plaintiff had been paid a base monthly salary. However, he was also able to earn additional amounts as commission, and was eligible for a "long-term incentive" which consisted of a share allotment of 1% of the company's equity after each year of employment, to a maximum of 5% [paras. 5 and 6]. In applying the facts to the law, Justice Wilkinson stated:
>
> > [22] ... The plaintiff assumed no financial risk, in fact the terms of engagement guaranteed his base salary regardless of commissions generated. The chance of profit existed in a restricted sense, in the form of the long-term incentive, but not in the wider sense that is generally considered in the analysis. **In answering the fundamental question, namely was the plaintiff in business for himself, the answer must be no.** [Emphasis of Director]

[57] In essence, Cheng only relies on profit sharing to support his argument on this point. He refers to no other evidence. In my view, the profit-sharing arrangement in place between Toppers and Selimos does not point to Selimos being an independent contractor.

d. CONCLUSION

[58] In addressing the fourfold test and, more to the point, in determining the debate in this matter, it is necessary to view the totality of the relationship between Selimos and Toppers from an "above the forest" perspective. In that context and on a focused examination of the true nature of the components of the relationship between Selimos and Toppers, the analysis leads inexorably to the conclusion that Selimos was, in real terms, an employee of Toppers.

3. CALCULATION

[59] I find as a fact Selimos:

a) worked 280 regular hours;
b) worked 246 overtime hours; and
c) had one eight-hour public holiday he did not work.

[60] Minimum wage was $10.00 per hour. I therefore find as a fact Selimos earned $2,800.00 in wages and Cheng and Toppers additionally owe him $4,149.04, comprising the following:

a) $3,690.00 for overtime pay;
b) $80.00 for public holiday pay; and
c) $379.04 for annual holiday pay.

[61] I find as a fact that Toppers paid no wages, overtime pay, public holiday pay and annual holiday pay to Selimos.

[62] I find as a fact that Toppers supplied $420.00 in food and $2,600.00 in accommodation to Selimos, totaling $3,020.00. I find this sum is deductible from the amount owing from Cheng and Toppers to Selimos.

[63] I find as a fact Cheng and Toppers have a net amount of $3,929.04 owing to Selimos.

[64] Cheng and Toppers shall pay interest on the sum owing from June 13, 2014, at the rates prescribed by Section 40 of *The Employment Standards Regulations*, c. S-15.1, Reg 5, being the rates calculated pursuant to section 113 of *The Enforcement of Money Judgments Act* and section 10 of *The Enforcement of Money Judgments Regulations*.

T. F. (TED)KOSKIE, B.Sc., LL.B.,
ADJUDICATOR

VI. NOTICE

The parties are hereby notified of their right to appeal this decision pursuant to section 4-8 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (as amended), which reads as follows:

> 4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.
>
> (2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.
>
> (3) A person who intends to appeal pursuant to this section shall:
>
> (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
>
> (b) serve the notice of appeal on all persons mentioned in clause 4 4(1)(b) who received the notice setting the appeal or hearing.
>
> (4) The record of an appeal is to consist of the following:
>
> (a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;
>
> (b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;
>
> (c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;
>
> (d) any exhibits filed before the adjudicator;
>
> (e) the written decision of the adjudicator;
>
> (f) the notice of appeal to the board;
>
> (g) any other material that the board may require to properly consider the appeal.
>
> (5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.
>
> (6) The board may:
>
> (a) affirm, amend or cancel the decision or order of the adjudicator; or
>
> (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.