Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1382/22

BEFORE:	T. Mitchinson: Vice-Chair
HEARING:	October 6, 2022 at Toronto Oral by Videoconference
DATE OF DECISION:	October 13, 2022
NEUTRAL CITATION:	2022 ONWSIAT 1596

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the Applicant:	D. Bierstone, Lawyer
For the Respondent:	K. Wolf, Lawyer
For the Interested Party:	N. Tischler, Lawyer
Interpreter:	N/A

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* (the Act) by two of the defendants in an action that has been filed in the Ontario Superior Court of Justice as Court File No. CV-498523, for a declaration and order to bar the plaintiff/respondent from commencing and maintaining a civil action against these defendants for damages stemming from an accident that occurred on May 15, 2012.

[2] The application was heard by videoconference in Toronto on October 6, 2022.

[3] The applicants, Allan Star Roofing Ltd. and Ebrahim Khezri [EK], are represented by David Bierstone, a lawyer.

[4] The respondent, James MacPherson [JM], who is also acting on behalf of his minor daughter, Sierra MacPherson as her Litigation Guardian, is represented by Kevin Wolf, also a lawyer.

[5] One of the other defendants in the civil action, David Paquette [DP] (also known as Mark Paquette) is deceased. Unsuccessful efforts were made to contact Mr. Paquette's estate, and his interests are not being represented in this application.

[6] The remaining defendant, Sylvia Marie-Louise Samuel [SS], is represented by lawyer, Nathan Tischler. Mr. Tischler attended the hearing as an observer, but did not participate.

[7] Mr. Khezri and Mr. MacPherson testified at the hearing, and Mr. Bierstone and Mr. Wolf made oral submissions on behalf of their clients.

(ii) Applicable law

[8] The accident fiving rise to this section 31 application occurred in 2012. Therefore, the *Workplace Safety and Insurance Act* applies.

(iii) Preliminary issue

[9] At the start of the hearing, Mr. Wolf objected to the admission of transcripts of the Examinations for Discovery of GM and SS which had been submitted by Mr. Bierstone after the Tribunal's 3-week deadline for tabling new documents. He submitted that this did not allow him and his client sufficient review time prior to the hearing. Mr. Bierstone pointed out that these documents had been in Mr. Wolf's possession for a lengthy period in the context of the civil action.

[10] I ruled that the transcripts of the two Examinations for Discovery were potentially relevant to the issues under consideration in this application, and that Mr. Wolf and his client were not unduly prejudiced by their late tabling. I admitted both documents as exhibits.

(iv) Statutory provisions and Board policy

[11] Sections 28(1) and 31(1) of the *Act* reads as follows:

> 28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

> 1. Any Schedule 1 employer.
> 2. A director, executive officer or worker employed by any Schedule 1 employer.
>
> ...
>
> 31(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the Insurance Act may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

[12] Board *Operational Policy Manual* (OPM) Document No. 15-01-05 sets out the policy and guidelines for determining whether the requirements of section 31(1) of the *Act* are present:

> **POLICY**
>
> The Act provides no fault loss of earnings benefits for injuries arising out of and in the course of employment in lieu of all rights of action that a worker or survivor may have against the worker's employer. In most cases any right of action is taken away by the Act. However, there are circumstances where a worker or survivor may have a right of action against a third party.
>
> **GUIDELINES**
>
> When all parties involved in the accident were in the course of their employment, the worker has no right of action against any Schedule 1
>
> - employer
> - director
> - executive officer, or
> - worker

[13] Section 2(1) of the *Act* includes the following definitions:

> - "worker" means a person who has entered into or is employed under a contract of service or apprenticeship ...
> - "independent operator" means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose

[14] OPM Document No. 15-02-02 outlines the policy and guidelines for determining whether an accident occurred in the course of employment:

> **POLICY**
>
> A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to ***place***, ***time*** and ***activity*** indicate that the accident was work-related.
>
> **GUIDELINES**
>
> In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of ***place***, ***time*** and ***activity*** in the following way:
>
> **Place**

If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace.

Application of criteria

The importance of the three criteria varies depending on the circumstances of each case. In most cases, the decision-maker focuses primarily on the activity of the worker at the time the personal injury by accident occurred to determine whether it occurred in the course of employment.

If a worker with fixed working hours and a fixed workplace suffered a personal injury by accident at the workplace during working hours, the personal injury by accident generally will have occurred in the course of employment unless, at the time of the accident, the worker was engaged in a personal activity that was not incidental to the worker's employment.

> The decision-maker examines the activity of the worker at the time of the accident to determine whether the worker's activity was of such a personal nature that it should not be considered work-related.

[15] OPM Document No. 12-02-01 provides policy and guidelines on the issue of whether an individual is a "worker" or an "independent operator".

[16] This policy document is helpful in the context of this application, as it sets out the various factors that are taken into account in determining whether GM was a worker. It states in part:

> **Policy**
>
> The WSIB uses questionnaires (a general questionnaire and six industry-specific questionnaires), to gather information to help determine if a person is employed under a "contract of service." The questionnaires reflect the principles of the organizational test (see below). Persons employed under a contract of service are workers. Independent operators are not employed under a contract of service.
>
> The WSIB has the authority to determine who is a worker or an independent operator under the *Workplace Safety and Insurance Act*.
>
> **Guidelines**
>
> **General**
>
> A "contract of service", or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.
>
> Workers – those who work under contracts of service – are automatically insured and entitled to benefits if injured at work. In addition, their employers must pay premiums to the WSIB.
>
> A "contract for service", or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.
>
> Independent operators – those who work under contracts for service – are not automatically insured or entitled to benefits unless they voluntarily elect to be considered "workers" and apply to the WSIB for their own account and optional insurance. (See 12-03-02, Optional Insurance.) Independent operators may not be insured through the hiring company's (payer's) WSIB account.
>
> **Organizational test**
>
> The organizational test recognizes features of control, ownership of tools/equipment, chance of profit/risk of loss, and whether the person is part of the employer's organization, or operating their own separate business.
>
> ...
>
> **Characteristics of workers and independent operators**
>
> The following list compares worker/independent operator characteristics. The statements on the left are more characteristic of the behaviour or situations of workers, while those on the right characterize the behaviour of independent operators. No one statement determines a person's status. The seven questionnaires do not necessarily include all the characteristics listed since they are designed to capture key elements of business relationships in specific industries.
>
> Decision-makers consider the statements on the questionnaires, and any other information relevant to the terms and conditions of employment.

	Workers	Independent Operators
Instructions	• Comply with instructions on what, when, where, and how work is to be done.	• Work on their own schedule. • Does the job their own way.
Training/ supervision	• Trained and supervised by an experienced employee of the payer. • Required to take correspondence or other courses. • Required to attend meetings and follow specific instructions which indicate how the payer wants the services performed.	• Use their own methods and are not required to follow instructions from the payer.
Personal service	• Must render services personally. • Must obtain payer's consent to hire others to do the work.	• Often hires others to do the work without the payer's consent.
Hours of work	• The hours and days of work are set by the payer.	• Work whatever hours they choose.
Full-time work	• Must devote full-time to the business of the payer. • Restricted from doing work for other payers.	• Free to work when and for whom they choose.
Order or sequence of work	• Performs services in the order or sequence set by the payer. • Performs work that is part of a highly coordinated series of tasks where the tasks must be performed in a well-ordered sequence.	• Performs services at their own pace. • Work on own schedule.
Method of payment	• Paid by the payer in regular amounts at stated intervals. • Payer alone decides the amount and manner of payment.	• Paid by the job on a straight commission. • Negotiates amount and method of payment with the payer.
Licenses	• Payer holds licenses required to do the work.	• Person holds licenses required to do the work.
Serving the public	• Does not make services available except on behalf, or as a representative, of the payer. • Invoices customers on employer's behalf.	• Has own office. • Listed in business directories and maintains business telephone. • Advertises in newspapers, etc. • Invoices customers on own

	Workers	Independent Operators
		behalf.
Status with other government agencies	(e) Terms of the relationship are governed by a collective agreement. (f) Canada Revenue Agency either makes no ruling on the person's status, or rules that the person is a worker under the Canada Pension Plan (CPP) and the Employment Insurance Act (EIA). (A ruling is made after the relevant parties complete the form "Request for a ruling as to the status of a worker under the CPP or EIA".) (g) Collects and pays GST and other applicable taxes on payer's behalf. (h) Payer deducts EI, CPP, insurance, income tax, etc. from pay.	• Terms of the relationship not governed by a collective agreement. • Canada Revenue Agency has made an official ruling that the person is not a worker under the CPP and the EIA. • Collects and pays GST and other applicable taxes on own behalf. • Takes no deductions from pay for EI, CPP, insurance, income tax, etc.

Profit or Loss

To determine what the opportunities are for the person to earn a profit or suffer a loss in doing the work, the decision-maker must consider

- what assets (labour, materials, tools, and equipment) are used, operated, or put into action when doing the work, e.g., a lathe. These are to be distinguished from assets that are the subject of the work, or that are acted upon in doing the work, e.g., the table leg that is "turned" on the lathe.
- what costs are incurred in doing the work, including

  -costs of the acquisition, maintenance, operation and repair of assets;

  -financing and loan arrangements with respect to the work, and

  -licensing and insurance fees
- who pays these costs - the employer or the person
- if the person pays the costs, does the person purchase items directly or indirectly from the employer or through an arrangement with the employer
- what decisions influence the costs and to what extent
- who makes and has the right (legal or otherwise) to make these decisions - the person or the employer
- the market mobility of the person or the demand that exists for these services.

Workers have the right to make decisions that, in comparison to those that the employer makes (or has the right to make), have an insignificant or lesser influence on the workers'

opportunity to make a profit or suffer a loss in doing the work.

Independent operators have the right to make decisions that, in comparison to those that the hiring company makes (or has the right to make), have a significant influence on their opportunity to make a profit or suffer a loss in doing the work.

Other applicable criteria

To determine what other applicable criteria suggest about the status of the person, decision-makers consider the paired statements that follow. None of these statements, on its own, leads to the determination of status. Before making a determination, decision-makers must consider each statement in reference to all other features of the work relationship.

To determine what other applicable criteria suggest about the status of the person, decision-makers consider the paired statements that follow. None of these statements, on its own, leads to the determination of status. Before making a determination, decision-makers must consider each statement in reference to all other features of the work relationship.

	Workers	Independent Operators
Continuing need for type of service	Payer has a continuing need for the type of service that the person provides. A payer has a continuing need for service if all persons who perform such services, collectively, spend **more** than 40 hours a month on average doing the work, or if the work continues full-time for more than 4 months.	Payer does not have a continuing need for the type of service that the person provides.
Hiring / supervising / paying assistants	Hires, supervises, and pays workers, on direction of the payer (acts as a supervisor or representative of the payer).	Hires, supervises and pays workers, on own accord and as the result of a contract under which the person agrees to provide materials and labour and is responsible for the results.
Doing work on purchaser's premises	Payer owns or controls the worksite.	Works away from payer's premises using own office space, desk, and telephone.
Oral and written reports	Required to submit regular oral or written reports to payer.	Submits no reports.
Right to sever relationship	Either the person or the payer can end the work relationship at any time without legal penalty for breach of contract.	Agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to pay for damages or loss of income that the payer sustains because of the failure to satisfactorily complete the work.
Working for more than one firm at a time	Usually works for one payer.	Works for more than one payer at the same time.

Determining Status

The decision-maker reaches a decision about the status of the person. When the criteria

indicate the person has a separate business that is not integrated into the employer's business, then the person is an independent operator. If the decision-maker finds

- that the person is subject to a high degree of control in doing the work, and
- that the decisions the person makes have an insignificant effect on the person's own opportunity to earn a profit or suffer a loss

the person is a **worker** and does not have a separate business, even if a review of "Other applicable criteria" suggests that some independence is afforded the person in the relationship with the employer.

(v) The issue

[17] The issues in this application are:

1. Whether GM is a "worker" pursuant to section 2(1) of the *Act*, who was in the course of employment at the time of the May 15, 2012 accident.

2. Whether GM's right to commence and continue an action against Allan Star Roofing Ltd. and EK is taken away pursuant to section 26(2) and 28 of the *Act*.

(vi) Background

[18] In May 2012, SS hired DP to replace the roof on her house. DP arranged for GM to assist with the job. After the first day of work, DP realized that additional help would be required, so he approached EK, the owner of Allan Star Roofing Ltd. EK agreed to help and attended the job site on the second day, along with a helper.

[19] GM proceeded to the rooftop on May 15, 2012, the second day of the job. After a brief period he began to come down off the roof, lost his balance, and fell to the ground. He was not secured with a roofer's safety harness at that time. GM was taken to the local hospital and diagnosed with a fracture of his spine, and underwent a surgical correction.

[20] On June 22, 2018, GM brought a civil action against SS, DP, Allan Star Roofing Ltd., and EK.

[21] SS, DP, EK and GM participated in Examinations For Discovery.

[22] On November 21, 2021, Mr. Bierstone filed an Applicant's Right to Sue Statement with the Tribunal on behalf of Allan Star Roofing Ltd. and EK. On August 24, 2022, Mr. Wolf filed a Respondent's Statement and Brief of Authorities with the Tribunal on behalf of GM. And on September 28, 2022, and September 29, 2022, Mr. Bierstone filed two Supplementary Briefs of Authorities.

(vii) Testimony

(a) Mr. Khezri (EK)

[23] EK testified that he is the owner of Allan Star Roofing Ltd., and the sole fulltime person involved in this roofing business. He explained that he sometimes needs assistance on certain roofing jobs, and hires individuals for that purpose. EK confirmed that he had hired DP in this capacity for previous jobs prior to the May 15, 2012 accident, but that DP's work was primarily as a shingler, which meant that he did not require many of the tools and equipment needed for the full range of duties associated with roof replacement.

[24] According to EK, he was approached by DP on May 14, 2012 with a request that he help with a roofing job underway at that time. DP explained that after one day on the job he realized that more help would be needed and asked EK to assist. EK agreed, and proceeded to SS's property on May 15, 2012, together with a helper. Although DP had been EK's employee on past jobs, in this case EK considered himself to be DP's employee, and his work on May 15, 2012 was done under the supervision of DP.

[25] EK testified that he did not know GM at that time. He stated that DP and GM had met with him the day before to borrow some roofing equipment, but he knew nothing of GM's work history or competence to work as a roofer. According to EK, DP assured him that GM was capable of handling the roofing tasks.

[26] EK also testified that he had no first-hand knowledge about the arrangements between DP and GM for work on the roofing project. He was just told that GM was a childhood friend of DP who would be working on the job. EK also stated that he had no supervisory responsibility for GM's work.

[27] EK went on to testify about the accident. DP and GM were on the roof at the beginning of the work day on May 15, 2012. EK was working on a different section of the roof when he heard a commotion and saw that GM had fallen to the ground. He did not observe the cause of the fall, and denied asking GM to hand him a tool shortly before the accident happened.

[28] EK recalled that his helper assisted DP to take GM to the local hospital emergency department after the accident, in GM's truck.

[29] EK also recalled speaking with SS on the job site after the accident, and providing her with a written quotation to complete the job. The quote was accepted, and he went on to finish the job, hiring DP to assist.

[30] When asked by Mr. Wolf if he had filed a claim with the Board as a result of the accident, EK confirmed that he did not, explaining that GM was not his employee. He also stated that he had no knowledge as to whether DP had filed a claim.

(b) Mr. MacPherson (GM)

[31] GM testified that he is a certified carpenter and scaffolder, but has no training or certification as a roofer. He worked in construction prior to the May 15, 2012 accident, and had received training for working at heights in the context of his work as a scaffolder. He also had harness equipment used in the scaffolding trade, but knew that it was not sufficient to safely allow work as a roofer.

[32] GM explained that he had been laid off from his regular job in May 2012 and was collecting Employment Insurance benefits. He had never worked as a roofer and did not have any specialized tools associated with roofing work when he was approached by DP with a request to assist on a roofing job. GM explained that DP was a childhood friend who he had recently reconnected with after approximately 10 years. GM knew that DP was having difficulties at the time, and agreed to help him on the roofing job as a favour out of friendship. He had never helped DP out before. GM testified that DP agreed to pay him $100 per day for the work, on a cash basis, and GM considered this to be a gift not payment under the terms of a contract. He confirmed that there was no documentation developed to reflect these arrangements. GM also recalled that DP gave him $200 in cash at some point after the accident. He did not declare this as income to the Canada Revenue Agency.

[33] GM recalled meeting EK for the first time on May 14, 2012, when he drove DP to EK's work site to borrow some tools and a ladder for use in SS's roofing job. He had never met EK before that.

[34] As far as activities on May 15, 2012 are concerned, GM confirmed that he was acting under DP's supervision. He did not have the proper harness for roofing duties, only his scaffolding harness and a hammer. According to GM, EK had spare tools and a harness in his truck, and he was in the process of going down the ladder from the roof in order to get them when he lost his balance and fell to the ground.

[35] GM testified that he did not file a claim with the Board following his accident, because he didn't consider himself to be an employee. In GM's view he was simply helping a friend with a job.

[36] During cross-questioning, Mr. Bierstone referred to GM's testimony during his Examination for Discovery where he described his conversation with DP about the roofing job. GM acknowledged that there is mention of a $100 per day payment to him, and no mention of him having agreed to do the work as a favour to DP.

(viii) Submissions

(a) Mr. Bierstone

[37] Mr. Bierstone submits that all of the requirements for characterizing GM as a worker for DP in May 2012 are present on the evidence, and confirmed by GM in his Examination for Discovery. Mr. Bierstone points out that, in that context, GM acknowledged that he was hired by DP as a labourer; was employed for agreed-upon remuneration of $100 per day; was a worker on the job site for SS's roof replacement on May 15, 2012; and was acting under DP's supervision at the time of the accident. EK, on the other hand had no supervisory responsibility for GM, and was also performing the role of a worker employed by DP when the accident occurred.

[38] Mr. Bierstone points out that DP and EK's company, Alan Star Roofing Ltd., were both active Schedule 1 employers on May 15, 2012, and that GM and EK were both Schedule 1 workers when the accident occurred, thereby satisfying the requirements of section 28 of the *Act*.

[39] In Mr. Bierstone's view, all of the requirements for establishing that an accident occurred while GM was in the course of his employment are present here: the accident occurred on SS's premises, during the regular workday hours, while GM was engaged in the roofing activities.

[40] Although Mr. Bierstone accepts that GM may have been a childhood friend of DP, GM has acknowledged that they lost connection for approximately 10 years prior to the accident, and he submits that friendship does not necessarily negate an employment relationship. In the circumstances of this case, Mr. Bierstone submits that the evidence establishes that DP made an offer of employment for a fee, which was accepted by GM, and it was during the course of engaging in this employment activity that the accident occurred.

[41] Mr. Bierstone also submits that *Decision No. 1554/11R*, 2012 ONWSIAT 1772 which is relied on by Mr. Wolf in his Respondent's Statement, is distinguishable on its facts. In that case, the two parties had a strong and special personal relationship, which the Vice Chair relied on in finding that there was no employment relationship. In contrast, Mr. Bierstone submits, despite

any friendship that may have existed, DP and GM entered into a commercial contractual relationship that is determinative of their status as employer and worker.

[42] As far as GM's position that he was performing duties on May 15, 2012 as an "independent operator" and not as a "worker", Mr. Bierstone submits that none of the characteristics of independent operator status set out in Board policy and Tribunal jurisprudence are present here. In Mr. Bierstone's view, GM was providing work under a verbal contact for service and was not a person who carries out business in an industry, as the terms "worker" and "independent operator" are defined in section 2(1) of the *Act*.

[43] In support of his position, Mr. Bierstone references directions provided by the Supreme Court of Canada in the *Sagaz* case (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] SCR 98*), and the Ontario Superior Court of Justice in *Ligocki* (*Ligocki v. Allianz Insurance Co. of Canada, 2010 ONSC 1166*) in considering whether an individual is an independent operator. He also references a number of prior Tribunal decisions including *Decision Nos. 2190/16*, 2016 ONWSIAT 2583, *484/17*, 2017 ONWSIAT 1883, *2352/10*, 2011 ONWSIAT 1712 and *22/18*, 2018 ONWSIAT 266 all of which set out criteria for considering the issue of worker vs. independent operator. Mr. Bierstone submits that the direction provided by these judgements and decisions points strongly to the appropriate characterization of GM as a worker and not an independent operator.

(b) Mr. Wolf

[44] Mr. Wolf points out that the onus is on the Applicant to establish the requirements of section 28 of the *Act*, and submits that Mr. Bierstone has failed to do so.

[45] Mr. Wolf acknowledged that, given the circumstances, there is very little evidence from DP to rely on in determining GM's status. He points to the affidavit provided by DP at earlier stages of the civil action which, in Mr. Wolf's view, support's GM's position that he was working on the roofing project as a friend and not as a worker. Mr. Wolf also relies on GM's testimony at the hearing, as well has the content of his Examination for Discovery, which both confirm that he and DP had a longstanding friendship, and that it was on that basis, and not any contractual arrangement, that GM was helping with the roofing project. In Mr. Wolf's view, the degree of friendship is not a relevant consideration.

[46] Mr. Wolf submits that *Decision No. 1554/11R* is analogous to the situation in the current application. In that case, the Tribunal concluded that the relationship between the two individuals was one of friendship and not employment, even though the injured party may have received compensation for the work he was performing when the accident occurred. In Mr. Wolf's view, a similar approach should be following in this case. He submits that DP and GM never intended to create an employment relationship, and that the modest $100 per day GM was meant to receive for his work is appropriately characterized as a gratuity and not income.

[47] Mr. Wolf also points to DP's affidavit where he describes GM as a "partner" on the roofing project, and argues that this is inconsistent with characterizing GM as a worker.

[48] Turning to the issue of worker/independent operator status, Mr. Wolf submits that the fleeting nature of the job at issue in this application makes it difficult to apply the various factors listed in Board policy and past Tribunal decisions normally considered in making the type of determination. However, Mr. Wolf submits that the facts favour a finding that GM was an independent operator. He points out that the worker brought his own tools to the worksite, albeit

not the harness required for a roofing job, and that there is no evidence of a formal contract or any of the routine deductions from income normally associated with worker status. He also relies on the fact that DP did not contact the Board following the accident as evidence that neither he nor GM considered the accident to have occurred in the employment context.

[49] Mr. Wolf submits that EK should also be considered to be an independent operator and not a worker. He points out that EK owned his own business, with his own tools, vehicle and expertise. In Mr. Wolf's view, this lends support to his position that GM was also an independent operator, since both individuals were in the same relationship with DP on May 15, 2012 when the accident occurred.

(c) Mr. Bierstone's reply

[50] Mr. Bierstone disagrees with Mr. Wolf's position that the degree of friendship between the parties is not material. He points to the findings in *Decision No. 1554/11R*, which placed strong emphasis on the strength of the relationship between the two parties in finding that an employment relationship was not present. In contrast, although DP and GM may have had a historical friendship as high school students, they had no contact for at least 10 years until a short time before work on SS's roof replacement project began, and the bond between the two of them did not resemble the strong personal relationship described in *Decision No. 1554/11R*.

[51] Mr. Bierstone also points out that, although DP described GM as a partner in his affidavit, GM specifically denied any partnership arrangement during his Examination for Discovery and clearly indicated that he was working for an agreed-upon fee under DP's supervision.

[52] Finally, Mr. Bierstone points out that, although GM brought some of his own tools to the job, he did not have the required harness for roofing work, and was reliant on DP to provide it.

(ix) Analysis and findings

[53] I find that the requirements for characterizing GM as a "worker" are established on the evidence.

[54] As noted earlier, the *Act* defines a "worker" as "a person who has entered into or is employed under a contract of service". GM and Mr. Wolf maintain that GM was not "employed" and was not engaged with DP under "a contract of service", but rather he was simply helping DP as a favour based on their friendship. Mr. Wolf maintains that the reasoning in *Decision No. 1554/11R*, which led to the conclusion that an employment relationship did not exist, should be applied to the relationship between DP and GM in this case.

[55] Mr. Bierstone submits that the facts of the two situations are distinguishable. I agree.

[56] *Decision 1554/11R* sets out a description of the relationship between the two parties, and the Vice Chair's rationale for concluding that an employment relationship did not exist.

> Turning to the legal relationship between the parties, clearly, Mr. Ouellette [the injured party] could not be described as an independent contractor in any way, shape or form. He owned no tools, brought no special skills, but rather was willing to perform hard work as would any labourer at both his "real job" of concrete restoration, as well as when he was helping out his friend at Wrightway Farms. Whether he was feeding the cattle at no cost, with no monies being sought or expected for that task, or whether he was helping for some extra cash money that *might* be provided to him, or was fixing the hole on the roof on March 14, 2002 as a way to repay his friend's generosity for virtually gifting him a

> truck, Mr. Ouellette was a labourer. That does not mean, however, that he as an employee of Wrightway Farms or of [R.] Wright, but rather what I state is that he was not an independent contractor. There was nothing entrepreneurial about his activities.
>
> Can it be said that Mr. Ouellette was a "worker" of the applicants? It is very clear that the definition of "worker" in the Act is a broad one. Yet, in order for someone to be a worker, and the other party to be an employer, there must be an intention to create a relationship of employment. Usually, the creation of a relationship of employment, or some kind of commercial relationship including that of independent contractor and principle, is a given. Very few people willingly work for free, after all. Whether a labourer or a professional, or with a specialized skill to offer, one usually provides ones services in exchange for compensation. That is the essence of a commercial relationship, after all.
>
> Yet in this case, I find that the commercial relationship, if it existed at all, was not even a secondary consideration between Mr. Ouellette and Mr. Wright. The relationship, again, was one of friendship, involving good friends helping each other out. Mr. Wright performed many acts of kindness for his new and good friend, who he thought of in some way as a son, or a close relation. The families socialized together on at least one notable occasion, and I observe that New Year's Eve is not typically when employers and employees get together to celebrate, but rather is a time for close friends or family.
>
> Mr. Wright also understood the strained financial circumstances of his friend, and tried to throw him a few dollars here and there in exchange for chores. Mr. Wright did not want to offer or provide outright charity, as that might offend someone with a strong work ethic as Mr. Ouellette demonstrated. Yet allowing him to "work it off" would enable Mr. Ouellette to keep his dignity by providing something in return, through his lending a hand to Mr. Wright with farm chores.
>
> ...
>
> Accordingly, in this case, it is not a given that there existed a relationship of employment between these parties. Certainly there was no intention to establish an employment relationship, given that Mr. Wright never recorded amounts on the farm's accounts which were paid to Mr. Ouellette, and Mr. Ouellette just pocketed the additional cash money that he received, until the monies were in some murky way allocated toward the truck.
>
> Indeed, while the intention to create an employment relationship is important, in many cases the lack of intention is hardly fatal to a finding that a relationship of employment nevertheless was created and exists. Parties in these cases can demonstrate by their conduct that, while they may not have intended to create a relationship of employment, one nevertheless existed based upon the principles of commerce described above: someone providing a good or service in exchange for financial compensation. That could also lead to a conclusion that there was a relationship of independent contractor and principal, if someone had the requisite degree of entrepreneurship and independence. As indicated earlier in these reasons, however, there was no entrepreneurship demonstrated by Mr. Ouellette in these circumstances.

[57] While I accept that GM and DP had a historic friendship dating from their time in high school together, GM acknowledged in his testimony that the friendship had faded over time, and it was only a short time prior to the May 15, 2012 accident that they had reconnected. There is no evidence that they had developed any particular personal bond or that DP had approached GM to help with the roofing job out of any sense that GM was in need of support and kindness, as was the case between Mr. Wright and Mr. Ouellette. Rather, DP had made arrangements with SS to replace her roof, and needed someone to help him on short notice, and turned to GM.

[58] And, unlike the situation in *Decision No. 1554/11R*, GM has acknowledged that he entered into what can accurately be described as a commercial relationship with DP. DP offered

to pay him $100 per day to help with the roofing installation; GM accepted the offer; and the work began on May 14, 2012 on that basis. Mr. Wolf has argued that the $100 per day arrangement is more accurately characterized as a gratuity, however I find that $12.50 per hour is more than a gratuity and is reflective of a rate of pay (particularly when the payment is made on a cash and undeclared basis) that is consistent with what a labourer could reasonable expect to receive in 2012 for this type of work.

[59] Mr. Wolf also submits that DP and GM did not intend to create a commercial relationship. However, as the Vice Chair in *Decision No. 1554/11R* points out, while the intention to create an employment relationship is important, "the lack of intention is hardly fatal to a finding that a relationship of employment nevertheless was created and exists". The parties' conduct must be considered and, in my view, the verbal agreement between DP and GM, which consisted of the provision of a service by GM in return for financial compensation from PD, is sufficient to establish an employment relationship between the two parties in this case.

[60] Accordingly, I find that GM is a "worker" as defined in section 2(1) of the *Act*.

[61] Given this finding, it is clear that the accident on May 15, 2012 occurred in the course of GM's employment. The time and place requirements of OPM Document No. 15-02-02 are established – the accident occurred at the job site soon after the start of the normal shift on May 15. And GM suffered his injury while engaged in the performance of his work-related duties that day.

[62] The only remaining issue is whether GM was a "worker" or an "independent operator" at the time of the workplace accident.

[63] The Vice Chair in *Decision No. 2190/16* sets out what I consider to be a clear and comprehensive outline of the approach followed by the Tribunal in determining the distinction between a worker and an independent operator, taking into account past decisions as well as the framework set out by the Supreme Court of Canada in the *Sagaz* judgement. It reads, in part:

> The Board has developed policy to assist decision-makers in making a determination whether a person is a worker or an independent contractor. *Operational Policy Manual* (OPM) Document No. 12-02-01 "Workers and Independent Operators" applies a legal test known as the "organizational test" in deciding whether a person should be treated as an "independent operator" or "worker".
>
> In *Decision No. 1460/02*, the Panel noted that the Tribunal is not required to apply Board policy in right to sue applications, as section 126 of the Act refers to appeals, not applications. The Panel, however, also noted that it is important to maintain consistency with findings that might have been made had the case come to the Tribunal by way of appeal from a decision regarding entitlement. Therefore, Board policy continues to be relevant in right to sue applications, see *Decision No. 755/02*.
>
> The applicant submits that I should apply the "organization test" to this matter. Mr. Heeny also noted that I should apply the Board questionnaire used to determine whether a person is a worker or independent operator in the trucking industry. The Board has adopted the use of questionnaires for particular industries, see OPM Document No. 12-02-01. The Tribunal has considered the questionnaire where appropriate, see *Decision No. 389/06I3*.
>
> The "organizational test" asks whether an individual is employed as part of another business, if work is done as an integral part of that business, or whether that work is only an accessory to that business. Factors to consider include:

- an examination of the degree of control that the individual is subject to in doing the work;
- ownership of tools and/or equipment;
- the opportunity that the individual has to make a profit or suffer a loss in doing the work; and,
- whether the person is part of the employer's organization, or operating his or her own separate business.

I note, however, most Tribunal cases have applied the "business reality test" (also called the "hybrid test") to make the same determination. See *Decision No. 921/89*. In *Blue Line Taxi Co. v. Deek*, [2002] O.J. No. 2036, the Divisional Court upheld *Decision No. 934/98*. In that case, the Tribunal made use of the organizational test mandated in the Board policy. The majority also considered the business reality test. The majority described the latter test as broad and flexible, and stated that it is essentially the same assessment as the organizational test.

The Tribunal's business reality test also takes a broad view, and looks to the substance of the relationship, rather than the form. See *Decision No. 1443/06*. The Tribunal considers a number of factors, including:

- whether the individual is in a business sufficiently independent that he or she bears the costs and risks of compensation;
- ownership of equipment;
- evidence of control;
- method of payment;
- business indicia;
- the degree of integration;
- furnishing of equipment;
- chance of profit or loss;
- the parties' intentions;
- business or government documents;
- the economic or business market;
- the influence of legislative and licensing requirements; and,
- whether a person structures his or her affairs for various purposes as if he or she is an independent operator.

See *Decisions No. 921/89, 543/93, 1097/05* and *2352/10*. Note also *Decisions No. 2224/06* and *1785/04* which have noted that the Tribunal's application of the above multi-factorial determination process is consistent with the Supreme Court of Canada decision in *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.* (2001) 204 DLR (4th) (SCC). *Sagaz* provided that "the central question to determining if a person is an employee or an independent contractor, 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, they outlined a number of factors very similar to the above factors, and held that the factors constitute a non-exhaustive list, and that 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.

As discussed in *Decision No. 2335/13*, no one factor is determinative and it is the substance of relationship, rather than form, which determines whether a "worker" or an

> "independent operator". *Decision No. 1443/06* noted that the name applied to the test, whether "integration", "organizational" or "business reality" is not important. The question to be asked is "what is the true nature of the service relationship between the parties, having regard to all relevant factors impacting the relationship?" This flexible approach is consistent with the multifactorial approach discussed in *Sagaz*.

[64] Applying this approach, and considering the substance of the relationship between GM and DP, I find that GM was not operating as an independent operator on May 15, 2012 when he experienced the workplace accident.

[65] I have reached this conclusion for a number of reasons:

- GM does not own or operate an independent business. He normally works under an employment arrangement in the construction industry and was temporarily laid off from work at the time of the accident.
- GM does not own the tools of the roofing trade. He was reliant on DP to provide the necessary safety equipment, and the fact that he fell from the roof because he did not have the proper roofing harness is evidence that he did not have the independent ability to perform roofing installation duties.
- GM's manner of working has no entrepreneurial component. He does not solicit work in the roofing industry, he has no clients or customers acquired by him independently, and he has acknowledged that he had never previously worked as a roofer.
- DP set the hours of work on the project, and GM has acknowledged that he worked under DP's supervision.
- GM was required to provide the work personally.
- GM was not certified as a roofer, nor did he hold himself out as having an independent capacity to obtain roofing contracts.
- GM has no office or phone number, and does not list a roofing business in business directories or solicit business through advertising.
- GM was not paid directly by SS for work on the roofing project. DP was paid for all work on the project, and he in turn paid GM based on the terms of their verbal agreement.

[66] The Vice Chair in *Decision No. 22/18* dealt with a similar fact situation, and reached the conclusion in that case that the injured individual was a worker and not an independent operator. He stated:

> Based on the materials filed in this application, I find that the respondent was a worker in the course of employment at the time of the November 2012 incident. In this regard, I rely on the evidence that the worker acknowledged that he was hired to personally perform construction work as a labourer on an hourly basis; he was not responsible for supplying his own tools; he was supervised by the applicant; and he was not engaged in obtaining contracts or jobs on his own behalf. While I acknowledge that the duration of his employment was day-to-day and there was no indication it would be on anything but on a casual basis, I find that the balance of evidence supports the respondent considered himself a casual construction labour for the applicant for the purposes of the applicant's industry.

[67] I find that the reasoning in this case also applies to the particular circumstances present in the current application.

[68] As the Supreme Court of Canada set out in the *Sagaz* judgement, the individual facts and circumstances of each case must be taken into account in determining worker/independent operator status, but "the central question to determining if a person is an employee or an independent contractor, is whether the person who has been engaged to perform the services is performing them as a person in business on his own account". On the facts and circumstances in this application, and for reasons I have outlined, I find that the standard for independent operator status set out by *Sagaz* and applied on previous Tribunal decisions has not been met. GM is properly considered to be worker, as that term is defined in the *Act*.

[69] In summary, I find:

- GM was a Schedule 1 worker who was in the course of employment at the time of the May 15, 2021 workplace accident.
- DP and Allan Star Roofing Ltd. were both Schedule 1 employers.
- GM was a "worker" and not an "independent operator".

[70] The application is allowed.

[71] GM is barred from proceeding with his civil action against EK and Allan Star Roofing by virtue of sections 28(1) and 31(1)(a) of the Act.

[72] GM's minor daughter, Sierra MacPherson, is similarly barred from proceeding with the civil action by virtue of section 27(2) of the Act.

[73] GM was a Schedule 1 worker of DP, a Schedule 1 employer and, as such, is entitled under section 31(1)(1)(c) of the *Act* to claim compensation benefits for injuries sustained in the May 15, 2012 accident.

[74] Pursuant to section 29(4) of the *Act*, no damages, contribution, or indemnity for the amount determined under subsection 29(3) to be caused by a person described in that subsection is recoverable in the civil action.

DISPOSITION

[75] The Application is allowed.

[76] George MacPherson was a worker in the course of his employment at the time of the workplace accident on May 15, 2012.

[77] George MacPherson was a "worker" and not an "independent operator" at the time of the workplace accident on May 15, 2012.

[78] The civil action brought in the Ontario Superior Court of Justice File #CV-498523 by George MacPherson on behalf of himself and his minor daughter, Sienna MacPherson is removed by sections 28(1) 31(1) and 27(2) of the *Workplace Safety and Insurance Act* against Ebrahim Khezri and Allan Star Roofing Ltd.

[79] George MacPherson was a Schedule 1 worker of David Paquette, a Schedule 1 employer and, as such, is entitled under section 31(1)(1)(c) of the *Workplace Safety and Insurance Act* to claim compensation benefits for injuries sustained in the May 15, 2012 accident.

[80] Pursuant to section 29(4) of the *Workplace Safety and Insurance Act*, no damages, contribution, or indemnity for the amount determined under subsection 29(3) to be caused by a person described in that subsection is recoverable in the civil action.

DATED: October 13, 2022

SIGNED: T. Mitchinson