Docket: 2014-3391(EI)

BETWEEN:

MARK ROBERTS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MICHAEL LIBOURKINE,

Intervenor.

Appeal heard on May 5, 2015, at Toronto, Ontario

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Leonard Elias
For the Intervenor:	The Intervenor himself

JUDGMENT

The appeal is dismissed and the decision of the Minister of National Revenue, dated June 17, 2013, on an appeal under the *Employment Insurance Act*, is confirmed in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 10th day of June 2015.

"D.W. Rowe"

Rowe D.J.

Citation: 2015 TCC 142
Date: 20150610
Docket: 2014-3391(EI)

BETWEEN:

MARK ROBERTS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

MICHAEL LIBOURKINE,

Intervenor.

REASONS FOR JUDGMENT

Rowe D.J.

[1] The appellant, Mark Roberts ("Roberts"), appealed from a decision issued by the Minister of National Revenue (the "Minister") on June 17, 2013 pursuant to the *Employment Insurance Act* (the "*Act*") wherein the Minister decided his employment with the Intervenor, Michael Libourkine ("Libourkine" or "payor"), was not insurable because the requirements of a contract of service were not met and therefore an employer-employee relationship did not exist during the relevant period from July 24, 2011 to September 10, 2012.

[2] Roberts testified he was hired by Libourkine after an interview in June, 2009 and provided his services thereafter until September 11, 2012 (one day later than the date in the decision issued by the Minister). Roberts stated he had filed an Answer to Reply of Notice of Appeal ("Answer") dated February 21, 2015 and that this document contained details of this working relationship and he wished to use it in his testimony by reading it verbatim. Permission was granted and Roberts read from the Answer as follows:

[…]

I did work for Michael Libourkine and Toronto Mutual Group in a master servant relationship acting under the direction of Michael Libourkine. He had total degree of control. He told me what to do and how to do it. I was never free to decide how the work should be done. He told me to use his office phone, his call lists, his chair and desk and office. He told me when to work and how to perform the job. I did not supply any tools, was not free to determine when to start work nor the best way to perform the job. I was paid an hourly wage. He owned all of the tools used and ran the risk of loss from the work performed. Our contract involves me agreeing to generally serve him and TMG. He supervised and directed me. I entered into a general service relationship with them I was not in business on my own account. I did not provide any of my own equipment in doing the work. They had complete control. I did not hire my own helpers nor was I permitted to do so. I held absolutely no degree of financial risk, no responsibility for investment and management whatsoever. My task was to telemarket for an hourly wage set by Michael Libourkine and TMG. There was no opportunity for profit by me in doing this. I did not negotiate rates of pay. They assigned me to work at particular times, on particular days and in specific geographical areas. I was not permitted to request such particulars. I was required by them to work a minimum of 3 hours per shift 6 days per week. They made me be consistently available during my shifts. Clients could not call me directly they had to call the dispatcher. I was required by Michael Libourkine to report to him at the end of every shift I was given security access cards and keys to the offices by them. I had to cancel his appointments set by me when he did not feel like going to them and I would not be paid bonuses for them but merely the hourly wage when this transpired. I was an integral part of the organization for Michael Libourkine and TMG. Their job was to meet potential clients my job was to telemarket Canada Life`s Money Back Mortgage Insurance Plan and to explain that I was calling from Canada Life (in addition to arranging for them to do that subject to group control from them) I was not free to offer my services to others and did not bear the risks of profit and loss when work was not completed in a timely manner. I was required by them to attend employee staff meetings and adhere to instructions provided at those. I was given a commitment by them to be paid an hourly rate of pay and then later an additional bonus arrangement for additional pay for setting appointments no notice was given for termination there was not just cause for termination. I was an employee employed in insurable employment while working for the payer the payer was involved in a partnership called Toronto Mutual Group. He was a senior partner and director of sales. I never performed my work from a home office. I worked from the Toronto Mutual Group offices consistently from June 22,2009 until September 11,2012 I had their permission and instructions to do so. I performed telemarketing services for and received remuneration from TMG and Michael Libourkine

TERMS AND CONDITIONS

I never provided on and off services to TMG nor to Michael Libourkine. I worked 6 consecutive days per week from June 22,2009 until September 11,2012 I did not determine my own hours of work. No flexibility was provided for my hours of work. I could not come and go to work as pleased I did not take time off work whenever I wanted. I was required to inform the payer if I was going to be absent from work. I was required to obtain the payers approval before taking certain actions. I was required to report to the payer daily. I was not free to accept or decline work. I did not find my own leads using the internet or telephone books. Michael Libourkine provided me with calling lists and I was supervised while at work in their offices. I was required to provide my services exclusively to the payer who provided me with a desk and telephone and a work space and office from June 22,2009 until September 11,2012 I never originally nor at any point in time provided an office nor a fully equipped office nor a cell phone. I was not responsible for any maintenance nor repairs of tools or equipment.
I was required to perform my services personally. I could not hire assistants or replacements. I was not responsible for hiring and paying assistants or replacements. If I did not book any appointments I was still paid $14.00 per hour worked. The payer paid a bonus in addition to my hourly pay when a potential client was seen only(not when making a certain number of appointments) I was not required to complete invoices in order to be paid. Time sheets were on TMG letterhead. I did not determine if work needed to be redone nor did I cover the related costs. I did not incur expenses in the performance of my work. The payer nor did I consider myself to be self employed. I never worked for another insurance broker from TMG nor provided telemarketing services to them as an independent contractor. I did not have a business for Disc Jockey Services ever. After Michael Libourkine and TMG fired me in the year 2012 I had cards printed for my hobby as a disc jockey which never was I in the business doing.

GROUNDS RELIED ON and RELIEF SOUGHT

I submit that I was insured in insurable employment with the payer and that there was a contract of services between the payer and myself. I respectfully request that the decision be reversed and that my appeal be approved.

INTENTION OF THE PARTIES/LEVEL OF CONTROL

I believed and stated during the appeal that I was hired as an employee for the period under review as well as the years before. I was not free to use my own methods to find clients using telephone books or internet searches. I did not determine my own schedule and could not have performed the work from home ever. I was in fact supervised and could not use any means that I saw fit to accomplish my tasks. Michael Libourkine trained me for the job. In the first year of employment I was paid bonuses set by the payer on confirmed client appointments in addition to my hourly rate of pay. I was always given an hourly rate of pay from June 22,2009 through to September 11,2012 I did not require a phone book to perform my duties. I did not use my cell phone nor any phone that

was owned by me at the place that the payer practiced his business. I could not have performed my work from anywhere using any phone equipment other than at TMG'S office and on their business telephone and business telephone lines.

SUBCONTRACTING WORK/HIRING ASSISTANTS

I was not in a position that allowed me to hire helpers and assistants at my own discretion. I was never allowed to decide my rate of pay. The payer insisted that I specifically perform the work and did not permit assistance to be used by others.

DEGREE OF FINANCIAL RISK

I incurred no expense in the performance of my work and was guaranteed income in the form of an hourly wage always. I was and would have been paid by the payer if I did not book and confirm client appointments for the payer.

DEGREE OF RESPONSIBILITY FOR INVESTMENT & MANAGEMENT

I was an important part of the organization for TMG and Michael Libourkine I worked for them exclusively and was not permitted to have worked for other payers nor did I. I was not entitled to subcontract my services nor able to generate a profit in excess of revenues. I was not permitted to determine my own schedule. The payer paid my an hourly wage per hour worked and in addition also bonuses on confirmed appointment(this was in the first year)in all other years I was paid an hourly rate of pay per hour worked plus bonuses on every person seen by the payer. The payer provided all the client information, call lists etc.

OTHER RELEVANT FACTORS

There was a verbal contract between the parties and I did not have any flexibility nor opportunity for profit.

[…]

[3] In additional testimony, Roberts stated that as of July 24, 2011, payments in the form of cheques were issued to him under the name of Libourkine whereas earlier the cheques had been in the names of Libourkine and Toronto Mutual Group ("TMG"). Roberts stated there was a further change in the manner of payment in that no bonus was paid unless Libourkine met with a potential client pursuant to an appointment that had been booked by him and although he did not agree to it, was informed by Libourkine this was the new system. Roberts re-iterated that his services, at that point, were remunerated at the rate of $14 per hour plus bonuses for booking successful meetings with prospective clients and that he had requested Libourkine to re-institute the former method where payment was made merely for booking an appointment, even though it did not result in a

meeting between Libourkine and the prospect. Roberts stated he requested an increase to his base hourly salary to compensate for the change in payment for booking appointments. He stated he had worked in retail and as a telemarketer and was familiar with statements issued by a payor showing the amount earned and the various deductions from the gross pay. He stated he had asked Libourkine for this information but it was not received. Roberts filed, as Exhibit A-1, a photocopy of a cheque dated 2011-12-23 in the sum of $720.00 and referred to the memo line and the handwritten insertion, "5 days + 1 App + 500 Bonus." He said the reference to the bonus was incorrect because the gross amount also included his entitlement to vacation pay. Roberts stated that for the relevant period, he filed his income tax returns and reported his earnings as employment income. With respect to starting to work for Libourkine prior to the relevant period, Roberts stated he had responded to an advertisement by TMG in a Toronto daily newspaper inviting applications for a telemarketing position. Initially, Roberts thought TMG was a corporation, but then met with Libourkine who indicated he was a senior partner in TMG. During the entire working relationship from June 20, 2009 to September 10, 2012, Roberts stated he was engaged in telemarketing the same product, namely Canada Life Money Back Mortgage Insurance Plan and made his calls to prospective customers using a prepared script. He worked 6 p.m. to 9 p.m. Monday through Saturday for a total of 18 hours a week and asserted he was always paid an hourly wage plus bonuses depending on the system in place. He did not work for any other entity during the relevant period and had not worked as a self-employed telemarketer in the past, as assumed by the Minister at paragraph 10(xx) of the Reply to the Notice of Appeal ("Reply"), nor at any other time. The telemarketing jobs varied in length from 2 weeks to 3 months depending on the nature of the product or service being offered and he had provided his services to 15 or 20 business entities and had always been an employee with the usual deductions from his pay cheques.

[4] Roberts was cross-examined by counsel for the respondent who referred him to the memo line on the cheque - Exhibit A-1 – dated December 23, 2011 and suggested the major portion of the amount was attributable to a Christmas bonus. Roberts replied that was not correct and while the amount in excess of 5 days' pay and a bonus for one appointment may not be equal to 4 percent vacation pay based on earnings for that year, it was still paid by Libourkine and received as vacation pay entitlement. Counsel suggested the appellant's earnings for that pay period was in the sum of $220 based on a payment of $10 for each appointment booked and kept by the persons contacted. Roberts denied that was the basis of his remuneration and re-iterated that he was paid an hourly wage of $14 in 2011, although his initial wage was only $10 per hour in 2009 when he began working

with Libourkine. Roberts stated he answered an advertisement in the Toronto Star and met with Libourkine who advised that he and his business partner were both self-employed individuals. Roberts stated he was paid his normal 3 hours' pay on any statutory holiday when he did not work. Counsel referred him to the reference near the bottom of his Answer – as read in as part of his testimony – where he asserted he had never performed any work from a home office and had worked from TMG offices consistently from June 22, 2009 until September 11, 2012 and had received permission and instructions from Libourkine to do so. Roberts also asserted that his payments were initially from both Libourkine and TMG. Roberts denied the suggestion by counsel that he had asked Libourkine if he could work from the TMG office so he could use their telephones to call long distance when required. Counsel referred Roberts to a bundle of three documents – of which two were entitled "Invoice" in the upper right-hand corner – and a photocopy of a cheque on the account of Libourkine dated 2102-07-02 in the sum of $420. (The bundle of three documents was entered for identification purposes only). Roberts acknowledged he wrote his name in the line at the upper left-hand corner of the first invoice for work done on the days from 21-06-2012 to 23-06-2012, inclusive, however, the printed word "Invoice" was not on the form when he did so. With respect to the invoice on the second page of the bundle, Roberts agreed the entry of his name on the appropriate line "appeared to be" in his handwriting, but the column headed "Hours Worked" was missing and the invoice he saw, and on which he probably entered his name, had been printed on TMG letterhead. Counsel referred Roberts to the Notice of Appeal and the handwriting therein and suggested it matched that on the two invoices referred to earlier. Roberts stated that the entry on the invoice for days worked from 25-06-2012 to 29-06-2012 (second page of the bundle) – referring to "30 appointments x 14 = 420" was not written by him entirely although he acknowledged he had written the words "30 appointments" but not the subsequent calculation "x 14 = 420". Roberts stated that during this particular pay period, he worked 24 hours and had booked six appointments which had been kept by prospective clients of Libourkine and that the payment of $420 was based on a combination of his hourly wage of $14 plus bonuses. During his working relationship with Libourkine, Roberts stated he attended one staff meeting at the TMG office at which Andy Zwolinski ("Zwolinski") was present but met with Libourkine quite often. Roberts re-iterated he had requested T-4 slips from Libourkine which were not received. However, he continued working because he needed the income and later reported the absence of the T-4 slips to Service Canada. In the course of providing telemarketing services prior to his working relationship with the payor, the appellant maintained he had always received T-4 slips. He denied the suggestion of counsel that he had never been provided with a script to use when calling people about the Canada Life product offered through

Libourkine and stated all telemarketers are instructed to adhere to a script when explaining the product being promoted. Counsel referred Roberts to a photocopy of the front page of a brochure pertaining to the services and products offered by TMG. Roberts acknowledged he had seen this material at the front of the office but had not received a copy directly. He stated he had been handed a typed script to use during calls and a checklist to use when booking an appointment. When making telephone calls between 6 p.m. and 9 p.m. from the TMG office, he often saw Zwolinski. Roberts stated he and Libourkine sometimes worked from the same small office – equipped with two desks - and it was noisy when both were on the telephone and that the entire TMG office was not large, perhaps twice the size of the courtroom. Roberts stated he never worked in a cubicle as it was distracting and had informed Libourkine a quieter environment was required. Roberts stated he had been instructed by the payor to work only from 6 p.m. to 9 p.m. and even though additional hours were requested, none were forthcoming. During the relevant period or perhaps earlier, TMG had moved its offices to different suites within the same building. Roberts stated he used a telephone in the TMG office to call long distance to Oshawa, Barrie and London or other places outside the Greater Toronto Area (“GTA”). He stated he used numbers provided to him on a call list and did not use his personal cell phone as the plan he had was limited to usage from 8 a.m. to 8 p.m. and extra time was billed at 50 cents per minute, which was excessive in comparison to his income. Roberts stated Libourkine would inform him when an appointment had been kept and that the appropriate bonus amount in effect at the time would be paid. Roberts stated Zwolinski gave him specific instructions not to call individuals who had complained about having been approached by telephone and repeated that “of course there were call lists” provided by the payor and that the Minister had made this assumption at subparagraph 10(x) of the Reply. If a potential customer wanted to return a call, they were given a number that was answered by Sandy, a receptionist that he considered to function as a dispatcher. On occasion, a response was provided by voice mail.

[5] Roberts was cross-examined by Libourkine, who referred to his testimony at a hearing before the Ontario Labour Relations Board resulting in a decision dated March 6, 2015. In said hearing, Roberts had testified he was entitled to the sum of $1,336 in unpaid vacation pay, including pay for statutory holidays. Roberts replied that he had intended to say that this unpaid amount represented the balance of vacation pay owing over the entire three-year period since commencing his working relationship in 2009 and that he had received partial amounts now and then attributable to vacation pay. Libourkine asked Roberts whether he could produce any cheque or other proof during that period – including the relevant

period – that had any reference to "vacation pay". Roberts agreed no cheque had ever been issued to him with that notation. Libourkine referred Roberts to the two invoices which indicated eight days worked for a total of 24 hours, which at $14 an hour – as alleged – would amount to $336, whereas the cheque was for $420. Libourkine advised Roberts that if the difference was to be attributable to supplemental pay for appointments booked – and kept – that would equal 8.4 such events at $10 each which did not make sense. Roberts repeated that he had to use TMG telephone lines to make long-distance calls and that there were two desks in Libourkine's office and he had worked from there to avoid distraction from calls made by other TMG telemarketers or conversation among themselves.

[6] Counsel for the respondent advised that the appellant had filed income tax returns on the basis of employment during the relevant period and not as a self-employed person.

[7] The appellant closed his case subject to rebuttal, if permitted.

[8] Libourkine was called to testify by counsel for the respondent. Libourkine stated he lived in Toronto and was a salesperson and had been in business for 15 years. He had a business relationship with TMG and carried on his activity as a broker by acquiring leads from various sources that could produce prospective customers for various products offered within the insurance industry including RRSPs, RRIFs, medical insurance, other health insurance and long-term care coverage. One of the methods of soliciting leads is to hire telemarketers and to that end he placed an ad on Kijiji - an Internet website – and not in the Toronto Star newspaper as alleged by Roberts. Libourkine stated he received numerous responses to the posting of the position on Kijiji including one from Roberts whom he interviewed. During their discussion, he became aware Roberts had worked as a telemarketer for a friend who had been a broker with Clarica – an insurance company – and later Libourkine called that individual for a reference. Libourkine stated there is a standard business practice within the insurance industry where various products and services are offered through a broker and that a telemarketer is remunerated only on the basis of procuring an appointment – a lead - with people who are interested. The agreement with Roberts was based on him using the telephone to secure potential customers who were willing to meet with Libourkine or – if required – another broker working out of the TMG office. Libourkine had the right of first refusal on any leads produced by Roberts but could pass one or more on to another broker in accordance with a list maintained at TMG. If another broker at TMG met with the prospective customer, Roberts would still be paid – by Libourkine - for the booking, who would share in any commission produced by his

alternate if a sale had been made. Libourkine stated it made no economic sense to pay a telemarketer an hourly rate as income generated by a broker depends on booked appointments and subsequent meetings with the prospects that may result in sales of a product or service that entitles the broker to a commission. Libourkine stated that in his experience, telemarketers providing service to brokers within the insurance industry work from their own home or other location but Roberts wanted to work from the TMG office because he had advised that his home environment was not conducive to business use. Libourkine stated he passed on that request to Zwolinski, who approved it. Libourkine stated that with respect to Roberts' allegation that he worked from a desk in Libourkine's office, that was not correct. Instead, no one – except the building manager in the event of an emergency - had access to that office due to licensing, regulatory and bonding requirements and the door was locked by Libourkine even if he left for a brief period for some purpose within the TMG office space or the building. The filing cabinets are full of extremely confidential information concerning policyholders and their families. Libourkine stated there was never a second desk in his office although there were two desks in another space at TMG. Libourkine did not care when calls were made by Roberts nor about the number of hours worked. Successful leads were generated in accordance with the "numbers game" because more calls will result in more appointments which are capable of being transformed into sales. Libourkine stated there were occasions when Roberts was absent for periods of two weeks or more. In Libourkine's experience, telemarketers providing services to brokers use various methods, including searches through Google, or the white pages of a telephone directory or other methods. He would not attempt to sell a product or service to people living in outlying areas, such as Barrie or London, as the travel and time involved would not be profitable compared to any potential commission revenue. Libourkine stated he did not know how Roberts produced the leads and was not provided with any call list, as no such document existed within his own business operation or at TMG. There was no script provided to Roberts nor to any other telemarketer providing services to brokers working from TMG premises, as the conversation with the prospect will dictate the type of product that person could use, whether an education policy for young children or health insurance or long-term care for a senior. Roberts had been retained as a telemarketer based on his experience. Libourkine identified a photocopy – Exhibit R-1 – of the TMG brochure referred to earlier during the cross-examination of Roberts – which explained the type of products and services sold by various insurance companies and available through brokers. Libourkine stated that for a while, cheques payable to Roberts or for other business purposes had the name TMG printed thereon, together with his own, but the account was solely in his name. TMG is owned by Zwolinski and the space is leased by him to brokers who are charged a fee for their

offices and other services. Libourkine was referred to the bundle of documents, including the two invoices referred to earlier during the cross-examination of Roberts. He identified them as invoices he had received from Roberts and stated they had not been altered and that the handwriting thereon was that of the appellant. The bundle of three documents was entered as Exhibit R-2. Libourkine stated he added the number of confirmed appointments and multiplied the total by 14 to determine the compensation payable to Roberts. The practice followed was for Roberts to call the prospect the day before the appointment to confirm it and at least 90 percent of the time a meeting was held as scheduled. On those occasions when the client was not met, Roberts would not be paid $14 but could re-book the appointment and receive payment if it resulted in a meeting. Libourkine recalled there were a few occasions – less than 10 percent of total - when Roberts had been paid for a missed appointment and that amount was then deducted from a payment for a subsequent pay period. Libourkine stated he had not used a TMG invoice at any time as the cheques paid to Roberts – and cashed – were sufficient for his accountant to track business costs. With respect to the cheque dated 2011-12-23 – Exhibit A-1 – Libourkine stated Roberts had not earned much money that month and it was just two days before Christmas so the amount paid included a bonus that was not based on any vacation pay or other entitlement and that the pay structure had been the same throughout the entire period – beginning in June, 2009 – that Roberts had provided his telemarketer services and had never included any vacation pay or pay for statutory holidays. Although the compensation for booking a successful appointment increased over the years from $10 to $14, there was no other remuneration paid. There were four or five other telemarketers at the TMG office who had longstanding working relationships with various brokers operating within the TMG business model and they were older people who worked from time to time and earned between $20 and $50 a week under circumstances that were often more consistent with a social outing. Libourkine stated that in his experience, even when the services of a telemarketing entity are retained, that payment is based on confirmed appointments. There was no receptionist or dispatcher at TMG and Roberts gave prospective clients Libourkine’s cell phone number if needed. TMG had a website that could be accessed by interested parties.

[9] Libourkine was cross-examined by Roberts. He denied Roberts had been provided with keys to his office, although a pass card had been issued so he could access the 9th floor where the TMG office was located. The advertisement seeking the services of a telemarketer had not been placed in the Toronto Star because of the cost, whereas a listing on Kijiji was free. Libourkine denied Roberts had been provided with a call list but had suggested Roberts should seek customers living in areas close to Libourkine’s residence, both as a matter of convenience and to

reduce travel costs and the time expended in comparison with potential revenue that could be generated from the sale of a particular product or service. Sometimes, it required three or four visits to a client before a sale was concluded.

[10] Andy Zwolinski was called to the stand by counsel for the respondent. He testified he was the sole shareholder of The Mutual Group Inc. referred to herein as TMG. All brokers with a working relationship with TMG are independent brokers who carry on business by selling products and services provided by various insurance companies and earn income from commissions on premiums and bonuses when applicable. Brokers obtain clients in various ways, including personal visits to corporate clients and by using the services of telemarketers. TMG does not have a staff and the person identified earlier in testimony as Sandy was not an employee but worked as a telemarketer and had provided services to three different brokers over many years. Any administrative services required by TMG were performed by an independent outside administrator. Zwolinski stated his practice is to inform brokers he wants to meet with a telemarketer prior to being hired and would have followed this course prior to Libourkine obtaining the services of Roberts and, during the meeting, would have provided Roberts with the pamphlet explaining the products and services available through brokers associated with TMG. Zwolinski stated he knew Roberts had worked – at some point between 2002 and 2004 - as a telemarketer for a broker who was selling products offered by Clarica. There were no scripts provided to any telemarketer working from the TMG office and the only suggestions he made to the brokers was that their telemarketers should not call after 9 p.m. or on weekends, but all brokers renting space from TMG were independent and could choose their own methods of operation. Zwolinski stated it makes business sense to pay telemarketers on the basis of appointments kept, which provides a broker with the opportunity to make a sale. He is familiar with 80 or 90 brokers and 10 percent of them do 90 percent of the business and many operate from their home. Zwolinski confirmed he permitted Roberts to use an available cubicle at TMG to make calls from 6 p.m. to 9 p.m., but was not there often when Roberts was working because his son was involved in a sport activity which occupied a lot of time in the evenings. Zwolinski confirmed there is a requirement that “tight security” protocols are followed with respect to the offices of brokers and while there is no direct supervision, someone working in TMG space is always responsible to lock up the premises and to ensure the office of each broker is locked. Zwolinski stated that in his 31-years’ experience in the insurance industry, he has not known any telemarketer to have provided services to any broker as an employee.

[11] In cross-examination by Roberts, Zwolinski repeated that there was no reason to instruct brokers and he definitely did not do so with respect to any telemarketers.

[12] Counsel for the respondent advised that the respondent did not rely on the assumption, contained at subparagraph 10(hh) of the Reply, that the appellant was paid $14.00 per hour and that it had been inserted based on erroneous information received at an earlier point in the overall process. Counsel advised the case for the respondent was closed.

[13] Roberts was permitted to testify in rebuttal and re-iterated that Libourkine had provided him with keys to his private office and that the normal practice within the telemarketing business is to be paid an hourly wage and that he had received payment on that basis when providing services to the broker associated with Clarica. He denied having worked from home and had only worked from the TMG premises since he began providing telemarketing services to Libourkine in 2009.

[14] The appellant closed his case.

[15] The appellant submitted his evidence was clear and supported his contention that he had been an employee of Libourkine during the relevant period and earlier. He submitted he had not acted as an independent contractor and had reported earnings as employment income during the taxation years pertaining to the relevant period.

[16] Counsel for the respondent submitted the evidence adduced on behalf of the respondent had demonstrated a lack of control and supervision, as Libourkine was concerned only with the result, which was a successful meeting with a prospect flowing from a confirmed appointment arranged by Roberts. Counsel acknowledged there were no tools of consequence provided or needed, other than a telephone, and that Roberts had requested permission to use TMG office space and telephone lines. With respect to potential for profit, the revenue earned by the appellant was directly related to his efforts and his own choice of methods to make enough calls so appointments could be made whereby Libourkine – as broker – had the opportunity to make a sale and earn revenue. Counsel submitted Roberts was aware of the nature of the services he was providing and did so as an independent contractor, utilizing his own skill and experience. With respect to the handwriting on the invoice – page 2 of Exhibit A-2 – it was obvious the handwritten portions and the notation "30 appointments x 14 = 420" were in the appellant's

handwriting, as borne out by a comparison with the contents of his Notice of Appeal. Counsel submitted that the evidence adduced by the appellant had not demonstrated that the decision of the Minister was wrong and that it should be confirmed.

[17] The pertinent definition of insurable employment under the *Act* for the purposes of this appeal is set out in paragraph 5(1)(*a*) of that legislation, which reads as follows:

> **5.(1) Types of insurable employment** - Subject to subsection (2), insurable employment is
>
> > (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
> >
> > (emphasis added)

[18] I have added the emphasis because although it was not raised in this appeal, there is often the mistaken belief by both parties to a working relationship that remuneration in the form of commission or piecework or other system of payment including bonuses will – without more – confer the status of independent contractor on the provider of the service.

[19] The Supreme Court of Canada in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983 [*Sagaz*] dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The judgment of the Court was delivered by Major J., who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan J.A. in *Wiebe Door Services Ltd. v Canada (Minister of National Revenue - MNR)*, [1986] 3 FC 553 and the reference therein to the organization test of Lord Denning – and to the synthesis of Cooke J. in *Market Investigations, Ltd. v Minister of Social Security*, [1968] 3 All ER 732 - Major J. at paragraphs 47 and 48 of his judgment stated:

> 47. Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a

persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

48. It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[20] In the case of *1392644 Ontario Inc. o/a Connor Homes v Canada (Minister of National Revenue, MNR),* 2013 FCA 85, [2013] FCJ No. 327 (QL) [*Connor Homes*], the Federal Court of Appeal considered the manner in which the analysis should proceed, which is that the intent of the parties should be ascertained before commencing the *Wiebe/Sagaz* analysis. The Court states the following in explaining how to conduct the analysis:

38. Consequently, *Wolf* and *Royal Winnipeg Ballet* set out a two step process of inquiry that is used to assist in addressing the central question, as established in *Sagaz* and *Wiebe Door*, which is to determine whether the individual is performing or not the services as his own business on his own account.

39. Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.

40. The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366, at para. 9, "it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties [*sic*] intent as well as the terms of the contract may also be taken into account since they colors [*sic*] the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, i.e [*sic*]

> whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.

[21] In the within appeal, it is clear neither Roberts nor Libourkine discussed the status to be accorded to the provision of services by Roberts. Libourkine testified that it was apparent, not only to him but also to Roberts, that the nature of the service provided within the context of the insurance industry was that the compensation would be based on results, namely leads culminating in a meeting between prospective customers and Libourkine. It was his understanding that Roberts – as an experienced telemarketer generally and specifically having provided his services to Clarica – an insurance company operating in Toronto – was aware he was free to utilize his own methods and to work such hours and under such conditions as he deemed appropriate to generate income. There was never any intention on the part of Libourkine that Roberts would be an employee. On the other hand, Roberts maintained that he had past experience both in retail and as a telemarketer and even though some telemarketing jobs lasted only three weeks, he was always accorded the status of employee and had received cheques as payment and accompanying information providing details of the relevant deductions from the gross amount of earnings. There was no written contract between the parties nor was there any subjective intent on the part of Libourkine and Roberts' only act of compliance with any purported intent in that regard came much later when he filed his income tax returns and reported earnings as employment income, based on his calculation of remuneration received from Libourkine for the particular taxation year.

[22] In accordance with the judgment in *Sagaz*, I undertake the following analysis.

<u>Level of Control</u>

[23] In order to arrive at a determination with respect to this factor, it is necessary to refer to the evidence of Roberts and Libourkine and – sometimes – Zwolinski to illustrate the conflict in evidence on many important points.

[24] Roberts adopted the contents of his Answer by reading it into his direct examination and thereafter in additional testimony – including on cross-examination by counsel for the respondent and Libourkine - made the following assertions that:

1. he responded to an advertisement in the Toronto Star seeking telemarketers;

2. when hired by Libourkine and starting work on June 22, 2009, he was required to work shifts and was an integral part of Libourkine's business and that of TMG;

3. he was required to attend staff meetings and to adhere to instructions provided during these sessions;

4. there was an initial commitment by both Libourkine and Zwolinski to pay an hourly wage and later in the working relationship, there was an arrangement to pay him bonuses based on appointments booked but later revised – unilaterally – by Libourkine who paid thereafter only for appointments that resulted in a meeting with the prospect;

5. Libourkine stated he was a senior partner in TMG and was Director of Sales;

6. he always worked from the TMG offices from June 22, 2009 to September 11, 2012, the actual last day prior to the termination of the working relationship, rather than September 10 as stated in the decision of the Minister;

7. he received payment in the form of cheques jointly from Libourkine and TMG;

8. he worked consistently 6 days a week throughout his entire telemarketing work for Libourkine;

9. he had to report daily to Libourkine who provided him with calling lists;

10. he was paid an hourly rate at all times which was increased from $10 to $14 in the later stages of his work and – initially – was paid a bonus for each appointment booked;

11. he submitted timesheets on TMG letterhead and received payment based thereon without the need to submit an invoice;

12. he could not determine his own work schedule and never worked from home;

13. he did not use a cell phone as asserted in adopting that portion of his Answer but later admitted he had one but the plan was not suitable for telemarketing as the minutes were limited and the charge for supplemental time was excessive in light of probable revenue generated;

14. he did not write the numbers utilized in the calculation on the invoice within Exhibit R-2;

15. he was provided with keys to Libourkine's office and worked from one of the two desks there but sometimes it became noisy because both of them were talking on the phone at the same time to prospects;

16. there had always been an entitlement to vacation pay and pay for working on a statutory holiday but only partial payments were received during the period June 22, 2009 until his final day of work on September 11, 2012;

17. there was a call list and a script provided by Libourkine that he was directed to use and follow when making calls;

18. when potential clients called the TMG office, Sandy, the receptionist/dispatcher, answered and directed the call accordingly to Libourkine or another specific broker at TMG;

19. he needed to use the telephone lines at TMG to make long distance calls on behalf of Libourkine; and

20. during his entire experience as a telemarketer for various entities - including when providing services to a broker associated with Clarica 10 or 12 years earlier - he had never been treated as other than an employee with the usual deductions from his gross pay which was based – always - on an hourly rate.

[25] The testimony of Libourkine with respect to these points was that:

1. he did not place an advertisement in the Toronto Star due to the cost involved but used the website Kijiji which was free;

2. Roberts was not required to work specific shifts and was not an integral part of his broker business or the business of TMG;

3. there were no staff meetings, but Zwolinski had met Roberts prior to Libourkine hiring him to work as a telemarketer;

4. there was not any agreement at any time during the entire working relationship to pay an hourly wage to Roberts, as that is not economically feasible or practical, nor is it a method of remuneration used within the insurance industry by independent brokers;

5. he did not represent to Roberts that he was a partner or investor in TMG other than to explain that he utilized space within the TMG leased premises;

6. most telemarketers who provide services to brokers make calls from their home or other location and Roberts did so for some time until he complained that his home environment was no longer suitable and requested permission to use space within the TMG premises and to use the telephones;

7. for some time during the entire period, cheques paid to Roberts did bear the name of TMG thereon but the account was always solely in his name and he was the sole signatory. He had used that form of cheque to identify business expenses until his accountant advised that was not necessary;

8. Roberts did not work consistently 6 days a week and had been absent for certain periods between June 22, 2009 and the last day of the relevant period – September 10, 2012 – which had not required his permission;

9. Roberts was never provided with any calling lists or a script to follow when making calls but had access to a brochure which explained the various products and services available from various insurance companies as arranged by a broker associated with TMG;

10. Roberts was not paid an hourly rate at any time but solely for appointments booked and kept by the prospect. The payment for that service increased over time to $14 and Roberts had never been paid merely for booking an appointment;

11. TMG did not have any timesheets and payments to Roberts were made according to the invoices submitted by him containing relevant information in his own handwriting;

12. Roberts was free to make calls at other times and locations other than between 6 to 9 p.m. from the TMG premises;

13. as Roberts had later acknowledged in his testimony, he had his own cell phone and could have used it to make telemarketing calls;

14. the invoices included in Exhibit R-2 had not been altered and the words and numbers were in the handwriting of Roberts;

15. he did not provide Roberts with keys to his private office, as strict licensing and other regulatory requirements and protocol within the industry prohibit access by unauthorized persons to extremely confidential and personal information concerning policyholders which is in files kept inside a locked cabinet in the office and that other than the building manager, for use in case of an emergency, no one else had a key. When leaving that private office even for a short time within the TMG premises or the building, he locked it. Roberts never worked from any desk within the private office and there was only one desk there, not two as alleged;

16. No vacation pay or statutory holiday pay had ever been paid to Roberts as alleged or at all;

17. there was no call list or script provided to Roberts as he was an experienced telemarketer who had worked earlier for a fellow broker who had been selling Clarica products and the types of products available were explained in the brochure available in the TMG front office area;

18. Sandy was a longstanding telemarketer for certain brokers with offices at TMG and she worked from time-to-time but had no responsibility to answer calls or to direct them to a particular person;

19. Roberts was not required to make any long distance calls to seek prospects because any travel outside the GTA, together with the usual time involved to finalize a sale when compared with potential revenue from the probable commission, was totally impractical and – instead – he suggested Roberts call people living within reasonable proximity to his home to reduce travel and enable more appointments to be kept; and

20. in his experience as a broker in the insurance industry, he had not known of any telemarketer who received remuneration for that service

other than based on a certain payment for each appointment booked and in the within case, payment was earned by Roberts only if a meeting was held with the prospect.

[26] The testimony of Zwolinski with respect to certain aspects of the appellant's testimony was that:

1. TMG does not have any staff and Sandy is not an employee but a telemarketer with a long relationship who used the office when she wanted to work and make some calls. There were no staff meetings;

2. in accord with TMG policy – set by him as sole shareholder - he advised all brokers that he wanted to meet potential telemarketers prior to their hiring and met with Roberts who he had known for years earlier when Roberts had worked as a telemarketer for a broker selling Clarica products;

3. Roberts was not provided with any script nor did any script exist within the TMG business model followed by the individual brokers, but Roberts was provided with a brochure explaining the products available;

4. he requested brokers to not have their telemarketers call any persons who had requested not to be called again and expressed his opinion that it was a good business practice not to call after 9 p.m. or during a weekend or holiday;

5. the brokers rented space and certain other services from TMG but were completely independent and could use their own methods of operation in seeking business and did not issue instructions to them and certainly not to their telemarketers with whom he had no business relationship whatsoever;

6. following a request from Libourkine, Roberts was granted permission to use a cubicle within TMG space to make his calls during the shift he chose to work, which was 6 - 9 p.m., but access to the private office of each broker was restricted, with security protocols in place to protect the confidential information in the files;

7. during his 31 years' experience in the insurance industry, it does not make any economic sense for any broker to remunerate a person for

obtaining valid leads except by a specific payment-per-lead which may result in an earned commission;

8. he was not in the TMG office often during the hours Roberts made his calls; and

9. Roberts had the appropriate pass to access the floor and main office of TMG but some broker or trusted individual assumed the task each night of ensuring all private broker offices were securely locked.

[27] It is apparent that an assessment of credibility in respect of the testimony and the reliability of the sparse documentation is required.

[28] In the case of *Le Conseil Atlantique du Canada – The Atlantic Council of Canada v The Minister of National Revenue*, 2012 TCC 13, [2012] TCJ No. 3, Justice D'Auray heard an appeal where the issue was whether an employer-employee relationship existed. With respect to the matter of addressing the import of conflicting testimony, at paragraphs 80 to 82, inclusive, she stated:

> [80] The nature of the relationship between the appellant and Ms. Sargsyan was the subject of detailed and at times conflicting testimony from Ms. Sargsyan and Ms. Lindhout. Some of the conflicts in the evidence are on vital points. In assessing the evidence of the witnesses, I am mindful of the caution articulated by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at page 359, that a Court must consider the truth of the story of a witness in the context of the surrounding circumstances. In the words of that Court:
>
> > In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> [81] In my view, Ms. Lindhout's [*sic*] was the more credible witness. She was a solid witness, her answers both in examination-in-chief and on cross-examination were precise and to the point. On the other hand, Ms. Sargsyan was at times evasive in cross-examination; she did not respond directly to the questions that she was asked. More importantly, I find that Ms. Lindhout's testimony was more consistent with the surrounding circumstances, including the written record.
>
> [82] The written record supports Ms. Lindhout's evidence. The aim of the SDF Internship Program was to promote relevant work experience and to complement the studies of interns. The scholarship under the SDF Internship Program was

> granted by the AUCC and not the appellant. The appellant served as a host under the program.

[29] As a result of a detailed analysis of the evidence of Roberts, Libourkine and Zwolinski pertaining to the conflict as outlined above, I have concluded that the evidence of Roberts is not reliable and where his testimony conflicts with that of Libourkine or Zwolinski on those matters referred to above, I accept the versions of Libourkine and Zwolinski and reject those of Roberts. Roberts' testimony was marked with frequent inconsistencies, outright contradictions of assertions contained in his Answer which he incorporated into his direct testimony together with his additional testimony. He was evasive, and when confronted with facts directly opposite to his position, blithely invented another version that he hoped would be accepted. When he could not escape a direct confrontation between two opposing positions or with respect to an issue such as his handwriting on the invoices, he was quick to resort to attacking the credibility of Libourkine by labelling him as a liar, and someone who was – in essence – a forger for having altered or substituted invoices and destroyed time sheets - allegedly on TMG letterhead - to defeat his valid claim of employment. To adopt the words of the British Columbia Court of Appeal, the story told by Roberts was not in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." The evidence of Libourkine and Zwolinski concerning the ordinary business methods employed by brokers within the insurance industry and the traditional method of retaining telemarketers or others who provide leads by other means, is reasonable and in accord with economic reality. A broker like Libourkine earns money from commissions and related premium sharing or bonuses paid by insurance companies and sales are possible if a prospect can be visited following an appointment booked by an individual whose services are retained for that specific purpose. The applicable testimony of both Libourkine and Zwolinski was consistent, reliable and trustworthy.

[30] There was no significant control exercised by Libourkine over Roberts who was free to work whatever hours he chose and to use whatever techniques he thought appropriate to convince people to meet with Libourkine. With respect to those indicia of control asserted by Roberts to bolster his position that he was an employee during the relevant period and since June 22, 2009, Roberts knew it was necessary to invent details such as staff meetings, daily reporting to Libourkine, specific shift assignments, the need to seek permission to be absent from work and his entitlement – as an employee - to vacation pay and statutory holiday pay. However, he could not provide any documentation to bolster those bald assertions

and admitted no cheques issued to him by Libourkine had contained any reference to those items. Roberts was an experienced telemarketer capable of operating independently to achieve the results required to receive payment from Libourkine.

[31] The assessment of credibility referred to herein impacts the analysis of these other indicia.

Provision of equipment and/or helpers

[32] The only equipment needed was a telephone, whether cellular or otherwise. For some time during the relevant period, Roberts used an empty cubicle in the TMG premises to make his calls and although the matter was never discussed, it is apparent the telemarketing was to be performed by Roberts personally.

Degree of financial risk and responsibility for investment and management

[33] The only financial downside associated with Roberts' telemarketing activity was that his own cell phone plan was not conducive to making numerous calls of substantial duration on a regular basis after 8 p.m. because the per-minute supplemental cost was prohibitive compared with potential revenue. However, this would not seem to be as significant had Roberts actually been paid an hourly wage – as alleged - regardless of appointments booked. There was no need for Roberts to invest any money or to participate in any management function.

Opportunity for profit in the performance of tasks

[34] The opportunity for profit was directly connected to the number of calls made and the probable appointments booked, of which 90 percent were routinely kept by the prospect, which then entitled Roberts to a fee. He chose to work limited hours per week – usually 18 – and to utilize the telephones of TMG but the search for prospects could have been broadened by using other techniques and methods, particularly because he was an experienced telemarketer who had worked earlier for a broker involved in the insurance business. Roberts was free to decide the amount of time to devote to this activity and to adapt his techniques if required to book more appointments that could result in meetings with prospects and Libourkine. When working from the TMG premises, Roberts was sometimes absent for certain periods - for his own reasons – and did not book any appointments for Libourkine.

[35] In the case of *Connor Homes*, *supra*, of the eight workers whose appeals were heard, three of them had signed contracts purporting to confer the status of independent contractor. The judgment of the Federal Court of Appeal was delivered by Mainville J.A. who in considering the issue of control - at paragraphs 44 to 47, inclusive – stated:

> 44. Despite the stated intent of the parties to characterize their relationship as that of independent contractors, the facts of this case suggest otherwise. Based on a review of these facts, I cannot conclude that the Tax Court Judge erred in finding that the concerned individuals were not providing their services to the appellants as their own business on their own account. Rather, as a result of the significant degree of control the appellants exerted over the three individuals in the execution of their tasks, the limits on their ability to profit, and the absence of any significant financial risks or investments, in essence, these individuals were acting as employees of the appellants.
>
> 45. First, it is clear from the record that the appellants exercised a significant degree of control over the duties exercised by the individuals and the manner in which these duties were carried out. Connor Homes drafted and issued its own Policies and Procedures Manual, based on the requirements of the provincial legislation relating to child and family services. This manual defined and dictated the procedures to be followed with respect to the provision of services within the homes. The manual was provided to the individuals, both area supervisors and child and youth workers alike. As part of their contracts, the individuals were required to abide at all times by the manual and the policies and the rules of conduct it contained (Testimony of Robert Connor AB vol 2 page 175, lines 18 to 24, pages 191-192, lines 20 to 25; 1 to 20).
>
> 46. Beyond the manual, the appellants also controlled the individuals' duties on a day-to-day basis. The appellants dictated administrative tasks and imposed mandatory attendance at staff meetings to discuss work procedures, work scheduling and day-to-day occurrences in the homes. The appellants also provided guidance and instruction to the individuals regarding how to manage difficult situations with clients, as well as marketing activities to be undertaken on their behalf (Testimony of Rollie Allaire AB vol 2 page 414 line 15 to page 46; line 19; Zoe Fulton page 509 lines 10-16; Jodi Greer pages 463 and 464 lines 6 to 25 and 1 to 17).
>
> 47. The degree of control that the appellants exercised over the work of the individuals resembled that of an employer. Indeed, it was acknowledged at trial that the duties exercised by the concerned workers were, in fact, the same as those exercised by the appellants' employees (Testimony of Robert Connor AB vol 2 page 207, lines 9-17).

[36] It is obvious that this sort of control, direction, guidance and instruction including marketing activities did not exist in the within appeal.

[37] In the case of *Greenshield Windows and Doors Ltd. v Canada (Minister of National Revenue – MNR)*, 2015 TCC 70, [2015] TCJ No. 51 (QL), Justice Woods heard appeals by workers who were engaged as telemarketers by the payor. With respect to the issue of control, Woods J., at paragraphs 16 to 25, inclusive, set forth the facts prior to concluding, at paragraph 26, as follows:

> [16] The control factor is often important in determining whether a worker is an employee. The question to be decided is whether Greenshield had the ability to control the manner in which the work was done. Based on the evidence as a whole, I conclude that the control factor is consistent with the parties' intention of an independent contractor relationship.
>
> [17] The telemarketing position did not require specialized knowledge and it was often filled by students who wanted part-time work. There was a very high rate of turnover, with approximately 50 percent of telemarketers leaving with the first month.
>
> [18] As mentioned earlier, the work was done in groups. Accordingly, weekly work schedules were prepared by Greenshield in accordance with the telemarketers' requests. There were two four-hour shifts each day, 10 to 2 and 5 to 9, with one 15 minute break.
>
> [19] It is likely that the telemarketers were expected to notify Greenshield if they subsequently were not able to attend at the scheduled time. I accept Mr. Solomon's testimony that many telemarketers did not do this.
>
> [20] In addition, since the work had to be performed in groups Mr. Hayes or a senior telemarketer decided when they should take their 15 minute break.
>
> [21] As for tracking hours worked, the hours had to be tracked in some fashion because the Workers were paid partly on an hourly basis and partly on commission.
>
> [22] The work entailed trying to obtain the consent of homeowners to have an estimated prepared. Greenshield's sales department would then follow up. The Workers received minimal training for this. I accept Mr. Solomon's testimony that it did not make sense to invest time in training when there was a high turnover rate.
>
> [23] The evidence reveals that Workers were given a sample of a "pitch" that they could use, but that they were not required to use it and they typically

> developed their own techniques. It is likely that the Workers learned from each other in this regard.
>
> [24] As for supervision, there was general oversight and censure if Workers were doing personal activities on the job, but there is no evidence that the Workers were told how to do their job. Ms. Trapara was informed that Mr. Hayes could listen in on calls, but there is no evidence that Greenshield could, or would, interfere with the manner in which pitches were made.
>
> [25] The only meetings with Workers consisted of a 5 minute presentation at the start of each shift in which relevant information, such as special sales promotions, were provided to the Workers.
>
> [26] When the evidence is considered as a whole, I find that it is more consistent with Greenshield not having the ability to control how the work was done. The Workers could choose their hours of work and the manner in which the work was done. This factor favours an independent contractor relationship.

[38] The conclusion by Woods J. is stated at paragraphs 35 and 36:

> [35] In weighing the evidence as a whole, I find that the relationship between Greenshield and the Workers was consistent with their common intention that the Workers be independent contractors.
>
> [36] The factor that dominates in this case is control. The Workers were able to determine their own work schedules and their own telemarketing pitches. In such a loose relationship, I find that the Workers were engaged as independent contractors.

[39] In the above case, those facts referred to in analyzing the degree of control were not sufficient to confirm the decisions by the Minister that it favoured an employer-employee relationship. By contrast, no similar circumstances pertaining to the issue of control existed in the working relationship between Roberts and Libourkine, who was functioning as an independent contractor.

[40] In preparing for this appeal, Roberts could have benefited from taking to heart the following admonition in the oft-quoted couplet from Sir Walter Scott's 1908 poem, *Marmion: A Tale of Flodden Field* – Canto VI, XVII:

> Oh, what a tangled web we weave
>
> When first we practice to deceive!

[41] As Roberts spun increasing strands of fantasy in the course of his testimony - let alone in cross-examination - he became trapped in an intricate weave of contradictions, deception, self-serving blather and outright lies from which he could not escape.

[42] Based on the evidence and applying the relevant jurisprudence, the decision of the Minister is confirmed and the appeal is dismissed.

Signed at Sidney, British Columbia, this 10th day of June 2015.

"D.W. Rowe"

Rowe D.J.

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COURT FILE NO.:	2014-3391(EI)
STYLE OF CAUSE:	MARK ROBERTS and THE MINISTER OF NATIONAL REVENUE and MICHAEL LIBOURKINE
PLACE OF HEARING:	Toronto, Ontario
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