T R E A T I N G A R T I S T S W I T H R E S P E C T:

THE PRESUMPTION OF INDEPENDENT CONTRACTOR STATUS

Legal Analysis
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TREATING ARTISTS WITH RESPECT:

THE PRESUMPTION OF INDEPENDENT CONTRACTOR STATUS

"The arts" - as we've come to term them - are not a frill.
They are the heart of the matter, because they are about our hearts,
and our technological inventiveness is generated by our emotions, not by our minds.
A society without the arts would have broken its mirror and cut out its heart.
It would no longer be what we now recognize as human.

Margaret Atwood
Excerpt from the Kesterton Lecture,
January 22, 2004, Carleton School of Journalism

INTRODUCTION

In recent years, the *Canada Revenue Agency* (the *"CRA"*) has aggressively targeted artists, arts organizations, and engagers (meaning all persons or organizations who engage the services of artists) in respect of their contractual dealings with one another. For reasons only fully known to the *CRA,* it has begun to question the long-standing practice of artists being engaged as independent contractors. Classifying an artist as an independent contractor or as an employee has consequences under the *Income Tax Act* (the *"ITA"*), the *Canada Pension Plan Act* (the *"CPP"*), the *Employment Insurance Act* (the *"EIA"*) and various other provincial statutes.

Engagers and artists have, historically, dealt with each other as independent contracting parties with each accepting the costs and benefits of such a relationship and the arts have developed around such a practice. In fact, and as will be explored later in this paper, artists were put to a form of an election as to their status for purposes of the *ITA,* the *CPP* and the *EIA* in or about 1971. The artists elected to continue their engagements as independent contractors and, with few exceptions, that status has continued since that time.

Since it was only the members of CAEA who were asked to choose, it might be more accurate in the third line to say “some artists were put to a test…”

The *ITA,* the *CPP* and the *EIA* fail to precisely define either an "employee" or an "independent contractor". The tests used by courts and administrative agencies (including the *CRA*) to assess the status of artists for this legislation have been derived from the common law (judge made law). However, the common law in this area has emerged largely from industrial workplaces and artists tend not to fit neatly into the traditional tests used to assess workers in those contexts.

When applied to artists, traditional tests are awkward and, on some occasions, could lead to a conclusion that an artist is an employee when the opposite conclusion would be more appropriate. As a result, traditional tests, at least in so far as they apply to arts, have little utility. Judges and the common law have begun to recognize the uniqueness of the arts. For example, and for the purpose of assessing an artist's status as an employee or an independent contractor, characteristics inherent to the artist (such as the artist's age or sex) have been recognized as constituting the artist's tools. The *CRA*, however, has been slower to recognize the unique

factual and contextual circumstances the arts presents and, despite recent judicial developments (including a decision of the Supreme Court of Canada), the *CRA* remains mired in historical notions developed for industrial workplaces, which are ill-suited to the arts.

EFFECT ON ENGAGERS

The uncertainty created by the collision of recent judicial developments and the *CRA's* assessment of artists' status (which, this paper submits, is inconsistent with those developments) is compromising artists, arts organizations and engagers. For example, engagers (which are largely not-for-profit or charitable organizations) are experiencing increasing difficulty recruiting members for their boards of directors. This difficulty is directly related to the uncertainty associated with the *CRA's* position and the potential for assessment for income taxes, Canada Pension Plan and Employment Insurance contributions that could follow from the *CRA* declaring an engager's artists to be employees. The engagers, typically, are required to present their art on severely constrained budgets and there are usually no reserves to satisfy any assessment of the types described. Accordingly, the members of an engager's board of directors could be individually liable for the amount of any assessment. It is not difficult to imagine the impact that this has had and will continue to have on the availability of qualified persons willing to serve on boards of directors and, ultimately, the negative effect that this has had and will continue to have on the arts in Canada.

EFFECT ON ARTISTS

A declaration by the *CRA* that an artist is an employee will have similar negative consequences on artists. For example, artists have structured their affairs in contemplation of their status as independent contractors. Should artists be declared employees, these artists will be unable to legitimately deduct, as business expenses, the costs associated with their artistic endeavours. Artists who are assessed by the *CRA* to be employees, as opposed to independent contractors, may be liable for the retroactive repayment of tax on items initially deducted as legitimate business expenses associated with their artistic endeavours. The uncertainty of artists' status as independent contractors or employees may discourage many talented people from pursuing artistic careers.

The other very significant element in this discussion is the fact that under Canada's Copyright Act the first owner of an artistic work created by an employee is the employer. Artists who are independent contractors have clear ownership of their artistic creations. While this primarily concerns creative artists (writers, visual artists, composers, etc.), performers whose work is recorded do enjoy certain rights in these works. Musicians working in orchestras which have been recorded may lose their right to the "neighbouring rights" if they are reclassified as employees of the orchestra.

SUGGESTED APPROACH

The *CRA* must be encouraged to recognize and adopt recent judicial developments that confirm the uniqueness of the arts and the reduced value of the traditional industrial-setting test for assessing independent contractor status. It is the position of this paper that, in respect of artists, the *CRA* should adopt a policy presuming that engagers and artists are independent contracting

parties. This presumption may be rebutted in cases where the artist and the engager explicitly enter into an employment contract providing for such.

One should add here that, where the artist is represented by a bargaining agent, it is the agent which would be empowered to negotiate the employment relationship, rather than the individual artist acting on their own.

A rebuttable presumption that artists are engaged as independent contractors would benefit all constituents in the arts community by providing certainty with respect to the status of the artist. As described above, historically, artists have been treated as independent contractors by engagers and determined to be so by the *CRA* and the courts. Any confirmation of this status occasioned by a presumption of independent contractor status would simply maintain this historical treatment. Independent contractor status also recognizes that artists are crafts people who provide unique services to engagers.

THE IMPORTANCE OF PROMOTING THE ARTS

> *It has been suggested to us that one measure of the degree of civilization attained by a nation might fairly be the extent to which the nation's creative artists are supported, encouraged and esteemed by the nation as a whole.*
>
> **Massey-Lévesque Report**
> Royal Commission on National Development in the Arts, Letters and Sciences 1949-1951

Art is often used by a society to define its culture, values and beliefs and is a central component of any nation's identity.

In 1992, the Federal government passed the *Status of the Artist Act*[1], wherein the government legislatively recognized the importance of artists within Canadian society. Section 2 of the *SAA* provides the following:

> 2. The Government of Canada hereby recognizes
>
> (a) the importance of the contribution of artists to the cultural, social, economic and political enrichment of Canada;
>
> (b) the importance to Canadian society of conferring on artists a status that reflects their primary role in developing and enhancing Canada's artistic and cultural life, and in sustaining Canada's quality of life;

> (c) the role of the artist, in particular to express the diverse nature of the Canadian way of life and the individual and collective aspirations of Canadians;
>
> (d) that artistic creativity is the engine for the growth and prosperity of dynamic cultural industries in Canada; and
>
> (e) the importance to artists that they be compensated for the use of their works, including the public lending of them.

In 1993, the Library of Parliament released an analysis of Canada's Cultural Policy. That analysis acknowledged the central role the Government of Canada plays in promoting and supporting the arts as follows:

> Through a government policy that promotes the arts and whose primary goal is cultural, individuals are familiarized with the characteristics of their own society and their sense of belonging and cultural identity are strengthened. The role of artists is not only to mirror the values of the society in which they live, but also to reflect on the issues that society must address if it is to know itself better. ***The role of the State in this regard is to support artistic activity, to provide creators with conditions favourable to the practice of their art, and to ensure access to their work by the general public***.[2]

Furtherance of the objective of providing favourable conditions to artists is accomplished by having a presumption of independent contractor status. Uncertainty with respect to the status of the artist creates an unfavourable environment for both engagers and artists.

STATUS OF THE ARTIST: A GLOBAL VIEW

STATUS OF THE ARTIST: THE UNITED NATIONS

The United Nations Educational, Scientific and Cultural Organization ("UNESCO") *Recommendation concerning the Status of the Artist*[3] states that the General Conference of UNESCO:

> [Recognizes] that the arts in their fullest and broadest definition are and should be an integral part of life and that it is necessary and appropriate for governments to help create and sustain not only a climate encouraging freedom of artistic expression ***but also the material conditions facilitating the release of this creative talent***,
>
> …

> [Affirms] the right of the artist to be considered, if he so wishes, as a person actively engaged in cultural work and consequently to benefit, taking account of the particular conditions of his artistic profession, from all the legal, social and economic advantages pertaining to the status of workers, [and]
>
> [Affirms] the need to improve the social security, labour and tax conditions of the artist, whether employed or self-employed, taking into account the contribution to cultural development which the artist makes, …

Canada became a signatory to the UNESCO Convention in 1980. A rebuttable presumption that artists are engaged as independent contractors is consistent with the provisions of the UNESCO Convention. As a signatory to the UNESCO Convention, such a presumption would meet Canada's obligations to provide "the material conditions facilitating the release" of creative talent within Canada.

While the Convention was developed at a meeting of UNESCO in Belgrade, it was adopted formally at the subsequent General Conference meeting in Paris. The document is almost universally known as the UNESCO Convention on the Status of the Artist.

STATUS OF THE ARTIST: PRACTICES IN EUROPE AND AUSTRALIA

Other countries have recognized artists as being unique. In fact, Germany has created a system of income averaging specific to artists and in Ireland artists are completely exempt from paying income tax.[4]

The Irish tax exemption is for CREATIVE artists and does not cover actors, singers, dancers, directors and other interpretive artists. A powerful precedent in the UK is that actors enjoy a true "dual status." They are considered to be self-employed or freelancers for purposes of tax, but are considered to be employees for purposes of social benefits (health, pension, unemployment insurance, etc. To help emerging artists in the Netherlands, young artists may collect the equivalent of welfare while also receiving income from their artistic practice for a period at the beginning of their professional career. The Scandinavian countries have many specific measures, including a granting system that provides support to artists not to create a specific work, but in recognition of their overall career.

In Australia, artists with unstable incomes are able to participate in an income-averaging scheme for a period of up to 5 years. Arts businesses are able to offset any losses that may be incurred while conducting their arts business against any other income generated. However, the definition of what is an "arts business" has been a contentious issue within the Australian arts community that has most recently resulted in a recognition by the *Australian Taxation Office* (the *"ATO"*) of the uniqueness of the arts context.

In January 2005, the *ATO* issued a landmark Taxation Ruling that addressed the definition of an "arts business". The Ruling acknowledges the distinctiveness of artists and the nature of an artist's work, and is specifically tailored in its application to the arts:

> This Ruling recognises that because of the nature of art activity, arts businesses typically have different characteristics to those found in other businesses. …
>
> The courts have recognised the distinct nature of arts activities and this distinction is also evident in the existence of the income tax averaging scheme…[5]

Prior to the issuance of this Ruling, the *ATO* policy was that if a person did not make any profit from the activity being claimed as a business, then that activity was not considered to be a legitimate business for tax purposes. The importance of this Ruling is that, in the income tax context, the *ATO* has recognized the distinctiveness and unique characteristics of the arts in the application of their legislation. Australian taxation assessment officers now have a valuable tool that provides a tailored and unique approach to the consideration of artists.

I believe a significant issue in the Australian ruling relates to the issue of CRA's insistence that an artist must have a "reasonable expectation of earning a profit." The Australian ruling outlines a concept of profit-motive. This is from a report I prepared:

"A taxpayer will have the intention (as determined objectively that is having regard to all the surrounding circumstances [sic]), to carry on a business if they make the decision to commercially exploit the skills they have developed pursuing the same activity as a hobby or pastime and this is reflected in their overt and planned activities." In other words, the artist is considered to be carrying on a business if they intend to exploit their artistic skills commercially and can demonstrate they have taken at least one measurable step toward that objective.

Although the unique characteristics of the working relationships between artists and engagers have been acknowledged and accommodated by the taxation systems within various other countries, similar concessions and accommodations have not been made within Canada. Instead of moving toward a recognition that the arts are unique and not properly suited to the traditional assessment criteria, the *CRA* in certain circumstances has applied the industrial-setting test without regard to the uniqueness of the arts context.

STATUS OF THE ARTIST WITHIN CANADA

Art is my job and my love. I would be very much in need without my art....
People often treat art as though it is very different from any other profession and ask,
why would you want to keep doing this? This is my job and my love.
I cannot imagine life without art.

Kenojuak Ashevak
Cape Dorset, Nunavut
The Globe and Mail, October 20, 2003.

FEDERAL SUB-COMMITTEE RECOMMENDATIONS ON THE STATUS OF THE ARTIST

In November 1989, the Federal Standing Committee on Communications and Culture established a sub-committee, the Sub-committee on the Status of the Artist, to review all preceding government-funded reports regarding the status of the artist to determine which initiatives should be implemented to improve the quality of life of artists within Canada.[6] In February 1990, the Sub-committee on the Status of the Artist made 11 recommendations, including the recommendation that legislation be implemented that would provide the following:

1. Professional associations representing self-employed artists would be permitted to collectively bargain on behalf of such artists;

2. Artists represented by certified professional associations would enjoy a presumption of independent contractor status for income tax purposes; and,

3. Artists represented by certified professional associations would be given the right to be an employee for unemployment insurance purposes, on the part of their income that is generated from salaried employment.

The Government of Canada responded to the above recommendations by enacting the *SAA*, which became effective in May 1995. Although the *SAA* permitted collective bargaining by professional associations representing artists, it did not explicitly provide for a presumption of independent contractor status for artists. However, the very purpose of the *SAA* is to permit independent contractors to bargain collectively. Therefore, there is an inherent recognition within the *SAA* that artists are independent contractors.

In the context of government institutions or broadcasting undertakings, determinations that artists engaged by government institutions or broadcasting undertakings are employees would undermine the very purpose for which the *SAA* was enacted. A presumption of independent contractor status is consistent with the presumptions for which the *SAA* was enacted.

Quebec's Act respecting regulating the professional relationship of performing, recording and film artists contains the following clause:

"6. For the purposes of this Act, an artist who regularly binds himself to one or several producers by way of engagement contracts pertaining to specified performances is deemed to practise an art on his own accord."

The guilds and unions in Quebec believe this confirms the status of artists as independent contractors for purposes of Quebec's income tax system.

ARTISTS' ELECTION REGARDING THE STATUS OF THE ARTIST

Unemployment insurance benefits became virtually universal to all employees within Canada by 1971. Additionally, benefits for periods of unemployment associated with maternity and sickness leave were introduced at that time. Coincidental to these developments, artists who

were represented by the Canadian Actors' Equity Association ("CAEA"), a professional association representing performing artists, were put to a form of an election by the federal body responsible for administering unemployment insurance benefits regarding their status as employees or independent contractors. The CAEA subsequently entered into consultations with their membership to determine whether these artists preferred to maintain their historical status as independent contractors or modify their terms of engagement to be more consistent with employment status and, thereby, allow access to the unemployment insurance regime.

The discussions between the CAEA and their membership resulted in a referendum vote. The vote confirmed that a majority of the CAEA's members sought to remain independent contractors. From that time forward, artists have, generally, been considered independent contractors. They have incurred expenses and structured their affairs accordingly. They have benefited from all of the allowable business expense deductions that are available to other self-employed persons in Canada. On the other hand, they have foregone access to the unemployment insurance regime. This decision was presumably communicated to the federal body responsible for administering unemployment insurance benefits.

CRA ASSESSMENTS OF ARTISTS' STATUS AS INDEPENDENT CONTRACTORS

Despite the recommendation made by the Sub-committee on the Status of the Artist that artists be considered independent contractors for purposes of the *ITA,* the *CPP* and the *EIA*, and despite the fact that the engagement of artists has historically been premised (by all concerned) on the assumption that artists are independent contractors, there has been an apparent shift within the *CRA* regarding its assessment of artists for taxation purposes.

In 1996, the *CRA* determined that musicians at the Thunder Bay Symphony Orchestra were employees for purposes of the *EIA*. The Tax Court of Canada, upon review of the decision of the *CRA*, upheld the *CRA*'s assessment of these musicians and found them to be employees of the Thunder Bay Symphony Orchestra for purposes of the *EIA*.[7] This decision was not appealed to the Federal Court of Appeal.

Consequently, the Thunder Bay Symphony Orchestra was faced with an assessment for retroactive statutory deductions that it was required to make under the *CPP* and *EIA* and an assessment for penalties associated with the failure to pay these statutory deductions. As a result, the Thunder Bay Symphony Orchestra declared bankruptcy and many members of the board of directors resigned for fear of being held personally liable for payment of these statutory deductions and penalties. The Thunder Bay Symphony Orchestra continues to operate today, after having financially restructured its affairs and come to re-payment agreements with its creditors.

Shortly after the *Thunder Bay* decision was released, the *CRA* conducted several other reassessments of the status of musicians at numerous other symphony orchestras. Many of these reassessments resulted in a change of status for the musicians engaged by these orchestras from independent contractor to employee. Further, the affected symphony orchestras faced retroactive liability for contributions required under the *CPP* and the *EIA* in respect of their employees.

At this time, the *CRA* is, arguably, pre-disposed to assessing artists as employees rather than recognizing them as independent contractors. As is discussed further below, the change to the status of artists for purposes of the *ITA,* the *CPP* and the *EIA* will result in great financial difficulties for many engagers, particularly those operating on a not-for-profit basis. These financial difficulties could result in engagers becoming financially unable to continue their operations and lead to the diminution of the arts in Canada. Further, due to the fact that directors can be held individually liable for any outstanding *CPP* and *EI* contributions resulting from a change to the status of artists, many qualified individuals have become reluctant to remain on boards of directors for many engagers.

A declaration by the *CRA* that artists are employees as opposed to independent contractors will have a similar negative effect on artists. Artists who have structured their affairs in contemplation of their status as independent contractors may also face retroactive liability for expenses deducted pursuant to the *ITA* as legitimate business expenses. The uncertainty that artists face with respect to their status as independent contractor or employee may discourage talented artists from pursuing, or continuing, artistic endeavours.

CRA REASSESSMENTS AT THE MAGNUS THEATRE, THUNDER BAY

The uncertainty created by the shift in policy within the *CRA* regarding the status of artists as independent contractors or employees is illustrated by the recent events at the Magnus Theatre. In December 2003, the *CRA* conducted a reassessment of the status of an actor engaged by the Magnus Theatre, deeming him to be an employee as opposed to an independent contractor as set out in the terms of his engagement. It is noteworthy that this same actor had been engaged pursuant to the same terms of engagement with another theatre that same year and the *CRA* declared him to be an independent contractor in that instance. Both the Magnus Theatre and the actor appealed the *CRA*'s declaration that the actor had been engaged as an employee.

Based upon its reassessment of this single actor, the *CRA* subsequently determined that all artists engaged by the Magnus Theatre during the 2002, 2003 and 2004 taxation years were employees for purposes of the *ITA,* the *CPP* and the *EIA*. The Magnus Theatre was ordered to pay *CPP* and *EIA* deductions for each artist it engaged, retroactive for a period of over two years. This resulted in the resignation of a number of the volunteer members of the board of directors due to a fear of personal liability (as previously discussed) and called into question the financial viability of the Magnus Theatre.

In November 2004 the Department of Justice consented to a judgment declaring that the original actor had not been engaged as an employee of the Magnus Theatre. Despite this consent to judgement, the *CRA* continued in its reassessment of the status of each artist engaged by Magnus Theatre for the 2002, 2003 and 2004 taxation years on a case-by-case basis until June 2005, at which time the *CRA* cancelled its assessments and found the artists to be independent contractors. The actions of the *CRA* in this situation have caused obvious concern to artists and engagers and have emphasized the uncertainty within the arts community regarding the status of artists. A presumption of independent contactor status will work to alleviate situations similar to the occurrences at the Thunder Bay Symphony Orchestra and Magnus Theatre and provide certainty within the industry.

IMPACTS OF A CHANGE IN THE EMPLOYMENT STATUS OF ARTISTS

Any change to the status of an artist for purposes of the *ITA,* the *CPP* and the *EIA* will result in great financial difficulties for the majority of Canadian engagers. As the majority of engagers operate on a not-for-profit basis, and already face substantial operating deficits, it is important to assess the financial impact that a change in an artist's status will have upon these organizations.[8]

In 2002, the Department of Canadian Heritage commissioned a study to analyze the financial impact of the reassessment of artists from independent contractors to employees. Specifically in respect of the impact that a change would have upon not-for-profit performing arts organizations, the study concludes:

> … the not-for-profit performing arts sector could face a potential assessment for [Employment Insurance ("EI")] premiums and [Canada Pension Plan ("CPP")] contributions of around $3 million-$7 million. Although this figure is small in comparison to the total revenues of $474 million, expenses for these organizations were $479 million, resulting in a deficit of $5 million. The assessment for EI and CPP could more than double the deficit, adding to an already substantial combined debt.
>
> This potential assessment figure does not take into account past year's EI and CPP contributions that [the *CRA*] could assess, or any interest and penalties. Including an assessment for uncollected EI premiums from the previous three years [to the above-noted figures] could more than triple the total assessment [from $3 million to $7 million] to $8 million to $22 million.[9]

This study did not assess the financial impact that a change in status could have upon individual artists; however, it is not difficult to assume that the overall financial impact of a change in status on artists would also be significant. The primary effect on artists would be the disallowance of business expenses under the *ITA*.

It can also easily be assumed that in order to cover the increased costs associated with a change in the status of artists, engagers will require significantly increased funding levels from the Government of Canada. Should engagers not receive an increase in funding at least equal to the increase in costs as noted above, the ensuing financial burden on these engagers may result in many of them ceasing arts production. To lose such an important and definitional part of Canadian society would be devastating.

CRA INTERPRETATION BULLETINS OF THE STATUS OF ARTISTS

In November 2000, the Canadian Conference of the Arts (the "CCA") convened the first annual Chalmers Conference to specifically address the uncertainty within the arts community surrounding the status of artists for purposes of the *ITA,* the *CPP* and the *EIA*. At the Chalmers Conference, members of the arts community requested that the *CRA* provide clarification to both

artists and engagers as to whether artists would be classified as independent contractors or employees.

After the Chalmers Conference, the *CRA* released a re-draft of "Interpretation Bulletin IT-525R" outlining the legal tests to be applied when assessing the status of an artist as either an employee or independent contractor for purpose of the *ITA,* the *CPP* and the *EIA*. Interpretation Bulletin IT-525R purported to assess artists as either independent contractors or employees based upon the traditional tests used to assess the employment status of workers in other industrial contexts.

After the release of the re-drafted Interpretation Bulletin IT-525R, the CCA, members of the arts community, the *CRA* and the Department of Justice engaged in discussions regarding required amendments to the content of the draft Interpretation Bulletin prior to any final version being published. The position of the arts community continues to be that a rebuttable presumption of independent contractor status of artists should be adopted by the *CRA*. Unless the presumption is rebutted by an explicit and written recognition to the contrary, artists will continue as self-employed persons and be permitted to make business deductions in the ordinary course.

Such a presumption recognizes the uniqueness of the arts, the historical treatment of artists, the election of artists to forego unemployment insurance benefits, the evolution of the arts around the assumption of independent engaging parties and is consistent with the Government of Canada's obligations under the Belgrade Convention. Engagers, on the other hand, will not be overcome by the costs associated with the change in artists' status and risk the demise of their artistic productions, thus compromising the arts in Canada. A presumption of independent contractor status creates certainty within the industry and alleviates situations similar to those that occurred at the Thunder Bay Symphony Orchestra and the Magnus Theatre.

INDEPENDENT CONTRACTOR or EMPLOYEE: THE LAW IN CANADA

What kind of Canada do we want? What kind of a country do we want to build?
.... A Canada overflowing with artistic creativity ...

Prime Minister Paul Martin
Reply to the Speech from the Throne
February 3, 2004

The tests used by courts and administrative agencies, including the *CRA*, to assess the status of a worker as either an independent contractor or an employee have been derived from the common law. Because most legislation either fails to define "employee" or "independent contractor" at all, or provides imprecise definitions, the common law continues to be the most significant factor guiding the assessment of the status of a worker.

The traditional test used to assess workers as either employees or independent contractors was outlined by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd. et al*.[10] This test, often referred to as the "four-part" test, identifies the four factors that ought to be assessed when classifying a worker as either an independent contractor or an employee. The four factors are: (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Prior to the enunciation of this test, many courts considered the element of control to be the greatest indicator when classifying workers. However, it was noted by Lord Wright that, although significant to the decision, the element of control by itself is not always conclusive of a worker's status.

In *Wiebe Door Services Ltd. v. The Minister of National Revenue*[11] Justice MacGuigan applied the traditional four-part test set out in *Montreal Locomotive*, but also considered the writings of Professor P.S. Atiyah in *Vicarious Liability in the Law of Torts,* London, Butterworths, 1967, p. 68:

> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose … The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy.[12]

Justice MacGuigan concluded that the total relationship of the parties should be the focus of any test used to classify workers, but that the four-part test should serve as the basis for this analysis.

In more recent jurisprudence, many courts have commented on the application of the four-fold test and the real objective of assessing the total relationship of the parties. Recently, the courts have concluded that the assessment of workers as employees or as independent contractors should not be limited to examining isolated factors, but that there ought to be a consideration of the entire working relationship and whether the worker is, in fact, carrying on his or her own independent business. [13]

A similar conclusion was reached by the Supreme Court of Canada in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc*.[14] The Supreme Court held that there is no one conclusive test that can be used to determine whether a worker is an independent contactor or an employee. The Supreme Court further held that a contextual approach must be applied when assessing the employment status of a worker. In a pivotal commentary regarding the tests used to classify a person as an employee or independent contractor, the Supreme Court held:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. [in *Wiebe Door*] 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.
>
> 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.[15]

Recognizing that the four-fold test (as described in *Montreal Locomotive)* must only provide the starting point of the inquiry and that the real object of the inquiry is to determine the true nature of the total relationship of the parties, it is both necessary and appropriate to have regard for the very real contextual differences presented by workers in the arts. The common law has recognized these contextual differences.

For example, in *Walden v. Danger Bay Productions*[16] the British Columbia Court of Appeal, in finding that two actors engaged on the production of the television series "Danger Bay" were independent contractors, recognized the uniqueness of the arts context when assessing the employment status of artists. This decision, made by a Superior Court of Appeal, has established within the common law a special recognition of the uniqueness of artists and serves to bind the *CRA* when making assessments of artists.

When the status of an artist is examined in the context of the entire working relationship, taking into account the judicial recognition of the unique nature of the working relationship between artists and engagers, there is room within the parameters of the existing jurisprudence to allow for a presumption of independent contractor status for artists. Even the traditional tests of “control”, “ownership of the tools” and “chance of profit and risk of loss” can result in a finding of independent contractor status for artists, as long as the uniqueness of artists is recognized and a contextual approach is applied.

CONTROL

The concept of control has long been considered a primary determining factor when classifying workers. However, as traditional master-servant relationships have become less common, less emphasis has been placed on the control criteria. The analysis of supervision and control is particularly complex when considering the relationship between an artist and an engager.

In *Walden*, Justice Legg held that the relationship between the engager and the actors was not one of control and subordination simply because the engagers provided direction to the actors, essentially monitoring the result of their work. Justice Legg noted:

> … the producers acknowledged that attempting to exert ultimate control over the way in which a particular scene was played might well result in a bad or wooden performance and not achieve the goals of either party. In my view, the real relationship was one of co-operation or at least attempted co-operation, not unilateral direction.[17]

The Tax Court of Canada has also since recognized that "[t]he more specialized the knowledge of the worker in performing a function, the less likely it is that the supervisor is able to direct the method of doing the work".[18] Further, it has been held that artists are not "controlled" in the traditional sense by the engagers simply because they receive direction from an artistic director, producer or stage director. Rather, for the most part artists work in collaborative environments, and such a collaborative working relationship will result in a finding that the artist is an independent contractor as opposed to an employee.

For example, in *Big Pond Publishing and Production Ltd. (c.o.b. Lupins Productions) v. Canada (Minister of National Revenue)*[19] the Court carefully considered each of the traditional four factors and concluded that the musicians were independent contractors and not employees. With respect to the amount of control exerted by the engager over the musicians, Justice Porter stated:

> Looking first at the aspect of control there was control, in a way, of what music they played and when, but not how. Much like the local carpenter who might be engaged to build a garage or a porch one might tell him when to do the job and give him a plan of what to do, but he would decide how he did it. So to, with a professional, such as an accountant or a lawyer, I see no more control than that in the situation at hand. Each was a professional musician in his or her own right. *Each knew how best to play their own particular instrument and they worked together to find the best result as a team. This is not in my view the type of control exerted in an employer/employee relationship* … From the control aspect they would appear to be more like independent contractors.[20]

Also, in *Productions Petit Bonhomme Inc. v. Canada (Minister of National Revenue)*,[21] the Tax Court of Canada disagreed with the Minister of National Revenue's assessment that the artists in this case were employees. Justice Angers noted that, when assessing the element of control, the determination should not be based upon the amount of control exercised by the engager over the worker, but rather the power an engager has to control *the way* in which the worker performs her duties.

The Court then considered the manner in which the engager achieved its results and whether the results were attributable to the control exerted by the engager, or the synthesis of each worker

under self control. The Court found that the finished artistic product was the result of the "*talent, know-how and creativity contributed by each person at each stage of the production*".[22] No worker performed her tasks blindly but did so after discussing and meshing her distinct abilities and talents with those of other workers to produce the final result envisioned by the producer. The Court concluded:

> All these features of each person's involvement in the production of the programs in question support the conclusion that a production of this type is the result of the ideas, talent, creativity, and know-how brought by all to the performance of their respective duties, which they carry out under the control of the producer in terms of how their work is to be done. Everything takes place in an atmosphere of collaboration among professionals. Thus, the situation of the workers in these appeals is more like that of self-employed workers.[23]

OWNERSHIP OF THE TOOLS

The tools of a business come in various forms and tools will differ between professions. For certain professions the tools are easily identified. In the arts, though, a recognition of the true tools of the trade requires a purging of stereotypical and antiquated notions. The common law has recognized that the tools of an artist can depart from the historical understanding of the constituency of tools.

Generally, it has been acknowledged that musicians own their own tools and have the financial responsibility for the upkeep of those tools. Similarly costumes, instruments, a painter's palette and a photographer's camera are easily acknowledged, under even historical assessments, as being tools belonging to the artist.

However, the more principled approach recognized by courts is that the tools of the artist are those inherent in the artist. For example, the tool through which the ballet dancer plies her trade is her body and form. It is her body in which the investment is made and is the delivery agent of the trade. Similarly, personal characteristics (height, weight, appearance) are the tools of the actor's trade. This notion has been approved by the British Columbia Court of Appeal in *Walden*. In this respect, Justice Legg found:

> *The ownership of tools is a traditional test although it may not be appropriate in this context.* Guardian [arguing for the workers to be found employees] stresses that sets, equipment, and wardrobe were all the property of the producers. It seems to me that the former two are necessary for all the performers and the entire work; the latter was subject to a right of consultation. *I feel it would be appropriate to view the characteristics of the performers as more significant.* We heard that the producers have a view of the production as a whole and its characters. Presumably they attempt to fill the roles with actors who have the appropriate appearance and characteristics. It would seem inappropriate to fill

> the role of a grandmother with a young athletic male in most instances. *If the actors were employees, would it even be legal to seek persons of a certain age or sex? There is as good a case for defining such characteristics as age or sex as the tool of an actor's trade as the wardrobe used. Obviously there will be skills employed by the actor or actress in using their characteristics and their part to best advantage. In the sense set out above, the "tools" are the property of the actor.*[24]

A variety of items, then, may be considered to be the tools of the artist. The artist's voice, appearance, gender, stature and age are examples of a few. While these may not fit the historical notion of "tools", the common law has come to recognize that when assessing the ownership of tools, the central and defining tools of a trade are to be considered. In the arts context, and particularly in the performing arts, it is the performance that is being traded. The central and defining tools used in the delivery of the performance are the artist's inherent tools. Lighting, props and costumes are tangential and are not properly described as the central and defining tools of the artist's trade.

CHANCE OF PROFIT AND RISK OF LOSS

As with many of the classifying factors, the results of the assessment of chance of profit and risk of loss will vary depending on from whose perspective, the worker or the engager, the assessment is undertaken. As with every other factor, the chance of profit and risk of loss ought to be examined from the point of view of the worker and not the engager.

When examining the element of profit and loss from the perspective of the worker, the Court in *Walden* confirmed that, in the arts context, the chance of profit and risk of loss is closely tied to the artist's selection of performance, role or production. Justice Legg states:

> There was a chance of profit under the arrangements with ACTRA, the performers' organization, and by the terms of the contracts between the actresses and the producer. *There was no apparent risk of loss in the contracts. Again, this perspective is skewed towards looking at the matter from the standpoint of the producer. From the performers standpoint, the particular part is but one step in the career path. The degree of success achieved by her in the role may be just as important or more so to her career than to the series. Viewed in this way, there is both a chance of profit and a risk of loss for the actress.*[25]

Therefore, if the production is successful, the artist's career may be greatly advanced, particularly if the artist's talent is a prominent factor in the success of the performance. However, should the performance, role or production be unsuccessful, an artist has taken a considerable risk in contracting her services to the project and perhaps declining any concurrent career-advancing engagements.

This could be stated more directly. Your performance may elevate you to stardom and doom you to mediocrity. If the performance, role or production is unsuccessful, the actor may have considerable difficulty getting another job.

Another important indicator of profit and loss potential is the artist's need to maintain, replace, and enhance their tools. For musicians, this presents in the obvious form of maintaining their instruments. In addition, and for all artists, there exists the need to maintain voice, appearance, body, acting, dancing and vocal skills and this need must be considered in any assessment of an artist's chance of profit and risk of loss. In this respect, the Federal Court of Appeal confirmed, in *Scott v. Canada*,[26] that the human body could be a crucial component of a business.

Artists also incur the more traditional expenses associated with being in business on one's own account. For example, artists incur costs in respect of attending artistic performances, networking with agents, producers and others in the arts community. Artists typically incur the costs of maintenance in respect of offices and studios (in-home or elsewhere) and engage professionals, like lawyers and accountants, to render services in respect of their businesses.

Many also have agents, a considerable cost.

INTENTION OF THE PARTIES

In addition to the traditional tests, the common law has recognized that the intention of the parties can be a useful measurement of the status of a worker. Several courts have noted that the intention of the parties, in the treatment of their relationship, and as may be described in a contract, should be considered when all other factors and indicators are equal. For example, Justice Robertson in *Big Pond* commented:

> It is perhaps trite to say that it is not the label but the substance of the arrangement which must be considered. Whatever the parties might call their relationship in the contract itself, it is the pith and substance that must be considered. Having said that, *all things being equal it does seem to me that some regard must be had to the intention of the parties as it may be expressed in writing*. If it is clear that the expressed intention has not been transposed, in reality, into the situation, then clearly it should be disregarded. However it is not for the Minister nor the Court to re-write the contract entered into between the parties. If the arrangement is consistent with the expressed intention albeit that it may have some aspects which more readily fit into the other category, sight should not be lost of that expressed intention.[27]

Further, in *Livreur Plus Inc. v. Canada (Minister of National Revenue - M.N.R.)*,[28] the Federal Court of Appeal considered the four-fold test as enumerated in *Weibe Door*, but also considered the intention of the parties when reaching its conclusion. Justice Létourneau, in writing for the Court, held:

> What the parties stipulate as to the nature of their contractual relations is not necessarily conclusive, and the Court may arrive at a different conclusion based on the evidence before it … However, if there is no unambiguous evidence to the contrary, the Court should duly take the parties' stated intention into account … Essentially, the question is as to the true nature of the relations between the parties. Thus, their sincerely expressed intention is still an important point to consider in determining the actual overall relationship the parties have had between themselves in a constantly changing working world: …
>
> … Where a real contract exists, the Court must determine whether there is between the parties a relationship of subordination which is characteristic of a contract of employment, or whether there is instead a degree of independence which indicates a contract of enterprise …[29]

CONCLUSION

The Government of Canada has recognized the importance of the arts within Canada. In doing so, one of the objectives of Canada's Cultural Policy is to provide artists with conditions favourable to the practice of their art. Additionally, as a signatory to the Belgrade Convention, Canada has committed to providing artists with material conditions that facilitate artistic endeavours. A rebuttable presumption that artists are engaged as independent contractors will further Canada's Cultural Policy objectives (and the Status of the Artist Act) and is consistent with Canada's commitments pursuant to the Belgrade Convention. Uncertainty within the arts community with respect to the status of artists does not promote either Canada's Cultural Policy objective or Canada's commitments under the Belgrade Convention.

In fact, case-by-case reassessments of the status of artists by the *CRA* have caused conditions unfavourable to artistic endeavours by creating uncertainty within the arts community regarding the classification of artists for the purposes of the *ITA,* the *CPP* and the *EIA*. Case-by-case reassessments of the status of artists, similar to those at the Magnus Theatre, have resulted in great uncertainty within the arts community. A change to the status of artists may result in engagers being reassessed by the *CRA* for the retroactive payment of deductions and contributions under the *CPP* and the *EIA*. Many arts organizations have lost valued members from their boards of directors for fear of personal financial liability resulting from such reassessments. Case-by-case reassessments of the status of artists similarly affect artists, resulting in artists facing a liability for the payment of tax on items initially deducted as legitimate business expenses. A presumption of independent contractor status for the purposes of the *ITA,* the *CPP* and the *EIA* benefits all members of the arts community by providing certainty to the entire arts community.

There is room within the parameters of the existing jurisprudence to allow for a rebuttable presumption of independent contractor status for artists, when the status of an artist is examined within the context of the entire working relationship and when the judicial pronouncement on the uniqueness of the arts is applied. The adoption of an administrative presumption by the *CRA* that all artists are independent contractors for the purposes of the *ITA,* the *CPP* and the *EIA* is permissible and reasonable given the fact that the relationship between artists and engagers contain all of the necessary indicia of independent contractor status as required by the common law.

Therefore, the *CRA* should adopt a policy presuming that artists are independent contractors for the purposes of the *ITA,* the *CPP* and the *EIA*, unless the parties to the engagement contract specifically rebut this presumption within the terms of the agreement. Such a presumption will recognize the uniqueness of the arts and respect the election made by artists in the early 1970s regarding their status. This presumption maintains the historical treatment of artists, provides certainty to all members of arts organizations, alleviates the concerns of persons acting on boards of directors for arts organizations for liability under the *ITA*, the *CPP* and the *EIA*, and, ultimately, ensures that the environment in Canada continues to encourage the development of the arts.

We know intuitively that we will become great only when
we translate our force and knowledge into … artistic terms.
Then, and only then will it matter to mankind whether Canada has existed or not.

Hugh MacLennan
The Other Side of Hugh MacLennan, 1978.

[1] S.C. 1992, c. 33, hereinafter the "*SAA*".

[2] J. Jackson & R. Lemieux "The Arts and Canada's Cultural Policy" *Current Issue Review*, 93-3E. Library of Parliament, Parliamentary Research Branch, Ottawa, 1993; last revised October 15, 1999, [***emphasis added***].

[3] United Nations Educational, Scientific and Cultural Organization, "Recommendation concerning the Status of the Artist", adopted October 27, 1980 (hereinafter the "Belgrade Convention"), [***emphasis added***].

[4] Moors, J.L. "Canada's Status of the Artist Act: Impact & Relevance". Unpublished Paper (Submitted for Master of Industrial Relations: Queen's University), July 2004.

[5] Australian Taxation Office. "Income tax: carrying on business as a professional artist", *Taxation Ruling TR 2005/1* (January 12, 2005), at paragraphs 53-54.

[6] House of Commons. "Second Report to the House: Status of the Artist", *Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture* (February 22, 1990).

[7] [1998] T.C.J. No. 955 (T.C.C.), hereinafter "*Thunder Bay*".

[8] Ernst & Young, "Impacts of a Change in Employment Status of Performing Artists on Organizations in the Arts and Culture Sector", Canadian Heritage, December 2002.

[9] *Ibid.* at page 27.

[10] (1947), 1 D.L.R. 161, hereinafter "*Montreal Locomotive*".

[11] (1986), 87 D.T.C. 5025 (F.C.A.), hereinafter "*Wiebe Door*".

[12] *Ibid.*, at pages 5029 – 5030.

[13] See for example *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2001] N.B.J. No. 222, 201 D.L.R. (4th) 450 (N.B.C.A.), leave to Supreme Court of Canada refused, [2001] S.C.C.A. No. 425.

[14] [2001] 2 S.C.R. 983, 204 D.L.R. (4th) 542.

[15] *Ibid.*, at paragraphs 46-48, *[emphasis added]*.

[16] (1994), 114 D.L.R. (4th) 85 (B.C.C.A.), hereinafter "*Walden"*.

[17] *Ibid.*, at page 92.

[18] *Airworks Media Services Ltd. v. Canada (Minister of National Revenue)*, [1997] T.C.J. No. 1105 (T.C.C.), at paragraph 21.

[19] [1998] T.C.J. No. 935 (T.C.C.), hereinafter "*Big Pond*".

[20] *Ibid*., at paragraph 38, *[emphasis added]*.

[21] [2002] T.C.J. No. 595 (T.C.C.), application for judicial review denied, [2004] F.C.J. No. 238, leave to the Supreme Court of Canada denied, [2004] C.S.C.R. no 128.

[22] *Ibid*. (T.C.C.), at paragraph 95, *[emphasis added]*.

[23] *Ibid*., at paragraph 104.

[24] *Supra*, note 16, at page 93, *[emphasis added]*.

[25] *Supra*, note 16, at page 93.

[26] (1988) 162 D.L.R. (4th) 595.

[27] *Supra*, note 19, at paragraph 36 *[emphasis added]*.

[28] [2004] F.C.J. No. 267 (F.C.A.).

[29] *Ibid.* at paragraphs 17-18.