A-443-04

2006 FCA 87

The Royal Winnipeg Ballet (*Appellant*)

v.

The Minister of National Revenue (*Respondent*)

Indexed as: Royal Winnipeg Ballet v. M.N.R. (F.C.A.)

Federal Court of Appeal, Desjardins, Evans and Sharlow, JJ.A.—Toronto, September 28, 2005; Ottawa, March 2, 2006.

Employment Law — Appeal from Tax Court of Canada decision that certain dancers engaged by Royal Winnipeg Ballet (RWB) employees, not independent contractors — Legal relationship between RWB, dancers determined, governed by seasonal Canadian Ballet Agreement, umbrella agreement between Canadian Actors' Equity Association (CAEA), RWB — CAEA, dancers, RWB agreeing dancers covered by Agreement independent contractors — Not written agreement characterizing legal relationship — Principles of law established by case law on whether employee, independent contractor reviewed, applied — Wiebe Door Services Ltd. v. M.N.R. setting out list of factors to be considered in determining individual's status — Tax Court of Canada erring when concluding not necessary to consider parties' intention in determining legal nature of contract — Should have considered factors, particularly control factor, established by case law in determination — While RWB's control over dancers' work extensive in present case, no more than needed to stage series of ballets in given season — Parties' common understanding of legal relationship supported by contractual terms, facts.

Employment Insurance — Appeal from Tax Court of Canada decision that specific dancers engaged by Royal Winnipeg Ballet (RWB) employees, not independent contractors — Determination of dancers' status having important implications for purposes of Employment Insurance Act (EIA), Canada Pension Plan (CPP) — Tax Court's finding meant work of dancers constituting insurable employment under EIA, not entitled to tax relief for certain expenses usually incurred by dancers — Uncontradicted evidence establishing RWB, Canadian Actors' Equity Association, dancers all believing dancers self-employed, acted accordingly — Dancers therefore independent contractors.

Contracts — Appeal from Tax Court of Canada decision that specific dancers engaged by Royal Winnipeg Ballet employees, not independent contractors — Freedom of contract constituting fundamental principle of common law of contracts — Principles of law of contracts stated in Civil Code of Québec (Arts. 1425, 1426) also present in common law — Common intention of parties sought in interpretation of contract — Evidence of parties' understanding of contract must always be examined, given appropriate weight, but parties' declaration as to legal character of contract not determinative — Terms of contract must reflect parties' legal relationship in factual context.

This was an appeal from a decision of the Tax Court of Canada that certain dancers engaged by the Royal Winnipeg Ballet (RWB) for a particular period were employees and not independent contractors. The RWB had asked the Minister of National Revenue (Minister) for a ruling on this point to determine its legal obligations to the dancers under the *Canada Pension Plan* (CPP) and the *Employment Insurance Act* (EIA). A Minister's delegate concluded that the dancers were employees of the RWB. The RWB, along with the three dancers at issue, filed separately two appeals each to the Tax Court of Canada: one under section 28 of the CPP and one under section 103 of the EIA. The eight appeals were dismissed. Only the RWB appealed the Tax Court judgment.

The legal relationship between the RWB and each dancer is determined and governed by the Canadian Ballet Agreement in force for that season. The Canadian Ballet Agreement is an umbrella agreement between the Canadian

Actors' Equity Association (CAEA) and the RWB. The RWB agrees to engage only persons who are members thereof. The record established that the understanding of the CAEA, the dancers, and the RWB was that the dancers covered by the Canadian Ballet Agreement are independent contractors and not employees of the RWB. However, there was no contractual instrument that purported to characterize the dancers either as employees of the RWB or as independent contractors. The Canadian Ballet Agreement sets minimum rates of remuneration, contributions to a health care plan and so forth. For all fiscal purposes, the dancers and the RWB acted consistently with their understanding that the dancers are independent contractors. The dancers are registered for GST purposes and charge GST to the RWB for their services. Furthermore, the RWB does not withhold tax from the remuneration paid to a dancer except at the dancer's request.

In finding that the dancers were employees of the RWB, the Tax Court considered it unnecessary to take into account "the intention of the parties" in determining the legal character of the relationship between the dancers and the RWB because the Court's consideration of other relevant factors yielded a conclusive result. The determination of the status of the dancers had important implications both for the RWB and the dancers. The Tax Court's finding meant that the RWB would be obliged to pay employment insurance premiums and make contributions to the CPP. From the point of view of the dancers, it meant, *inter alia*, that their work as dancers for the RWB was insurable employment under the EIA and that they were not entitled to tax relief for certain expenses borne by a dancer. The issue was whether the Tax Court was correct in finding that, for the purposes of the EIA and the CPP, the dancers in question were employees of the RWP.

Held (Evans J.A. dissenting), the appeal should be allowed.

Per Sharlow J.A. (Desjardins J.A. concurring): The state of the law after the 1986 Federal Court of Appeal decision in *Wiebe Door Services Ltd. v. M.N.R.* was that the key question in determining whether an individual is an employee is whether the individual was engaged to provide services as a person in business on his or her own account. It also provided a list of factors, such as the level of control, the ownership of the equipment, the degree of financial risk and the opportunity for profit, aimed at answering that question. In 2001, the Supreme Court stated in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, that there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor and that the total relationship of the parties must be considered. Another leading case, *Wolf v. Canada*, was rendered by the Federal Court of Appeal in 2002 and involved a mechanical engineer whose working contract was governed by the laws of Quebec. Under the *Civil Code of Québec*, the key distinction between a "contract of employment" and a "contract of enterprise" lies with the element of subordination or control but, in the case law, the distinction is also examined in light of the tests now found in the other two cases. Desjardins J.A. applied the principles stated in *Sagaz* and *Wiebe Door* and concluded that the appellant was an independent contractor. Noël J.A. who concurred in the result but on the basis of a different analysis held that the characterization which the parties had placed on their relationship should be given great weight where the relevant factors point in both direction with equal force.

The Tax Court of Canada erred in concluding that it was unnecessary to take into account the intention of the parties. The Judge's apparent concern that parties may escape the legal consequences of creating an employment relationship simply by denying that they had created an employment relationship was unfounded. Indeed, there is ample authority for the proposition that parties to a contract cannot change the legal nature of that contract merely by asserting that it is something else. He also misunderstood Noël J.A.'s reasons in *Wolf* as treating the parties' contractual description of their legal relationship as a tie-breaker, to be taken into account only if the *Wiebe Door* factors fail to yield a conclusive result. In determining the legal nature of a contract, a search for the common intention of the parties is the object of the exercise. Décary J.A. expressed the same idea in *Wolf* when he referred to the *Civil Code of Quebec*, articles 1425 and 1426 which state principles of the law of contract that are also present in the common law. One such principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that the circumstances in which a contract was formed, the interpretation the parties have already given it and usage must all be taken into account in interpreting a contract. In short, the evidence of the parties' understanding of their contract must always be examined and given appropriate weight. This however does not mean that the parties' declaration as to the legal character of their contract is determinative. If it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded.

Given the uncontradicted evidence as to the parties' understanding of their legal relationship, the Tax Court should have considered the *Wiebe Door* factors and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the Court to an incorrect conclusion. The control factor required particular attention in this case. While the degree of control exercised by the RWB over the work of the dancers is extensive, it is no more than is needed to stage a series of ballets over a well-planned season of performances. The elements of control in this case could not reasonably be considered to be inconsistent with the parties' understanding that the dancers were independent contractors. The common understanding of the parties as to the nature of their legal relationship was borne out by the contractual terms and the other relevant facts.

Per Evans J.A. (dissenting): The particular issue raised in this case was the weight that a court should give to the parties' understanding of the legal nature of their relationship when determining into which category a contract to supply services falls.

Freedom of contract is a fundamental principle of the common law of contract. With some specific limitations, parties may contract on whatever terms they think will best advance their interests. It also means that the courts must give effect to the terms on which the parties intended to contract. Whether a contract falls into a particular legal category is an inference of law, drawn from the terms of the agreement and the conduct of the parties. It does not rest on the legal label attached to the agreement by the parties or on their purpose in entering into it. The intention of the parties is relevant to determining the terms of the transaction, not to its legal characterization, nor to whether the parties attained their ultimate objective. Neither *Wiebe Door* nor *Sagaz* states that the common intention or understanding of the parties about the legal nature of their contract is a relevant factor in the analysis of the characterization of a contract. The reasons in both cases focus on objective factors for determining whether the individuals concerned were in business on their own account or were employees. When a dispute arises over the proper legal character of a contract, there are good reasons to attach little if any weight to the parties' understanding of it, or to their objective in entering into the contract. The only significant role of the parties' stated intention or understanding about the legal nature of their contract is as part of the interpretative context in which the Court views the contract in order to resolve ambiguities and fill in silences in its terms. With respect to the present case, the fact that the dancers were registered for and charged GST was not evidence of the legal nature of the contract. It was a legal consequence of characterizing the contract as one for the supply of services, not proof of its legal character, and the law attaches little or no weight to the fact that the parties' conduct is consistent therewith. At most, this fact was evidence that the parties believed that they were not in an employment relationship.

Wiebe Door was decided 20 years ago, at a time when the contextual approach to legal analysis was less well established in Canadian case law than it is now. The four factors enumerated in *Wiebe Door* are drawn largely from the law of tort. The test was devised before the rapid growth of outsourcing and privatization of work had occurred and the effects of the globalization of the economy had become so apparent. The changing nature of the workplace, and the increasing complexity and diversity of the relationships under which labour is supplied, are apt to reduce further whatever value the *Wiebe Door* test may once have had to determine who is an employee for EI and CPP purposes and thus entitled to the benefits that these statutory schemes provide.

The Tax Court Judge did not err in law when, in applying the *Wiebe Door/Sagaz* considerations to the terms of the contracts, he did not consider the parties' understanding of, or stated intention about, the legal nature of their relationship. The Judge was able to reach a clear conclusion about the proper characterization of the contracts on the basis of the *Wiebe Door/Sagaz* factors and a contextual examination of the terms of the contracts. He was also properly alert to the fact that an application of those factors had to be sensitive to the nature of the dancers' work. He declined to consider some aspects of the contractual relationship as indicative of control because they were inherent in the production and performance of a ballet as a coherent work of art.

The legal test for determining whether a contract is one of employment or for services is multi-factored. Unless a judge commits some egregious error in its application, it will be difficult to establish palpable and overriding error. As the Tax Court Judge pointed out, the contracts in the present case contained terms that subjected dancers to controls that went well beyond the requirement of artistic performance.

statutes and regulations judicially

considered

Canada Pension Plan, R.S.C., 1985, c. C-8, s. 28 (as am. by S.C. 1997, c. 40, s. 65; 1998, c. 19, s. 255).
Civil Code of Québec, S.Q. 1991, c. 64, Arts. 1425, 1426.
Employment Insurance Act, S.C. 1996, c. 23, s. 103 (as am. by S.C. 1998, c. 19, s. 268).
Interpretation Act, R.S.C., 1985, c. I-21, s. 8.1 (as enacted by S.C. 2001, c. 4, s. 8).
Labour Relations Act, C.C.S.M., c. L10.
Status of the Artist Act, S.C. 1992, c. 33.

cases judicially considered

applied:

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983; (2001), 204 D.L.R. (4th) 542; 17 B.L.R. (3d) 1; 11 C.C.E.L. (3d) 1; 8 C.C.L.T. (3d) 60; 12 C.P.C. (5th) 1; 274 N.R. 366; 150 O.A.C. 12; 2001 SCC 59; *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553; [1986] 5 W.W.R. 450; (1986), 46 Alta. L.R. (2d) 83; [1986] 2 C.T.C. 200; 87 DTC 5025; 70 N.R. 214 (C.A.); *Wolf v. Canada*, [2002] 4 F.C. 396; [2002] 3 C.T.C. 3; 2002 DTC 6853; 288 N.R. 67; 2002 FCA 96; *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161; [1946] 3 W.W.R. 748 (P.C.); affg [1945] S.C.R. 621; [1945] 4 D.L.R. 225; [1945] CTC 386; revg in part *sub nom. Montreal Locomotive Works Ltd. v. Montreal and Attorney-General for Canada*, [1945] 2 D.L.R. 373; [1945] CTC 349 (Que. K.B.).

distinguished:

Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129; (1998), 161 D.L.R. (4th) 1; 80 C.P.R. (3d) 321.

considered:

Stevenson Jordan and Harrison, Ltd. v. Macdonald and Evans, [1952] 1 T.L.R. 101 (C.A.); *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.); *Lee Ting Sang v. Chung Chi-keung*, [1990] 2 A.C. 374 (P.C.); *Backman v. Canada*, [2001] 1 S.C.R. 367; (2001), 196 D.L.R. (4th) 193; 11 B.L.R. (3d) 165; [2001] 2 C.T.C. 11; 2001 DTC 5149; 266 N.R. 246; 2001 SCC 10; *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298; (1998), 163 D.L.R. (4th) 385; 98 DTC 6505; 222 N.R. 58; *Hayes v. Canada*, [2005] 3 C.T.C. 241; 2005 DTC 5373; (2005), 336 N.R. 141; 2005 FCA 227.

referred to:

Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent, [1978] 1 S.C.R. 605; (1977), 3 C.C.L.T. 109; 17 N.R. 593; *Curley v. Latreille* (1920), 60 S.C.R. 131; 55 D.L.R. 461; *Spire Freezers Ltd. v. Canada*, [2001] 1 S.C.R. 391; (2001), 196 D.L.R. (4th) 210; 12 B.L.R. (3d) 1; [2001] 2 C.T.C. 40; 2001 DTC 5158; 266 N.R. 305; 2001 SCC 11; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888; (1979), 112 D.L.R. (3d) 49; [1980] I.L.R. 595; 32 N.R. 488; *Family Insurance Corp. v. Lombard Canada Ltd.*, [2002] 2 S.C.R. 695; (2002), 212 D.L.R. (4th) 193; 167 B.C.A.C. 161; 38 C.C.L.I. (3d) 165; 288 N.R. 373; 2002 SCC 48; *Minister of National Revenue v. Standing* (1992), 147 N.R. 238 (F.C.A.); *9041-6868 Québec Inc. v. M.N.R.*, 2005 FCA 334.

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APPEAL from a Tax Court of Canada decision ((2004), 35 C.C.E.L. (3d) 101; 2004 TCC 390) that certain dancers engaged by the Royal Winnipeg Ballet were employees and not independent contractors. Appeal allowed.

appearances:

Peter H. Harris, Q.C. and *Harry C. G. Underwood* for appellant.

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McCarthy Tétrault LLP, Toronto, for appellant.

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The following are the reasons for judgment rendered in English by

[1] SHARLOW J.A.: The Royal Winnipeg Ballet (the RWB) is appealing a decision of the Tax Court of Canada that Tara Birtwhistle, Johnny Wright and Kerrie Souster, when engaged by the RWB as dancers during the period from January 1 to July 29, 2001, were employees of the RWB and not independent contractors. The decision is reported as *Royal Winnipeg Ballet v. Canada (Minister of National Revenue—M.N.R.)* (2004), 35 C.C.E.L. (3d) 101.

[2] The RWB asked the Minister for a ruling on this point for the purpose of determining whether it had any legal obligation, in relation to the dancers, to pay contributions under the *Canada Pension Plan*, R.S.C., 1985, c. C-8 (CPP), and premiums under the *Employment Insurance Act*, S.C. 1996, c. 23 (EIA). Such obligations would exist only if the dancers were employees of the RWB.

[3] A delegate of the Minister concluded that the dancers were employees of the RWB. The RWB, Ms. Birtwhistle, Mr. Wright and Ms. Souster appealed separately to the Tax Court of Canada. Each of them commenced two appeals, one pursuant to section 28 [as am. by S.C. 1997, c. 40, s. 65; 1998, c. 19, s. 255] of the CPP, and the other pursuant to section 103 [as am. by S.C. 1998, c. 19, s. 268] of the EIA.

[4] The eight appeals were heard together on common evidence. In judgments dated June 3, 2004, all of the appeals were dismissed.

[5] The RWB has appealed the Tax Court judgment. The dancers have not appealed. Their bargaining agent, Canadian Actors' Equity Association (the CAEA), sought leave to intervene in support of the appeal of the RWB. Leave was denied on the basis that the CAEA did not represent a point of view that would not otherwise be adequately represented (order of Pelletier J.A. dated March 16, 2005).

The Facts

[6] The facts are not in dispute. The RWB is a world-renowned ballet company. In a typical season, running approximately from September to May, the RWB produces four ballets, which it performs in Winnipeg and on tour in Canada and abroad. Approximately 25 dancers are engaged by the RWB for a season. The RWB may also engage guest artists and other dancers, referred to as "local jobbers," for limited periods within a season. The dancers are supported by numerous staff who work behind the scenes.

[7] The performances for a season are planned two to three years in advance. In February of each year, the recruitment of dancers begins for the following season. A dancer who is engaged for a particular season cannot be

assured of an offer of engagement for the next season, but normally will be advised by the end of February if no new engagement offer is to be made. Ms. Birtwhistle, Mr. Wright and Ms. Souster were engaged for the season covered by the period in issue in this case.

[8] The RWB recruits dancers from those engaged for the current season, from its affiliated ballet school, and from an open audition process. The dancers the RWB wishes to engage are chosen by the artistic director, who also decides which dancers are assigned to particular roles.

[9] The rehearsal and performance of a ballet is an artistic collaboration involving the choreographer who creates the dance movements, the dancers who perform the dance, the ballet masters and ballet mistresses who instruct and coach the dancers, and the artistic director who co-ordinates the work of the dancers with the work of others, including the musicians and designers. A dancer is not free to dance his or her assigned role in a manner that departs from the choreography or the artistic vision of the artistic director. However, each dancer's artistic expression is necessarily unique, even while performing choreographed dance movements.

[10] The artistic director chooses dancers for particular roles based on their individual artistic qualities. Dancers considered for lead roles generally are so advised when they are offered an engagement for the season. Discussions and negotiations ensue and, if fruitful, result in a written contract.

[11] The legal relationship between the RWB and each dancer is determined and governed by the Canadian Ballet Agreement in force for that season, which may in some cases be supplemented by an individual contract between the dancer and the RWB. The Minister does not argue, and there is no evidence that the RWB or the dancers have acted in any way that is inconsistent with any of those contracts.

[12] The Canadian Ballet Agreement is an umbrella agreement between the CAEA and the RWB. It is negotiated every three years. Under the Canadian Ballet Agreement, the RWB recognizes the CAEA as the exclusive bargaining agent for all dancers, narrators, singers, choreographers, stage managers, assistant stage managers, ballet masters and ballet mistresses that the RWB engages. The RWB agrees to engage only members of the CAEA for those positions.

[13] The record establishes that the understanding of the CAEA, the dancers, and the RWB is that dancers covered by the Canadian Ballet Agreement are independent contractors and not employees of the RWB. It is also generally understood that stage managers engaged by the RWB under the Canadian Ballet Agreement are employees of the RWB.

[14] The understanding that dancers are self-employed exists in relation to all but one of the ballet agreements to which the CAEA is a party. The one exception is the ballet agreement between the CAEA and the Alberta Ballet in Calgary. Dancers with the Alberta Ballet were employees before they were represented by the CAEA and remain so even though they are covered by a ballet agreement negotiated with the CAEA.

[15] There is no evidence that there are any practical considerations relating to the activities of the RWB, or the work environment of dancers engaged by the RWB, that compels dancers to be employees of the RWB, or that compels them to be independent contractors.

[16] There is no contractual instrument that purports to characterize the dancers as employees of the RWB or as independent contractors. The Canadian Ballet Agreement is silent on that point. Although the record does not disclose a reason for that silence, the omission may be deliberate because the Canadian Ballet Agreement covers some members of the CAEA (stage managers) who are understood to be employees and some (dancers) who are understood to be independent contractors.

[17] The Canadian Ballet Agreement sets minimum rates of remuneration, including overtime and vacation pay, contributions to a health care plan and a disability insurance plan, and minimum standards for a large number of working conditions for dancers of varying levels of experience. A dancer may be classified under the Canadian Ballet Agreement as apprentice, corps de ballet (levels 1 to 6), second soloist (levels 1 to 2), first soloist (levels 1 to 5), or principal dancer. Among the dancers' working conditions covered by the Canadian Ballet Agreement are

rehearsal and performance conditions, periods of rest between performances, and travel arrangements and allowances.

[18] A dancer is free to negotiate with the RWB terms of engagement that are better than those set out in the Canadian Ballet Agreement. Normally, the soloists and principal dancers are the individuals who are most likely to obtain such terms, which generally include a slightly better rate of remuneration, better billing, and special concessions of a relatively minor nature.

[19] A dancer who is engaged by the RWB may accept an engagement for a live performance with another company after the start of rehearsals for the season, if there is a permissive term in the individual contract or the RWB consents. A dancer has the right to accept other engagements that do not conflict with the fulfilment of his or her contractual obligations, if the RWB consents. A principal dancer or soloist engaged by the RWB is free to accept any radio or television broadcast engagement but is required to ensure that his or her engagement with the RWB is publicized.

[20] The RWB is obliged to display the names of all dancers prominently on its premises, and to list in programmes distributed to its audiences the names of all dancers performing in a principal or soloist role. Dancers retain ownership of their images, subject to the limited licence given to the RWB under the Canadian Ballet Agreement to use them for certain purposes.

[21] The RWB cannot require a dancer to perform any tasks that are not stipulated in the Canadian Ballet Agreement or in the dancer's individual contract. For example, a performance cannot be filmed or broadcast unless a separate agreement is negotiated.

[22] Dancers personally bear certain costs in order to carry out their contractual obligations, including the cost of fitness and rehearsal wear, physical conditioning (including gym memberships), orthopedic devices, makeup and certain health-related items. The RWB is required by the Canadian Ballet Agreement to purchase pointe shoes, specialized belts and costumes. The RWB, as a bulk purchaser, is able to obtain discounts for such items.

[23] For all fiscal purposes, the dancers and the RWB have acted consistently with their understanding that the dancers are independent contractors. The dancers are registered for GST [Goods and Services Tax] purposes and charge GST to the RWB for their services. The RWB does not withhold tax from the remuneration paid to a dancer, except at the dancer's request. If a dancer requests that tax be withheld, the dancer also stipulates the amount to be withheld. The RWB complies with any such request by a dancer.

[24] A dancer may choose to contribute to a fund called the "Dancer's Resource Transition Plan" operated by a not-for-profit organization called the Dancer Transition Resource Centre. The fund is used to assist dancers moving from a dancing career to their next endeavour. If a dancer contributes to that fund, the RWB makes a matching contribution although it has no obligation to do so under the Canadian Ballet Agreement or the dancers' individual engagement contracts.

The Tax Court Decision

[25] The Judge found that the dancers were employees of the RWB. He provided a lengthy account of the legal principles upon which he based his decision, and an extensive explanation of his application of those principles to the facts. I do not propose to restate the Judge's reasons, but I observe that he considered it unnecessary to take into account what he referred to as "the intention of the parties" in determining the legal character of the relationship between the dancers and the RWB, because his consideration of other relevant factors yielded what he found to be a conclusive result (see paragraph 82 of the Judge's reasons). For the reasons that are discussed below, I must respectfully disagree with the Judge that the intention of the parties was irrelevant in this case. In my view, his error in that regard led him to an incorrect conclusion.

Discussion

1. Preliminary points

(a) Consequences of the status of the dancers as employees or independent contractors

[26] It is common ground that the RWB is entitled to succeed in this appeal if the dancers were not employees of the RWB during the relevant period. The importance of this to the RWB is that the RWB has no obligation to pay employment insurance premiums or make contributions to the CPP for the dancers unless they are employees of the RWB. Although this case deals with only three dancers for a limited period of time, it is anticipated that as a practical matter the conclusions reached in this case will be applied in later periods to all dancers engaged by the RWB, unless the facts change significantly.

[27] From the point of view of the dancers, the finding of the Tax Court that they are employees of the RWB means that their work as dancers for the RWB is insurable employment under the EIA. Also, if the dancers are employees of the RWB, they are obliged to make only a portion of the required contributions under the *Canada Pension Plan* (the "employee's share"), because the RWB must pay the "employer's share." An independent contractor is required to pay both portions (although the earnings upon which the required contribution is based may be reduced by certain deductions that are not available to employees).

[28] If the RWB's appeal to this Court is successful, the dancers whose cases were before the Tax Court would not necessarily be at risk of any negative consequences, at least in relation to the EIA and the CPP for the period in issue, because they did not appeal their Tax Court judgments. However, as indicated above, they and other dancers engaged by the RWB may be affected for later periods, unless the facts change significantly.

(b) Potential tax issues

[29] A question may arise as to the extent to which the dancers, if they are employees, are entitled to tax relief for certain expenses typically borne by a dancer, such as agent's fees, special clothing, shoes and equipment, and physical training costs. Generally, a self-employed person may claim tax relief for all expenses reasonably incurred to earn his or her income from self- employment. By contrast, the tax relief available to an employee is restricted to a permitted list of items, most of which would not be applicable to a dancer who is an employee. This differential treatment assumes that essential employment expenses generally are borne by the employer. It is generally recognized that in particular cases, that assumption may not be valid.

[30] The record of this case contains no particulars on the extent to which any dancer could be adversely affected by being found to be an employee, rather than an independent contractor. Nor does the record disclose whether the RWB would be amenable to a change in the terms of engagement to ameliorate the potential negative income tax consequences of a finding that the dancers are employees.

(c) Provincial employment laws

[31] The record does not disclose whether and in what respect the labour and employment laws of Manitoba would affect the RWB or the dancers if the dancers are employees of the RWB rather than independent contractors. Neither party made any submissions about whether the Canadian Ballet Agreement is or should be governed by the *Labour Relations Act*, C.C.S.M., c. L10, or any other provincial legislation that establishes employment standards or authorizes collective bargaining for employees. Since no argument was presented in this regard, I have assumed that the scope of provincial labour legislation is not relevant to the issues raised in this case.

(d) The *Status of the Artist Act*

[32] The *Status of the Artist Act*, S.C. 1992, c. 33, was referred to in argument in the Tax Court and in this Court. It deals with a number of issues relating to self-employed artists engaged in work that is within federal legislative jurisdiction. It contemplates collective agreements between self-employed artists and federal government organizations, and between self-employed artists and broadcasting undertakings within the jurisdiction of the Canadian Radio-television and Telecommunications Commission (CRTC). The *Status of the Artist Act* has no application in this case because the RWB is not an organization that is regulated by a federal authority.

[33] The only relevance of the *Status of the Artist Act* in these proceedings is that it represents a formal

recognition by the Parliament of Canada that performing artists may be independent contractors whose minimum terms of engagement are the subject of a collective agreement. The existence of the *Status of the Artist Act* does not and cannot establish that performing artists are always self-employed or that they cannot be employees.

2. The jurisprudence

[34] *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (*Sagaz*) is the leading case from the Supreme Court of Canada on the determination of the status of a person as an employee or an independent contractor. However, before discussing *Sagaz*, it is useful to consider *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553 (C.A.), because it forms an important part of the jurisprudential foundation for *Sagaz*.

(a) *Wiebe Door*

[35] The issue in *Wiebe Door* was whether certain installers and repairers of overhead doors were employees of a corporation, even though the corporation hired them on the basis that they would be running their own businesses. If the installers were employees, the result would have been to confirm an assessment against the corporation for the payment of unemployment insurance premiums and CPP contributions for the years 1979, 1980 and 1981.

[36] The Tax Court Judge had determined that the installers were employees, citing the "integration test" from *Stevenson Jordan and Harrison, Ltd. v. Macdonald and Evans*, [1952] 1 T.L.R. 101 (C.A.) [at page 111], *per* Denning L.J. The key part of that case is quoted in *Wiebe Door* [at page 560], and reads as follows:

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

[37] MacGuigan J.A. said that the Tax Court Judge had misapplied this statement by treating it as though it stated a single test for distinguishing between an employee and an independent contractor. He found that test not to be a fair one because it will necessarily result in a finding of employment if the parties have developed a relationship of mutual dependence. MacGuigan J.A. [at page 564] adopted instead the following analytical framework from the decision of Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.) [at pages 737-738]:

The observations of LORD WRIGHT, of Denning, L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him.

[38] MacGuigan J.A. concluded that the Tax Court Judge had erred in law in determining the matter on the basis of the integration test alone, when he should have considered all of the relevant factors as taught in *Market Investigations*. MacGuigan J.A. did not engage anew in a detailed review of the relevant factors, but returned the matter to the Tax Court for reconsideration based on the correct law. I have been unable to find a published report of a decision of the Tax Court on the reconsideration.

[39] Some years after the decision in *Wiebe Door*, the Judicial Committee of the Privy Council considered the same issue in the context of a mason who was injured on a construction site in Hong Kong: *Lee Ting Sang v. Chung Chi-keung*, [1990] 2 A.C. 374. The mason was entitled to compensation from the principal construction contractor only if he was its employee. The District Court in Hong Kong found him not to be an employee, based essentially on the integration test from *Stevenson Jordan*. The Hong Kong Court of Appeal upheld the decision. The Judicial Committee reversed the decision, citing as the correct law the statement of Cooke J. quoted above.

[40] Thus, the state of the law after *Wiebe Door* was that, in determining whether an individual is an employee, the key question is whether the individual has been engaged to provide services as a person in business on his or her own account. The list of factors from *Wiebe Door*, cited in practically every case of this kind, are aimed at finding an answer to that question.

(b) *Sagaz*

[41] The problem of determining whether a party was an independent contractor arose in *Sagaz*. Although that case did not involve employment insurance, the analysis in *Wiebe Door* was approved and adopted.

[42] The issue in *Sagaz* was whether Sagaz Industries Canada Inc. and Sagaz Industries Inc. (collectively, Sagaz) could be held liable for the tortious conduct of a New York corporation called American Independent Marketing Inc. (AIM) and its controlling shareholder, Stewart Landow. Sagaz had engaged AIM to assist in marketing synthetic sheepskin seat covers to Canadian Tire Corporation. For approximately 30 years, those products had been supplied to Canadian Tire by 671122 Ontario Limited, formerly called Design Dynamics Limited (Design). Sagaz was initially successful in replacing Design as a supplier to Canadian Tire because Mr. Landow bribed Robert Summers, a Canadian Tire official, who was fired from his job and eventually went to prison. By the time the bribe was discovered, Canadian Tire had concluded that the Sagaz product was superior to the Design product. As a result, Design was not awarded a new contract with Canadian Tire. Design's fortunes declined as a result and its assets were sold. Design sued 13 defendants, including Sagaz, AIM and Mr. Landow. Canadian Tire was sued, but settled. Mr. Summers was sued, but the action was discontinued when he went bankrupt. By the time of the trial, the only remaining defendants were Sagaz and its president, AIM and Mr. Landow.

[43] Design's claim against Sagaz could succeed only if Sagaz could be held vicariously liable for the tortious conduct of AIM. In the Supreme Court of Canada, the determination of that issue turned on whether AIM was an independent contractor of Sagaz. The Court found that AIM was in business on its own account and thus an independent contractor. The result was that Sagaz could not be held vicariously liable for the tortious conduct of AIM.

[44] The conclusion that AIM was an independent contractor of Sagaz was based on the application of the principles stated by MacGuigan J.A. in *Wiebe Door*. Those principles were quoted and endorsed by Major J., writing for the Supreme Court of Canada. Major J. provided this summary of the relevant principles (at paragraphs 46-48):

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming [John G. Fleming, in *The Law of Torts*, 9th ed. Sydney, Australia: LBC Information Services, 1998] observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . ." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah [P.S. Atiyah, in *Vicarious Liability in the Law of Torts*. London: Butterworths, 1967] at p. 38, that what must always occur is a search for the total relationship of the parties:

> [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.

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.

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.

(c) *Wolf*

[45] In 2002, this Court decided *Wolf v. Canada*, [2002] 4 F.C. 396 (C.A.), another leading case on the problem of distinguishing an employee from an independent contractor.

[46] Mr. Wolf was a mechanical engineer specializing in aerospace. Many aerospace companies that might have employed his services did not hire mechanical engineers as employees. They often preferred to engage independent contractors because their contracts could be terminated at any time without incurring liabilities. For the contractors, the pay generally was higher but there was less job security. Mr. Wolf sought out such contracts because of the prospect of higher pay. A company called Kirk-Mayer of Canada Ltd. (Kirk-Mayer), located in Calgary, had a contract with Canadair Limited under which it provided Canadair with personnel. Mr. Wolf signed a contract with Kirk-Mayer under which he agreed to provide his services to Canadair. The expected duration of the assignment was one year, renewable at Canadair's discretion, but dependent entirely on the workload available at Canadair. The agreement provided that if, in the opinion of Kirk-Mayer and its client Canadair, Mr. Wolf did not provide his services in a workmanlike and professional manner, Kirk-Mayer could terminate the agreement.

[47] The contract established an hourly rate of remuneration and provided extra remuneration for overtime, vacations and statutory holidays. It also stipulated a *per diem* allowance payable in certain circumstances and a completion bonus if the contract was completed to Canadair's satisfaction. Canadair was also obliged to pay all travel costs incurred by Mr. Wolf in the performance of the contract. Mr. Wolf invoiced Canadair for his work. Canadair paid Kirk-Mayer, which then paid Mr. Wolf, after deducting income tax, CPP contributions and employment insurance premiums, on the basis that Mr. Wolf was an employee.

[48] Mr. Wolf worked with a team at Canadair involved with the testing of aircraft. He reported to a Canadair project manager. He worked on a number of different projects, to which he was assigned by Canadair as the need arose. Mr. Wolf had no promise of future engagement, no pension and no employee benefits. He was employed in this manner from 1990 until 1995, during which time he worked on nine projects, but there were some periods during that time when he had no work. In 1995 when the time came to terminate the contract, Canadair wrote to Kirk-Mayer asking them to inform Mr. Wolf of the termination.

[49] A number of tax disputes arose between Mr. Wolf and the tax authorities. When his case reached this Court, the only issue was whether he was an employee or an independent contractor. I summarize as follows the relevant portion of the lead judgment, written by Desjardins J.A.

[50] The contract in issue was governed by the law of Quebec. It was therefore necessary to consider whether the contract was a "contract of employment" or a "contract of enterprise" as those terms are defined in the *Civil Code of Québec* [S.Q. 1991, c. 64]. It is generally accepted that, under the Code, the key distinction lies with the element of subordination or control, but in the jurisprudence, the distinction is also examined in light of the tests now found in *Wiebe Door* and *Sagaz*: see *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.); *Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent*, [1978] 1 S.C.R. 605; and *Curley v. Latreille* (1920), 60 S.C.R. 131. On that basis, Desjardins J.A. considered it appropriate to apply to Mr. Wolf's case the principles stated in

Sagaz and *Wiebe Door*. She concluded that those factors, considered in the context of the special nature of Mr. Wolf's highly specialized work and the economic environment in which he chose to work, justified his contention that he was an independent contractor.

[51] Décary J.A. rendered separate reasons in which he analysed the issues somewhat differently but reached the same conclusion as Desjardins J.A. He also suggested that it might not even have been necessary to have recourse to *Wiebe Door* and *Sagaz* because the nature of their contract was so clear. He said this, at paragraph 119 (my emphasis):

Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. Should that not be enough, suffice it to add, in the case at bar, that the circumstances in which the contract was formed, the interpretation already given to it by the parties and usage in the aeronautic industry all lead to the conclusion that Mr. Wolf is in no position of subordination and that Canadair is in no position of control. The "central question" was defined by Major J. in *Sagaz* as being "whether the person who has been engaged to perform the services is performing them as a person in business on his own account". Clearly, in my view, Mr. Wolf is performing his professional services as a person in business on his own account.

[52] Noël J.A. also concurred in the result, but on the basis of a different analysis. His reasons are short and I quote them in their entirety, at paragraphs 122-124:

I too would allow the appeal. In my view, this is a case where the characterization which the parties have placed on their relationship ought to be given great weight. I acknowledge that the manner in which parties choose to describe their relationship is not usually determinative particularly where the applicable legal tests point in the other direction. But in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties' contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.

My assessment of the applicable legal tests to the facts of this case is essentially the same as that of my colleagues. I view their assessment of the control test, the integration test and the ownership of tool tests as not being conclusive either way. With respect to financial risk, I respectfully agree with my colleagues that the appellant in consideration for a higher pay gave up many of the benefits which usually accrue to an employee including job security. However, I also agree with the Tax Court Judge that the appellant was paid for hours worked regardless of the results achieved and that in that sense he bore no more risk than an ordinary employee. My assessment of the total relationship of the parties yields no clear result which is why I believe regard must be had to how the parties viewed their relationship.

This is not a case where the parties labelled their relationship in a certain way with a view of achieving a tax benefit. No sham or window dressing of any sort is suggested. It follows that the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship. In this respect, the evidence when assessed in the light of the relevant legal tests is at best neutral. As the parties considered that they were engaged in an independent contractor relationship and as they acted in a manner that was consistent with this relationship, I do not believe that it was open to the Tax Court Judge to disregard their understanding (compare *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), at page 170).

[53] It is common ground that *Wiebe Door*, *Sagaz* and *Wolf* establish the principles of law that must be applied in determining whether the dancers were employees of the RWB, or independent contractors. Precisely how they apply in this case is the heart of the dispute.

3. The relevance of the intention of the parties

[54] I turn now to the Judge's conclusion that it was unnecessary to take into account the intention of the parties. The Judge does not explain what he meant by the phrase "the intention of the parties," but it seems to me that he considered himself free to disregard the uncontradicted evidence that the parties shared a common understanding

that the dancers were self-employed and were not employees of the RWB.

[55] The Judge's explanation for disregarding the intention of the parties appears at paragraph 31 of his reasons:

Intent only becomes a factor in the event the relevant legal tests yield no definitive result, and where no sham or window dressing is suggested. I agree with this approach. In appropriate circumstances intention simply serves as a tie-breaker. This accords with Justice Major's approach; it does not elevate "intention" to a more primary role. If "intention" was given the prominence the Supreme Court of Canada appears to have reserved for the control factor, there would be a risk that payors, employers, employees and independent contractors might view it as some endorsement of a right to opt in or out of the employment insurance scheme. It should be borne in mind this is not a voluntary program.

[56] The Judge apparently was concerned that parties may escape the legal consequences of creating an employment relationship simply by denying that they had created an employment relationship. In my view, the Judge's concern is unfounded. There is ample authority for the proposition that parties to a contract cannot change the legal nature of that contract merely by asserting that it is something else. This is why Major J. said, in *Sagaz* (at paragraph 49):

Although the contract designed AIM as an "independent contractor", this classification is not always determinative for purposes of vicarious liability.

Similarly, in *Wiebe Door*, the parties' understanding that the door installers were self-employed was not conclusive. In *Wolf*, this Court respected the parties' declared intention that Mr. Wolf would be an independent contractor but only after determining, after due consideration of all of the relevant evidence, that the parties had succeeded in creating the legal relationship that they intended to create.

[57] The Judge apparently understood the reasons of Noël J.A in *Wolf* as treating the parties' contractual description of their legal relationship as a kind of tie-breaker, to be taken into account only if the *Wiebe Door* factors fail to yield a conclusive result. In my view, those reasons are not authority for that proposition. I reach that conclusion because of *Montreal Locomotive*, the case cited by Noël J.A. at the end of his reasons.

[58] The issue in *Montreal Locomotive* was whether a manufacturer was liable for taxes imposed by the City of Montréal in 1941 to 1943. The manufacturer had entered into a contract with the Government of Canada, which was stated to be governed by the law of Quebec, to manufacture armaments. The contract stated that the manufacturer would be an agent of the Crown. The manufacturer located the factory in Montréal. The City of Montréal sought to tax the manufacturer in respect of its occupation and its use of the land. It could do so only if the manufacturer held the land and was carrying on business on its own account (that is, as an independent contractor). It would not be liable for any taxes if it owned and used the land in its capacity as agent of the Crown. The Judicial Committee of the Privy Council found that the manufacturer was an agent of the Crown. The Judicial Committee noted that the contract stated that the manufacturer would be an agent of the Crown, but then went on to conduct an extensive and detailed analysis of all of the terms of the contract, and in particular what the contract said about the factors that were later adopted in *Market Investigations*, *Wiebe Door* and *Sagaz*.

[59] It seems to me from *Montreal Locomotive* that in determining the legal nature of a contract, it is a search for the common intention of the parties that is the object of the exercise. The same idea is expressed as follows in the reasons of Décary J.A. in *Wolf*, at paragraph 117:

I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e. the intention of the parties.

[60] Décary J.A. was not saying that the legal nature of a particular relationship is always what the parties say it is. He was referring particularly to Articles 1425 and 1426 of the *Civil Code of Québec*, which state principles of the law of contract that are also present in the common law. One principle is that in interpreting a contract, what is sought is the common intention of the parties rather than the adherence to the literal meaning of the words. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has

already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties' understanding of their contract must always be examined and given appropriate weight.

[61] I emphasize again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded.

[62] It is common for a dispute to arise as to whether the contractual intention professed by one party is shared by the other. Particularly in appeals under the CPP and the EIA, the parties may present conflicting evidence as to what they intended their legal relationship to be. Such a dispute typically arises when an individual is engaged to provide services and signs a form of agreement presented by an employer, in which she is stated to be an independent contractor. The employer may have included that clause in the agreement in order to avoid creating an employment relationship. The individual may later assert that she was an employee. She may testify that she felt coerced into signifying her consent to the written form of the contract because of financial need or other circumstances. Or, she may testify that she believed, despite signing a contract containing such language, that she would be treated like others who were clearly employees. Although the court in such a case may conclude, based on the *Wiebe Door* factors, that the individual is an employee, that does not mean that the intention of the parties is irrelevant. Indeed, their common intention as to most of the terms of their contract is probably not in dispute. It means only that a stipulation in a contract as to the legal nature of the relationship created by the contract cannot be determinative.

[63] What is unusual in this case is that there is no written agreement that purports to characterize the legal relationship between the dancers and the RWB, but at the same time there is no dispute between the parties as to what they believe that relationship to be. The evidence is that the RWB, the CAEA and the dancers all believed that the dancers were self-employed, and that they acted accordingly. The dispute as to the legal relationship between the dancers and the RWB arises because a third party (the Minister), who has a legitimate interest in a correct determination of that legal relationship, wishes to assert that the evidence of the parties as to their common understanding should be disregarded because it is not consistent with the objective facts.

[64] In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The Judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the Judge to an incorrect conclusion.

4. Reconsideration of the relevant factors

[65] The Judge chose the following factors as relevant to the *Wiebe Door* analysis (it is not suggested that he chose the wrong factors or that there are any relevant factors that he failed to consider):

• The indispensable element of individual artistic expression necessarily rests with the dancers. The RWB chooses what works will be performed, chooses the time and location of the performances, determines where and when rehearsals will be held, assigns the roles, provides the choreography, and directs each performance.

• The dancers have no management or investment responsibilities with respect to their work with the RWB.

• The dancers bear little financial risk for the work they do for the RWB for the particular season for which they are engaged. However, their engagements with the RWB are for a single season and they have no assurance of being engaged in the next season.

• The dancers have some chance of profit, even within their engagement with the RWB, in that they may negotiate for remuneration in addition to what is provided by the Canadian Ballet Agreement. However, for the most part remuneration from the RWB is based on seniority and there is little movement from that scale.

• The career of a dancer is susceptible to being managed, particularly as the dancer gains experience. Dancers engaged by the RWB have considerable freedom to accept outside engagements, although there are significant contractual restrictions (the need for the consent of the RWB, and the obligation to hold themselves out as being engaged by the RWB).

• Although the dancers bear many costs related to their engagement with the RWB and their dancing careers generally, the RWB is obliged to provide dance shoes, costumes, tights, wigs and certain other necessary items.

• The dancers are responsible for keeping themselves physically fit for the roles they are assigned. However, the RWB is obliged by contract to provide certain health related benefits and warm-up classes.

[66] The control factor in this case, as in most cases, requires particular attention. It seems to me that while the degree of control exercised by the RWB over the work of the dancers is extensive, it is no more than is needed to stage a series of ballets over a well-planned season of performances. If the RWB were to stage a ballet using guest artists in all principal roles, the RWB's control over the guest artists would be the same as if each role were performed by a dancer engaged for the season. If it is accepted (as it must be), that a guest artist may accept a role with the RWB without becoming its employee, then the element of control must be consistent with the guest artist being an independent contractor. Therefore, the elements of control in this case cannot reasonably be considered to be inconsistent with the parties' understanding that the dancers were independent contractors.

[67] The same can be said of all of the factors, considered in their entirety, in the context of the nature of the activities of the RWB and the work of the dancers engaged by the RWB. In my view, this is a case where the common understanding of the parties as to the nature of their legal relationship is borne out by the contractual terms and the other relevant facts.

Conclusion

[68] I would allow this appeal and set aside the judgment of the Tax Court dated June 3, 2004 in docket number 2003-2569(EI) and docket number 2003-2580(CPP). Making the judgment the Tax Court should have made, I would allow the appeals of the RWB under subsection 103(1) of the EIA and section 28 of the CPP, and set aside the determination of the Minister that Tara Birtwhistle, John Wright and Kerrie Souster were employees of the RWB during the period from January 2001 and July 2001, and refer this matter back to the Minister for a determination that they were not employees of the RWB during that period. I would grant the RWB its costs in this Court and in the Tax Court.

* * *

The following are the reasons for judgment rendered in English by

[69] DESJARDINS J.A.: I agree with the reasons for judgment and with the disposition of the case as suggested by Sharlow J.A.

[70] In *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161, the Judicial Committee of the Privy Council (J.C.P.C.) decided the issue they were faced with "by examining the precise terms of the contracts before them" (at page 169) and by an analysis of "the combined force of the whole scheme of operations" (at page 170). The nature of the contracts, particularly the production contract, had split the judges of the superior and appeal courts of Quebec. With the assistance of criteria distinguishing a contract of enterprise from a contract of service (master and servant), their Lordships concluded that the contract was one of agency, concurring in the result with the unanimous decision of the Supreme Court of Canada delivered by Rinfret C.J. who used such terms as "contracts of agency or service" and the words "agent or servant" ([1945] S.C.R. 621, at page 633). The J.C.P.C.'s determination of the nature of the contract amounted to a search for what the parties had agreed upon. But since

there was no consensus on what the parties had agreed upon, a judicial determination was required.

[71] The determination of whether or not the parties have entered into a contract of employment for the purpose of the Employment Insurance (EI) or the *Canada Pension Plan* (CPP) has proven over the years to be a difficult and somewhat perilous exercise as the jurisprudence of our Court demonstrates. I would not deprive the common-law judge of the possibility of being apprised of the intention of the parties so as to test such intention against objective factors and the surrounding circumstances of the case when he makes the final determination.

[72] As demonstrated by Sharlow J.A., if the intention of the parties is uncontested, save by third parties, as in the case at bar, the common-law judge has nevertheless the responsibility to "look to see" if the terms used and the surrounding circumstances are compatible with what the parties say their contract is. The common-law judge must make sure that what the parties say they have agreed upon is in fact what is contained in the contract they have signed.

[73] In some cases, the common-law judge is not denied the opportunity of considering the testimony of witnesses with regard to their understanding of the contract. The acceptance of such evidence is not determinative. It is preliminary to the judge's finding and does not free him from the necessity of characterizing the contract.

[74] Hence, in the area of partnership, where "[a]t the time the alleged partnership is formed, the evidence must disclose that the alleged partners were (1) carrying on a business, (2) in common, (3) with a view to profit" (*Spire Freezers Ltd. v. Canada*, [2001] 1 S.C.R. 391, at paragraph 15; *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, at paragraph 22), the subjective intention of the parties as well as the intention of the parties as appearing from the whole facts of the case is an ever present consideration for the common-law judge. In *Backman v. Canada*, [2001] 1 S.C.R. 367, Iacobucci and Bastarache JJ. for the Court stated the following (at paragraph 25):

As adopted in *Continental Bank*, *supra*, at para. 23, and stated in *Lindley & Banks on Partnership*, *supra*, at p. 73: "in determining the existence of a partnership . . . regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case". In other words, to ascertain the existence of a partnership the courts must inquire into whether the objective, documentary evidence and the surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit. [Emphasis mine.]

[75] In *Continental Bank Leasing v. Canada*, at paragraph 45, Bastarache J., dissenting but with whom the majority agreed on this point, wrote:

The respondent argues that intending to constitute a valid partnership is not the same thing as intending to carry on business in common with a view to profit. I agree. The parties in the present case, however, set up a valid partnership within the meaning of s. 2 of the *Partnerships Act*. They had the intention to and did carry on business in common with a view to profit. This conclusion is not based simply on the parties' subjective statements as to intention. It is based on the objective evidence derived from the Partnership Agreement entered into by the parties. As Millett L.J. held in *Orion Finance*, *supra*, at p. 85:

> The question is not what the transaction is but whether it is in truth what it purports to be. Unless the documents taken as a whole compel a different conclusion, the transaction which they embody should be categorised in conformity with the intention which the parties have expressed in them. [Emphasis mine.]

[76] I am of course aware of other rules of contractual interpretation which leave little or no room for evidence of the parties' subjective intention (*Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at page 901; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paragraphs 52-61 (*Novopharm*); *Family Insurance Corp. v. Lombard Canada Ltd.*, [2002] 2 S.C.R. 695, at paragraph 36; Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 14th ed. (London: Butterworths, 2001), at Chapter 6, pages 133 and 135; Kim Lewison, *The Interpretation of Contracts*, 2nd ed. (London: Sweet & Maxwell, 1997), at Chapter 1, paragraph 1.02, where the author notes however that in modern times, particularly with the increasing admission of extrinsic evidence, the aspect of objectivity in the interpretation of contracts is losing ground; S. M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005), at pages 228-229, where the

author explains that *Novopharm* is not absolute on this point; J. Beatson, *Anson's Law of Contract*, 28th ed. (Oxford: Oxford University Press, 2002), at page 160).

[77] These two lines of authority may be distinguishable.

[78] In *Novopharm*, the Supreme Court of Canada was called upon to determine whether the supply agreement signed between Novopharm and Apotex conferred or had the effect of conferring a sublicence upon Apotex (at paragraph 52). The interpretation of the contract was therefore at issue. In the partnership cases, the issue was not the interpretation of the contract but the nature of the contract. The Court was called upon to ascertain whether the parties met the test of a valid partnership, namely whether they were carrying on business in common with a view to profit.

[79] In the case at bar, it is the nature of the contract which must be determined, through an analysis of its terms in light of the fourfold test, namely the level of control, the ownership of the equipment, the degree of financial risk and the opportunity for profit.

[80] Given the above case law, I see no compelling reason why the common-law judge, who embarks on the difficult task of determining whether a contract is one of service or for service, should be deprived of the possibility of adverting to as many criteria and *indicia* as may reasonably be recognized in order to assess the true nature of the relationship governing the parties.

[81] The Tax Court Judge erred in law, in my view, when he said that the intention of the parties could only be used as a tie-breaker (paragraphs 31 and 82 of his reasons). I accept Sharlow J.A.'s analysis, at paragraph 64 of her reasons, that what the Tax Court Judge should have done was to take note of the uncontradicted evidence of the parties' common understanding that the dancers should be independent contractors and then consider, based on the *Wiebe Door* factors, whether that intention was fulfilled. In so doing, she relied, at paragraph 61 of her reasons, on a long line of cases of this Court as expressed by Stone J.A. in *Minister of National Revenue v. Standing* (1992), 147 N.R. 238 (F.C.A.), which I reformulated in *Wolf*, at paragraph 71, when I said that the parties' intention will be given weight only if the contract properly reflects the legal relationship between the parties.

[82] For the purpose of disposing of this case, I need not decide whether the words "the intention of the parties" have conceptually the same extension in the common-law systems as in the civil law of Quebec. This matter can only be decided on a case-by-case basis.

[83] I find however that *Montreal Locomotive* is an interesting example of bijuralism. The J.C.P.C. decided this Quebec case as the court of last resort for Canada. The contract their Lordships were called upon to interpret stated that it was to be interpreted "in accordance with the laws of the Province of Quebec", [1945] 2 D.L.R. 373 (Que. K.B.), at pages 400-401. The J.C.P.C. used the legal concepts it knew best to decide the case. The *ratio decidendi* of the case became binding on the parties. *Montreal Locomotive* thus entered the case law of Quebec. Since the decision was pronounced by the J.C.P.C., the case turned out to be an authority in the common-law world.

* * *

The following are the reasons for judgment rendered in English by

EVANS J.A. (dissenting):

A. INTRODUCTION

[84] This appeal raises the familiar question of whether individuals supplying services under a contract are employees or independent contractors for the purpose of the employment insurance (EI) and *Canada Pension Plan* (CPP) schemes. The particular issue raised is the weight that a court should give to the parties' understanding of the legal nature of their relationship when determining into which category the contract falls.

[85] I have had the benefit of reading in draft the reasons of my colleague, Sharlow J.A., but with the greatest

respect I do not agree with her on this issue, nor with the disposition of the appeal that she proposes. Having concluded that the Tax Court Judge committed no reversible error, I would dismiss the appeal with costs.

[86] It is common ground that the parties' characterization of their relationship is not determinative of its legal nature. Indeed, in the past,courts seem to have attached little significance to the parties' understanding of the legal nature of their contract, or to their stated intention to enter into a particular kind of contract. The legal character of a contract has been determined largely on the basis of its terms and, to an extent, the conduct of the parties. It is not a legal characteristic of a contract for the sale of goods, for example, that the parties intended to enter into a contract for the sale of goods, or understood that they had.

[87] However, in some comparatively recent EI and CPP cases arising in Quebec, which are fully described in the reasons of Sharlow J.A., this Court has afforded considerable significance to the parties' statements about the legal nature of their contract when deciding whether the service providers in question were employees or independent contractors. In these cases, the Court based its reasoning, in part, on articles of the *Civil Code of Québec*.

[88] To the best of my knowledge, this is the first appeal in an EI or CPP case arising in a common-law jurisdiction to examine the relevance of the parties' understanding of the legal nature of their contract to its proper legal characterization. The importance of the issue extends well beyond the factual and legal contexts of this case.

B. CONTRACTS, INTENTION AND THE COMMON LAW

[89] Freedom of contract is a fundamental principle of the common law of contract. It means that, subject to some specific limitations, parties may contract on whatever terms they think will best advance their interests. For example, parties who wish not to be subject to the EI regime can attain this objective by ensuring that their contract does not have the legal hallmarks of a contract of employment.

[90] Freedom of contract also means that it is the function of the courts to give effect to the terms on which the parties intended to contract. To this end, terms are interpreted in the light of the context in which the contract was made, including: the prevailing custom of the relevant trade; the market in which the parties were operating; the parties' conduct; and the commercial purpose of the contract.

[91] However, like "the intention of the legislature," "the intention of the parties" to which the law of contract gives effect is something of a legal fiction, in the sense that it is determined on the basis of an objective analysis of the words and conduct of the parties, not by reference to their subjective intention or understanding.

[92] Whether a contract falls into a particular legal category is an inference of law, drawn from the terms of the agreement and the conduct of the parties. It does not rest on the legal label attached to the agreement by the parties or on their purpose in entering into it. The intention of the parties is relevant to determining the terms of the transaction, not to its legal characterization, nor to whether the parties attained their ultimate objective.

[93] The generally accepted common-law approach to determining whether parties' contractual relationship is a partnership has recently been restated by Rothstein J.A. in *Hayes v. Canada*, [2005] 3 C.T.C. 241 (F.C.A.):

The Tax Court judge gave other reasons for not finding the spouses to be in a partnership relationship. Because there were no partnership agreements and because the spouses denied they were in a partnership relationship, the judge determined that to find a partnership "would require conduct of the parties overwhelmingly pointing to that finding" (paragraph 153). The Tax Court judge cited no authority for this standard of proof.

A declared intention of the parties that there is no partnership relationship will carry little or no weight. Lindley & Banks at paragraph 5-05 quote Cozens-Hardy M.R.'s more forceful statement in *Weiner v. Harris*, [1910] 1 K.B. 285:

> Two parties enter into a transaction and say "It is hereby declared there is no partnership between us." The Court pays no regard to that. The Court looks at the transaction and says, "Is this, in point of law, really a partnership?" It is not in the least conclusive that the parties have used a term or language intended to indicate

that the transaction is not that which in law it is.

Nor will the existence or non-existence of a partnership agreement be sufficient to decide the issue. In *Backman v. Canada*, [2001] 1 S.C.R. 367 at paragraph 27, Iacobucci and Bastarache JJ. determined that, even in the face of a partnership agreement and other formal documentation, there was no partnership because the fundamental criteria for a valid partnership were not met.

Sophisticated parties may have elaborate documentation. Unsophisticated parties may not and may also not be aware of the law of partnership. The question is always whether there is a business carried on in common with a view to profit. If there is, a partnership subsists at law, irrespective of the parties' stated intention, the existence or non-existence of a partnership agreement or the parties' understanding of the law. [The underlining is mine.]

[94] There is no reason to think that Rothstein J.A.'s analysis would have been different if the question in dispute had been whether the contract was one of employment or for the supply of services, rather than partnership. The underlined sentences are plainly inconsistent with the position advanced in the present case by counsel for the Royal Winnipeg Ballet (RWB), namely that the parties' stated intention with respect to, or understanding of, the legal nature of their relationship is determinative, in the absence of terms or conduct that point unequivocally to the contrary conclusion. Accordingly, the failure of the Tax Court Judge in the present case to have taken note, at the start of his analysis, of a consideration which, according to Rothstein J.A., should "carry little or no weight" would not seem, on its face, a reversible error.

[95] Turning to the jurisprudence on the characterization of a contract as one of employment or for the supply of services, I note that neither of the leading cases, *Wiebe Door* and *Sagaz*, states that the common intention or understanding of the parties about the legal nature of their contract is a relevant factor in the analysis. The reasons in both cases focus on objective factors for determining whether the individuals concerned were in business on their own account or were employees. However, as Sharlow J.A. correctly points out, neither case explicitly excludes the possibility that the parties' understanding of the legal nature of their contract might be relevant.

[96] Because the more recent cases from this Court discussed in the reasons of Sharlow J.A. all place some reliance on the *Civil Code of Québec*, I cannot regard them as elevating the significance traditionally attached by the common law of contract to the parties' understanding of the legal nature of their contract. When the scope of federal legislation refers to a private-law concept, which is not defined in the statute, the bijural nature of our federation leaves open the possibility that the statute may be applied differently in Quebec from common-law Canada: *Interpretation Act*, R.S.C., 1985, c. I-21, section 8.1 [as enacted by S.C. 2001, c. 4, s. 8]; see also, for example, *9041-6868 Québec Inc. v. M.N.R.*, 2005 FCA 334, at paragraph 6.

[97] I do not know to what extent the *Civil Code of Québec* differs from the common law in the manner in which contracts are to be characterized, or whether any of those cases would have been decided differently on the basis of the common-law approach as I have described it.

[98] When a dispute arises over the proper legal character of a contract, there are good reasons to attach little if any weight to the parties' understanding of it, or to their objective in entering into the contract. First, it is difficult to understand on what basis the parties' view of their contract's legal characterization is relevant, or how it should be weighed with the objective *Wiebe Door/Sagaz* factors. It is one thing to draw an inference about the legal nature of a contract based on, for example, the factors of control, and risk of loss and opportunity for profit. It is quite another to draw an inference from the parties' view of the legal nature of their contract, which is the ultimate question that the court must decide. It is not a legal characteristic of a contract for the supply of services that the parties intended to enter that kind of contract.

[99] Secondly, the parties' view of the legal nature of their contract is inevitably self-serving. Parties generally care primarily about their ultimate objective and only secondarily, if at all, about the legal means of achieving it. Suppose, for example, that their objective was to be exempt from EI premiums. The legal means of achieving this is by entering into a contract for the supply of services. Whether they succeed depends on whether the terms of their contract and their conduct are more consistent with the *indicia* of a contract for the supply of services than of employment. To the extent that they have thought about it, parties will want to enter into the kind of contract that in

law will enable them to attain their ultimate objective.

[100] Similarly, the law attaches little or no weight to the fact that the parties' conduct is consistent with the legal consequences of having entered into a contract for the supply of services. These consequences may include the payor's exemption from having to deduct and pay EI premiums and CPP contributions, and the service provider's obligation to register for and to charge GST. These are the legal consequences of a contract for the supply of services, not proof of its existence. The fact that the parties may intend these consequences does not assist in determining whether they have adopted the legal means of achieving them, namely, entering into a contract which has the characteristics of a contract for the supply of services, rather than of employment.

[101] Third, parties to contracts for the performance of work (to use a neutral term) are often not in equal bargaining positions. To attribute appreciable weight to a statement in the contractual document signed by the parties that the contract is one for the supply of services may disadvantage the more vulnerable party, who may subsequently say, for example, that she intended the relationship to be one of employment so that she would be covered by EI.

[102] In the face of a clear provision in a signed contract that it is a contract for the supply of services, not a contract of employment, it may be difficult for such a party to deny that, on an objective analysis, this provision embodied the parties' common intention, at least in the absence of misrepresentation or duress. In other words, the vulnerable party is not only bound by the terms of the contract, but her contractual status and consequently her statutory rights may also be prejudiced by the stronger party's legal characterization of the contract.

[103] Fourth, the legal characterization of a contract may have an impact on third parties, such as the victim of a tort committed by a service provider in the course of performing the contract or, as in this case, Revenue Canada. Not to base legal characterization squarely on the terms of the contract, interpreted contextually, may jeopardize those interests and undermine non-voluntary protective statutory programs, such as EI and CPP.

[104] I am concerned also about the impact on other dancers with the RWB of a finding about the contractual status of the dancers in this case. If the understanding of the dancers is significant to the decision, could the result be different in the case of another dancer with the RWB who denied entering into his contract on the understanding that it was a contract for the supply of services? It seems odd that essentially the same contract could be characterized differently on this basis.

[105] In my opinion, the only significant role of the parties' stated intention or understanding about the legal nature of their contract is as part of the interpretative context in which the Court views the contract in order to resolve ambiguities and fill in silences in its terms.

C. THE PRESENT CASE

[106] The evidence of the "common intention of the parties" in this case consists principally of statements made at the hearing before the Tax Court Judge by Ms. Susan Wallace, the Executive Director of the CAEA, and Mr. Johnny Wright, one of the dancers who appealed the Minister's ruling to the Tax Court. Their statements are brief and unexplored.

[107] Neither witness indicated the basis of their understanding or assumption about the legal nature of the contracts, nor said that they communicated this understanding to the RWB. The two members of the RWB's senior management who were called to testify were not asked about their understanding of the legal nature of the contracts. Neither the umbrella agreement negotiated with the RWB by the CAEA on behalf of its members and applicable to very different categories of work, nor the individual contracts signed by the dancers stated that they were contracts for the supply of services.

[108] As I have already indicated, the fact that the dancers were registered for and charged GST is not evidence of the legal nature of the contract. Whether the dancers had to charge GST, and the RWB to pay it, are legal consequences of characterizing the contract as one for the supply of services, not proof of its legal character. At most, it is evidence that the parties believed that they were not in an employment relationship.

[109] Finally, I note that the umbrella agreement negotiated by the RWB and the CAEA is a lengthy and detailed document. It regulates extensively the relationship of dancers and others, with the RWB, and contains an ample basis for determining the legal nature of the dancers' contracts without the need to have regard to what the parties thought that it was. Typically, decisions in this area of the law have to be made on the basis of much sparser contractual material.

D. RE-OPENING THE *WIEBE DOOR*

[110] *Wiebe Door* was decided 20 years ago, at a time when the contextual approach to legal analysis was less well established in Canadian jurisprudence than it is now. In the mid-1980s, courts were much more inclined to accept that whether a person was engaged under a contract of employment could be determined in the abstract, without enquiring about the particular context in which the issue arose.

[111] The four factors enumerated in *Wiebe Door* are drawn largely from the law of tort. The issue in the *Montreal Locomotive* case, on which *Wiebe Door* also relied, was whether a government contractor was liable to pay tax as a result of its occupation of certain land. The answer turned on whether it was operating on the land as an agent of the Crown or was carrying on its own business. No contract of employment was involved.

[112] When legislation attaches consequences to whether work is being performed under a contract of employment, it is reasonable to attribute a legislative intention that the concept of employment should be interpreted and applied in light of its meaning in other areas of the law. However, it is out of keeping with current legal methodology to interpret and apply the term, "contract of employment," when used in a statute to define the scope of a social programme, by reference only to the law of vicarious liability in tort, which has its own policy considerations, without any regard to the context and purposes of the statutory scheme in question. These issues are thoroughly discussed by Laura Friedlander, "What Has Tort Law Got To Do With It? Distinguishing Between Employees and Independent Contractors in the Federal Income Tax, Employment Insurance, and Canada Pension Plan Contexts" (2003), 51 *Can. Tax J*. 1467.

[113] It is also appropriate to question the utility of a test devised before both the rapid growth of outsourcing and privatization of work had occurred and the effects of the globalization of the economy had become so apparent. The changing nature of the workplace, and the increasing complexity and diversity of the relationships under which labour is supplied, are apt to reduce further whatever value the *Wiebe Door* test may once have had to determine who is an employee for EI and CPP purposes and thus entitled to the benefits that these statutory schemes provide.

E. CONCLUSIONS

[114] The common law of contract attaches little if any significance to parties' understanding of, or stated intention about, the legal nature of their relationship. Consequently, I cannot conclude that the Judge erred in law in not factoring it into his application of the *Wiebe Door*/*Sagaz* considerations to the terms of the contracts. There was no dispute about the interpretation of the terms of the contracts which the parties' understanding of the legal nature of the contracts might have helped to resolve. While recognizing that, as usual, there was room for dispute, the Judge was able to reach a clear conclusion about the proper characterization of the contracts on the basis of the *Wiebe Door*/*Sagaz* factors and a contextual examination of the terms of the contracts.

[115] Absent legal error, this Court may only interfere with the Judge's conclusion if it is vitiated by palpable and overriding error. In my view, it is not. The Judge was properly alert to the fact that an application of the *Wiebe Door/Sagaz* factors had to be sensitive to the nature of the dancers' work. Thus, he declined to consider some aspects of the contractual relationship as indicative of control, because they were inherent in the production and performance of a ballet as a coherent work of art. In so far as counsel for the RWB suggested that the very nature of artistic performance and expression is incompatible with an employment status, I do not agree. He conceded that dancers with the Alberta Ballet Company in Calgary are regarded as employees.

[116] The legal test for determining whether a contract is one of employment or for services is multi-factored. Unless a judge commits some egregious error in its application, it will be difficult to establish palpable and overriding error. For the most part, I would characterize counsel's criticism of the reasons of the Judge in this case

as going to his assignment of weight to the various factors and to his appreciation of the evidence. Whether I would have weighed each and every factor as the Judge did, drawn the same inferences from the evidence, or reached the same result, is not the point. I am not satisfied that his reasoning or conclusion is clearly wrong.

[117] I would only add that it is open to the RWB, and to other dance companies, to revise the terms of engagement with their dancers so as to take them outside the category of employees. As the Judge pointed out, the present contracts contain terms that subject dancers to controls that go well beyond the requirements of artistic performance.

[118] For these reasons, I would dismiss the appeal with costs.