

An appeal

- by -

Richmond Certigard Auto Ltd.
carrying on business as Petro-Canada
("RCA")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2009A/133

DATE OF DECISION: January 5, 2010

DECISION

SUBMISSIONS

Peter Pang	on behalf of Richmond Certigard Auto Ltd. carrying on business as Petro-Canada
Christopher D. Ma	on his own behalf
Kristine Booth	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), brought by Mr. Peter Pang (“Mr. Pang”), a director of Richmond Certigard Auto Ltd. carrying on business as Petro-Canada (“RCA”), of a Determination that was issued against RCA on September 3, 2009 by a Delegate of the Director of Employment Standards (the “Director”). The Determination found that RCA contravened Sections 18 and 58 of the *Act* in respect of the employment of Mr. Christopher D. Ma (“Mr. Ma”) and ordered RCA to pay Mr. Ma \$2,399.56 for unpaid wages, vacation pay and accrued interest pursuant to section 88 of the *Act*.
2. The Determination also imposed two administrative penalties of \$500.00 each under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for the said contraventions of the *Act*.
3. The total amount of the Determination is \$3,399.56.
4. I note that in paragraph 1 of the Appeal Form Mr. Pang is shown as the “[p]erson making the appeal” and not RCA against whom the Determination is made. Although the Determination is not against Mr. Pang, as a director of RCA, he was copied the Determination by the Director. I further note that Section 112 of the *Act* provides:

“...a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds...”
5. Therefore, pursuant to Section 112, Mr. Pang “as a person served with a determination” has standing to appeal the Determination on behalf of RCA.
6. The grounds of appeal Mr. Pang advances on behalf of RCA include all three available in Section 112(1) of the *Act*, namely, the Director erred in law and breached the principles of natural justice in making the Determination and there is “new evidence” available that was not previously available at the time the Determination was made.
7. Mr. Pang is seeking the Tribunal to cancel the Determination.
8. Pursuant to Section 36 of the *Administrative Tribunals Act* (the “*ATA*”) which is incorporated in the *Act* (s.103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the Section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUES

- 9. The issues in this appeal are:
 - (i) Did the Director err in law in making the Determination?
 - (ii) Did the Director fail to observe the principles of natural justice in making the Determination?
 - (iii) Is there new evidence that has become available that was not available at the time the Determination was being made, and, if so, does that evidence justify cancelling the Determination?

FACTS AND REVIEW OF THE DETERMINATION

- 10. RCA had a franchise agreement with Petro-Canada and operated an auto repair shop in Vancouver, British Columbia.
- 11. Pursuant to an “Independent Contractor Agreement” dated October 17, 2008 (the “Agreement”) between RCA, Mr. Ma and the latter’s “sole proprietorship”, Chris Ma Consulting (“CMC”), RCA engaged Mr. Ma to provide general management services at its auto repair shop commencing November 1, 2008 (although Mr. Ma’s actual start date was November 3, 2009).
- 12. The relevant provisions of the Agreement including the face page and recitals are reproduced below:

INDEPENDENT CONTRACTOR AGREEMENT

THIS CONTRACT FOR SERVICES made as of October 11, 2008

BETWEEN:

RICHMOND CERTIGARD AUTO LTD.
(hereinafter, “Certigard”)

AND:

CHRIS MA CONSULTING
(hereinafter, “CMC”)

AND:

CHRISTOPHER DALE MA
(hereinafter, the “Contractor”)

WITNESSES THAT WHEREAS:

- A. Certigard wishes to retain the services of the Contractor as an independent contractor;
- B. The sole shareholder, sole director and sole employee of CMC is the Contractor (CHRISTOPHER DALE MA), who has vast experience in auto industry.

NOW THEREFORE in consideration of the mutual covenants set out herein, the parties agree that:

1. The Contractor's Appointment and Term

1.1 During the term of this Agreement, the Contractor shall provide Certigard with services as a manager of day to day operations of Certigard. The Contractor's duties shall include all those usually performed by an effective and competent manager, and shall include without limitation:

- a. Conduct of daily operations necessary for Certigard to carry on business efficiently and profitably;
Conduct of daily operations includes and is not limited to: customer service; salesmanship; management of staff; overseeing maintenance and upkeep of Certigard premises and overseeing maintenance and upkeep of Certigard's equipment and chattels.
- b. Hiring of mechanics necessary for the efficient and profitable operation of Certigard;
- c. Conduct of daily office administration necessary for Certigard to carry on business efficiently and profitably;
Conduct of daily office administration includes and is not limited to: handling and sorting of incoming mail; correspondence and communications with customers and clients; correspondence and communications with vendors and suppliers and organization and filing of Certigard's daily paperwork and documentation.
- d. Payroll preparation;

The foregoing list in paragraph 1.1(a) to 1.1(d) is not exhaustive, and the Contractor will perform any reasonable management-related task requested by Certigard.

1.2 The term of this Agreement ("Term") shall commence on November 1, 2008 and last until November 1, 2010 subject to termination herein.

1.3 This agreement shall terminate upon the death or disability of the Contractor and following such termination Certigard shall have no further payment obligations whatsoever other than for any fees which are accrued and owing on the date of termination. For the purposes of this section 1.3, "disability" shall mean any physical or mental incapacity of the Contractor that has prevented him from performing the Services for 30 consecutive days or for 45 days in any three-month period.

1.4 At any time, Certigard may terminate this agreement summarily following such termination Certigard shall have no further payment obligations whatsoever other than for any fees which are accrued and owing on the date of termination. The Contractor shall not commit any of the following acts:

- a) Any act of dishonesty or bad faith which adversely affects Certigard; or
- b) Material breach of or material failure to perform any obligations under this agreement; or
- c) The performance of any act or failure to perform any act which, directly or indirectly:
 - i) brings discredit to, impairs the reputation of or conflicts with the best interest of Certigard or any affiliate; or
 - ii) materially adversely affects the profits of Certigard or any affiliate; or
 - iii) constitutes competition with Certigard or any affiliate, including carrying on a business which is substantially similar to the business of Certigard.

1.5 CMC or Contractor agrees that it will not sub-contract or delegate any of the services nor assign the Agreement. Certigard may assign this Agreement or the benefit of any portion of this Agreement without prior notice to or consent of the Contractor.

- 1.6 In performing the Services, the Contractor shall:
- a) Conduct himself in a professional a businesslike manner appropriate to the Certigard’s corporate image and perform his activities in accordance with the highest and best professional standards of industry;
 - b) At all times maintain his actions in compliance with applicable federal, provincial and municipal laws, statues and regulations;
 - c) Agree to act in a confidential and fiduciary capacity and in the best interest of Certigard;
 - d) Shall provide any and all services requested by Certigard in a timely fashion.

2. The Contractor’s Fees

- 2.1 The Contractor’s fee for services rendered under this agreement shall be paid by Certigard to CMC at a flat rate of \$3,500 per month (the “Contractor’s Fee”).
- 2.2 The obligation of Certigard to pay the Contractor’s Fee is contingent upon the Contractor rendering services under this Agreement for the period of time and during such hours as the Contractor may in his sole discretion determine, provided that the Contractor shall take into consider and give effect to Certigard’s reasonable requests. Certigard’s hours of operation are shown as followed:

Monday – Friday	Open: 8:00AM Close: 6:00PM
Saturday	Open: 9:00AM Close: 4:00PM
Statutory Holidays:	Closed
Long Weekends:	Closed if Certigard gives advance notice to customers and staff.

Hours of operation may be changed upon approval of Certigard.

- 2.3 The Contractor’s Fee is payable to CMC at the end of each month.
- 2.4 Bonus becomes payable to CMC when the following monthly gross sales occur:

Monthly Gross Sales	Bonus
\$35,001 - \$60,000	\$ 1,000
\$60,001 - \$90,000	\$ 3,500
over \$90,001	\$7,000

3. Non-Competition, Non-solicitation, and Confidentiality

The Contractor acknowledges that through the Contractor’s association with Certigard, the Contractor will develop close relationships with Certigard’s client, and Certigard’s affiliates, gain knowledge of Certigard’s methods of operation, and acquire Confidential Information of Certigard all of which would cause irreparable harm and injury to Certigard if made available to or used for any competitor of Certigard.

- 3.1 **Confidentiality:** During the Term and thereafter, the Contractor will not disclose to anyone not employed by Certigard, nor use for any purpose other than work under this Agreement:
- a) any confidential or proprietary technical, financial, marketing, distribution or other technical or business information or trade secret of Certigard, or information Certigard has received from any party that Certigard is obligation to treat as confidential (all of which is herein called “Confidential Information”), including without limitation any materials, concepts, techniques, processes, methods, systems, designs, cost data, computer programs, formulas,

development or experimental works, works in progress, client or supplier information, except generally known in the industry;

- b) any confidential or proprietary information circulated within Certigard's business via electronic mail or otherwise.

The Contractor will not disclose any Confidential Information to anyone employed by Certigard except on a "need-to-know" basis. If the Contractor has any question as to what comprises such Confidential Information, or to whom (if anyone) employed by Certigard it may be disclosed, The Contractor shall consult with the president of Certigard, Peter Y. Pang. Notwithstanding anything else in this section the Contractor may disclose the confidential information if requested to do so by a court or government authority.

- 3.2 **Non-Solicitation:** The Contractor will not, during the Term for any reason whatsoever (the "Restriction Period"), directly or indirectly, either alone or in conjunction with any individual, corporation or other entity, as principal, agent, employee, or in any other capacity:
- a. in connection with any business similar to Certigard's business, solicit or accept or assist anyone else to solicit or accept any business or service arrangements for:
 - i. any person who was a client of Certigard during the Term, whether or not such person remains a client of Certigard; or
 - ii. any client whose name or address or requirements became known to the Contractor during the Term; or
 - iii. any person with whom any employee of Certigard dealt or transacted business with, except for the benefit of Certigard;
 - b. cause or assist in causing any client of Certigard to discontinue or refrain from doing business with Certigard whether or not the Contractor personally dealt with such client during the Term; or
 - c. engage, hire or attempt to solicit away from Certigard any employee or independent contractor.
- 3.3 **Non-Competition:** During the Term, the Contractor will not, either individually or in partnership or conjunction with or on behalf of any other entity:
- a. carry on or be engaged or employed in or concerned with, or permit the Contractor's name to be used in connection with, any business supplying services similar to those the Contractor supplies to Certigard's clients on behalf of Certigard pursuant to this Agreement, in any market where Certigard is then doing business; or
 - b. intentionally act in any manner that could reasonably be expected to be detrimental to relations between Certigard and its clients, employees, independent contractors, affiliates or other persons.

[sic]

4. **Termination**

This Agreement shall terminate upon the earlier of:

- a) the expiry of 3 years after the signing of this Agreement; or
- b) Certigard and the Contractor agreeing in writing to terminate the Agreement; or
- c) Section 1.3 – Death and Disability; or
- d) Breach of this Agreement.

13. RCA terminated Mr. Ma's engagement under the Agreement on January 23, 2009.
14. Subsequently, on January 27, 2009, Mr. Ma filed a complaint against RCA (the "Complaint") alleging that RCA contravened the *Act* by failing to pay him regular wages, overtime wages, annual vacation pay and statutory holiday pay.
15. The Delegate conducted an investigation of the Complaint and received both oral and written submissions from both Mr. Ma and RCA, which the Delegate relied upon in issuing her Determination dated September 3, 2009.
16. In the Reasons for the Determination (the "Reasons"), the Delegate, in advance of comprehensively summarizing the evidence and submissions of both parties, identifies three issues pertinent to her investigation of the Complaint, namely:
 - (i) Is Mr. Ma an employee of RCA or an independent contractor?
 - (ii) If Mr. Ma is an employee, is he owed regular wages, overtime wages, annual vacation pay and/or statutory holiday pay?
 - (iii) If the answer is to both questions in (i) and (ii) is in the affirmative, then what amounts is Mr. Ma owed?
17. While I do not intend to reiterate the comprehensive summaries of evidence and submissions of the parties set out in the Reasons by the Delegate (which I have very carefully read and considered), I will only reference pertinent parts of the evidence and submissions the Delegate considered under the heading "Findings and Analysis" in the Reasons leading to her decisions on the issues above.
18. With respect to the first of the issues, namely, the status of Mr. Ma, the Delegate notes that it is important to first determine whether Mr. Ma is an "employee" under the *Act* or an independent contractor. If he is not an employee, then his claim falls outside of the jurisdiction of the *Act*. Having said this, the Delegate notes that RCA in its submissions maintains that Mr. Ma is an independent contractor who operated his sole proprietorship, CMC, and therefore the *Act* does not apply to him and therefore the Delegate is, effectively, without jurisdiction to investigate or make any determination with respect to the Complaint. Mr. Ma, on the other hand, argues that regardless of the Agreement which refers to him as an independent contractor, he was, at all material times, an employee of RCA and the latter simply created the arrangement delineated in the Agreement to save itself money and to avoid paying Work Safe BC and taxes.
19. In her analysis of this issue, the Delegate, in the Reasons, turns to section 1 of the *Act* and particularly the definitions of "employee", "employer" and "work" below with a view to determining Mr. Ma's status:

"employee" includes

 - (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
 - (c) a person being trained by an employer for the employer's business,
 - (d) a person on leave from an employer, and
 - (e) a person who has a right of recall;

"**employer**" includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

...

"**work**" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

20. Applying the definitions above to the evidence submitted by the parties in the investigation of the Complaint, the Delegate concludes that Mr. Ma is an "employee" within the meaning of the *Act* based on the following reasoning:

The general management duties that Mr. Ma completed is 'work' of managing an auto repair shop, defined as the labour and services an employee performs for an employer. Overseeing the daily activities as a manager of an automotive repair shop is 'work' normally performed by an 'employee'. The permission to carry out these duties were [sic] expressly and directly allowed by RCA. The control and direction RCA had of Mr. Ma is that of an 'employer'. The definitions in the *Act* are broad enough to include Mr. Ma; as such I find Mr. Ma an 'employee' under the *Act* and RCA as his 'employer'.

21. The Delegate, having concluded that Mr. Ma is an "employee" within the meaning of the *Act*, then proceeds to subject Mr. Ma's relationship with RCA to various factors derived from common law tests for determining whether a relationship between parties is an employer-employee relationship or an independent contractor one. More particularly the factors the Delegate subjects Mr. Ma's relationship with RCA to include: control, ownership of tools, chance of profit, risk of loss, integration, specific results, personal service, and economic reality. The analysis of the Delegate is quite comprehensive and I propose to set it out verbatim below:

Control:

- RCA selected Mr. Ma to manage daily operations. Term 1.5 of the contract stipulates that Mr. Ma was unable to sub-contract or delegate any of services he agreed to complete out.[SIC]
- RCA held it had the right to suspend or dismiss Mr. Ma if a term or condition of the contract was violated. Term 1.4 of the contract states that RCA or Mr. Ma may terminate the agreement summarily. Term 1.5 of the contract allowed RCA to assign the agreement without prior notice to or consent of Mr. Ma.
- Mr. Ma was involved in the hiring of staff for RCA.
- Mr. Ma directed and supervised daily activities through scheduling staff, and RCA supervised the operations through phone calls and visits to the premises.
- Mr. Ma ordered parts for RCA.
- RCA paid suppliers directly.
- Mr. Ma had the ability to change the hours of operation, provided it was approved in accordance with RCA's franchise agreement with Petro-Canada.
- RCA set the payment rate and Mr. Ma agreed to it. Term 2.1.1 of the contract states RCA would pay CMC a flat rate of \$4,000 per month for the first four months of the agreement and that the bonus schedule was applicable.
- Employees were paid by RCA's funds.

Ownership of tools:

- RCA provided CMC with a lap-top.
- RCA held the franchise from Petro-Canada and through this agreement RCA leased standard equipment and the property.
- Apart from the mechanics hand tools, RCA provided by lease the required equipment for the business.

Chance of profit:

- Mr. Ma had a fixed base regardless of business profit. There was an additional opportunity to earn bonus pay through a set bonus schedule based on gross profits.

Risk of loss:

- Mr. Ma carried no financial risk as he had not invested in the business.

Integration:

- Mr. Ma's service of managing day to day operations was integral to the business. The shop could not function without staff being hired, trained and scheduled to work. Inventory and supplies had to be ordered, and the business has to be open. The business could not function without someone carrying out Mr. Ma's duties; he highly contributed to the business.

Specific Work:

- Mr. Ma was not required to complete specific work, instead he provided general management services.

Personal Service:

- Mr. Ma's personal services were at the disposal of RCA. Term 1.5 of the contract states that Mr. Ma could not delegate or sub-contract the services he agreed to provide. Term 3.3 of the contract disallowed Mr. Ma from engaging with business carrying out similar operations to RCA.

Economic Reality:

- Mr. Ma made no financial investment into the shop.
- Suppliers and employees were paid from RCA's financial accounts.
- Revenue from sales and services were deposited into RCA's financial accounts.

22. Having reviewed Mr. Ma's relationship with RCA based on the factors in the common law tests for determining an employment relationship, the delegate goes on to state that no single factor above is conclusive or determinative of the relationship between the parties. The Delegate then goes on to explain the factors that impacted on his decision to conclude that Mr. Ma was in an employee-employer relationship under the common law tests. In particular, the Delegate states that while Mr. Ma exercised some control in the repair shop's business as it was expected of someone in his position as a general manager, he was not able to function autonomously at the shop. RCA exerted some control over him. RCA, and not Mr. Ma, held the franchise with Petro-Canada and controlled the business's bank account. RCA maintained the risk of loss and opportunity for profit, according to the delegate. Mr. Ma was not allowed to delegate or subcontract to another his duties and responsibilities under the Agreement, which duties and responsibilities were of a general nature. He was prevented under the Agreement from engaging in a similar business while under the

Agreement with RCA. RCA also provided the tools or equipment necessary for the business at the repair shop and not Mr. Ma, noted the Delegate. While the Agreement created an incentive bonus structure, there was really no opportunity for profit or risk of loss Mr. Ma was subject to, according to the Delegate. The risk of the Agreement being terminated did not, according to the Delegate, qualify as a “risk of loss” as defined in the common law tests. In the circumstances, the Delegate concluded that Mr. Ma was an employee under both the *Act* as well as at common law and the Agreement, although referring to Mr. Ma as an independent contractor, was of no effect by virtue of the application of section 4 of the *Act* which prevents waiving or contracting out of the minimum provisions of the *Act*. Accordingly, the Delegate concluded that the *Act* applies to Mr. Ma and the Director had jurisdiction to investigate and decide the Complaint.

23. Having determined that Mr. Ma was an employee, the Delegate then proceeds to consider if RCA owed him any regular wages, overtime wages, annual vacation pay, and/or statutory holiday pay and if so how much.
24. With respect to statutory holiday pay claim of Mr. Ma, the Delegate notes in the Reasons that Mr. Ma, as a manager, was not entitled to statutory holiday pay as section 36 of the *Employment Standards Regulation* (the “*Regulation*”) excludes the application of the statutory holiday pay requirements of the *Act* to a manager. When advised of this by the delegate, Mr. Ma withdrew his claim for statutory holiday pay.
25. Similarly, in the case of his claim for overtime wages, Mr. Ma withdrew this claim once the Delegate informed him that as a manager he was not entitled to overtime pay because section 34 of the regulations excludes the application of the statutory overtime requirements of the *Act* to a manager. Furthermore notes the Delegate, a review of the Agreement did not show that the payment in the Agreement was tied to a specified number of hours Mr. Ma was expected to work and no evidence of such was produced in the investigation such as to require the Delegate to consider the question of additional wages for Mr. Ma.
26. Furthermore, based on the Delegate’s review of the number of hours worked by Mr. Ma, the amount the latter was paid under the Agreement was in compliance with the minimum wage requirement of the *Act* and therefore there was no additional regular wages owed to Mr. Ma by RCA for the work he claims to have performed between November 3, 2008 and December 31, 2008, according to the Delegate. Thus the Delegate dismissed Mr. Ma’s claim for additional regular wages.
27. With respect to Mr. Ma’s annual vacation pay claim, the Delegate notes that RCA submitted that all payments made to Mr. Ma were inclusive of 4% annual vacation pay. However, notes the Delegate, the copies of RCA’s payments made to Mr. Ma do not evidence a payment of annual vacation pay or a separate payment of an additional 4%, on account of vacation pay. As a result, the Delegate concludes, since RCA under the Agreement was paying CMC as a sole proprietor it “would not have paid Mr Ma annual vacation pay” and therefore, RCA contravened section 58 of the *Act*. Pursuant to section 18 of the *Act*, the Delegate states that the vacation pay should have been paid to Mr. Ma within 48 hours of the termination of his employment on January 23, 2009.
28. In determining the amount RCA owed Mr. Ma on account of vacation pay, the Delegate notes that Mr. Ma received a total of \$9,000.00 in wages for the period November 2008 to January 2009. More particularly, the Delegate notes that Mr. Ma received \$4,000.00 for each of the two months worked in 2008, namely, November and December and he retained \$1,000.00 of the \$2,000.00 he took from the repair shop’s cash register on or about January 17, 2009 when he feared that he would not receive his monthly paycheque from RCA. RCA, on the other hand, contends that the payments it made to CMC in November and December 2008 consisted of two cheques in amount of \$4,200.00 each, which included \$200.00 on account of GST. Therefore, RCA argues, that if Mr. Ma was determined to be an employee, then the GST portion (\$400 total) should be deducted from the total amount found to be wages and should be paid back to RCA.

29. However, the Delegate, states that for the purposes of calculating outstanding annual vacation pay, the GST component should not be included in the calculation because only ‘wages’ is considered and GST does not come within the meaning of ‘wages’ in section 1 of the *Act* as it is not “money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency”. Having said this the Delegate goes on to calculate vacation pay by determining 4% of Mr. Ma’s total wages of \$9,000.00 and concludes that RCA owes Mr. Ma \$360.00 for annual vacation pay.
30. However this does not resolve the outstanding wages and vacation pay thereon for the month o of January 2009. The Delegate notes that Mr. Ma claimed that he was due wages for services he provided until his termination date on January 23, 2009. The only payment he received for January was \$1,000.00 he obtained from the cash register at the shop. Both parties acknowledged no other payment was made to CMC or Mr. Ma for January 2009. Based on Mr. Ma’s uncontested record of hours worked in January until his termination date, the Delegate notes that Mr. Ma worked every day with the exception of statutory holidays and Sundays. This pattern, according to the Delegate, continued through the first three weeks of January and it would have continued past January 23, 2009 had Mr. Ma’s employment not been terminated. According to the Delegate, had Mr. Ma’s employment carried on during the month of January, he would have worked 26 days instead of the 19 days he actually worked. 19 days constitutes 73% (19/26) of the time Mr. Ma could have worked but for the termination of his employment and therefore, Mr. Ma is entitled to wages and vacation pay based on 73% of his \$4,000 per month salary (not including the GST component), according to the delegate. This translates to \$2,923.08 (73% of \$4,000). Taking into consideration the \$1,000.00 Mr. Ma retained for the month of January, Mr. Ma is owed \$1,923.08. Annual vacation pay on the said amount at 4% totals \$76.92. Therefore, according to the Delegate, the total annual vacation pay Mr. Ma is owed is \$436.92. According to the Delegate, pursuant to section 18 of the *Act*, RCA should have paid all regular wages for January 2009 as well as annual vacation pay within 48 hours of terminating its relationship with CMC and Mr. Ma on January 23, 2009. That is, Mr. Ma should have been paid all he was owed by January 26, 2009, but RCA failed to do this and as such, RCA contravened section 18 of the *Act*, according to the Delegate.
31. The Delegate further notes in the Reasons that RCA argued that despite the auto repair shop being closed for one week in December 2008, Mr. Ma received full monthly pay of \$4,200.00, inclusive of GST. However, RCA’s witness, Mr. Matthew Ip (“Mr. Ip”), a former mechanic at the shop, failed to corroborate RCA’s assertion that the shop was closed for an entire week. Regardless, the Delegate states that services and hours for which RCA already paid without any dispute in a previous pay period could not now serve as a basis to offset future earnings of Mr. Ma and therefore RCA was not allowed to offset any amounts paid in December against the Delegate’s award in the Determination.
32. The Delegate also notes that RCA asserts that Mr. Ma retained without any right \$8,014.37 of RCA’s money in his possession after the termination of his employment and in the circumstances he should not be able to advance his claim for outstanding wages. According to the Delegate, pursuant to Section 21 of the *Act*, an employer cannot withhold, deduct or require payment of all or part of an employee’s wages except as permitted under the said section. According to the Delegate there was no evidence from RCA to support a basis at law for withholding Mr. Ma’s wages. Further, according to the Delegate, RCA’s claim that Mr. Ma is holding monies belonging to RCA is not a claim she could determine as it fell outside her jurisdiction under the *Act*.
33. The Delegate also notes RCA’s further assertion that due to statutory withholdings/deductions not having been made in the case of Mr. Ma, the latter received an amount greater than the net amount he would have received as an employee. According to the Delegate, the issue of tax withholdings and deductions relates to obligations under the *Income Tax Act*, which is a matter outside her jurisdiction under the *Act*.

34. In summary, the Delegate ordered RCA to pay Mr. Ma a total of \$2,360.00 in wages inclusive of annual vacation pay, plus interest pursuant to section 88 of the *Act* and levied two administrative penalties under section 29 of the *Regulation* for breaches of sections 17 and 18 of the *Act*.

SUBMISSIONS OF RCA

35. RCA, as previously indicated, appeals under all three grounds of appeal available under section 112(1) of the *Act*. I will set out briefly the submissions of RCA in support of each ground of appeal under separate descriptive subheadings below.

I. Error of Law

36. Under the error of law ground of appeal, RCA submits that if either CMC or Mr. Ma is considered an employee of RCA, under section 153 of the *Income Tax Act* RCA is required to withhold CPP, EI and income tax from any payments made to them.
37. Furthermore, RCA submits that it made two payments to Mr. Ma of \$4,200.00 (inclusive of GST) for November and December 2008. Mr. Ma also received another \$1,000.00 for January 2009 for a total of \$9,400.00. This amount, added to the \$8,214.37 which RCA claims Mr. Ma received on account of customer payments of invoices, totals \$17,614.37. Therefore, it appears, RCA is stating that nothing is owed to Mr. Ma or CMC.

II. Natural Justice

38. Under the natural justice ground of appeal, RCA submits that the Director or the Delegate “failed to determine” if CMC or Mr. Ma is an independent contractor or an employee of [RCA], regardless of the signed independent contractor agreement”.
39. RCA also submits that CMC or Mr. Ma had the opportunity to consult legal counsel in relation to the Agreement and refers the Tribunal to the Agreement, which is reproduced by RCA as part of its submission without referencing any particular provision therein. However, I note that the Agreement in paragraph 9 contains an acknowledgement on the part of Mr. Ma, which states:

The Contractor acknowledges having read and understood the terms of this Agreement, and having been advised and had the opportunity to obtain independent legal advice in connection with the execution of this Agreement.

40. RCA also submits under the natural justice ground of appeal that the Director or the Delegate failed to determine the “integrity of each individual/party” with specific reference to the following matters:
- 2.2.1 Chris Ma is one of the major reasons for RCAL to lose its franchise right. As a result, the business experienced a distressed sale to the third party.
 - 2.2.2 Chris Ma requested customers to pay their bills in cash.
 - 2.2.3 Chris Ma requested customers to write cheques, payable to CMC.
 - 2.2.4 Client information/invoice was taken away from RCAL’s premises. This incident was reported to Richmond RCMP with a police file #.
 - 2.2.5 Chris Ma charged RCAL for unauthorized and unverified expenses. (see Tab 4)
 - 2.2.6 Chris Ma has still been holding RCAL’s cash in trust, with an amount of \$8,214.38. (see Tab 3)

41. RCA also makes a bare assertion that the Director failed to provide “an impartial decision in the Determination as a whole”.
42. RCA further submits that customers at the repair shop paid their repair bills in cash or cheque. Mr. Ma collected these payments and recorded them on an excel summary sheet. RCA submits that the Director, in making the Determination, failed to examine the summary excel sheet containing recordings made by Mr. Ma purportedly showing \$8,214.37 collected by him which the latter did not deposit in RCA’s bank account.
43. RCA also submits, in relation to purported closure of the auto repair shop in December 2008 due to snow, that the Director “failed to examine the impossibility of Chris Ma to drive from his residence in the hills of North Vancouver to Richmond to work during the heavy snowfall in December 2008, given that Chris Ma has a late model 2-door Honda Accord and he does not have an all-wheeled drive vehicle.” RCA submits that Mr. Ma, during the said period, did not go to work for “more than a week”.

III. New Evidence

44. With respect to the last point under the natural justice ground of appeal, RCA submits that Mr. Ip could be contacted to corroborate RCA’s position that Mr. Ma “did not go to work more than a week in December 2008”. RCA proposes to submit a copy of his affidavit at a later date.

SUBMISSIONS OF MR. MA

45. I have read Mr. Ma’s undated submissions received by the Tribunal on November 5, 2009 and do not find it necessary to set them out here except to say that they are not helpful as they do not directly address or relate to the issues or grounds of appeal raised in the appeal by RCA. Some of the submissions relate to personal comments about Mr. Pang’s nature and business practices and again are not relevant to the issues in question in the appeal.

SUBMISSIONS OF THE DIRECTOR

I. Error of Law

46. In response to submissions of RCA under the error of law ground of appeal, the Director states that RCA has not made out a “clear or compelling argument” to succeed under this ground of appeal. According to the Director, RCA’s submissions simply raise matters that were previously considered and dealt with in the Determination.

II. Natural Justice

47. In response to the natural justice ground of appeal, the Director rejects that there is any evidentiary basis for RCA to advance or succeed on this ground of appeal. The Director states that RCA was made aware of the complaint against it, participated in the investigation of it by providing oral and written evidence and an unbiased decision-maker decided the complaint.
48. The Director also rejects RCA’s contention that the delegate failed to determine if CMC or Mr. Ma is an independent contractor or an employee of RCA and identifies that part of the Determination containing the Delegate’s analysis on the matter, which reviews the evidence submitted by the parties including a review of the Agreement, concluding that Mr. Ma is an employee and not an independent contractor.

49. With respect to RCA's further submission under this ground that the Director failed to determine the integrity of Mr. Ma pertaining to those matters itemized as 2.2.1 to 2.2.6 quoted in the submissions of RCA above, the Director expresses uncertainty as to what the appellant is arguing here. However, the Director goes on to state that with respect to RCA's contention that the repair shop was closed for a period in December, the Delegate accepted the evidence Mr. Ma provided and Mr. Ip, RCA's witness, corroborated that evidence.
50. The Director also addresses certain documents adduced for the first time by RCA in the appeal. In particular, RCA submitted documents which comprising of an undated summary of cash and cheques purportedly received by Mr. Ma for the period November 1, 2008 to January 23, 2009 showing receipts totalling \$8,214.37 accompanied with supporting invoices of RCA to customers purportedly totalling the same amount. The Director states that these documents were not produced by RCA during the investigation of the Complaint and no reason is provided by RCA for not producing them previously. Furthermore the Delegate submits that RCA has not demonstrated why this "new evidence" is relevant or probative except that it relates to RCA's submission that Mr. Ma purportedly withheld the said monies belonging to RCA after the termination of his employment. According to the Director, the Delegate in the Determination previously dealt with this matter.
51. With respect to the allegation of RCA that a complaint or report was made against Mr. Ma with RCMP with respect to certain client information and invoices Mr. Ma allegedly took from RCA's repair shop or premises, the Director notes that this matter is not relevant to the issues in the Complaint or in the Determination.
52. With respect to RCA's allegation that the Delegate was not impartial in his decision-making, the Director contends that that RCA has failed to produce any evidence to support this assertion.
53. The Director also refutes or challenges RCA's allegation that the Delegate failed to examine the summary of cash or cheques Mr. Ma received from customers of RCA by pointing to that part of the Determination containing the Delegate's analysis and decision on the subject matter.
54. With respect to RCA's allegation that the repair shop was closed in December 2008 for at least a week due to snow with the result that Mr. Ma did not work during the same period, the Director notes that the Delegate considered this matter in the Determination and found that RCA's allegation lacked corroboration from its own witness, Mr. Ip. Further, states the Director, Section 21 of the *Act* has the effect of preventing RCA from offsetting from Mr. Ma's future earnings any wages already paid to Mr. Ma in a previous period.

III. New Evidence

55. The Director states that while RCA has expressed its interest to submit the Affidavit of Mr. Ip as part of its new evidence, RCA has failed to establish how this would be relevant to a material issue and probative in any way. Notwithstanding, the Delegate states that Mr. Ip, pursuant to Mr. Pang's request, was questioned by the Delegate during the investigation of the Complaint and his evidence was considered in the Determination and therefore does not constitute new evidence. In the circumstances, the Delegate submits that RCA's appeal should be denied as it fails on all three grounds of appeal.

ANALYSIS

I Error of Law

56. As indicated previously, RCA states under the error of law ground of appeal that if CMC or Mr. Ma is an employee then RCA is required to withhold CPP, EI and income taxes from any payments made to either. RCA also notes that it paid GST in the payments it made to Mr. Ma or CMC in November and December 2008 and further, Mr. Ma is not owed any monies as he has retained \$8,214.37 from customer payments at the repair shop, which belongs to RCA.
57. Based on my review of the record and the submissions of the parties in this appeal, I find that these submissions were previously made and properly dealt with by the Delegate in the Determination and therefore they constitute nothing short of reargument on the part of RCA, which is inappropriate in context of an appeal.
58. I also note that the Delegate meticulously examined the Agreement and the relationship of Mr. Ma with RCA in context of the definitions of “employee”, “employer” and “work” under the *Act* and properly concluded that Mr. Ma is an “employee” within the meaning of the *Act*. The Delegate also arrived at the same conclusion when he subjected Mr. Ma’s relationship with RCA to various factors in the common law tests for determining whether a relationship between parties is an employer-employee relationship or an independent contractor one.
59. While how parties structure their relationship in terms of taxes is not an irrelevant factor for the purpose of determining the nature of their relationship, it is but only one of many factors for the decision-maker to consider. Further, how an individual is classified or treated in context of or for the purposes of the *Income Tax Act* is not determinative of that individual’s status under the *Act*. In this case, there was, on the balance of probabilities, sufficient evidence for the Delegate to properly conclude that Mr. Ma was in an employment relationship and the *Act* applied to him.
60. It was furthermore available to the Delegate to conclude as she did that the amount of \$8,014.37 RCA alleged Mr. Ma wrongfully retained in his possession after the termination of his employment could not be relied upon by RCA to withhold wages otherwise due to Mr. Ma, as a result of the operation of section 21 of the *Act*. I also agree with the Director that RCA’s claim that Mr. Ma is holding monies belonging to RCA is not a claim she could determine as it fell outside her jurisdiction under the *Act*.
61. Notwithstanding my decision to reject the error of law ground of appeal of RCA’s on the basis of the above reasons, I query whether RCA’s submissions properly fall within the error of law ground of appeal. In this regard, I note that the Tribunal has consistently adopted the following definition of “error of law” set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C.A):
1. a misinterpretation or misapplication of a section of the *Act*;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not be reasonable be entertained; and
 5. adopting a method of assessment which is wrong in principle.
62. In my review of the record and the submissions, I did not find any misinterpretation or misapplication of the *Act* or any applicable principles of general law on the part of the Delegate. In particular, the Delegate’s

determination that Mr. Ma was an employee and therefore the *Act* applied to his claim was both rationally supported in the law and the evidence.

63. I also considered whether or not the Delegate made any errors on findings of fact that could amount to an error of law but discovered none in this case. The onus of course is on the appellant, RCA, to show either that there was no evidence to support the findings of fact made by the Delegate or that the Delegate took a view of the facts that could not reasonably be entertained based on the evidence before the Delegate in the investigation. RCA, in my view has failed to discharge this onus.
64. Accordingly I reject RCA's ground of appeal based in an error of law.

II Natural justice

65. In *Re: 607730 B.C. Ltd. (c.o.b. English Inn and Resort)*, [2005] B.C. E.S.T.D. no. 55 (Q.L.), the Tribunal stated that principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.
66. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.

67. In this case, RCA, has not provided any evidence in support of its allegation that the Director breached the principles of natural justice in making the Determination or made an impartial or biased decision. To the contrary, there is ample evidence in the record of the proceedings, from the onset of the investigation leading to the Determination, that RCA was aware of the Complaint and availed itself, through Mr. Pang, to make both written and oral submissions in response. The Delegate also contacted Mr. Ip, a witness of RCA at the request of Mr. Pang. There is, in my view, no evidence and no basis that RCA was denied procedural fairness during the investigation stage or at any other time leading to the Determination.
68. As for the specific submissions and allegations of RCA under the natural justice ground of appeal--failure on the part of the Delegate to determine if CMC or Mr. Ma is an independent contractor or an employee of RCA, failure of the Delegate to determine the integrity of Mr. Ma pertaining to those matters itemized as 2.2.1 to 2.2.6 quoted in the submissions of RCA above, failure of the Director to consider RCA's complaint or report made to RCMP about Mr. Ma, failure of the Director to examine the summary of cash or cheques Mr Ma received from customers of RCA at the shop and allegedly retained, and failure of the Director to consider that Mr. Ma did not work for at least a week in December 2008 when the shop was allegedly closed due to snow—I find I am not persuaded with RCA's position and do not find these submissions or allegations of RCA having any basis to properly challenge the Determination or any part of it under the natural justice ground of appeal and therefore, dismiss this ground of appeal of RCA.

III New Evidence

69. With respect to the new evidence ground of appeal hereunder RCA requests that Mr. Ip should be contacted as he will corroborate RCA's position that Mr. Ma did not attend for a week or more in December due to snow, and RCA's further desire to submit at a later time Mr. Ip's affidavit (presumably for the purpose of corroborating again RCA's position on the same subject matter), it should be noted that the Delegate in his investigation contacted Mr. Ip and the latter did not corroborate RCA's position. In this regard it is important to note that in *Re: Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 171 (QL), (27 May 2003), B.C. E.S.T. # D171/03, the Tribunal resolved that in deciding whether or not to accept fresh evidence on appeal of a determination, it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a four-fold test as follows:
- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) The evidence must be relevant to a material issue arising from the complaint;
 - (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) The evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
70. The four criteria above are a conjunctive requirement and therefore any party requesting the Tribunal to admit new evidence must satisfy each of the criteria before the Tribunal will admit the new evidence.
71. In this case, I agree with the Director that Mr. Ip's evidence would not constitute new evidence because it was before the Delegate and considered by her in the Determination. Regardless, Mr. Ip's evidence is unhelpful to RCA as it does not support the latter's position.
72. As an aside, it is not the function of this Tribunal on appeal to contact witnesses of the appellant (or the respondent) to obtain evidence. The obligation is primarily of the party desiring to adduce evidence of its witness to get it before the Delegate or the decision-maker during the investigation process and before the determination is made in the first instance, particularly where the evidence is available to the party. Here, Mr. Pang, during the investigation, asked the Delegate to contact Mr. Ip and the Delegate complied with that request, however, as indicated, Mr. Ip's evidence was unresponsive of RCA's position.
73. As for RCA's desire to present, "later" in this appeal, the affidavit of Mr. Ip, I am not persuaded at all that there is any basis to allow such particularly when RCA has not shown that it could not have, with the exercise of due diligence, discovered and presented to the Delegate in the investigation of the Complaint and prior to the Determination the evidence of Mr. Ip, whether in the affidavit or alternative form.
74. Further, while RCA does not specify what evidence it intends to adduce by way of Mr. Ip's affidavit (which fact alone would see RCA failing on the second criteria in *Re Merilus* test), if the evidence in the affidavit is the same as what Mr. Ip provided to the Delegate during the investigation then it fails as it is not new evidence (not to mention unhelpful to RCA's position). For all these reasons, I reject RCA's "new evidence" ground of appeal.

ORDER

75. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued together with whatever additional interest that may have accrued, pursuant to Section 88 of the *Act* since the issuance of the Determination.

Shafik Bhalloo
Member
Employment Standards Tribunal