Employment Standards TRIBUNAL

An appeal

- by -

Kimberley Dawn Kopchuk
("Kopchuk")

- 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

TRIBUNAL MEMBER: Matthew Westphal

FILE No.: 2004A/177

DATE OF DECISION: April 11, 2005

DECISION

SUBMISSIONS

Kimberley Dawn Kopchuk	On her own behalf
Michelle Alman	On behalf of the Director of Employment Standards
Erin Benoit	On her own behalf

OVERVIEW

This is an appeal by Kimberley Dawn Kopchuk ("Kopchuk") under s. 112 of the *Employment Standards Act* (the "*Act*") of Determination ER # 199-071, dated September 15, 2004 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards. The Delegate ordered that Kopchuk pay wages, annual vacation pay, and statutory holiday pay owed to Erin Benoit ("Benoit"), and imposed three administrative penalties of $500 each in respect of three contraventions of the *Act*.

The Tribunal has decided that this case can be decided without an oral hearing. Based on my review of the Determination, the submissions of the parties, and the record provided to me, I am dismissing Kopchuk's appeal and confirming the Determination.

ISSUES

1. Did the Delegate violate the principles of natural justice in arriving at his decision?
2. Did the Delegate err in finding that Benoit was an employee, rather than an independent contractor?
3. Did the Delegate err in not finding that Benoit was a sitter, to whom the *Act* did not apply?
4. Does Benoit have standing to argue on this appeal that the Delegate erred in finding that she had been dismissed for just cause?
5. Did the Delegate err in imposing three administrative penalties on Kopchuk?

BACKGROUND

Kopchuk and Guy Dinoto ("Dinoto") hired Benoit under a verbal contract as a live-in child care attendant for two of their three children. Benoit worked in that capacity from November 4, 2002 until February 10, 2003. Kopchuk was also at home, caring for her and Dinoto's third child, an infant. The parties had apparently contemplated that Benoit would work for an initial three-month trial period. On February 4, 2003 Kopchuk and Dinoto provided Benoit with two weeks' verbal notice of termination of employment.

On February 10, 2003, the Ministry of Children and Family Development (the "Ministry") contacted Kopchuk and Dinoto concerning a complaint it had received alleging neglect of their children. The Ministry found that the complaint was groundless. Kopchuk and Dinoto believed that Benoit had made the complaint, and told Benoit to leave their house that same evening. The Delegate found that Benoit had made the complaint, but believed that she had done so not out of spite, as Kopchuk and Dinoto maintained, but out of concern for the children.

Benoit filed a complaint in February 2003 with the Director alleging that Kopchuk and Dinoto had failed to pay her wages, minimum wages, statutory holiday pay, annual vacation pay, and compensation for length of service. Approximately 14 months elapsed between Benoit's initial complaint and the hearing held by the Delegate on April 26, 2004. The Delegate issued the Determination on September 15, 2004.

Both at the hearing before the Delegate and in their submissions to the Tribunal, the parties disagreed considerably about Benoit's duties and hours of work. Benoit says that she worked 35 hours per week and was required not only to care for the two older children, but also to perform various housecleaning tasks. Kopchuk says that Benoit worked 20 hours per week, that her duties were restricted to child care, and that Benoit was never required to do any cleaning. The Delegate accepted Benoit's evidence that she had generally worked 35 hours per week for Kopchuk and Dinoto.

The Determination is unfortunately far from clear on a number of matters, including that of Benoit's rate of pay. In their submissions to me, both Kopchuk and Benoit agree that Benoit was paid $450.00 per month, and received room and board. Benoit says that when she agreed to work for Kopchuk and Dinoto, she assumed that room and board in North Vancouver would be worth approximately $700.00 per month. There is some reference in the Determination to Kopchuk and Dinoto's having claimed that the $450.00 per month was net of a deduction of $325.00 per month for room and board. That happens to be the maximum amount that an employer may deduct from a domestic's wages under s. 14 of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the "*Regulation*"), but Kopchuk has maintained that Benoit was an independent contractor or a sitter, and was therefore not protected by the *Act* or the *Regulation*. Kopchuk and Dinoto did not maintain any payroll records, and there is nothing in the record before me to indicate that the parties agreed to ascribe any particular monetary value to the room and board provided to Benoit. It is common ground that Kopchuk and Dinoto paid Benoit a total of $1,240.00 between November 4, 2002 and February 10, 2003, and that Benoit did not pay any money out-of-pocket to Kopchuk and Dinoto for room and board during this period. Thus, as far as I can determine, the agreement was that, in exchange for Benoit's work, Kopchuk and Dinoto paid Benoit $450.00 per month, and provided room and board for free.

Before the Delegate, Kopchuk and Dinoto agreed that they owed Benoit wages for February 10, 2003, her last day worked, but stated that Benoit worked 4 hours on that day, not 7 as claimed by Benoit.

The Delegate accepted Benoit's evidence about the degree of direction and control exercised by Kopchuk and Dinoto over her work, and found that Benoit had been an employee (specifically, a domestic) under the *Act*. Based on his finding that Benoit had generally worked 35 hours per week (for a total of 435.5 hours), the Delegate found that Kopchuk and Dinoto had paid Benoit less than the minimum wage of $8.00 per hour required under the *Act* and the *Regulation*. The Delegate found that Kopchuk and Dinoto had contravened s. 18 of the *Act* by failing to pay Benoit all wages owing within 48 hours of terminating her employment, s. 45 of the *Act* by failing to pay statutory holiday pay for December 25, 2002 and January 1, 2003, and s. 58 of the *Act* by failing to pay annual vacation pay. He imposed an administrative penalty of $500.00 for each of these three contraventions.

SUBMISSIONS

Kopchuk argues that the Delegate, having found that Benoit had made a groundless complaint to the Ministry concerning neglect of her and Dinoto's children, should have found that Benoit lacked credibility, and therefore should not have preferred her evidence concerning her duties and hours of work to that of Kopchuk and Dinoto. She also argues that Benoit was exempt from the *Act* as an independent contractor or a sitter, and disputes the validity of the three administrative penalties the Delegate imposed.

Kopchuk made a further submission, dated December 28, 2004. This submission was not solicited, and was out of time, so I have not considered it in making this decision.

Benoit argues that she was an employee, and that the Determination should be confirmed, except for the Delegate's finding that she was dismissed for just cause.

In the course of my deliberations, I found that this appeal raised a number of legal issues concerning the Director's application of the mandatory administrative penalty scheme under the *Act* and the *Regulation*. Accordingly, I requested submissions from the Director on a number of questions. The Director provided a detailed submission on the questions I posed, and the other parties had an opportunity to respond. Kopchuk provided a further submission in response. I address the issue of administrative penalties, and the submissions I received about that issue, later in this decision.

ANALYSIS

1. Did the Delegate violate the principles of natural justice in arriving at his decision?

Kopchuk bases her claim that the Delegate violated the principles of natural justice in arriving at his decision, on the fact that the Delegate accepted Benoit's evidence concerning hours of work, despite having found that Benoit made an unsubstantiated report to the Ministry that the children were being mistreated. (I should note that Benoit denies ever having made such a report, but did not herself appeal the Determination; I address that issue later in this decision.)

The first question is whether this is properly an issue of natural justice. The Tribunal described this statutory ground of appeal as follows in *Moon Arc Interiors Co. Ltd.*, BC EST #D200/04:

> Such a challenge normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in the appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence.

The Delegate issued the Determination following an oral hearing at which Kopchuk and Dinoto were present, gave evidence, and made submissions. It is clear from the Determination that the issue of Benoit's complaint to the Ministry was raised at the hearing. Kopchuk does not claim that she was not permitted to state her position that the Delegate should not accept Benoit's evidence concerning her terms and conditions of employment, given that Benoit made a serious, and unsubstantiated, complaint about Kopchuk and Dinoto to the Ministry. There was no denial of natural justice. This ground of appeal does not strike me as raising an issue of natural justice, so much as concerns about the Delegate's weighing of the evidence, and his finding that Benoit worked 35 hours per week.

As the Tribunal noted in *Healey*, BC EST #D207/04, "An appeal is not an opportunity to re-argue a case that has been fully made before the delegate. Provided that there is an evidentiary basis for the delegate to make the findings of fact that he did, the Tribunal will not substitute its findings of fact without a substantial basis to do so." Thus, an appellant must provide clear and persuasive evidence that an error has been made: *Premier Auto Transmission Ltd.*, BC EST #RD373/99 (reconsideration of BC EST #D051/99 and #D249/99).

It is true that the Delegate, in his discussion of why he preferred Benoit's evidence to that of Kopchuk and Dinoto, does not mention the question of Benoit's having made the complaint to the Ministry. In

considering the contest of credibility between Benoit and Kopchuk and Dinoto on this point, the Delegate did not expressly take into account that he had disbelieved Benoit's evidence about whether she had made the complaint to the Ministry. Rather, his principal stated reason for preferring Benoit's evidence regarding her hours of work was that Benoit had provided pages from her agenda book with notations, which he accepted had been made contemporaneously, indicating that her hours of work were from 7:30 to 2:30.

Kopchuk's argument amounts to the claim that the Delegate, having in effect found that Benoit lacked credibility on the issue of whether she made the complaint, was required to reject the rest of her evidence as well. Although Benoit's having made an unsubstantiated complaint to the Ministry alleging the neglect of Kopchuk and Dinoto's children's is certainly troubling, and raises legitimate concerns about her credibility, it does not render her other evidence incapable of belief. The Delegate conducted an oral hearing and was able to hear and observe the witnesses' evidence. Further, he was entitled to reject Benoit's evidence on one issue, and accept it on others. Since there was an evidentiary basis for the Delegate's finding that Benoit had worked 35 hours per week, I am not prepared to interfere with it.

2. Did the Delegate err in law in finding that Benoit was an employee, rather than an independent contractor?

Kopchuk maintains that Benoit was never an employee, but rather, that she and Dinoto hired Benoit as an independent contractor.

Section 1(1) of the *Act* contains the following definitions:

> "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, …
>
> "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 employee whether in the employee's residence or elsewhere.

The Supreme Court of Canada has emphasized the need to interpret the scope of employment standards legislation broadly and liberally, as where it stated, in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 1003, about the Ontario *Employment Standards Act*, that:

> ...an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible, is favoured over one that does not.

The Delegate relied upon the broad statutory definitions of "employee" and "employer" in finding that Benoit was an employee, stating "Given that Dinoto and Kopchuk exercised direction and control of Benoit regarding the working relationship they would be deemed to be the employer of Benoit." The Delegate did not address any of the tests that have been developed at common law for distinguishing

between employees and independent contractors. In their submissions to the Tribunal, the parties have addressed elements of various common law tests.

The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.,* BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:

> 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 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 own 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.

In *Cove Yachts (1979) Ltd.*, BC EST #D421/99, the Tribunal set out the following factors as relevant to determining whether a person is an employee or an independent contractor:

- the actual language of the contract;
- control by the employer over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- the parties' perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term

Kopchuk argues that Benoit owned the tools used to perform her work, since she played her own compact discs to amuse the children. This argument is not at all persuasive, given that Benoit would have done so in Kopchuk and Dinoto's home, and using their equipment. Kopchuk says that Benoit had the ability to take on other work, and did in fact do so. Even if that is the case, it does not prevent Benoit from being

an employee. Finally, the evidence regarding the actual terms of the contract, the parties' intentions, and their perception of their relationship, is at best equivocal, since Benoit maintains that she intended to, and did, agree to an employment relationship, and perceived herself as the employee of Kopchuk and Dinoto.

Apart from the issue of direction or control, the Delegate did not address any of these factors. Admittedly, not all are relevant to the situation of a live-in child care attendant, and given the authorities cited above, it was not an error of law for the Delegate to focus on the issues of direction and control, which are central to the statutory definition of "employer". Bearing in mind the need to interpret the *Act*'s protections broadly, and the fact that there was evidence to support the Delegate's finding that Kopchuk and Dinoto exercised direction and control over Benoit's care of their children, I find that Kopchuk has not met her burden of proving that the Delegate erred in law in concluding that Benoit was an employee, rather than an independent contractor.

3. Did the Delegate err in law in not finding that Benoit was a "sitter", to whom the *Act* did not apply?

Kopchuk argues that the Delegate erred in finding that Benoit was a domestic, rather than a sitter.

Under s. 32(1)(c) of the *Regulation*, the *Act* does not apply to sitters, which s. 1 of the *Regulation* defines to mean:

> a person employed in a private residence solely to provide the service of attending to a child, or to a disabled, infirm or other person, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of
>
> (a) a business that is engaged in providing that service, or
>
> (b) a day care facility
>
> [emphasis added]

A "domestic", on the other hand, is defined in s. 1(1) of the *Act* to mean a person who

> (a) is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services, and
>
> (b) resides at the employer's private residence.

According to these definitions, a person who resides in a private residence and is employed to provide child care services is either a domestic or a sitter, but not both, since a domestic is expressly excluded from the definition of sitter. This distinction is critical, because a domestic is entitled to all the protections of the *Act*, but a sitter is not.

The Delegate found that Benoit was "an employee, in the capacity of a domestic". As such, she would be excluded from the definition of "sitter" under the *Regulation*. However, after finding that Benoit was an employee, rather than an independent contractor, the Delegate did not expressly consider whether Benoit was a sitter, rather than a domestic.

There is no dispute that Benoit resided at the private residence of Kopchuk and Dinoto, and I have upheld the Delegate's finding that Benoit was employed there. Thus, the question of whether she was a sitter or a domestic depends on whether she was employed "solely to provide the service of attending to" two of Kopchuk and Dinoto's children.

The Tribunal has considered the scope of the definition of "sitter", but there remains some uncertainty about the extent to which an employee can also perform household duties, without thereby ceasing to be a sitter. In cases involving caregivers for disabled adults, the Tribunal has held that the performance of incidental tasks of caring for a dependent person, such as some cleaning and feeding, do not prevent that person from being a sitter, because they are included in "attending" to the dependent person: *Dolfi*, BC EST #D524/97; *Renaud*, BC EST #D436/99 (Reconsideration denied, BC EST #D373/00); *Wood*, BC EST #D176/00.

However, if an employer requires the employee to perform other tasks of a housekeeping nature that are not directly linked to the care of a person, then the employee is not a sitter, and is protected by the *Act*: *Hampshire*, BC EST #D044/01; *McLellan*, BC EST #D438/98. Further, the Tribunal adopted a narrow interpretation of the definition in *Tikkanen*, BC EST #D433/02, on facts similar to those in this case, in that it involved the issues of whether a live-in caregiver for children was an employee or an independent contractor, and whether she performed sufficient other household tasks to take her out of the definition of sitter. The Tribunal held as follows:

> …[T]he Tribunal is bound to interpret language excluding persons from the protections of the *Act* narrowly. In *Renaud*, the adjudicator was clearly uncomfortable with his decision to exclude a caregiver from the *Act*.
>
> In this case, I conclude on the balance of probabilities that Balogh did perform some duties beyond the scope of simply caring for the Tikkanen children. The *Regulation* states that a sitter is employed "solely" to provide the service of attending. Given the evidence before me, it is unreasonable to expect that an employee caring for two young children did not carry out at least incidental cleaning activities in the household.

Kopchuk's evidence is that Benoit's duties consisted only of supervising and amusing two of her children. Benoit says that her duties extended to ironing, dusting, vacuuming, and cleaning floors, walls, bathrooms and the kitchen, and that Dinoto and Kopchuk provided her with a list of cleaning duties each day. She supports these statements with excerpts from her calendar on which she noted which cleaning tasks she performed on a given day. Although the Delegate, because he apparently did not consider whether Benoit was a sitter, did not decide in the Determination whether Benoit's duties were limited to caring for the children or included housecleaning tasks, he did accept Benoit's calendar notations as a contemporaneous record of her hours worked.

In assessing credibility, the test to be applied is that in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.), where the Court held that:

> …the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

In light of the Delegate's general acceptance of Benoit's evidence concerning her terms and conditions of employment, the need to interpret exclusions from the *Act* narrowly, and my assessment of the preponderance of the probabilities which a practical and informed person would readily accept as reasonable in the situation of a live-in employee caring for two young children for seven hours a day, I find that Kopchuk has not shown that the Delegate erred in not concluding that Benoit was a sitter employed solely to attend to two of her children.

4. Does Benoit have standing on this appeal to challenge the Delegate's finding that she was dismissed for just cause?

The Delegate denied Benoit's claim for compensation for length of service because he found that Kopchuk and Dinoto had dismissed her for just and reasonable cause, namely, making a groundless complaint to the Ministry that the children were being neglected. This act, in his view, fatally undermined the trust and confidence essential to the employment relationship.

In her submission, Benoit denies having made any report to the Ministry, and says that she therefore was not dismissed for cause. She says, however, that

> In the pursuit of a timely decision, I am not filing an appeal of my own, although I disagree with the Delegate's reasons for finding my employment terminated for just cause…
>
> …I am requesting these false accusations be stricken from the record, due to my clear contradiction to [*sic*] Kopchuk's appeal statement in regard to 'just cause' and because there is no reason for the Director to state this claim as a fact.

Had Benoit filed her own appeal of the Determination, it would have resulted in no delay of this decision as I could have adjudicated it at the same time as I did Kopchuk's appeal. Since she did not, however, I have no jurisdiction to set aside the Delegate's conclusion that Kopchuk was terminated for just cause, and was therefore not entitled to compensation for length of service under s. 63(3)(c) of the *Act*.

5. Did the Delegate err in imposing three administrative penalties on Kopchuk?

Kopchuk takes issue with the Delegate's imposition of three administrative penalties on the basis that the contraventions pre-date the introduction of the present penalty regime, and that the imposition of three penalties with respect to a single set of circumstances is excessive.

(a) Statutory provisions

Section 98 of the *Act* sets out the basic penalty requirement:

> 98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
>
> (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 28.
>
> (1.2) A determination made by the director under section 79 must include a statement of the applicable penalty.
>
> (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.
>
> (3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person
>
> (a) has been convicted of an offence under this Act or the regulations, or
>
> (b) is also liable to pay a fine for an offence under section 125.
>
> (4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Section 79 provides, in part, as follows:

> 79 (1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may require the person to do one or more of the following:
> (a) comply with the requirement;
> (b) remedy or cease doing an act;
> …
> (d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;
> …
> (4) The director may make a requirement under subsection (1), (2) or (3) subject to any terms and conditions that the director considers appropriate.

Section 81 of the *Act* provides as follows:

> 81 (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:
> ...
> (b) If an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or other amount, the amount to be paid and how it was calculated;
> (c) If a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;…

The current language of s. 98(1) is the result of an amendment. The former version of s. 98(1) read:

> (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.
>
> [emphasis added]

That prescribed schedule of penalties was set out in the former s. 29 of the *Regulation*, which permitted penalties from $0 to $500. Section 29 of the *Regulation* was amended along with s. 98(1) to impose administrative penalties in set amounts, according to an escalating scale for repeated contraventions:

> 29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:
> (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of $500;
> (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of $2 500;
> (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of $10 000;
> …
> (4) If an administrative penalty is imposed on a person, a prosecution under the Act or this regulation for the same contravention may not be brought against the person.
> (5) A person who is subject to an administrative penalty under this section must pay the amount to the minister charged with the administration of the *Financial Administration Act*.

(6) Subsections (1) to (5) apply only in respect of contraventions that occur on or after November 30, 2002.
(7) In subsection (8), "former provisions" is a reference to sections 28 and 29 and Appendix 2 of this regulation, as those provisions read immediately before November 20, 2002.
(8) The former provisions apply, despite their repeal, for purposes of contraventions of the Act and this regulation that occurred before November 30, 2002.

(b) Does the current administrative penalty regime apply in this case?

Kopchuk notes that prior to the amendment of the *Regulation* by B.C. Reg. 307/2002 effective November 30, 2002, the imposition of penalties was at the discretion of the Director, rather than following automatically from a finding of a contravention. She says that the Delegate should not have automatically imposed three penalties, because all contraventions he found occurred before November 30, 2002.

This argument, with respect, has no foundation in fact. The Delegate found that Kopchuk and Dinoto had contravened the *Act* by not paying Benoit all wages owing within 48 hours after they terminated her employment on February 10, 2003 (s. 18), not paying annual vacation pay (s. 58), and not paying statutory holiday pay for December 25, 2002 and January 1, 2003 (s. 45). All of these events occurred after the amendment of the *Regulation*.

(c) Did the Delegate err in imposing three administrative penalties in the circumstances of this case?

Kopchuk has also argued that it was unreasonable for the Delegate to impose three separate administrative penalties arising from a single set of circumstances, namely, the belief of Kopchuk and Dinoto that they had hired Benoit as an independent contractor, and that the *Act* therefore did not apply. In my view, given that the current penalty scheme is a relatively recent development, and the Tribunal is still in the process of delineating its scope and operation, it is appropriate for me to consider some of the broader issues underlying the Director's administration of this scheme.

I sought submissions from the parties on a variety of issues relating to the interpretation of the penalty provisions, including the extent to which:

- the *Act*, interpreted in light of s. 28(3) of the *Interpretation Act*, limits the Director's ability to impose administrative penalties;
- concurrent penalties may be imposed based on a single set of facts;
- the Director has discretion in finding contraventions giving rise to mandatory penalties; and
- the Tribunal may review the Director's decisions regarding penalties.

The Director provided detailed submissions on these issues. I will not summarize the Director's submissions here, but will refer to them at various points in my analysis. Kopchuk replied, stating that she found many of the Director's legal arguments technical and difficult to understand, and asking why the submissions only addressed the imposition of administrative penalties, rather than the merits of her appeal. I only sought further submissions on this one issue because the parties' positions on the facts and law relating to the other issues on this appeal were clear to me. Nevertheless, I regret that this last round of submissions was confusing to Kopchuk. Although the Tribunal strives to make its decisions comprehensible to the parties before it, the vast majority of whom have no legal training or experience, it must also at times consider complex legal issues which people without a legal background may find difficult to understand.

(i) Application of the Interpretation Act

Section 28(3) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides that "In an enactment words in the singular include the plural, and words in the plural include the singular." This provision, like the rest of the *Interpretation Act*, applies to the interpretation of all British Columbia legislation unless a contrary intention is indicated in the legislation.

The British Columbia Court of Appeal in *Biller v. British Columbia (Securities Commission)* (2001) 199 D.L.R. (4th) 124, 2001 BCCA 208 applied s. 28(3) of the *Interpretation Act* to limit the application of administrative penalties under s. 162 of the *Securities Act*, R.S.B.C. 1996, c. 418. That penalty scheme provided as follows:

> 162 If the commission, after a hearing,
>
> (a) determines that a person has contravened
>
> (i) a provision of this Act or of the regulations, or
>
> (ii) a decision, whether or not the decision has been filed under section 163, and
>
> (b) considers it to be in the public interest to make the order
>
> the commission may order the person to pay the commission an administrative penalty of not more than $100,000.

After a lengthy hearing, the Commission found that Biller had contravened four sections of the statute, and imposed substantial penalties: $100,000 for two of the contraventions, and $100,000 for each of the other contraventions, for a total of $300,000. The Court relied upon s. 28(3) of the *Interpretation Act* to interpret "a provision" to mean "one or more provisions". That meant that s. 162 only permitted the imposition of one penalty of up to $100,000 after a hearing, regardless of how many contraventions were found, so the Court reduced the penalties to $100,000. While the Court recognized that the Commission could circumvent this restriction on the number of administrative penalties that it could impose, by subjecting a person to separate hearings for different contraventions, the Court considered that to do so would constitute an abuse of process.

The Court in *Biller* did not rely only on the *Interpretation Act* in reaching this conclusion, but also considered the purpose of administrative penalties under the *Securities Act*. Other provisions of the *Securities Act* provided for criminal penalties for contraventions of the statute, but the *Securities Act* specifically required the Commission to apply money collected as administrative penalties under s. 162 "only for the purpose of promoting the knowledge of participants in the securities market of the legal, regulatory and ethical standards that govern the operation of the securities markets in British Columbia" (s. 15(3)). Since, unlike the criminal sanctions of the *Securities Act*, the administrative penalties were intended to further the remedial purposes of the legislation, the Court held that, to be proportionate, they must be interpreted as only permitting a single penalty to be imposed in respect of one hearing.

In my view, s. 28(3) of the *Interpretation Act* does not produce the same result as that in *Biller* when applied to the administrative penalty provisions in the *Act*, and does not restrict the Director to imposing only one administrative penalty, regardless of how many contraventions have occurred. As the Director noted, s. 2(1) of the *Interpretation Act* states that that statute applies only if there is no contrary intention indicated in the legislation. In *Daryl-Evans Mechanical Ltd. v. Director of Employment Standards -and- The Employment Standards Tribunal -and- John E.*

Tyler, 2002 BCSC 48 at paras. 83-84, the court, on judicial review from the Tribunal, considered the effect of these provisions:

> [T]he *Interpretation Act* only governs where a contrary intention does not appear in the relevant statute (see section 2(1) of that *Act*). In *Bank of Canada v Gratton* [1987] B.C.J. No. 1887 (B.C.C.A.), the court said, while considering the effect of section 2(1) on section 28(3):
>
> > The contrary intention need not be found in the express words, but may be inferred from the scheme of the enactment, its legislative history and other circumstances which surround the use of the word in question.
>
> Thus it appears that section 28(3) does not set out a hard and fast interpretative rule; it provides a caution that, in the absence of contextual factors suggesting otherwise, the legislative drafter's choice of a plural or singular term is not semantically significant.

In the Director's submission, the legislature intended the administrative penalty provisions to be applied as requiring separate penalties for each contravention, and to hold otherwise could lead to absurd results.. For example, the Director cited the escalating penalty scheme in s. 29 of the *Regulation*, which provides for escalating penalty amounts if "the same provision" is contravened more than once in three years.

If anything, s. 28(3) of the *Interpretation Act* reinforces the Director's interpretation of the administrative penalty provisions. After all, ss. 81(1)(c) and ss. 98(1) and (1.1) all refer to a person's being subject to "a penalty", which can be interpreted to mean "one or more penalties".

Further, unlike the administrative penalties under the *Securities Act* considered in *Biller, supra*, the administrative penalties under the *Act* and the *Regulation* are not required to be used only to further education. The legislature's intention in replacing the previous discretionary penalty system, under which the prospect of a penalty for a contravention was uncertain and generally unlikely, with a system of mandatory penalties for contraventions, appears to me to have been twofold: to deter employers from contravening the *Act* and the *Regulation*, and to encourage the settlement of complaints, because an employer who settles before the making of a determination, and the finding of contraventions, will not be subject to administrative penalties.

Accordingly, in my view, the *Interpretation Act*, when applied to the mandatory penalty scheme under the *Act* and the *Regulation*, does not preclude the imposition of multiple administrative penalties for multiple contraventions found in a single determination.

(ii) Interpretation of the administrative penalty provisions by the Tribunal

The Tribunal has considered the present administrative penalty provisions on a number of occasions, and has found that the legislature has not provided the Director or the Tribunal with any discretion regarding imposing a penalty once a contravention has been found. In this case, the Director has argued that the Director does, in fact, have the power in limited circumstances not to impose a penalty for every contravention.

In *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST #D160/04, the Tribunal, after soliciting submissions on the legitimacy of imposing three penalties (relating to overtime pay, statutory holiday pay, and vacation pay) arising out of a single set of circumstances, summarized the applicable principles as follows:

> As the Tribunal recently noted in *Summit Security Group Ltd.* (BC EST #D059/04, Reconsidered BC EST #D133/04), administrative penalties under the *Act* are part of a larger scheme to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the *Act*, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.
>
> It does appear that the penalty assessment against Brother's is excessive in light of the amounts owing to Mr. Joly, and thus, for essentially minor breaches, the cumulative penalties seem unfair. However, in *Douglas Mattson* (BC EST #RD647/01) the Tribunal found that it could not ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgment about what is "fair" or "logical". Further, in *Actton Super-Save Gas Stations Ltd*. (BC EST #D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme."
>
> The Director states that only one administrative penalty will be imposed in respect of a single contravention, for concurrent violations, or several contraventions of the *Act* arising out of the same circumstances. This appears to be in accord with the "Keinapple [*sic*] principle" (*R. v. Kienapple*, [1975] 1 S.C.R. 729), which prohibits multiplicity of convictions in respect of the same factual incident or transaction.
>
> The undisputed evidence is that Brother's repeatedly breached several provisions of the *Act* with respect to overtime, statutory holiday pay, and annual vacation pay. The Tribunal has concluded that the penalty scheme is in accordance with the purposes of the *Act*, and is not subject to fairness considerations, provided the penalties are not imposed for several contraventions arising out of the same circumstances. Although Brother's claimed that the violations arose as a result of clerical errors and lack of attention to detail, the Tribunal notes that Mr. Joly's final paycheque was not sent to Mr. Joly despite his parents' repeated telephone calls until after Mr. Joly filed his complaint with the Employment Standards Branch. Brother's claims that the breaches were due to clerical errors or a lack of attention to detail rings hollow in light of this evidence.

The Tribunal upheld the imposition of three administrative penalties in *Brother's Restaurant* on the basis that since the employer had failed to pay overtime, statutory holiday pay and annual vacation pay over the course of several pay periods, it was not a situation of several contraventions of the *Act* arising out of the same circumstances.

Based on the reasoning in *Brother's Restaurant,* I could likewise uphold the imposition of three administrative penalties in this case on the basis that Kopchuk and Dinoto repeatedly violated the *Act* over multiple pay periods by not paying vacation pay, statutory holiday pay, and by not paying all wages owing within 48 hours after they terminated Benoit's employment. Alternatively, based on the Director's position in *Brother's Restaurant* that only a single penalty might be imposed for concurrent contraventions or if all contraventions arose from the same circumstances, it could be said that only one penalty should have been imposed in this case because the three contraventions arose from Kopchuk and Dinoto's belief that Benoit was an independent contractor, and that there was therefore no legal impediment to their paying her only $450 per week plus room and board for her work, with no vacation pay or statutory holiday pay.

This latter characterization would run counter to the decision of the Tribunal in *Virtu@lly Canadian Inc. operating as Virtually Canadian Inc.*, BC EST #D087/04, which involved the imposition of four administrative penalties on an employer which had paid a worker on a commission basis. Since the worker was found to be an employee rather than an independent contractor, the employer was held to have violated the *Act* by not paying minimum wage (s. 16), not paying all wages owing within 48 hours of termination of employment (s. 18), not maintaining payroll records (s. 28), and not paying annual vacation pay (s. 58). Arguably, all four penalties arose from the employer's unsuccessful attempt to structure the relationship so that the worker was an independent contractor paid on a commission basis (which, if successful, would legitimately have excluded the operation of the *Act*), rather than as an employee. The Tribunal upheld the imposition of four penalties on the basis that s. 29 of the *Regulation* "provides for mandatory administrative penalties without exception where a contravention of the *Act* or *Regulations* is found by the Director," and continued:

> I appreciate that in some cases the application of the provisions relating to administrative penalties may seem excessive and punitive, but I must apply the law as it is and such considerations do not allow the Tribunal to ignore the clear direction in the legislation.

However, another factor, which has not yet been resolved in the Tribunal's jurisprudence, is the extent to which the Director has latitude in how he and his delegates determine whether the *Act* and the *Regulation* have been contravened.

(iii) Discretionary elements in the application of the mandatory administrative penalty scheme in practice?

While I agree that the *Act* and *Regulation* do not allow for any discretion regarding the imposition of penalties once contraventions have been found, they do appear to provide delegates of the Director with considerable latitude in how they characterize facts as amounting to contraventions of the *Act*. This discretion creates the scope for inconsistent decisions by different Director's delegates based on the same facts, and for the appearance of arbitrariness.

I will illustrate this point by way of example. Strictly speaking, although the Delegate made no findings in this regard, based on the findings of fact that he did make Kopchuk and Dinoto could potentially have been found to have contravened at least the following requirements of the *Act* and the *Regulation*:

- keeping payroll records (s. 28 of the *Act*);
- providing a domestic with a copy of the written employment contract (s. 14 of the *Act*);
- paying the minimum wage of $8.00 an hour (s. 16 of the *Act* and s. 15 of the Regulation); and
- providing the Director with information regarding a domestic within 30 days of hire (s. 13 of the Regulation).

Had the Delegate made these findings, then he would also have been required to impose four more administrative penalties, for a total of $3,500.00. But for the Delegate's finding that Benoit was dismissed for just cause, he could also have found that Kopchuk and Dinoto contravened the requirement to pay compensation for length of service (s. 63 of the *Act*), which would have carried a further $500 penalty.

I make these observations not to suggest that the Delegate necessarily erred in not finding more contraventions and imposing more penalties, but to demonstrate that although under the *Act* and the *Regulation* the Director's delegates do not appear to have any discretion regarding whether, and in what amount, to impose administrative penalties once they have found contraventions, in practice they clearly do have discretion concerning how to characterize a set of facts as giving rise to one or more contraventions.

Consider another example, that of *Candiz Bakery & Café Trading and Services Inc.*, BC EST #D012/05, an appeal that I decided. The claimant alleged that he had worked as an employee but had never been paid anything. The employer denied that there had been any employment relationship at all. The Director's delegate accepted the claimant's evidence, and found that he had been an employee. The Delegate ordered the employer to pay the claimant a) regular wages, b) statutory holiday pay, c) vacation pay, and d) overtime pay for the work he had performed. Although each amount was in respect of a distinct obligation under the *Act*, the Director's delegate found only one contravention--the failure to pay all wages owing within 48 hours under s. 18 of the *Act*--not four, and hence imposed a single administrative penalty of $500. A different delegate might have found four contraventions, and imposed four administrative penalties.

Similarly, in cases in which an employer has contravened the same provision of the *Act* with respect to multiple employees--such as a failure to provide written notice of termination of employment to employees upon the sale of the employer's business--the Director has found only a single contravention, even though in principle the employer committed a separate contravention for each employee: see, for example, *366178 B.C. operating as Northern Hotel - and - Candace Fox*, BC EST #D202/04.

In his submission, the Director resisted the characterization of his delegates' finding of contraventions as one of discretion, preferring to call it "principled statutory interpretation". I do not find that a particularly meaningful distinction. The concern is that there is clearly the potential for inconsistent application of the mandatory penalty scheme under the *Act* and the *Regulation*, specifically at the stage when a Director's delegate decides how to characterize a set of facts as constituting contraventions. The issue is whether there are limits on the Director's ability to find contraventions which will trigger mandatory penalties, and whether it is subject to review by the Tribunal. It is to those issues that I now turn.

(iv) The Kienapple principle

The Tribunal alluded to this principle in *Brother's Restaurant*, but I do not read that decision as necessarily indicating that the Director clearly acknowledged that the *Kienapple* principle applies to the administrative penalty scheme under the *Act* and the *Regulation*. Accordingly, that was a question I put to the Director, and I will consider whether and to what extent this principle applies.

The *Kienapple* principle is a rule in the criminal law prohibiting multiple convictions arising from the same "matter", "delict", or "cause", which is more popularly known as the concept of "double jeopardy". (This principle was developed by the courts, and is related to, although distinct from, s. 11(*h*) of the *Canadian Charter of Rights and Freedoms*, which provides that once a person has been tried for an "offence" and finally acquitted or convicted, he or she may not be tried and punished for it again.) Although the common law principle first discussed by the Supreme Court of Canada in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, it was more fully developed and

articulated in *R. v. Prince*, [1986] 2 S.C.R. 480. For present purposes, it is not necessary to discuss the details of how this rule developed, so I will summarize the requirements of the rule.

The first requirement of the rule is that there must be a factual nexus between the charges. That is, are the charges based on the same act of the accused?

The second requirement is that there must be a sufficient nexus between the two offences. As Chief Justice Dickson, writing for the Court in *Prince,* explained,

> The next question which must be addressed is whether the presence of a sufficient factual nexus is the only requirement which must be met in order to justify application of the *Kienapple* principle…
>
> In my opinion, the application of *Kienapple* is not so easily triggered. Once it has been established that there is a sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves. The requirement of an adequate legal nexus is apparent from the use by the majority in *Kienapple* of the words "cause", "matter" or "delict" in lieu of "act" or "transgression" in defining the principle articulated in that case…
>
> In my opinion, the weight of authority since *Kienapple* also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions.
>
> (pp. 493-94)

In *Prince* at pp. 494-95 Chief Justice Dickson cited examples from previous cases in which courts had correctly declined to apply *Kienapple* because of the lack of a legal nexus, even though both offences arose from the same act or incident:

- hunting out of season, and hunting at night with lights;
- driving while suspended and impaired driving;
- contributing to juvenile delinquency and trafficking in a narcotic;
- breach of recognizance and possession of a narcotic;
- breach of probation and common assault; and
- contempt of court and unlawfully detaining children

Thus, the *Kienapple* principle does not prohibit the imposition of more than one conviction arising from the same act. It only operates where the offences arise from the same act, and there is sufficient proximity between the offences themselves, in the sense that "there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be preclude by the *Kienapple* principle" (pp. 498-99). As the Court noted at p. 499,

> Where offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided there are no distinct additional elements in the lesser offence.

The Court in *Prince* discussed three ways in which there can be sufficient correspondence between elements of the offences to trigger the application of the rule:

- An element is a particularization of another element.
- There is more than one method, embodied in more than one offence, to prove a single delict.
- The legislature in effect deems a particular element to be satisfied by proof of a different nature.

Importantly, subject to *Charter* considerations, the operation of the *Kienapple* principle is subject to Parliamentary intent that more than one conviction be entered where offences overlap (p. 498). The Court emphasized, at p. 502, that

> [I]n applying the above criteria it is important not to carry logic so far as to frustrate the intent of Parliament or as to lose sight of the overarching question whether the same cause, matter or delict underlies both charges.

(v) Does the *Kienapple* principle apply to the administrative penalty scheme under the *Act*?

The *Kienapple* principle, as discussed above, derives from the criminal law context. Administrative sanctions, unlike criminal or regulatory offences, are not considered to be penal in nature: *Martineau v. Canada (Minister of National Revenue - M.N.R.)*, [2004] 3 S.C.R. 737, 2004 SCC 81 at para. 54. Thus, it cannot simply be assumed that the *Kienapple* principle applies equally to administrative penalties under the *Act*. Indeed, there is reason to question whether it does.

The British Columbia Court of Appeal held that penalty assessments under federal and provincial income tax legislation for filing false statements were not "offences" for the purposes of s. 11(*h*) of the *Charter*, and thus did not preclude taxpayers from subsequently being convicted of offences for making false statements in a return: *Lavers v. British Columbia (Minister of Finance)*, (1989) 41 B.C.L.R. (2d) 307 (C.A.). And in *R. v. Frederickson* (2002) 32 M.V.R. (4th) 224, 2002 BCSC 1777, where a motorist had refused to comply with a police officer's demand for a breach sample, the court held that the *Kienapple* principle did not preclude a criminal prosecution for failing to provide a breath sample, where the motorist had already received a 90-day driving prohibition under the *Motor Vehicle Act* for the same conduct. For this point the court relied upon *Regina v. Art* (1987), 39 C.C.C. (3d) 563 (B.C.C.A.), where the court held that a roadside suspension was not a punishment, and therefore could not trigger the *Kienapple* principle or s. 11 (*h*) of the *Charter.*

However, *Lavers* involved s. 11(*h*) of the *Charter*, not *Kienapple*, and *Frederickson* involved a claim that *Kienapple* applied to prevent a prosecution for an offence where an administrative penalty had already been imposed. These authorities involve the relationship between an administrative penalty and a criminal or regulatory offence, and show that an administrative penalty is different from an offence, and cannot preclude prosecution for an offence arising from the same conduct. Thus, while these authorities give cause to question whether the *Kienapple* principle ever applies to administrative penalties, they do not conclusively show that the *Kienapple* principle applies as between two or more administrative penalties, where no criminal or regulatory prosecution is at issue.

The *Kienapple* principle has been accepted in some administrative contexts and rejected in others. It has been applied to professional discipline proceedings by self-regulated professions: see *Creager v. Provincial Dental Board of Nova Scotia*, 2005 NSCA 9 at para. 78 and authorities

cited therein. On the other hand, the Appeal Division of the B.C. Workers' Compensation Board (Appeal Division Reference #2002-0636 and #2002-0637) held at paras. 55-61, that the *Kienapple* principle did not apply on the facts, but in the alternative, held that there was a legislative intent to override the rule and permit multiple penalties for the same facts or same safety problem. And the B.C. Forest Appeals Commission, in *Canadian Forest Products Ltd. -and- Government of British Columbia -and- Forest Practices Board*, Appeal No. 1998-FOR-09, held that the *Kienapple* principle did not apply to contraventions of the *Forest Practices Code of British Columbia Act* and its regulations, because those provisions contemplated overlapping or duplication in contraventions; the Commission, however, also seemed influenced by the fact that the *Code* did permit flexibility in the assessment of penalties to avoid unfairness.

The Director, in his submission to the Tribunal in this case, stated that the *Kienapple* principle does apply to the mandatory penalty scheme under the *Act* and the *Regulation*, and gives him the power to "choose to impose fewer penalties than one per each and every contravention of the Act or the Regulation in a given case arising from the Director's responsibility to interpret and administer the penalty scheme with due regard to the entirety of the Act and all of the purposes of the Act". The Director further stated his view of the application of the *Kienapple* principle to the penalty scheme:

> The Tribunal has confirmed that the penalty scheme exists to ensure the attainment of minimum employment standards for British Columbian employees […] Bearing this purpose in mind, the Director submits that the rule against multiple convictions arising from the same "delict", "matter" or "cause" can be taken as applying in respect of the penalty scheme under s. 98 of the Act and s. 29 of the Regulation only in circumstances in which there is sufficient identity of the facts of the contravening employer's conduct, sufficient identity between the elements of a contravention of the Act of [*sic*] Regulation, and an absence of any additional, differentiating element in those contraventions.
>
> The Director has attempted to observe these principles when considering whether there are multiple contraventions flowing from an employer's conduct in the circumstances of each case, while also considering the Act's purposes. Section 2(b) indicates that a purpose of the Act is "to promote the fair treatment of employees and employers." To attain both the attainment of minimum employment standards in B.C. and the fair treatment of both employees and employers, the Director has not sought to apply blindly the provisions of the statutory penalty scheme. Rather, the Director has taken a principled approach to interpreting s. 98 of the Act and s. 29 of the Regulation so as to avoid an overly broadly [*sic*] application of the penalty scheme to contraventions that are "subsumed" or "consequential" contraventions flowing from one or several contraventions of the Act or Regulation.

After reviewing certain Tribunal decisions, the Director states:

> In the Director's submissions, the noted Tribunal decisions all indicate that the Director cannot exercise discretion as regards applying a penalty once the Director finds that a person has contravened a provision of the Act or Regulation. The Director further contends that he has no discretion to avoid finding that a person has contravened a provision of the Act or Regulation. In the Director's submission, however, these concepts do not relieve the Director from administering the statutory penalty scheme in accordance with the noted purposes of the Act. To fair to employers while administering the statutory penalty scheme, the Director has attempted to apply the penalty scheme within analogous common law principles arising from criminal law so as to avoid assessing penalties for contraventions that are subsumed in another contravention or that flow from a remedy (such as finding that wages are owing, which would necessarily also lead to a finding that there is unpaid vacation pay owing on the amount of unpaid wages).

In my request for submissions, I specifically asked in what circumstances the Director would consider that a contravention was "subsumed" in another, including whether multiple contraventions would be considered to arise from the same circumstances in the situation of an employer who thought that an independent contracting relationship had been created, but was incorrect. The Director stated as follows:

> The breadth of the concept of "several contraventions of the Act arising out of the same circumstances" is substantial, in the Director's submission. The Director believes that the concept must be interpreted in light of the facts and circumstances of each case so as to ensure that a fair result is attained, keeping in mind the mandatory nature of the penalty scheme and the purposes of the Act. The concept is not limited to the single example of the subsuming of a contravention of vacation pay owing in the contravention of a failure to pay an amount of wages owed; that was merely one of several examples and not the Director's sole position in his submissions in *Marana Management, supra*. The Director considers that the concept could apply to a situation in which an employer had characterized the relationship as a contract for services rather than an employment contract. In a given case involving an independent contractor vs. employee situation, the Director would have to consider all the circumstances of the case to determine whether there was solely a single penalty applicable for failure to pay wages in a timely fashion (s. 17 and/or s. 18), which would subsume several potential contraventions involved in failing to pay vacation pay and statutory holiday pay to a person the employer had incorrectly characterized as an independent contractor, or whether other contraventions of a more distinctive nature, such as the failure to provide a domestic employee with a written contract of employment, were involved. Again, the Director submits that this is in accordance with the principles in *Prince, supra,* that permit multiple convictions if there is a distinct, additional element in a situation involving a substantial factual nexus and a substantial nexus in contraventions or offences.

The Director distinguishes between contraventions that are "stand-alone" and those that are subsumed in other contraventions, and suggests that another example of the latter is where an employer fails to pay all wages owed for overtime or statutory holiday pay, and also failed to pay wages on a payday. The failure to make payment of the statutory holiday pay or overtime pay would automatically subsume the failure to make payment of all wages owing within the time required by either sections 17 or 18 of the *Act*. The Director notes that there is an imperfect accord between criminal law concepts and the *Act*'s penalty provisions, but suggests that the distinction between "stand-alone" and "subsumed" contraventions is analogous to the distinction in criminal law between separate but related offences, and lesser and included offences. In the case of subsumed contraventions of the *Act* or the *Regulation*, as in the case of lesser and included offences in the criminal law, the *Kienapple* principle may prevent imposition of multiple penalties or convictions.

The position of the Director, as I understand it, is that he does not have any discretion to decline to find a contravention where it is established on the facts, and does not have any discretion to decline to impose an administrative penalty once a contravention has been found, yet he may, despite the apparently mandatory language in s. 98 of the *Act* and s. 29 of the *Regulation*, choose not to impose a penalty for every contravention. Nothing in the *Act* or the *Regulation* expressly gives the Director jurisdiction to decline to impose a penalty in respect of each contravention. Nor does the Director claim that it does; rather, he argues that he derives this jurisdiction from the purposes of the *Act* in s. 2, notably s. 2(b), which is "to promote the fair treatment of employees and employers".

It is not clear to me that the Director's stated position on this issue in this case reflects what the practice of the Employment Standards Branch has been to date. I do not intend this as a criticism,

because the Director has the ability to adopt different policies regarding how he will administer and enforce the *Act.* I am not aware, however, of any case in which the Director or one of his delegates has declined to impose a penalty for every contravention found based on *Kienapple* or an analogous principle. Rather, it appears to me based on a review of examples found in decisions of the Tribunal, that in practice, delegates of the Director may have sought to avoid what might seem to be unfair results by finding fewer contraventions than have actually occurred, or by lumping multiple contraventions together as a failure to pay "wages" (which is defined very broadly to include most amounts that an employer is liable to pay under the *Act* and *Regulation*) under s. 18.

Although the Director and his delegates may have such discretion regarding the characterization of contraventions, it would in my respectful view be preferable for delegates of the Director to be clearer in making such decisions. That is, if they are exercising their discretion not to find every contravention that might be said to have occurred on the facts, they should say why they are doing so, and similarly, if they are declining to impose penalties because some contraventions might be subsumed in others, they should state so expressly. As the Tribunal held in *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BC EST #D405/98, the Tribunal may review the Director's exercise of discretion for abuse of power or process, mistake in construing the limits of the Director's authority, procedural irregularity, or unreasonableness. Although the statutory grounds of appeal in s. 112 of the *Act* have been narrowed since *Insulpro* was decided, in my view the Tribunal can still review the Director's exercise of discretion on these bases.

I am sympathetic with the Director's desire to avoid the overly harsh treatment of employers in certain cases as a result of a the imposition of separate penalties for every contravention arising on a given set of facts, but I am not convinced that the Director has jurisdiction to do so under the present language of the *Act* and the *Regulation*. The statement in s. 2(b) of the *Act* that one of its purposes is to promote the fair treatment of employers is primarily an interpretive guideline, rather than a source of rights, and I doubt whether it is capable of conferring a discretion on the Director to deviate from mandatory requirements of the *Act* in the name of fairness. In previous cases before the Tribunal the Director has maintained that the Tribunal has no jurisdiction to vary administrative penalties based on considerations of fairness, and the Tribunal has agreed. Yet here the Director asserts that he has jurisdiction to decline to impose a penalty for each contravention where to do otherwise would be unfair, albeit with unfairness measured according to the strict requirements of the *Kienapple* principle. I do not believe that the Director has this jurisdiction under the current provisions of the *Act* and *Regulation*, and if the legislature had intended in enacting the present penalty scheme to give the Director such jurisdiction, it could have stated so expressly, and provided legislative guidance as to the principles according to which this discretion is to be exercised.

By contrast, the current penalty scheme, which by its mandatory nature opens the door to penalties for concurrent and overlapping contraventions, could equally be said to signify a legislative intent to exclude the operation of the *Kienapple* principle. As noted above, the *Kienapple* principle can be excluded if the legislature makes its intention to do so clear. Section 29(4) of the *Regulation* provides that if an administrative penalty is imposed on a person, then that person may not be prosecuted under the *Act* or the *Regulation* for the same contravention. However, the reverse is not true, because s. 98(3) of the *Act* provides that a person subject to a monetary penalty under that section must pay it even if he or she has also been convicted of an offence under the *Act* or *Regulation*, or is liable to pay a fine for an offence under s. 125 of the *Act*. These provisions do not speak to the question of whether separate administrative penalties

may be imposed for separate contraventions of related provisions, which is what s. 98(1) of the *Act* and s. 29 of the *Regulation* contemplate.

Based on all of these considerations, and although the point is far from clear, in my view the *Kienapple* principle does not apply to permit the Director to decline to impose an administrative penalty once a contravention has been found, regardless of how many contraventions have occurred. However, if I am wrong in this conclusion, the penalties imposed on the facts of this case do not violate *Kienapple*.

(vi) Does the Tribunal have jurisdiction to review the Director's decisions regarding administrative penalties based on compliance with the *Kienapple* principle?

The Director takes the position that the Tribunal has no jurisdiction to modify administrative penalties in any way. The Director relies upon the mandatory language in ss. 98(1) and 98(1.2) of the *Act* and s. 29 of the *Regulation*, as clearly indicating "that the legislature has intended that the Director must assess administrative penalties for contraventions of the Act." If the Tribunal finds an error in the penalty assessment in a determination, in the Director's submission, its power is limited to referring the determination back to the Director for review of the penalty assessment. (Presumably the Director is not suggesting that the Tribunal does not have jurisdiction to cancel an administrative penalty if it sets aside the contravention on which the penalty was based.) The Director also relies on the decision of the Tribunal in *Malibu Rayz Tanning Ltd.*, BC EST #D169/04, where the Tribunal, in upholding the imposition of penalties totaling $7,500 (for second violations of three provisions of the *Act* within 3 years), noted that "the Tribunal has no jurisdiction to change the amounts of those penalties, or conclude that they should not be imposed once a contravention has been found."

I am not persuaded by the Director's argument that the Tribunal lacks jurisdiction to review his decisions regarding the imposition of administrative penalties. A strict reading of the penalty provisions in the *Act* and the *Regulation* that I have cited above seems to require that the Director find all contraventions arising from a given set of facts, and impose a penalty with respect to each. The Director asserts that he nevertheless has the power not to impose one penalty for each contravention, and grounds this power in s. 2(b) of the *Act*. Just as the Tribunal derives its jurisdiction from the *Act*, so too does the Director. If it is true that the Director has the power not to impose an administrative penalty for every contravention where to do so would violate the *Kienapple* principle--as I am accepting for the sake of argument at this stage of my analysis--then it follows, in my view, that the Tribunal must have the power to review the Director's exercise of this power under any of the permitted grounds of appeal in s. 112 of the *Act*: breach of natural justice, error of law, or new evidence.

(vii) Would the *Kienapple* principle prevent the imposition of multiple penalties in this case?

The Delegate found that Kopchuk and Dinoto had contravened the following three provisions of the *Act*:

Section 18	Failure to pay all wages owing within 48 hours of terminating Benoit's employment
Section 45	Failure to pay statutory holiday pay
Section 58	Failure to pay vacation pay

The Delegate did not make clear in the Determination whether the contravention of s. 18 related only to the failure to pay Benoit for her last day or work, or also to the failure to pay wages that were owing because Benoit had been paid at less than minimum wage.

It is true that at least two of the contraventions appear to have stemmed from the belief of Kopchuk and Dinoto that the minimum standards of the *Act* and the *Regulation* did not apply to Benoit. However, the *Kienapple* analysis must focus on the specific contraventions. Kopchuk and Dinoto did not contravene the *Act* by attempting to enter into an oral contract for services that would not be subject to the *Act*. They contravened the *Act* because, in performing that contract, they failed to meet various minimum statutory requirements that applied to Benoit because, it turns out, she was an employee under the *Act*. And at least in respect of Benoit's last day of work, they failed even to pay what they had agreed to pay her under the oral contract.

It is true that the scope of s. 18, which requires an employer to pay an employee all wages owing within 48 hours of terminating his or her employment, creates the potential for both a factual and legal nexus sufficient to trigger the *Kienapple* principle. "Wages" are defined very broadly under s. 1(1) of the *Act*, and include annual vacation pay and statutory holiday pay. Thus, it could be argued that the failure to pay statutory holiday pay and annual vacation pay were subsumed within the failure to pay all wages owing within 48 hours of the termination of Benoit's employment. If I were convinced that the failure to pay all "wages" owing referred only to vacation pay and statutory holiday pay, then in my view, there would be a complete overlap; the *Kienapple* principle, assuming it applies, would permit the imposition either of penalties for the contravention of ss. 45 and 58, or of a single penalty for a contravention of s. 18, but not three penalties for all three contraventions.

However, as noted above, Kopchuk and Dinoto failed to pay at least some wages (namely, wages owing for Benoit's last day of work) owing that were distinct from the vacation pay and statutory holiday pay. Each contravention relates to the failure to pay discrete sums of money, relating to separate obligations under the *Act*: wages (apart from holiday pay and vacation pay), statutory holiday pay for December 25, 2002 and January 1, 2003, and vacation pay equal to 4% of total wages earned. Thus, I am not persuaded that these contraventions arose from the same act or omission, so the factual nexus required by *Kienapple* is not present.

Further, even if there were a factual nexus between these contraventions, I would not find a legal nexus between the provisions that have been contravened in the circumstances of this case. The failure to pay distinct amounts of money required to be paid by statute can give rise to separate delicts. For example, in *R. v. Chung*, [1999] B.C.J. No. 528 (Q.L.) (S.C.) the accused was convicted of two counts of possession of cigarettes upon which the applicable taxes had not been paid. One count related to federal excise tax, and the other related to provincial tobacco tax. The accused argued that both charges related to the same delict, namely, possession of cigarettes on which the applicable taxes had not been paid. The court held that the charges related to distinct delicts: a contravention of the federal *Excise Act*, and a contravention of the provincial *Tobacco Tax Act*.

Similarly, here the delict was not simply failing to pay all amounts required to be paid under the *Act*. Rather, there were three separate delicts, relating to three separate obligations under the *Act*. The obligations may also serve distinct policy goals. Requiring employers to pay all wages owing within 48 hours of terminating an employee's employment, for example, serves a separate legislative purpose from requiring employers to pay employees for statutory holidays, even if

they do not work on those days, or from requiring employers to pay employees 4% vacation pay in addition to their regular wages.

The statutory contraventions found by the Delegate in this case do not satisfy any of the three ways discussed in *Prince* for demonstrating a legal nexus between the contraventions. Therefore, I find that even if the *Kienapple* principle applies to administrative penalties under the *Act*, it does not prohibit the imposition of an administrative penalty of $500 for each of these three contraventions. The three administrative penalties stand.

(viii) Should I remit this matter back to the Director to impose further administrative penalties on Kopchuk and Dinoto?

In posing the questions on which I sought further submissions, I specifically mentioned what I have stated in this decision about how the facts of this case could, based on a strict reading of the *Act*, give rise to as many as seven administrative penalties. I made that comment only to illustrate the proposition that the Director does in practice have considerable latitude in determining when to declare a contravention, which then gives rise to a penalty. However, the Director made the following submission on remedy:

> The Director has conceded that further penalties may have been appropriate to assess in the circumstances of this case but submits that there were no other errors of law and no breaches of natural justice in the reaching of the factual findings and conclusions of law in the Determination. The Director therefore requests that the appeal be dismissed on the merits and the Determination's findings of fact confirmed, but that the matter be referred back to the Director for review of the appropriate penalties to be assessed in all the circumstances of the case.

I am not prepared to accede to this request. The issue of whether Kopchuk and Dinoto contravened other provisions of the *Act* was not raised in Kopchuk's appeal, and was not argued before me. My power on this appeal is limited to matters dealt with in the Determination or matters under appeal: *Mt. Rocky Investment Ltd.*, BC EST #RD 457/01 (Reconsideration of BC EST #D269/00 and BC EST #D142/01). In my view, I have no jurisdiction on this appeal to find further contraventions, and I make no such finding. Although the penalty provisions of the *Act* require the Director to impose an administrative penalty once a contravention has been found, nothing in the *Act* or *Regulation* requires the Tribunal to remit a determination back to the Director on the basis that other contraventions may have occurred, in order to give the Director a second chance to decide whether to find further contraventions, with further ensuing penalties.

The Director has jurisdiction under s. 86(1) of the *Act* to vary or cancel a determination, but once a determination has been appealed, the Director can no longer vary or cancel the determination after 30 days from the date that the Director received a copy of the appeal request. Once that period has expired--as it has in this case--then the Director's jurisdiction to vary a determination is exhausted.

To accede to the Director's request to revisit the Determination would mean that any time an employer appealed a determination, the Director could not only oppose the appeal, but also, even if time had expired for the Director to vary the determination under s. 86(1), ask for the determination be remitted back for the assessment of further contraventions and penalties. Such a result would, in my view, be unfair to employers, contrary to one of the purposes of the *Act*.

Since nothing in the *Act* or the *Regulation* requires that I remit the Determination back to the Delegate to determine whether further contraventions occurred, and I do not consider that doing so, and exposing Kopchuk and Dinoto to more than the $1,500 in penalties that have already been imposed, would further the purposes of the *Act*, I decline the Director's request.

(ix) Concluding remarks

In conclusion, I return to the question of whether, had the Delegate found seven contraventions resulting in seven penalties, there would have been any scope for review by the Tribunal. In my view, absent circumstances amounting to bad faith or abuse of process (neither of which occurred here), once the Director or one of his delegates has found multiple contraventions of the *Act* or *Regulation*, then the Tribunal may only set aside these penalties to the extent that it can set aside the underlying contravention based on the grounds of appeal in s. 112 of the *Act.* Even if I am wrong and the *Kienapple* principle applies, its scope is quite narrow. Further, although consistency in administrative decision making is an important goal (see, for example, *Park Lane Ventures Ltd.*, BC EST #D211/03), the imposition of three administrative penalties in this case falls within the range established in cases with similar facts (*Candiz Bakery, supra* where one penalty was imposed, and *Virtu@lly Canadian, supra* where four were imposed). In any event, it is open to question whether the fact that more contraventions and penalties have been found in one case than in another similar case, is sufficient, in and of itself, to provide a basis for appealing a determination: see *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 for a discussion of the issue of consistency as a ground of judicial review.

It is true that this finding holds the potential for arguably unfair results where parties either consciously attempt to create an independent contracting relationship, or agree to exchange pay for work without giving any thought to whether an employment relationship arises, along with all the statutory obligations that go along with it. Given the many interrelated obligations imposed by the *Act* and the *Regulation*, if an employment relationship is found, then the employer will automatically be subject to multiple penalties to the extent that the contract fails to meet the minimum statutory requirements. In my view, however, that result flows from the language chosen by the legislature in creating the mandatory penalty scheme, and the legislature's intent appears to have been that although parties may legitimately seek to avoid the *Act* and the *Regulation* by creating a contractual relationship that is not an employment relationship, they do so at their peril, given the potential for multiple penalties if an employment relationship is found. Similarly, people who pay others to perform work, and do not devote any thought or effort to determining whether they thereby assume statutory obligations as employers, risk significant liability if the Employment Standards Branch subsequently determines that an employment relationship existed and the employer failed to comply with the statutory requirements. That result is consistent with the general policy aim, articulated by the Supreme Court of Canada, that employment standards legislation be interpreted as extending its protections to as many people as possible.

However, there is no doubt that the language used by the legislature in creating the present administrative penalty scheme creates the potential for disproportionate and unfair results. If the Director's interpretation of the *Act* is correct, he may impose a single penalty on an employer for concurrent violations of the *Act* affecting multiple employees (for example, in *Northern Hotel, supra*), but multiple penalties in situations such as in this case, or in *Virtu@lly Canadian, supra,* affecting only a single employee. Further, as the Tribunal noted in *Brother's Restaurant, supra*,

under the present penalty scheme penalties bear no relation to the amount actually owing to an employee as a result of the employer's contraventions, and may be far in excess of that amount. Such results, which the legislature may not have had in mind when it enacted the present penalty scheme to require penalties to be imposed for contraventions, could be avoided by expressly permitting the Director not to impose administrative penalties where to do so would be unduly harsh. As the *Act* and *Regulation* stand, however, it seems to me that the Director can only avoid unduly harsh results by the rather fictitious expedient of finding fewer contraventions even where more contraventions are indicated on the facts.

Nevertheless, both the Tribunal and the Employment Standards Branch must do their best with the *Act* and *Regulation* as they have been enacted. The fact remains that the Director does have considerable latitude in how the *Act* and *Regulation* are enforced, and with that latitude, there is the potential that these statutory requirements may be applied and enforced in a matter that is overly harsh in particular cases, or that treats similar cases inconsistently. The Director has assured the Tribunal in this case that he recognizes the potential for unfairness to employers resulting from a blind or mechanical application of the penalty scheme, and is striving to avoid such a result. I do not doubt that ensuring a consistent approach by the Employment Standards Branch in applying and enforcing the statutory requirements in countless different cases across the province is a difficult task for the Director. However, given the great power of the Director and his delegates to affect the interests of employers and employees in British Columbia, it is to be hoped that the Director is making ongoing efforts to create policies and procedures to help ensure as much as possible that the statutory requirements will be applied and enforced consistently between different offices of the Employment Standards Branch, and among different delegates within the same office.

ORDER

I order, pursuant to s. 115(1)(b) of the *Act*, that the Determination be confirmed.

Matthew Westphal
Member
Employment Standards Tribunal