IN THE MATTER OF A HEARING PURSUANT TO SS. 62.1 AND 66.2 OF *THE LABOUR STANDARDS ACT*, R.S.S. 1978, c. L-1 (AS AMENDED)

BETWEEN:

ACANAC INC., MELVIN COHEN, DON CAVANAGH and LES LORINCZ,

APPELLANTS,

- and -

TOMAS SABAU,

RESPONDENT (COMPLAINANT)

ADJUDICATOR'S PRELIMINARY RULING - May 23, 2012

T. F. (TED) KOSKIE, B.Sc., J.D.

Date of Argument: May 17, 2012

Place of Hearing: Telephone Conference

Representatives: Gerald Matlofsky, for the Appellants, Acanac Inc., Melvin Cohen, Don Cavanagh and Les Lorincz

Shelley Stretch, Labour Standards Officer, for the Respondent (Complainant), Tomas Sabau

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I. INTRODUCTION

[1] Wage Assessment No. 4900 (the "Assessment")–issued pursuant to section 60 of *The Labour Standards Act*, R.S.S. 1978, c. L-1 (as amended) (the "*Act*") by the Director of Labour Standards (the "Director") on April 16, 2012–directed the Appellants to pay $6,625.13 to the Respondent.

[2] The Appellants appealed the Assessment.

II. PRELIMINARY MATTERS

[3] At the request of the Appellants, I convened a preliminary hearing by telephone conference at 9:00 a.m., Saskatchewan time, on May 17, 2012. Gerald Matlofsky was in attendance and advised he represented the Appellants. Shelley Stretch, Labour Standards Officer, was also present and advised she represented the Respondent. Neither the Appellants, nor the Respondent, were present.

A. THE APPLICATION

[4] The Appellants made application to participate in the hearing of their appeal by way of video conference. They proposed that not only would they and their legal counsel appear by video conference, but they would also tender their witnesses in that manner.

[5] The Respondent opposed the application.

B. SUBMISSIONS

[6] The Appellant, Acanac Inc. ("Acanac"), is a small corporation, with three (3)

shareholders, based in Mississauga, Ontario. The Appellants, Melvin Cohen, Don Cavanagh and Les Lorincz, all reside in Mississauga, Ontario. Mr. Matlofsky resides in Mississauga, Ontario.

[7] The Appellants advised that the principle issue at hand in this appeal is whether the Respondent is an employee within the meaning of the *Act*. They intend to argue that the "old" manner of interpreting the *Act* must give way to "new tests" for a business that, *inter alia*, engages services at "long distance" and primarily uses the internet for contact, such as that conducted by Acanac. As an evidentiary underpinning, the Appellants intend to call three (3) witnesses–an officer of Acanac, an employee of Acanac and an expert on the "characteristics of new industries selling expertise." They advise all witnesses reside in the area of Toronto, Ontario.

[8] The Appellants propose that the cost of their attendance and procuring the attendance of their counsel and witnesses would be excessive, particularly given the amount of the Assessment. They also say a hearing by video conference will make it easier for not only their scheduling and attendance, but that of their witnesses.

[9] The Respondent countered by arguing the potential of difficulty in showing documents or exhibits to witnesses during cross-examination. The Respondent further argued that video conferences tend to be "choppy" and make it difficult to focus on and observe the demeanor of witnesses.

C. ANALYSIS

[10] Neither party argued that I did not have jurisdiction to allow the hearing to proceed by video conference. The issue is whether this is an appropriate case to do so.

[11] The relevant provisions of the *Act* are as follows:

> 62.1(1) An adjudicator who is selected pursuant to subsection 62(5) shall conduct a hearing of the appeal.
>
> (2) Subject to any regulations made pursuant to section 84, the adjudicator may determine the procedures by which the hearing is to be conducted.
>
> (3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.
>
> (4) An adjudicator may adjourn the hearing of an appeal from time to time and for any period that the adjudicator considers necessary.

Nothing within the *Regulations* provides guidance with respect to the application at hand.

[12] It is normative in appeals under the *Act* to have evidence presented in open hearing in the personal presence of the parties and the adjudicator. The reasons for this are that a party adverse in interest and the adjudicator will then have the best opportunity during the examination in chief and any cross-examination to assess the testimony, and that oral communication is best assessed where one can both hear and see the person giving the testimony.

[13] However, I interpret my authority under the *Act* such that I may, where it appears necessary for the purposes of justice, allow a hearing to proceed by video conference on such terms, if any, as I may direct.

[14] The parties have advised that they do not believe this hearing will be "document driven." They say they expect there is nothing complicated with the facts of this matter. They further say they expect the matter to rise and fall largely on legal argument.

[15] In today's technological time, I believe there is merit in interpreting our rules such that we modernize and effect economy in appeal proceedings. The particular facts of each case can

dictate what is necessary for the purposes of justice. The rules should not be emasculated by an unduly restrictive interpretation, but should not be given such a liberal construction as would open the flood gates for video conferencing. There should be a balancing of interests.

[16] I believe we need to embrace modern technology, particularly where it will serve to simplify procedures, reduce costs, prevent unnecessary delay or give access where access might otherwise be denied. Video conferencing should not replace live hearings. However, it does allow a party to overcome obstacles such as those presented in this case, and allow a party to fully and completely present an appeal.

[17] In this instance, the reasons offered in support of the Appellants' application are cost, efficiency and expediency. At this time, the Appellants are not saying that they or their counsel and witnesses are unable or unwilling to travel to Saskatoon, Saskatchewan.

[18] Where expense is a prime consideration, it is also appropriate to consider the quantum of the Assessment claim in relation to the expenses to be incurred. Here, it appears that the latter would exceed the former.

[19] While it is preferable that evidence at appeal is presented in person, when all of the factors present in this case are taken into account, the alternative option of having the Appellants and witnesses attend the hearing trial by video conference is a reasonable and appropriate alternative. Interaction by video conferencing is an increasingly accepted method of bringing together people from different parts of the globe. We ought to embrace appropriate modern technology where it is suitable, as I find that it is in the present case.

[20] The Respondent's objections have merit. However, I do not think they are sufficient for refusing the Appellants' application. I have considered not only what is expedient, but what is necessary for the purposes of justice. I am of the view that the parties can carry out an effective

examination, cross-examination and argument. I realize the importance of having all evidence and argument taken in the personal presence of all parties and the adjudicator and that this practice should not be lightly departed from. However, occasions will arise when we must, for the purposes of justice, depart from this well-established practice, however reluctantly we may do so.

[21] Under the circumstances, I am of the opinion that a refusal of the application would deprive the Appellants of not only reasonable facilities for making out their appeal, but perhaps the only substantial means they have of doing so and thereby doing them a positive injustice.

III. DECISION

[22] The hearing of this Appeal will proceed by way of video conference on July 10, 2012, commencing at 10:00 a.m., Saskatchewan time.

[23] The Appellants will be responsible for and bear the cost of their connection–for both audio and video–to the video conferencing facilities available to the Respondent.

[24] The Appellants and Respondent will each tab and bind a book of documents they intend to rely upon at the hearing. Each will provide the other with two (2) copies of that book on or before July 3, 2012. Each will provide the adjudicator with one (1) copy of that book within the same time constraint.

Dated at Saskatoon, Saskatchewan, on May 23, 2012.

T. F. (TED) KOSKIE, B.Sc., J.D.,
ADJUDICATOR