EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Southgate Inn Inc ("Southgate")
And Carmela Roper ("Roper")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 97/911, 98/029

DATE OF HEARING: February 20, 1998

DATE OF DECISION: April 2, 1998

DECISION

APPEARANCES

Carmela Roper	on her own behalf
Jonathon Lampman	for Southgate Inn Inc.
Janine Ritchie	
Roxanne Gain	
Sandra Collins	
Frank Robinson	
Susan Dendy	
Ian McNeill	for the Director of Employment Standards

OVERVIEW

This is an appeal by Carmela Roper and the Southgate Inn Inc ("Southgate") from a Determination of the Director dated December 4, 1998. The Determination held Ms. Roper and the Southgate Inn Inc. were associated employers and jointly and severally liable for wages payable to Roxanne Gain, Sandra Collins, Frank Robinson, Susan Dendy, Janine Ritchie and Adrien Gauthier (the "employees"). At the hearing Ms. Roper argued that she was a manager and not an employer, and Southgate argued that there was no requisite measure of control for Southgate to be found an employer in relation to Ms. Roper's employees. At the hearing each party was given the opportunity to make an opening statement, call evidence, question witnesses of other parties and give submissions. Ms. Roper, Southgate and the Director's delegate provided written submissions.

ISSUE TO BE DECIDED

Is Carmela Roper an employer of the employees?

Is Southgate an associated employer?

FACTS

On or about October 8, 1996 Carmella Roper, and Carole Savage entered into an oral agreement with Sam Lo to operate and purchase a restaurant, in premises that were owned by the Bakerview Motor Inn doing business as Harbourview Days Inn Ltd. ("Bakerview").

Prior to a taking of possession by Ms. Roper and Ms. Savage, the terms of sale of the restaurant were agreed on as follows: the price was $100,000, interest on that amount was at 8.5 %, Mr. Lo was to carry the mortgage, with no interest for 3 months, a $500 per month lease payment was to be made after that time, and the restaurant would be responsible for 25 % of the utilities and taxes.

Ms. Roper commenced her business one day after the previous operator learned that Mr. Lo was planning to "shut the restaurant" down and put in a new operator. The previous operator terminated all its employees, took the inventory, and left in the middle of the night.

After an inspection, Ms. Roper determined that the previous owner removed the food, liquor, cash register and much of the inventory. Ms. Savage decided that she was not prepared to commence the business with Ms. Roper. Ms. Roper renegotiated the terms of sale with Mr. Lo and entered into the business as a sole proprietor. The new purchase price was to be $82,000 with a $5,000 line of credit, which would be included in the principal amount of the mortgage. While there is no written agreement, the terms of the oral lease and restaurant purchase agreement are not in dispute between Mr. Lo and Ms. Roper in the hearing of this matter.

Sam Lo arranged for a $5,000 line of credit, in the name of Bakerview Motor Inn Ltd. with the Hong Kong Bank, over which he and his wife retained signing authority. The account was drawn on from time to time by Ms. Roper, by presenting cheques to Mr. Lo for signature. Mr. Lo would sign the cheques after being assured by Ms. Roper that there were sufficient funds in the account. Mr. Lo did not refuse to sign any cheques, which were presented to him by Ms. Roper or her employees. All the bank statements were forwarded unopened, by the motel to Carmela Roper.

Ms. Roper neglected to inform me, until it was elicited in cross-examination, that in addition to the line of credit supplied by Mr. Lo, she had a separate bank account at a different bank. She paid some of the restaurant expenses from this account.

Ms. Roper operated a restaurant, which she called "Mississippi Mama's" from the restaurant premises located within the motel. The restaurant received most of its customers from the motel. The motel handled the Visa receipts and room charges from the restaurant using a Visa account operated under the name of the Harbour View Restaurant.

Ms. Roper was solely responsible for hiring, supervising, scheduling and terminating the restaurant employees. She hired new employees to assist her in the restaurant, none of which were working in the restaurant prior to her agreement with Mr. Lo. She purchased the inventory or food for the restaurant. She planned the menu. The gas and utility bills came to the restaurant, and were in the name of the restaurant. Ms. Savage was the bookkeeper for the restaurant. The restaurant maintained its own accounting records. Ms. Savage or other restaurant employees made bank deposits, at the direction of Ms. Roper.

Bakerview assisted in the renovations to the restaurant, particularly to the floor in the restaurant during the early days of the operation.

The restaurant failed because Ms. Roper had insufficient working capital to carry on the business, and because there were not sufficient customers. Ms. Savage, a witness called by Ms. Roper, testified that the business required a cash intake of $700 per day, and it was only taking in $150 to 250 per day.

In July of 1997, Ms. Roper advised her employees that she was ceasing business and she moved out her assets during the middle of the night, after the "gas" had been cut off by Centra Gas. She did not consult Mr. Lo before closing down the restaurant. She admitted at the hearing, on questioning from an employee that she would be attending to the preparation of T4 slips.

Southgate owned the restaurant assets. The director of that company is Shirley Lo, Sam Lo's daughter. Southgate and particularly Shirley Lo and Kwan Lo were the operators of the restaurant at an earlier time. Sam Lo and his wife Kwan Lo are officers and directors of the Bakerview , and are involved in the day to day operation of the hotel. Sam Lo and Kwan Lo were not involved in the day to day operation of the restaurant. I note that there were a number of operators of the restaurant between the date of operation by Southgate, and the date of operation by Ms. Roper.

None of the parties to these proceedings challenge the findings of fact made by the Director's delegate that the sum of $3,800.06 in wages, annual vacation pay and compensation for length of service is due and owing to the employees. Ms. Roper advised in her evidence that she was not insolvent, and she was holding on to Visa vouchers from the restaurant business, which could be used to pay the employees, in part. She was holding on to these vouchers at the suggestion of the Director's delegate pending the outcome of this hearing.

ANALYSIS

In coming to my decision I have considered the documents filed, the oral testimony presented at the hearing by the parties and the written submissions provided by Ms. Roper, Southgate and the Director's delegate. I have carefully "sifted" the closing submissions presented in particular by Ms. Roper. Her submissions attempted to provide rebuttal evidence in addition to submissions. I do not take into account the rebuttal evidence as this should have been given at the hearing, where it would have been tested by cross-examination.

For the purposes of this analysis I have considered Southgate, Bakerview, and Harbourview Days Motor Inn as the motel, and the restaurant operated by Ms. Roper using the name of Mississippi Mama's or Harbourview as the restaurant.

Issue # 1: Is Carmela Roper an employer?

In my view the Director was correct in determining that Ms. Roper was an employer. I do not accept her evidence or her argument that she was a manager. She started off purchasing this business. There was no change in that business relationship. The only change was that the business failed. There is no evidence to support her assertion at this hearing that she was a manager. She is liable for the payment of wages to which the employees are entitled. In written submissions made prior to the hearing, the Director's delegate indicated that he was surprised at the position that Ms. Roper was talking on this appeal in that she was clearly an owner and not just a manager as she alleged. I do not accept her view, and I place little weight on much of the evidence advanced by her at the hearing, in light of her clear bias.

Even if she were a manager, as she alleges, it is clear that on the authority of *Kaiser v. British Columbia (Director of Employment Standards*), BC EST#D299/97, that she would be liable for the amounts owing to these employees as she terminated them, thus evidencing her control or direction over the employees.

Issue # 2: Is Southgate Inn Inc an employer?

In this appeal, the burden of proving an error in the Determination on this issue rests with Southgate. In the Determination the salient reasoning for finding that Southgate was an associated employer is set out as follows:

> The employees have presented information that Mr. and Mrs. Lo acted as their employers. It is clear that they paid the wages and had the only signing authority over the bank account that issued those cheques. It is also clear that they loaned funds to Mrs. Roper to start the restaurant, effectively making them a partner in the venture. They also made specific arrangements to have funds withheld from the restaurant revenue to repay this loan. Further the restaurant equipment was owned by the Southgate Inn Inc.. A party that controls finances to the extent that Southgate Inn has in this situation can be considered a common employer for the purposes of this Act. Carmela Roper is also the employer. She acknowledged hiring the employees, terminating them and acting as their employer in the day to day operation of the Restaurant. Further she has confirmed that the amounts claimed by the employees are accurate.

In my view there are four clear errors in the Determination. Firstly, the finding by the Director that there was information presented by the employees that the Southgate was their employer, is not supported by the evidence before me at the hearing. The evidence of the employees was quite clear that Mr. and Mrs. Lo were not involved in the day to day operation of the motel.

Secondly, in my view the Director relied too heavily on the evidence of Carmela Roper in coming to his conclusion that Southgate was an associated employer. Ms. Roper clearly had an interest in characterizing or attempting to characterize Southgate as an employer, in that she would evade liability for payment of wages to the employees. I consider that her

evidence before me was largely unhelpful because of her very clear bias. I considered her submission that she was a manager and not the owner, lacking in any factual foundation. As a result of the position she advanced at the hearing, I am skeptical of much of the information that she advanced during the course of the hearing.

Thirdly, the Director also found that the Southgate owned the assets of the restaurant and found that the Mr. Lo's wife was the owner of the company. The true facts are, however, as shown by company searches filed by Mr. Lo and his oral testimony, that Southgate was a company controlled by Mr. Lo's daughter, Shirley Lo. Southgate, is the owner of movable property within the restaurant. Shirley Lo lives in Richmond, and she had no involvement with either Ms. Roper or the day to day operations of the restaurant. Ms. Roper made payments to Mr. Lo, for transmission to his daughter's company. The Bakerview Motor Inn, a company controlled by Mr. Lo and his wife operated the motel, without any involvement of the Southgate Inn or Shirley Lo. The restaurant premises were situate on property owned by the Bakerview Motor Inn.

Fourthly, the Director's delegate characterized the relationship between the restaurant and the motel as one of partnership. I disagree with the characterization of the relationship between the restaurant and the motel as a partnership. Neither Ms. Roper, nor Mr. Lo characterized the relationship in that manner. There is no evidence that the relationship meets the classic test for partnership: two or more persons, embarking upon a commercial venture, with an intention to profit. Here there was no community of interest in the profits. Each party expected the restaurant to be profitable. Mr. Lo wished for the success of the restaurant and was expecting to be paid for his loan, and for use of the space, but otherwise he did not expect to share in the profits or losses of the venture. It was clear from the evidence advanced that Ms. Roper did not intend or expect the motel to share in the profits of the restaurant.

I have given fresh consideration to the evidence tendered at the hearing to determine whether the errors make a difference to the finding of the Southgate as an employer under the associated employer test.

I have considered the definition of employer set out in the Act:

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

I note that on a plain reading of the words of the Act, and applying this section to the facts I have found, the motel does not have control or direction over the restaurant employees, and was not responsible for the employment of any of the employees.

In certain circumstances the Director can treat two or more persons as one person or an an associated employer. These circumstances are set out in s. 95 of the Act as follows:

If the director considers that businesses, trades or undertakings are carried on or by or through one or more corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and

b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal and this Act applies to the recovery of that amount from any or all of them.

(my emphasis)

It is clear from a combination of the definition of employer and the associated employer sections of the Act, that an employee may have one or more employers. The fact that Ms. Roper is an employer of the employees does not exclude the possibility that Southgate may also be an employer.

The applicable test in determining whether Southgate is an employer is to consider:

1. Are there two or more entities?
2. Are these entities carrying on business?
3. Is there common control or direction over the entities?
4. Is there a statutory purpose for treating the entities as one employer?

Invicta Security Systems Corp v. British Columbia (Director of Employment Standards), (BCEST #D349/96.)

In this particular case it is self evident that there are two or more entities, carrying on business. A "statutory purpose" would be present in this case as there are unpaid employees. The real issue is whether there was common control or direction over the restaurant and the motel, by the motel.

As owner of the real property, the motel had control over the business premises of the restaurant under the terms of an oral lease. Presumably had there been a breach of the oral lease, Bakerview, as the landlord could have re-taken possession of the restaurant. As the owner of the motel, it was helpful to the business of the motel to have a viable restaurant in place that would accept room charges. The motel provided financial services to the restaurant which included a line of credit in the amount of $5,000, the clearing of Visa and other credit card receipts, as well as the crediting of room service charges to the account of the restaurant at the time of check out. Mr. Lo also signed cheques presented to him by Ms. Roper or her employees including pay cheques for the employees. These were the elements, which would support an argument of association.

The evidence at this hearing by the employees confirmed the evidence of Sam Lo that the motel had no day to day control over the manner in which the restaurant operated. He may

have from time to time offered business advice or passed on complaints to the restaurant. Examples of this included suggestions that the restaurant staff wear a "black and white" uniform similar to those worn when the restaurant was an "ABC" restaurant. There was some evidence that Mr. Lo pointed out that a washroom in the restaurant required cleaning. This appears to be the extent of his involvement.

There was evidence before me from Rhonda McNeill, the manager of the motel, that it is common for motels to deal with Visa and other credit card slips, and room service charges in the hospitality industry by crediting the funds received to an account for the restaurant. The was some financial data filed by the motel which indicated that the restaurant was credited with $7,745.66 of income from room charges over the period of October 1996 to June of 1997. The restaurant was paid for the charges by a cheque drawn by Mr. Lo or the motel and payable to Carmela Roper. Ms. McNeill confirmed Mr. Lo's evidence that there was no direction or control over the restaurant by the motel although the motel did provide some financial functions and passed on complaints from guests.

I note that at the hearing most of the employees gave their opinion that the Southgate Inn or Mr. Lo was their employer because he signed the pay cheques. Clearly it is in their interest to hold that view as Ms. Roper has not paid them for their services, she is no longer in business and the motel is still in business. I have considered the facts in this case in light of the Tribunal's decision in *Cunningham v. British Columbia (Director of Employment Standards)* (BCEST #D241/97). In that case a company providing day to day direction and issuing pay cheques to employees was found to be an associated employer. In this case under appeal, there was no day to day direction or control of the employees by Mr. Lo or the restaurant. The fact that Mr. Lo signed paycheques is not determinative of the issue. While Lo signed cheques on the line of credit, this was for the purpose of protecting his loan, as opposed to any attempt by him to control or regulate the restaurant or its employee's.

In this case there is a connection between the restaurant and the motel. The motel carried on the functions of landlord. It was important for the motel's business to have a viable restaurant. As a landlord the motel could have re-taken possession of the restaurant had the restaurant breached its payment obligations. This appears to be no different than the relationship between the owner of a shopping mall and a number of independent stores within the mall. The owner of the shopping mall would expect the independent businesses to be profitable, might offer business advice from time to time, as it would be important for a shopping mall to have viable stores within its premises. The mall owner also could re-take possession of a store if lease payments were not made. The right to retake possession by a landlord, for non-payment of lease payments, does not give the landlord control over the tenant's business.

There was, however, an "arm's length relationship" between the restaurant and the motel. The fact that the motel provided a line of credit and some financial services does not make an association. The motel had no control or direction over the restaurant employees on a daily basis. The loaning of money or the handling of clearing of credit card vouchers, do not amount to control or direction over the employees. By way of analogy, if a store owner

took its deposits to a bank within a shopping mall, and the bank incidentally was also the owner of the shopping mall, it could not be said that by virtue of providing financial services, or the bank's right as landlord to terminate a lease for non-payment, that the bank was associated with the store within the meaning of the Act. The bank would have an arms length relationship with its customer, and would have no day to day control of the customer's business.

I do not find, however, that there was any control exercised by the motel over the restaurant to such an extent that one could say that that there was any association other than a debtor/creditor, or landlord/tenant relationship between the motel and the restaurant. It is my view that if the legislature intended landlords or creditors of an employer to be "associated employers" this would have been set out in the definition section of the Act. The fact that a landlord can retake possession in the event of the breach of a lease does not mean that there is direction and control over the business of the tenant. Nor does the fact that a bank loans money to a business, making deductions from a current account for loan repayment make a bank an employer of its customer's employees. In order to find an association in the above two analogies, one would have to strain the intent and statutory language, beyond its plain meaning.

In my view it is not sufficient to find that the statutory purpose is satisfied by the fact that there are unpaid employees. The intent of this legislation surely must be to cure the mischief of an employer or persons closely connected with the employer using corporate or other form of business association to evade the liabilities to an employee. For example if Mr. Lo owns the motel and restaurant, and has control over all the employees but uses different corporate forms for example numbered companies in connection with the restaurant or motel, a finding of an associated corporation would be justified. The Director can look at the substance rather than the form of the business relationship to inquire whether the person or persons are employers of employees. A connection, without some degree of control beyond that of landlord/tenant or debtor/creditor, is not sufficient to warrant a finding of liability for the payment of wages to employees of the tenant/debtor's failed business venture.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated December 4, 1998 be cancelled in respect of Southgate Inn Inc. and confirmed in respect of Carmela Roper.

Paul Love
Adjudicator
Employment Standards Tribunal