EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, S.B.C. 1995, c.38

- by -

Can-Achieve Consultants Ltd.
("Can-Achieve")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/677

DATE OF HEARING: February 24th, 1997

DATE OF DECISION: March 10th, 1997

DECISION

APPEARANCES

Dean D. Pietrantonio	for Can-Achieve Consultants Ltd.
Qian Zhai	on her own behalf
Victor Lee and Adele J. Adamic	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Can-Achieve Consultants Ltd. ("Can-Achieve" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act")* from Determination No. CDET 004394 issued by the Director of Employment Standards (the "Director") on October 22nd, 1996. The Director determined that Can-Achieve owed its former employee, Qian Zhai ("'Zhai"), the sum of $8,017.81 on account of unpaid commission earnings, vacation pay and interest.

The appeal hearing in this matter was held in Vancouver at the Tribunal's offices on February 24th, 1997 at which time I heard evidence from Mr. Allen Lee and Alex Li on behalf of the employer (both Messrs. Lee and Li are officers and directors of Can-Achieve) and Ms. Zhai on her own behalf. The Director elected not to call any evidence but did make a final submission as did Ms. Zhai and Mr . Pietrantonio on behalf of Can-Achieve.

FACTS

Can-Achieve is in the business of recruiting and assisting would-be immigrants to Canada. To that end, it established an office in Beijing, China in April 1995 (the company now has three offices in China) and hired Ms. Zhai as a "consultant" for that office. Ms. Zhai is a Chinese national although at the time she was hired she held Canadian landed immigrant status (she has since become a Canadian citizen). Her function was to solicit potential immigrants and then assist them with the immigration process--the nature of the services provided to a Can-Achieve client include preparation of necessary immigration forms, arranging for interviews by Canadian immigration officials and generally preparing the client's immigration dossier.

There is a dispute as to the precise nature of Zhai's compensation entitlement although both parties agree that her compensation was based on a fixed monthly salary of $1,000 plus additional commission earnings which were calculated as a percentage of the fees paid by the Can-Achieve clients that she procured for the company.

While Zhai's employment contract was negotiated and entered into in the province of British Columbia, the services that she performed for the company were rendered entirely in China. Zhai was paid in cash, in China, by way of United States dollars or Chinese yuan. The employer did not make any withholdings on account of Canadian income tax or any other statutory deductions required under Canadian law. The employer did not issue Zhai a statement of earnings for purposes of filing a Canadian tax return although Zhai did, in fact, file a Canadian income tax return, reporting her earnings from China while working for Can-Achieve. So far as I can gather from the evidence before me, China does have some form of income taxation system. Can-Achieve did not report the earnings of its employees in China to the Chinese taxation authorities.

Can-Achieve is a company incorporated pursuant to the laws of British Columbia where it carries on business. The evidence before me is that the funds generated by the Beijing office were, at least in part, patriated back to British Columbia. The affairs of the Beijing office were directed and otherwise supervised by Can- Achieve's head office in Vancouver. Responsibility for the clients procured by the Beijing office was, in due course, turned over to employees working out of the Vancouver head office.

According to the evidence of both Ms. Zhai and the employer, Can-Achieve clients paid fees based on certain performance benchmarks; in particular, Mr . Allen Lee testified that a client would typically pay about 20% of the total contract price upon initially retaining Can-Achieve, a further 40% at the immigration application interview stage, and the final 40% upon the issuance of a Canadian entry visa. This entire process could take anywhere from several months to two years. All of the processing of documents at any stage of the client relationship was undertaken in Vancouver by head office staff. The Vancouver office solely dealt with Canadian immigration officials on behalf of Can-Achieve clients. According to Mr. Lee (and this is not challenged by Ms. Zhai), Can- Achieve consultants were to be paid their commissions (based on the fees paid by the client) as and when the clients actually paid Can-Achieve for the latter's services rendered.

The employer asserts, by way of a preliminary objection, that neither I nor the Director have jurisdiction over this particular employment relationship. I advised the parties that I would first hear all of the evidence, particularly in light of the fact that the jurisdiction question can only be determined after certain findings of fact have been made, and then rule on the jurisdictional issue. Accordingly, I will now turn to that matter .

THE JURISDICTIONAL ISSUE

Can-Achieve asserts that neither the Director nor the jurisdiction over Zhai's employment contract because:

i) British Columbia laws cannot have extra-territorial application over activities that take place in a foreign country, in this case, China; and

ii) In any event, even if the employment relationship could be said to fall under Canadian law, the employment contract falls under federal law ,rather than provincial law , by reason of the federal government's exclusive constitutional jurisdiction over "naturalization and aliens" [see Constitution Act, 1867, section 91(25)].

The Conflict of Laws Issue

Zhai and Can-Achieve entered into a written employment contract in British Columbia on or about April 26th, 1995. However, after a few days of training that was conducted in Vancouver, Ms. Zhai travelled to China where she worked as an immigration consultant in Can-Achieve's Beijing office. Thus, although the contract was executed in B.C., it was substantially performed (at least on Ms. Zhai's part) in China. In these circumstances does B.C. law, and in particular, the *Employment Standards Act,* apply?

The leading recent authorities regarding conflict of laws and *forum conveniens* issues are the Supreme Court of Canada decisions in *Amchem Products Incorporated* v. *B.C. Workers' Compensation Board* [1993] I S.C.R. 897 and *Tolofson* v. *Jensen* [1994] 3 S.C.R. 1022.

In the *Amchem* case, various defendant asbestos companies sought a declaration that British Columbia was the natural forum for the various plaintiffs' actions and, further, sought an injunction restraining the plaintiffs from continuing an action that they had commenced in the Texas courts against the defendants. In the course of rendering judgement for the court, Sopinka, J. stated that:

> The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others.

Sopinka, J. went on to identify the "natural forum" as that which has the "most real and substantial connection" to the dispute between the parties. **In** determining which forum is the "natural forum", the following factors are relevant: "...convenience or expense (such as availability of witnesses)...the law governing the relevant transaction, and the places where the parties respectively reside or carryon business."

In the *Tolofson* case, a British Columbia resident, a passenger in a car registered and insured in British Columbia and driven by a B.C. resident, brought an action in B.C. against a Saskatchewan licensed and insured driver as a result of a motor vehicle accident that occurred in Saskatchewan.

Although *Tolofson* is a case where the claim arose in tort, it is my view that the principles enunciated in that case are equally applicable to a claim in contract. According to principal judgement of La Forest, J. (writing for himself and four other justices), the overriding consideration in determining the appropriate forum is the concept of *lex loci delicti--that* is, the forum where the wrong arose. In the case of a claim arising in contract, the "wrong" is the breach.

In light of the governing principles set out in the *Amchem* and *Tolofson* cases, it is my view that the natural forum for the resolution of Zhai's claim for unpaid wages is British Columbia. British Columbia is, in my view, the jurisdiction that has the most "real and substantial connection" to the dispute between the parties.

Further, in order for B.C. to be *forum non conveniens,* it is the employer's burden to show that China is a more convenient and appropriate forum for the pursuit of Ms. Zhai's wage claim and for securing the ends of justice (see *Amchem).* In my opinion, the employer has not met its burden in this regard; indeed, I am of the view that China is a markedly *less* convenient forum. In reaching this conclusion I rely on the following factors:

- the employer was incorporated and carries on business in B.C
- the employer's head office is located in B.C. and the principals of the company reside in B.C.;
- the employment contract was entered into in B.C.
- Ms. Zhai now resides in B.C. and did so when the employment contract was negotiated;
- Ms. Zhai's initial training was conducted in B.C.
- clients who were procured by Ms. Zhai for Can-Achieve were serviced, in latter stages of their relationship with the company, out of the Vancouver head office. All processing of documents was undertaken by the staff at Can-Achieve's Vancouver office. Thus, at least some of the work that gave rise to Ms. Zhai's commission claims was undertaken in B.C.
- all of the relevant witness reside in B.C.;
- most, if not all, of the necessary documents are now located in B.C

- the alleged breach of contract *(i.e.,* the employer's failure to pay Zhai her full commission earnings) took place in B.C.;

- it is not at all clear that Zhai's claim would be recognized under Chinese law or that, if recognized, she could proceed with her claim in the Chinese courts or some other Chinese adjudicative forum;

- if the case was to be adjudicated in China, rather than in B.C., the parties would incur substantial additional expenses; and finally,

- on the assumption that Zhai could proceed with her claim in China, there is a strong likelihood that, if Can-Achieve failed to voluntarily pay any judgment against it, Zhai would not be able to secure payment of the judgment in China. There is no evidence before me that B.C. and China are reciprocating jurisdictions for the purposes of enforcing civil judgments.

In my view, British Columbia is a convenient forum; however, I would go further and also hold that this particular employment agreement ought to be interpreted in accordance with BoCo law. In essence, Zhai's claim is for breach of contract. The *Act* sets out minimum statutory terms and conditions of employment (which override any contractual terms and conditions that fall below these statutory minima--see So 4) and a dispute resolution procedure that may be utilized when an employee has not been paid the wages to which he or she is entitled under their employment agreement. Zhai has simply chosen to proceed with her claim for unpaid commission earnings, allegedly payable under her contract of employment, by way of a complaint under the *Act* rather than by way of a civil action in the Provincial Court of B.C. (N .8. that her option to sue is specifically preserved by s. 118 of the *Act).*

The threshold question is, therefore, which jurisdiction, B.C. or China, governs the employment agreement in question. As noted by J .-Q .Castel in *Canadian Conflict of Laws,* 3rd ed., at p. 547, the rules pertaining to this latter question are easy to state but not always easy to apply. However, the overriding consideration appears to be a determination as to the "proper law of the contract". In making this determination, the courts look to a number of criteria such as the *lex loci contractus,* that is, the jurisdiction where the contract was made; any express provision in the agreement regarding jurisdiction; or failing such a provision, the system of law that has the "closest and most real connection" to the contract *(cf.* Castel at p. 553).

In the present case, there is no express provision in the parties' employment agreement regarding jurisdiction. Thus, in order to determine which jurisdiction has the "closest and most real connection" to the agreement, the following factors are relevant: the "legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the use of a particular language, a connection with a preceding transaction, the nature and location of the subject matter of the contract, the residence (but rarely the nationality) of the parties, the head office of a corporation party to the contract, or the fact that one of the parties is a government." *(cf.* Castel at pp. 557-558). With respect to the

foregoing factors I would note the following: the subject employment agreement, dated April 26th, 1995, is drafted in english; payment is to be made in Canadian dollars; the employer is a Canadian corporation with its head office in B.C.; the agreement contains provisions and otherwise refers to legal and contractual concepts that may not be recognized under Chinese law such as probation, notice of termination, overtime, statutory holidays, and payment by way of a percentage commission. All of these factors lead to me to conclude that B.C., rather than China, is the "proper law of the contract".

Provincial or Federal Jurisdiction.

Even if B.C. is an appropriate forum, the employer asserts that Ms. Zhai's claim for unpaid wages must be resolved under federal rather than provincial law. In other words, given that the Director's (and my) authority is derived from the provincial *Employment Standards Act,* I am asked to cancel the Determination for want of jurisdiction.

The basis for the employer's assertion that Ms. Zhai's unpaid wage claim ought to be determined under federal, rather than provincial, legislation is found in section 91(25) of the *Constitution Act,* 1987 (Naturalization and Aliens). Counsel for the employer submits that the business of Can-Achieve, namely, assisting persons who wish to immigrate to Canada, falls exclusively under federal jurisdiction. I do not agree.

In my view, section 91(25) sets out exclusive federal constitutional authority regarding the admission of immigrants to Canada. In other words, control over immigration law, policy and procedure is a federal, not a provincial, matter . However, it does not follow, in my view, that any otherwise private business that, in some way, assists immigrants is, by that reason alone, subject to exclusive federal jurisdiction. If that argument was to hold then lawyers who practice in the area of immigration law (or for that matter, criminal law) would have to be federally licensed; real estate agents who exclusively offer their services to immigrants would have to be federally licensed; indeed *any private business* that limited its goods and services to immigrants (and there are, of course, a great many such businesses) would fall under federal jurisdiction.

In my view, the governing constitutional provisions in this case are sections 91(13) and (16) of the *Constitution Act,* 1867 (respectively, "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province").

In *Montcalm Construction Inc. v. Minimum Wage Commission* [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641, a Quebec company was awarded several federal government contracts to construct runways at the new Mirabel airport in Quebec. The Quebec Minimum Wage Commission sought to enforce various provisions of the Quebec *Minimum Wage Act* (and related enactments) against the company. The Supreme Court of Canada held that Quebec's employment and labour laws applied to the company. Of particular note are the following comments of Beetz, J. (writing for a seven-justice majority):

> The issue must be resolved in the light of established principles, the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider* (cite omitted). By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject...
>
> In the case at bar, the impugned legislation does not purport to regulate the structure of runways. The application of its provisions to Montcalm and its employees has no effect on the structural design of the runways; it does not prevent the runways from being properly constructed in accordance with federal specifications; nor has it even been shown, assuming it could be, that "the physical condition" of the runways, as opposed to their structure, is affected by the wages and conditions of employment of the workers who build them.

The principles expressed in *Montcalm* remain sound (see *e.g., Ontario Hydro* v. *O.L.R.B.* [1993] 3 S.C.R. 327). In the case at hand, I would note that the *Employment Standards Act* does not, in any way, purport to trample on the federal government's power respecting immigration. Nor is the business of the employer a federal work or a work declared to be for the general advantage of Canada [see s. 92(10) of the *Constitution Act,* 1867]. I fail to see how the application of the *Employment Standards Act* to the employer is this case will, in any way, affect the federal government's authority over immigration. In my view, the B.C. *Employment Standards Act* governs the employment contract between Zhai and Can-Achieve.

The Marchant Decision

My decision with respect to the ')urisdictional issue" is arguably inconsistent with the decision of another adjudicator in *Marchant* (B.C. EST #D233/96, August 30th, 1996) which also involved a situation where an employment contract was negotiated in British Columbia but where the employee's services were rendered wholly outside B.C. In *Marchant,* the adjudicator upheld the Director's Determination that the *Employment Standards Act* did not apply. Thus, the employee's unpaid wage complaint, which arose from certain construction labouring services undertaken by the employee entirely in Japan, was dismissed for want of jurisdiction.

In the course of his Reasons for Decision, the adjudicator referred, as has the employer in this case, to the following passage from *Driedger on the Construction of Statutes,* 3rd ed. (1994) at p. 343:

> (I) It is presumed that legislation is not intended to apply to persons, property or events outside the territory of the enacting jurisdiction. In the case of provinces, this presumption is reinforced by constitutional limitations on the territorial application of provincial law.

(2) *The presumption does not limit the application of legislation to trans-border or multi-national facts where, in the view of the court or under the testt applied by the court, the facts are adequately connected to the enacting jurisdiction.*

(3) The test used to determine the adequacy of connection between the enacting jurisdiction and the facts is an evolving one- *The current approach emphasi;:es three factors:* (*i) the enacting jurisdiction must have a legitimate interest in the facts or its connection to the facts must be substantial and significant; (ii) the application of the legislation should not interfere inappropriately with the interests of other jurisdictions,- and (iii) the application of the legislation should not be unfair to the parties.*

(emphasis added)

In *Marchatit,* the adjudicator did not expressly deal with the criteria that I have italicized above. Nevertheless, it is reasonable to infer that neither the Director , nor the adjudicator, were of the view that these criteria had been satisfied in that case.

Contrariwise, in the present case, the Director *does assert* a "substantial and significant" connection and, as I have already noted in some detail, I agree that the nexus between this employment contract and the province of British Columbia is sufficiently substantial so as to justify the application of the *Act* to the employment agreement in question. Further, I am not satisfied that the application of the *Act* to this employment contract will inappropriately interfere with China's legislative autonomy nor am I satisfied that application of the *Act* will be unfair to the parties.

THE UNPAID WAGES CLAIM

The Director applied the commission structure set out in the employment contract, namely, a 5% commission with respect to her first client referral and a 20% commission for every client thereafter. The employer now says that the actual bargain was that a 5% commission would be paid for the first client referred in any given month and that a 20% commission would only be paid for subsequent referrals *during the same month.* The contract itself states [in paragraph 3(e)]:

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e) The Employee is entitled to a 5% commission for the first client she refers to the company or whatever if the client(s) is refered (sic) by the company or company's agent(s). The Employee is entitled to a 20% commission for all other clients she refers to the company by the employee herself or the agent who is developed by the employee. The Employee's commission is paid upon receipt of payment from the clients. The employee is entitled to aquire (sic) the fully commission of the clients(s) regardless if the employee is still remain in the

company or not unless the employee is broken the serious company relus can be otherwise. (sic).

I accept Ms. Zhai's evidence that the 20% commIssIon was not limited to subsequent referrals in a given month. I further note that the employer's assertion is contrary to the clear wording of the employment contract that it presented to Ms. Zhai for signature. On the basis of the rule of contract interpretation known as *contra proferentum,* I find that the Director has not erred in calculating the first commission payable at a 5% rate and all subsequent commissions at a 20% rate.

As noted above, the contract specifically provides that the "commission is paid upon receipt of payment from the client". However, the employer says that the commission structure was subsequently amended to provide for only a 10% commission on subsequent client referrals. In my view, the employer's unilateral reduction in the commission payable from 20% to 10%, which apparently occurred sometime during June or July 1995, has no contractual force for want of consideration [see *Watson v. Moore Corp.* (1996) 134 D.L.R. (4th) 252 (B.C.C.A.)].

The employer also says that the Director's delegate based his calculations on incorrect client payment information. On this point, I must find in favour of the employer. The only evidence before me is that Zhai earned commissions with respect to five clients who, in turn, paid the following fees to Can-Achieve:

First client:	$ 10,000 U.S.
Second client:	$ 10,000 U.S.
Third client:	$ 6,000 U.S.
Fourth client:	$ 2,000 U.S.
Fifth client	$ 7,000 U.S.
Total	$ 35,000 U.S.

The evidence before me (and before the Director's delegate) was that Ms. Zhai agreed to accept a 5% commission with respect to the third client because this was a referral generated by Mr. Allen Lee.

Accordingly, I find Ms Zhai is entitled to the following [I should parenthetically note that, in light of paragraph 3(e) of the parties' employment agreement, Ms. Zhai may be entitled to additional compensation if and when these clients make further payments to Can-Achieve]:

Commissions payable:

First client:	5% of	$ 10,000 U.S. =	$ 500
Second client:	20% of	$ 10,000 U.S. =	$2,000
Third client:	5% of	$ 6,000 U.S. =	$ 300
Fourth client:	20% of	$ 2,000 U.S. =	$ 400
Fifth client	20% of	$ 7,000 U.S. =	$1,400
Total			$4,600 U.S.

Vacation Pay: 4% x 4,600 U.S. = $184 U.S.

Exchange Rate: 1.3 x 4,784 = $6,219.20 Cdn.

Vacation Pay on monthly salary paid: 4% x 3,000 $120

Total: $6,339.20

In addition, Ms. Zhai is entitled to inerest in accordance with section 88 of the Act.

ORDER

Pursuant to section 115 of the *Act,* I order that Determination No. CDET 004394 be varied and that a new Determination be issued as against Can-Achieve Consultants Ltd. in the amount of $6,339.20 together with interest to be calculated by the Director in accordance with section 88 of the Act.

Kenneth Wm. Thornicroft, Adjudicator
Employment Standards Tribunal