Employment Standards TRIBUNAL

An appeal

- by -

Selkirk Paving Ltd.
(the "Appellant")

- 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

ADJUDICATOR: W. Grant Sheard

FILE No.: 2001/732

DATE OF HEARING: March 21, 2002

DATE OF DECISION: April 4, 2002

DECISION

APPEARANCES:

Al Strachan	on behalf of the Appellant
Ed Wall	on behalf of the Director

No one appearing on behalf of the employee, James Nagy, but a written submission filed (the "Employee")

OVERVIEW

This is an appeal with an oral hearing by Selkirk Paving Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on September 21, 2001 (the "Determination") wherein he found that the Appellant had contravened Section 40 of the *Act* regarding overtime wages due and directing the Appellant to pay wages and interest totaling $5,359.28.

ISSUE

Does the *Act* apply (does this Tribunal have jurisdiction) over work performed outside of the Province of B.C.?

ARGUMENT

The Appellant's Position

In a written appeal form dated October 15, 2001 filed by Mr. Strachan on behalf of the Appellant on the same date, the Appellant says the Determination should be cancelled arguing that the delegate erred in the facts he found and interpreting the law. The Appellant says there is a different explanation of the facts. The Appellant says that the Employee did not work seven weeks in B.C. prior to working in Alberta, that he worked over 2/3 of the year in Alberta, and that he subsequently worked for a company which later purchased the Appellant's assets and operation in Alberta. The Appellant says that it has a permanent location in Alberta with assets owned, registered, and licensed there related to paving contracts there.

In oral submissions at the hearing Mr. Strachan repeated the written submissions and states that, based on the case of *Can-Achieve Consultants Ltd.* ("Can-Achieve"), BC EST # D463/97, the Appellant meets the criteria of an Alberta-based business such that the *Act* does not apply to this employee and the Determination should be cancelled.

The Employee's Position

In a written submission filed November 13, 2001 the Employee notes that he resides in Vernon, B.C. and has been resident in B.C. since 1973. During the 2000 paving season he was called to report to work in Crescent Valley, B.C. which he did and began work in Genelle, B.C. on March 21, 2000. He was not paid a Living Out Allowance ("LOA") there because, he was told, it was too close to the Employer's head office in Crescent Valley. He then worked in Nakusp, B.C. and on May 2, 2000 was sent to Alberta where he worked until about August 19, 2000. After that he worked in Chetwynd and McLeese Lake, B.C. until October 6, 2000. He then worked in Alberta once again until November 10, 2000 when he hauled one of the Appellant's asphalt plants back to Crescent Valley, B.C., where he was laid off from his seasonal work on November 27, 2002. The Employee says he was not paid overtime as required by the *Act*. He says he was never told he was being hired as an Alberta Employee and notes that he was hired in B.C., and that he was paid and received all his paperwork in B.C. from the Appellant's Crescent Valley, B.C. office. He also notes that he picked up and returned the truck he drove for the Appellant at the beginning and end of the season at the Appellant's Crescent Valley, B.C. office. In view of all this the Employee maintains he was a B.C. employee and, inferentially that the *Act* does apply to him and the Determination should be upheld.

The Director's Position

In a written submission prepared by a delegate of the Director, filed November 14, 2001, the Director says that the Appellant has not met the onus upon it to demonstrate, on a balance of probability, an error in fact or law. The Director refers to several cases decided by this Tribunal on the issue of jurisdiction and says that, applying the principles and factors set out in those cases to facts found in the Determination (which are not disputed by the Appellant), the Determination should be upheld.

At the oral hearing, Ed Wall, the delegate of the Director who wrote the Determination appeared and echoed the submission of Graeme Moore. He also noted that he contacted Alberta's Employment Standards Branch and they declined jurisdiction. He says that if this Tribunal declines jurisdiction the Employee will be out of time in Alberta and without recourse.

THE FACTS

At the outset of the hearing the parties agreed that an issue of confidentiality with respect to certain documents the Appellant wished to produce did not arise afterall as the parties agreed that the Appellant remitted income tax in Alberta for its income earned on jobs performed in Alberta, the Appellant remitted Alberta WCB Benefits based on its entire payroll paid in respect of work performed by all employees in Alberta, and that the Appellant paid medical benefits in Alberta for its Alberta employees (not this Employee). The parties agreed that the only issue for this appeal was the question of jurisdiction. That is, whether the *Act* applies to work performed by

this Employee in Alberta. There is no dispute with respect to the determination in terms of the amount of the award if the *Act* applies.

In addition to the written submissions filed the Appellant called two witnesses at the oral hearing - Mr. Dennis Hall, the President of the Appellant, and Jim Halpin, the Appellant's Manager of Paving Operations. All of the witnesses were forthright and credible.

The Employer operates a paving company. The Employee was employed as a truck driver at a rate of $19.00 per hour in seasonal employment with the Appellant for the years 1999 and 2000. In the year which is the subject of this appeal, 2000, the Employee worked from March 21, 2000 to November 27, 2000. The Employee resides in Vernon, B.C. and has been resident in B.C. since 1973. During the 2000 paving season he was called to report to work at the Appellant's office at Crescent Valley, B.C. He did so and began working in Genelle, B.C. on March 21, 2000. He was not paid a Living Out Allowance ("LOA") there because, he was told it was too close to the Employer's head office in Crescent Valley. He then worked in Nakusp, B.C. and on May 2, 2000 was sent to Alberta where he worked until about August 19, 2000. After that he worked in Chetwynd and McLeese Lake, B.C. until October 6, 2000. He then worked in Alberta once again until November 10, 2000 when he hauled one of the Appellant's asphalt plants back to Crescent Valley, B.C., being laid off from his seasonal work there on November 27, 2000.

The President of the Appellant originally began working in the field of highway maintenance in the West Kootenays and Okanagan in about 1987. In about 1991 the Appellant company was incorporated for the purposes of moving into the highway paving industry. In 1996 the maintenance contracts were lost and the Appellant expanded its paving work. By 1998 the asphalt industry in B.C. had greatly diminished and the Appellant got its first job working in Alberta. The Appellant was registered extra-provincially in Alberta on June 14, 1999. By 2000, the Appellant had two asphalt plants in Alberta an 90% of their work there. In 2000 the Appellant picked up a few "filler jobs" in British Columbia as well, one being in Chetwynd and the other in McLeese Lake. The Employee worked at all of these locations.

In the fall of 2000 after the end of the paving season the Appellant sold virtually all of its asphalt equipment and operations in Alberta to another company and ceased operations in Alberta entirely. The Appellant only retained six trucks from the sale of the asphalt operation in Alberta.

While the Appellant was operating in Alberta it purchased a shop and yard to store and repair equipment. The Appellant still owns that property. Most of the "lay down" equipment was registered in Alberta and kept there. The Appellant had two asphalt plants in Alberta. One of them was used exclusively in Alberta, the other was used both in Alberta and B.C. The Employee worked on both plants.

Major repairs and rebuilds on equipment were done at the Appellant's head office at Crescent Valley, B.C. Other repairs were done in the field. Both of the principals of the Appellant reside in British Columbia. The administration of the Appellant's operations took place in British Columbia with the payroll being generated from their office at Crescent Valley, British

Columbia. The Appellant maintained the Employee on the Medical Services Plan benefits in B.C. but paid WCB remittances in Alberta based on its entire payroll for its contracts or operations in Alberta. The Appellant paid income taxes for its revenue from Alberta in that Province while the Employee paid income tax on the wages he earned from the Appellant's operations in Alberta in British Columbia.

The Employee's contract of employment with the Appellant was entered into in British Columbia. When the Employee began his seasonal employment in 2000 in the area of the Appellant's head office in Crescent Valley, B.C. he was not paid a living out allowance, though his personal residence was elsewhere in British Columbia. Notwithstanding the fact that the Employee began and ended his work with the Appellant in the 2000 season in British Columbia, between 67 to 71% of his days and 80% of his hours worked were in Alberta. Cumulatively, however, less than 6 months total was spent working in Alberta.

The Appellant made a distinction between some classes of its employees (eg. Labourers and Operators) in the wage rates paid for employees hired and resident in B.C. versus employees hired and resident in Alberta, though not with respect to this Employee and other truck drivers. The Employee was not told that he would be working for a different corporate entity than the Appellant B.C. company or that he would not be a "B.C. employee". This Employee was not subject to any exclusions under the *Act.*

The Appellant and its employees in British Columbia had, in about 1998 (the year before this Employee began working for the Appellant), entered into an agreement whereby, in lieu of overtime over 8 hours to 10 hours, employees were paid $2.00 for each hour into an RRSP fund and medical benefits were paid through the winter when they were not working. The Employee never complained of overtime not being paid for hours worked in Alberta in the previous season. The Appellant acknowledges that this agreement is not enforceable in view of Section 4 of the *Act*, but notes the absence of a complaint in previous years and that, as there were provisions in the agreement more favourable to employees than the requirements of the *Act,* this is evidence of a positive employment relationship.

ANALYSIS

The issue of the extra-territorial application of the *Act* for work performed outside of B.C. has been considered in many cases previously decided by this Tribunal including *Re: G.A. Borstad Associates Ltd.* BCEST #D339/96, ("*Borstad*"), *Re: Finnie* B.C. EST #363/96 ("*Finnie*"), *Can-Achieve Consultants Ltd.* B.C. EST #D463/97, ("*Can-Achieve*"), *Re: Xinex Networks Inc.* B.C. EST #D575/98, ("*Xinex*") and Randy and Laura Saueracker op. as RALA Associates B.C. EST #D399/01, ("RALA").

A useful discussion on the jurisdiction of this Tribunal and the application of the *Act* was set out in *Can-Achieve* at pages 6 - 8 as follows:

> Unlike statues such as Ontario's *Employment Standards Act* or British Columbia's *Workers Compensation Act*, there is no provision in this province's *Employment Standards Act* specifically addressing the Legislature's intention regarding the territorial scope of the *Act*.
>
> Section 2 of the *Act* sets out its purposes as follows:
>
> *(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment.*
> *(b) To promote the fair treatment of employees and employers.*
> *(c) To encourage open communication between employers and employees.*
> *(d) To foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia.*
> *(e) To contribute to assisting employees to meet work and family responsibilities.*
>
> Section 2(a) clearly suggests that the *Act* was intended to protect "employees **in** British Columbia". For two reasons, however, we do not see this subsection as conclusive. First, the fact that the *Act* applies to employees "in British Columbia" does not necessarily mean it was intended to exclude any employee for any work done outside the province. Second, whether the status as an "employee" derives solely from the place where the work is performed or the place where the contract is made. On one reading of s. 2(a), it could be argued that the Legislature intended the employee to be **physically** performing work in British Columbia for the "standards" governing the employee to apply. However, s. 2(a) could be read with s. 2(d) to argue the opposite - namely, that Ms. Zhai contributed directly to the prosperity of the employer and province and is therefore an "employee in British Columbia" who should enjoy the Act's protections.
>
> Section 119 of the *Act*, which deals with extraprovincial certificates, does not provide a conclusive answer to the scope of the *Act*. That section is directed to allowing orders obtained by "foreign" designated statutory authorities to be enforced by the Director in British Columbia. The existence of that power does not answer the question as to who has jurisdiction in the first place over a particular employee who performs work outside the place of contracting.
>
> "Employer" is defined in section 1 of the *Act* as follows:
>
> "*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. (emphasis added)***

"Employee" is also defined in section 1 and includes:

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

Section 1 also defines "work" as meaning "the labour or services an employee performs for an employer whether in the employee's residence ***or elsewhere***".

It was further stated at page 8 - 9 of *Can-Achieve* as follows:

> There is a presumption that the Legislature intends its enactments to respect its constitutional limitations, including the constitutional limitation prohibiting extra-territorial legislation. As noted by Sullivan in *Driedger on the Construction of Statutes* (1994) at p. 335:
>
> > At the provincial level, the presumption against the extra-territorial application of legislation is reinforced by constitutional limits on the permissible scope of provincial law. Since the provinces do not possess external sovereignty, under Canadian Constitutional law they lack the capacity to exercise limited extra-territorial jurisdiction that is conferred on Canada by international law. Moreover, under s. 92 of the *Constitution Act, 1867* a province may legislate only in respect of matters that are "in the Province". Under the presumption of compliance with constitutional norms, it is presumed that provincial legislatures intend to observe these limitations on the territorial reach of their law.

It was further observed at p. 10 of *Can-Achieve* as follows:

> The relevant caselaw make clear that merely because a company is resident in British Columbia does not entitle all its employees, wherever situated, to the protection of provincial labour legislation. For example, in *New Brunswick (Labour Relations Board) v. Eastern Bakeries*, [1961] S.C.R. 72, the Supreme Court of Canada held that a labour board could not constitutionally create a bargaining unit that included a company's employees residing and working at its operations outside the province.
>
> In Can-Achieve this Tribunal then quoted from the case of British Columbia (British Airways Board) v. British Columbia (Workers' Compensation Board) (1985), 17 D.L.R. (4th) 36 (B.C.C.A.) ("British Airways") at p. 10 - 11 saying:

> "In order to give the province jurisdiction to secure the civil rights of a person related to his employment there must be sufficient connection between that person's employment and the province".

At p. 11 of *Can-Achieve*, this Tribunal then elaborated on this "sufficient connection" test from *British Airways* saying as follows:

> In our view, for a "sufficient connection" to exist so as to permit a province to confer statutory civil employment rights upon a person, a real presence performing work within the province must be established. It is clear from *British Airways* that a person need not be present a majority of the time, but there must be a real presence performing employment obligations within the province: *Eastern Bakeries*, supra.
>
> It is significant that the Court of Appeal in *British Airways*, following the judgement in *C.P. Rail v. W.C.B.*, specifically pointed to s. 8 of the *Workers' Compensation Act* as illustrating "the limits" of the extra-territorial jurisdiction of the province and the types of factors that lie at the basis of the inquiry. That section, which has not changed in substance since it was considered by the Privy Council in 1919, requires that all of the following factors must be present before a person is entitled to statutory rights under the *Workers' Compensation Act*:
>
> (a) a place of business of the employer is situate in the Province;
> (b) the residence and usual place of employment of the worker are in the Province;
> (c) the employment is such that the worker is required to work both in and out of the province; and
> (d) the employment of the worker out of the province has immediately followed his employment by the same employer within the province and has lasted less than 6 months.

In the case of *Borstad*, the office and work location of each employee was in Sidney, B.C., but approximately 20% of the employees field-work was performed outside of British Columbia. At page 5, paragraphs 38 to 44 the following was said:

> I find that the work of Borstad's employees, regardless of where that work was performed, is protected by the *Act.*
>
> Section 2(a) of the *Act* provides that one of the purposes of the *Act* is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment.
>
> Section 3 provides that the *Act* applies to all employees, other than those excluded by regulation, regardless of the number of hours worked.

> Borstad's employees were not excluded from the application of the *Act* by regulation.
>
> Borstad is a provincially registered company with a registered office in Victoria. The permanent home of each of the employees is in B.C. The work performed by those employees occurs primarily in British Columbia.
>
> From time to time, the employees perform work on behalf of, and for the benefit of Borstad, in locations other than British Columbia. However, there was no dispute to the finding that approximately 20% of the total time was spent outside of the province. All of the work outside of the province involved mapping techniques using a CASI from the air. Once those images were captured, the employees returned to B.C. to analyse and classify the date.
>
> Section 8 of the *Workers' Compensation Act* provides compensation for workers injured outside of the province, where the place of residence of the employer is in B.C., where the residence and usual place of employment of the worker is in the province, and the employment is such that the worker is required to work outside the province. This section does not assist Mr. Borstad in his claim that the *Employment Standards Act* should not apply to the company's employees.

The case of *Finnie* also involved a truck driver who worked in Alberta for part of the time. The adjudicator followed the *Borstad* decision where, similarly, only about 20% of the work was performed outside of B.C. and the employee received instructions and was directed by the employer from B.C., holding the *Act* did apply.

In the case of *Xinex*, the employer's office and principal place of business was in B.C., while the employee was a resident of California and the employment duties were primarily performed in California. The employee's contract of employment was not entered into in B.C. and the contract said it was governed by the laws of Washington State. All remittances were paid in the USA and the employee paid tax in the USA. The adjudicator in that decision applied the reasoning in *Can-Achieve* finding that there was not a sufficient connection or "real presence, performing employment obligations in B.C. and that the employee's residence and usual place of employment being outside of B.C. was determinative".

In the *RALA* case, the issue was whether an aircraft maintenance mechanic hired in Alberta but who worked exclusively in B.C., though only for two weeks, was an employee in B.C. The employer's only office was in Alberta and the employee was hired in Alberta. While working briefly in B.C. the employee stayed in a hotel and was paid a per diem living allowance. The Federal Employment Standards Agency declined to investigate and Alberta's Employment Standards Branch also declined jurisdiction though the adjudicator noted at page 3 that this was not determinative of the issue of jurisdiction. At page 4 the adjudicator found that the delegate had erred in determining jurisdiction solely on the basis of the *situs* of the work and, applying *Can-Achieve*, held this temporary employment of only two weeks did not support a "sufficient

connection" between the employer and the employee on the one hand, and the Province of B.C. on the other such that the *Act* did not apply.

In the present case the facts which would seem to support the argument that the *Act* does not apply are as follows:

1. The Employer is an extraprovincially registered company in Alberta.
2. The Employer owned a shop in Alberta where much of the equipment used in the Alberta operation was stored and/or repaired.
3. Most of the equipment was owned, licensed and operated in Alberta.
4. The Employer paid Alberta WCB remittances for all the employees working in Alberta based on the work performed in Alberta.
5. The Employer paid its income tax in Alberta for its income earned on Alberta operations.
6. Out of the entire season in question, the Employee worked between 67 to 71% of his days and 80% of his hours in Alberta.

The facts which tend to support an argument that the *Act* does apply and that the Employee is an employee within British Columbia, notwithstanding that much of the work was performed in Alberta, are as follows:

1. The Employee is a resident of B.C.
2. The employment contract was entered into in B.C.
3. Some of the equipment operated in Alberta was repaired in B.C.
4. The Employer company was initially incorporated in B.C. and its directors reside in B.C.
5. The Employee previously worked exclusively in B.C. then, increasingly over the past several years in Alberta.
6. The Employee reported to work at the beginning of the season in B.C. and ended his employment for the season in B.C., picking up and dropping off the truck he drove in B.C.
7. The Employer maintained the Employee on the B.C. Medical Services Plan.
8. The Employer generated the Employee's payroll from its head office in B.C.
9. The Employee paid his income tax in B.C.
10. The Employee was working for less than 6 months of the year in Alberta.
11. When the Employee was working in the area of the Employer's head office in B.C. the Employee was not paid a living out allowance, though he was when he worked in Alberta.

12. The Employee was not told that he would be working for a different corporate entity than the B.C. company or that he would not be considered an employee in B.C. for the purposes of the *Act*.
13. The Employer made a distinction between some classes of its employees (labourers and operators) in the wage rates paid for employees resident in B.C. and employees resident in Alberta, both of which worked in Alberta, though this did not apply to this Employee, a truck driver.
14. The Employee is not subject to any exclusion under the *Act*.

Applying the reasoning in the *Can-Achieve* decision I find that there is a sufficient connection between the employer and the employee on the one hand and British Columbia on the other hand such that the *Act* does apply and this Tribunal does have jurisdiction. The Employee had a "real presence" performing work within British Columbia beginning his employment and his ending his employment for the season working in B.C., being resident of B.C., being maintained on the B.C. Medical Services Plan by the Employer, the contract of employment having been entered into in British Columbia, the payroll being generated from the Employer's office in British Columbia and the Employee not receiving a living out allowance when working in the area of the Employer's head office in British Columbia. This is, of course, notwithstanding the fact that the Employee worked a majority of his time in this seasonal employment in Alberta.

I also note that Section 2(c) of the *Act* provides that one of the purposes of the *Act* is to encourage open communication between employers and employees. The issue of which province would have jurisdiction over the Employee was not discussed by the parties, such that no opportunity was given for the Employee to make a conscious decision before going to work in Alberta at the direction of the Employer to waive or forego the protection of the *Act*.

I note that, as in *Borstad,* Section 8 of the *Workers' Compensation Act* does not assist. It would appear to me that the Employee would be covered by *Workers' Compensation Act* in British Columbia as the Employer clearly had a place of business in British Columbia, the residence and, arguably, usual place of employment of the Employee is in British Columbia, the Employee's employment required work both within and outside of British Columbia, and the Employee's employment outside of British Columbia covered a period of time less than 6 months.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated September 21, 2001 be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal