

An appeal

- by -

Andrew Davie, Gordon Davie and James Davie  
(the “Davies”)

- 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* (as amended)

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2007A/95

**DATE OF DECISION:** December 11, 2007

## DECISION

### SUBMISSIONS

Sandy Davie on behalf of Andrew, Gordon and James Davie  
Greg Brown on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Andrew Davie, Gordon Davie and James Davie, (collectively, the "Davies"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 24, 2007.
2. The Davies, a father and his two sons, filed complaints alleging that Make Door Pro Your Garage Door Company Ltd. ("Door Pro") had contravened the Act by failing to pay certain wages. Although the delegate treated each complaint separately, he issued one Determination because the Davies were members of the same family and represented by Sandy Davie, the wife and mother of the complainants.
3. After investigating the complaints, the Director's delegate concluded that the Davies were self employed and that there had been no contravention of the Act.
4. The Davies contend that the delegate erred in law and failed to observe the principles of natural justice.
5. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I conclude that this appeal can be decided on the section 112(5) "record", the submissions of the parties and the Reasons for the Determination.

### ISSUES

6. Whether the delegate erred in law in arriving at his conclusion that the Davies were self employed contractors; and
7. Whether the delegate failed to observe the principles of natural justice in making the Determination.

### FACTS

8. The facts, as set out by the delegate, may be summarized as follows.
9. The Davies worked for Door Pro as Residential Installers/Service Technicians. Gordon, the father, began working in August 2001. James began in November, 2001 and Andrew in April 2005. Initially, the Davies considered themselves to be self-employed or independent contractors. However, they contended that their relationship changed over time and that their status became that of employees.

10. The delegate considered the evidence of the Davies and three of their witnesses, as well as evidence of Dennis Baitz, one of Door Pro's Directors, its General Manager, Michael Plecash, and two witnesses on behalf of Door Pro.
11. The delegate analyzed the definition of "employee" and "employer" contained in the *Act* as well as Tribunal jurisprudence on those definitions. He also analyzed the evidence in considering the four common law tests ("Control", "Four Fold", "Integration or Economic Dependency" and "Economic Reality").
12. Applying the "Control" test, the delegate concluded that the Davies were independent contractors. He found that Door Pro had significant control over where the work the Davies was performed as it assigned them jobs on a daily basis. However, he found that the work was not consistently monitored and if a customer complained about the work the Davies would be required to remedy any deficiencies at their own cost. The delegate also concluded that the work could have been performed by other subcontractors as there was evidence that if the Davies could not work on Saturday they could have the work done by another subcontractor with Door Pro's approval. The delegate relied on *Truong v. British Columbia* ((1999), 67 B.C.L.R.(3rd) 234 (C.A.)) in placing significant weight on this aspect of the relationship between the Davies and Door Pro.
13. Applying the "Four Fold" test, the delegate also concluded that the Davies were independent contractors as each of them provided their own tools, including a service vehicle which represented a significant investment. He further determined that the Davies had an opportunity to take on more work and make additional money if they completed the work quickly and risked loss if they performed the work badly.
14. Applying the "Integration/Economic Dependency" test, the delegate determined that the Davies were independent contractors as the evidence showed that they were free to work for other companies.
15. Applying the "Economic Reality" test, the delegate found that the Davies were running their own business and could have taken on work from other companies. He noted that the Davies had insurance policies which stated they could work up to 15% of the time for other companies if they chose.
16. Finally, the delegate examined the language of the subcontractor agreements each of the Davies had with Door Pro which stated that they were independent contractors in business for themselves. The agreement required that the Davies were to report and pay taxes to Canada Revenue Agency ("CRA") based on their self-employed income. The delegate noted that although the language of the contract was not, in itself, definitive of the nature of the relationship, it was useful in assessing the intention of the parties. He found that the language of the contract and the nature of the daily relationship between the parties established the Davies as independent contractors.
17. The delegate relied on the evidence of one of Door Pro's witnesses who testified that Door Pro made it clear to the Davies that they were to be self employed. He noted that each of the Davies set up their own accounts at WorkSafe BC as "individual private businesses", each had their own GST numbers and each completed their income tax filings as a business owner, claiming business income and deducting business expenses. He also considered a November 2006 CRA ruling that the Davies were self-employed, an appeal of which was upheld in May 2007.
18. In conclusion, the delegate determined that the Davies were self-employed independent contractors who provided their services to Door Pro as subcontractors.

## ARGUMENT AND ANALYSIS

19. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
  - (b) the director failed to observe the principles of natural justice in making the determination;  
or
  - (c) evidence has become available that was not available at the time the determination was being made
20. The burden of establishing the grounds for an appeal rests with an Appellant. The Davies must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. A disagreement with the result, in and of itself, is not a ground of appeal.
21. The Davies's reply submission, in particular, is voluminous. They contended that the section 112 record provided by the delegate is both incomplete and misleading as it did not contain documentation they provided to the delegate. In October 2007 the Davies sought disclosure of their Employment Standard Branch files under a Freedom of Information request. The results of that request were provided as part of their reply. The file contents substantiated the Davies' contention that the delegate failed to provide the full "record" in his response to the appeal.
22. I have not attempted to summarize the Davies' evidence in any detail. The essence of their appeal submission and reply is that the delegate ignored or misconstrued their evidence and accepted the oral evidence of the employer without documentary evidence to substantiate it.
23. The delegate contends that the appeal is an appeal of the facts and an attempt to have the Tribunal re-weigh the evidence.
24. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the Act;
  2. A misapplication of an applicable principle of general law;
  3. Acting without any evidence;
  4. Acting on a view of the facts which could not be reasonably entertained; and
  5. Exercising discretion in a fashion that is wrong in principle
25. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence or on a view of the facts which could not reasonably be entertained.

26. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
27. Having reviewed the submissions and the record, I am persuaded that the delegate made several factual errors in arriving at his decision that the Davies were self employed contractors, considered evidence that was not properly before him and acted on a view of the facts that cannot reasonably be entertained.
28. As a preliminary matter, I note that the delegate received information from Gordon Davies' WorkSafe BC claim file from Door Pro in contravention of section 95 of the Workers' Compensation Act. The delegate was advised by Worksafe BC's legal counsel that the information was inadmissible in the proceedings before him. It is unclear whether the delegate did rely on that information. However, given that the delegate made findings of fact that are unsupportable by the record, I can only infer that he did.
29. Remedial and benefits-conferring legislation is, in general, to be given a broad and liberal interpretation, as are definitions contained within legislation itself. An interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not. (see s. 8, *Interpretation Act*, R.S.B.C. , *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2<sup>nd</sup>) 170, and *Machtinger v. HOJ Industries Ltd.* , [1992] 1 S.C.R. 986).
30. The Act definition of employee includes:
- (a) a person....receiving or entitled to wages for work performed for another, and
  - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee....
31. An employer is defined as including 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.
32. Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."
33. Thus, irrespective of the common law tests, the overriding test is whether the Davies "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: (*On Line Film Services Ltd v Director of Employment Standards* BC EST #D 319/97), and the common law tests of employment are subordinate to the statutory definition (*Christopher Sin* BC EST #D015/96). Although the delegate had regard to section 1 of the Act, it appears that he improperly subordinated the statutory definition to that of the common law tests. Nevertheless, whether the delegate assessed the relationship in light of the statutory definition or the common law tests, in my view, having regard to the totality of the evidence properly before him, I find that the delegate arrived at the wrong conclusion.
34. The record discloses that the Davies performed the same work and were treated substantially the same as other installers who were Door Pro employees. It also discloses that Door Pro had significant control and direction over the Davies (which was properly noted by the delegate) and was responsible for their

employment. On this basis alone, I find that the delegate erred in his analysis of the facts in light of the statutory definitions.

35. Both the *Act* and the common law establish control and direction as a key indicator of whether an individual is an employee or a self employed or independent contractor. (see *671122 Ontario Ltd. V. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 (S.C.C.) and *Truong v. British Columbia* (1999) B.C.C.A. 513, [1999] BCJ No 2049)
36. In determining the nature of a relationship, courts, and this Tribunal, have typically assessed the nature of the relationship, looking beyond the language used by the parties. While there is no magic test, the total relationship of the contracting parties must be examined, with a view to determining “whose business is it?”
37. In my view, the totality of the evidence before the delegate shows overwhelmingly that the business was that of Door Pro not that of the Davies and the Davies were employees.

#### ***Written agreement***

38. While it is instructive to have regard to the intention of the parties as reflected in a written contract, particularly where the parties are sophisticated, and or represented by counsel, the written agreement will only be given weight provided that it properly reflects the relationship between the parties. The delegate appeared to place significant weight on the language of what he identified as “subcontractor agreements” in arriving at his conclusion. In fact, the documents were actually “confidentiality agreements”, and were drafted by Door Pro. In my view, these documents ought to have been given little, if any, weight. The Davies had never before been in business for themselves and there was no evidence they understood the distinction between an employee and a contractor.

#### ***Level of control***

39. None of the Davies had door installation or service experience when they first began working for Door Pro. Door Pro paid for all of the Davies to take installation courses. It reimbursed the Davies for conferences, workshops and successfully completed training sessions. Door Pro supplied the Davies with company business cards containing Door Pro’s name, address and telephone number. There is no evidence the Davies did any advertising of their own.
40. As noted by the delegate, Door Pro assigned the Davies jobs on a daily basis. The amounts customers paid for each job was determined entirely by Door Pro. Door Pro issued all invoices and all customer payments were made to Door Pro. Door Pro paid the Davies only after they submitted their work orders. The evidence is that the Davies were required to have all time off and vacation time approved by the Director, Mr. Baitz. Although the delegate correctly noted that the Davies could assign their Saturday work to other installers, he failed to consider their evidence, supported by one of their witnesses, that those installers also worked for Door Pro and they would have to agree to assume the work. There is no evidence the Davies could “subcontract” the work out to an unrelated installer as suggested by the delegate. A Door Pro memo stated that if Gordon Davie, among others, objected to or failed to comply with Mr. Baitz’s assignment of work his “service arrangement” could be terminated. Rather than suggesting a self-employment arrangement, in my view this level of control is indicative of an employment relationship.

***Degree of financial risk and profit***

41. The record shows that Door Pro applied “penalties” for each installer, whether he was an employee or a “subcontractor”, for any reported deficiencies which were deducted from their paycheques. The delegate concluded that this was evidence of the Davies assuming a risk of loss in that if they failed to perform their work adequately they would be required to remedy the deficiencies in their own time. In my view, rather than an indicator of financial risk, this was evidence of the control Door Pro exercised over the Davies.
42. Although the delegate concluded that the Davies were free to work for other companies, there is no evidence the Davies worked for anyone other than Door Pro. One of the Davies’ witnesses told the delegate that if any of the “subcontractors” worked for other companies, Door Pro “punished” them by not giving them other work until Mr. Baitz approved it. The delegate does not say what weight, if any, he gave this evidence, or how it was reconciled with any of the other evidence.
43. The record shows that all the business income the Davies reported on their tax returns was earned at Door Pro. There is no evidence that the Davies deducted business expenses, as found by the delegate. The delegate appeared to rely on Mr. Baitz’s allegation that he “knew [the Davies] deducted business costs from the earnings they received from Door Pro because they considered themselves to be self-employed” without corroboration. Although the delegate referred to the credibility of the witnesses, he did not indicate which parties he found credible or not, why he preferred one person’s evidence over another or how he reconciled contradictory evidence. In this instance, I am unable to determine why he preferred Mr. Baitz’s uncorroborated assertions over documents provided by the Davies.

***Ownership of tools***

44. The delegate also found that the fact that the Davies supplied their own service vehicle as an indicia of self employed contractor status. There was no dispute that Door Pro required that they do so as a condition of their employment. He also seemed to place no weight on the fact that Door Pro supplied all other major specialized equipment such as ladders over 6 feet, a welder and a hilti gun as well as all supplies including doors, openers, lumber and paint.
45. While there is also evidence that Door Pro required the Davies to have their own Business and GST numbers, this is not determinative of a self-employed contractor status. Further, although the CRA ruling was not in the Davis’ favour, it is but one factor to consider when assessing the relationship of the parties. As this Tribunal has frequently noted, the CRA applies legislation which has different definitions and purposes than the *Employment Standards Act*.
46. In summary, whether applying the *Act* or the common law, it is my view the delegate erred in concluding that the Davies were self employed contractors. I conclude that the evidence supports a conclusion that the business was that of Door Pro and that the Davies were employees.
47. In light of my conclusion on this issue, it is not necessary to consider the Davies second ground of appeal.

**ORDER**

- <sup>48.</sup> I Order, pursuant to Section 115 of the Act, that the Determination, dated July 24, 2007, be referred back to the Director for a determination of the Davies' claims.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**