

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 -

515600 B.C. Ltd.
("515600")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 98/017

Date of Hearing: March 9, 1998

Date of Decision: April 7, 1998

DECISION

APPEARANCES

Guy Charles Montgomery	on behalf of 515600 B.C. Ltd.
Guy Christopher Montgomery	on behalf of 515600 B.C. Ltd.
Al Jensen	on behalf of 515600 B.C. Ltd.
Lorne Garry McCarty	on his own behalf

OVERVIEW

This is an appeal by 515600 B.C. Ltd. (“515600”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated December 15, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). 515600 alleges that the delegate of the Director erred in the Determination by concluding that Lorne Garry McCarty (“McCarty”) was an employee and was owed wages in the amount of \$10,573.87.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was McCarty an employee or an independent contractor ?
2. If McCarty was an employee, is McCarty owed wages ?

FACTS

Guy Charles Montgomery (“Montgomery Sr.”), together with his sons Guy Christopher Montgomery (“G.C. Montgomery”) and Greg Montgomery (“G. Montgomery”) are directors/officers of the numbered companies who issued cheques made out to McCarty during the period in dispute in this matter. Furthermore, a number of personal cheques were issued by Montgomery Sr. made out to McCarty. I will refer to all companies under the control of the Montgomery family umbrella as 515600 B.C. Ltd. (“515600”).

I received evidence from Montgomery Sr., G.C. Montgomery, Jensen and McCarty. I will not reproduce all of the evidence provided, but will highlight the relevant testimony.

Montgomery Sr. stated that:

- McCarty was interviewed and advised that he would be paid an advance of \$2,500 per month against commissions earned;
- McCarty was advised that the commission rate was 6% which would be split on a 60 / 40 basis with the companies to cover their expenses;
- there was no written contract between the parties;
- the reason for the various cheques being issued to McCarty was that those company accounts were the accounts which had sufficient funds in them at the time the cheque was to be written;
- McCarty performed the same or similar work for others while working for 515600;
- examples of this work were the sale of a trailer home for a Mr. Oliver, the sale of a property for a Rob Gravelle and McCarty attempted to sell some property owned by Montgomery Sr.'s wife who has no connection to any of the companies;
- there was no coercion exercised on McCarty to get him to sign the statement of account dated May 23, 1997;
- if McCarty was working for someone else selling properties and we were paying him \$2,500 per month advance, sure we would be upset;
- we heard from his current employer that McCarty was intending to work as a licensed real estate agent and we were concerned about a conflict of interest;
- McCarty did not have any signing authority on behalf of the companies;
- the verification of employment letter provided to McCarty was provided to assist him with obtaining a mortgage and did not clearly spell out the commission structure in order to keep business information confidential;
- the verification of employment letter on mentioned "available" commissions and this indicates the 60/40 split;
- our main concern was that McCarty was selling the companies properties;
- McCarty was not paid commission on the sale of Lot 56 as this lot was purchased for his own use and he was given a reduced price of \$29,900.

Al Jensen ("Jensen") stated that:

- McCarty clearly understood he was an independent contractor;
- the position did not require a licensed Realtor;
- the sale of the "Rainbow Road" property credited to McCarty was in fact never completed;
- the sale of the "Avison" property did not close until the end of 1997, well after McCarty left;
- McCarty had his own office, his own telephone line and would call forward calls to his own home when he was not in the office;
- McCarty had his own key and was free to come and go as he pleased;
- the companies' secretary would take messages for McCarty and put them into his slot;
- McCarty had a fax machine available for his use;

- McCarty also made space available in his own home for office use;
- McCarty supplied his own vehicle;
- McCarty was not required to provide any regular reports, did not have a set schedule of work and was not instructed by 515600 in any regard to how or when the work was to be performed;
- McCarty's work was not an essential part of the Montgomery operations, in fact the company's business would not be dramatically affected by the lack of performance by McCarty;
- any property sale signs posted by McCarty had only McCarty's name and phone number on them;
- the Montgomerys determined the selling price of any particular piece of property;
- McCarty would refer legitimate offers to the Montgomerys for their approval as McCarty did not have the authority to conclude a sale or to accept an offer;
- any leads would be forwarded to McCarty to follow up;
- the company did not object if McCarty used someone else to assist him in his sales, however the company did not pay for that person;
- on several occasions members of McCarty's family would assist him in the performance of his work;
- there was no continuing connection between McCarty and the Montgomerys on a regular basis;
- McCarty was not reimbursed through the companies for business or travel expenses;
- there was no company logo or name on McCarty's vehicle;
- there were no company business cards;
- McCarty was not required to devote his full time to any specific one of the Montgomery companies;
- McCarty was not instructed how or where or when to conduct his sales activities;
- McCarty was not paid weekly, daily or monthly;
- the funds from any sale of property by McCarty would go to the Montgomerys and they would then pay McCarty his commission;
- they did not object when McCarty sold the trailer for Oliver;
- McCarty entered into contracts with other persons in regard to property sales while selling for the Montgomerys;
- 515600 did not have the right to terminate McCarty;
- McCarty was paid his commission even after he left;
- no statutory deductions were made from any money paid to McCarty

Jensen conceded on cross examination that:

- McCarty's office was located in a building owned by the Montgomerys;
- McCarty did not pay any rent for his office;

- the Montgomerys paid for the cost of the telephone and provided the desk in the office;
- while McCarty placed advertisements to sell the property, the cost of the advertisements was paid for by the Montgomerys;
- the statement of account was prepared by the companies' secretary, although this is not an uncommon practice for their contractors;

McCarty stated that:

- he met with the Montgomerys in late July 1996 and agreed to work for them on the basis of \$2,500 advance each month against commissions of 6% on all sales;
- he surrendered his real estate license in the first week of August 1996 and commenced working for the Montgomerys on August 15, 1996;
- he understood his job was to bring acceptable offers of purchase and sale to the Montgomerys for their approval and once the offer was accepted, his work was finished;
- he was given a \$500 cheque to cover his expenses in traveling back and forth from Kelowna to look for a place to live;
- he was given an advance of \$2,000 to enable him to pay for his moving expenses;
- he commenced working out of the companies offices on Front Street;
- he would arrive at the office at approximately 8:30 a.m. and leave around 4:30 p.m. each day;
- he did not have any keys to this office;
- in January 1997 the companies moved to new offices on Elliot Street and he was given office space in the downstairs area;
- he was given a key to this office;
- he never had any business cards;
- there was never any mention of expenses, deductions or 60/40 split until after the move to the new offices in January 1997;
- he was advised around the end of January that because of the new offices, the commissions would now be split 60/40 to cover the costs;
- he received the \$2,500 per month advance from August 1996 until February 1997 and thereafter payments became erratic;
- he only signed the statement of account dated May 23, 1997 as he was told if he did not sign he would not get the \$500 he needed;
- he has known Oliver for 28 years so as a favour to Oliver he did post sign for the trailer owned by Oliver and when a call was received, he referred the caller to Oliver;
- Oliver had loaned him some money the year before and advised McCarty to consider the debt paid;
- Lot 56 was purchased for the purpose of having a home built for himself;

- he paid the same price for Lot 56 as other Lots had been advertised for, \$29,900;
- he requested the letter verifying his employment and it was provided by the companies;
- he never invoiced the companies for work performed;
- he was requested to provide an itemized list of expenses to Jensen in January 1997 and he was reimbursed for those expenses;
- he advertised the property owned by Montgomery Sr.'s wife as a favour;
- he received a call about Mrs. Montgomery's property after he left and referred the caller to the Montgomerys;
- he did not perform work for anyone else from August 15, 1996 to May 15, 1997;
- he did not ask 515600 to withhold CPP, EI or Income Tax;
- he did not receive a T-4 for 1996 but he did not make enough money to worry about it;
- after he was advised of the 60/40 split, he made a proposal to the Montgomerys to market all of their properties, but the Montgomery's did not respond to this proposal;

ANALYSIS

The delegate of the Director determined that McCarty was an employee. As a consequence of that determination, McCarty became entitled to certain statutory benefits provided for in the *Act*. The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, 515600.

The issue of whether a person is an employee or an independent contractor is often difficult to determine especially in the absence of any written agreement which sets out the terms and conditions.

To differentiate between an employee/employer relationship as opposed to a contractual one, all elements of the relationship between the parties must be considered carefully. Being in harmony with any one element on its own doesn't necessarily mean a person is or is not an employee, rather, I would suggest, it is a matter of balance. If there are enough elements or factors suggesting there is an employee/employer relationship the decision would then, on the balance of probabilities, lean towards the person in question being considered an employee.

Professor P.C. Weiler, as chairman of the Labour Relations Board, stated in *Hospital Employees Union, Local 180 v. Cranbrook and District Hospital (1975)*, CLRBR 42, page 51;

“The difficulty is that there is no single element in the normal make-up of an employee which is decisive, and which would tell us exactly what point

of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee....”

When determining whether or not there is an employee/employer relationship I must consider the definitions and language of the *Act*, other relevant statutes and the applicable jurisprudence pertaining to this issue.

Statutory Considerations

The *Act* in Section 1 defines ‘employee’ and ‘employer’ as:

"employee" 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 employer's business,*
- (d) a person on leave from an employer, and*
- (e) a person who has a right of recall;*

"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;*

When considering these definitions, I note that they both contain the word “includes” which indicates that the items noted in the definitions are not exclusive of the ordinary meaning of the terms ‘employee’ and ‘employer’.

When considering the objectives of the *Act*, I must take note of Sections 2 and 4 which state:

Section 2, Purposes of this Act

The purposes of this Act are to

- (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
- (b) promote the fair treatment of employees and employers,*
- (c) encourage open communication between employers and employees,*
- (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*
- (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and*

(f)contribute in assisting employees to meet work and family responsibilities.

Section 4, Requirements of this Act cannot be waived

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

My reason for taking note of these Sections of the *Act* is to illustrate that a person may not, under the guise of a contractual relationship, waive the basic minimum standards of compensation as required by Section 4 of the *Act*.

Jurisprudence

To decide whether there is an employment relationship or a contractual relationship, the courts have developed two major approaches in the common law. The so-called “four factor test” [see, for example, *Walden v. Danger Bay Productions Ltd.* (1994) 90 B.C.L.R. (2d) 180 (BCCA) which refers to *Montreal Locomotive Works Ltd.* (1946) 3 W.W.R. 748] and the more recently developed “integration test”, otherwise known as the “organization” or “economic dependency” test [see, for example, *Jordan & Harrison Ltd. v. Macdonald & Evans* (1952) 1 L.R. 101 C.A. at p. 111; and *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986) 5 W.W.R. 450]. However, both of the analytical approaches which are found in the common law must be subordinated to the statutory definition of “employee” contained in the *Act* [*Yellow Cab Ltd. v. Board of Industrial Relations* (1982) 114 D.L.R. (3d) 427 (SCC)].

When I adopt either analytical approach I am brought to the same conclusion for the reasons which follow.

Control Test

The Control Test determines whether one person is in a position to order not only what is to be done, but also the manner in which it is to be done.

When reviewing the Control Test as it applies to the circumstances of this case, I have noted the characteristics of their relationship:

Selection - 515600 offered McCarty employment as a “Property Sales Representative”. There was no evidence of any ‘bids’ being solicited by 515600 from a number of independent contractors to do the sales work performed by McCarty.

Dismissal - 515600 claims they did not have the right to terminated McCarty.

Method of Work - 515600 determined which of its properties would be placed for sale and what the price of each property would be. McCarty's sole function was to solicit offers for the various properties and present them to the Montgomerys.

Remuneration - The evidence was that McCarty would be paid a set percentage of commission for all sales. There was no evidence of any negotiation in regard to the rate of commission to be paid. The rate was set by 515600.

Clearly, in the case at hand, 515600 owned the properties, determined the price of those properties and determined when those properties were to be sold by either McCarty or someone else. The fact that McCarty was paid on the basis of commission on sales does not, in and of itself, make him an independent contractor. Employees are remunerated by a number of different incentive or production based methods.

Integration

The Integration Test examines the extent or degree to which an individual interacts with the organization or operation. This test looks at whether an individual is an integral part of the operation or is merely ancillary to the operation.

Clearly, in the case at hand, McCarty was responsible for soliciting offers for purchase or sale for properties owned by the Montgomery companies and presenting those offers for approval. McCarty was an integral and important part of the chain of activities of the Montgomery group of companies. McCarty did not have authority to change prices of property or accept offers, he was merely a conduit between prospective purchasers and the Montgomerys

Economic Reality

The Economic Reality Test requires the analysis of the entire relationship between the parties in order to determine whether a particular individual is carrying on business for himself or for someone else.

Reviewing the Economic Reality Test as it applies to this case involves the close analysis of the four criteria;

- 1. Risk** - whether McCarty bears any risk of loss or possibility of profit ?
- 2. Financial Investment** - does McCarty have an ownership of machinery and equipment and if so, is the investment substantial ?
- 3. Lasting Relationship** - is there an ongoing permanent relationship between McCarty and 515600 ?

- 4. Diversity** - is McCarty permitted to provide the same or similar services to other parties and, if so, is McCarty actively involved in searching out other business opportunities ?

In the case at hand, McCarty had no risk at all. McCarty takes no financial risk, has no liability regarding the business of 515600 and has an on-going, indefinite term relationship with 515600. McCarty ventured no capital investment into 515600 and can expect no return for profit. McCarty's only option to increase his earnings were by virtue of selling more of the Montgomery's properties.

McCarty did provide and maintain his own vehicle and signs, however, it is not unusual for an employee engaged in sales to be required to provide a vehicle.

The evidence was that McCarty worked for 515600 from August 1996 to May 1997. The relationship between McCarty and 515600 would be considered as ongoing in the context of the nature of this industry.

With respect to "diversity", while there was some evidence of McCarty providing a favour for a long time friend there was no evidence that he performed the same or similar work for remuneration for anyone else during the period in question or to suggest that he was actively searching out other business during the period in question.

Specific Result

The Specific Result Test looks at the intent of the parties and whether a contract is to provide for a single service leading to a specific result or whether McCarty is simply required to provide general efforts on behalf of 515600 through his sales activities.

A review of the Specific Result Test as it relates to this case involves two criteria;

- 1. Specific Work** - if McCarty is an independent contractor, it is agreed that certain specific work would be done for 515600. Conversely, in an employee/employer relationship, McCarty agrees to provide labour and services for 515600.
- 2. Personal Service** - a contract of employment normally requires a specific person to place his own services at the disposal of the company. Usually an independent contractor's only obligation is to see that a certain agreed upon task is completed. In other words, it does not matter who actually performs the work.

In this case, McCarty personally provided the labour and services relating to the sale of properties for 515600. 515600 alleges that McCarty did hire family members to assist him perform the work although there was no evidence that this was ever done.

If McCarty were an independent contractor, the contract should have been for specific work required to be performed in a specific period. In this case, there was an indefinite

term contract to provide labour and services related to selling of properties to be determined by 515600 and at a price determined by 515600.

Based on the evidence provided and on the balance of the probabilities, I conclude that McCarty was an employee of 515600.

Based on the evidence provided and of the balance of probabilities, I conclude that the rate of remuneration for McCarty was 6% of all sales until the end of January 1997 when it was changed to 60% of 6%.

Based on the evidence provided and on the balance of probabilities, I conclude that McCarty earned wages for **all** sales and is owed wages in the amount as calculated by the delegate of the Director and set forth in the Determination.

The appeal by 515600 is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated December 15, 1997 be confirmed in the amount of \$10,573.87 together with whatever further interest may have accrued pursuant to Section 88 of the *Act* since the issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal