

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-

Valerie Rita Sampson

- of a Determination issued by-

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Fernanda Martins
FILE NO.:	97/930
DATE OF HEARING:	April 28, 1998
DATE OF DECISION:	August 11, 1998

DECISION

APPEARANCES

Valerie Sampson	on her own behalf
Herb Meiner	on behalf of Wicklow Properties Ltd./Christina Lakeside Resort Ltd./ Brenher Group Management Corp./ Brenher Construction Ltd. ("Brenher")

OVERVIEW

This is an appeal by Valerie Sampson , pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued on December 1, 1997. In this appeal the Appellant claims that the Director was in error in finding that she was not an employee within the meaning of the *Act*.

Valerie Sampson and her husband, Gordon Sampson each filed an appeal stating:

We each submitted identical complaints against Wicklow Properties, Christina Lakeside Resort Ltd./ Brenher Group Management Corp. to the Employment Standards Branch, asking for a ruling that we were in fact employees and not contractors, and upon receipt of this ruling, asking for payment of wages and benefits, as provided under the *Employment Standards Act*. Our documentation outlining the circumstances of our position was in total some sixty pages in length. The Employment Standards Branch Delegate assigned to our case: Ms. Ruth Atterton, in her determination, concluded that we were not employees within the meaning of the *Act*.

The following was noted as the reason for making this appeal:

We believe that the Determination was wrong in that the Delegate did not take into consideration each and every point which we covered in our sixty pages of documentation, which resulted in her weighing only a minor portion of the factors involved, in her Analysis for the Determination.

The Sampsons first wrote to the Director on April 14, 1997 an eight page letter with seven attachments setting out their complaints.

On June 25, 1997, the Director wrote to the Sampsons with an indication of her preliminary conclusions and solicited additional information they had advised a month and a half prior would be forthcoming.

On July 14, 1997, the Sampsons wrote another letter to the Director eleven pages in length with twenty-five pages of attachments.

A hearing was held on April 28, 1998 in Castlegar, BC at which time evidence was given under oath by Valerie Sampson, Gordon Sampson and Herb Meiner. Valerie Sampson and Gordon

Sampson provided 290 pages of copies of submissions and documents which they had submitted to the Tribunal in advance of the hearing.

Application for Adjournment by Mr. Meiner

The Tribunal notified the Employer on December 29, 1997 regarding the appeal and advised :

If you wish to respond to this appeal, please forward your written submission to me by **4:30 p.m. on January 19, 1998**. Your response should detail the facts and your arguments about the appeal. **You must also include a copy of all records and documents in support of your response.**

No response was submitted and on January 21, 1998, the Tribunal wrote to the Employer's lawyer requesting that a response be provided no later than 4:00 p.m. February 15, 1998. On February 5, 1998, Mr. Meiner wrote to the Tribunal and stated that:

At this time, you have all the information we can provide for resolution of this matter. There are, however, a few points I would like to emphasize for your consideration. The first point is that there is a signed letter of intent for a contract between the Sampsons (and their company, Timberline Ventures) and the companies mentioned in the appeal dated April 5, 1995. Secondly, the Sampsons' invoiced Christina Lakeside Resort Ltd. (CLR) through the company set up by them for their monthly contracted price plus GST. CLR in turn issued a cheque to the Sampsons' company for services rendered. Finally, the Sampsons, through Timberline Ventures, had ample opportunity and were not restricted from making other business deals for profit. The letter of intent explicitly states that Timberline Ventures is free to generate profit by providing goods and services directly to the tenants of CLR.

On February 13, 1998 Mr. Meiner delivered a two page document called "The Letter of Intent" to the Tribunal by facsimile.

On March 31, 1998, the Employer requested an adjournment of the hearing set for April 2, 1998. This request was granted and the hearing was rescheduled to April 28, 1998.

At the hearing, Mr. Meiner stated that he had provided no further submissions or documents because "the Sampsons had done such a good job" of supplying the documents. Mr. Meiner hesitated in commencing his cross-examination and claimed that he would require two days to do it and needed time to prepare for it. I reviewed with him the opportunities which he had to review documents and submissions prior to the hearing and that having heard Mrs. Sampson's evidence he could question her on anything she had stated or submitted. He then cross-examined Mrs. Sampson and Mr. Sampson.

After the Appellants had finished with their submissions and evidence, Mr. Meiner was invited to present his case. He asserted that he did not wish to provide any evidence. He stated that he had no further information to add to that of the Director in her determination.

I explained to Mr. Meiner that although the onus was on the Appellants to show why the determination should be varied, the hearing was the Employer's opportunity to provide its side of the case and to dispute anything stated by the Appellants. Without any evidence from the employer or any challenge by the employer to the Appellants' evidence, he would risk the Tribunal possibly drawing adverse inferences. At this juncture Mr. Meiner requested an adjournment to consult with counsel to prepare his response to the appeal. This request was denied as he had already been granted a previous adjournment and time to prepare for the hearing of the appeal.

With regard to the presentation of evidence and the burden of proof in an appeal before the Tribunal, the adjudicator in the case of **John Ladd's Imported Motor Car Co.** BC EST #D313/96 held:

In light of the object and purposes of the statutory scheme established by the *Act* I find that while the nature of the hearing is more akin to a true appeal, it nevertheless has the characteristics of a de novo hearing. I have had regard to the powers of the Tribunal to receive evidence and decide questions of fact, which are indicators of a de novo hearing in arriving at this conclusion...

If the factual underpinnings of the Determination are at issue, an oral hearing may be granted.

The oral hearing may take the form of a hearing de novo where facts are disputed, or credibility of witnesses are at issue.

The Determination from which the appeal is taken forms the basis for the hearing, and frames the issues in dispute. The burden of establishing that the Determination is incorrect, or the burden of proof, rests with the Appellant...

Once the hearing has commenced, the Tribunal must give the parties an opportunity to present evidence supporting their grounds of appeal. That includes compelling witnesses to appear to give evidence under oath, and be subjected to cross examination, where facts are disputed. In this respect, the process is not one of reviewing evidence, but hearing it afresh, and making findings of fact, as if the Determination was not made.

With regard to the drawing of adverse inferences it was held in **Re: British Columbia, the Director of Employment Standards** (BC EST #D051/98) that:

The non-attendance of a party does not change the onus, which remains on the Appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the Appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to the Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, and Employee or the Director's delegate. In the case of an Appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

Although Mr. Meiner was in attendance, it would follow from the above decision that if he remained silent at the hearing, he would still be risking the Appellants having met their tactical burden and information which might be helpful to the Tribunal would not be available.

In Re The British Columbia Director of Employment Standards BC EST #D051/98 the Tribunal went on to state that:

Normally, the information taken by the Director's delegate is not taken under oath, and the Employer has no right to challenge or cross-examine the Employee at the stage of an investigation, prior to the making of a Determination. Once a Determination is made the Employer does have that right, before this Tribunal, to test and challenge the information presented under oath or affirmation. If the non-attendance of a successful party to a Determination became common place at oral hearings before this Tribunal and the unsuccessful party did not have the opportunity to challenge the complainant's evidence great mischief could result. It would simply be open to an Employee or Employer to provide fabricated evidence to the Director's delegate.

I find that the above would be equally true for a successful party to a Determination who attended the oral hearing but remained silent.

ISSUES TO BE DECIDED

This appeal requires me to decide whether Valerie Sampson was an employee of Wicklow Properties Ltd., Christina Lakeside Resort Ltd., Brenher Group Management Corporation and or Brenher Construction Ltd., and whether she is owed regular wages, overtime, annual vacation pay, and statutory holiday pay as per the *Act*.

FACTS

Valerie Sampson claims that:

While living in Manitoba, she and her husband ,Gordon Sampson, responded to a posting through the Canada Employment Centre for a position to manage a campground at Christina Lake. Interviewing, negotiations and the offering of the position were conducted by Terry Scott of Brenher Construction. On April 5, 1995, the Sampsons accepted the position of Campground Managers for Christina Lakeside Resort Ltd., a company not yet formed at the time. Later that same day, Mr. Scott delivered, via facsimile, a letter of intent which proposed to outline the basic terms and conditions of a "more Formal Contract For Services the parties agree to enter into by April 24th, 1995, ... for services of Managers of Christina Lakeside Resort...". The "Letter of Intent" also stated "The Formal contract for Services will be a contract for services and not an employment agreement." Even though the Sampsons had travelled to Victoria for an interview and had various telephone conversations and correspondence with Mr. Scott, this was the first indication that this position was not for employment . Nevertheless, they signed the letter of intent because they had already accepted the position and they believed it might be to their advantage to engage themselves in additional entrepreneurial opportunities as held out to them by Mr. Scott.

The Sampsons' understanding of the remuneration after discussions and correspondence with Mr. Scott, was that for six months of campground management , they would be paid \$30,000.00 jointly, receive free on-site housing and utilities, and could supplement their income with on-site enterprises such as fish smoking, firewood and ice sales, and taxidermy. There would also be an opportunity to do work on the major construction project slated to take place at the campground. They also understood that during the "off season" (October through March) they would only be required to be caretakers and provide security for property stored at the campground by seasonal campers.

During negotiations Mr. Scott proposed that they be paid \$2500.00 per month for twelve months rather than \$5000.00 per month for six months to ensure that they had a steady income all year. The Sampsons were not receptive to this proposal but accepted on the understanding that if they accepted this arrangement, they would be offered the position.

The Sampson family moved from their home in Manitoba to Christina Lake and started work six days after accepting the position. The campground opened to the public on May 1, 1995 and closed September 30, 1995. On the first day of work, during the orientation meeting with Herb Meiner and Terry Scott, part of the garage was made available to the Sampsons for taxidermy work in the "off season". They were told at this time that in order to get paid they would have to get a company name and submit an invoice which included G.S.T. The Sampsons obtained the company name "Sampson's Timberline Ventures" and invoiced Christina Lakeside Resort on a monthly basis. They were then paid with two cheques: half the amount drawn on the account of "Brenher Group Management Corp." the other half on the account of "Christina Lakeside Resort Ltd." The Sampsons entered into evidence copies of four of these cheques with the signatures of Herb Meiner and Ed Walters. They were also provided with Workers' Compensation coverage.

During the orientation on the first two days of work , it was apparent that the scope of the work was greater than had been held out to them during the negotiations for the position. This was a 161 site campground on over eight acres of land. The Sampsons raised their concerns about the

requirements to operate the campground and were told to do the best they could and problems would be discussed as they arose.

At the beginning of May, 1995, Mr. Meiner advised the Sampsons that Mr. Scott was no longer with the company.

At the beginning of July the Sampsons could not keep up with the demands of the campground and advised Mr. Meiner that they would need help. He advised that they should find someone who would do the work as inexpensively as possible. They hired someone on an on a casual basis who they paid themselves and were reimbursed later by Christina Lake Resort.

During the first camping season the Sampsons were able to sell firewood for the net amount of about \$300.00 and ice for the net amount of about \$2500.00.

Although Mr. Meiner was located at the company office in Victoria, he was involved in all aspects of the operation of the campground and directed the Sampsons in all aspects of their work by requiring weekly reports in writing or by telephone. They were not permitted to make many decisions on their own without prior approval from Mr. Meiner.

Although no formal contract was drawn up as was indicated in the Letter of Intent, this was not a significant concern for the Sampsons initially because there was a six month probation period to work through. At the end of the probation period the Sampsons approached Mr. Meiner regarding his satisfaction with their work and they were advised to continue.

At the end of the first camping season, Herb Meiner attended the campground and directed that a number of tasks be completed including: the clearing of the campground in order to prepare the grounds for construction, salvaging plywood, removing and burning debris, pulling cedar float logs out of the water, removing hydro poles and attachments, storing picnic tables, removing water taps, salvaging sinks, toilets, electrical panel boxes, hot water tanks, and cinder blocks from washroom buildings and demolishing one of the buildings; dismantling the gazebo and salvaging that lumber, arranging sewage pumping service; felling, dicing or salvaging twenty-three trees, spreading sand on the beach using a tractor, dismantling a shed and salvaging materials, and pouring concrete footings.

The Sampsons completed the work as requested and asked Mr. Meiner for compensation which was never paid.

In October 1995, Mr. Meiner instructed Mr. Sampson to fell an additional forty-one trees which were in the way of the proposed roadway and the site of the new buildings. Mr. Sampson also cut down another twelve trees later while he was on the Brenher Construction payroll.

In November 1995, Herb Meiner attended the campground with the Brenher project supervisor, Martin Christman. The Sampsons were advised that Mr. Christman would be in charge of all construction on the site. From the time Mr. Christman arrived, there was ongoing interference from him with regard to various aspects of the campground operation: the use of the garage and the tools (the Sampsons' and the resort's) housed there, the use of the workshop, he took over the use of the campground office housed in the Sampson's residence, he and his crew used the washroom and bedroom on the lower floor of the residence which Mrs. Sampson was left to clean, he and his crew left debris throughout the campground and did not co-operate with the Sampsons to complete certain projects to make the campground more usable.

In January 1996, Mr. Christman asked Mrs. Sampson to do occasional typing but the job became full-time.

At the end of April, 1996, Mr. Meiner told the Sampsons that because the campground was not opening on the first of May as planned and since he was paying them to operate a campground they had to do other work to earn their money in lieu of operating the campground.

They were controlled by Mr. Meiner in various respects. He would give authorization to the Sampsons and then withdraw it without negotiation or notice: Although the Sampsons had been permitted to sell firewood and ice during the first camping season, those opportunities were removed during the second season. Mr. Christman refused to provide a reasonable and safe place to store the firewood. They were advised that the firewood would make the place look messy. The Sampsons had also made arrangements to cut lawns for some of the campground residents but were told by Mr. Meiner in the second camping season that they were working on company time and any money they made belonged to the company. Initially the Sampsons had been permitted to install a two way radio to make their work easier. In the second season they were asked to take down the antenna.

The Sampsons entered into evidence copies of monthly expense reports of items paid for by Christina Lakeside Resort Ltd. The items were the full range of everything needed to operate the campground from office supplies to gas for the chainsaw.

On September 20, 1996 a letter dated September 13, 1996 on Christina Lakeside Resort Ltd. letterhead signed by Herb Meiner on behalf of Wicklow Properties Ltd., Christina Lakeside Resort Ltd. and Kootenay Boundary Joint Ventures, was delivered to the Sampsons by facsimile. The Letter was addressed to the Sampsons personally and not to Sampson Timberline Ventures. This letter was entered into evidence. The letter advised:

Please consider this letter formal notice to you that we will not be extending the term of our Agreement with you beyond the end of our current season. Accordingly, our agreement with you will terminate on October 15, 1996.

We confirm that on the date of termination, you will return all keys, tools and any other equipment or possessions of Christina Lakeside Resort and provide vacant possession of our on-site manager's premises.

This letter was also delivered by registered mail on September 26, 1996.

There was a delay in getting paid for the period from September 1, 1996 to October 15, 1996. When the Sampsons contacted the Victoria office to make inquiries they were told that the \$3800.00 (approximately) was being held as a damage deposit, and would not be released until after they vacated the premises. The Sampsons responded that they would not move until they received the funds. On October 18, 1996, the Sampsons received a Brenher Construction company fax (which was entered into evidence) signed by Bruce Macleod, the company accountant, which stated:

As per my discussion with Valerie, you are able to vacate the managers residence at any time, and that you will vacate upon receipt of your final pay from Sept. 1/96 to October 15/96. These cheques will be forwarded to Martin Christman for him to distribute. Please read the attached agreement and return a signed copy by fax, with the original to Martin, as the cheques will not be released until such time as this is received. I will await this fax before sending the cheques.

The Sampsons advised Mr. Macleod that they would not be signing the agreement which purported to prevent the Sampsons from disclosing any information of a confidential or proprietary nature concerning the development and operation of the resort. They also advised that they would not be moving out until they were assured that the cheques had cleared their account. They moved out in the last week of October.

Herb Meiner submits that:

When he purchased the resort he wanted to create a " five star" resort. He had no previous experience in operating a resort of this nature. Terry Scott, a shareholder in Wicklow Properties, brought in the Sampsons to operate the resort. Contact was directly between the Sampsons and Mr. Scott who in turn would bring the information to Mr. Meiner.

It was clear from the outset that the arrangement with the Sampsons was not an employment agreement but a contract for services. The arrangement would give the Sampsons opportunities to generate more revenue in the off season.

He asked the previous on-site managers to guide the Sampsons during the first few days of work. There were three previous owners, two of whom did the bulk of the work cleaning up and managing the park nine months out of twelve.

Part of the contract was that the Sampsons would live in the on-site house rent free which would be more beneficial to them than just \$2500.00 per month. Since it was part of the agreement to provide the Sampsons with housing and the house was not yet vacant at the start date of the contract, they were provided with hotel accommodation.

The Sampsons were engaged because of their experience and he had to rely on them because it was his first experience operating a park. The continued phone calls and "faxes" were to work together with the Sampsons in resolving problems and not to control them.

The Sampsons were required to fill purchase orders for accounting purposes since the G.S.T. had to be kept track of. The purchase order system was not a control device. He was responsible to others in the companies and it was not appropriate for the Sampsons to be writing cheques for a business that was not their own.

During the first camping season he was making plans and getting approval to turn the campground into a construction-site. The Sampsons asked for help on how to deal with the clientele and new situations as they arose. This was a team effort and not a master servant relationship. That is, the Sampsons helped him and he helped them. Any inquiries he made regarding specific tasks were akin to a friend reminding another to complete the jobs. He stated that this was very much like a building contractor maintaining contact with all the trades to ensure the job was seen to completion. The Sampsons made decisions in many areas that he was not aware of and when he learned of their actions he was not dissatisfied. For example, there were problems with the septic system and the Sampsons dealt with it in a "free will" position. Mrs. Sampson brought in new office systems and made changes which he did not get involved in. The faxes which he sent to them were helpful and not directional. He was not at the campground on a day to day basis because he trusted them, otherwise, he would have been on site. He did not require reports and most contacts were initiated by the Sampsons.

When construction started, Mr. Sampson cut trees down and was told that he could keep the trees as firewood. There was a tractor on site which was not in great condition but was available to Mr. Sampson for his use as required for work around the campground.

Martin Christman was working with the Sampsons. As the construction project continued, Mr. Sampson mentioned that he wanted extra work and Mr. Meiner relied on Mr. Christman to determine what Mr. Sampson could do. Mr. Sampson was hired as an employee of Brenher Construction Ltd. There was no policy in place regarding overtime although overtime was not encouraged because he did not want people working long hours. Mr. Sampson was paid overtime and holiday pay as directed by the Director after a separate Employment Standards complaint was made by Mr. Sampson .

An excavator known as a "Kubota" was brought on site by John Mehman who discounted the cost of the excavator to Mr. Meiner so that Mr. Sampson could have it available for his use to repair damage done to the beach from flooding.

The Letter of Intent was in no way misleading regarding the hours required to operate the campground. The contract was never drawn up because there were problems with Mr. Scott and Mr. Meiner believed that the Letter of Intent would cover the relationship with the Sampsons.

He believes that there was a misunderstanding regarding Mr. Sampson's involvement in running the construction project but it was not feasible for Mr. Sampson to do both jobs. Mr. Sampson worked "under" Mr. Christman and there appeared to be a personality conflict between the two as there was a dispute over who had responsibility for what at the campground. As time went on many issues overlapped regarding the construction project and the management of the campground resort. There was an internal control problem of who was more important. He tried to appease them by saying they were equally important.

With obligations to meet, he had to put construction as a priority and the Sampsons were not privy to a lot of the decisions made in that regard. Whether the office in the house was to be used for resort purposes or for construction purposes was the prerogative of owners.

He was aware that Mrs. Sampson was working in the office and believed her to be working on reservations and preparing to open the campground.

It was determined that a larger sewage treatment plant was required and it was necessary for on-site managers to have knowledge of its operation. Mr. Sampson was offered the option of being trained. He was not forced to do so and there was no expense to him. Mr. Sampson was told that this was an opportunity to improve his abilities and his career. If Mr. Sampson passed the course then they would discuss future arrangements regarding the operation of the plant. When Mr. Sampson did not pass the course the decision was made that the resort manager should be someone who understood more regarding the construction in the park.

The radio antenna was taken down because the Realtors were making complaints regarding its appearance. The Letter of Intent specified that prior approval would have to be obtained from Wicklow Properties for such matters.

The Sampsons had the ability to earn extra income. They chose taxidermy which did not work at the time because of construction. They had other options which they could have exercised.

The Letter of Intent laid out the "ground rules" of what was expected and was not misleading.

The Letter of Intent which was submitted into evidence by both parties is a two page document entitled "Letter of Intent to a Formal Contract for Services at Christina Lakeside Resort" between Wicklow Properties Ltd. and Gordon (Sam) and Valerie Sampson. It states that "the Formal Contract for Services will be a contract for services and not an employment agreement". It states that the Terms of the contract "will include probationary periods of one(1) and five (5) months, with the goal of a longer term relationship, on mutual terms and conditions".

The section of the Letter of Intent entitled "Remuneration" states:

Monthly Fees: (a) \$2500 per month, plus GST;
(b) free occupancy of the on-site residence, excluding utilities;
Additional Fees: The Managers will be permitted to sell firewood, smoke fish, provide goods or services to and for the use and consumption of the private guests/members of CLR from time to time for additional fees, subject to the prior approval of WPL.

The section of the Letter of Intent entitled "Duties" states:

Duties will include the regular undertaking or direction from time to time, the following (but not limited to):

- a) to manage the affairs of the owner of the property (CO-OP):
- repairs and maintenance of the park and its improvements
 - purchasing supplies
 - entering and overseeing co-operative contracts for operation of the RV Park and Lands
 - negotiate, arrange and keep insurance on the property
 - pay taxes
 - pay common expenses
 - collect fees from members
 - report to directors
 - make deposits
 - prepare and submit budgets and statements
 - maintain a petty cash fund
 - clean washrooms daily
 - maintain a storage/workshop with tools and implements to reasonably carry out the work required
 - maintain the grounds/lawns, generally keep the park clean
 - pick up of trash and refuse and removal of garbage to the dump
 - oversee the property in the off-season
 - do private work for members for extra fees
 - report unusual circumstances
 - enforce the rules and regulations
 - keep gate control
 - police the public areas
 - handle disturbances
 - take 'emergency' calls
 - be directly responsible to CO-OP directors, through WPL
 - conduct all own personal and business in matters in a professional and courteous manner, no different than WPL or CO-OP matters
 - keep private and confidential all material or information of WPL, or the park as requested;

ANALYSIS

In deciding whether Valerie Sampson was an employee or an independent contractor, I am bound by the following 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;

Section 1 of the *Act* defines “**work**” as:

“**work**” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

These definitions must be given a liberal interpretation according to the BC Court of Appeal [**Fenton v. Forensic Psychiatric Services Commission** (1991)56 BCLR (2d) 170].

The purposes of the *Act* as set out in Section 2 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 sets that the requirements of this *Act* cannot be waived:

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.

In addition to the *Act*, I must also consider the jurisprudence concerning the determination of employees versus independent contractors.

In distinguishing between an employee/employer and a contractual relationship, the courts have traditionally considered four factors:

1. **Control** - is there a traditional master/servant relationship? 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.

2. **Integration** - to what extent or degree is the individual involved in the operation or organization? The Integration Test examines the extent or degree to which an individual interacts with the organization or operation. This test examines whether an individual is an integral part of the operation or is merely ancillary to the operation.
3. **Economic Reality** - is the individual in business for himself, or does he work for someone else? 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 the Appellant bears any risk of loss or possibility of profit?
 - 2) **Financial Investment** - does the Appellant have an ownership of machinery and equipment and if so, is the investment substantial?
 - 3) **Lasting Relationship** - is there an ongoing permanent relationship between the parties?
 - 4) **Diversity** - is the Appellant permitted to provide the same or similar services to other parties and, if so, is she actively involved in searching out other business opportunities?
1. **Specific Result** - is the individual required to perform general work or to only accomplish a specific job? 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 it is simply required to provide general efforts on behalf of the employer.

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

- 1) **Specific Work** - if the Appellant is an independent contractor, it is agreed that certain specific work would be done for Brenher. Conversely, in an employee/employer relationship, the Appellant agrees to provide labour and services for Brenher.
- 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.

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, at 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.... But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.

In **Castlegar Taxi v. Director of Employment Standards** (1988) 58 BCLR (2d) 341, the Supreme Court of British Columbia noted:

The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship.

Valerie Sampson asks this Tribunal to consider ruling her position as an employee:

of Christina Lakeside Resort from April 11, 1995 to September 30, 1995;
of Brenher Construction from October 1, 1995 to June 30, 1996; and
of Christina Lakeside Resort from July 1, 1996 to October 15, 1996.

In their submissions the Sampsons explained the relationship and structure of all the companies and Mr. Meiner's involvement with the campground:

All companies - Wicklow Properties/ Christina Lakeside Resort/ Brenher Group Management Corp. and its subsidiary Brenher Construction - all share one common principal, Herb Meiner, who is actively involved in running all of these companies simultaneously.

Christina Lakeside Resort was the company which operated the active campground.

Brenher Construction was the company in charge of the construction project, which during the 1995/96 closed camping season (October 1/95 to June 30/96) demolished the existing campground down to bare land and built a new campground from the ground up.

In later submissions the Sampsons state:

Wicklow Properties Ltd. was used to contract us prior to him [Mr. Meiner] taking title to 388392 BC Ltd. Brenher Construction Ltd. is his subsidiary company of Brenher Group Management Corporation. Meiner Investments Ltd. controls Kootenay Boundary Joint Venture who is the developer of the land and owner of issued and outstanding shares of the strata co-operative corporation. 388392 BC Ltd. is the registered owner of this land and Christina Lakeside Resort Ltd. is the operator of the campground and the co-operative corporation situated on this land. Judah Properties Ltd. owns the adjacent property on which the sewage treatment plant and field are located and Judah provides sewage disposal services for a fee to the co-operative corporation.

Mr. Meiner in his cross-examination of Mrs. Sampson got her to admit that she was not entirely certain regarding the workings of the corporations or of their structure. He challenged her description of one of the companies as a “strata” and wanted to clarify that it was a “co-operative”. However, in his evidence Mr. Meiner did not explain the structure of the corporations nor their relationship to each other nor did he deny or challenge that he was a principal actively involved in running all of the companies. When he was cross-examined, Mr. Meiner stated that he was part owner of Wicklow Properties and that Mr. Scott was a shareholder in Wicklow Properties.

The following documents as submitted by the Sampsons corroborate that the following companies were involved in some aspect of the campground and that Mr. Meiner was either a principal or an individual involved in each company with some authority to give direction:

1. Letter of Intent between *Wicklow Properties Ltd* and the Sampsons dated 5 April 95 signed by Terry Scott.
2. Facsimile memos to the Sampsons from Mr. Meiner on *Brenher Construction* fax forms.
3. Cheques to Sampson Timberline Ventures for half the monthly pay from *Brenher Group Management Corp.* signed by Mr. Meiner and Ed Walters.
4. Cheques to the Sampson Timberline Ventures for half the monthly pay from *Christina Lakeside Resort Ltd.* signed by Mr. Meiner and Ed Walters.
5. Letter to British Columbia Water and Wastewater Operators Certification Program dated April 3, 1996 on *Christina Lakeside Resort* letterhead signed by Martin Christman as Project Manager and Site Supervisor for *Brenher Construction Ltd.* and *Christina Lakeside Resort Ltd.*
6. Record of Employment for Gordon Sampson with the Employer’s name completed as *Brenher Construction Ltd.*
7. Letter from *Wicklow Properties Ltd., Christina Lakeside Resort Ltd.* and *Kootenay Boundary Joint Venture* signed by Herb Meiner on *Christina Lakeside Resort Ltd.* letterhead to the Sampsons dated 13 September 96 giving them notice.
8. Letter to the Sampsons from the offices of Mullen DeMeo Dalsin Barristers and Solicitors dated October 17, 1996 identifying themselves as solicitors for *Christina Lakeside Resort Ltd.* and for the *Kootenay Boundary Joint Venture*, the developer for the project.

The Sampsons argued:

Not only did Herb instruct us in our duties at Christina Lakeside Resort, but also instructed us to perform duties for Judah Properties and Brenher Construction. Herb instructed us and manipulated us to work for his other companies how and when it suited him to his best advantage and in the same manner as an employer would instruct his employees for what and where and when to do things.

In the Determination the Director stated:

The difficulty I had with your complaint is that during the 18 month period you and Gordon Sampson had different relationships with Brenher. In the beginning you and Gordon Sampson jointly entered into an agreement with Brenher as campground managers under a contractual agreement. You jointly signed a Letter of Intent which clearly outlined the contractual agreement ...

Gordon Sampson entered into another agreement with Brenher when he began working at an hourly wage as a construction labourer at \$12.00 an hour. This remuneration was over and above the money you received from the campground manager. According to your records you worked from December 18, 1995 to April 26, 1996, averaging over 40 hours per week, and you have submitted an Employment Standards Complaint form alleging you were not paid properly for all Regular Wages, Overtime, Statutory Holiday, and Vacation Pay I have done the initial calculations of all your hours and I concur that there is outstanding wages owed. Brenher has complied with my request to forward a cheque in the amount of \$1570.32 plus interest. The money will be held in Trust with the Director of Employment Standards pending the outcome of your complaints.

The Sampsons submitted that the letter of intent served as an understanding by both parties that a formal contract would be drawn within one month. Although they asked Mr. Meiner several times throughout their employment, about a formal contract, one was never presented by him. Further, the letter of intent described the duties which would be required to run an operational campground. The Sampsons argued that there is no mention of construction work nor could the demands the construction project placed upon them be considered as part and parcel of regular campground duties.

In their submissions to the Tribunal the Sampsons stated:

The scope of duties were to operate the campground in the summer season and act as a form of security in the winter season by showing a presence on the property and taking reasonable care to safeguard the property and its contents, and were agreed upon by both parties. No where in negotiations nor in the letter dated April 4/95 nor in the letter of intent was it understood or agreed upon that the upcoming project construction work was included as part of campground operational duties. In fact, as outlined in the April 4/95 letter, ...it was understood and agreed upon that any additional works on the construction project would be a separate issue of employment or contract.

The Sampsons argued that most of the duties that they were required to do were not of a management, executive or administrative nature. In their first letter of complaint to the Director they stated:

All of the work performed for the company was of a blue collar nature or clerical nature. All duties for which a manager would normally be responsible, were in fact handled by Mr. Meiner and /or Head Office. There were no employees to speak of, to be supervised, other than ourselves. The day-to-day operations of a 161 site campground in 1995 were handled by Mr. and Mrs. Sampson. In 1996, the campground was downsized to 131 sites.

I accept this evidence and find on a balance of probabilities that the Sampsons were not “managers” and can not be excluded from the *Act* on that basis.

The Sampsons argued that they were supervised and controlled by Mr. Meiner through the frequent telephone and written communication required by Mr. Meiner. Mrs. Sampson testified in great detail about the number of contacts she had to make to Mr. Meiner in order to get his prior approval to make even the most minor of decisions. She also submitted copies of notes which were sent back and forth to Mr. Meiner via facsimile. Many of the contacts were with regard to expenditures as Mr. Meiner required that a purchase order system be in place. The Sampsons set out in their letter to the Director on July 14, 1997 that they had no spending authority other than small petty cash purchases for minor or necessary items. There were also communications to Mr. Meiner regarding difficulties presented with the construction project interfering with the smooth operation of the campground. There were also lengthy reports to Mr. Meiner in specific detail regarding all manner of activities at the campground. Mrs. Sampson testified that if they did not report to Mr. Meiner every few days he would phone or fax with inquiries as to why there had been no report. She testified that Mr. Meiner telephoned them at least once a week and spoke to them for the duration of a half hour to one hour to review what they had done and to tell them what to do next.

In the Determination the Director concluded that these contacts were a "normal contractual expectation with regards to your contract". I find that she did not err entirely in making this conclusion. That is, it was anticipated by both parties that this campground was in a state of transition with a major construction project to take place to make considerable alterations to the campground. Bearing that in mind, it would not be outside reasonable expectations that the Sampsons would need to seek guidance regarding information being passed on to clients or guidance for resolution of any situations which arose due to the anticipated construction. However, having made the finding that both parties were aware of the ensuing construction and that the Sampsons would have anticipated operating the campground under those circumstances, this would in no way mean that the Sampsons could have been expected to do the actual construction related work for no additional compensation. Further, the contacts from Mr. Meiner reminding the Sampsons what tasks to attend to and when, were also of a nature found within the bounds of an employer/employee relationship. Mr. Meiner was, after all, operating in the role of employer and not of “friend” as he claimed. I find on the balance of probabilities that Mr. Meiner was actively supervising the Sampsons and exercising control over their work.

I find that the Director erred in concluding that the campground operation work done by the Sampsons was done as independent contractors and not as employees. In the Determination the Director’s Delegate stated:

There are certain aspects of the position that may have employee/employer aspects to it when not taken with the whole picture. You worked for Brenher for 18 months under a contract. According to your written statement Brenher did not live up to his

end of the bargain as when you did extra work over and above the contract he did not pay you, also he terminated the employment contract in October, whereas the intent of the contract appears to be that you would have minimal amount of work during the winter and be able to supplement your income at this time.

The company never kept a schedule of hours nor did you provide me with a schedule of hours.

The fact that the intent of the relationship was a contract, with limited direction and control, the fact that you were allowed to make a profit, the fact that you had your own company and you did work for more than just Christina, are all conditions of a contractor. In addition, the name of the company was used for invoicing and for the GST. The fact there were no remittance to the Receiver General or no deductions taken off your cheques on your behalf have all persuaded me that you were an independent contractor and not an employee.

I find that the Sampsons were employees of Christina Lakeside Resort Ltd. for the following reasons:

1. Based on all the evidence submitted by both parties it is clear that the Sampsons were “employees” within the meaning of the *Act*. They were allowed to perform work normally performed by an employee. Indeed they were directed to provide the labour and service through the Letter of Intent and Mr. Meiner’s regular contact by telephone and in writing and periodic visits. Mr. Meiner’s explanation that he was reminding the Sampsons regarding the completion of the work as a friend would does not relieve him from having his actions characterized as those of an employer.
2. Although there may have been the mutual intention initially to operate as independent contractors, an agreement to waive any of the minimum requirements of the *Act* or the *Regulations* is of no effect. The nature of the relationship between the Sampsons and the employer is one of employment and any language to the contrary in the “contract” does not override this reality.
3. Under the “control” test, the Sampsons would also be found to be employees as Mr. Meiner was in a position to order what was to be done and how. There may have been instances where the Sampsons completed work without Mr. Meiner’s involvement but I find that on the whole he required contact from the Sampsons regarding the operation of the campground and involved himself on a frequent and lengthy basis with regard to the completion of that work.

4. Although there were extra staff hired during the camping seasons to clean washrooms, the Sampsons had no discretion as to the pay of this staff, nor were they permitted to bill the employer for any amount different than what they had paid out of their own pockets to the staff until they were reimbursed. An independent contractor would have set his own terms with the staff and billed whatever amount he desired or incorporated it into his costs.
5. The Sampsons also qualify as employees under the “integration” test. They were integral to the operation of Christina Lakeside Resort. Apart from the two part-time staff who only cleaned the washrooms, the Sampsons were the only staff operating the Resort. There were other activities taking place at the resort location such as the selling of property and the construction but the main purpose of the resort was being handled by the Sampsons. They were also required to live on-site when the campground was not open to provide security.
6. The application of the “Economic Reality” test also leads me to find that the Sampsons were employees. I find that the Sampsons were carrying business for Christina Lakeside Resort Ltd. and not for themselves. The Sampsons bore no risk of loss. Whether the campground was full or empty, open or closed from April to October, they would be paid the same amount. They had some opportunities to earn income outside the operation of the campground but these were quite separate services and income received in those instances had no connection to profit from the operation of the campground successfully. These services, such as the selling of firewood and ice were only permitted if approved first by the employer. The Sampsons had no financial investment in operating the campground. The equipment and machinery to maintain the campground was owned by the employer. All supplies needed to operate the campground were paid for by the employer. There was no defined time period for the duration of the “contract”. I find that there was an ongoing permanent relationship between the parties. The Letter of Intent also set out a probation period which is typical only of an employment relationship. I find that there was no diversity in the operation of the Sampsons’ “business”. They were not permitted to provide the same or similar services to other parties. The Sampsons were engaged personally and not their company “Sampson’s Timberline Ventures” which was created only after they were hired as a condition set by the employer before they would get paid.
7. The “Specific Result” test also leads me to a finding of an employment relationship. The Letter of Intent sets out a lengthy list of duties and statement that the Sampsons are not limited to the listed duties. I conclude from this and from the evidence presented that they were required to provide general work and not only to accomplish a specific job. They were providing general efforts on behalf of Christina Lakeside Resort Ltd. I find that they were also required to put their own services at the disposal of the resort. It was not anticipated by either party that someone else would provide the work. They were required to maintain a personal presence at the campground all year.

I find that the Director’s Delegate did not give sufficient consideration to the nature of the daily relationship between the Sampsons and the employer. The following factors she listed as part of her reasons for arriving at her conclusion: the company did not keep a schedule of hours, nor make any deductions; the Sampsons used their company name to invoice for their pay and GST; there was no remittance to the Receiver General, were not determinative of whether there existed an employment relationship, rather, they were symptoms of an erroneously characterized relationship. It may bear repeating that the parties could not contract out of the protection of the legislation.

Time Worked For Christina Lakeside Resort Ltd.:

As to the hours worked by the Sampsons, Mrs. Sampson testified that they were required to be on site and available to serve the public from 7:00 AM until 11:00 PM. They were to patrol the campground at 11:00 PM and be available for any emergencies throughout the night which did arise from time to time. In their letter to the Director dated July 14, 1997 they stated that :

We worked at all tasks as time allowed and dictated proper, seven days a week every day during the open gate hours from 7:00 AM to 11:00 PM. We are not saying that we each worked 16 hours every single day, but we did put in at least 12 hours each, if not more, each day, as our energy levels allowed.

I accept this evidence and find that on the balance of probabilities the Sampsons each worked twelve hours per day from April 11, 1995 to September 30, 1995 and from July 1, 1996 to October 15, 1996 for Christina Lakeside Resort Ltd..

Construction related (non campground operation) work performed by the Sampsons:

I also find that the Director did not give due consideration to the work performed by the Sampsons for the construction project operated by Brenher Construction Ltd. which clearly did not form part of campground management or operation services even if a contract relationship was found to exist.

Mr. Sampson testified that at the time of entering into the “contract” there was no knowledge of the extent of the construction work and they were not in a position to bid on it.

The Sampsons entered into evidence a letter dated April 4, 1995 which they delivered by facsimile on April 4, 1995, to Mr. Scott in which they wrote in part:

If however, your plans should include other duties or the building or repairing of various structures such as docks, washroom facilities, fencing, etc., during the winter, (1) a monthly salary, or, (2) a straight wage for the duration of the project , or, (3) a contract labour price for the project, can be negotiated. We trust that you would favour us as first choice for any winter construction projects you may have which are within our capabilities.

Time Worked by the Sampsons for Brenher Construction Ltd.:

Mrs. Sampson testified that she and her husband prepared a detailed list of dates and hours that they worked and descriptions of work performed from October first, 1995 to November 7, 1995 which totalled 204.75 hours. A copy of this list was entered into evidence. She claimed that they presented this to Mr. Meiner and he appeared surprised and said that he would have to consider it later as he was so busy with the construction project. Mrs. Sampson testified that Mr. Meiner told them that it was not unreasonable for them to be paid for this additional work. Mrs. Sampson testified that on November 5, 1995 they approached him again and he still had no response but asked them not to worry as they would be treated fairly.

Mrs. Sampson testified that several weeks later Mr. Meiner was again asked about the hours they had submitted and his reply was the same: that he had just too many other things to tend to but he

stated that he would speak to Mr. Christman and have Mr. Sampson placed on the Brenher Construction payroll. When Mr. Sampson approached Mr. Christman two weeks later about being on the payroll he claimed he knew nothing about it but added Mr. Sampson to the payroll at that time.

In January 1996, the Sampsons delivered the October time sheet once again to Mr. Meiner as he claimed to have lost it.

The Sampsons submitted that in April, 1996, they met with Mr. Meiner with regard to the work done in October and were informed at that time by Mr. Meiner that his partner, Ed Walters, felt that the work formed part of the regular campground duties and they were not to be paid. Mrs. Sampson testified that she and Mr. Sampson pointed out that in accordance with their agreement of the scope of duties prior to hiring, that any works undertaken after the summer season closed, would be paid for as additional work. They also pointed out that demolition of structures, felling of some seventy-six trees and land clearing under any stretch of imagination could not be considered within the scope of regular and annual campground duties. She testified that Mr. Meiner agreed with them and advised that he would persuade Mr. Walters. She testified that she and Mr. Sampson had no choice but to give Mr. Meiner the benefit of the doubt and continue to wait.

In his evidence Mr. Meiner stated that he could not recall receiving the time sheet as it was a very busy time.

Mrs. Sampson testified that they continued to make inquiries regarding payment and Mr. Meiner continued to use "one stall tactic after another". The Sampsons entered into evidence an invoice dated June 30, 1996 for payment of the work. Mrs. Sampson further testified that by July 1996, Bruce Macleod, the company accountant, confirmed that a cheque for payment of the work (186 hours at \$12.00/hour plus G.S.T. for a total of \$2388.00) had been drawn but not signed and indeed the cheque never arrived despite their repeated requests throughout August and September of 1996.

In his evidence, Mr. Meiner stated that there had been some discussion about Mr. Sampson being given the trees he felled as payment. Mr. Meiner admitted that the trees remained piled on the property .

I find that on a balance of probabilities, the work as set out in the time sheet for October/November 1995 was completed by the Sampsons as employees :

1. they were controlled and directed by Mr. Meiner from time to time which tasks were to be done as the need arose for Brenher Construction Ltd.;
2. had it not been for the construction project, this work would not need to be done and I cannot accept that it would form part of operating a campground or of maintaining or repairing this particular campground;
3. Mr. Sampson did identical work while on Brenher Construction Ltd. payroll as an employee and which other employees did, that is, work normally performed by an employee;
4. there was no meeting of the minds to do this work as independent contractors or to include it in the operation of the campground;
5. Mr. Sampson was operating heavy machinery and tools which were not his own in order to complete this work.

Construction related work performed by Valerie Sampson:

In addition to the construction work performed in October and November ,1995, with her husband, Mrs. Sampson submitted that in November, 1995, Mr. Christman instructed her on three different occasions to go to Grand Forks to purchase needed construction supplies. Between January and April 1996, he instructed her on ten different occasions to do the same.

Mrs. Sampson testified that in January 1996, Mr. Christman asked her to work in the office on an "as needed" basis performing typing and clerical duties and this work very quickly became full-time. She received flowers and a note in February acknowledging her work for Brenher prior to February 14, 1996. This note was entered into evidence and it stated:

Happy Valentine's Day
Thank you for your never ending help,
with work & assignments
from Brenher Const.

Mrs. Sampson argued that this note confirmed that she had done a great deal of work for Brenher Construction prior to February 14, 1995.

When I asked Mrs. Sampson regarding any discussion about payment for this work she testified that Mr. Christman advised her that he would keep track of the hours and submit for payment, but payment was never received. I also asked her if she had provided a record of her time worked to the Director during the investigation or if it was included in the material before the Tribunal. She responded that she had records in her keeping but had not provided them to the Director and did not have them at the hearing.

Mr. Meiner testified that he knew Mrs. Sampson was in the office performing duties which included reservations and preparing for the campground to open.

Mrs. Sampson testified that the campground related office work such as answering inquiries and receiving bookings was being done in the evenings.

Although I accept that Mrs. Sampson was doing construction related work for Brenher Construction Ltd. between October of 1995 and April of 1996, I am unable to make a finding of how much work. I have some difficulty accepting that she was working full-time, because when she wrote to the Director in July, 1997, with information to add to the initial letter of complaint she set out in great detail the following:

We also spoke to Mr. Meiner of other work we had performed in the off-season. In accordance to our original agreement, our remuneration covered a six month heavy work period; being the summer tourist season, and on-site residence for the winter off-season. For this winter period, no previous consideration had been given by neither Christina Lakeside Resort nor us as to the amount of time required to book reservations for the upcoming tourist season. We pointed out that during January to April, we answered some 1200 requests; both from mail and telephone calls from potential campers. Requests for information covered queries on the facilities, amenities, availability dates and rates. Most calls ended with a request that a brochure and information be mailed or faxed to them. 200 inquires in four months

equated to an average of 300 calls per month or 75 calls per week. The time spent on each call was approximately 1/2 hour, which included telephone time determining availability to accommodate the requested length and dates of stay and the typing of a one page letter tailored to that request. Upon receipt of the mailed or faxed information, clients usually placed a second call to book a reservation, which entailed additional time spent on collecting the deposits and mailing subsequent confirmation receipts. All of this work had to be performed manually and with a typewriter as the company did not provide a computer for speed of information preparation and computerized reservations program.

From the above I would calculate that thirty-seven and a half hours per week from January until May 1996 were being spent on the campground booking work for Christina Lakeside Resort Ltd. She did not make any mention of office work for Brenher Construction Ltd. I find on a balance of probabilities that it was not feasible for Mrs. Sampson to be working full-time at both jobs and I am inclined not to believe she worked full-time at construction work during this period in light of the omission of information in this regard during the complaint process. I do accept that she was doing some work for Brenher Construction Ltd. at this time.

Mrs. Sampson testified that at the end of April, 1996, Mr. Meiner advised the Sampsons to work under the control and direction of Mr. Christman until the campground opened. She testified that Mr. Meiner explained the delay in opening the campground meant they would have to earn their pay otherwise. Mrs. Sampson was asked to work under the direct day-to-day supervision of Mr. Christman in the office. She also submitted that Mr. Christman advised that she would work under his direction on clerical matters in the office from 9:00 A.M. to 4:00 P.M., five days per week, minimum. On a daily basis she was assigned various clerical duties such as making telephone calls for Mr. Christman, typing letters, contracts, daily site reports, performing payroll calculations, sending faxes, making photocopies, writing up purchase orders, matching purchase orders to incoming invoices, checking of extensions on invoices, etc...

It bears noting that although Mr. Christman was in attendance during the hearing of this appeal, he was not called as a witness and did not challenge any statements made by the Sampsons which concerned him.

Having considered the evidence provided I find that on the balance of probabilities, Mrs. Sampson was an employee of Brenher Construction Ltd. between October 1, 1995 and June 30, 1996 for the following reasons:

1. this work was clearly distinct from work involving the "operation" of the campground and was for the benefit of the construction project.
2. she was performing work normally performed by an employee.
3. Mr. Meiner and/or Mr. Christman had control and direction of her with regard to the construction related work she performed.

Time Worked by Valerie Sampson for Brenher Construction Ltd.:

I accept Mrs. Sampson's calculation of time worked in October as submitted in the timesheet provided to Mr. Meiner in November of 1995 and that she worked full-time during the months of May and June in 1996. However, I am unable to make a finding regarding the amount of time she spent doing work for Brenher Construction Ltd. from November of 1995 to the end of April of 1996 and therefore refer this back to the Director for calculation.

ORDER

After carefully considering the evidence and argument, I find the Director's Delegate erred in her Determination and that the Appeal should be allowed. Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated December 1, 1997 and filed under number 97/930, be varied as follows:

Valerie Sampson was an employee :

of Christina Lakeside Resort Ltd. from April 11, 1995 to April 30, 1996;
of Brenher Construction Ltd. from October 1, 1995 to June 30, 1996; and
of Christina Lakeside Resort Ltd. from July 1, 1996 to October 15, 1996; and is entitled to regular wages, overtime, annual vacation pay and statutory holiday pay as per the *Act*.

The matter is referred back to the Director for calculation of the correct monies owed to Valerie Sampson.

Fernanda M. R. Martins
Adjudicator
Employment Standards Tribunal