

**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 -

Canadian Council of the Blind, BC-Yukon Division  
("CCB")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Hans Suhr
<b>FILE No.:</b>	97/576
<b>DATE OF HEARING:</b>	October 9, 1997
<b>DATE OF DECISION:</b>	October 30, 1997

**DECISION**

**APPEARANCES**

Carl Cartier	on behalf of Canadian Council of the Blind, BC-Yukon Division
Sharon Wagner	on behalf of Canadian Council of the Blind, BC-Yukon Division
Pamela Pacsay	on behalf of Canadian Council of the Blind, BC-Yukon Division
Peter Watson	on behalf of Canadian Council of the Blind, BC-Yukon Division
Raymond Draznin	on his own behalf

**OVERVIEW**

This is an appeal by Canadian Council of the Blind, BC-Yukon Division (“CCB”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated July 8, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). CCB alleges that the delegate of the Director erred in the Determination by concluding that Raymond Abraham Draznin (“Draznin”) was an employee and entitled to annual vacation pay. The delegate of the Director concluded that CCB owed Draznin the total amount of \$864.32 for annual vacation pay and interest.

**ISSUES TO BE DECIDED**

The issues to be decided in this appeal are:

1. Is Draznin an employee of CCB ?
2. Is Draznin entitled to annual vacation pay in the amount calculated by the delegate of the Director ?

**FACTS**

Draznin solicited donations for CCB by way of door to door canvassing from April 1, 1995 to October 31, 1996.

CCB supplied all materials required by Draznin for the purpose of conducting the canvass, for example, literature, identification, official receipts etc.

Draznin was to be paid on the basis of a sliding scale directly related to the amount of donations obtained. This rate was to be a minimum of 40% to a maximum of 50%.

CCB had contractual arrangements with an independent consultant, Peter Watson (“Watson”), to develop and manage a strategy for fundraising which included door to door canvassing. Watson was also responsible for recruiting canvassers and organizing geographical assignments so that the canvassers did not overlap areas.

Draznin was paid directly by CCB for his canvassing work.

Draznin “resigned” from CCB at the end of October 1996.

### **SUBMISSIONS OF THE PARTIES**

I received a great deal of evidence from all parties, both written and verbal, however I will only recapitulate the relevant portions of that evidence.

Sharon Wagner (“Wagner”) testified and stated that:

- she is the Executive Director of CCB;
- CCB had hired a firm called McKeown Marketing to perform canvassing on behalf of CCB;
- McKeown Marketing provided a number of canvassers with whom they had worked on previous fundraising activities for other clients. Draznin was one of those canvassers.
- CCB derives their income from a number of different sources, investments, bingo, canvassing and other fundraising activities;
- approximately 10% to 20% of the income is from the door to door canvassing;
- there were approximately 25 - 30 canvassers until September 1995 when that number was reduced to 4 or 5;
- all canvassers were free to decide when they wanted to canvass, however, CCB did offer suggestions as to time of day, areas, methods, etc.;
- McKeown Marketing approached CCB in August 1995 and advised that Draznin would no longer be utilized by them but as he was an effective canvasser, CCB might want to continue to utilize him;
- Draznin approached CCB in September 1995 and requested to be paid vacation pay. When Draznin was advised that only employees received vacation pay and that an employee’s pay was subject to deductions for income tax, C.P.P. and E.I., Draznin stated he would rather just receive an increase in his commission rate. Draznin’s rate was increased at this time;
- CCB did not take statutory deductions from any payments to Draznin;
- Draznin was a good canvasser although he did balk at following the rules;
- Draznin was supposed to be paid by cheque however on several occasions Draznin took his 50% from the donations and remitted the balance to CCB;

- Draznin consistently took 50% commission even though he did not reach the benchmarks necessary to justify that rate;

Carl Cartier (“Cartier”) testified and stated:

- he is currently the President of CCB and was a Vice-President at the time Draznin canvassed for CCB;
- he attended the meeting in September 1995 at which time CCB offered Draznin the option of being an employee;

Watson testified and stated that:

- his experience was that canvassers are paid on a commission basis and are independent contractors;
- the door to door canvassing program is considered to be part-time cash based employment;
- it was made very clear to the canvassers that they were not employees, however, there have been problems as most people generally consider themselves to be employees;
- he was aware that Draznin had previously worked with McKeown Marketing;
- he was responsible for developing a strategy for effective fundraising and to that end arranged to have McKeown Marketing conduct door to door canvassing activities;
- McKeown Marketing brought a number of experienced canvassers to CCB and Draznin was one of those;
- McKeown advised him that Draznin was no longer going to be required and he then suggested to CCB to enter into an agreement with Draznin;
- Draznin was a “top producer” as his ability to collect donations was at least 2 - 3 times the statistical average for canvassers;

Draznin testified and stated:

- he did not work for McKeown Marketing;
- his work was directed by CCB who assigned him an area, provided all materials necessary for the canvassing;
- he believed that McKeown Marketing owner Kevin McKeown (“McKeown”) was his manager;
- he negotiated his wage with Watson and Wagner;
- he also was employed in a program involving greeting cards;
- he was paid by cheque and in cash from CCB;
- he eventually quit;
- he wrote his resignation on a reporting sheet and also noted that “checks have been stolen-cash was also stolen, receipts and receipt books are missing...”

## ANALYSIS

The evidence provided by the parties was in some respects contradictory, so I must consider the credibility of the witnesses. The evidence provided by Draznin was rambling, vague, confusing and on many occasions he contradicted his own earlier evidence. Draznin was not able, or perhaps unwilling, to provide an explanation of how the receipts, which he stated were missing at the time of his resignation, were now a part of his evidence to prove that he was an employee of CCB. Where the evidence of Draznin differs from that of other witnesses, I find that the evidence of the other witnesses to be more credible.

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 between the parties which sets forth their understanding of the circumstances surrounding the performance of work.

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 the *Act*.

### **Jurisprudence**

To differentiate between an employee/employer and a contractual relationship, the courts have traditionally considered four factors.

1. **Control** - is there a traditional master/servant relationship ?
2. **Integration** - to what extent or degree is the individual involved in the operation or organization ?
3. **Economic Reality** - is the individual in business for himself, or does he work for someone else ?
4. **Specific Result** - is the individual required to perform general work or to only accomplish a specific job?

### **Analysis of the Jurisprudence**

#### **Control**

Perhaps the most important factor in determining the status of a person is the nature or degree of direction and control exercised by one party over the other. 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 characteristics of their relationship;

**Selection** - CCB, through McKeown Marketing, offered Draznin employment.

**Dismissal** - CCB accepted Draznin's resignation without any complaint of a breach of contract.

**Method of Work** - CCB provided all materials needed for Draznin, assigned geographical areas and identified the best time of day to call potential donors.

**Remuneration** - While Draznin and Wagner negotiated with respect to the percentage of commission that Draznin was to receive, such negotiation is the norm in circumstances of a commission remunerated position.

### **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.

1. **Integration** - is the work performed by Draznin integrated and done as part of the business of CCB or simply an accessory to the business of CCB ?
2. **Part and Parcel** - is Draznin an integral part of the organization ?
3. **Ordinary Man** - would an ordinary person view the relationship between Draznin and CCB as one of employee/employer ?

Clearly, in the case at hand, door to door canvassing for donations, while the income generated for CCB was only a portion of their overall income, it was nevertheless an integral part of CCB's business. The perception of the "ordinary man" would be of the view the relationship was one of an employee/employer because any cheques were made payable to CCB, not to Draznin. Draznin was also provided with identification and promotional material which identified him as being from CCB.

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



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

Draznin had no risk at all. In the case at hand Draznin supplied no capital, takes no financial risk, has no liability regarding the business of CCB and has an on-going, indefinite term relationship with CCB.

Draznin ventured no capital investment into CCB and can expect no return for profit other than which would result from increasing the level of donations. His commission rate of pay provides this incentive.

With respect to “diversity”, there was no evidence of Draznin performing the same or similar work 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 Draznin is simply required to provide general efforts on behalf of CCB through his canvassing activities.

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

- 1. Specific Work** - if Draznin is an independent contractor, it is agreed that certain specific work would be done for CCB. Conversely, in an employee/employer relationship, Draznin agrees to provide labour and services for CCB.
- 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, Draznin personally provided all labour and services relating to door to door canvassing.

If Draznin 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 verbal contract to provide labour and services by way of door to door canvassing.

Based on the evidence provided and on the balance of probabilities I conclude that Draznin was an employee of CCB. My conclusion is founded primarily on the evidence of the relationship between Draznin and CCB, which is more consistent with a relationship of employer-employee rather than one of a contractual nature.

Draznin is therefore entitled to be paid annual vacation pay from CCB. CCB is obligated to ensure that the requirements set forth by Revenue Canada with respect to statutory deductions, if any, have been met.

The appeal by CCB is therefore dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 8, 1997 be confirmed in the amount of \$864.32.

**Hans Suhr  
Adjudicator  
Employment Standards Tribunal**