



**WCAT**

**Workers' Compensation  
Appeal Tribunal**

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**WCAT Decision Number:** **WCAT-2007-03606**  
**WCAT Decision Date:** **November 21, 2007**

**Panel:** Marguerite Mousseau, Vice Chair

**WCAT Reference Number:** **053341-A**

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Section 257 Determination  
In the Supreme Court of British Columbia  
Victoria Registry No. 03 0304  
Deborah June Mombouquette v. Kenneth Randall Pruss and Telus Communications Inc.

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**Applicant:** Deborah June Mombouquette  
(the "plaintiff")

**Respondent:** Kenneth Randall Pruss and  
Telus Communications Inc.  
(the "defendants")

**Representatives:**

For Applicant: Monte W. Prior  
PEARLMAN LINDHOLM

For Respondent: Sarah L. Klinger  
WADDELL RAPONI



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## Noteworthy Decision Summary

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**Decision:** WCAT-2007-03606    **Panel:** M. Mousseau    **Decision Date:** November 21, 2007

***Status – Worker, Labour Contractor or Independent Operator/Firm – Use of status policies set out in the former Assessment Policy Manual and Workers' Compensation Reporter Decisions – Section 257 of the Workers Compensation Act***

This decision is noteworthy as it illustrates the complexity involved in determining whether the status of an individual under workers' compensation law and policy is that of a worker, labour contractor, or an independent operator/firm.

The plaintiff requested a determination of her status under section 257 of the *Workers Compensation Act* (Act). At the time of the motor vehicle accident (MVA) the plaintiff provided rehabilitation support services to clients. She had contracted services for three clients. The plaintiff argued that she was an independent operator at the time of her MVA. The defendant argued that she was an unregistered labour contractor who should be deemed to be the worker of the Insurance Corporation of British Columbia (ICBC) with whom she had contracted to provide services to the client who was with her at the time of the MVA.

The panel found that the plaintiff's status was that of an independent operator. She considered it appropriate to use the assessment policies concerning status set out in the former *Assessment Policy Manual* and *Decision No. 255* of the *Workers' Compensation Reporter* and not the current policies in the *Assessment Manual*. She considered it likely that the Workers' Compensation Board, operating as WorkSafeBC (Board), did not intend to alter the fundamental principles applicable to determining the status of an entity for the purposes of the Act, but there was a sufficient difference in the guidelines or factors used for determining status that it was appropriate to refer to the policies in effect at the time of the MVA.

The panel found that there was very little evidence that the parties with whom the plaintiff had contracted at the time of the MVA exerted control over her services, measured largely in terms of the restrictions placed on the plaintiff that would make her incapable of carrying on business on her own behalf. There was no indication that any of the parties with whom she contracted exercised control over the plaintiff's ability to promote her business or over the terms or conditions under which she provided her services.

The panel found that the plaintiff, as a supplier of labour, had an existence as a business enterprise separate from the companies and individuals with whom she contracted for the provision of her services. The plaintiff used her own vehicle for transporting her clients; she used her own home for the provision of respite care; and, she used her own equipment and office supplies for the administrative aspects of her service. In addition, she had provided for wheelchair access to her home by having a ramp installed. It does not appear that any licenses were required but she was responsible for the provision of insurance. All of these aspects pointed to a separate business existence, independent of the parties with whom she contracted for the provision of services. The plaintiff's ability to profit from her business depended on her own initiative and ability to obtain contracts for her service, to receive adequate funds under those contracts and to contain the costs of providing her service. In those respects, she was also largely independent of the parties with whom she contracted. There was no evidence the

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plaintiff employed anyone. The plaintiff met the description of a person moving from one job site to another to complete an assigned task and who was available to anyone who would pay for her services. Although the plaintiff's operations met certain aspects of the definition of labour contractor, to rely upon this alone would be inconsistent with what was stated to be the overarching test of "whether the supplier of labour has any existence as a business enterprise independently of the person for whom he works."

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## **Introduction**

On January 26, 2001 the plaintiff, Deborah June Mombouquette, and the defendant, Kenneth Randall Pruss, were involved in a motor vehicle accident. The defendant, Mr. Pruss, was driving a vehicle owned by the defendant Telus Communications Inc. By letter dated December 2, 2005, counsel for the plaintiff requested a determination pursuant to section 257 of the *Workers Compensation Act (Act)* with regard to the status of the plaintiff. Section 257 of the Act provides that the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court with respect to actions based on a disability caused by occupational disease, a personal injury or death.

Subsection 257(3) of the Act provides that Part 4 applies to proceedings under section 257 save for subsection 253(4), which imposes a statutory due date for decisions.

Under Part 4 of the Act, WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law or discretion arising or required to be determined under that part (section 254). WCAT is not bound by legal precedent (subsection 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Workers' Compensation Board, operating as WorkSafeBC (Board), that is applicable in the case (subsection 250(2)).

## **Issue(s)**

The issue on this application is the status of the plaintiff, Ms. Mombouquette.

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## **Background and Evidence**

At the time of the accident, the plaintiff was employed in the provision of rehabilitation support services to clients. In an affidavit sworn on November 30, 2005, she stated that she operated this business out of her home. Her communications to arrange contracts and meetings took place from her home and she prepared all client reports there. She also provided respite care for clients at her home. The respite care attendances could be for hours, overnight or for several days. She had a wheelchair ramp installed to allow clients to access her home for this purpose.

She stated that she is required to have insurance specifically to cover clients attending at her home for respite care. She also required a motor vehicle to transport clients and to provide rehabilitation support services to them. In addition, she needed a computer to prepare client reports and a copier/fax machine in order to operate the business out of her home. She had purchased the motor vehicle and all the office equipment and supplies and was not reimbursed for these expenses.

At the time of the accident, she had been transporting a client, Mr. Virgil Lima, for an outing and it was intended that he would then attend her home for respite care. Originally, she had been retained by Mr. H. Hayward, specialized adolescent & family counsellor, mental health consultant, to work with Mr. Lima. Subsequently, however, she contracted directly with the Insurance Corporation of British Columbia (ICBC) to provide these services to Mr. Lima.

She stated that, at the time of the accident, she was providing rehabilitation support under contract and she was paid by two individuals to provide these services. These contracts would be additional to the contract for services to Mr. Lima. She states that she had been hired by Mr. R. Habgood to provide assistance to him, as of January 10, 2001. He paid her directly for these services. At the time of the accident, she was also providing services to Mr. J. Helliwell, under a contract with his family. She was paid directly for these services by Mr. Helliwell's family.

The following documents were appended to Ms. Mombouquette's affidavit, in support of her statements:

- Exhibit A - A document titled "rehabilitation support worker contract" which is in the form of a letter from Mr. H. Hayward, rehabilitation consultant, to Mr. I. Clarkson, rehabilitation coordinator for the ICBC Rehabilitation Department, regarding Mr. Virgil Lima and Ms. June Mombouquette.

The document states that Ms. Mombouquette will provide recreational/social support services from April 1, 1998 through July 1, 1998 and enumerates the services

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included in these recreational/support services. These are described as “[c]ommunity, recreational opportunities, pool exercise workout, with a focus on general conditioning and physical rehabilitation,” “[s]ocial skills improvement, exploring the many community-based social opportunities,” and “[s]elf-advocacy, goal accomplishments within the context of Ms. June Mombouquette’s and Mr. Lima’s contractual agreement.” The services are to be provided at the “agreed upon fee for services rate of \$15.00 per hour” to a maximum of eight hours per week. Fifty percent of this rate will be applied to time spent for travel with an additional 32 cents per kilometre. It states that Ms. Mombouquette will provide monthly detailed billings and progress reports with copies forwarded to Mr. Clarkson and Mr. Hayward and that Ms. Mombouquette would provide safe and secure activity opportunities for Mr. Lima in consultation with Mr. Clarkson or his delegate. Additional expenditures or changes to the program schedule had to receive the prior approval of Mr. Clarkson. The document had been signed by Ms. Mombouquette and Mr. Lima.

- Exhibit B - An invoice for service provided by Ms. Mombouquette which provides the ICBC claim number, the ICBC contact and the client (Virgil Lima). The invoice is for services provided in March and June of an unspecified year.
- Exhibit C - A copy of an unsigned letter dated June 26, 1998, from ICBC to Ms. Mombouquette regarding Mr. Virgil Lima. The letter advises her that any payments made to her by ICBC are made on behalf of the insured as part of his benefits under the Autoplan Insurance. Under no circumstances was the plaintiff considered to be an employee of ICBC. As such, the letter goes on to say, ICBC was not responsible for making payments such as payments to the Board, Employment Insurance, Canada Pension Plan or other such benefits or insurance. ICBC was not deducting income tax from payments made to her and it was up to her to remit the appropriate income tax.
- Exhibit D - A letter from Rick Habgood to Ms. Mombouquette dated January 8, 2001 and titled “RE: Rehabilitation Support Services Contract.” Mr. Habgood states that it is to confirm that Ms. Mombouquette has been contracted to attend as a one-to-one support worker with him “to assist and participate in exercise rehabilitation for the period from February 1, 2001 through August 1, 2001. It states that Ms. Mombouquette “will provide services at 8 hours per week at 4 times per week” and that travel time per visit is “1 hour and mileage.” The agreed fees are at the rate of \$20.00 per hour, plus travel time at the rate of \$8.50 per hour and mileage at 38 cents per kilometre.
- Exhibit E - A letter dated March 9, 2001 from Douglas Helliwell, written “To Whom It May Concern.” The letter states that it is to confirm that June Mombouquette

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provides one-to-one support services for Jeremy Helliwell, “once per week on a monthly basis.” The service is two hours per week plus one hour for travel time and mileage. The services rate is \$15.00 per hour plus travel time at \$7.50 per hour and 38 cents per kilometre.

## Submissions

In a submission dated July 23, 2007, counsel for the plaintiff submitted that the plaintiff was an independent operator at the time of the accident. He notes that policy at item #AP1-1-1 of the *Assessment Manual* states that an independent operator performs work under a contract but has a business existence independent of the person or entity for whom that work is performed and that an independent operator is an independent firm. Counsel refers to policy #AP1-1-3 which sets out the factors used to assist in distinguishing an employment relationship from a relationship between independent firms and notes that the principal test is whether the individual doing the work “exists as a business enterprise independent of the person or entity for whom the work is done.”

The policy also notes that many small parties may only contract with one or two large firms over a period of time but they may be independent of the person with whom they are contracting in that they must seek out and bid on their own contracts, maintain their own books and records, and make appropriate contributions and deductions required by law. These parties may also retain the right to hire and fire their own workers and exercise control over the work performed by their workers. Counsel also notes the specific guidelines enumerated in policy #AP1-1-3 describe entities that would be considered independent firms. Under these guidelines, service industry firms that enter into two or more contracts simultaneously are considered independent firms. He also points out that the policy states these guidelines “will resolve the question whether a particular person or entity is an ‘independent firm’ in most cases.”

Counsel also cites the text, *Workers’ Compensation in Canada (2<sup>nd</sup> Edition)*, in which Professor Ison states that the most cogent indicator of whether a relationship is one of employment is whether the person works exclusively or almost exclusively for another. Professor Ison also notes that other tests include whether the person doing the work exists as a business independent of the party for whom the work is done or whether the person doing the work was part of the overall business organization of the other party.

Counsel notes that Ms. Mombouquette had multiple contracts at the time of the accident and she used her own home and provided her own office equipment and supplies in providing respite care to her clients. She exercised a significant degree of independence in providing this service and was partially responsible for determining whether it was profitable. She was responsible for obtaining clients, maintaining her own books and records and making the necessary contributions and deductions.

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Defendants' counsel, on the other hand, submits that Ms. Mombouquette was a labour contractor at the time of the accident and that she should be considered a worker of ICBC since she was not registered with the Board. Counsel cites policy at item #AP1-1-7 of the *Assessment Manual* which provides examples of proprietors who will be considered labour contractors. This policy states that labour contractors include proprietors or partners who are not defined as workers, do not have workers, or do not supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis. She submits that Ms. Mombouquette is not defined as a worker under the policy at item #AP1-1-3, she does not employ workers and she does not supply materials or revenue-producing equipment. Rather, at the time of the accident, she was employed under three separate contracts: one with ICBC, one with Mr. Habgood and one with the family of Mr. Heliwell. Accordingly, she fit within the definition of a labour contractor.

In rebuttal, plaintiff's counsel noted the policy cited by defendants' counsel, item #AP1-1-7, states that the category of labour contractor is applicable to persons who are not covered by the usual criteria for "independent firms" set out in policy item #AP1-1-3. In this case, however, the application of the normal criteria for independent firms results in a conclusion that Ms. Mombouquette met that designation. Accordingly, policy at item #AP1-1-7 is not applicable to her situation.

### **Law and Policy**

In this case, the accident occurred on January 26, 2001. Although significant amendments were made to the Act in June 2002 and March 2003, the definition of worker in section 1 of the Act was not amended, nor was section 2(2) of the Act.

A "worker" is defined in Section 1 of the Act to include:

- a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

...

- f) an independent operator admitted by the Board under section 2(2).

Section 2(2) of the Act provides that the Board may direct that Part 1 of the Act applies "to an independent operator who is neither an employer nor a worker as though the independent operator was a worker."

The policies in effect at the time of the accident were contained in the *Assessment*



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*Policy Manual* (APM). This manual was substantially revised and reissued as the *Assessment Manual* in January 2003. In their submissions, both counsel have referred to the current policies found in the *Assessment Manual* rather than those that were in effect at the time of the accident. In this regard, I note that the footnotes to the policies specifically referenced by counsel, policy items #AP1-1-1, #AP1-1-3 and #AP1-1-7, each indicate that these policy items result from “the 2002 ‘editorial’ consolidation of all assessment policies into the *Assessment Manual*.”

The implication of this footnote is that there has been no substantive change made to these policies and, in some areas, it is apparent that there is no change of significance. In this case, however, there are some changes which I consider must be taken into account. Although I consider it likely that the Board did not intend to alter the fundamental principles applicable to determining the status of an entity for the purposes of the Act, there is a sufficient difference in the guidelines or factors used for determining status as an independent firm that I consider it appropriate to refer to the policies in effect at the time of the accident.

In January 2001, policy item #20:30:20 of the APM stated, in part:

The current operational policy for the administration of registration requirements or eligibility is set out in Workers’ Compensation Reporter Series Decision Number 255. That decision sets out the spirit and intent of registering firms.

The policy defined workers as including:

...individuals not employing other individuals and who are:

(a) paid on an hourly, salaried or commissioned basis;...

Independent firms were defined as including:

(c) Service industry firms contracting to two or more clients simultaneously and employing workers.

Policy at #20:30:20 of the APM further used the term “labour contractor” to assist in determining the status of certain persons who were not clearly workers or independent firms. The policy stated:

Registration for labour contractors is not mandatory, but is allowed. Those labour contractors who do not elect to be registered, and any help they employ to assist them, which may include paid members of their families, are considered workers of the prime contractor or firm for whom they are

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contracting, and that firm is responsible for assessments and injury reporting.

...

Labour contractors include unincorporated individuals or partners:

- (b) who are not defined as workers, do not have workers, or supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis (e.g. a janitorial contractor having simultaneous contracts with two or more unaffiliated firms).

The policy at item #20:10:30 of the APM also referred to *Decision No. 255* as follows:

The commencement and termination of an employment relationship and distinguishing a relationship of employment from a relationship between independent contractors is considered in Workers' Compensation Reporter Series Decisions 26, 32, 138 and 255. . . .

In *Decision No. 255*, the former commissioners made the following comments at pages 155 – 156 regarding the distinction between contracts of employment and contracts between independent firms:

It may be difficult in certain circumstances to determine which type of relationship is created by a particular labour contract. For instance, the parties may claim that the contract creates an independent contractor relationship, and may even put in a term in the contract to that effect, while the Board thinks that an employer/employee relationship is created or that the matter at least requires some investigation. The result of *Decisions 32* [1 W.C.R. 127] and *138* [2 W.C.R. 143] is that the Board makes its own determination as to the status of the parties to a contract and is not bound in its determination by “the labels used in the document as showing how the relationship should be classified.”

*Decisions 32 and 138* also lay down the factors considered by the Board in determining how the relationship between the parties to a contract should be classified. These factors include, for example, the degree of control exercised over the supplier of labour by the person for whom he works, whether the supplier of labour or the person for whom he works provides the necessary equipment or licenses, and whether the supplier of labour engages continuously and indefinitely for one person or works

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intermittently and for different persons. The major test, which largely encompasses these factors, is to ask whether the supplier of labour has any existence as a business enterprise independently of the person for whom he works.

The factors described in *Decision Nos. 26, 32, 138, and 255* as being significant in determining whether a person is an independent firm, labour contractor or a worker were formerly summarized at #7.44 of the *Rehabilitation Services and Claims Manual (RSCM)* as follows:

- (a) Control
- (b) Ownership of Equipment or Licences
- (c) Terms of Work Contract
- (d) Independent Initiative, Profit Sharing, and Piecework
- (e) Employment of Others
- (f) Continuity of Work
- (g) Separate Business Enterprise

The policy also included discussion with respect to the application of these criteria. Also of relevance is the comment in *Decision No. 32* that, "In distinguishing between an employment relationship and one of independent contractors there is no single test that can consistently be applied."

### **Reasons and Decision**

I note that under the current policies which were cited by counsel, the "Specific guidelines" outlined in item #AP1-1-3 of the *Assessment Manual* provide that "service industry firms that enter into two or more contracts simultaneously" are considered independent firms. However, according to the policy that was in effect at the time of the accident, item #20:30:20 of the APM, independent firms included "service industry firms contracting to two or more clients simultaneously and employing workers." Accordingly, under the policy in effect at the time of the accident, the fact of entering into two or more contracts simultaneously was not sufficient to establish an entity as an independent firm. It was also necessary for that firm to have workers; and, in this case, the plaintiff did not have workers.

The plaintiff's operations were similar to those of a labour contractor as defined in policy item #20:30:20 of the APM, which stated that labour contractors include entities that do not have workers or supply major materials or major revenue-producing equipment but contract a service to two or more firms on an ongoing basis. The example provided is that of a janitorial contractor with simultaneous contracts with two or more unaffiliated firms. If Ms. Mombouquette is found to be a labour contractor on the basis of this item

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alone, however, the result is that she is characterized as a worker of the parties with whom she has contracted regardless of the degree of independence existing between herself and the contracting parties. This approach is inconsistent with what is stated to be the overarching test of "whether the supplier of labour has any existence as a business enterprise independently of the person for whom he works." Accordingly, I consider it appropriate to also take into account the factors described in *Decision No. 255* in determining the status of Ms. Mombouquette at the time of the accident.

A number of the factors which are applied in determining workplace status were recently considered by the New Brunswick Court of Appeal in *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, (*Joey's v. NB*), [2001] N.B.U. No. 222, 2001 NBCA 17, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 425.

With respect to the factor of control, the court made the following comments:

74 Rather than isolating individual factors, the focus of any analysis must be directed at the question of whether a worker qualifies as an independent contractor, that is to say, whether that worker is capable of carrying on business on his or her own account. After all, this is essentially what Lord Wright concluded in *Montreal Locomotive Works Ltd. (1946)*, *supra*, and what Cooke J. expanded upon in *Market Investigations Ltd.*, *supra*. At the same time, it is equally important to recognize that what distinguishes a business entrepreneur from an employee is the degree to which the party requesting the services is able to exercise control over the party providing them.

75 Control, in my view, has always been and remains a critical consideration when classifying a working relationship. The less control a person exercises over a provider of services the more the provider is capable of assuming the role of business entrepreneur. Of course, the converse is equally true. It follows that "control" is not to be looked on as if it were a separate factor or test, but only as a means of assessing whether a worker qualifies as an independent contractor. Thus, the immediate task is to identify what is meant by control and how to measure it.

76 In classical terms, "control" is defined by reference to four aspects: (1) power to direct the thing to be done; (2) the means by which it will be done; (3) the way it will be done; and (4) directing the time and place it shall be done: see *Ready Mixed Concrete (South East) Ltd. v. Min. of Pensions and National Insurance*, *supra*. The modern law, however,

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eliminates the third aspect and instead emphasizes control in the sense of directing the residual "when and where" of the work, as opposed to the manner of its completion. The elimination of the third criterion is necessitated by the fact that today professional employees and other highly skilled workers exercise a great deal of discretion in deciding how tasks are to be performed. The employer is more concerned with assigning tasks and their date of completion than with the way in which results are achieved: see *Wiebe Door Services Ltd. v. Minister of National Revenue*, supra, at paras. 6 & 7.

...

78 It is not surprising that litigation is pursued only in cases where an employer is unable to exercise direct control or supervision over a worker. For this reason, the question inevitably turns to whether the company engaging the worker continues to exercise sufficient control to warrant his or her classification as "employee". But none of this tells us how control is to be measured and what is meant by controlling the "when and where" of the work. In my view, control is measured largely in terms of the restrictions placed on workers that make them incapable of carrying on business on their own behalf.

79 There are two ways in which to assess what limitations have been placed on a worker. More often than not the parties to the working relationship testify as to the parameters of the working relationship.

In the present case, there is very little evidence that the parties with whom Ms. Mombouquette had contracted at the time of the accident exerted control of this nature over Ms. Mombouquette. Of the three parties with whom Ms. Mombouquette had contracted at that time, only the agreement made under the auspices of ICBC contained elements of control in that the services provided to Mr. Lima were stated to be provided under the "direction and supervision" of the ICBC rehabilitation coordinator (Mr. Clarkson) and changes to the program schedule or additional expenditures required the prior approval of Mr. Clarkson. The services to be provided, however, were so broadly defined in the agreement that Ms. Mombouquette would have had considerable discretion over the activities chosen to provide those services. The copy of the invoice that was submitted refers to very few specific activities; rather, Ms. Mombouquette's time has been billed for "socialization." In addition, since Ms. Mombouquette provided respite care in her own home, there would have been minimal, if any, supervision of that aspect of her service. Beyond that, the evidence does not suggest that ICBC sought to restrict her in any way so as to make her incapable of carrying on business on her own behalf.

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With regard to her agreement with Mr. Habgood, it is simply an agreement between Mr. Habgood and Ms. Mombouquette that she will provide one-to-one support in exercise rehabilitation for eight hours per week over a seven-month period. The letter from Doug Helliwell for the provision of services to his son simply indicates that Ms. Mombouquette provides one-to-one support services once per week on a monthly basis. None of these documents indicate that the parties with whom Ms. Mombouquette had contracted to provide rehabilitation support had attempted to constrain her ability to perform services for other clients.

With respect to the ownership of equipment or licenses, the Court of Appeal made the following comments in *Joey's v. NB*:

82. Ownership of tools is important because it signifies that the worker has invested capital in the enterprise, something that is not required of most employees. In theory, an independent contractor must ensure that income is sufficient to defray the cost of capital investments. For this reason, independent contractors are exposed to a greater risk of financial loss than are employees whose principal concern is with respect to fair remuneration. As well, independent contractors have the opportunity of profiting from sound management.

...

84 It is much easier to claim status as an independent contractor if capital expenses have been incurred. This is true even if the investment comes in the form of office space within the confines of one's home.

In the present case, Ms. Mombouquette used her own vehicle for transporting her clients; she used her own home for the provision of respite care; and, she used her own equipment and office supplies for the administrative aspects of her service. In addition, she had provided for wheelchair access to her home by having a ramp installed. It does not appear that any licenses were required but there were insurance requirements and she was responsible for the provision of insurance. All of these aspects point to a separate business existence, independent of the parties with whom she contracted for the provision of services.

With respect to the factor described as the terms of the work contract, the Court of Appeal stated:

97 In some cases, the lack of indicia that a worker is carrying on business on his or her own account may be attributable to restrictions that the employer has placed on that worker. The ability of one party to promote

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his or her business may be diminished by the ability of the other party to exercise greater control over the terms and conditions of the working relationship. One example is workers that are required to present themselves to the public as employees. It should come as no surprise if such workers were classified employees. If someone is told to dress and act like an employee, the control factor points in the direction of an employment relationship. This is certainly true of those who are required, or voluntarily choose, to wear a company uniform. The same holds true for drivers required to market the business of their principal by placing advertisements on the formers' vehicles. The legal reality is that if you are carrying on business in the name of another it is difficult to promote your own. It is also difficult to accept that you are carrying on business for yourself.

In this case, there is no indication that Ms. Mombouquette's ability to promote her business was in any way diminished by the ability of any of the parties with whom she contracted to exercise control over the terms or conditions under which she provided her services. The fact that she contracted with private individuals at the same time as she contracted with ICBC indicates that ICBC did not attempt to restrict her from contracting with others. In fact, ICBC made a point of advising her that it had hired her for the benefit of the insured and she was paid from the funds of the insured. Accordingly, ICBC was acting as an agent for the insured, Mr. Lima, in obtaining the rehabilitation services of Ms. Mombouquette, rather than as an employer. Furthermore, there is no evidence that the private individuals with whom she contracted placed any restrictions on her or required her to hold herself out in any way as an employee. This factor also points to her existence as an independent operator.

With respect to the factor of "independent initiative, profit sharing and piecework," no evidence was provided as to how the plaintiff obtained contracts. However, it appears that she was able to negotiate the fee for her service, at least to some degree. The contract with ICBC indicates that she will be paid the "agreed upon fee" of \$15 per hour and she had, apparently, negotiated a higher fee with one of the other parties, since she was paid at the rate of \$20 per hour under the agreement with Mr. Habgood. Her rate for travel time was also higher under that agreement than it was under the other two agreements. In addition, there is no provision in these agreements for the reimbursement of her office expenses and the expenses incidental to providing respite care in her home. Accordingly, her ability to profit from her business depended on her own initiative and ability to obtain contracts for her service, to receive adequate funds under those contracts and to contain the costs of providing her service. In those respects, she was also largely independent of the parties with whom she contracted.

RE: Section 257 Determination  
In the Supreme Court of British Columbia  
Victoria Registry No. 03 0304  
Deborah June Mombouquette v. Kenneth Randall Pruss and  
Telus Communications Inc.

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There is no evidence that Ms. Mombouquette employed others.

Turning to the factor identified as “continuity of work,” the Court of Appeal further commented:

88 By contrast, the classical notion of an independent contractor is a person moving from one job site to another to complete an assigned task and who is available to anyone who will pay for his or her services.

This describes the circumstances of Ms. Mombouquette in the sense that she moved from client to client to provide rehabilitation support, using community facilities and providing respite care in her own home. Her service was more independent than that described in this excerpt in that it appears that she was generally not assigned specific tasks; rather, she undertook activities that would support the ultimate goal of rehabilitation of the client. It also appears that she was available, to a degree determined by herself, to anyone who would pay for her services.

Taking into account all of the above, I find that Ms. Mombouquette, as a supplier of labour, had an existence as a business enterprise separate from the companies and individuals with whom she contracted for the provision of her services.

Although she appears to meet the description of a labour contractor under the policy at item #20:30:20 of the APM, when her relationships with the parties for whom she provided services is examined in relation to the factors which determine whether parties are independent, she is quite clearly independent of those parties in every significant aspect. As a result, I conclude that she was an independent operator at the time of the accident.

Since Ms. Mombouquette was not registered with the Board at the time of the accident, she was not a worker for the purposes of Part 1 of the Act. It follows that her injuries did not arise out of and in the course of her employment for the purposes of Part 1 of the Act.

### **Other Parties**

Counsel did not request determinations regarding the status of the defendants nor make submissions with respect to their status. Accordingly, I have made no determinations regarding those parties.



RE: Section 257 Determination  
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Deborah June Mombouquette v. Kenneth Randall Pruss and  
Telus Communications Inc.

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## **Conclusion**

I find that, at the time of the January 26, 2001 accident, the plaintiff, Deborah June Mombouquette, was not a worker within the meaning of Part 1 of the Act and any injuries she sustained in the accident did not arise out of and in the course of the employment.

Marguerite Mousseau  
Vice Chair

MM:gw

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT  
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

DEBORAH JUNE MOMBOUQUETTE

PLAINTIFF

AND:

KENNETH RANDALL PRUSS and  
TELUS COMMUNICATIONS INC.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the plaintiff, Deborah June Mombouquette, in this action for a determination pursuant to section 257 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of the action arose, January 26, 2001:

1. The Plaintiff, DEBORAH JUNE MOMBOUQUETTE, was not a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, DEBORAH JUNE MOMBOUQUETTE, did not arise out of and in the course of the employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this      day of November, 2007.

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Marguerite Mousseau  
VICE CHAIR

IN THE SUPREME COURT OF BRITISH COLUMBIA  
IN THE MATTER OF THE WORKERS COMPENSATION ACT  
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

DEBORAH JUNE MOMBOUQUETTE

PLAINTIFF

AND:

KENNETH RANDALL PRUSS and  
TELUS COMMUNICATIONS INC.

DEFENDANTS

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SECTION 257 CERTIFICATE

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WORKERS' COMPENSATION APPEAL TRIBUNAL

150-4600 Jacombs Road

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FAX (604) 664-7898

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**Workers' Compensation  
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November 20, 2007

Monte W. Prior  
PEARLMAN LINDHOLM  
Barristers & Solicitors  
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Victoria, BC V8V 5A6

Sarah L. Klinger  
WADDELL RAPONI  
Barristers & Solicitors  
1002 Wharf Street  
Victoria, BC V8W 1T4

Dear Mr. Prior and Ms. Klinger:

**RE: Mombouquette v. Pruss et al.  
Request for Section 257 Determination  
WCAT Reference No. 053341-A**

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By letter dated December 2, 2005, Mr. Prior of PEARLMAN LINDHOLM applied, on behalf of the plaintiff, Deborah June Mombouquette, to the Workers' Compensation Appeal Tribunal (WCAT) for a section 257 Certificate.

Enclosed is an unentered copy of the Certificate and Decision rendered by the panel pursuant to section 257 together with reasons for the decision. The consideration of this matter by WCAT is now concluded. The enclosed WCAT decision is final and conclusive pursuant to section 255 of the *Workers Compensation Act*.

A copy of the decision will be forwarded to the Workers' Compensation Board for placement in its records and whatever action the Board deems appropriate.

The original copy of the section 257 Certificate and Decision will be forwarded by WCAT to the court registry for filing. After the Certificate and Decision has been filed with the court, WCAT will provide an entered copy to counsel for named parties in the legal action or to unrepresented named parties in the legal action. (*No entered copies of the Certificate and Decision will be forwarded to any of the parties not named in the action.*)

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**RE: Mombouquette v. Pruss et al.**

**Request for Section 257 Determination  
WCAT Reference No. 053341-A**

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All WCAT decisions from March 3, 2003, the effective date of WCAT, will be available to the public on the Internet at: <http://www.wcat.bc.ca>. Names and identifying information are generally not used in WCAT decisions to ensure privacy. However, as section 257 determinations are publicly accessible upon filing in a B.C. Court Registry, this Certificate and Decision will be placed on the website without editing.

Yours truly,



Janice Macrae  
Appeals Coordination Officer

JM:gw/053341-A

Enclosure

Copies to: Jason McDaniel, Corporate Law Department, ICBC  
Mr. Syrus Bacha, Policy Manager, Assessment Department, WCB  
WCB claim file – VB01323829  
Ms. Gaida Thomson, Entitlement Officer, WCB