

DECISION OF ADJUDICATOR
IN THE MATTER OF AN APPEAL
PURSUANT TO SECTION 2-75 WITH RESPECT TO A DECISION OF
AN EMPLOYMENT STANDARDS OFFICER PURSUANT TO
THE SASKATCHEWAN EMPLOYMENT ACT,
R. S. S. S-15.1 (as amended)



APPELLANT: Input Capital Corp.

RESPONDENT: Kim Althouse

and

Director of Labour Standards
Ministry of Labour Relations and Workplace Safety

DATE OF HEARING: August 29, 2018

PLACE OF HEARING: Saskatoon, Saskatchewan

I. INTRODUCTION

This is an appeal by Input Capital Corp. (hereinafter referred to as Input) with respect to a Wage Assessment issued by the Respondent, the Director, Employment Standards Branch, Ministry of Labour Relations and Workplace Safety, on May 25, 2018. The Wage Assessment required the Appellant to pay Kim Althouse the sum of \$6,915.19 representing unpaid wages. The Wage Assessment was prepared pursuant to s. 2-74 of *The Saskatchewan Employment Act*, R.S.S. S-15.1 (hereinafter referred to as *the Act*) (as amended).

This matter was heard before me on August 29, 2018. The Appellant was represented by Jamie Burgess, Director of Finance and Gerry Wilson. Present for the Respondent at the Hearing was Dale Schmidt, Department of Employment Standards and the employee, Kim Althouse.

The Appeal had been perfected as the Wage Assessment was served on the Appellant on May 28, 2018 and the Notice of Appeal was received, along with the prescribed fee, on June 13, 2018.

II. PRELIMINARY MATTERS

All parties remained present throughout the hearing and there were no other preliminary issues.

III. BACKGROUND

Input purchases canola from farmers. That is, canola producers are identified, approached and contracts for sale are negotiated and signed. Input hires employees to work as sales representatives and, in a nutshell, the job is to sell these contracts to farmers. These are called 'streaming' contracts. The employee, referred to as a sales representative or sales rep, is the person on the ground for Input and is the 'face' of Input in all dealings between Input and the farmer. The employee, Kim Althouse, was one of these sales reps. He commenced working for Input in this capacity on September 1, 2014 and left that employment on November 22, 2017.

Employees are paid a base salary and also a commission. While the amount of the commission is by a formula determined on a per tonne basis, a review of that formula is not relevant to this decision.

Basically, commission on a contract is paid as follows:

- 50% on signing of the contract
- 25% after the 1st year
- 25% after the 2nd year

So, all commissions are paid after 24 months.

Here is an example:

Where five-year contract has been signed, the price and quantities are predetermined over that five-year period. Down payments or deposits are paid to the farmer on a regular basis. If the farmer was to deliver 1000/tonne per year over five years that would total 5,000 tonnes. At a commission of \$3/tonne the total commission earned by the sales rep would be \$15,000. As per the above, the sales rep would receive \$7,500 on signing of the contract, and \$3,750 after the first year and again after the second year.

Input and the employee signed an Employment Agreement (ER2) on September 1, 2014. While there was no information provided at the hearing as to whether different employees had different employment contracts, ER2 looks very much like a template.

Schedule "A" in ER2 deals with the duties of the employee and the employee's compensation, which includes when an employee is entitled to be paid commission. While Schedule "A" speaks for itself, the basics of the compensation regime are:

- 1) The employee is to receive a base salary of \$80,000 per year. The duties of the employee are clearly set out on page 1 of Schedule "A". These duties are to be performed by the employee as part of the base salary. The base salary includes generating interest in and identifying leads for potential contracts as well as keeping the farmer engaged during the course of the contract.
- 2) The employee is entitled to commissions only if the employee continues in discussions with the farmer and is active and instrumental in causing the farmer to sign the contract with the employer. In other words, it is only when the employee has actually made the deal happen, culminating in a signed contract, that the employee is entitled to commissions.
- 3) The commission structure, as indicated above, is set out on page 2 of the Agreement.

IV. ISSUES

The issues in this Appeal relate to commission.

Schiltroth farm

Input had streaming contracts with Schiltroth farm. ER4 is the initial contract between Schiltroth and Input of April 30, 2014. This contract was negotiated directly by Brad Farquhar, Chief Financial Officer of Input, not by any employee in the field. It should be noted that Mr. Althouse was hired after this contract was signed. Two subsequent and distinct contracts between Schiltroth and Input were signed on December 31, 2014. Both were negotiated and sourced out of the head office of Input by Gord Nystuen, the Vice-president of Market Development. These contracts are ER5 and ER6. Mr. Farquhar and Mr. Nystuen both work in Head Office and neither are paid commission.

Input's position is that unless an employee (sales rep) is the one who negotiates and is the moving force (that is, solely instrumental) to the signing of the contract, there is no commission paid. In other words, an employee is only entitled to commission for business and contracts they develop on their own. All servicing performed after contract is covered by the base salary.

The position of Mr. Althouse is that he should be paid the commission for all the work he did with Schiltroth post-contract. There was a sizeable amount of leg work required for the upkeep of the business relationship between Schiltroth and Input. This work included clarifying the amount of grain hauled, determining proper amounts of payments, finding out timing of payments and maintaining ongoing communication with Input.

It is my decision that this work performed was to maintain the contracts and is not work which would entitle Mr. Althouse to any commission. This nature of work is compensated via the base salary of \$80,000/year.

On September 28, 2015 a new Schedule A was signed with Schiltroth for 3,550 tonnes (ER7). This was supplemental to the Schedules in the previous contracts. While Mr. Althouse signed this contract on behalf of Input and would have necessarily discussed it with Schiltroth at the time of signing, he was not instrumental in its creation. He neither developed nor negotiated this addendum. The business relationship between Input and Schiltroth expanded and new contracts, noted as ER8 and ER9, were signed on March 3, 2016 and February 17, 2017 respectively. While Mr. Althouse arranged and signed the contracts on behalf of Input, he did nothing to initiate these contracts. Therefore, he is not

entitled to any commission arising from these contracts. Again, this is work for which he is compensated by his base salary.

Mr. Althouse was in fact paid commission on the Schiltroth contracts in the amount of \$6,712.50, which Input indicates was in error. Had Mr. Althouse been entitled to any commission, this amount represents 75% of that commission. The wage assessment includes the remaining 25%. Regardless of the mistake made, Mr. Althouse is not entitled to any commission with respect to the Shilttorh contracts.

Hagmann and B & G Friesen farms

The second issue in this appeal was with respect to two other contracts which Mr. Althouse had clearly negotiated and developed. Input agrees that Mr. Althouse was active and instrumental in causing the farmer to sign the streaming contracts and that Mr. Althouse was entitled to his commission for them. The problem arose when the contracts were terminated and bought out. When the anniversary dates came due, at which time Mr. Althouse would have received the commission, the contracts were no longer in effect. The position of Input is that the balance of any commission is therefore not owed to Mr. Althouse. I can find no reference to how this type of situation would be handled in ER2, the employment contract between Input and Mr. Althouse.

Input and the Hagmann farm signed two contracts. The combined commission that Mr. Althouse should have received for both contracts was \$7,500. Mr. Althouse received the first installment of \$3,750 in the usual course. The contracts were bought out and therefore terminated prior to the first and second anniversary date. There is no evidence that Mr. Althouse did anything to precipitate the sale of and termination of these contracts. Mr. Althouse had done his job to initiate the contracts in the first place and he should not have to suffer financially because his employer decided to sell or transfer the contracts. Therefore, Mr. Althouse is entitled to the balance of his commission for the Hagmann accounts in the amount of \$3,750.

The B & G Friesen contract situation is very similar. The contract was bought out and terminated before the entire amount of commission owing was paid out. The total commission that Mr. Althouse would have received for this contract was \$1,062.50. He received the initial commission payment of \$531.25. For the same reasons as above, the balance owing to Mr. Althouse is \$531.25.

IV. CONCLUSION

On these two contracts, therefore, Mr. Althouse is still owed the sum of \$4,281.75 representing unpaid commissions. I have endeavored to calculate the vacation pay on this amount and arrived at the sum of \$247. Therefore, the Wage Assessment is amended to \$4,528.25.

V. DECISION

The Appeal is dismissed, in part. However, the amended Wage Assessment of \$4,528.25 is upheld.

DATED at the City of Saskatoon, in the Province of Saskatchewan, March 7, 2019.



Leslie T.K. Sullivan, Q.C.
Adjudicator

Exhibit List

ER1	June 12, 2018 letter from Input Capital Corp.
ER 2	Employment Agreement September 1, 2014
ER3	mis-numbered
ER4	Schiltroth contract April 30, 2014
ER5	Schiltroth contract December 31, 2014
E66	Schiltroth contract December 31, 2014
ER7	Schiltroth contract September 28, 2015
ER8	Schiltroth contract March 3, 2016
ER9	Schiltroth contract February 27, 2017
EE1	Reconciliation report from Kim Althouse

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of

The Saskatchewan Employment Act (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal;

and

(b) to appeal any decision of an adjudicator or the board.