



An appeal

- by -

Andrew Chengalath

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**PANEL:** Shafik Bhalloo

**FILE NO.:** 2018A/24

**DATE OF DECISION:** May 16, 2018

## DECISION

### SUBMISSIONS

Garry F. Benson

counsel for Andrew Chengalath, a Director of Martketer Marketing & Design Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Andrew Chengalath (“Mr. Chengalath”), a Director of Martketer Marketing & Design Inc. (“MMDI”), has filed an appeal of a section 96 determination issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on January 19, 2018 (the “Determination”).
2. The Determination found Mr. Chengalath was a director of MMDI, an employer found to have contravened provisions of the *ESA*, at the time wages were earned or should have been paid to five former employees of MMDI, namely, Sheldon Dent (“Mr. Dent”), Colby Hubscher (“Mr. Hubscher”), Krista Lusted (“Ms. Lusted”), Shanna Lyndon (“Ms. Lyndon”) and Natasha Vanderburg (“Ms. Vanderburg”) (collectively “the Complainants”) and as such personally liable under section 96 of the *ESA* for wages in the amount of \$20,942.41.
3. This appeal is grounded in the assertions that the Director erred in law and failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available when the Determination was being made. Mr. Chengalath seeks to have the Determination cancelled or referred back to the Director “for reconsideration”.
4. In correspondence dated March 2, 2018, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal.
5. The section 112(5) record (the “Record”) has been provided to the Tribunal by the Director and a copy has been delivered to all of the parties including Mr. Chengalath by way of delivery to his legal counsel, Garry F. Benson of Benson Law LLP. All parties were provided with the opportunity to object to its completeness. No objection to the completeness of the Record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
6. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal based on the Determination, the reasons for the Determination (the “Reasons”), the submissions of Mr. Chengalath’s counsel, and my review of the Record that was before the Director when the Determination was being made and any other material allowed by the Tribunal to be added to the Record. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection. If satisfied the appeal or part of it should not be dismissed under section 114(1) of the *ESA*, the Director and the Complainants will be invited to file submissions on the merits of appeal. On

the other hand, if I find the appeal satisfies any of the criteria set out in section 114(1) it's liable to be dismissed. Therefore, I will consider whether there is any reasonable prospect the appeal can succeed.

## ISSUE

7. The issue at this stage is whether the appeal should be dismissed under section 114 of the *ESA*.

## FACTS AND REASONS FOR THE DETERMINATION

8. MMDI operated a marketing and web design business and employed the Complainants in various capacities in its business. The Complainants all had different start and end dates of their employment with the earliest start date being June 20, 2016, and the latest end date October 3, 2017.
9. The Complainants filed complaints under section 74 of the *ESA* against MMDI alleging that the latter contravened the *ESA* by failing to pay their wages.
10. An investigation was conducted into the Complainants' allegations and the Director issued a determination (the "Corporate Determination") against MMDI on November 24, 2017, finding the latter owed wages and interest totaling \$21,027.03 to the Complainants. It was also determined that MMDI was liable for three administrative penalties totaling \$1,500.00 for breach of sections 17 and 18 of the *ESA* and section 46 of the *Employment Standards Regulation* (the "*Regulation*").
11. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to MMDI, with copies to its registered and records office and to the directors and officers. The appeal period on the Corporate Determination expired on January 2, 2018, with no appeal filed by MMDI.
12. As MMDI failed to pay the Corporate Determination, the Director pursued an investigation for the purpose of section 96 of the *ESA*.
13. Based on a BC Online: Registrar of Companies - Corporation Search of MMDI conducted by the Delegate on October 17, 2017, the Delegate found MMDI was incorporated on March 31, 2014, and Ariele Parker ("Ms. Parker") was listed as its sole director.
14. The Delegate contacted Ms. Parker during her investigation. Ms. Parker, from the outset, claimed that MMDI was insolvent and would be dissolved. Ms. Parker, herself, made a personal assignment into bankruptcy on November 9, 2017.
15. In the ensuing investigation, the Delegate notes that the Complainants claimed that from October 2016 to October 3, 2017, Ms. Parker operated MMDI with a business partner, Mr. Chengalath, who is also her fiancée. On all company advertising (some of which is contained in the Record), the Complainants stated Ms. Parker represented herself as the company's Founding Partner and Mr. Chengalath as the company's Managing Partner. The Complainants also claimed Mr. Chengalath exercised many of the same functions as Ms. Parker in directing the operations of the company. In the circumstances, the delegate decided to consider

whether Mr. Chengalath should be found to be a director for the purpose of section 96 of the *ESA*. In concluding in the affirmative on this question, the delegate considered the evidence of the Complainants, Mr. Chengalath, MMDI's clients, and MMDI's former and prospective employees. The evidence of these parties and witnesses is meticulously delineated by the Delegate in the Reasons together with her analysis for her decision. I propose to summarize this evidence and the delegate's analysis in greater detail than I would otherwise only because legal counsel for Mr. Chengalath alleges in the appeal, among other things, that the Delegate was biased or "failed to remain impartial in the decision-making process" and that there is insufficient evidence for the Delegate's conclusion that Mr. Chengalath was a director of MMDI.

16. With respect to the evidence of the Complainants, the Delegate makes some general observations before more specifically setting out the evidence of individual witnesses. She states that all of MMDI's employees believed Ms. Parker and Mr. Chengalath were co-owners of the company based on how they referred to themselves and how they conducted themselves in the workplace. They were also engaged to be married and lived together.

17. As for the evidence of Ms. Lyndon, the Delegate notes that Ms. Lyndon stated:

- She was MMDI's Social Media Strategist.
- When Mr. Chengalath started working at MMDI in October of 2016, Ms. Parker introduced him to the employees as their "new boss".
- MMDI's Facebook post also identified Mr. Chengalath as the company's "new partner".
- MMDI's proposals to clients set out the names and titles of all of MMDI staff and referred to both Ms. Parker and Mr. Chengalath as "partners".
- Ms. Parker and Mr. Chengalath subsequently changed their titles to "Founding Partner" (in the case of Ms. Parker) and "Managing Partner" (in the case of Mr. Chengalath).
- A copy of MMDI's Instagram post shows all employees name tags including that of Mr. Chengalath's which refers to him as the "Managing Partner".
- In Mr. Chengalath's LinkedIn professional profile, he also refers to himself as a "partner" of MMDI.
- During her employment with MMDI, she had access to MMDI's accounting e-mail records and observed that Mr. Chengalath would transfer money bi-weekly to himself from MMDI's bank account via e-mail transfers.

18. With respect to the evidence of Ms. Lusted, the Delegate notes that she stated:

- She was MMDI's Client Services Director.
- On October 30, 2016, Ms. Parker told her that Mr. Chengalath was signing on as a partner of the company and she introduced him to the employees as "our new boss".
- Mr. Chengalath's headshot was taken for the company website and e-mail and his electronic signature referred to him as the "Managing Partner".

- Mr. Chengalath was an authorized signatory for the company and instrumental in the direction of the company and its management and made decisions on matters such as finances, hiring and firing staff, and establishing policies and objectives for the company.
- Mr. Chengalath was actively involved with the company's large clients from sales and pricing, to client relations and he accepted e-transfers and cash payments from clients on behalf of MMDI.
- Mr. Chengalath set the service rates and prices for clients' packages; he increased the service rate from \$70.00 per hour to \$110.00 per hour.
- Mr. Chengalath also had authority to decide how much to charge clients as a deposit; funded company expenses including payroll, staff lunches; and was the final approver of staff expenses.
- Both Mr. Chengalath and Ms. Parker met with her in mid- September 2017 to advise her that the company would be dissolved and they intended to start up another company in the cannabis industry.
- Ms. Parker and Mr. Chengalath met with each employee on September 28, 2017, to advise them that the company would be shut down.
- A copy of a press release that appeared on the company's website on April 7, 2017, introduced Mr. Chengalath as "the company's new partner" who would be responsible for such things as the expansion and new direction of the company.
- Mr. Chengalath handled the building of a new office for the company at the Innovation Centre in Kelowna, BC and facilitated a trade agreement with the construction company, 3rd Generation Homes.
- Mr. Chengalath was the sole contact for contractors and tradespeople and had signing authority for purchases for the renovations.
- Mr. Chengalath was also involved in the strategic direction of the company and in particular, directed the opening of a new satellite office in Victoria to be closer to MMDI's largest client, Compass Cannabis.
- Mr. Chengalath and Ms. Parker hired two employees to staff the Victoria office and she believes that since Mr. Chengalath had signing authority for MMDI, he would have signed a lease for office space.
- The Victoria office was supposed to open in August 2017 however Compass Cannabis severed its relationship with MMDI prior to that date and therefore, Ms. Parker and Mr. Chengalath decided not to open that office and terminated the employment of the two people they had hired. A copy of the Instagram message between Mr. Chengalath and one of the two employees terminated shows Mr. Chengalath made an e-transfer in partial payment of the employee's expenses.

19. Mr. Vanderburg stated:
- She was a graphic designer for MMDI.
  - Mr. Chengalath handled many of the same responsibilities as Ms. Parker such as hiring and firing staff and conducting meetings with clients.
  - Mr. Chengalath made many of the decisions about what to do on client projects.
  - Mr. Chengalath was in charge of the construction of a new office in the Innovation Centre in Kelowna and he solely dealt with builders and the purchase of materials.
20. Mr. Dent stated:
- He was a photographer for MMDI.
  - When Mr. Chengalath was not out of the office meeting with clients, he assisted Ms. Parker in the management of the office such as hiring and firing staff and giving directions on jobs.
21. Mr. Hubscher stated:
- Mr. Chengalath introduced performance reviews in the company and ensured that all employees did one.
  - He met with both Ms. Parker and Mr. Chengalath for his performance review.
22. The Delegate noted that all of the Complainants claimed that they believed Mr. Chengalath made a financial investment in MMDI because when they asked Mr. Chengalath what he did at MMDI he always responded, “I pay you guys”.
23. The Delegate also spoke with some other former and prospective employees of MMDI with a view to determining the scope of Mr. Chengalath’s role with MMDI. She spoke with a former operations manager for MMDI who claimed that Mr. Chengalath was fully involved in the operations and decision making of the company and oversaw all of the hiring and firing of employees, benefits, payroll, sales prospecting, account management and employee performance reviews.
24. The Delegate also spoke with two former employees of MMDI. One indicated to her that on or about August 15, 2017, he received a written termination letter from Mr. Chengalath who signed the letter in his capacity as “Managing Partner of Martketer Inc.”
25. The second former employee informed the delegate that Mr. Chengalath was actively involved in her hiring process. She also said she discussed with him, in detail, compensation and benefits. She said that while Ms. Parker was also present in the hiring process, it was Mr. Chengalath who led the meetings. On May 8, 2017, she received an e-mail from Ms. Parker which said “Andy and I will have an offer for you via e-mail in the next couple of days”. Subsequently in a follow up e-mail on May 10, 2017, Ms. Parker wrote to her “*our* thought [regarding] base salary and compensation”... and that “within 6 months [of hiring] *we* would do a review of performance.” [**emphasis** in original]

26. A prospective hire of MMDI, with whom the Delegate spoke with, indicated that she participated in an employment interview with both Ms. Parker and Mr. Chengalath. She stated that on March 9, 2017, she received an e-mail from Ms. Parker advising her that both Ms. Parker and Mr. Chengalath were pleased with her interview and that they would follow up with her the following week.
27. The Delegate also spoke with some clients of MMDI. The largest client of MMDI was Compass Cannabis. The President of this client, Dave Martyn (“Mr. Martyn”), claimed that he had business dealings with both Ms. Parker, the founding partner, and Mr. Chengalath, the managing partner. At each meeting he had with them, both Mr. Chengalath and Ms. Parker made decisions about his company’s marketing strategy and they were both involved in the management of his account. However, at the end of his business relationship with MMDI, Mr. Martyn said he dealt solely with Mr. Chengalath and believed that the latter was an authorized signatory on behalf of MMDI because “Ms. Parker and Mr. Chengalath both positioned him as such”. Mr. Martyn also said that Mr. Chengalath purchased URL or website addresses for Compass Cannabis as an authorized representative of MMDI but kept the URL’s in his personal name. Mr. Martyn also made payments to Mr. Chengalath for MMDI’s services.
28. Another client of MMDI was Starbuds. The delegate spoke with the co-founder of Starbuds, Rob McMillan (“Mr. McMillan”), who said that he met with both Ms. Parker and Mr. Chengalath on a number of occasions to discuss developing Starbuds’ brand. According to Mr. McMillan, Mr. Chengalath made it clear that he had authority to make decisions on behalf of MMDI and on one occasion told him that he had bought into MMDI as a partner.
29. The Delegate also spoke with Derek Hogins (“Mr. Hogins”), the owner of High Roller Games, another client of MMDI. She notes that Mr. Hogins said he understood from MMDI’s brochures and business cards that Mr. Chengalath was Ms. Parker’s new business partner and that he was replacing Ms. Parker’s previous business partner. During his meetings with Mr. Chengalath, Mr. Hogins said that he gave him the impression that he had an ownership interest in the business and that he had the same decision-making authority as Ms. Parker.
30. West Cabs was another client of MMDI. Its owner, Powen Aulegh (“Mr. Aulegh”), informed the Delegate that he met with Mr. Chengalath and the owner of a Kelowna Radio Station, Peter Angle (“Mr. Angle”), to discuss branding for his company. In that meeting, Mr. Aulegh states Mr. Chengalath advised them that he was an owner of MMDI. Mr. Angle, whom the Delegate also spoke with, said Mr. Chengalath said he was a partner of MMDI and clearly implied to all present that he was a co-owner with Ms. Parker. After the meeting, Mr. Angle was convinced that Mr. Chengalath had an ownership interest in MMDI and had the same authority to make decisions as Ms. Parker.
31. The Delegate also spoke with Cassidy Deveer (“Ms. Deveer”), a representative of 3<sup>rd</sup> Generation Homes, a client of MMDI since early 2016. Ms. Deveer said that she solely dealt with Ms. Parker at the start but in January 2017 she was introduced to Mr. Chengalath as the person in charge of construction of a new office space for MMDI at the Innovation Centre in Kelowna. She said that Mr. Chengalath was the sole contact and decision maker for determining the office layout, materials and construction schedule. She also said he was an authorized signatory for any purchases and payments and often said “we” when referring to MMDI. At no time did he ever indicate that he required Ms. Parker’s approval to make decisions, according to

Ms. Deveer. She also believed that since Ms. Parker changed her title on MMDI's advertising from "partner" to "founding partner", she believed Ms. Parker had another business partner.

32. The final former client of MMDI the Delegate contacted was Grizzli Winery and she spoke with its representative, Amy Chang ("Ms. Chang"). Ms. Chang said she believed Mr. Chengalath had authority to make the final decisions on the pricing of projects that MMDI developed for her company. She said she dealt solely with him on matters of contentious billings.
33. The Delegate also contacted Ms. Parker of MMDI. In a telephone conversation with Ms. Parker on October 26, 2017, the delegate states that Ms. Parker informed her that MMDI was insolvent and was going to be dissolved. She also said she would be making a personal assignment into bankruptcy. The Delegate says she advised Ms. Parker, among other things, that she would be investigating whether Mr. Chengalath was a director of MMDI for the purposes of section 96 of the *ESA*.
34. The Delegate says that as of approximately October 27, 2017, the last known telephone number for Ms. Parker was no longer in service and correspondence she sent to her by registered mail to her last known residence and to MMDI's registered and records office was returned. A representative of the company's records office confirmed by e-mail on November 29, 2017, that Ms. Parker had not provided a forwarding address and as a result she had sent Ms. Parker "multiple reminders to pick up her documents and mail."
35. The Delegate also tried to reach Ms. Parker by registered mail at the address set out in her bankruptcy disclosure statements but that correspondence was also returned unclaimed.
36. On December 22, 2017, the Delegate contacted Ms. Parker's trustee in bankruptcy, and she got the trustee to e-mail Ms. Parker and ask her to provide the delegate with a current address but Ms. Parker did not comply.
37. In the circumstances, the Delegate concluded that the only form of communication to which correspondence could be sent to Ms. Parker was by e-mail at the address from which Ms. Parker sent her last correspondence to the Delegate on November 11, 2017, attaching a notice of her personal assignment into bankruptcy. Therefore, on November 8, 2017, the Delegate e-mailed Ms. Parker at that e-mail address a letter setting out her preliminary findings regarding Mr. Chengalath's role in MMDI and asked her to respond. The Delegate received no response.
38. On November 14, 2017, the Delegate sent Ms. Parker another e-mail advising her that she would like to speak to her about Mr. Chengalath's role in MMDI. In the same e-mail she also requested Ms. Parker to provide her access to MMDI's records. The Delegate also sent Ms. Parker additional e-mails on November 15, 17 and 21, 2017, asking her to provide her with access to the company's records. Ms. Parker did not respond to any of these e-mails, notwithstanding the Delegate's warning to her that it could be open to her (the Delegate) to draw an adverse inference that she was withholding this information because it would not be helpful to her fiancée, Mr. Chengalath.
39. Subsequently, on November 30, 2017, the Delegate made an application to the BC Corporate Registry and, the latter issued an order (the "Order") to MMDI to produce certified copies of its central securities and directors' registers no later than December 22, 2017. On December 5, 2017, the delegate sent a copy of the



Order to Ms. Parker by registered mail to her last known address and e-mail address. A copy of the Order was also sent on the same date by e-mail to Mr. Chengalath's counsel. On December 27, 2017, the Registrar of Companies confirmed that MMDI had not complied with the Order.

40. On January 16, 2018, the Delegate sent Ms. Parker an e-mail which advised her generally of the information the Delegate had gathered in her investigation and afforded her a final opportunity to discuss that information and to provide any other information to the delegate, but Ms. Parker did not respond.
41. The Delegate also e-mailed Mr. Chengalath on October 26, 2017, to notify him that she was investigating whether he met the definition of a director of MMDI under section 96 of the *ESA* and to give him an opportunity to respond.
42. On October 31, 2017, Mr. Chengalath responded by e-mail to the delegate denying that he was a director, shareholder or partner in MMDI and claimed that he “worked purely in part time capacity and did not ever receive a salary.”
43. In a subsequent e-mail to the Delegate on November 1, 2017, Mr. Chengalath denied investing any money in MMDI or receiving any money from the company. He also denied having any authority to direct the company stating “I provided consultation services but did not take on the role as a Corporate Director (in the Company sense) nor did I obtain any ownership, [or] have any signing authority or control.”
44. On November 8, 2017, the Delegate sent Mr. Chengalath her letter of preliminary findings and asked for his response.
45. On November 15, 2017, the Delegate received correspondence from Mr. Chengalath's counsel stating that Mr. Chengalath denies the Complainants' allegations. Counsel also said that that Mr. Chengalath claimed his authority was similar to that of a manager giving employees directions on operational procedures but “he never participated [in] or made any decision regarding hiring and termination of employees, employee assessment and evaluation and payroll related matters.” The letter also added that Mr. Chengalath claimed that he “never held himself [out to be] the owner of Martketer Inc. [on] any occasion” and, therefore, he was not a director of MMDI under section 96 of the *ESA*.
46. Between November 15, 2017, and December 22, 2017, the Delegate provided Mr. Chengalath's legal counsel with further information she obtained from the Complainants and MMDI's former clients referred to above.
47. On December 19, 2017, counsel made additional submissions to the Delegate stating that Mr. Chengalath claimed that:
  - He was not a director of MMDI nor did he conduct himself as one for the purposes of section 96 of the *ESA*.
  - His “involvement in the Company was limited to being in a position of, or similar to a project manager/consultant”.

- The e-mails from Ms. Parker to employees showed that Ms. Parker was the sole decision-maker regarding hiring and payroll matters and he was only copied on those e-mails in order to “better his performance at project management work and customer service.”
- He only signed an employee’s termination letter on the instruction and consent of Ms. Parker.
- He did not mislead former clients of MMDI that he was a legal partner or owner with Ms. Parker in MMDI
- His role in MMDI was only that of project manager.
- He had had no access to MMDI’s bank account and that is why he had to “shoulder all client expenses [such as for URLs for Compass Cannabis] in his personal name.”
- Ms. Parker appointed him to handle the office construction with 3<sup>rd</sup> Generation Homes and that when he used the word “we” in conversation with representatives of that Company, he was referring to himself and MMDI as a whole, and not to himself and Ms. Parker.
- Although his title within MMDI was “managing partner”, his duties and work for the company were “limited to providing customer service, marketing strategic advice to clients and supervising other employees when required.”
- His involvement in employee interviews and evaluations was “limited solely to consulting and advising Ms. Parker but [he] did not partake in any decision-making.”
- “[He] did not act in an executive position [or] make executive decisions regarding the Company’s contracts with third parties, clients and employees”.
- Ms. Parker was the sole decision maker and any actions he took were on the instruction and consent of Ms. Parker.
- He did not have authority to sign contracts on behalf of the company nor did he have authority to access bank accounts of the company.

<sup>48.</sup> The Delegate also notes that in an e-mail from counsel on December 5, 2017, counsel contended that Mr. Chengalath did not have access to MMDI’s company record books and it was “an improper investigative technique and outside of the scope of the Delegate’s duty and authority” to draw an adverse inference regarding MMDI’s failure to provide access to those records.

<sup>49.</sup> Having delineated the evidence of the Complainants, Mr. Chengalath, and the witnesses, the Delegate then explains the governing law under section 96(1) of the *ESA*, stating, among other things that a person does not have to be registered with the Corporate Registry as a director or officer to be a director or officer for the purposes of section 96. She refers to the oft quoted decision of the Tribunal in *John Moore*, BC EST # D095/11, and the following very instructive passage at paragraph 20 of the decision:

If the corporate records do not show the individual as a director or officer, the Tribunal, when faced with the question of determining whether an individual is a director or officer, will use a functional approach. The functional approach entails an examination of the actual role of the individual in relation to the corporation. Does the individual exercise the typical functions, tasks, or duties that a

corporate director or officer would exercise in the normal or usual course of events? While no one function is determinative of an individual's status as a director or officer under the functional approach, the existence of such, non-exclusive, factors as the following are taken into consideration in the determination: participation in the management of the corporation; signing and cancelling of agreements on the employer's behalf; reviewing or overseeing financial reports or financial matters of the corporation; handling the corporation's payroll; dealing with the corporation's creditors; establishing policies and objectives of the corporation; directing employees of the corporation and approving corporate budgets.

50. The Delegate then applies the functional test propounded in *Re John Moore, supra*, and meticulously assesses the arguments and evidence of Mr. Chengalath in relation to the Complainants and other witnesses. She commences her analysis by stating:

[Mr. Chengalath] claimed ... that he was an unpaid employee who exercised a managerial and consulting role but had no investment in and no authority to make decisions for the company. He claimed that his title, "Managing Partner" was intended "to reflect an image of a well-built team to the public" and did not have a legal connotation such as under the Business Corporations Act of B.C.

However, definition of "partner" according to the Oxford English Dictionary in a business or commercial context is "any of a number of individuals with interests and investments in a business enterprise, among whom expenses, profits and losses are shared." Consequently the use of the title, "partner" would reasonably have led employees and clients of Martketer to believe that Mr. Chengalath was not just another employee or manager but that he shared equal authority and an ownership interest in the company with Ms. Parker. I also note that in a Martketer press release of April 6, 2017 which identified Mr. Chengalath as "the company's new partner" stated that "Andy will be working alongside founding partner Ariele Parker." I find that this statement also suggests that Mr. Chengalath would be working in an equal capacity to Ms. Parker. In any event, if Mr. Chengalath's title was intended to convey his actual role within Martketer as a manager or consultant, then presumably, his title would more accurately have been described as "Managing Consultant", for example.

51. With respect to Mr. Chengalath's claim that he did not have an ownership interest or financial investment in MMDI and did not receive any income from MMDI, the Delegate notes:

This was disputed by the Complainants who claim Mr. Chengalath personally funded business expenses including payroll, however this could not be verified given that the person who had the possession and control of the corporate and banking records, Ms. Parker (who is Mr. Chengalath's fiancée), failed or refused to participate in this investigation and Martketer failed to produce corporate records with respect to its shareholders. Martketer's former clients also claimed that both Ms. Parker and Mr. Chengalath represented to them that Mr. Chengalath was an equal partner who had the same decision making authority, signing authority and ownership interest in the company as Ms. Parker and at least one client claimed Mr. Chengalath told him he had "bought into the company". Accordingly, I make an adverse inference that Ms. Parker failed to provide any financial information or corporate documents because they would likely show Mr. Chengalath had a financial investment or ownership interest in the Martketer.

52. With respect to Mr. Chengalath's claim that he had no decision making authority or that he did not direct the operations or policy of the company, but only gave Ms. Parker advice as a consultant and she made all of the final decisions, the Delegate states:

There is no corroborating evidence to verify Mr. Chengalath's claims with respect to this issue. All of the Complainants claimed that Mr. Chengalath was actively involved with Ms. Parker in payroll matters, hiring and firing employees and conducting their performance reviews. The Complainants also claim that Mr. Chengalath was directly involved in setting their compensation, he was the final approver of expenses and when they asked him what he did at the company, he said, "I pay you guys". A former employee . . . claimed that during her pre-hire meetings with Mr. Chengalath she discussed compensation and benefits with him in detail. She noted that in a follow up e-mail from Ms. Parker on May 10, 2017, Ms. Parker wrote "*our* thought" [regarding] base salary and compensation"... and that "within 6 months [of hiring] *we* would do a review of performance." [emphasis in original]

53. With respect to Mr. Chengalath's contention that Ms. Parker corresponded with employees and this evidences that she made the final decisions with respect to hiring, firing and payroll even though he was copied on all of them, the Delegate states:

... an e-mail from Ms. Parker to [a prospective employee] on May 8, 2017 states, "*Andy and I* will have an offer for you via e-mail in the next couple of days". Conversely, Mr. Chengalath argued that although he signed a termination letter for [an employee] on August 15, 2017, he did so only after getting Ms. Parker's authorization. However, the letter is signed solely by Mr. Chengalath in his capacity as Managing Partner and does not state that it was issued on behalf of Ms. Parker; instead, it says "*we* regret to inform you that your employment is being terminated...after the completion of a full internal review with management." The letter goes on to say that if Mr. Dunkin had any questions, he should discuss them with his manager . . . . Notably, [the] operations manager, also claimed that Mr. Chengalath oversaw and made decisions with respect to the hiring and firing of employees, benefits, payroll and employee performance reviews. The Complainants also claim that both Ms. Parker and Mr. Chengalath met with each of them individually to advise them that the company would be closing and their employment ending. Consequently, I conclude that Mr. Chengalath participated equally with Ms. Parker in making decisions regarding hiring, firing, payroll and performance reviews as the Complainants claim.

54. With respect to Mr. Chengalath's contention that he did not have any authority to make decisions regarding client projects and the authority lay solely with Ms. Parker, the Delegate notes:

However, this was denied both by the Complainants and Martketer's clients. The Complainants claim it was Mr. Chengalath who decided to increase the service rates to clients, who decided the amount of a deposit to charge a client and who oversaw the projects of Martketer's larger clients. All of the clients who gave evidence on the investigation claimed that Ms. Parker and Mr. Chengalath led them to believe that Mr. Chengalath had equal decision making and signing authority with Ms. Parker and they were never told he required Ms. Parker's prior approval. In fact, representatives of Compass and Grizzli Winery both claimed that toward the end of their contracts with Martketer, they dealt solely with Mr. Chengalath.

55. With respect to Mr. Chengalath's argument that his role with respect to the construction of a new office at the Innovation Centre in Kelowna was done solely at the direction of Ms. Parker and any decisions required her prior approval, the Delegate states:

... there is no evidence from Ms. Parker on this point and it was denied by a representative of the construction company, 3<sup>rd</sup> Generation. Ms. Deveer claimed that Mr. Chengalath was the sole decision maker for determining the office layout, materials and construction schedule and that he was an authorized signatory for purchases and payments. She also claimed that Mr. Chengalath never said he required Ms. Parker's prior approval to make decisions. This evidence was also corroborated by several of the Complainants. Similarly, the Complainants claimed that Mr. Chengalath was directly involved with Ms. Parker in expanding the company by opening a satellite office in Victoria, BC in order to be closer to Martketer's largest customer, Compass Cannabis. However, there is little evidence regarding the short-lived satellite office in Victoria other than an Instagram message from Mr. Chengalath to an employee . . . [hired for that office], indicating that he would send the employee an electronic funds transfer in partial payment of his expenses. Further, Martketer's press release of April 6, 2017 confirms that Mr. Chengalath was brought into the company to direct an expansion of its operations. It states that "with his vast knowledge Andy will be leading Martketer in increasing its service offerings to include pitch platforms, sales presentations and tools, sales funnels, search engine marketing and social media and community advertising."

56. On the basis of the foregoing, the Delegate concludes that "Mr. Chengalath was the Managing Partner of the company both in title and in function; he had the same authority as Ms. Parker (who is a registered director of the company) over the operation and direction of the company." She also notes that while the Complainants contended that Mr. Chengalath signed on as a partner of MMDI in October 2016, Mr. Chengalath's LinkedIn Profile stated that he was a partner of the company from December 2016 to September 2017 and therefore, he was a director of MMDI for at least the period, December 2016 to October 3, 2017, before the company ceased to operate. In the result, the Delegate concludes that Mr. Chengalath was a director when the Complainants' wages were earned and should have been paid by MMDI and is personally liable for up to two months' unpaid wages for each Complainant pursuant to section 96. Since two months' wages for each of the Complainants exceeds the amount found owing to each of the Complainants in the Corporate Determination, the Delegate concludes that Mr. Chengalath is liable for the full amount of the wages owing to the Complainants plus interest.
57. With respect to the three administrative penalties levied against MMDI in the Corporate Determination for contravention of sections 17 and 18 of the *ESA* and 46 of the *Regulation*, the Delegate concludes that there is insufficient evidence that Mr. Chengalath authorized, permitted or acquiesced in the contravention and therefore he is not personally liable for the administrative penalties.

## **SUBMISSIONS OF MR. CHENGALATH**

58. As indicated in the Overview section of this decision, Mr. Chengalath appeals the Determination on all of the available grounds of appeal under section 112(1) of the *ESA*, namely, the director erred in law and failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made.

59. I note that submissions of Mr. Chengalath’s counsel in the appeal, to some extent, reiterate submissions made on behalf of Mr. Chengalath before the Determination was made.

***Error of law***

60. Under the error of law ground of appeal, counsel makes three separate submissions, namely, the Director: “(i) misapplied the law, or misinterpreted the law of functional test, (ii) misapplied the general principle of burden of proof, and (iii) made the Determination when there is not sufficient evidence to reasonably conclude Mr. Chengalath was a director.”

61. With respect to contention that the Delegate misapplied the law or misinterpreted the functional test, counsel notes that section 96 of the *ESA* allows for a functional test to be applied when the alleged director is not a registered director of the company. Counsel also notes that the *ESA* does not define “director” but the *Business Corporations Act*, SBC 2002, c.57 (the “*BCA*”) does. He notes that the definition of “director” in the *BCA*, particularly in subsection 1(b) of the *BCA* suggests that the title of a person’s position in a corporation is not as important as the substance of the role that person plays in the corporation which is consistent with the functional approach under section 96 of the *ESA*.

62. As in counsel’s written submissions to the Delegate on November 15, 2017, in his appeal submissions counsel again refers to the *Interpretation Guidelines Manual British Columbia Employment Standards Act and Regulations* (the “*Guidelines*”) and the policy interpretation of section 96 therein. Counsel delineates from the *Guidelines* the non-exclusive factors the Director may apply under the functional test to determine whether the person is a director or officer and impose liability on that person. Counsel notes verbatim the following passage from the *Guidelines*:

Activities associated with being a director or officer *may include* regular attendance at the place of business, direction of employees, ownership of equipment, tools, furniture and furnishings, representing the company to creditors, suppliers, and customers, and holdings oneself out to be an owner. [*Italics mine*]

63. Counsel also quotes, but only in part, the passage in *Re Moore, supra*, (which is set out in full at paragraph above) containing non-exclusive factors which may be taken into consideration in determining whether an individual is a director of a company under the functional test. Counsel submits that where, on a balance of probabilities, the (non-exclusive) factors in *Re Moore* and in the policy statement in the *Guidelines* are not proven then it is “less probable” that the individual is a director under the functional test.

64. Having said this, counsel then goes on to contend that Mr. Chengalath is not a director of MMDI under the functional test and for the following reasons the Delegate misapplied and misinterpreted the law in concluding otherwise:

- The evidence, on the balance of probabilities, does not prove Mr. Chengalath dealt with financial matters, creditors, and payroll, nor proves that he owned any assets or shares of MMDI.

- The title of Mr. Chengalath at MMDI, “Managing Partner”, “carries little weight to the substance of his work duties” and the Director “erred in the application of common law” by “giving heavy weight to the evidence of Mr. Chengalath’s title”.
- Internal e-mails with clients were largely with Ms. Parker and Mr. Chengalath was only a third party who was copied the e-mails to make him aware of the contents of the e-mail but he was not an active participant in the e-mail.
- Mr. Chengalath was not in a position to direct or control the payroll, hiring and termination of employees of MMDI. Payroll decisions were exclusively determined by Ms. Parker and MMDI had an independent accounting service to manage its payrolls and benefits.
- Mr. Chengalath’s signature on the termination letter to Mr. Dunkin does not amount to “sweeping power over all employees” but only indicates he was asked to execute the termination letter that was a decision made by the “management” after an internal review.
- Any involvement of Mr. Chengalath in the employment affairs of MMDI was “reasonable participation from a person required to provide assistant to manage projects and clients because he was expected to be aware of the talent pool in the Company and the needs [of] the clients.”
- Based on “[l]egal principle from precedents in common law” Mr. Chengalath is not a director under the functional test.
- Like the Branch Manager who was an investment advisor in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, Mr. Chengalath “did not have authority to make decisions impacting the Company’s business or legal interest on national or provincial level” and should be treated accordingly. He was in a role of advisor and/or project manager, and only had limited discretion in advising clients, advising colleagues, and receiving payments from clients.
- In *2909731 Canada Inc. v. Toews*, 2016 BCSC 852, “employees with power and discretion regarding the corporation’s affairs are not top management and thus not directors of the corporation as long as their authority does not allow them to make decisions impacting the legal and practical interests”. Mr. Chengalath role in MMDI as a sales manager or customer service manager who attended client meetings, responded to client requests, provided advice to clients, took payments from clients, and performed other work to fulfil clients’ requirements does not make him a director of MMDI as his power to deal with clients was limited and did not lead to decisions that impacted the legal and business interests of MMDI.
- Evidence of MMDI’s clients supports the conclusion that Mr. Chengalath was performing his duties as a sales person by attending client meetings, assisting on client projects and providing advice to clients and to Ms. Parker.
- Mr. Chengalath was only a “hired help” with MMDI and took payments from MMDI’s client, Compass Cannabis, only to “pass on to their accounting department” and when he personally paid client expenses from his personal bank account he submitted receipts to obtain reimbursement from MMDI.

- Mr. Chengalath did not know all clients of MMDI and only worked with “some selected clients and projects” he was assigned to work on by Ms. Parker.

65. With respect to Mr. Chengalath’s second contention under the error of law ground of appeal, counsel submits that the Complainants had the onus to prove that Mr. Chengalath, on a balance of probabilities, is the director of MMDI but the Complainants failed to discharge this burden. In the circumstances, the Director’s finding that that Mr. Chengalath was a director of MMDI resulted from the Director’s misapplication of “the standard proof in this civil dispute”. Counsel then sets out the following reasons why the Complainants failed to prove Mr. Chengalath was a director of MMDI:

- The Complainants only assumed that Mr. Chengalath had authority to make decisions pertaining to employee payroll and benefits but there was no direct supporting evidence.
- The Complainants’ discussion about salaries, benefits, and their role within the company with Mr. Chengalath was “likely part of normal interaction and socialization among co-workers”.
- The Complainants did not present any direct evidence to prove that Mr. Chengalath set pay-rates for any employee.
- The Complainants claimed that “Mr. Chengalath was involved in the policy making of the Company beyond advising in a consulting role [and] the onus is on the [Complainants] to prove their claim rather than ... Mr. Chengalath to produce corroborating evidence for his position”.
- The Complainants failed to provide “any factual evidence” that Mr. Chengalath had signing authority in MMDI and “signed contracts on behalf of the Company”.

66. Counsel also submits that the Complainants assumed that Mr. Chengalath personally invested in MMDI and that is why the Delegate requested from Ms. Parker the company records. However, states counsel, Mr. Chengalath should not be punished for Ms. Parker’s failure to provide company records to the Delegate when he has no control over Ms. Parker and no access to the records. Counsel alleges that the Delegate was biased in drawing an adverse inference against Mr. Chengalath that Ms. Parker’s failure to provide any financial information or corporate documents was because the records would likely show Mr. Chengalath had a financial investment or ownership interest in MMDI. Counsel adds that this, too, is an example of the Delegate misapplying the burden of proof on the Complainants to prove that Mr. Chengalath was a director of MMDI.

67. Counsel also submits that the Delegate failed to pursue records and documents of MMDI from the registered and records office of MMDI under the *BCA* or alternatively, under the *Bankruptcy and Insolvency* (“*BIA*”), by not requesting them from Ms. Parker’s trustee in bankruptcy.

68. Counsel also submits that it was unreasonable for the Delegate to have requested corporate records from Ms. Parker as she was “not a party to the action before the Director” and “did not have the corporate records in her possession or control upon her assignment into bankruptcy”.

69. The final submission of counsel under the error of law ground of appeal is that on the totality of the facts before the Director, “there is insufficient evidence in respect of the claim that Mr. Chengalath was a director



of the Company” and therefore the Director should refused to proceed with the Complainants’ Complaint under section 76(3)(e) of the *ESA*. In support of this argument, counsel submits:

- The statement in the press release of MMDI on April 6, 2017, that “Andy will be working alongside founding partner Ariele Parker” cannot be construed to mean that Mr. Chengalath would be an equal partner.
- Titles of the employees in the company were very fluid concepts as explained by Ms. Parker to a former employee, Leslie Thomson, in an e-mail dated May 8, 2017.
- The titles of the employees were presented on the company webpage for the purpose of “reflecting an image of a well-built marketing team to the public” and should be disregarded in favour of the functions and duties of employees.
- Mr. Chengalath’s role in the Company was unique from other employees and he was not paid regularly. He was hired in a consulting role to assist Ms. Parker to manage selected projects with some clients.
- Mr. Chengalath’s role was never to direct the affairs of the company.
- Titles were “fluid concepts” in the company and “did not equate to absolute power of anyone” as evidenced by Ms. Parker’s “invitation to Leslie Thomson for naming a title of his own position within the Company”.
- The Complainants did not provide sufficient evidence to establish their claim that “they believed Mr. Chengalath was an equal partner to Ariele Parker based on his title”.
- Former clients Compass Cannabis and Starbuds are competitors of Mr. Chengalath's new cannabis business venture and a determination against Mr. Chengalath would “impose a big challenge to his new cannabis business investment”. Therefore, the credibility of the evidence of these clients is suspect and should “carry little weight”. The evidence of these clients is also lacking factual basis.

### *Natural justice*

<sup>70.</sup> Counsel submits that the Delegate breached the principles of natural justice in making the Determination because:

- The Delegate was biased or impartial in the decision-making process when she made an adverse inference against Mr. Chengalath because Ms. Parker failed to provide corporate documents requested by the delegate.
- The Delegate “failed to allocate appropriate weight to the claims and evidence provided and stated by the former employees and former clients”.
- The Delegate “allocate[ed] more weight to claims and statements from [Complainants] whose credibility is compromised.” More specifically, counsel states:
  - i. The credibility of Ms. Lusted is compromised as she is now an employee of Starbuds, a former client of MMDI and current competitor of Mr. Chengalath’s business.

- ii. The credibility of Ms. Vanderburg is minimal because she informed the delegate that her employment with MMDI commenced in June 2016 but her employment contract with the company shows that she started employment on May 11, 2017. (Counsel includes as “new evidence” what is purported to be Ms. Vanderburg’s employment contract and argues that, in the circumstances, the Delegate’s calculation of the unpaid wages for Ms. Vanderburg is incorrect.)
- In the letter of termination for Mr. Dunkin, it states that the termination decision was as a result of “management review” but the delegate failed to make a finding that the termination decision was made by the management team.
  - The Complainants claimed that Mr. Chengalath had authority with respect to employee payroll and other employee affairs, but the Delegate did not find any “facts and evidence to support this conclusion”.
  - The Complainants claimed that the termination of their employment was without sufficient notice, and without sufficient compensation for length of service in lieu of notice, but the Delegate failed to make any findings in the evidence to support this claim.
  - The Delegate “failed to make findings of fact to verify whether each [Complainant] was terminated by the Company or resigned on [his or her own] volition, and to verify the actual length of service each claimant was employed by the Company, which resulted in error of wage calculation.”
  - The Delegate failed “to verify the legal status of the former clients who made claims against Mr. Chengalath” and “illegal business such as the Starbuds does not carry any weight in making statements and claims”.
  - The Delegate “failed to hear Mr. Chengalath’s evidence” because she “never requested any contracts, financial statements, payroll statements, or Company’s documents that Mr. Chengalath was aware or had access to”. The Delegate only requested “Mr. Chengalath’s response in arguments opposing to the claims from the former employees” (sic).
  - The Delegate only “made efforts and obtained statements and emails from former clients [of MMDI] ... in support of the position that Mr. Chengalath was a director, but failed to reach out to other former clients, consultants or employees of the Company who never dealt with or received instructions from Mr. Chengalath in their contracts with the Company”.
  - The Director failed to obtain “a statement from the accountant of the Company to determine whether Arielle Parker was the only person made decisions regarding payroll and employee benefits.”

### ***New evidence***

- <sup>71.</sup> Under the new evidence ground of appeal, counsel for Mr. Chengalath submits Ms. Vanderburg’s employment contract executed on May 11, 2017, as “new evidence” because he states that Mr. Chengalath was not aware that Ms. Vanderburg’s claim was that she commenced her employment with the Company in 2016 until he received the Determination. Therefore, Mr. Chengalath could not have “anticipated the need

to present this contract to the Director.” He also submits that the contract “is useful in determining Mr. Chengalath’s position and role in the Company” but does not explain why or how.

72. In the result, counsel asks the Tribunal, based on all of the forgoing submissions, to find that the Director’s determination that Mr. Chengalath was a director of MMDI during the period of December 2016 to October 3, 2017 is “clearly wrong” and to cancel the Determination. In the alternative, counsel asks that the Determination should be referred back to the Director for “reconsideration and investigation”.

## ANALYSIS

73. Section 96 of the *ESA* provides as follows:

### Corporate officer’s liability for unpaid wages

- 96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.
- (2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for
- (a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,
  - (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act (Canada)* or to a proceeding under an insolvency Act,

...

74. It is settled law in the Tribunal’s decisions pertaining to an appeal of a determination made under section 96 of the *ESA*, that the appellant is limited to arguing only those issues that arise under section 96 of the *ESA*, namely:

- Whether the person was a director when the wages were earned or should have been paid;
- Whether the amount of liability imposed is within the limit for which a director may be found personally liable;
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

75. It is also settled law that the director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST #D180/96). Therefore, Mr. Chengalath may not make any submissions questioning or raising the matter of the correctness of the Corporate Determination in this appeal. However, in the appeal submissions, Mr. Chengalath’s counsel disputes the delegate’s calculation of unpaid wages of Ms. Vanderburg as incorrect stating that her written contract of employment shows she started employment on May 11, 2017,

and not June 2016. The question of the correctness of the wages awarded to Ms. Vanderburg is a matter challenging the correctness of the Corporate Determination and, therefore, Mr. Chengalath is precluded from arguing this point in the appeal of the section 96 Determination. This is something that could have been raised in the appeal of the Corporate Determination by MMDI but MMDI did not appeal the Corporate Determination.

76. Furthermore, under the natural justice ground of appeal, counsel argues that the Complainants claimed that the termination of their employment was without sufficient notice or compensation for length of service in lieu of notice, but the Delegate failed to make any findings in evidence to support this claim and also failed to verify the actual length of service of each Complainant which resulted in an error in wage calculation. While I am not persuaded with the relevance of counsel's above submissions advanced under the natural justice ground of appeal, I note, based on the Reasons, that the Corporate Determination only awarded outstanding wages to the Complainants for breach of sections 17 and 18 of the *ESA* and not breach of section 63. Notwithstanding, any dispute questioning error in wage calculation or whether or not sufficient notice for length of service was provided to the Complainants goes to the correctness of the Corporate Determination and therefore, it should not be considered in the appeal of the section 96 Determination. The appropriate time for raising these issues would have been in the appeal of the Corporate Determination. However, as indicated, MMDI failed to file an appeal of the Corporate Determination.
77. Having said this, it is clear that the substance of Mr. Chengalath's appeal challenges the delegate's finding that Mr. Chengalath was a director of MMDI at the material time the Complainants wages were earned or should have been paid. In making this challenge, Mr. Chengalath, as previously indicated, relies on all three grounds of appeal delineated in section 112(1) of the *ESA*, namely:
- (a) the director erred in law;
  - (b) the director failed to observe the principles of natural justice in making the determination;  
and
  - (c) evidence has become available that was not available at the time the Determination was being made.
78. It is important to note that an appeal is not simply another opportunity to argue the merits of a claim to another decision maker. It is an error correction process, with the burden on the appellant to persuade the Tribunal there is an error in the determination under one of the above statutory grounds.
79. It also well established in the Tribunal's decisions that the grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.

80. I have carefully reviewed counsel's submissions which, in many instances, repeat the submissions counsel made in the earlier correspondences to the Delegate dated November 15 and December 19, 2017 (see paragraphs 45 and 47 above) and the evidence Mr. Chengalath emailed to the Delegate in his e-mails on October 31 and November 1, 2017 (see paragraphs 42 and 43 above). To the extent the appeal submissions of counsel repeat his and Mr. Chengalath's submissions before the Determination was made they constitute re-argument and are inappropriate. As indicated above, an appeal is not simply another opportunity to argue the merits of a claim to another decision maker.

### ***Error of law***

81. I have also reviewed counsel's submissions under the error of law ground of appeal, namely, the allegations that the Delegate: (i) misapplied the law, or misinterpreted the law of functional test, (ii) misapplied the general principle of burden of proof, and (iii) made the Determination when there is not sufficient evidence to reasonably conclude Mr. Chengalath was a director. I am not at all persuaded with and do not find any merit in any of these submissions. I will provide my reasons below.

82. First, *John Moore, supra*, only sets out some *non-exclusive* factors, as examples, of factors that should be considered in the determination. None of the factors set out in *John Moore*, alone, are determinative of the question whether an individual not listed as a director in the corporate records of a company is a director. The Reasons show that the Delegate meticulously reviewed and assessed all of the evidence of the Complainants, Mr. Chengalath, MMDI and the latter's clients and former and prospective employees in context of the functional approach propounded in *John Moore* to arrive at the decision she did, namely, that Mr. Chengalath was a director of MMDI. I find the analysis of the Delegate (delineated at paragraphs 49 to 55 above) convincing and persuasive and do not find any reason to interfere with the Delegate's decision.

83. It is also apparent from the Delegate's analysis (contained in paragraphs 49 to 55 above) that she preferred the evidence of the Complainants, MMDI's clients and other employees and prospective employees to Mr. Chengalath's, which it was within her discretion to do.

84. It is also clear from the her analysis that the Delegate was not persuaded that Mr. Chengalath's power to deal with the clients and employees was as limited as he claimed or that he was subordinate to Ms. Parker and took instructions from her. It is also apparent that the Delegate did not find convincing counsel's submission that Mr. Chengalath was not in a position to impact the legal and business interests of MMDI. I do not find the Delegate to have erred in her decision above as I do not find her conclusions of fact are perverse and inexplicable, in the sense that they are made without any evidence or without any rational foundation.

85. I am also not persuaded with counsel's argument that Mr. Chengalath's title as "Managing Partner" did not reflect the substantive position Mr. Chengalath occupied within MMDI and that the Delegate unnecessarily considered this title or placed more weight on the title than necessary under the functional test. I find that it was open to the Delegate to prefer the evidence of the Complainants and former employees and clients of MMDI with respect to the role of Mr. Chengalath in MMDI to determine whether he was a director of MMDI at the material time in question. The evidence of the title of Chengalath as "Managing Partner" of MMDI was but one piece of evidence that the Delegate, together with all other evidence, considered in

deciding that Mr. Chengalath was a director of MMDI. I do not find any error on the part of the Delegate in this regard.

86. I have also reviewed the court decisions set out in the submissions of counsel in support of Mr. Chengalath's argument that the delegate misapplied or misinterpreted the functional test. I do not find any of the cases including *RBC Dominion Securities v. Merrill Lynch Canada Inc.* ("RBC") or *2909731 Canada Inc. v. Toews* ("Toews") helpful to Mr. Chengalath. While I do not take any issue with the legal principles set out in these cases, the facts in these cases are distinguishable from the case at hand. The findings of fact made by the Delegate in the case of Mr. Chengalath show that Mr. Chengalath's role in MMDI was more substantive than of the employees in *Toews* or the Branch Manager in *RBC*. I reiterate again that, based on the Delegate's analysis (referred to at paragraphs 49 to 55 above) the scope of Mr. Chengalath's power and dealings with clients and employees of MMDI was greater than Mr. Chengalath or his counsel made out and the Delegate evidently saw Mr. Chengalath as someone who impacted the legal and business interests of MMDI based on the totality of the evidence. I do not find any basis not to defer to the Delegate's conclusions of fact here.
87. With respect to counsel's contention that the delegate misapplied the general principle of burden of proof, the gist of counsel's argument here is that the onus was on the Complainants to prove that Mr. Chengalath was a director and they failed to do so. I have reviewed all of the submissions of counsel under this argument and find that counsel is primarily challenging the delegate's findings of fact in the Determination. The Delegate, as indicated, appeared to prefer the evidence of the Complainants and the former and prospective employees and clients of MMDI over Mr. Chengalath's. On closer look, counsel is arguing that the Delegate should not have given the weight she did to the evidence of the Complainants because it was deficient and did not meet the burden of proof to establish, on a balance of probabilities, that Mr. Chengalath was a director of MMDI. The weight of evidence is a matter to be decided by the Delegate and is a question of fact, not law (see *Beamriders Sound & Video*, BC EST # D028/06). The Tribunal is without jurisdiction to hear appeals based on questions of fact alone. I do not find the Delegate erred in accepting or weighing the evidence of the Complainants as she did and I do not find counsel's argument that the Complainants (or the evidence in totality) did not, on a balance of probabilities, establish Mr. Chengalath was a director of MMDI.
88. Counsel also argues that the Delegate was biased in drawing an adverse inference against Mr. Chengalath that Mr. Parker's failure to provide financial information and corporate documents was because they would likely show Mr. Chengalath had a financial or ownership interest in MMDI. Counsel contends that this is but another example of the Delegate misapplying the burden of proof on the Complainants to prove that Mr. Chengalath was a director of MMDI. I will address the allegation of bias under the natural justice ground of appeal below as counsel also reiterates this argument under this ground. However, I do want to point out that I do not find anything wrong with the adverse inference the Delegate drew against Mr. Chengalath. It was uncontested that Ms. Parker was Ms. Chengalath's fiancée. In the circumstances, I find it was open for the Delegate to make the inference she did that it would not be helpful to her fiancée (Mr. Chengalath) if she cooperated and produced the documents requested by the Delegate. If I am wrong in this conclusion, I find that, independent of the adverse inference the Delegate drew, there is sufficient evidence, on the balance of probabilities, for the Delegate to have made the finding that Mr. Chengalath was director of MMDI.
89. Counsel also submits that the delegate failed to obtain the company documents of MMDI from the registered and records office of MMDI pursuant to the *BCA* or, alternatively, under the *BIA* by requesting Ms. Parker's

trustee in bankruptcy. The Record adduced in the appeal indicates the efforts the Delegate made to obtain company documents of MMDI. More particularly, in her email of November 16, 2017, to Ms. Parker, the Delegate states that a BC Corporate Registry search of MMDI on October 19, 2017, indicated that MMDI's registered and records office changed from Pihl and Company on Ellis Street in Kelowna to Accelerate Okanagan on Doyle Avenue, in Kelowna. The Delegate's correspondence to the new address of the registered and record's office was returned and a representative of Accelerate Okanagan, in an e-mail dated November 29, 2017, indicated that Ms. Parker had not provided a forwarding address for correspondence. The Delegate in her November 16 e-mail asks Ms. Parker where the company's records are currently located but she did not get a response. She also contacted the trustee appointed in the personal bankruptcy of Ms. Parker and through the trustee asked Ms. Parker to provide her current address but Ms. Parker did not comply. I do not find the delegate to have neglected any avenue to obtain the company records of MMDI. If counsel is assuming that Ms. Parker's trustee in bankruptcy had possession of the company records and the Delegate could have obtained those records from the trustee, I do not find there is any evidentiary basis to support that assumption. I find it to be speculative at best.

<sup>90.</sup> The final argument counsel makes under the error of law ground of appeal is that there was insufficient evidence to establish or prove that Mr. Chengalath was a director of MMDI at the material time in question. The submissions counsel makes in support of this argument (set out at paragraph 69 above) are similar to the submissions counsel made in his correspondences to the Delegate before the Determination was made and I find them to be re-argument.

<sup>91.</sup> Having said this, I note that counsel is arguing that the Delegate erred in law as there is insufficient evidence to conclude that Mr. Chengalath was a director. As indicated previously, where there is an allegation that the Delegate acted without evidence or acted on a view of facts which could not reasonably be entertained, an error of law may be found under the test in *Britco Structures Ltd., supra*. The Tribunal, in *Britco*, quoting from the decision of the British Columbia Supreme Court in *Delsom Estate Ltd. v. Assessor of Area 11 – Richmond/Delta*, [2000] B.C.J. No. 331, stated that error of law, in these circumstances, is only found where it is shown:

...that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as the relevant law, could have come to the determination, the emphasis being on the word 'could'...

<sup>92.</sup> In this case, the Delegate considered the evidence of both parties and preferred the evidence of the Complainants and other employees and clients over Mr. Chengalath's. I do not find that the Delegate acted without any evidence, nor did she act on a view of facts that could not reasonably be entertained. I am not persuaded that a reasonable person, acting judicially and properly instructed as to the relevant law, could not have come to the same determination as that made by this Delegate. I also find that the Delegate, in this case, set out all of the evidence that supported her findings of fact in a clear manner, and the Reasons indicate that the Delegate did give consideration to all relevant evidence (see paragraphs 49 to 54 above). I do not find the Delegate erred in any respect in the Determination, and dismiss Mr. Chengalath's error of law ground of appeal.

### *Natural justice*

93. Counsel for Mr. Chengalath alleges breach of natural justice on the part of the Delegate in making the Determination. He states that the Delegate was biased or impartial because she made an adverse inference against Mr. Chengalath on the basis that Ms. Parker failed to provide financial and corporate documents of MMDI requested of her.
94. An allegation of bias on the part of the delegate must be proven by Mr. Chengalath on the evidence. As the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact:
- . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.
95. It is also important to note that an allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.
96. In *R. V. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court added the following to the concern expressed above:
- Regardless of the precise words used to describe the test (of bias or apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.
97. As well, the Tribunal has adopted the view that allegations of bias, as has been made here, must be considered in light of the fundamental nature of the statutory purposes and the complaint process within which a Delegate of the Director functions.
98. On the basis of the law delineated above, the onus or burden of proving actual or a reasonable apprehension of bias is high and demands “clear and convincing” objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances would conclude the object of the allegation was biased against him. I do not find that burden has been discharged or met in this case by Mr. Chengalath. I do not find the Delegate’s decision to draw an adverse inference against Mr. Chengalath because of the failure of the latter’s fiancée, Ms. Parker, to produce the corporate documents, amounts to clear objective evidence from which it can reasonably be found that the Delegate was disposed to hold an adverse view of Mr. Chengalath. As indicated previously, I think it was open for the delegate to make the adverse finding she made.



99. Counsel also alleges under the natural justice ground of appeal that the Delegate “failed to allocate appropriate weight to the claims and evidence provided and stated by the former employees and former clients”. This is an argument that was also advanced under the error of law ground of appeal. I find it equally unconvincing under the natural justice ground of appeal. I find counsel’s argument above is grounded in his or Mr. Chengalath’s dispute with the Delegate’s findings of fact. As I have said before, it was open for the delegate to prefer and attribute greater weight to the evidence of the Complainants and other witnesses over Mr. Chengalath’s. In so doing, it was open to the Delegate to make findings of fact that were averse to Mr. Chengalath’s interests. In the result, I do not find the Delegate to have violated any natural justice concerns here.
100. I also find speculative and unpersuasive counsel’s contention that the credibility of Ms. Lusted is compromised as she is now an employee of Starbuds, a former client of MMDI and current competitor of Mr. Chengalath’s business. Similarly, I find unpersuasive counsel’s argument that the credibility of Ms. Vanderburg is minimal because she informed the Delegate that her employment with MMDI commenced in June 2016 but her employment contract with the company shows that she started employment on May 11, 2017. The opportunity to challenge Ms. Vanderburg’s contention that her employment commenced in June 2016 was in the investigation leading to the Corporate Determination or in an appeal of the Corporate Determination. However, MMDI failed to appeal the Corporate Determination. It is not open to counsel, in the appeal of a section 96 Determination, to question Ms. Vanderburg’s credibility by questioning her evidence in the corporate proceeding.
101. Counsel also alleges that the Delegate breached the principles of natural justice for failing to make a finding that the decision to terminate Mr. Dunkin was made by the management team because the termination letter says the decision was made after “management review”. I do not agree with counsel. I find it was open to the Delegate to conclude that the termination letter, solely signed by Mr. Chengalath, was signed in his capacity as the Managing Partner of MMDI. The Delegate also correctly points out in the Reasons that the letter does not say that it was issued on behalf of Ms. Parker notwithstanding Mr. Chengalath’s earlier claim that he only signed the termination letter after getting Ms. Parker’s authorization. I find this is another instance of counsel or Mr. Chengalath disputing the Delegate’s findings of fact. As previously indicated, the grounds of appeal listed in section 112(1) of the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law. I do not find any error of law in the Delegate’s findings here.
102. Counsel is also disputing, under the natural justice ground of appeal, the Delegate’s findings of fact that Mr. Chengalath had authority with respect to employee payroll and other employee affairs. For the same reasons delineated above, namely, that the *ESA* does not provide for appeals based on errors of fact, I reject counsel’s argument here.
103. Counsel also argues, under the natural justice ground of appeal, the Delegate failed:
- to make any findings in the evidence to support the Complainants’ claim that the termination of their employment was without sufficient notice or compensation for length of service in lieu of notice;

- to verify whether each Complainants' employment was terminated by MMDI or they resigned on their own volition; and
- to verify the actual length of service each Complainant had with MMDI "which resulted in error of wage calculation".

<sup>104.</sup> I do not find the above arguments helpful to Mr. Chengalath. I find these arguments go to the question of the correctness of the Corporate Determination and should have been properly raised in an appeal of the Corporate Determination and not in the appeal of the section 96 Determination. As indicated previously, MMDI did not appeal the Corporate Determination.

<sup>105.</sup> Counsel also argues that a breach of natural justice occurred because the Delegate failed "to verify the legal status of the former clients who made claims against Mr. Chengalath" and "illegal business such as the Starbuds does not carry any weight in making statements and claims". I find this argument by counsel dubious at best and most likely spurious. I put no credence in it.

<sup>106.</sup> Counsel also states that the Delegate breached the principles of natural justice because she "failed to hear Mr. Chengalath's evidence" and "never requested any contracts, financial statements, payroll statements, or Company's documents that Mr. Chengalath was aware [of] or had access to". He states that she only requested "Mr. Chengalath's response in arguments opposing to the claims from the former employees" (sic). I find this submission unpersuasive. Counsel represented Mr. Chengalath and if Mr. Chengalath had access to any documents in the nature of those listed above that would help his position, I would have thought that counsel would have assisted his client and presented them to the Delegate before the Determination was made. I also find counsel's submission no more than speculative in that if there were any documents of the sort counsel has suggested in Mr. Chengalath's possession, one would have thought that these documents, if helpful to Mr. Chengalath, would have been adduced by his counsel in the appeal but that is not so.

<sup>107.</sup> The next argument counsel makes under the natural justice ground of appeal is that the Delegate only "made efforts and obtained statements and emails from former clients [of MMDI] ... in support of the position that Mr. Chengalath was a director, but failed to reach out to other former clients, consultants or employees of the Company who never dealt with or received instructions from Mr. Chengalath in their contracts with the Company." Similarly, he argues that the Delegate failed to obtain "a statement from the accountant of the Company to determine whether Ariele Parker was the only person [who] made decisions regarding payroll and employee benefits." I find these submissions as unconvincing as the previous and somewhat confusing. I note that counsel and his client, Mr. Chengalath, were privy to the Delegate's preliminary determination which was sent to Mr. Chengalath by registered mail on November 8, 2017. In response to the preliminary findings letter, counsel sent a letter dated November 15, 2017, to the Delegate advising that Mr. Chengalath had retained legal counsel and they were in receipt of the preliminary findings letter and responding to the allegations therein. In a subsequent letter from counsel to the Delegate dated December 19, 2017, counsel, among other things, specifically responded to the evidence of former employees and clients of MMDI. If counsel was aware of any evidence favourable to Mr. Chengalath, whether from other clients of MMDI or the latter's accountant, then it defies reason why counsel would not have produced such evidence to the Delegate before the Determination was made. It is not the obligation of the Delegate to go on a fishing expedition to search for evidence from unknown clients or individuals to support Mr. Chengalath's position or to rebut the

evidence in the preliminary findings letter. The onus is on Mr. Chengalath to seek out evidence from witnesses whom he knows to be supportive of his position whether they are former employees, clients, consultants or other service providers of MMDI. At the very least, Mr. Chengalath could have informed the delegate to contact any specific witness he felt was favourable for him but he did not do so before the Determination was made. I reiterate that it is not the responsibility of the Delegate to go on a fishing expedition to seek out evidence from unknown individuals to support Mr. Chengalath's position; it is Mr. Chengalath's responsibility.

108. Having reviewed the submissions of counsel under the natural justice ground of appeal, I am sufficiently convinced that Mr. Chengalath has not made out a successful case for a finding of a breach of natural justice on the part of the Delegate. To the contrary, having reviewed the Record and the Reasons, I am convinced that the Delegate afforded Mr. Chengalath all of the procedural rights associated with natural justice. Mr. Chengalath had a full and fair opportunity to learn the case against him, the right to present his evidence, and the right to be heard by an independent decision-maker. In the result, I reject Mr. Chengalath's natural justice ground of appeal.

### ***New evidence***

109. It is important to note that the new evidence ground of appeal in section 112(1)(c) of the *ESA* is not intended to allow a person dissatisfied with the result of a determination to simply seek out more evidence to supplement or buttress what was already provided to, or acquired by the Delegate during the investigation or hearing of the complaint if that evidence could have been provided to the Delegate before the determination was made. The main or essential aspect of this ground of appeal is that the fresh evidence was not available at the time the determination was made.

110. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, (BC EST # D171/03), the Tribunal, faced with the issue of whether or not to accept fresh evidence, decided that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. This test is a four-pronged test as follows:

- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) The evidence must be relevant to a material issue arising from the complaint;
- (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) The evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

111. It is important to note that the criteria above are a *conjunctive* requirement. Therefore, the party requesting the Tribunal to admit evidence as new evidence must satisfy each criterion before the Tribunal will consider it in the appeal.

112. In this case, the purported new evidence Mr. Chengalath wants to adduce is Ms. Vanderburg's employment contract executed on May 11, 2017. Counsel states that Mr. Chengalath was not aware that Ms. Vanderburg's claimed that she commenced her employment with the MMDI in 2016 until he received the Determination. Therefore, he could not have "anticipated the need to present this contract to the Director." He also submits that the contract "is useful in determining Mr. Chengalath's position and role in the Company" but does not explain why or how. It should also be noted that, under the natural justice ground of appeal, Mr. Chengalath or his counsel also relies on the contract in question to challenge Ms. Vanderburg's credibility and the Delegate's calculation of the unpaid wages owing to her (see paragraph 70).
113. I have reviewed counsel's submissions and I do not find the contract of Ms. Vanderburg is "new evidence" under the first and fourth prongs of the test for admitting new evidence in *Bruce Davies, supra*. The contract, executed on May 11, 2017, clearly existed at the time of the Delegate's investigation into the question of whether or not Mr. Chengalath was a director of MMDI and could have, with the exercise of due diligence, been discovered and presented to the Delegate during the investigation or adjudication process. Therefore, solely on the first prong of the test, the contract is not "new evidence". While I need not go further in the test, I note that the contract also does not meet the fourth prong of the test. That is, the contract does not have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on a material issue in the Determination. The material issue in the Determination is whether, under section 96 of the *ESA*, Mr. Chengalath was a director of MMDI at the time wages were earned by the Complainants or should have been paid. I do not find the contract probative in this regard.
114. I reiterate that in an appeal of a section 96 determination, the appellant is limited to arguing *only* those issues that arise under section 96 of the *ESA* (see paragraph 74 above). Mr. Chengalath is not using the contract in question to argue any of the issues that arise under section 96 but instead to argue issues that go to the correctness of the Corporate Determination (as previously noted). Therefore, the contract is irrelevant in this appeal.
115. For all of above reasons, I reject the natural justice ground of appeal.

## Conclusion

116. In sum, nothing in this appeal has persuaded me that the decision made by the Director concerning Mr. Chengalath's liability under section 96 is based on an error of law. Rather, I find the decision is based on an analysis and weighing of information provided to and acquired by the Delegate during the investigation. As for the natural justice ground of appeal, I am not persuaded that any such failure has occurred. It is not a breach of principles of natural justice for the Delegate to have accepted or preferred some evidence and not others. I also do not find any bias on the part of the Delegate in drawing the adverse inference she did. However, I do find it troubling that counsel would make such a serious allegation against the Delegate without sufficient foundation.
117. As for the new evidence ground of appeal, as indicated, I find the evidence sought to be introduced by Mr. Chengalath fails to qualify under the test for admitting new evidence in *Bruce Davies, supra*. It is also not relevant or probative evidence in terms of the issues that arise under section 96 of the *ESA*.

- <sup>118.</sup> In the result, I am satisfied that Mr. Chengalath's appeal has no presumptive merit and has no prospect of succeeding and I dismiss it pursuant to section 114(1)(h) of the *ESA*.

## **ORDER**

- <sup>119.</sup> Pursuant to subsection 115 of the *ESA*, I order the Determination dated January 19, 2018, be confirmed in the amount of \$21,127.76 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**