

Citation: Kanin Construction Management Inc. (Re)  
2021 BCEST 45

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Kanin Construction Management Inc.  
("Kanin")

- 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:** David B. Stevenson

**FILE No.:** 2021/020

**DATE OF DECISION:** May 17, 2021

## DECISION

### SUBMISSIONS

C. Nicole Mangan

counsel for Kanin Construction Management Inc.

### OVERVIEW

1. Kanin Construction Management Inc. (“Kanin”) has filed an appeal under section 112 of the *Employment Standards Act* (the “*ESA*”) of a Determination issued by Jake Kislock, a delegate of the Director of Employment Standards (the “Director”), on January 19, 2021.
2. The Determination found Kanin had contravened Part 4, section 40, Part 5, section 46 and Part 8, section 63 of the *ESA* and section 46 of the *Employment Standard Regulation* (the “*Regulation*”) in respect of the employment of Daryl Jacobs (“Mr. Jacobs”) and ordered Kanin to pay wages to Mr. Jacobs in the amount of \$21,433.60, an amount that included interest under section 88 of the *ESA* and concomitant annual vacation pay, and to pay administrative penalties in the amount of \$2,000.00. The total amount of the Determination is \$23,433.60.
3. In this appeal Kanin says the Director erred in law and failed to observe principles of natural justice in making the Determination. Kanin seeks to have the Determination cancelled or, alternatively, referred back to the Director.
4. In correspondence dated March 2, 2021, the Tribunal acknowledged having received an appeal. Among other things, the correspondence requested the section 112(5) record (the “record”) from the Director and indicated that no submissions were being sought from either Mr. Jacobs or the Director pending a review of the appeal by the Tribunal.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to the parties; each have been given an opportunity to object to its completeness. Counsel for Kanin has acknowledged the completeness of the record. Mr. Jacobs has not raised any objection to its completeness. The Tribunal accepts the record is complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
  - 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:
    - (a) the appeal is not within the jurisdiction of the tribunal;
    - (b) the appeal was not filed within the applicable time limit;
    - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

- (d) the appeal was made in bad faith or filed for an improper purpose or motive;
- (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
- (f) there is no reasonable prospect the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;
- (h) one or more of the requirements of section 112 (2) have not been met.

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), Mr. Jacobs and the Director will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

### **ISSUE(S)**

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

### **THE FACTS**

9. At the relevant time, Kanin operated a construction management company.

10. Mr. Jacobs was employed as a Finishing Superintendent on a high-rise construction project in Vancouver from August 2018 to December 18, 2019, when he was terminated. Following his termination, he filed a complaint with the Director alleging Kanin had contravened the *ESA* by failing to pay overtime wages. Mr. Jacobs later added an allegation that he was terminated without cause and was entitled to length of service compensation.

11. Kanin denied any contravention of the *ESA* relating to Mr. Jacobs, contending he was a manager, and as such was excluded from certain entitlements under the *ESA*, including overtime, that he was terminated for cause and in any event was not entitled to length of service compensation by operation of the exception in section 65(1) (e) of the *ESA*.

12. The Director investigated the complaint, finding Mr. Jacobs was entitled to overtime pay, length of service compensation, statutory and annual vacation pay; ordered wages be paid relating to those matters and imposed administrative penalties for denying those entitlements and for failing to produce records as required in a Demand for Employer Records (the "Demand") issued to Kanin during the investigation.

13. During the investigation of the complaint, Kanin provided the following information and assertions relating to the employment of Mr. Jacobs:

- He was categorized as a "manager" and not paid overtime.
- He was left to manage his own hours and his contract of employment did not state a specific number of hours per week.

- He was responsible for scheduling and managing all the trades on the site, to ensure their work was up to acceptable standards, and for all the resources necessary to finish the project.
- He could hire, fire and discipline the subtrades on the site; Kanin had few employees.
- He could not authorize overtime, time-off or leaves of absence.
- He was responsible for creating all work schedules and sequencing for the subtrades, for ensuring work was completed on time, and was able to authorize capital expenses up to a limit.
- He self reported his hours and, in a letter from Kanin dated October 31, 2019, was directed not to work any hours over 8 in a day or 40 in a week.
- Kanin's role on the site was to direct and manage subtrades to complete the finishing on the project.
- He was terminated for a serious breach of employment obligations relating to the acquisition of an occupancy permit on part of the project.

14. These assertions are recorded in the Determination.

15. I set them out to make the point that some of the information and assertions provided by Kanin were accepted by the Director: that Mr. Jacobs supervised the subtrades, self reported his hours and could not authorize overtime, time-off or leaves of absence.

16. The Director disregarded some of the assertions made because they were inconsistent with more compelling, and hence better, evidence.

17. The Director rejected the assertion that Mr. Jacobs was responsible for creating all work schedules and managing all the finishing subtrades on site.

18. Some of the assertions made by Kanin were not given effect by the Director, or their weight was minimized, because they were unsupported by any objective evidence from Kanin and failed to either acknowledge or address what Mr. Jacobs said, and the evidence supported, were other responsibilities Mr. Jacobs had on site. I note here that the assertions by Kanin that Mr. Jacobs hired, fired or disciplined persons on the site and that he was able to authorize capital expenditures could quite easily have been supported by Kanin with objective evidence. As an aside, I share the Director's view that the failure to do so speaks volumes.

19. The Director received a substantial amount of information from the parties and made the following findings of fact:

- Mr. Jacobs was not employed in an executive capacity.
- There was agreement that Mr. Jacob was employed as Finishing Superintendent and he had no authority to authorize overtime, time-off or leaves of absence.
- There was conflicting evidence about the scope of his duties.

- While Mr. Jacobs may have assisted in creating the schedules for the trades people, the responsibility for that lay with the Project Superintendent employed by ICON West Construction Corp. (“ICON”); it was not Mr. Jacobs’ responsibility.
- Mr. Jacobs acknowledged supervising tradespeople, but that was not his “principal” responsibility; there were several other aspects of his job responsibilities outside of supervising tradespeople, including preparing status reports, inspecting the site and checking efficiencies.
- Kanin provided no evidence relating to other aspects of Mr. Jacobs’ responsibilities.
- Mr. Jacobs was best suited to describe the duties he performed and, based on all of the evidence, his principal duties were not supervisory in nature.
- Kanin had not met the burden of showing just cause for terminating Mr. Jacobs.
- Kanin’s principal business was not construction.

20. On June 16, 2020, the Director provided the parties with a written report setting out preliminary findings on the issues identified in the complaint. The Director invited the parties to respond to the written report if there were any areas of dispute, allowing either party to provide new relevant information, an explanation of the relevance of the new information and why that information had not been provided earlier.

21. Kanin provided a response (the Rebuttal”), which included: an undated organizational chart; an e-mail, dated June 25, 2020, from Kurt LaPlante, Senior Site Superintendent for Kanin; an e-mail, dated June 25, 2020, from Radine Rutschmann, Project Manager for Kanin, presenting her summary of Mr. Jacobs’ job responsibilities, a second e-mail from Radine Rutschmann, dated November 14, 2019; an e-mail, dated June 26, 2020, from John Shoesmith, Senior Vice-President of Operations for ICON; and a letter, dated June 29, 2020, on ICON letterhead, from SiuKee Wong, whose position with ICON is not indicated in the letter.

22. In an e-mail to Mr. Jacobs dated July 9, 2020, the Director stated:

I received submissions in response to the written report from both yourself and the Employer. I have now reviewed those submission and I am in the process of writing the determination ...  
(record, page 70)

## **ARGUMENT(S)**

23. The appeal is grounded in assertions that the Director erred in law and failed to observe principles of natural justice in making the Determination. I shall deal with these grounds of appeal as they arise in the submission made on behalf of Kanin.

### *Failure to Observe Principles of Natural Justice*

24. Kanin says the Director failed to observe principles of natural justice by failing to consider the Rebuttal and the material provided with the Rebuttal. Kanin says all this information was relevant to their position that Mr. Jacobs was a “manager”. The Rebuttal, from Harj Dhaliwal, Executive Vice President of Kanin,

that accompanied this additional information asserts this information confirms Mr. Jacobs had a level of responsibility within the chain of command that “entails quite a bit of responsibility for organizing and managing the finishing trades”, that he signed off on all trade billings, a function that can “only be done by a Manager”, that Mr. Jacobs “had exclusive authority to call Workforce [a labour contractor] for labour” in his area of responsibility and the exclusive authority to organize that labour, that Mr. Jacobs acted independently of management plans, changing them of his own volition, and that Kanin was contracted to provide all necessary management resources to complete the project.

25. Kanin submits the documents that accompanied the submission from Mr. Dhaliwal were relevant to the “manager” issue, as they addressed: the purpose for which Mr. Jacobs was hired; his authority to hire, fire and discipline; his role in scheduling the finishing tradespeople; procuring supplies; and the purpose for which Kanin generally was contracted.
26. Kanin argues the failure of the Director to address the Rebuttal in the Determination is a denial of procedural fairness. The submission of Kanin actually goes further and says it is “clear” the Director failed to consider the Rebuttal.
27. Kanin says if the Director had considered this material, the resulting finding on the manager issue would have been different.

#### *Error of Law*

#### Definition of Manager

28. Kanin submits the Director erred in law by misapplying the definition of “manager” in the *Regulation*, arguing it is contrary to common sense for the Director not to have found the other responsibilities of his job – to check, note or manage efficiencies or issues – are part of, and inclusive of, a responsibility to supervise and direct resources.
29. Additionally, Kanin argues the Director imposed an unduly narrow interpretation of the definition by suggesting “supervision” does not suffice as “direct management”.
30. Kanin relies on the decision of the Tribunal in *Ye Qing Lu*, 2021 BCEST 13, arguing the facts in that case, which resulted in the complainant being found to be a manager, are substantially similar to the facts in this case and, to provide consistency, ought to have guided the result in this case.

#### Section 65(1) (e) Exclusion

31. Kanin submits the Director erred in finding Kanin’s principal business, the management and financing of construction projects, did not place them within the exclusion and disentitle Mr. Jacobs to compensation for length of service under section 63 of the *ESA*.

#### **ANALYSIS**

32. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *ESA*, which says:

- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- a) the director erred in law;
  - b) the director failed to observe the principles of natural justice in making the determination;
  - c) evidence has become available that was not available at the time the determination was made.

33. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

34. The *ESA* is remedial legislation and, as such should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objectives. The Tribunal has adopted what the courts have repeatedly stressed: that employment standards legislation, being “benefits-conferring” legislation, should be interpreted in a “broad and generous manner”; see *Helping Hands Agency Ltd. v. B.C.* (1995), 131 D.L.R. (4th) 336 (BCCA); *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27].

35. Statutory provisions that take away employment benefits should be construed narrowly.

36. The burden of establishing a person is excluded from the entitlements and protection of the *ESA*, or any part of it, is on the person asserting an exclusion and there must be clear evidence supporting such an exclusion.

37. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

#### *Failure to Observe Principles of Natural Justice*

38. I reject the suggestion that the Director failed to consider the Rebuttal and the material submitted with it. The record indicates the Director did review the responses to the written report received from both Kanin and Mr. Jacobs before writing the Determination.

39. In assessing the merits of this argument, I make two key observations.

40. First, the reasons in the Determination must be read as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they were delivered: see *Prince George Nannies and Caregivers Ltd.*, BC EST # RD106/09 (Reconsideration of BC EST # D055/09) and *R. v. R.E.M.*, 2008 SCC 51, at paragraph 15.

41. Second, there are good reasons for the Tribunal to exercise caution in intervening in a decision of the Director on the basis that a delegate failed to consider relevant evidence. As pointed out in *Jane Welch operating as Windy Willows Farms*, BCEST # D161/05:

...any attempt to determine whether an administrative decision-maker has considered “all of the evidence” as a matter of procedural fairness, can come very close to the reassessment of the

actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.

42. In that decision, the Tribunal also stated it will not lightly find a delegate of the Director has failed to consider relevant evidence. Accepting the Director and his delegates have a duty, both under the *ESA* and at common law, to provide reasons for their determinations, it is trite that not every finding and conclusion needs to be explained and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned. If a delegate does not mention particular relevant evidence in his or her reasons that does not, in and of itself, demonstrate a failure to consider that evidence in making the determination. That said, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate's reasons.
43. In my view, it was sufficient for the Director to deal with Kanin's position, as a whole, by stating the lack of detail in the evidence they had provided minimized the effect of their assertions that Mr. Jacobs was a manager for the purpose of the *ESA*. It is logical to conclude from that finding that the Rebuttal, and the material that accompanied it, did not alter the perspective of the Director about the absence of objective support for Kanin's position on this issue. Simply put, it is probable the Director did not find this submission or the material particularly relevant or cogent to the issue being considered, which was whether Mr. Jacobs' *principal* responsibilities were supervising and/or directing human and other resources.
44. It is difficult to see how this material could overcome the difficulty expressed in the Determination with Kanin's evidence or otherwise advance Kanin's position on the issue. My examination and observations of the material submitted with the Rebuttal highlights the following concerns:
- the material is vague, imprecise and, in places, contradictory of some of the assertions made by Kanin earlier in the investigation, specifically that Mr. Jacobs could not authorize overtime, days off or leaves of absence and that he was responsible for creating all schedules and managing subtrades.
  - some of the material might even be said to undermine the assertions made by Kanin and support the findings of the Director. Mr. Shoemith's e-mail says Mr. Jacobs' function was to "organize various subtrades to complete the finishing portion of the project consistent with the agreed schedule under the direction of the Head Supervisor and Project Manager". That is not consistent with Kanin's position that Mr. Jacob's had "full autonomy" in organizing subtrades. (emphasis added)
  - none of the material rectifies the deficiency which the Director found with the information provided by Kanin – that assertions of fact made by them were unsupported by any evidence and no consideration was given by Kanin to the totality of the job duties performed by Mr. Jacobs. In my view, this deficiency is particularly problematic for Kanin as they were in the best position to provide objective support for their assertions and had even failed to comply with the Director's Demand. Expressed in another way, none of this material addresses the *principal* responsibilities of Mr. Jacobs in any objectively acceptable way. If there were records showing Mr. Jacobs hired labourers or trades people or made expenditures, Kanin was actually under a statutory duty to provide that information.



- the information provided has no compass; terms used such as “directing”, “coordinate”, “organize” and “procuring” have no objectively factual foundation and provide no basis for finding these observations and opinions should be given more weight than the evidence of Mr. Jacobs and Mr. Gillespie; this material is of the same type as Kanin saying Mr. Jacobs was a manager without providing the factual basis necessary to test that assertion.
- none of the statements in the material derogate from the rationale for accepting the information provided by Mr. Jacobs and Mr. Gillespie: that the former was found to be credible and was in the best position to know the job he performed; and the latter, in addition to also being in the best position to speak to those matters contained in his e-mails, was a disinterested person. Mr. Gillespie’s evidence had the added benefit of being supported by objective evidence.
- the material does not show Mr. Gillespie was not being truthful, which is suggested in the Rebuttal from Mr. Dhaliwal and in the argument made on behalf of Kanin by legal counsel. Kanin has not provided a copy of any construction schedule prepared and distributed by Mr. Jacobs and which might show Mr. Gillespie did not perform this function or submit any other evidence that might have allowed for such a conclusion concerning Mr. Gillespie’s truthfulness.

45. At its core, this argument by Kanin is nothing more than attempt to have this panel review and alter findings of fact made by the Director. The material provided with the Rebuttal does nothing more than reiterate, out of different mouths, assertions made by Kanin during the investigation, but found by the Director to have little weight, and I find nothing in this additional material that derogates from or justifies calling into question the conclusions reached by the Director. Kanin has shown no legal or factual basis for their natural justice argument.

46. Kanin has not shown the Director failed to observe principles of natural justice by ignoring or failing to address relevant evidence. The facts as found by the Director will govern this appeal.

47. As I note below, the authority of the Tribunal does not extend to considering appeals based on findings of fact unless such findings raise an error of law, which I do not find in this aspect of Kanin’s argument.

#### *Error of Law*

48. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

49. To confirm what I said immediately above, the grounds of appeal under 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: see *Britco Structures Ltd.*, BC EST # D260/03.
50. To reiterate, Kanin has not shown an error of law on the facts.
51. Kanin submits the Director misinterpreted and misapplied the definition of manager to the facts.
52. I will make a few preliminary points before addressing the substance of the argument made on this issue. First, there is no appeal from the finding that Mr. Jacobs was not employed in an executive capacity. Second, the finding of fact, that Mr. Jacobs' principal responsibilities did not consist of supervising and/or directing human and other resources, has not been shown to be wrong in law or to merit review. Third, there is an allusion to Mr. Jacobs' "job description" in the appeal submission; the evidence shows, and the Director found, that Mr. Jacobs had no job description. Fourth, and related to the previous point, the terminology used to describe an employee's position has no relevance.
53. The evidence in this case from Mr. Jacobs and Mr. Gillespie, which the Director accepted, was that Mr. Jacobs was not able to authorize overtime, time off or leaves of absence, he could not hire, fire or discipline employees and recommendations he made to that end were ignored, he did not direct resources, as that was done by the Project Manager and the Site Superintendent, he was not responsible for creating work schedules. Mr. Jacobs duties around the job site included checking efficiencies, making sure things were installed properly, answering questions relating to the schedules from supervisors, supervising tradesmen, but not managing them, making notes on the trades' progress and reporting that to his superiors and assisting the Project Manager (at ICON) in making work schedules.
54. The Director found, on the accepted facts that Mr. Jacobs' principal duties were not supervisory in nature.
55. Kanin submits the Director is wrong, not necessarily in respect of whether his principal duties were supervisory, but in respect of whether the performance of what the Director accepts as non-supervisory duties were, in fact, just another way of describing a duty to supervise and/or direct resources and should have resulted in the Director reaching a different conclusion.
56. The following comment is found in *J.P Metal Masters 2000 Inc.*, BC EST #D057/05 (Reconsideration refused, BC EST #RD137/05; Judicial Review dismissed, 2006 BCSC 928), at page 5:
- The Tribunal recently considered the wording of subsection (a) of the definition of manager in *Howe Holdings Ltd.*, BC EST #D131/04 and re-affirmed the view expressed by the Tribunal in *429485 B.C. Limited operating Amelia Street Bistro*, BC EST #D497/97, that the question of whether a person's principal employment responsibilities consist of supervising and/or directing human or other resources will depend on a total characterization of that person's duties, including consideration of the amount of time spent supervising and directing human and other resources, the nature of the person's other (nonsupervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business.

57. The Tribunal has never found that non-supervisory, or non-managerial, functions can be applied to reinforce an argument that a person is a manager for the purposes of the *ESA*. The above excerpt is a clear expression that the task of determining if a person is a manager must address the definition of manager in the *Regulation* in a balanced way. If there are no duties consisting of supervising and/or directing human or other resources, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their non-supervisory duties to the business. In other words, non-supervisory duties, even very important ones, do not tilt the question of the employee's status toward finding that employee is a manager. That point was made by the Tribunal in *Anducci's Pasta Bar Ltd.*, BC EST # D380/97. In that case, many of the duties to which the employer pointed as evidence of the employee's managerial status did not address the definition of manager in the *Regulation*. The Tribunal stated that functions such as the handling of cash, custody of a key, responsibility for checking purchases and the like were all responsible duties, but were not connected with the supervision or direction of employees and did not put that person into the position of a manager.
58. Similarly, in this case, except for supervising tradespeople, none of the functions the Director accepted were being performed by Mr. Jacobs are connected with the supervision and/or direction of human and other resources.
59. The decision in *429485 B. C. Limited Operating Amelia Street Bistro*, BC EST # D170/ 97, was an exercise in statutory interpretation, providing a reading of the definition of manager in the *Regulation* harmoniously with the remedial nature and the purposes of the *ESA*. The Tribunal recognized the potential consequences of a broad interpretation of the definition of manager on persons, like foremen and first line supervisors, who spend a significant amount of time supervising and/or directing resources but frequently do not have those functions as their principal responsibilities. The argument made here raises the same concern and the interpretation advanced by Kanin does not accord with the remedial nature and the purposes of the *ESA*.
60. The burden of establishing a person is excluded from the protection of the *ESA*, or any part of it, is on the person asserting it and there must be clear evidence supporting such an exclusion.
61. I do not find it necessary to comprehensively address the argument wrapped around the reference in the Determination to "direct management". The short answer to this argument is that the Director found that Mr. Jacobs' principal responsibilities did not make him a manager for the purposes of the *ESA*. There is nothing in the material that is before this panel in this appeal that indicates the Director did not have in mind the full scope of Mr. Jacobs' duties when that determination was made. I find the Director correctly applied the definition of manager to the facts as found.
62. The decision in the *Lu* case does not assist the argument made by Kanin on this issue. The factual findings in *Lu* were considerably different than in this case.
63. Kanin also submits it was an error of law for the Director to have found the exclusion from entitlement to length of service compensation found in section 65(1) (e) did not apply. Section 65(1) (e) excludes persons "employed at one or more construction sites by an employer whose principal business is construction" from the entitlements found in sections 63 and 64 of the *ESA*. In section 1, "construction" is defined to mean "the construction, renovation, repair or demolition of property, or the alteration or improvement of land".

64. Kanin does not disagree with the finding of the Director that its principal business is the managing and financing of construction projects but disputes the finding that such activity is not “construction” as that term is defined in the *ESA*.
65. The Director found the definition of construction to mean the physical activities of construction reflected in the terms found in the definition and that Kanin was not engaged in those activities, but in the management and financing of construction projects. I find no error in the reasoning or the decision of the Director on this issue. To restate what has already been often said, provision in the *ESA*, statutory provisions that take away employment benefits should be construed narrowly: see *E. Nixon Ltd.*, BC EST # D573/97. The burden of showing an exclusion applies is on the party asserting it. I find no error of law in the finding of the Director on this issue.
66. In sum, I find the appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring Mr. Jacobs or the Director to respond to it. The appeal is dismissed under section 114(1) of the *ESA*.

## **ORDER**

67. Pursuant to section 115 of the *ESA*, I order the Determination dated January 19, 2021, be confirmed in the amount of \$23,433.60, together with any interest that has accrued under section 88 of the *ESA*.

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**David Stevenson**  
**Member**  
**Employment Standards Tribunal**