Citation: Triple M Housing Ltd. and Triple M Modular Limited Partnership (Re)
2022 BCEST 46

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Triple M Housing Ltd. and Triple M Modular Limited Partnership

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2022/012

DATE OF DECISION: July 21, 2022

DECISION

SUBMISSIONS

Michael Watt	counsel for Triple M Housing Ltd. and Triple M Modular Limited Partnership
Mitchell Dermer	delegate of the Director of Employment Standards

OVERVIEW

1. This appeal is in relation to the second of what is anticipated to be three determinations (the "Determination") resulting from the closure of operations of Triple M Modular Ltd., ("Modular" or the "Employer") and complaints filed by a number of former employees for unpaid wages and severance.

2. Mitchell Dermer, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), conducted an investigation which included an investigation into whether two Alberta entities, Triple M Housing Ltd. ("Housing") and Triple M Modular Limited Partnership (the "Partnership") (collectively, the "Appellants") were associated employers to Modular.

3. The Delegate concluded that the appropriate time frame for his investigation began in February 2020[1]. The Delegate also concluded that Housing and the Partnership were associated employers under section 95 of the *Employment Standards Act* (the *"ESA"*), and that it was within his jurisdiction to make such a finding.

4. The Appellants appeal the Determination pursuant to section 112 of the *ESA* on the bases that the Director erred in law and failed to observe the principles of natural justice. Although the Appellants have indicated the intention to appeal on the basis that new evidence has become available that was not available at the time the Determination was being made, the Appeal contains no submissions to this effect.

ISSUES

5. Did the Delegate err in law in finding that he had jurisdiction to determine that Housing and the Partnership were associated employers?

6. Did the Delegate err in law in finding that Housing was an associated employer under the *ESA*?

7. Did the Delegate err in law in finding that the Partnership was an associated employer under the *ESA*?

8. Did the Delegate fail to observe the principles of natural justice in conducting his investigation and reaching his determination?

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[1] The Determination incorrectly refers to the one-year period prior to the Delegate's February 2020 letter, which was actually sent February 9, 2021.

THE DETERMINATION

9. This Determination is the second flowing from complaints filed by a number of former employees against the Employer. In the record before me, the particulars and quantum of any liabilities towards these former employees have not yet been determined.

10. The Determination before me is one in which the Delegate concluded that both Housing and the Partnership were associated employers pursuant to section 95 of the *ESA*.

11. The Delegate first determined that the time frame within which his investigation was to be conducted was the twelve-month period preceding his notice to the Employer of his investigation. Notice was first given to the Employer February 9, 2021, and, accordingly, the Delegate established the investigation time frame as commencing March 2020.

12. The Delegate also determined that although Housing and the Partnership were companies situated in Alberta, his finding that they were associated employers with Modular necessarily brought them within the jurisdiction of the *ESA*.

13. The Delegate then went on to conclude that, although there were a number of factors present that would suggest that Modular and Housing were not carrying on business together, these were more than offset by the factors that suggested they were.

14. The Delegate found the factors supporting a common enterprise between Housing and Modular were that they used product wrapping that included the logos for both companies together, that Housing was charged a "preferential, 'intercompany' rate" as a customer of Modular, and the presence of an intercompany loan of more than $7,000,000, without a written agreement or security. The Delegate concluded that the loan, in particular, was "beyond the pale of an ordinary commercial relationship, or even a close relationship between a vendor and once of its best clients, or unassociated businesses under a common corporate umbrella."

15. The Delegate also relied on a letter from Rick Weste, President and CEO of the "Triple M Group of Companies", regarding COVID-19 and the guidelines that were to be followed by "Metric Modular and the Triple M Group of Companies." The Delegate asserted that "[a]s to whether there was a sufficient degree of common control or direction, I need look no farther…" and said of this letter that "[t]his, in my view, clearly indicates he was directing the policy of the Triple M Group of Companies, which includes Housing and Modular, in concert, at least to a sufficient degree to satisfy the test for association."

16. The Delegate found the Partnership to be an associated employer of Modular on the basis of his finding that the Partnership's business activity was limited to acquiring and providing financial support to several companies, including Modular and Housing, and that Modular could not function without the financial support of the Partnership.

ARGUMENTS

17. As noted above, the Appellants appeal on the basis that the Delegate erred in law, and that he failed to adhere to the principles of natural justice. The appeal form also indicated an intention to appeal on the basis of new evidence, but no such submissions were made.

18. The Appellants assert that the Delegate erred in law by “straying significantly from the principles set out in the authorities interpreting section 95 of the Act” and by finding that the Partnership was an associated employer in the absence of a finding of common control or direction between the Partnership and the Employer.

19. The Appellants contend that the Delegate not only misinterpreted and misapplied the law, but also that he made findings of fact contrary to the evidence before him, failed to consider relevant evidence, and relied on inadmissible evidence in reaching his conclusions.

20. The Employer relies on a number of cases including *J.C. Creations Ltd. (c.o.b. Heavenly Bodies Sport)*, BC EST D132/03 and *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 Coquitlam)*, 1998 CanLII 6466 (BCCA) (*Gemex*) for the principles guiding an appeal on the basis of an error of law, and on *Re Welch (c.o.b. Windy Willows Farm)*, BC EST #D161/05, and *Re Britco Structures Ltd.*, BC EST #D260/03 with respect to its appeal on the principles of natural justice.

21. The Appellants say the Delegate’s findings with respect to jurisdiction were improper in failing to recognize a legal presumption against the extra-territorial application of the *ESA*, and by, essentially, determining jurisdiction on the basis of the answer to the substantive question of whether the test under section 95 had been met.

22. To this end, the Appellants say that it is the Alberta *Employment Standards Code* that applies to Housing and the Partnership, and that Housing (and the Partnership) have “no basis to expect that employment standards legislation outside of the Province of Alberta would be applied to its business.”

23. In particular, with respect to the Partnership, the Appellants say the only connection between the Partnership and the Employer is its ownership of shares, and “[t]he *Act* does not enforce statutory wage claims based on share ownership.”

24. The Appellants rely on a number of cases, including *San Bao Investment Inc.*, BC EST #D017/17, *Invicta Security Systems Corp.*, BC EST #D349/96, *Vencorp Enterprises Corp. v. British Columbia (Director of Employment Standards),* 1998 CanLII 3943 (BC SC), and *Jordan Enterprises Ltd.*, BC EST #RD038/17 (Reconsideration of BC EST #D114/16) to assert the Delegate failed to properly interpret and apply the test for association under section 95 of the *ESA*.

25. The Appellants assert that there must be both a common business enterprise, and common control or direction.

26. The Appellants assert that “Housing was not a shareholder of Modular and it had its own long-standing independent business operation in Alberta which existed before Modular acquired the modular construction

business at issue." The Appellants say the only connections between the Employer and Housing were that both companies were owned in whole or in part by the Partnership, that Modular was a subcontractor to Housing, and that Housing provided access to its credit facilities to Modular through ATB Financial.

27. The Appellants contend that none of these connections demonstrate that the Employer and Housing were in business together as contemplated by section 95 of the *ESA*.

28. With respect to the three factors relied on by the Delegate, the Appellants assert as follows:

   a. The use of both the Modular and Housing logos on packaging for Modular products was not evidence of a common venture;

   b. There was no evidence before the Delegate that Modular products were provided to Housing at a "preferential rate"; and

   c. The Delegate's findings with respect to the significance of the "intercompany loan" were made without evidence, or on a view of the facts which could not reasonably be entertained.

29. The Appellants rely on *Mekdam and Hamilton Construction*, 2020 BCEST 123, to assert that the facts on which a finding of association is made must exist at the time the wages are earned and says the evidence the Delegate has relied on predated the time frame of his investigation. Specifically, the Appellants contend it was impermissible for the Delegate to rely either on the fact that Housing's logo was displayed at Modular's Penticton site, or on the invoice dated in January 2020 indicating "intercompany cost of sales".

30. The Appellants say the Delegate erred in law by misapplying section 95 of the *ESA* to the relevant evidence, and made findings without evidence with respect to whether Housing had been provided a preferential rate in relation to purchases from Modular, that the financing described as an intercompany loan was unsecured, and that the use of Modular and Housing logos together on Modular's packaging implied to unidentified third parties that Modular and Housing were engaged in a common business enterprise.

31. The Appellants contend that there was no evidence before the Delegate that the rates charged to Housing by Modular for its products was "preferential." They say the Delegate instead drew an inference from the phrase "intercompany cost of sales" and that a preferential rate is something inherently comparative. The Appellants point out there was no evidence before the Delegate of rates charged to other customers, either for similar single family residential modular units, or otherwise.

32. The Appellants assert that the evidence of Housing's logo being included on the packaging of Modular's products was not evidence that Modular and Housing were engaged in a common business or joint venture, and in making this finding, the Delegate ignored the evidence of the Employer that this was done without the input or direction of Housing and elevated the perception of a common enterprise over reality. The Appellants submit "[t]he requirement under section 95 is that the two companies are carrying on a common business, not whether there may be a perception that the companies are carrying on a common business."

33. With respect to the financing provided to Modular described as an "intercompany loan" the Appellants say the Delegate acted without evidence, or on a view of the facts that could not reasonably be entertained. The Appellants point to the Determination in which the Delegate notes, among other things, that there was no security for the loan, and that "Housing was listed as a creditor for the loan amount."

34. The Appellants say this is in direct contradiction to the evidence before the Delegate which includes that Housing was not listed as a creditor, and that ATB Financial did, in fact, have a secured interest against Modular, and that ATB Financial acted on this security to appoint a receiver for Modular in bankruptcy.

35. Accordingly, the Appellants submit the Delegate erred in finding that the financing described as an “intercompany loan” was evidence of a joint enterprise.

36. The Appellants point out that the Delegate, in reaching his conclusion that Modular and Housing were under common control and direction, relied only on a March 2020 memo advising that the Triple M Group would be following all government protocols during the COVID-19 pandemic. The Appellants say this memo alone is not sufficient to establish that the two companies were under common control or direction.

37. The Appellants also allege the Delegate erred in finding that the Partnership was carrying on business with Modular under common control or direction.

38. The Appellants point out that the only basis upon which the Delegate found that the Partnership was carrying on a business with Modular, under common control or direction, was the fact that the Partnership was the sole shareholder of Modular. The Appellants say this is a misapplication of the test set out in *Remko’b Investments Ltd. v. British Columbia (Director of Employment Standards),* 1998 CanLII 6454 (BC CA), and was based on assumptions that were not grounded in fact.

39. The Appellants assert first that the test in *Remko’b, supra*, only addresses the first part of the section 95 test and does not address whether two entities are under common control or direction, and second, the Delegate made the assumption, without evidence, that the fact that the Partnership was the sole shareholder necessarily meant that the Partnership was providing financial support to the Employer.

40. More generally, and in addition to the Appellants’ assertions that the Delegate erred in law, the Appellants submit that the manner in which the Delegate made findings of fact contrary to the evidence and without evidence, failed to consider relevant evidence, and relied on inferences and assumptions to reach his conclusions, constituted a failure to provide procedural fairness.

41. The Appellants say the Determination should be cancelled, and that this is not a case in which referral back to the Delegate is warranted or should be issued.

42. In response, the Delegate states that his findings with respect to the product wrapping, and the ‘intercompany rate’ for the sale of goods and services, were findings of fact that are entitled to deference from this Tribunal.

43. The Delegate says that although the January 2020 invoice was dated prior to the appropriate time frame for his investigation, it was not considered as evidence of the relationship between the Appellant and Modular in January 2020, but as evidence of the supplier/purchaser relationship through June 2020, and asserts the document was understood to be an example of the documents that were issued between the entities during the appropriate period.

44. The Delegate says that the 'intercompany rate' was described by the Appellants in their letter dated November 1, 2021, and accordingly, "this fact was ascertainable from other evidence that was before the Delegate."

45. The Delegate also says the Appellants were given the opportunity to describe whether or not the intercompany rate was preferential and they did not. The Delegate says that accordingly, it was within his discretion to infer from the evidence that the intercompany rate was more likely than not a preferential rate.

46. The Delegate asks this Tribunal to refer the matter back to the Director in the event that the inference was not properly drawn, and that the outcome would turn on evidence relating to the intercompany rate between Housing and Modular.

47. With respect to the financing referred to as an 'intercompany loan' the Delegate says "[w]hether or not ATB had a security interest in Modular's assets with respect to this amount is irrelevant," and asserts that based on the evidence before him, and the response provided by the Appellants, "it is only reasonable to infer that the Appellant was also 'on the hook' in the event Modular defaulted."

48. The Delegate goes on to say that "[i]t is a reasonable finding that one entity making its own line of credit available to a second and with the second entity obviously having insufficient security (else why the receivership), is evidence of a common enterprise."

49. With respect to the Partnership, the Delegate says that this case is "on all fours" with *Remko'b, supra*, and *San Bao, supra*, and says "[i]f Entity A is a sole or majority shareholder of Entity B, the Director submits that Entity B is fundamentally financially reliant on Entity A, because Entity A owns Entity B." The Delegate says "[i]t is nonsensical to say that an entity that is wholly owned by another entity is not financially reliant on its owner."

50. In reply, the Appellants assert that the Delegate is not owed any deference with respect to the Delegate's findings regarding the product wrapping and the 'intercompany rate' as they were "inferences of fact" from which there was not an adequate basis in the evidence to be drawn.

51. The Appellants say the inferences drawn with respect to the presence of a 'preferential' rate between Housing and Modular do not stand in the absence of the document dated outside of the time frame for the investigation. The Appellants also submit that the same inferences are not supported by the Appellants' November 2021 letter, and in fact the Appellants' description of the rate charged to Housing by Modular refutes the inference drawn of a preferential rate. The Appellants say "[t]he absence of evidence of Modular's rate structure bars the Delegate from drawing an inference of the existence of a preferential rate by Modular a supplier."

52. Although the Delegate asks for a referral back in the event that he erred in his reliance on the January 2020 invoice, the Appellants point out that the Delegate does not state how the interests of justice would be served by referring the matter back.

53. The Appellants rely on *Jordan Enterprises, supra* for its discussion of when a referral back is appropriate, noting that "[a] referral back order should not be issued as a matter of course whenever a section 95

declaration is cancelled," and that "[a] referral back order issued solely for the purposes of conducting a new investigation should only be issued where there was a failure of natural justice tainting the investigation insofar as the complainants were concerned, for example a failure to provide the complainants with a full and reasonable opportunity to present their evidence and argument to the Director."

54. The Appellants reassert that the Delegate ignored the existence of the security interest held by ATB against Modular, and note that his findings include reference both to the lack of a security interest and "an unsupported assumption about the payment of interest." The Appellants say the Delegate "relies on these errors of fact together with his broad and unsupported assumptions about an 'ordinary commercial relationship', or a 'close relationship between a vendor and one of its best clients" or between 'unassociated businesses under a common corporate umbrella' to conclude that the intercompany loan is a significant indicator of a common business venture."

55. The Appellants note that "[t]he evidence before the Delegate was that ATB Financial was Modular's senior secured creditor acting on its security to appoint a receiver of Modular."

56. The Appellants go further to say that the Delegate's response submissions in respect of the financing described as an 'intercompany loan' should be disregarded by the Tribunal as going beyond his proper role in explaining his conclusions based on the findings of fact and say that the Delegate is instead "making new and substitute findings to support or 'bootstrap' his conclusion." The Appellants rely on a line of cases including *Old Dutch Foods,* BC EST #RD115/09, to assert that the Delegate's response is crossing the "line between permissible explanation and impermissible advocacy." (*AJ Hummel*, BC EST # D007/16 at para 47)

57. The Appellants say the Delegate mischaracterizes the decisions of the BC Supreme Court and the BC Court of Appeal in *Ewachniuk v. British Columbia (Director of Employment Standards),* 1997 CanLII 4149 (BC SC)*;* affirmed in *Ewachniuk v. British Columbia (Director of Employment Standards),* 1998 CanLII 6454 (BC CA), (*Ewachniuk*) and the decision of the BC Court of Appeal in *Remko'b, supra,* and says neither of these support the Delegate's position. The Appellants say that in both *Ewachniuk* decisions and *Remko'b* there was evidence of financial relationships beyond mere ownership.

58. The Appellants also point out that the Delegate provides no legal basis for his assertion that it is "nonsensical to say that an entity that is wholly owned by another entity is not financially reliant on its owner" nor does the Delegate point to any evidence to support a finding that Modular was financially reliant on the Partnership.

59. The Appellants submit that share ownership does not determine financial reliance, and that there is "no evidence of any financial relationship between Modular and the Partnership before the Director on which the Delegate could base his finding against the Partnership."

ANALYSIS

60. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:

> 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 being made.

61. The Appellants have indicated in their appeal that they are appealing on all three grounds; however, they have made no submissions with respect to the "new evidence" ground of appeal.

62. I will start, briefly, with the jurisdictional arguments. To this end, I agree with the Delegate that if, in fact, a finding is made that an entity is an associated employer under section 95 of the *ESA*, the Delegate has jurisdiction to make a finding against them. While I appreciate the Appellants' arguments that Housing and the Partnership are incorporated/registered in the Province of Alberta, and all of their employees are situated in Alberta, if indeed either or both of Housing and the Partnership are found to be associated employers, such a finding has the effect of concluding that Modular's (former) employees are also their employees, and there is no doubt Modular's (former) employees are (were) situated in BC and covered by the *ESA*.

63. Accordingly, the Appellants' arguments to the extent that the Delegate does not have the jurisdiction to find that they are associated employers must fail. To find otherwise would shield any business from being an associated employer by virtue of its incorporation or registration in another jurisdiction.

64. The Tribunal has adopted the following definition of "error of law" set out by the BC Court of Appeal in *Gemex, supra*:

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.

65. The question of whether entities can be associated under section 95 of the *ESA* is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles developed under the *ESA*.

66. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

67. As this Tribunal noted in *Mekdam, supra*, "in order to establish the Director committed an error of law on the facts, Mekdam is required to show the findings of fact and the conclusions and inferences reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable."

68. Section 95 of the *ESA*, often referred to as the 'common employer' provision, reads as follows:

> 95 If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
>
> (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
>
> (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

69. This Tribunal discussed at length the jurisprudence when addressing a "common employer" situation in *0708964 B.C. Ltd.*, BC EST # D015/11. The Tribunal noted that "[t]here must be at least two entities that are carrying on a "business, trade or undertaking" **and** there must be evidence of "common control or direction" of those entities." (para. 28, **emphasis added**)

Common Control or Direction

70. There can be no doubt that what is required is both that the two entities are carrying on business together, and that there is common control or direction. The Tribunal in *0708964 B.C. Ltd., supra*, further identified the following with respect to the "common control or direction" requirement:

> "common control or direction" may be determined based on financial contributions from on entity to another (although this factor, standing alone, in not determinative); the fact that one entity is economically dependent on another entity, interlocking shareholdings and directorships; common management principals (e.g., corporate officers and other key employees); sharing of resources (including human resources) among the various entities; asset transfers at non-market transfer prices; operational control by one entity over the affairs of another entity; joint ownership of key assets and operational integration.

71. It is with respect to the Delegate's findings on the "common control or direction" requirement that I am most troubled.

72. The Delegate concluded as follows with respect to the relationship between Housing and the Employer:

> As to whether there was a sufficient degree of common control or direction, I need look no farther than the letter from Mr. Weste to Modular employees dated March 10, 2020. He instructed those employees that "Metric Modular and the Triple M Group of Companies" would be acting in a certain manner. This, in my view, clearly indicates that he was directing the policy of the Triple M Group of Companies, which includes Housing and Modular, in concert, at least to a sufficient degree to satisfy the test for association.

73. With respect, the test that needs to be satisfied for a finding of common control or direction is not a *de minimus* one. As the Appellants point out, with reference to this Tribunal's decision in *Invicta, supra,* common direction will "normally be found in an entity which makes significant decisions respecting how the business, trade or undertaking has been, is, or will be, run." (at p.24, Employer Appeal at para 109)

74. The Delegate does not refer to the nature of the memo relied on in the Determination, but as the Appellants point out, the memo is one advising that in response to the global pandemic declared in March 2020, and which continues to this day, Metric Modular and the Triple M Group of companies will be following the guidelines of both the Federal and provincial governments.

75. Consistent with the direction of public health authorities across the country, the memo essentially recommends self-isolating when you are ill, recommends against international travel, and advises that they will work with anyone who needs further support.

76. I can't agree that the Delegate's finding that this memo alone demonstrates that Housing, not referenced in the memo, is making significant decisions respecting how Modular is to be run. Accordingly, I find this conclusion to be based on a view of the facts which could not reasonably be entertained, and is, accordingly an error of law.

77. With respect to the Partnership, I am equally unable to find a basis in the Determination for the Delegate's finding of association.

78. It appears, on the face of both the Determination and the Delegate's submissions, that he has conflated the notions of ownership and financing and has ignored the required element of common control or direction with respect to the Partnership. The Delegate concludes in the Determination that "[a]s Modular's sole or majority shareholder, Modular could not function without the financial support of the Partnership."

79. To this end, I find the Delegate has reached his conclusion that Modular and the Partnership are associated employers in the absence of any evidence, at best, or at least based on a view of the facts which could not reasonably be entertained.

80. The Appellants point out on several occasions in their appeal that there is no evidence that the Partnership provided any financial support to Modular, and that the only relationship between the Partnership and Modular was as its sole shareholder.

81. The Partnership *may* have provided the initial capital required for the asset purchase that occurred when Modular was formed and purchased the business of Pacific Coast Modular Construction LP in 2017, (though the Record lacks any such evidence to demonstrate this), nevertheless, there is no evidence of the Partnership providing, or even facilitating, further financing required for the operation of Modular.

82. While the Delegate asserts that this case in "on all fours" with *Remko'b, supra*, and *San Bao, supra*, I can't agree. I note that in addition to the fact that there was no dispute as to the common control or direction in *Remko'b*, the financial support took the form of a loan from Remko'b to O'Brien Press secured by a debenture. In addition, Remko'b owned residential properties which were provided rent-free to O'Brien and members of his family.

83. In the present matter, there is no evidence of any similar financial arrangements between the Partnership and Modular.

84. Similarly, in *San Bao*, in addition to holding shares in the employer, San Bao was also raising funds for investment in or loan to the employer. In that case, the Tribunal found that “[t]he economic dependence of VHL on the Appellant is clear, considering the quantum of money advanced to VHL from time to time, and [sic] fact that the principal source of that money was the Appellant, according to VHL.” (para. 39)

85. The BC Court of Appeal confirmed in *Ewachniuk, supra,* that shareholding, and even financial support, to an extent, is not sufficient in and of itself to bring two entities together under what is now section 95. The Court concluded at paragraphs 19-20:

> In my opinion, to accede to the submissions of the appellant would lead to a far reaching net being cast over those who financially support a business to keep it going but have no other part to play whatever in that business. I share the views of the judge below when he said:
>
>> In the end, the most that can be said is that the appellant was a landlord, investor, and shareholder. None of that necessarily leads to the conclusion on a balance of probabilities that he exercised control of the character necessary to bring him within s. 20. Evidence of the appellant being involved in the design or direction of the renovations, of the advertising, of strings attached to the advances of those sums of money, or of participation in the management of the company or restaurant would bring him within s. 20. There is no such evidence.
>
> As I read what the judge below said - "control of the character necessary to bring him within s. 20" - he is saying that on the facts before him his findings of financial support and the necessity of it to continue in business is not enough, standing alone, to bring s. 20 into play. I agree with that. I cannot accept that it was the intention of the Legislature to bring home liability under s. 20 of the ***Act*** where that support and necessity stand alone as is the case here. That would be, as I have said before, a far reaching net to bring home liability under the ***Act*** to a person whose relationship or connection to the carrying on of the business and to the control or direction of the business is the same as is the respondent's in the case before us.

86. As with my findings with respect to Housing, I conclude that the Delegate’s findings with respect to common control and direction as between Modular and the Partnership, were made without evidence, or at least on a view of the facts that could not reasonably be entertained, and accordingly constitute an error of law.

87. Though my findings with respect to common control or direction are sufficient to allow the Appeal, I will nevertheless also address the arguments with respect to common business, trade or undertaking.

Common Business, Trade or Undertaking

88. As noted above, the Delegate determined there was a common business or enterprise as between Housing and the Employer based on the use of Housing’s logo on product wrapping used by Modular, the determination that Modular had provided its products to Housing at a “preferential” rate, and the presence of an “intercompany loan” in which Housing provided the Employer with access to its credit facility with ATB Financial.

89. Notwithstanding the Appellants’ assertions that the logo of Housing was placed on the product wrapping for the Employer’s products without the input or direction of Housing, I conclude the finding that the logo’s use

on the product wrapping as an indicator of a common venture to be a finding of fact entitled to deference. I remain concerned, however, that the Delegate felt compelled to reference the presence of Housing's logo at the Penticton facility while at the same time acknowledging that the Penticton facility closed prior to the time frame covered by this investigation.

90. I am not, however, able to give the same deference to the Delegate's finding that a preferential rate existed for the sale of products and services by the Employer to Housing. Looking at the evidence before the Delegate, I find that this conclusion is based on a view of the facts which could not reasonably be entertained.

91. To begin with, the Delegate relies on an invoice dated January 23, 2020, in which sales to Housing are identified as "Intercompany Cost of Sales". In referring to the invoice, the Delegate makes no reference to its date being outside of the time frame of his investigation. He further acknowledges that "it is conceivable that a vendor could offer a preferred purchaser an advantageous rate."

92. When the Delegate addresses this in his response to the Appeal, I agree with the Appellants that this response takes more the form of advocacy, rather than an explanation of the reasoning in the Determination. The Delegate agrees the invoice fell outside of the time frame of his investigation and agrees it should not have been considered; however, he then goes on to defend his reliance on the same document by saying it was "an example of the documents that were issued between the entities during the recovery period." The Delegate also says this information was also available elsewhere, in the Appellants' November 2021 response letter. Although the Delegate indicates he relied on the document as an example, there is no indication he requested a similar example that would have fallen within the time frame of his investigation.

93. Further, the Delegate's response, which I agree reflects some impermissible advocacy, asserts that the Appellants had an opportunity to describe whether or not the intercompany rate was preferential but did not do so.

94. While the Delegate's question to the Appellants asked for a description of the "intercompany rate" it is unclear how he could have reached the conclusion that the rate was preferential based on the Appellants' response, which was as follows:

> Housing products are marketed and sold through independent third-party dealers. Housing receives orders from dealers and not directly from home buyers.
>
> For some of the homes ordered, Housing contracted with Metric Modular to construct the residential homes. The contract price was determined by taking the sales price and other charges, and then deducting sales allowances **(deductions given to dealers)** and the BC association fee of $125 per unit to obtain a net sales price. From the net sales price, Housing deducted amounts payable to Housing for sales commission, finance charges (if any), volume bonus discount and advertising costs.
>
> Housing's internal report reflecting the contracted rate paid to Metric Modular for the Halston Modular set out in Exhibit X to Mr. Branch's affidavit is attached. The internal report also shows a warranty amount which Metric Modular is suggested to accrue for warranty claims in respect of the residential home constructed. Warranty claims on the house constructed by Metric Modular for Housing were the responsibility of Metric Modular. **(emphasis added)**

95. Notwithstanding the Delegate's efforts to support his conclusions with respect to the existence of a "preferential rate" he does not point to anything in the Appellants' response above that would suggest Housing was treated any differently, as a customer, than any other of its customers, even in the absence of evidence of the rates charged to other customers. At best, one might infer that some other customers may not have received a "volume bonus discount" but this would appear to be just that, a discount for larger or more frequent purchases.

96. In addition, the Appellants reference their submission to the Delegate dated August 3, 2021, in which they assert, relying on the statutory declarations of both Rick Weste and Stephen Branch, "Metric Modular was an occasional supplier to Housing; Metric Modular never comprised a unit of Housing's business and Housing was not the parent company of Metric Modular." Further, the Appellants noted "Metric Modular required payment from Housing before it delivered any manufactured products to housing."

97. Accordingly, I find the Delegate's conclusion with respect to the existence of a "preferential rate" to be based on a view of the facts which could not be reasonably entertained.

98. I find the Delegate's conclusions with respect to the 'intercompany loan' to be equally problematic, but for different reasons. Of this financing, the Determination reads:

> I view the intercompany loan for more than $7,000,000.00 as a significant indicator of a common business venture. If one enterprise lends another enterprise $7,000,000.00, with no written agreement, no security, and no interest (beyond, presumably, interest the lender is paying to their own lender), they are conducting a common business for the purposes of section 95. This kind of arrangement is beyond the pale of an ordinary commercial relationship, or even a close relationship between a vendor and one of its best clients, or unassociated businesses under a common corporate umbrella.

99. The Delegate doesn't simply leave out the presence of the security interest held by ATB on the loan, the premise of his conclusion specifically references the absence of a security interest. The Delegate also incorrectly asserts, without evidence, that "[w]hen Modular went bankrupt, Housing was listed as a creditor for the loan amount." In fact, it was ATB Financial listed as the largest creditor in the Employer's bankruptcy proceedings, while Housing does not appear to be listed at all. While the Delegate's response submission asserts "[w]hether or not ATB had a security interest in Modular's assets with respect to this amount is irrelevant." This, again, in my view crosses over the line between permissible explanation and impermissible advocacy when the Delegate appears to rely on a certain factor in reaching his conclusion, then seeks to assert that that factor is irrelevant.

100. Further, the Delegate does not provide any basis for how this credit arrangement is "beyond the pale of…a close relationship between…unassociated businesses under a common corporate umbrella." Accordingly, I am unable to give deference to this finding which relied on assertions of fact contrary to the evidence before the Delegate.

101. With respect to the Partnership, as with my finding regarding common control or direction, I find the Delegate has conflated the notion of share ownership with financing or financial dependence. There was no evidence before the delegate of the financial support or financial dependence of the type that was present

in *San Bao* or *Remko'b*, and I find the Delegate has provided no evidentiary basis for his assertion that "Modular could not function without the financial support of the Partnership."

102. Accordingly, the Delegate's finding with respect to a common venture between the Employer and the Partnership was based on a view of the facts which could not be reasonably entertained.

Disposition

103. I agree with this Tribunal's reasoning in its reconsideration decision in *Jordan Enterprises*, *supra*, in which the Panel writes "[i]n our view, a "referral back" order should not be issued as a matter of course whenever a section 95 declaration is cancelled." In that case, the Panel found they were unable to conclude that there were "unusual circumstances that justify a referral back order for the purposes of conducting a *de novo* investigation." (para 49) While the Delegate in this case has not asked for a "de novo" investigation, he has provided no rationale for the referral back other than "it would be in the interests of justice" to provide the Delegate an opportunity to better understand the nature of the intercompany rate between the Appellant and Modular.

104. As I have noted above, the Appellants have already articulated the breakdown of the pricing structure provided to Housing by Modular and there is nothing on the face of that pricing structure that would suggest the rate was in any way unusually preferential to Housing. Further, my conclusions with respect to common control or direction render null the utility of a further review into the nature of the 'intercompany rate.'

105. Accordingly, and for all of the foregoing reasons, I find this an appropriate case in which to cancel the Determination.

ORDER

106. Pursuant to section 115(1)(a) of the *ESA*, the Determination dated December 22, 2021, is cancelled.

Ryan Goldvine
Member
Employment Standards Tribunal