Employment Standards TRIBUNAL

Appeals

- by -

Worldspan Marine Inc.

- and -

27222 Developments Ltd.

- of Determinations issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/50 and 2011A/83

DATE OF DECISION: January 23, 2012

DECISION

SUBMISSIONS

Dean P. Davidson	counsel for Worldspan Marine Inc. and 27222 Developments Ltd.
Karpal Singh	on behalf of the Director of Employment Standards
Adele J. Adamic	counsel for the Director of Employment Standards
M.J. (Peggy) O'Brien	counsel for Dave Boudreau
Dave Boudreau	on his own behalf
Ron Best	on his own behalf
Jody Gaston	on her own behalf

OVERVIEW

1. On March 18, 2011, a delegate of the Director of Employment Standards (the "Director") issued a Determination against Worldspan Marine Inc, Queenship Marine Industries Ltd. and Crescent Custom Yachts Inc. The Director had found Queenship Marine Industries Ltd. and two other entities, Worldspan Marine Inc. and Crescent Custom Yachts Inc., met the statutory requirements for being associated under section 95 of the *Act* and, exercising the discretion provided in that section, declared those entities to be associated for the purposes of the *Act*. I shall refer to this Determination as the "associated employer Determination" and to the entities, collectively, as the "Associated Employer".

2. The associated employer Determination was made on behalf of ninety-seven former employees of Queenship Marine Industries Ltd., some of whom had complained to the Director alleging they had been terminated from their employment and were not paid all wages owed.

3. The Director conducted an investigation under section 76(2) of the *Employment Standards Act* (the *"Act"*). The Director found the *Act* had been contravened and that the former employees were owed wages and interest in the amount of $1,208,481.23.

4. The Director also imposed administrative penalties on the Associated Employer under Section 29(1) of the E*mployment Standards Regulation* in the amount of $1,000.00.

5. On April 25, 2011, Worldspan Marine Inc. ("Worldspan") filed an appeal of the associated employer Determination in which Worldspan alleged the Director erred in law in associating the entities under section 95 of the *Act*, failed to observe principles of natural justice in making the Determination and erred in law in finding the Associated Companies were liable under section 63 of the *Act* for length of service compensation and under section 64 of the *Act* for group termination pay.

6. On June 3, 2011, the Director issued a Determination against 27222 Developments Ltd. ("27222"), associating that entity with the Associated Employer. The Director found the *Act* had been contravened and

that the former employees were owed wages and interest in the amount of $1,216,447.50. I shall refer to this Determination as the "27222 Determination".

7. The 27222 Determination was appealed on July 11, 2011. In the appeal, 27222 says the Director has erred in law in finding this company could be associated under section 95 of the *Act* with Worldspan Marine Inc, Queenship Marine Industries Ltd., and Crescent Custom Yachts Inc. and, in any event, has erred in finding section 64 of the *Act* was applicable to the termination of the employees of Queenship Marine Industries Ltd.

8. The two appeals have been consolidated for the purpose of this decision.

ISSUE

9. The issues in the appeals are whether the Director erred in associating the four entities under section 95 of the *Act*, whether the Director failed to observe principles of natural justice, or comply with the requirements of section 77, in making the associated employer findings and whether the Direction erred in finding there was a liability under sections 63 and 64 of the *Act* on the Associated Employer and 27222 Developments Ltd.

THE FACTS

10. Based on information gleaned from on-line searches of the Associated Employer and 27222 conducted by the Director, the Determinations set out the following background information concerning those entities:

- Worldspan was incorporated on July 20, 2004. Steven Barnett and Chris Blane are listed as directors and James Hawkins and Lee Taubeneck are listed as officers;
- Queenship Marine Industries Ltd. ("Queenship") was incorporated as an extra-provincial company on July 10, 2002. An online federal corporate information search listed Lee Taubeneck as a director;
- Crescent Custom Yacht Inc. ("Crescent") was incorporated on April 18, 2005. Daniel Lowell Fritz is listed as a director and officer; James Hawkins is listed as an officer;
- 27222 was incorporated on November 3, 2009. James Hawkins, Lee Taubeneck and, as of April 25, 2011, Daniel Lowell Fritz, are listed as directors.

11. The Determinations state that Worldspan undertakes contracts to build custom fibreglass craft in the 70 to 150 foot range for individual clients. Queenship, Crescent, and 27222 are wholly owned subsidiaries of Worldspan. Worldspan purchased the assets of Queenship in 2004 and the assets of Crescent in 2007. All of the entities operate from a location on Lougheed Highway in Maple Ridge, BC (the "27222 property").

12. Worldspan secured a contract to build a luxury yacht for a client in the United States. The yacht was being built at the 27222 property. In early 2010, the client defaulted on instalment payments which resulted in a failure to meet wage obligations to employees working at the 27222 property and, in May 2010, the layoff and consequent termination of nearly 100 employees.

13. The Director, through the investigating delegate, first contacted the Associated Employer in May 2010 in respect of two complaints that had been filed with the Employment Standards Branch. The Director spoke to Daniel Pascoe, who has identified himself in communications with the Director as Chief Financial Officer, Worldspan Marine. Mr. Pascoe provided some information relating to the business and the circumstances behind the complaints. Mr. Pascoe indicated, among other things, that the circumstances affecting the two

persons who filed complaints affected approximately 95 employees, many of whom had already been laid off. On May 11, 2010, the Director issued a Demand for Employer Records for all employees of Queenship. Between May 2010 and November 2010, there were several more discussions and communications between the Director and Mr. Pascoe, including a meeting involving the Director, Mr. Pascoe, and Mr. Taubeneck in August 2010.

14. In October 2010, the Director asked for more details "regarding Queenship's corporate structure". The request was copied to Mr. Taubeneck. Some information was provided; more was requested. On November 10, 2010, Mr. Pascoe provided a more complete response in an e-mail to the Director.

15. On November 16, 2010, the Director sent an e-mail to Mr. Pascoe and all of the directors and officers of the Associated Employer, with the exception of Mr. Fritz, advising them of an intention to associate Worldspan, Queenship, and Crescent under section 95 of the *Act* and inviting the directors and officers to provide written submissions by November 22, 2010, if they objected to being associated under section 95. No written submission was received from any of the directors or officers of the Associated Employer. The material in the section 112(5) "record" does, however, refer to a telephone discussion between the Director and Mr. Pascoe on November 16, 2010, during which Mr. Pascoe is noted as stating there was no dispute that Worldspan was the employer since it had control and direction over Queenship and Crescent.

16. Subsequent to the issuance of the associated employer Determination, the Director received additional information regarding 27222 and its relationship to the Associated Employer. That information is set out in the 27222 Determination. Some of the information was contained in affidavits filed in a British Columbia Supreme Court proceeding, Vancouver Registry No. S-113550, that had been commenced by the Associated Employer, 27222, and Composite FRP Products Ltd. under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the *"CCAA"*).

17. Based on the information received by the Director, 27222 was added as an associated employer with Worldspan, Queenship, and Crescent. The reasons for that decision are set out in the 27222 Determination.

18. In the 27222 Determination, the Director considered whether the Associated Employer and 27222 was a construction company engaged in construction work on a construction site and decided it was not. The Director listed the following reasons for that conclusion:

a) the employer was in the manufacturing business, engaged in building and manufacturing "luxury sea-going vessels";

b) the luxury yacht being built at the location on Lougheed Highway, the 27222 property, was not a "one-off" project; numerous sea-going vessels had been built at the shipyard; maintenance and repairs were also done at that location;

c) the notion of a "construction site" under the *Act* evokes the notion of a *"project which involves the erection of a single, large, permanent structure at a fixed location"*: see *E. Nixon Ltd.*, BC EST # D573/97; the Associated Employer and 27222 were involved in the manufacturing of sea-going vessels in a permanent 90,000 square foot structure that operates like a workshop; once the vessels are completed, they are delivered to the customer; the vessels are not permanent fixed structures and do not increase the value of the shipyard; there was no evidence that the work of the affected employees amounted to the alteration or improvement of the 27222 property; the affected employees were hired to build sea-going vessels, which are not permanent structures fixed to the 27222 property; and

d) the yacht being built – the Crescent 144 – was registered to Worldspan at the Personal Property Registry, which covers interests in personal property under the *Personal Property Security Act*, as opposed to the Land Title Registry; the yacht was not treated as real property for the purpose of determining its value or affecting the value of the 27222 property or the structures on it.

ARGUMENT

19. I shall address the appeals of the associated employer Determination and the 27222 Determination separately.

The associated employer Determination

20. As indicated above, the associated employer Determination has been appealed by Worldspan. Counsel for Worldspan says the Director erred in law, by associating Worldspan, Queenship, and Crescent under section 95 of the *Act* and by imposing liability on the Associated Employer under sections 63 and 64 of the *Act*, and failed to observe principles of natural justice in making the Determination.

21. Counsel has submitted seven affidavits with the appeal: from Dan Pascoe, from Jim Hawkins, who describes himself as being involved in the management of Queenship, from Jack McKay, a businessman, from Daniel Fritz, who describes himself as the president of CNC Manutech Ltd, a shareholder of Worldspan, from Steven Barnett, who describes himself as an investor and director of Worldspan, from Michael Nesbitt, a chartered accountant, and from Meghan Koop, a legal administrative assistant. The content of these affidavits will be addressed as necessary and appropriate.

22. Counsel for Worldspan says the Director erred in deciding whether Worldspan, Queenship, and Crescent were "associated employers" under section 95. Counsel accepts the Director correctly identified the four conditions referred to in *Invicta Security Systems Corp.*, BC EST # D349/96, as the requirements for a finding under section 95 and concedes the first, second and fourth parts of the associated employer criteria were present. Counsel says, however, the Director erred in finding the third condition – common control or direction – was present.

23. Counsel contends the three associated entities are "autonomously operated entities" each with a different person having control and direction. Counsel submits the notion of "common control or direction" requires a full examination of the nuances of the relationships between the parties and, had that been done, the Director would not have associated the entities under section 95. Several of the affidavits submitted with the appeal speak to this ground and the argument made by counsel for Worldspan makes considerable reference to them. Counsel submits that, based on the affidavits, the associated entities were not operating under common direction or control and, further, there is no evidence supporting the decision made by the Director under section 95.

24. Counsel says the Director also erred in law in finding sections 63 and 64 of the *Act* applied to the circumstances of this case. He says the exemption found in subsection 65(1) (e) – for persons employed at one or more construction sites by an employer whose principal business is construction – applies to the affected employees. Counsel contends the "principal business" of the employer is "construction", specifically the construction of super yachts, as that term is defined in section 1 of the *Act*.

25. Counsel argues that determining whether the employer's principal business is construction is a question of fact that must be decided on "proper objective evidence" that points to a clear result. On this argument, counsel focuses particularly on the affidavit of Michael Nesbit, which was filed with the appeal.

26. Counsel for Worldspan says the Director failed to provide the key persons involved on the associated employer issue with either "meaningful disclosure of the details" of the basis for an associated employer decision or with a reasonable opportunity to respond to the stated intention of the Director to associate Worldspan, Queenship, and Crescent. Counsel asserts that the only individual to reply, Mr. Pascoe, was not qualified to provide the necessary information due to his limited involvement with the three entities.

27. Counsel says the associated employer decision was made on insufficient evidence and argues that a decision made without relevant evidence constitutes a breach of principles of natural justice. He says there was relevant evidence that was not provided to the Director and consequently not considered by the Director because of the limited amount of time to respond provided by the Director. Counsel refers in his submission to "twenty-two separate issues of law and fact that needed to be researched and determined so as to allow a proper opportunity to respond" and has compiled a list of those issues in the submission.

28. Counsel for Worldspan says the associated employer Determination must be cancelled or, alternatively, referred back to the Director for a "proper and fair consideration".

29. The Director and several of the affected employees have responded to the associated employer Determination appeal.

30. The initial point made in the Director's response addresses the several affidavits filed by counsel for Worldspan with the appeal. The Director says Worldspan is attempting to make a case on appeal that should have been made in the complaint process and notes that section 112(1) (c) of the *Act* limits fresh evidence on appeal to that which was not available at the time the Determination was being made. The Director says all of the evidence sought to be submitted with the appeal was available and could have been submitted. Also, the Director says that while the Tribunal has a discretion to allow fresh evidence on an appeal, that discretion has been applied sparingly and should be applied in that way in this appeal.

31. The Director says Mr. Pascoe was given the responsibility by Worldspan of responding to the complaints and to the Director's inquiries during the complaint process. The Director says it is not an appropriate reason for allowing fresh evidence to say he did not fulfill that responsibility.

32. The Director says, in any event, the additional facts while having some probative value, would not change the decision on the issues in dispute.

33. In response to the specifics of the argument relating to the section 95 decision, the Director says that none of the entities associated in the Determination took the position there was no common control or direction among them. The Director says if such a position had been taken, the reasons for the decision on that aspect of the associated employer test would have been provided.

34. The Director says the argument made by counsel for Worldspan has taken a limited view of the question of common control or direction and failed to address the decision in the context of the entire relationship among the three entities, which were set out at pages R1 to R6 of the associated employer Determination and which, in totality, showed the three entities operated more as one company than three separate companies.

35. In response to the construction exemption argument, the Director says this issue was also not raised during the complaint investigation and has provided reasons why subsection 65(1) (e) would not have been applied to the business of the Associated Employer.

36. As an opening point, the Director notes that subsection 65(1) (e) removes what would otherwise be statutory entitlements under section 63 and 64 of the *Act* and should be construed narrowly. The Director says the business of the Associated Employer is not "construction" as that term has been interpreted and applied in the *Act* and the 27222 property is not a construction site. The reasons for that position are stated as follows:

a) the employer was in the manufacturing business, engaged in building and manufacturing "luxury sea-going vessels";

b) the luxury yacht being built at the location at the 27222 property was not a "one-off" project; evidence showed the Associated Employer built numerous sea-going vessels at that property; e-mails from Mr. Pascoe indicated that maintenance and repairs were also done at that location;

c) at no time during the investigation was there any suggestion that the affected employees would have been laid off after the completion of work on the Crescent 144 yacht or that they had been hired for a defined period of time; Mr. Pascoe stated the employer was actively soliciting work for the affected employees when the payroll difficulties occurred and the payroll records showed the affected employees as "permanent full time staff";

d) the notion of a "construction site" under the *Act* evokes the notion of a *"project which involves the erection of a single, large, permanent structure at a fixed location"*: see *E. Nixon Ltd.*, BC EST # D573/97; the Associated Employer and 27222 were involved in the manufacturing of sea-going vessels in a permanent 90,000 square foot structure that operates like a workshop; once the vessels are completed, they are delivered to the customer; the vessels are not permanent fixed structures and do not increase the value of the shipyard; there was no evidence that the work of the affected employees amounted to the alteration or improvement of the shipyard; the affected employees were hired to build sea-going vessels, which are not permanent structures fixed to the 27222 property;

e) the yacht being built – the Crescent 144 – was registered to Worldspan at the Personal Property Registry, which covers interests in personal property under the *Personal Property Security Act*, as opposed to the Land Title Registry; the yacht was not treated as real property for the purpose of determining its value or affecting the value of the Lougheed Highway property or the structures on it; and

f) the affidavit of Mr. Nesbitt incorrectly, and contrary to the evidence, refers to the Crescent 144 yacht as a "one-off" project; the comparison in his affidavit between the manufacturing of sea-going vessels (personal property) and the building of high end homes or commercial structures (real properties) does not support the argument that the former is "construction" under the *Act*.

37. The Tribunal has received, and I have reviewed, several responses to the appeal filed by affected employees.

38. The submission of Ron Best speaks to his involvement in constructing the Crescent 144 and other yachts. He says it is not accurate to speak of the Crescent 144 as a "one-off". His submission also provides some detail on the relationship between Queenship and Crescent.

39. The submission of Jody Gaston speaks to the suggestion that she was hired only to work on the Crescent 144.

40. Dave Boudreau has filed two submissions. In one of the submissions, he speaks to his understanding of the apparent seat of authority within the group of three companies and of his involvement in attempting to secure other yacht building contracts for Worldspan. He disagrees with the notion that the Crescent 144 was

a "one-off" project. The other submission has been filed on Mr. Boudreau's behalf by his legal counsel. This submission contains comprehensive responses to the associated employer and natural justice issues.

41. In respect of the former, counsel has submitted affidavits from Mr. Boudreau, from Dale Roberson, the Director of Materials Management and Inventory at the 27222 property, from Leland Alan Taubeneck, who identifies himself as the former President and Chief Executive Officer of Worldspan, Queenship, and Crescent, and from Mary Roberson, a former Administrative Assistant at the 27222 property. All of the affidavits speak to the ownership of the three entities, the ownership of physical assets used in business carried on at 27222 property, the integration of operations among the three entities, financing, commonality (or partial commonality) of directors and officers and the day to day control of employees and operations.

42. The Director says the directors and officers of the Associated Employer had ample opportunity to respond to the claims being made. The Director notes that while the November 16, 2010, e-mail allowed the persons to whom it was sent six days to respond, the Determination was not issued for another four months after that date, during which time the Director continued some communication with Mr. Pascoe. The Director notes that the November 10, 2010, e-mail from Mr. Pascoe was sent to the directors and officers. None of those persons disputed any part of the content of the e-mail during the investigation or delivered any response between November 16, 2010, and the issuance of the Determination on March 18, 2011.

43. The Director says the Associated Employer had opportunities during the complaint investigation to bring forward any of the twenty-two issues listed in the appeal submission and to provide any evidence in respect of them, but never did. The Director says the evidence that was provided during the investigation was used in making the Determination. The Director says there can be no failure to review "relevant" evidence if that evidence was not brought forward during the complaint investigation.

44. The submission made on behalf of Mr. Boudreau contains comments relating to Worldspan's knowledge of the claims. That submission notes that the issue of unpaid wages arose in May 2010, when the first complaints were filed and the Director requested operational information and demanded production of payroll records. He says the demand for payroll records was provided to Steven Barnett and Chris Blane, principals of Worldspan, in May 2010.

45. Counsel for Worldspan has not filed a final reply to the Director's and affected employees' submissions.

The 27222 Determination

46. As with the appeal of the associated employer Determination, counsel for 27222 says the Director erred in law, by associating Worldspan, Queenship, Crescent, and 27222 under section 95 of the *Act* and by imposing liability on the Associated Employer and 27222 under sections 63 and 64 of the *Act*. The appeal form indicates one of the grounds of appeal is a failure by the Director to observe principles of natural justice. The appeal submission refers to a failure by the Director to seek out any evidence specifically addressing the status and corporate relationship of the other three entities and 27222, but there is no other reference to natural justice in the appeal or appeal submission.

47. Counsel has submitted three affidavits with the appeal of the 27222 Determination – from Steven Barnett, who describes himself as an investor and director of Worldspan, from Michael Nesbitt, a chartered accountant, and from Jim Hawkins, who describes himself as a Manager and former officer of Worldspan and Crescent. The content of these affidavits will be described as necessary and in the context of their relationship to the appeal process and the arguments.

48. While the appeal of 27222 is separate from the Associated Employer appeal, the arguments are, not surprisingly, virtually identical. Counsel argues that the Director did not have sufficient information about 27222 to determine it was an associated employer with Worldspan, Queenship, and Crescent. He calls the Director's decision an "assumption" that is "inherently problematic" as it was founded on a previous opinion that Worldspan, Queenship, and Crescent are associated employers under the *Act*. Counsel argues that in order to establish that 27222, Worldspan, and Crescent are associated employers with Queenship, the Director needs to demonstrate that the criteria set out in the *Invicta Security* test exists between Worldspan and Queenship and then between 27222 and either Worldspan or Queenship. Counsel says if the nuances of the relationship between 27222 and Worldspan, Queenship and Crescent had been fully explored, the Director would not have found these entities could be associated under the *Act*.

49. Counsel says the two affidavits referred to by the Director in the 27222 Determination, from Mary Roberson and Leland Alan Taubeneck, were not sworn or are improperly sworn and several of the documents attached to Mr. Taubeneck's affidavit were improperly sworn.

50. Counsel acknowledges 27222 owns and has leased the 27222 property to the "Parties", but says nothing should be taken of that, as 27222 is in the business of owning and leasing property. Counsel also concedes 27222 and the associated entities share the same corporate registered and records office, but says that is merely a coincidence and cannot be indicative of common control or direction. Counsel argues that other factors identified by the Director in the 27222 Determination – marketing materials, the absence of financial statements for 27222 and the application for restructuring under the *CCAA* – are not indicative or particularly cogent evidence of common control or direction.

51. Counsel says other factors, such as the lack of a financial connection between Worldspan, Queenship, and Crescent and Queenship being recorded as the employer, with responsibility for remittances to Revenue Canada and Worksafe BC, are more compelling evidence and operate against the associated employer finding.

52. Counsel argues that while the fact that 27222, Queenship, and Crescent are wholly owned subsidiaries of Worldspan and, in some cases, have overlapping directors and officers between these entities satisfies one of the criteria for associating entities, there are "larger policy considerations involved that must be weighed". Counsel identifies these larger policy considerations as including the absence of any indication that 27222 was created as an "alter ego" of Worldspan for the purpose of avoiding liability or for improper, fraudulent or illegal purposes. Counsel says absent these kinds of circumstances, the Tribunal should not allow the corporate veil to be lifted.

53. Counsel argues that, in any event, the Director erred in finding sections 63 and 64 of the *Act* should apply to the business of the 27222. As in the Associated Employer appeal, counsel contends the business of building the Crescent 144 should have been exempted from those provisions of the *Act* by operation subsection 65(1)(e) as it is "construction" as that term is defined in section 1 of the *Act*, which states:

> **"construction"** means the construction, renovation, repair or demolition of property or the alteration or improvement of land.

54. Counsel submits the building of the Crescent 144 fits comfortably within that definition and the property on which that activity takes place would, by logical extension, be a "construction site".

55. Counsel cites *Antepreet Brar and Others*, BC EST # D072/00, as authority for finding the work being done at 27222 property, including the building of the Crescent 144, is "construction". Counsel also relies on

E. Nixon Ltd., BC EST # D573/97, in arguing the activity being carried on at 27222 property is "construction" and the property is a "construction site".

56. The Director has filed a response to the appeal of the 27222 Determination. The Director notes the similarity between this appeal and that of the Associated Employer and indicates the purpose of the Director's submission is to add detail to the response filed in the former appeal.

57. The submission sets out the following background facts:

i) 27222 was incorporated in 1997. As of April 13, 2011, its directors/officers were Daniel Owen Fritz, James B.E. Hawkins, and Leland Alan Taubeneck. These individuals are involved in the appeals of the companies, in the application of the companies under the *CCAA* and the restructuring under the *CCAA*.

ii) 27222 owns the land on which the Crescent 144 is being constructed and is located.

iii) One of the first mortgage holders, in priority, is CSPN Financial B.C. Ltd. Its director/officers are Chris Blane and Steven L Barnett, who are also prominent in the group of companies currently under *CCAA* protection. Mr. Blane and Mr. Barnett also hold first mortgages on the 27222 property.

iv) In the application to the Supreme Court to extend their *CCAA* protection and obtain other orders, the companies involved in that application indicate they have "engaged in various discussions with respect to the sale of the real property (the "Lands") owned by 27222 Developments Ltd. At this point, counsel submits if the other Worldspan companies operated separate and apart from 27222, they would not be contemplating sale of the Lands as part of the *CCAA* process.

v) In his affidavit dated September 17, 2011, Mr. Barnett notes he is authorized to make the affidavit on behalf of the "companies", including 27222. At paragraph 14 of that affidavit, Mr. Barnett notes the "companies", including 27222, are "acting in good faith and with due diligence in this process and are seeking an extension of the stay to enable them to continue their restructuring efforts".

vi) The Director also refers to excerpts from an affidavit sworn on April 28, 2011, by Mervyn Monger in the action brought in the Supreme Court of British Columbia by Harry Sargeant III against the companies. The Director says it is clear from this affidavit that, at least *vis* Harry Sargeant III, Worldspan, Queenship, Crescent, and 27222 operated as one business.

58. The Director says there is sufficient connection between the Associated Employer and 27222 to ground a decision to associate. The Director says there is consistent group of individuals demonstrating control of the associated entities in a collective enterprise. These individuals have worked in concert in the *CCAA* process to make a plan of restructure, attempt to plan the completion of the Crescent 144, attempt to sell the Lands, with a leaseback arrangement, and to do all other things that would allow the entities to survive as an ongoing business. No one entity has attempted to do this in isolation from the others; it has been a common venture. The Director has attached the affidavit of Mr. Monger to the reply; a copy of this affidavit was before the Director when the 27222 Determination was made and is a part of the section 112(5) "record".

59. Counsel for 27222 has submitted a final reply. The submission is little more than a restatement of the initial submission. Counsel does, however, make the point that the Director's submission should not presume the validity of the associated employer Determination as that decision is under appeal.

ANALYSIS

60. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, 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.*

61. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

62. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The following statement appears in the *Britco Structures Ltd.* case and is relevant to aspects of this appeal, as counsel for Worldspan and 27222 does not dispute the Director applied the correct legal test on the section 95 issue, but erred in finding there was "common control or direction" on the facts:

> As noted, the Supreme Court of Canada has said in *Southam*, *supra*, that questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (paragraph 35). Since the Employer does not allege that the Delegate erred in interpreting the law or in determining what legal principles are applicable, it cannot allege that the Delegate erred in applying the incorrect legal test to the facts. Nor can it allege that the Delegate erred in applying the correct legal test to the facts the Employer accepts. I can only conclude that it alleges that the Delegate erred in applying the correct legal test to facts that the Employer disputes. Therefore, the question, in reality, is whether or not the Delegate erred in respect to the facts that the Employer disputes. This is a question of fact over which the Tribunal has no jurisdiction. The application of the law, correctly found, to allegedly erroneous errors of fact does not convert the issue into an error of law. (at page 15)

63. Counsel for Worldspan and 27222 has adopted error of law by the Director as one of the grounds of their appeal. 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.

64. The Tribunal has also recognized that a failure to observe principles of natural justice is a species of error of law: see *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03.

New Evidence

65. Worldspan and 27222 have, in part, grounded their appeals on subsection 112(1) (c): new evidence becoming available that was not available when the Determination was made. This ground of appeal has not been specifically addressed in either appeal submission. It does not appear, however, that the 27222 appeal includes any new evidence, at least as it relates to the Determination affecting that entity. There are certain elements of the affidavits filed with the 27222 appeal that can only be characterized as new evidence on the appeal of the associated employer Determination and I will take the same approach to that evidence as I intend to take for the new evidence filed on the associated employer appeal.

66. I shall first address whether any of this new evidence and new material will be considered, as my conclusions in this area will reflect on several aspects of the appeal.

67. As stated by the Tribunal in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03:

> This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made.

68. As noted by the Director, the Tribunal is given discretion to accept or refuse new or additional evidence and has taken a relatively strict approach to the exercise of this discretion. This approach is consistent with the purpose and objective of ensuring quick, fair and efficient resolution of disputes arising under the *Act*. The Tribunal tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint or investigation process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.

New Evidence Submitted in the Associated Employer Appeal

69. There is a substantial amount of new evidence presented with this appeal, comprising all of the affidavits and attached exhibits filed by counsel for Worldspan, some of the assertions of fact made by several of the affected employees who filed submissions, the affidavits filed by counsel for Mr. Boudreau, and some of the information submitted by the Director. In fairness, much of the new evidence submitted by the responding parties has been submitted in response to the material submitted by counsel for Worldspan with the appeal.

70. All of the new evidence provided on behalf of Worldspan was available and could have been provided to the Director during the complaint investigation. Notice was sent by e-mail to Mr. Pascoe, Mr. Taubeneck, Mr. Barnett, Mr. Hawkins, and Mr. Blane on November 16, 2010, advising them of the Director's intention to invoke section 95 in respect of Worldspan, Queenship, and Crescent. The e-mail contained the following sentence:

> If you have any objections to the association under section 95, please provide your written submissions no later than **November 22, 2010**.

71. No submission was ever provided by any of the five individuals to whom the notice was delivered. The Determination was issued March 18, 2011; the Associated Employer appeal was delivered to the Tribunal on April 26, 2011.

72. To allow such evidence is not only inconsistent with the provisions of section 112(1) (c) of the *Act* and the approach taken by the Tribunal to the new evidence ground of appeal, but having substantially failed or refused to respond to the Director's invitation to voice their objections on section 95 decision, to allow Worldspan to enter and argue "new" evidence at this stage would be inconsistent with the objects and purposes of the *Act* and fly in the face of the long standing approach by the Tribunal to such attempts in similar circumstances; see expressed *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.

73. Much of the evidence provided by counsel for Worldspan is not relevant to the issue of law raised in the appeal, but is aimed at findings of fact made by the Director. In that sense, the evidence is not particularly relevant. Nor am I persuaded the evidence is capable of resulting in a different decision than was made by the Director.

74. For these reasons, I conclude the new evidence submitted with the appeal of the associated employer Determination (with a limited exception that I will refer to later), and the information and evidence filed in response to this new evidence, will not be accepted.

75. Even if I were inclined to allow the new evidence on the appeal of the associated employer Determination, I have several comments to make about its effect on the decision of the Director to associate the three entities under section 95 of the *Act*.

76. First, as alluded to above, the new evidence submitted by counsel for Worldspan is predominantly aimed at findings of fact made by the Director. It is crafted in a way that attempts to raise peripheral facts and factors to a greater significance on the "common control or direction" question than is warranted, while failing to address the key elements of the basis for the Director's decision. In other words, the new evidence does not affect the key factual basis and findings made by the Director on the section 95 issue.

77. Second, allowing the evidence submitted by counsel for Worldspan, would compel the inclusion of all the statements and evidence filed in response to that evidence, including the statement of Mr. Best, the statement from Mr. Boudreau and the affidavits of Mr. Roberson, Mr. Boudreau, Mr. Taubeneck, and Ms. Roberson. The addition of that information and evidence overwhelmingly supports the decision to associate the three entities.

78. Third, the affidavits filed with the appeal go to only a few points relating to the section 95 analysis in the Determination: whether Mr. Pascoe said Worldspan exercised control over Queenship and Crescent; whether Mr. Pascoe said the employees were employed by Worldspan; whether Mr. Pascoe said the 27222 property was owned by Mr. Blane and Mr. Barnett and who controls or directs Worldspan and Queenship. The limited efficacy of the information provided in respect of these points is obvious on a reading of both the affidavits and the response material, and has been commented on by the other parties.

79. Fourth, the terms "control" and "direction" are used in the affidavits in a very general way and without reference to their intended meaning. For example, the Director found, and the material supports the finding, that Worldspan exercises complete financial control over Queenship and Crescent; all financing for the operations at the 27222 property, including the payroll for the affected employees, comes from Worldspan. Mr. Pascoe, who is identified in his communications with the Director and in the Determination as the Chief

Financial Officer of Worldspan, has significant day to day control over the financial operations of the shipyard. He says he is paid by Queenship, but that statement of course fails to indicate that the money to pay his salary comes from Worldspan. The documents do not support the suggestion that Mr. Barnett had no "control" of Worldspan. There are several references in the affidavit of Mr. Taubeneck to his receiving instructions and communications from Mr. Barnett in respect of the operations of Worldspan. Even if those instructions and communications are not determinative of effective operational control, they are a strong indication of Mr. Barnett's involvement in directing the operations of Worldspan. The fact that Mr. Blane and Mr. Barnett do not directly own the 27222 property is insignificant once one appreciates the registered owner, 27222, is owned and controlled by Mr. Blane and Mr. Barnett, either directly or through other companies they own and control.

80. There is no significance under the *Act* to whether, in these circumstances, Queenship is the "employer" of the affected employees on paper. Nothing in the *Act* prevents there being more than one employer for the purposes of the *Act*. In fact, section 95 exists, in part, to recognize the reality that application of the definition of "employee" and "employer" may point to more than one entity. In this case, it would be a perverse reading of the evidence to say that Worldspan did not exercise some element of "control or direction" of the affected employees or to say Worldspan was not, through their exclusive involvement in the contract to build the Crescent 144 and their providing the financing for the operations at the 27222 property, at least indirectly responsible for the employment of the affected employees.

81. Fifth, none of the new evidence challenges or impacts on most of the key findings made in the associated employer Determination on the section 95 issue which are set out at pages R5 and R6. It is not disputed that all three entities operate from one location with nothing to distinguish or differentiate their operations; Worldspan is the parent company and owns Queenship and Crescent; Worldspan makes all major financial, operational and business decisions relating to Queenship and Crescent, including the decision to build the Crescent 144; all contracts and payments under the contracts are secured through Worldspan; while employees are paid from a Queenship bank account, all funds in this account come from Worldspan's bank account; Crescent has no assets or employees and its name is used for "branding" purposes; the three entities carry on a business dependent on each other with Worldspan exercising direction and control over all aspects of the financing, operation and management of Queenship and Crescent; and the structure and interrelationship among the entities place them on the same footing as a single employer for the purposes of the *Act*.

82. In respect of the sections 63 and 64 issue, it would be entirely inappropriate to allow an argument that was never raised, or even alluded to, during the complaint process to be crafted on appeal. The essential facts relating to this part of the appeal can be found in the section 112(5) "record" and the appeal will be confined to those facts. The essential facts do not need elaboration in affidavits which are, in any event, more argument and opinion than fact.

83. For the reasons set out above, the associated employer Determination appeal will be decided on the material that was before the Director when the Determination was being made.

The associated employer Determination

Error of Law

84. The Director has set out in the associated employer Determination the correct legal test and analysis for considering whether different entities should be associated for the purposes of the *Act*. Only the decision on common control or direction has been challenged. On that matter, a central point made in the *Invicta Security*

Systems Ltd. case is that common control or direction may be exhibited in a number of ways, but will generally be found in an entity that makes significant decisions respecting how the business has been or will be run. Accordingly, it was entirely correct for the Director to focus on the prominent elements of the relationship between Worldspan and its subsidiaries.

85. The appeal submission refers to a number of section 95 cases that have listed factors that were considered in the circumstances of those cases. For the purpose of this appeal, the point to be taken from those cases, however, is not that those particular factors were, of themselves, found to be relevant or determinative in the circumstances, but that common control or direction can be decided from any number of factors. The cases frequently make reference to the common factors as being ownership of the entities, ownership of the assets, the degree of integration of the operations, financing, common (or partially common) directors and officers and the day to day direction of the entities and the employees. To exemplify this point, I note the following excerpt from the Tribunal's reconsideration decision in *Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd., and Oxbridge Ventures Inc.*, BC EST # RD106/10:

> I observe, however, that the Member properly interpreted the criteria that would inform a discussion of the applicability of section 95 when he referenced the language in *Invicta Security Systems* to the effect that factors like financial and operational control are not meant to be exhaustive. Rather, they are merely illustrative of the variety of circumstances which may lead to a conclusion that there is common control or direction. Regarding this point, the Tribunal in *Invicta Security Systems* also said this:
>
> > Control or direction is not limited in its application to direct financial or corporate control. The totality of the business and the inter-relationships of the entities must be examined.

86. And in *0708964 BC Ltd.*, BC EST # D015/11, the Tribunal stated that:

> . . . "common control or direction" may be determined based on financial contributions from one entity to another (although this factor, standing alone, is 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.

87. The above decision also stands for the proposition that the law does not require the Director or this Tribunal to interpret section 95 "narrowly". As noted in the *0708964 BC Ltd.* case:

> The legislative objective underlying section 95 is to ensure that employees' wage claims are not defeated by niceties of legal form. Although it is perfectly permissible for individuals to organize their business affairs in order to limit legal risk, or to maximize tax advantages, by conducting the business through separate legal entities, the effect of both the common law and section 95 is to ensure that employees are not unfairly disadvantaged by such arrangements.

88. The above comment answers the argument of counsel for Worldspan that the Tribunal should confine the "lifting of the corporate veil" to those circumstances where there is evidence of an intention to avoid liability or fraud or illegality. The objective of section 95 is not to interfere with how employers order their affairs, but with ensuring employees are not disadvantaged by corporate arrangements or structures regardless of whether the reasoning behind such arrangements is permissible or otherwise.

89. Nor does the *Act* require that the commonality of control or direction be perfect, in the sense that the same persons must be involved in all of the entities. Consistent with the nature of the *Act*, the concept of control

or direction referred to in Section 95 should be applied in a way that gives effect to the broad remedial nature of the legislation. The Director may look to several aspects of control or direction, including operational control or direction, financial control or direction or de facto control or direction when considering whether this condition has been met: see *Brunswick Avenue Holdings Ltd. and Others*, BC EST # D705/01.

90. In this case, it is apparent that the factors frequently considered in section 95 cases effectively tie Queenship and Crescent to Worldspan within an operation that is, on the available facts, completely integrated and has common (or partially common) directors, officers and management. Even if, as argued by counsel for Worldspan, there have been other factors that were not referred to or considered by the Director, that does not denigrate from the effect of the factors that were found to be present and which drove the decision of the Director to associate the three entities.

91. Based on the facts before the Director, applying the relevant considerations that were present on the available evidence and taking into account the statutory objective for the existence of section 95 in the *Act*, I can find no error in the conclusion of the Director that the three entities operate on the same footing as a single employer and are appropriately associated under section 95 of the *Act*.

92. Turning to the other error of law alleged in the appeal, that the Director erred in finding sections 63 and 64 of the *Act* applied to the affected employees, I do not accept the central premise supporting this alleged error of law – that the affected employees were employed at a construction site "by an employer whose principal business is construction".

93. The issue of whether the principal business of the Associated Employer is construction was not addressed in the associated employer Determination and the issue is raised for the first time in this appeal. As with the evidence submitted on the section 95 issue, the evidence submitted in support of this argument was not provided to the Director during the complaint process. Counsel for Worldspan has submitted affidavits from Mr. Pascoe, Mr. Hawkins, Mr. Fritz, and Mr. Nesbit, all of which speak, directly or indirectly, to the building of the Crescent 144 being "construction".

94. My view of this evidence has already been expressed. It will not be admitted or considered in this appeal. Accordingly, the decision on this aspect of the appeal will be decided on the Determination and the material in the section 112(5) "record". In that context, there is little evidence directed to whether the principal business of the Associated Employer is construction or whether the affected employees were employed at "one or more construction sites".

95. In my view, however, the limited amount of evidence does not significantly affect an analysis of the issue of law raised in the appeal. There is sufficient evidence to make an assessment of the nature of the business of the Associated Employer. A review of the Associated Employer's website material and of an article that appeared in Vol. 10, Issue 4 of US Industry Today indicate that Queenship and Crescent manufacture semi-custom and fully customized yachts in the 70 foot to 150 foot range at a 9.6 acre shipyard featuring "a 90,000 square foot purpose-built structure with 1400 square feet of deep-water frontage" on the Fraser River. Included in the shipyard is "a large construction and lamination hall, a state of the art joinery and cabinetry center and an environmentally controlled paint booth". That description of the operations at the 27222 property substantially accords with the description of the business found in the associated employer Determination.

96. The question of law then becomes whether that description of the operation at the 27222 property is "construction" as that term is interpreted and applied in the *Act*.

97. In *Urban Sawing & Grooving Company Ltd.*, BC EST # D112/05 (Reconsideration denied, BC EST # D188/05) the Tribunal stated, at pages 6-7:

> Construction, as defined in the Act means, "the construction, renovation, repair or demolition of property or the alteration or improvement of land". In *E. Nixon Ltd.*, BC EST # D573/97, the Tribunal made the following comment concerning that definition:
>
> > The definition of construction in the Act is comprehensive. Such a broad definition raises certain difficulties, not the least of which is its limits. Technically, one could include in the definition such activities as minor household repairs and gardening. In the context of the Act, this is hardly appropriate. The Act is intended to have a general application to employees in the province. Provisions of the Act that allow for exceptions to the application of basic standards of compensation and conditions of employment are strictly construed.

98. The above point was affirmed in the Reconsideration decision, at para 25:

> In our view, "concrete coring and testing" might be characterized as being ancillary to the "construction", "renovation" or "repair" of property. Further, the "cutting of concrete or tarmac roadways" might possibly fall within the ambit of "alteration or improvement of land". However, we also note that section 65(1)(e) of the *Act* removes what would otherwise be a statutory employment benefit, namely, compensation for length of service. It is, of course, a well-established principle that employment standards legislation, being "benefits-conferring" legislation, must be given a large and liberal interpretation - see e.g., *Re Rizzo and Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27. That being the case, statutory provisions that take away employment benefits should be construed narrowly (see e.g., *E. Nixon Ltd.,* B.C.E.S.T. Decision No. D573/97).

99. See also *Heron Construction and Millwork Ltd.*, BC EST # D087/08 (Reconsideration denied, BC EST # RD113/08), where the Tribunal stated, at pages 6-7:

> It is evident that the definition of "construction" in the *Act* is very comprehensive. Care must be taken to ensure that the term is applied in an appropriate manner given the context of the *Act*. Because section 65 establishes statutory exceptions to the usual rights of employees to receive either written notice or pay in lieu of notice, the exceptions are to be narrowly construed, and the employer must bring itself strictly within the statutory language (see *M.J.M. Conference Communications of Canada Corp.,* BC EST #D 182/04; and *Re Daryl-Evans Mechanical Ltd. et al.,* [2002] BCSC 48).

100. In *E. Nixon Ltd.*, *supra*, the Tribunal concluded that a sand and gravel pit operation did not fall within the meaning of "construction site" in subsection 65(1) (e) of the *Act*. The decision reads, in part, as follows at pages 3 to 4:

> The reference in subsection 65(1)(e) to "construction site" evokes the typical notion of a construction project, which involves the erection of a single, large, permanent structure at a fixed location. Such an undertaking involves a complex network of participants, many of whom specialize in some segment of the operation. The owner is the client, the purchaser of the product of the operation. It hires an architect and/or engineer to design and oversee construction. The contract is put out for bid, sometimes in its entirety, sometimes in stages. The successful bidder often does much of the contracted work itself and manages those parts of the contract for which it is responsible. It may subcontract other parts of the work to specialized construction employers, who come on site only for the purpose of making a specific contribution to the project. Employees working on construction sites for construction employers often exhibit the same specialization as their employers, coming to the construction site only to perform the function required of them and, when they are finished, leave the site and, more often than not, leave the employ of the construction employer.

> Construction employers do not normally maintain a regular work force, but normally acquire employees as and when required. Persons employed on construction sites are employed for a finite term which is generally predictable, either by the duration of their role in the project or by the duration of the project itself. It is this characteristic of employment in construction, resulting from both the way individual construction projects are organized and the erratic pattern of construction activity generally, that justifies the exception in the *Act*. Knowledge on the part of the employee of the finite aspect of the duration of their employment is the same characteristic shared by some of the other exceptions found in subsection 65(1).

101. The business of the Associated Employer does not involve the erection of a single, large, permanent structure at a fixed location. In other words, the facility at which the yachts are built does not evoke the notion of a construction project as described above. The yachts which are built at the 27222 property are removed from the facility once they are completed or bought and delivered to the client or buyer. They are never built with the intention that they will remain on the property. There is no evidence that the affected employees were employed for a finite period, comprising one project. A view of what is construction and a "construction site" that reflects the finite nature of the employment is consistent with the characteristics of several of the other areas of exemption found in section 65(1): employees employed under a temporary arrangement, for a definite term or for specific work that is to be completed within 12 months: see subsection 65(1) (a), (b) and (c).

102. In my view, and I so find, it is more appropriate to describe the 27222 property as a manufacturing facility and the Associated Employer as a yacht builder. While it is fair to say one could generally describe the activity at the 27222 property as "constructing" yachts, or "building" yachts, or "manufacturing" yachts, characterizing the activity of the Associated Employer as "construction" under the *Act* and the property as a construction site is not an appropriate application of those terms in the context of the *Act*.

103. I can find no error in the Director applying sections 63 and 64 of the *Act* to the affected employees. This argument is dismissed.

Natural Justice

104. I note at the outset that submitting new evidence relating to a breach of natural justice is viewed differently than new evidence submitted for the purpose of having that evidence considered "on the merits": see *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03, at page 14. In that context, I have reviewed the affidavit material filed by counsel for Worldspan with the appeal and the responses to that evidence from the other parties' submissions. Only Mr. Barnett makes any reference to the opportunity to know the section 95 case and to respond to it. He says he did not see the November 10, 2010, e-mail until April 2011. However, in Mr. Taubeneck's affidavit, at para. 31, he attaches an e-mail he sent to Mr. Barnett, and also to Mr. Blane, dated November 16, 2010, advising them of the section 95 issue and attaching a copy of the information summarized by the Director in the November 10 e-mail. The Director's submission also indicates the November 10 e-mail and the notice of the Director's intention to consider section 95 were successfully delivered to Mr. Barnett's e-mail address. There is no indication in any of the material that Mr. Barnett did not receive either of those e-mails. The same information was also sent to the corporate lawyer for Worldspan, Queenship, and Crescent by Mr. Taubeneck. On those facts, I conclude that even if Mr. Barnett did not see the November 10, 2010, e-mail, he received it or at the very least had notice of it and his failure to read it does not raise a natural justice issue.

105. Viewing the evidence, there is nothing that alters what I expressed above, that the Director provided the key individuals of the entities that were associated under section 95 with "meaningful" disclosure and a reasonable opportunity to respond to that material, but those persons simply failed or refused to respond. If

it was the case that Mr. Pascoe had no authority or sufficient knowledge to respond to the Director's inquiry, it would have been a simple enough matter for any one of them to have at least contacted the Director and indicated that.

106. On the material, I find there was no failure by the Director to provide directors and officers of the Associated Employer a reasonable opportunity to respond on the section 95 issue. Nor do I find the Director acted on insufficient information in finding there was a basis for associating the three entities as one employer for the purposes of the *Act*.

107. I have also found the Director had a sound evidentiary basis for the decision to associate under section 95. The submission of counsel for Worldspan asserting there were "twenty-two separate issues of law and fact" that the Director needed to research and determine is not supported on either a review of the circumstances in this case or the law relating to section 95, which I have addressed above. To reiterate, provided the relevant statutory criteria are satisfied, including the critical factors that have been identified when addressing the question of "common control or direction", it is not necessary for the Director to examine and determine the minutiae of those criteria. In others words, where the Director finds Worldspan exercises operational and financial control over Queenship and Crescent and the evidence supports that conclusion, it is not necessary or relevant for the Director to address the "degree" of operational and financial control that is exercised (even though the Director found financial control to be "complete"). If the factual finding of the Director on any particular point is considered to be wrong, it can be appealed and be decided on the proper allocation of the law and the burden of persuasion that operates in an appeal. The appeal submission relating to the "twenty-two points" makes no case for concluding that a specific finding on any of these points was essential to the section 95 finding. As I stated above:

> Even if, as argued by counsel for Worldspan, there have been other factors that were not referred to or considered by the Director, that does not denigrate from the effect of the factors that were found to be present and which drove the decision of the Director to associate the three entities.

108. As a result, the natural justice ground is dismissed and, consequently, the appeal of the associated employer Determination is dismissed

The 27222 Determination

109. As a result of my decision on the associated employer Determination, a consideration of the 27222 Determination appeal does not need to address the arguments which presume the former Determination is wrong or invalid. Nor will I revisit the associated employer Determination. This appeal concerns the question of whether the Director erred in associating 27222 with the Associated Employer under section 95 of the *Act*.

110. The factual basis for the section 95 decision is found at pages R1 to R5 in the 27222 Determination and the reasons for the finding is set out at pages R8 to R10.

111. As with the appeal of the section 95 decision in the Associated Employer Determination, counsel for 27222 concedes the proper test was applied and that the first, second and fourth parts of the associated employer criteria are present, but disputes whether there was a basis for finding common control or direction between the Associated Employer and 27222. The thrust of the appeal is not as much with the findings of fact that were made, as whether those facts could have formed the basis of a section 95 decision. There are two aspects to this part of the appeal: the Director did not have sufficient information about 27222 to decide if it

should be associated with the other entities; and the evidence which the Director did have, "do not add up to a finding of common control or direction".

112. The first matter echoes the argument concerning the "twenty-two issues" in the associated employer Determination appeal submission and the same response applies. Counsel has not indicated what this "evidence" is, how it is relevant to the decision made by the Director to associate 27222 under section 95 or how, as a matter of law, that "evidence" would derogate from that decision. The facts and factors relied on by the Director in associating 27222 provide a sufficient basis for the decision made. They clearly demonstrate the presence of most of the essential factors described in the *0708964 BC Ltd.* case and the *Carestation Health Centres* case as the "common factors": ownership of the entities, ownership of the assets, the integration of the operations, financing, common (or partially common) directors and officers and the day to day direction of the entities and the employees.

113. The second matter – that the evidence did not "add up to a finding of common direction and control" – simply challenges the conclusion made by the Director on the available facts. As stated earlier, the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law.

114. The arguments made by counsel in respect of this matter do no more than submit alternate views of the evidence considered by the Director which, he submits, are simply "trite commonalities" that do not support a finding of "common control and direction". These arguments have little merit when the facts considered to be "trite commonalities" are considered in the context of the totality of the evidence. Put more succinctly, it is not whether the fact of a lease, the sharing of registered and records offices, marketing materials or the failure by 27222 to file financial statements, considered individually, might compel a finding of common control or direction, but whether those facts and all of the other facts set out and considered by the Director in the 27222 Determination, viewed in their "functional context", were capable of supporting the finding that the requirements of "common control or direction" were fulfilled.

115. I do not give any weight to those parts of the affidavits provided with the appeal submission expressing an affiant's view on which person has "control and direction" in the entities. I agree with counsel for Mr. Boudreau, that it is meaningless to say Worldspan has been under the "control and direction" of Mr. Blane or that Mr. Taubeneck was the "controlling mind" of Queenship without providing an explanation of how those terms are being used and the facts which support those assertions. What is clear from the evidence that was before the Director and the undisputed findings of fact made by the Director is that Worldspan has operational and financial control over the other entities. There is also the affidavit of Mr. Taubeneck which shows Mr. Barnett exercising some operational direction in Worldspan and Queenship.

116. The evidence also supports the finding that 27222 functions as part of a single enterprise comprised of the four entities. It is wholly owned by Worldspan, has common directors and officers, has no existence outside the ownership of the 27222 property and operates more like a shell company for Worldspan for the purpose of owning the 27222 property. While 27222 is the registered owner of the 27222 property, Worldspan makes all decisions relating to the care, management, use and well being of the 27222 property. There are other facts and factors identified in the 27222 Determination. I need not recite them all.

117. In sum, I am not persuaded the Director committed any error of law in the decision to associate 27222 with the Associated Employer. This argument is dismissed.

118. The argument relating to the application of sections 63 and 64 to the affected employees is also dismissed, for the reasons provided above in the appeal of associated employer Determination. (see paras. 92 to 103)

119. If it is not already apparent, I find no breach of principles of natural justice by the Director in making the 27222 Determination. As indicated earlier, the arguments made by counsel for 27222 alluding to natural justice concerns are, at their core, merely an expression of disagreement with the factual basis for the decisions made by the Director on section 95 and sections 63 and 64 of the *Act*.

120. The 27222 appeal is also dismissed.

ORDER

121. Pursuant to section 115 of the *Act*, I order the Determinations dated March 18, 2011, in the amount of $1,209,481.23, and June 3, 2011, in the amount of $1,217,447.50, be confirmed together with any interest that has accrued on those amounts under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal