Employment Standards TRIBUNAL

An appeal

- by -

0708964 B.C. Ltd.
(the "Appellant")

- of a Determination 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: Kenneth Wm. Thornicroft

FILE No.: 2010A/163

DATE OF DECISION: February 4, 2011

DECISION

SUBMISSIONS

Jonathan D. Tweedale	Counsel for 0708964 B.C. Ltd.
Leahanne Hodges	on her own behalf
Kay Jasinski	on her own behalf
Karry Kainth	on behalf of the Director of Employment Standards

INTRODUCTION

1. On October 1, 2010, a delegate of the Director of Employment Standards (the "delegate") issued a Determination (the "Determination") and accompanying "Reasons for the Determination" (the "delegate's reasons") pursuant to section 79 of the *Employment Standards Act* (the "*Act*") regarding the unpaid wage complaints filed by 25 former employees (the "complainants") of an educational institution known as "VIS-Greybrook Academy". This independent school, which was located in Pitt Meadows, ceased operations on or about November 30, 2009. The complainants were employed as teachers, administrators, and other support staff. The delegate investigated the complaints and ultimately issued a Determination in the total amount of $88,726.57 representing unpaid wages (largely comprising section 63 compensation for length of service), $1,500 representing three separate $500 administrative penalties (see section 98) and section 88 interest.

2. The Determination was issued against an incorporated society, "Vancouver International Primary and Secondary School", carrying on business as "VIS-Greybrook Academy" ("Greybrook"), and against the current appellant, 0708964 B.C. Ltd. (the "Appellant"). The delegate determined that Greybrook and the Appellant were "associated employers" as defined by section 95 of the *Act* and, accordingly, were jointly and separately (severally) liable for the full amount of the Determination (see section 95(b)).

3. The delegate determined that Greybrook operated the school and the Appellant was its landlord. It is common ground that the Appellant owns the lands and premises where the school was located. Mr. Nigel Turner ("Turner") is a director of both Greybrook and the Appellant. The delegate found that although Greybrook was a tenant, the Appellant allowed Greybrook to fall into significant rent arrears and that Mr. Turner provided significant operating funds, both personally and through the Appellant, to Greybrook.

4. The Appellant appeals the Determination under section 112(1)(a) of the *Act* on the sole ground that the delegate erred in law in making the section 95 declaration. The Appellant seeks an order cancelling the Determination. The Appellant does not challenge the delegate's calculation of the 25 complainants' unpaid wage claims nor does it challenge the propriety of the administrative penalties. Further, so far as I am aware, Greybrook has not appealed the Determination.

5. The Appellant also applied for a Tribunal order suspending the Determination pending the final adjudication of this appeal. In reasons issued on December 6, 2010, I refused to issue a suspension order. These reasons for decision address the sole issue in this appeal, namely, the correctness of the section 95 declaration.

6. I am adjudicating this appeal based on the parties' written submissions (see section 103 and *Administrative Tribunals Act*, section 36). I have before me submissions filed by the Appellant's legal counsel, by two of the 25 employees and by the delegate. I have also reviewed the section 112(5) record.

THE SECTION 95 DECLARATION

7. According to the information contained in a submission filed by the Appellant's legal counsel (appended to the Appellant's Appeal Form), Greybrook was incorporated under the *Society Act* and its only members and directors are Mr. Turner, Kira Turner, and Shelby Turner. The Appellant is a business corporation governed by the *Business Corporations Act* and Mr. Turner is its sole director and shareholder. Greybrook was incorporated to "establish, govern, administer, operate and promote a non-denominational, co-educational independent school". The Appellant "was incorporated for the purpose of acquiring and holding real property". As noted above, it is common ground that Greybrook operated the school from land and premises owned by the Appellant.

8. Section 95 of the *Act* provides as follows:

> Associated employers
>
> 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.

9. The delegate determined that Greybrook and the Appellant should be "associated" because both entities "were involved in the operation and financial workings of [the school]" and were "under the common care and control of Mr. Turner" (delegate's reasons, page R10). The principal justification advanced for making the section 95 declaration was to ensure that the complainants received the unpaid wages to which they were entitled under the *Act*.

10. In making the section 95 declaration, the delegate relied on the following circumstances:

- Mr. Turner caused the Appellant to provide funding to Greybrook and to allow Greybrook to accrue significant rent arrears without taking any eviction and/or rent collection proceedings (page R10);
- "Mr. Turner said that he provided Greybrook, either personally or through [the Appellant], with $2,000,000.00 as an interest free loan…[Greybrook's] financial statements for 2007 and 2008 record related party loans in excess of $3,000,000.00, where the related parties are Mr. Turner and [the Appellant]…" (page R11);
- "Mr. Turner stated to me that if Greybrook was found owing wages [sic], he may just close the society in which case no one will receive wages. As a director of a society, he may not be personally held liable for the wages. The association of these two entities allows for [the Appellant] to be held responsible thereby increasing the chance of wage recovery. Furthermore, Mr. Turner may be held personally liable for wages via [the Appellant] as he is its director and officer. To ensure the provisions of the Act are enforced, it is necessary to associate Greybrook and [the Appellant] to ensure the minimum standards required by the Act are met." (page R11)

11. I wish to parenthetically observe that I do not share the delegate's stated view that directors of a society cannot be held liable for employee's unpaid wages under section 96 of the *Act*. Section 45 of the *Employment Standards Regulation* immunizes directors and officers "of a charity" – defined as meaning, *inter alia*, an organization incorporated under the *Society Act* – from section 96 liability but only if that person's remuneration was limited to reimbursement for reasonable out-of-pocket expenses:

> Exclusion from liability provisions
>
> 45. Section 96 of the Act does not apply to a director or officer of a charity who receives reasonable out-of-pocket expenses but no other remuneration for services performed for the charity.

12. I am unable to determine based on the material before me whether Mr. Turner would be immunized from section 96 liability.

THE APPELLANT'S POSITION

13. Counsel for the Appellant advances four separate "errors of law" all of which concern the correctness of the section 95 declaration in the case at hand (November 8, 2010 submission, para. 59):

> …the Delegate (i) misapplied…section 95 of the Act by failing to apply to the correct legal test [sic] (i.e., the *Ewachniuk* Test), (ii) made a determination without a sufficient evidentiary basis, (iii) made an error of law in his approach to the interpretation and application of section 95…under *Marbec*, supra, regarding resolving ambiguities in the application of section 95 in favour of the Appellant Company, and (iv) in the alternative, misapplied a section of the Act by misapplying the *Invicta* Test.

14. In a separate submission, also dated November 8, 2010, counsel made the following point regarding section 45 of the *Employment Standards Regulation* (see above) in support of his position that the section 95 declaration should not have been made in this case:

> In addition, because Nigel Turner is the sole shareholder and director of the Company, to treat the [Appellant] as a "common employer" with the Society would undermine the public policy underlying section 45 of the Employment Standards Regulation. That section of the Regulation exempts from liability for unpaid wages directors or officers of charities. In our submission, to impose liability upon the [Appellant] and, in turn, liability upon Mr. Turner in such circumstances is contrary to the public policy purposes recognized in the Regulation.

15. I wish to reiterate, however, that section 45 of the *Employment Standards Regulation* does not provide a blanket immunity from section 96 liability; as noted above, the immunity is only extended to directors and officers who do not draw any remuneration from the charity beyond reasonable out-of-pocket expenses. Mr. Turner may or may not be immunized from liability under section 96 given his status as a director and officer of Greybrook. Further, the question of Mr. Turner's potential liability under section 96 is not before me since, so far as I am aware, no section 96 determination has been issued against him although I do recognize that if the section 95 declaration is upheld, Mr. Turner could be held personally liable as a director and officer of the Appellant under section 96(4) of the *Act*.

16. In support of his position that the Determination should be cancelled, counsel for the Appellant advanced the following factual assertions none of which appears to be seriously contested by any respondent. Greybrook was incorporated in 2004 to facilitate the operation of an independent private school and Mr. Turner was one of three directors – Greybrook closed down the school on November 30, 2009, due to a lack of operating funds (para. 5). The Appellant, incorporated in 2004, owns the land and premises where the school was situated and Mr. Turner is its sole officer and director (para. 6). Mr. Turner provided the $1.4

million necessary to fund the property purchase (para. 7). Although there was a lease in place between the Appellant and Greybrook, Mr. Turner allowed rent arrears to accrue (para. 9(g)) apparently "to allow the School to keep tuition fees within the desired range" (Nigel Turner affidavit sworn October 6, 2009, para. 14 – the "Turner affidavit").

17. It appears that the school never operated on a proper independent financial footing and Mr. Turner, either personally or through the Appellant, provided significant operating funds. Mr. Turner, at paras. 11 – 16 of his affidavit, states that the school's revenues were insufficient to meet its operating expenses for the first five years of the school's operation and that the school borrowed "in excess of $3 million [from "related parties"], the related parties being myself and my numbered company [*i.e.*, the Appellant]." Mr. Turner says that he borrowed $2 million from his family and, in turn, provided this money to Greybrook "as a further interest-free loan". He further states: "Between myself and my family I have loaned in excess of $5,000,000 to the School [and] no interest has ever been demanded of the School, as I have recognized that the School would not be able to fund such interest payments. My goal has always been to ensure, as best as I can, the continued operations of the School…".

18. Counsel for the Appellant says that section 95 should be "strictly construed with any ambiguity to be resolved in favour of exempting an entity from liability" (paras. 21 and 49). Counsel further says that based on the leading authorities, a section 95 declaration cannot be made without a finding that the Appellant "exerted control, design or direction" over Greybrook and that no such finding was made (or even could be made) in this case (paras. 36 – 37 and 42). Counsel says that, as a matter of law, the delegate failed to apply the correct legal test in making the section 95 declaration. Counsel put the point, at para. 46 of his submission, as follows: "…the issue is not whether both the Society and the Appellant Company were controlled by the same persons. The issue is whether the Society's business was carried on under the control or direction of the Appellant Company. Whether Mr. Turner exerted control over both the Society and over the Appellant Company is immaterial."

19. The delegate, at pages R9 – R11 of his reasons, referred to several interpretive principles regarding the interpretation and application of section 95 in the instant case. First, he referred to the Supreme Court of Canada's decisions in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 as support for the interpretive principle that employment standards statutes should be interpreted in a broad and generous manner and that ambiguities regarding their scope should be resolved in favour of employees. The delegate also referenced the legislative purposes set out in section 2 of the *Act* as justifying "an interpretation…that extends protection to employees…over an interpretation that does not". Finally, in making the section 95 declaration, the delegate applied the four-part test set out in the Tribunal's decision in *Invicta Security Systems Corp.*, BC EST # D349/96. Counsel for the Appellant says that the delegate erred in his interpretive approach – section 95 should be construed narrowly rather than broadly – and in applying the *Invicta* test since it is inconsistent with binding judicial authorities (paras. 48 – 50). Counsel also submits, in the alternative, even if *Invicta* governs, the delegate misapplied the test since there was no evidence that the Appellant and Greybrook were operating on a common enterprise, namely, the school (paras. 51 – 54). Counsel reiterated the above arguments in his reply submission dated and filed January 4, 2011.

THE DIRECTOR'S POSITION

20. Not surprisingly, the delegate says that he applied the correct legal test in making the section 95 declaration. He says that Mr. Turner's role in both organizations is highly relevant and that, on the facts as found, all of the relevant criteria governing section 95 declarations were satisfied.

21. The delegate submits that the two entities were engaged in a common business enterprise, namely, the operation of the school (delegate's December 10, 2010, submission, page 3):

> The Appellant was not defunct or completely withdrawn from the business of the Society as the Society required land and a building to operate from. Both of these entities together, as a whole, were necessary for the operation of the school. The Appellant, by accruing the Society's rent (as opposed to evicting the Society for non-payment of rent) and providing it with loans was allowing the Society to carry on with its objectives. It is only because the Appellant was not defunct or completely withdrawn from the business of the Society that the school operated for as long as it did at this particular location (it avoided being evicted).

22. Although two of the complainants filed submissions in this matter, neither submission speaks, in any meaningful way, to the legal issues raised in this appeal. I shall now turn to my findings.

FINDINGS AND ANALYSIS

The proper interpretive approach to section 95

23. Counsel for the Appellant says that section 95 should be interpreted narrowly whereas the delegate says that it should be interpreted in a broad and generous manner. Counsel for the Appellant principally relies on the B.C. Supreme Court's decision in *Vencorp Enterprises Corp. v. Director of Employment Standard*s, 1998 CanLII 3943 but also relies on two B.C. Court of Appeal decisions, *Remko'B Investments Ltd. v. British Columbia (Director of Employment Standards)*, 1994 CanLII 168 and *Ewachniuk v. British Columbia (Director of Employment Standards)*, 1998 CanLII 6454. These cases all address the scope of the predecessor to what is now section 95, namely, section 20 of the *Employment Standards Act*, S.B.C. 1980 c. 10. For convenience, I have reproduced both the former section 20 and the current section 95, below (my underlining):

Employment Standards Act, S.B.C. 1980 c. 10 (section 20)	*Employment Standards Act*, R.S.B.C. 1996 c. 113 (section 95)
Associated corporations 20. Where the director or his authorized representative 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, the director or his authorized representative may treat the corporations, individuals, firms syndicates or associations, or any combination of them, as constituting one person for the purposes of this Act, and they are jointly and severally liable for payment of the amount set out in a certificate or order made under this Act and this Act applies to the recovery of that amount from any or all of them.	Associated employers 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.

24. As can be seen from the above table, the two versions are essentially identical save that the current legislation utilizes the less common term "joint and separate liability" rather than "joint and several liability" (nonetheless, the terms are synonymous) and that under the former provision the constituent parties were declared to be "one person" rather than, as it now reads, "one employer". Since the two provisions cannot, in my view, be meaningfully distinguished from each other, British Columbia judicial decisions regarding the scope of section 20 of the former *Act* are binding regarding the interpretation and application of the current section 95.

25. As noted above, counsel for the Appellant principally relies on *Vencorp* for the proposition that section 95 should be construed narrowly. In *Vencorp*, Drossos, J. cited *Rizzo Shoes* for the now well-accepted principle that employment standards legislation should be interpreted in a broad and generous manner. However, he also held that section 20 must be interpreted narrowly (at paras. 35 and 40):

> However, while a general approach of a broad and generous interpretation is given to such legislation, it is unlikely, in the absence of clear and express language, to apply where the specific nature of a section is little short of confiscatory or interferes with the rights of citizens under common law or statute or creates an exception to generally accepted law. In such cases, the broad and generous interpretation gives way to a strict construal and interpretation of the statutory provision.
>
> On summarizing the principles of statutory interpretation in relation to section 20, I am satisfied that the general principle or approach to the interpretation of the Employment Standards Act is that the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of parliament. However, since section 20 imposes liability on other corporations or individuals for unpaid wages, it clearly interferes with the rights of separate legal entities and is also an exception to generally accepted law. Accordingly, the provisions of section 20 should be strictly construed and any ambiguity must be resolved in favour of exempting the appellants from liability…

26. It seems clear that Drossos, J. believed that the "common employer" provision now contained in section 95 of the *Act* should be interpreted narrowly since it constituted an "exception to generally accepted law" and otherwise ignores the fact that each constituent entity is a separate legal person. However, that statement must be qualified since the common employer doctrine is also well recognized at common law: see *Sinclair v. Dover Engineering Services Ltd.*, 1987 CanLII 2692 (B.C.S.C.), appeal dismissed 1988 CanLII 3358 (B.C.C.A.); *Bagby v. Gustavson International Drilling Co. Ltd.* (1980), 24 A.R. 181 (Alta. C.A.); *Downtown Eatery (1993) Ltd. v. Ontario*, 2001 CanLII 8538 (Ont. C.A.). Further, *Vencorp* now appears to be inconsistent with later decisions of the B.C. Supreme Court such as *Vanderpol v. Aspen Trailer Company Ltd.*, 2002 BCSC 518, *Bartholomay v. Sportica Internet Technologies Inc. et al.*, 2004 BCSC 508 and *Coupe v. Malone's Restaurant Ltd.*, 2006 BCSC 1350. The common employer provision found in section 95 of the *Act*, far from being an "exception" to the common law, is simply a codification of the common law.

27. Section 95 is found in Part 11 of the *Act* - the "enforcement" provisions. 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. As the Ontario Court of Appeal observed in *Downtown Eatery* (at paras. 36 – 37):

> However, although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law…The definition of "employer" in this simple and common

> scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees.
>
> The trial judge focussed on the absence of a contract between Alouche and any of the potential common employers. With respect, we think this focus is too narrow. A contract is one factor to consider in the employer-employee relationship. However, it cannot be determinative; if it were, it would be too easy for employers to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets.

28. In my view, the law does not require the Director or this Tribunal to interpret section 95 "narrowly". Section 95 is qualitatively different from section 96 (the provision that deems corporate officers and directors personally liable for unpaid wages). An individual could be held liable under section 96 despite having little, if any, material role in the employer's day-to-day operations (as was the case in *Director of Employment Standards and Michalkovich*, BC EST # RD047/01). Accordingly, it is appropriate to interpret section 96 narrowly (see, *e.g., Archibald*, BC EST # D090/00 and *Director of Employment Standards and Michalkovich*, *supra*). However, a section 95 declaration cannot be made against an entity that was completely independent from the business to whom the employee provided services – section 95 requires a common business enterprise and evidence of common direction or control of the associated entities. That said, a section 95 declaration must not be made unless there the statutory criteria are clearly satisfied. In other words, the limiting factors are already present within the language of section 95. There 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.

29. I now turn to the question of what constitutes "common control or direction".

Section 95 – The Relevant Criteria

30. In *Remko'B Investments*, the director "associated" the employer of record, O'Brien Press Limited ("OBL"), with Remko'B. At all material times, both firms were under the common control or direction of Robert O'Brien. Remko'B lent money to OBL (as did Mr. O'Brien personally) and this loan was secured by a debenture that charged all of OBL's assets. Remko'B had other investments including homes occupied by the O'Brien family for which no rent was ever paid. In confirming the director's decision associating the two firms, Finch J.A., for the majority, observed at paras. 7 – 10 and 15:

> …for a twelve year period from about 1978 to the date of [OBL's] bankruptcy in 1990, [Remko'B's] only outstanding loan was to [OBL]. [OBL] had no other source of credit, apart from Mr. O'Brien's loan…[OBL] made no payments on account of the principal on the loan from [Remko'B] after 1980 and no payments on account of interest for the last two years prior to the bankruptcy.
>
> These facts lead, irresistibly in my view, to the conclusion that [Remko'B] had no business activity other than financially supporting the printing business. It could not in any real sense be described as carrying on the business of investor or lender, apart from its financial interest in [OBL]. It is equally clear that [OBL] was unable to carry on the printing business without [Remko'B's] financial support.
>
> Where company A carries on its business with the financial support of company B, and cannot continue to do so without that support, and where company B has no business activity other than the provision of financial support to company A, then it can reasonably be said that the business of company A is carried on by or through company B.
>
> Here [Remko'B's] only business activity was as the financial arm of the printing business. The inference that [Remko'B] and [OBL] were both engaged in that business is strengthened by the fact that both companies were under the sole direction and control of O'Brien.
>
> In my respectful view it was open to the Director on the agreed facts to conclude, as he did, that the printing business was carried on by or through both [OBL] and [Remko'B]…

31. In *Ewachniuk v. British Columbia (Director of Employment Standards)*, 1998 CanLII 6454 (B.C.C.A.) the Director of Employment Standards issued an "associated corporations" declaration under section 20 of the former *Act* that was subsequently challenged. The director's declaration was issued on the basis that two natural persons were "partners" in a failed restaurant venture. The Court of Appeal held that the mere fact that one of the two persons provided needed financial support to the business did not, in turn, make him a "partner" with the principal of the business. The Court of Appeal adopted the reasoning of the B.C. Supreme Court judge who initially set aside the section 20 declaration (at para. 19):

> 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.

32. My review of the relevant authorities suggests that the following propositions emerge when dealing with section 95:

- there must be at least two separate entities that are being "associated";
- the nominal employer is not particularly relevant and there is no need that a formal contract of employment subsist as between the employee and the entities that are being "associated";
- the entities must be jointly carrying out some business, trade or other activity although the business, trade or activity in question need not necessarily be the only one that each entity is carrying on;
- "common control or direction" may be determined based on financial contributions from one 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.

33. The foregoing list is not intended to be exhaustive but does constitute, I believe, the critical factors that have been identified by both the courts and the Tribunal when addressing a "common employer" situation. I now turn to the matter of whether a section 95 declaration was properly made in this case.

Did the Director's delegate err in making the Section 95 declaration?

34. In my view, the delegate did not fall into legal err in determining that the Appellant and Greybrook were "associated employers" under section 95 of the *Act*. Clearly, there were two entities, namely, the Appellant and Greybrook and no provision of the *Act* that prohibits the association of a not-for-profit society with a for-profit corporation. I reject the Appellant's counsel's assertion that there is any sort of legal principle to that effect. Further, I think it important to note the evidence suggests that it was the for-profit corporation (*i.e.*, the Appellant) that was facilitating the operations of a not-for-profit society (*i.e.*, Greybrook), not the reverse.

35. Counsel for the Appellant makes several assertions in his April 8, 2010, submission that I find to be inconsistent with the evidence or otherwise irrelevant:

- "Greybrook was operated and controlled entirely by the Society [and the Appellant] has no role in Greybrook's operations";
- " No Greybrook employee entered into a contractual relationship with the [Appellant]";
- "…it was open to the Society to operate Greybrook at the location of its choosing";
- "…it was open to the [Appellant] to determine whether to continue renting to the Society";
- "…the Society and the [Appellant] were, at all material times, operationally distinct from one another, and [both entities] had separate objects and separate purposes. They did not conjunctively operate a common enterprise";
- "In the present case, the [Appellant's] enterprise was profit-making and ownership of real estate. None of the Society's employees at any time contributed to that enterprise. The Society's employees were at all material times working in a not-for-profit school. No such employee could have reasonably conceived that they had entered into an employment relationship with the owner of the property upon which the school was situated."

36. The evidence before me indicates that Greybrook was incorporated on December 22, 2004, and the Appellant was incorporated on November 18, 2004. Nigel Turner is the sole director and officer of the Appellant and is one of three Greybrook directors (the other two being Kira Turner and Shelby Turner). The Appellant acquired the land where the school was situated in 2004 for $1.4 million. Mr. Turner in his affidavit states that upon his return to Canada in 2003 "I sought to purchase a local school in the Maple Ridge area" (para. 5). The Turner affidavit continues at para. 7 to describe the purchase of an abandoned school for $1.4 million through the Appellant and in para. 8 states that Greybrook was incorporated in 2004 to "facilitate the operation of the School". In my view, one can reasonably conclude that although the Appellant and Greybrook were separately incorporated, the two entities were closely linked in a joint initiative to operate an independent school. The Appellant acquired a purpose-built facility that was uniquely suited to Greybrook's needs. The two entities were in a symbiotic relationship. The notion, asserted by counsel for the Appellant, that Greybrook could have operated its school at whatever location it wished, ignores the clear fact that the Appellant deliberately acquired the property in question (a former school) because of its unique suitability for Greybrook's purposes. Further, there is absolutely no evidence before me to the effect that Greybrook had the financial wherewithal to locate to whatever suitable site it might have found. The evidence clearly shows that but for the Appellant's intercession and largesse, Greybrook would never have opened or continued to operate for as long as it did.

37. Although the Appellant did not formally employ any of the Greybrook employees – the complainants in these proceedings – I see nothing particularly remarkable about that fact. It will *always* be the case in a section 95 declaration that some of the associated entities are not parties to an employment contract with the employees; if there were subsisting employment contracts, there would be no need for a section 95 declaration since those entities could be characterized as "employers" under section 1 of the *Act*. Further, as a matter of common law, a "common employer" designation does not depend on whether there is an underlying contractual relationship between a given entity and the employee (see *Downtown Eatery*, *supra*, at para. 37 quoted above).

38. As for the Appellant's assertion that Greybrook's employees could not have conceived that they had employment contracts with the property owner, that assumes that the employees would have known – or should have known – that Greybrook did not own the land and buildings where the school was situated. It seems to me that the employees might well have equally assumed that Greybrook owned the land and premises in question. There is nothing in the record before me to indicate that the employees were clearly informed about the true state of the property title.

39. Counsel for the Appellant says that the relationship between the Appellant and Greybrook was strictly landlord-tenant and, at a later point in time, debtor-creditor. However, while that might be technically correct, most commercial landlords do not fund their tenant's operations through significant interest-free loans (Turner affidavit, para. 12) nor do they allow their tenants to accrue significant rent arrears without taking any sort of enforcement proceedings (Turner affidavit, para. 12). The interrelatedness of the two entities is further illuminated by the fact that Mr. Turner caused the Appellant to refrain from taking any enforcement proceedings against Greybrook in an effort to "keep tuition fees within the desired range" and "to ensure, as best I can, the continued operations of the School" (Turner affidavit, paras. 14 and 16). Indeed, the evidence strongly suggests that the Appellant was willing to accrue rent arrears and to otherwise provide necessary operating funds because it appeared to Mr. Turner that Greybrook was "very close to reaching the point at which tuition fees would be sufficient to cover the School's operating expenses" (Appellant's counsel's submission, para. 9(l)). This evidence suggests that the two entities were much more closely aligned than are typical landlords and tenants and, indeed, were parties in a joint endeavour, namely, the initial establishment, and subsequent operation and funding, of the school.

40. In light of the foregoing, I find that the delegate did not err in making a section 95 declaration in this case. I might add that I consider the evidence to be sufficiently cogent and probative that I would have affirmed the declaration even if I were of the view that section 95 should be "narrowly construed".

ORDER

41. Pursuant to section 115 of the *Act*, I confirm the Determination as issued in the total amount of $88,726.57 together with whatever further interest that may have accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal