Employment Standards TRIBUNAL

An appeal

- by -

San Bao Investment Inc.
("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: Rajiv K. Gandhi

FILE No.: 2016A/127

DATE OF DECISION: February 20, 2017

DECISION

SUBMISSIONS

Paula Krawus	counsel for San Bao Investment Inc.
Maureen E. Baird, Q.C.	counsel for San Bao Investment Inc.
Adele J. Adamic	counsel for the Director of Employment Standards

OVERVIEW

1. Sections 76 and 77 of the *Employment Standards Act* (the "*Act*") impose on the Director of Employment Standards (the "Director") a duty to receive, review and, where appropriate, investigate or adjudicate complaints alleging contraventions of both the *Act* and the *Employment Standards Regulation* (the "*Regulation*").

2. Acting within the scope of that authority, the Director issued a determination (the "Determination") on July 27, 2016, in which San Bao Investment Inc. (the "Appellant") was associated with Viceroy Homes Ltd. ("VHL") under section 95 of the *Act* and ordered to pay wages, in the aggregate amount of $352,023.65, to fourteen separate complainants (and employees of VHL), together with interest calculated according to section 88 of the *Act*, and administrative penalties totalling $1,500.00.

3. The Appellant does not challenge the administrative penalties, or the Director's calculations with respect to the amounts due and owing to each complainant. Rather, it takes issue with the Director's determination that the Appellant should be associated with VHL.

4. The Appellant says that the Director was wrong to do so, and it asks this Tribunal to vary the Determination under section 115(1)(b) of the *Act*, on the basis that the Director:

   (a) erred in law; and

   (b) failed to observe the principle of natural justice,

   both permitted grounds for appeal according to section 112(1)(a) and 112(1)(b).

Extension of Time

5. As a preliminary matter, the Appellant seeks an extension of the time in which to file the appeal. The Director takes no position with respect to this request.

6. The Determination was issued on July 27, 2016. Counsel for the Appellant was not retained until August 30, 2016. The appeal form was filed on September 2, 2016, and the substantive argument subsequently delivered to the Tribunal on October 20, 2016, following a request on October 3, 2016, for a further extension.

7. Extensions should not be granted as a matter of course. The discretion to do so should be exercised sparingly.

8. The Appellant does not offer a particularly compelling or, in fact, any, reason with respect to why it waited almost one month before engaging counsel to deal with the appeal, or why the reasonable time lines set by this Tribunal were unworkable.

9. However, I note that the appeal form was filed before the end of the appeal period, and the delay in filing the substantive argument was not unreasonably long. For these reasons, and largely because the Director does not oppose, I grant the extensions previously requested.

10. That said, I am dismissing the substantive appeal.

11. In doing so, I have reviewed the Determination, together with:

(a) a related determination issued by the Director on July 27, 2016, with respect to Mr. Kuen Yu Kwok, the Appellant's sole director at all times material to the matters addressed in the Determination;

(b) the Director's record, consisting of 432 pages (the "Record");

(c) submissions from the Appellant received on September 2, 2016, October 4, 2016, and, most importantly, October 20, 2016; and

(d) submissions from the Director received on December 9, 2016.

FACTS

12. Facts relevant to this appeal are summarized as follows:

(a) VHL was an Ontario company engaged in the design and manufacture of panelized and pre-cut homes, in part from business premises located in Richmond, British Columbia.

(b) Canada Wood Frame Solutions Inc. ("CWF"), C2 Global Holdings Inc. ("C2"), and the Appellant are or were British Columbia companies.

(c) CWF and C2 were each incorporated in October 2012, shortly before the acquisition of VHL. The Appellant was incorporated in 2008.

(d) VHL was or is a wholly owned subsidiary of CWF, acquired from the previous owner in late 2012, shortly after the incorporation of CWF and C2.

(e) Seventy-eight percent of the outstanding and issued shares of CWF are or were owned by the Appellant. The remaining twenty-two percent are or were owned by C2.

(f) The Directors of VHL included, at varying times, Mr. Kwok, Jasbinder Hayre, and Yan Wang. Officers included Mr. Kwok, Mr. Hayre, Douglas Auer, Robert Hammell, William Simpson, Daniel Fox and Roy Fritz.

(g) Mr. Kwok became a director of VHL in late 2012. For a time, he was also an officer of VHL, using the title of "Managing Director". It is common ground that Mr. Kwok formally resigned as a director of VHL effective February 27, 2015.

(h) The Directors of CWF and C2 are, or at relevant times were, Mr. Kwok, Mr. Hayre, Harpal Dhillon, and Ming Tang Liang.

(i) Mr. Kwok has been the Appellant's sole director since December 2012.

(j) CWF is a holding company. It had no operating business and its sole asset was the issued and outstanding shares it held in the capital of VHL.

(k) The Appellant similarly had no operating business; it was the vehicle by which to solicit investment in VHL, indirectly through CWF. Since 2012, the Appellant's sole asset has been the seventy-eight percent interest it held in CWF.

(l) Mr. Auer, Ms. Zhau, Mr. Hammell, and Mr. Simpson directed the day-to-day operations of VHL, in part.

(m) The Record reflects that between 2014 and at least April 2015, Mr. Kwok had some involvement in managing the affairs of VHL.

(n) Between October 18, 2013, and August 19, 2014, the Appellant made available to VHL loans in the aggregate sum of approximately fourteen million dollars. VHL, in turn, granted to the Appellant a general security over all of the assets of VHL. When VHL made a proposal to its creditors in June 2015, there remained due and payable by VHL to the Appellant almost eleven and one half million dollars.

(o) On June 9, 2015, VHL issued a Notice of Intention to File a Proposal under the provisions of the *Bankruptcy and Insolvency Act* (Canada).

(p) The assets of VHL have since been sold to a new vendor. The Record contains little information about the sale, and no information concerning the terms of sale, the amount payable, the payor, or the date of payment.

13. I could find no information in either the Determination or the Record, with respect to the identity or proportionate interests, in the Appellant, of the Appellant's shareholders.

14. There is also no information in the Determination or the Record with respect to whether or not any funds have been recovered, or will be recoverable, for the complainants in this matter, out of proceeds realized from sale of the VHL assets.

ANALYSIS

Section 95

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

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

16. The purpose of section 95 is to ensure that employees are not unfairly disadvantaged where business is conducted through separate legal entities in order to limit risks or minimize tax (*0708964 B.C. Ltd.*, BC EST # D015/11, at paragraph 27). However, the Director must be careful in exercising its authority under this provision; section 95 was not intended to extend liability to unrelated parties - "[A] section 95 declaration

cannot be made against an entity that was completely independent from the business to whom the employee provided services…" (*0708964 B.C. Ltd., supra,* at paragraph 28).

17. In *Invicta Security Systems Corp.,* BC EST # D349/96, the Tribunal held that the Director may associate parties under section 95 where four conditions are satisfied:

(a) there must be more than one corporation, individual, firm, syndicate or association;

(b) each of these entities must be carrying on a business, trade or undertaking;

(c) there must be common control or direction; and

(d) there must be some statutory purpose for treating the entities as one employer.

18. The first condition is self-evident. So too is the last, at least in my view. I address the argument of the Appellant on that point, below.

19. In my estimation, if they are carrying on businesses, trades or undertakings under common control or direction, the Director may, according to section 95 of the *Act*, treat VHL and the Appellant as one employer.

20. The Appellant says that in doing so, the Director erred in law.

Did the Director err in law by associating VHL and the Appellant according to section 95?

21. An "error of law" exists where:

(a) a section of the Act has been misinterpreted or misapplied;

(b) an applicable principle of general law has been misapplied;

(c) the Director acts in the absence of evidence;

(d) the Director acts on a view of the facts which cannot reasonably be entertained; or

(e) the Director adopts a method of assessment which is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

22. Several errors of law are alleged in the Appellant's submissions. I address each, in turn.

- *The Director erred in finding that VHL and the Appellant were carrying on a business, trade, or undertaking.*

23. The Tribunal has previously opined that entities to be associated under section 95 "… 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…" (see *0708964 B.C. Ltd., supra,* at paragraph 32).

24. The Appellant argues that it did not carry on business with VHL, and says that the Director was wrong to conclude otherwise. It says that VHL's business of manufacturing panelized and pre-cut homes was entirely different than its "business" which can be described essentially as, firstly, the holding of shares in CWF, parent company of VHL and, secondly, the raising of funds for investment in or loan to VHL.

25. With respect, I disagree.

26. The Appellant had no active business, and existed only to source and invest funds in the corporate structure, of which it was a significant part, created in 2012 contemporaneously with the acquisition of VHL from its previous owners. Very clearly, VHL was the operating arm of that structure. The Appellant, having no other business, no other holdings, and no other purpose, was an integral part of the financing arm.

27. In *Remko'B Investments Ltd. v. Director of Employment Standards,* 1994 CanLII 168 (BCCA), the British Columbia Court of Appeal considered section 20 of the *Employment Standards Act,* S.B.C. 1980, what is now section 95. In that instance, the Director sought to associate companies that were very clearly under common control and direction. The issue on appeal was whether or not the business conducted by the primary company was carried on by or though the appellant. In dismissing the appeal, a majority of the Court found that the appellant had no business activity other than financially supporting the primary company, and that the primary company could not operate absent that 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.* (*Remko'B*, at paragraph 9, emphasis added).

28. The esteemed Chief Justice McEachern, as he then was, opined in a dissenting opinion that it was irrelevant that the appellant company had no business interests other than investment in the primary company; it was only necessary to show that the business of the primary company was being carried on by or through the appellant company.

29. The Director submits, and I accept, that the facts of this matter closely resemble those in *Remko'B.*

30. The Appellant says that it was nothing more than a financier and lender to VHL, and relies on a decision of this Tribunal in *Jordan Enterprises Ltd.*, BC EST # D114/16, to argue against a finding that it carried on business in common with VHL. In *Jordan Enterprises*, I accepted that the associated company was carrying on business, in part, as the financier and lender of the employer company, but rejected the conclusion that both companies were carrying on a common business enterprise.

31. In my view, *Jordan Enterprises* is clearly distinguishable from this matter. In that case, the companies that the Director sought to associate under section 95 were created at different times and for different purposes. Each had different, independent, and well-documented business activities, and no related shareholders, directors, or jointly held assets.

32. Unlike *Jordan Enterprises*, the fact that VHL was incorporated years before the Appellant is not relevant, considering the acquisition of VHL in 2012, and the Appellant's involvement and significant position in a corporate structure created immediately before acquisition. Also unlike *Jordan Enterprises,* there is a commonality of shareholders in this case, in that the Appellant directly or indirectly controls or controlled enough shares in CWF, parent to VHL, to unilaterally direct or influence the day-to-day VHL operations.

33. Despite the assertion otherwise, I am satisfied that the Appellant was not merely an independent financier or lender to VHL, and there is nothing in the Director's conclusion on that matter that I can say is unreasonable or otherwise inconsistent with the Court of Appeal's guidance in *Remko'B.*

34. In concluding that the parties were carrying on a common business, trade, or undertaking, I am satisfied that the Director did not err.

- *The Director erred in finding that VHL and the Appellant were operating under common control or direction.*

35. According to this Tribunal:

(a) "Common control or direction is clearly established where the same person is in reality the guiding force or managing authority for both businesses…" (*Broadway Entertainment Corporation*, BC EST # D184/96, at page 11).

(b) Common control or direction "… is not limited in its application to direct financial or corporate control." *(Invicta Security Systems Corp.*, BC EST # D349/96, at page 6).

(c) 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 principles (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" (*0708964 B.C. Ltd., supra,* at paragraph 32).

(d) "The totality of the business and the inter-relationships of the entities must be examined." *(Invicta Security Systems Corp., supra,* at page 6).

36. The Appellant argues that there was no common control or direction, notwithstanding that for a significant period of time Mr. Kwok was either a director, officer, or both of VHL, and at all times a director of the Appellant. It says that Mr. Kwok did not control or influence the day-to-day operations of VHL, did not make decisions relating to employees, had no ability to sway the decisions of the other directors of VHL, and became involved only when the financial difficulties of VHL forced the Appellant to invest funds in order to avoid bankruptcy.

37. I cannot say that I agree with this characterization of the evidence.

38. The Appellant controlled more than three-quarters of the outstanding and issued shares of CWF, the immediate parent of VHL, and as such effectively controlled all of the outstanding and issued shares of VHL. Mr. Kwok may not have been the only director of VHL, CWF, or C2, but it is clear from the evidence referenced in the Determination and otherwise included in the Record that he was a guiding force in managing the affairs of both VHL and the Appellant. At material times, Mr. Kwok, before and after resigning as a VHL Director on February 27, 2015:

(a) held himself out, or allowed himself to be held out, as the managing director or owner of VHL;

(b) gave direction to VHL employees;

(c) communicated with VHL employees concerning their wages and delays in paying outstanding wages;

(d) communicated with VHL employees concerning a potential acquisition by new investors;

(e) made arrangements to obtain loans for certain VHL employees in lieu of wages;

(f) solicited investment in the Appellant for advance to VHL;

(g) executed security documents on behalf of VHL in connection with loans and advanced, from time to time, all of which came from the Appellant; and

(h) negotiated the sale of VHL assets to a third party.

39. The economic dependence of VHL on the Appellant is clear, considering the quantum of money advanced to VHL from time to time, and fact that the principal source of that money was the Appellant, according to VHL.

40. Unlike *Jordan Enterprises*, in which the employer company and the associated company had different ownership structures, different directors, and different shareholders, VHL and the Appellant have common governance, and a corporate structure that in appearance is somewhat similar to a set of Matryoshka dolls.

- *The Director erred in finding that VHL and the Appellant had common directorship after Mr. Kwok's resignation.*

41. The Appellant argues that Mr. Kwok's resignation as a director of VHL from and after February 27, 2015, is conclusive evidence that there was no common control or direction after that date, because Mr. Kwok ceased to have legal authority, or any authority whatsoever, *vis-à-vis* VHL, its operations, and employees. It says that after February 27, 2015, VHL and the Appellant were completely separate entities, operating at arms' length, and maintaining a purely debtor-creditor relationship.

42. I accept that commonality of directors is evidence (albeit not conclusive evidence) of common control or direction. The opposite, however, is not automatically true – the absence of common directors after February 27, 2015, does not also mean the absence of common control or direction.

43. In my opinion, to require the formality of the common appointment of directors as a prerequisite to showing common control and direction is to render section 95 impotent. As this Tribunal noted in *Invicta*, *supra*, one must consider the totality of the evidence and the relationships between parties.

44. Despite his resignation as a director (a fact acknowledged in the Determination), Mr. Kwok continued, firstly, to hold himself out as both the managing director and the "owner" of VHL, in letters sent after February 27, 2015, and secondly, to take those other steps I noted previously (see paragraph 38 above.)

45. In my view, Mr. Kwok continued to manage or participate in the management of VHL after his resignation in February 2015, and in reaching that conclusion, the Director did not err in law.

46. If not in his capacity as director of VHL, and not in some personal capacity, it would not be unreasonable to conclude that Mr. Kwok did so acting as the Appellant's sole director. (For reasons that I explain below, I do not believe it crucial or even necessary to arrive at that specific conclusion.)

- *The Director erred in finding that VHL and the Appellant had a relationship more than that of a debtor and creditor.*

47. The Appellant argues that the facts in this matter demonstrate nothing more than an arms' length relationship between creditor and debtor.

48. The Appellant relies on *Southgate Inn Inc.*, BC EST # D092/98, in which the Tribunal, at page 9, concluded that "[a] connection, without some degree of control beyond that of landlord/tenant or debtor/creditor, is

not sufficient to warrant a finding of liability for the payment of wages to employees of the tenant/debtor's failed business venture."

49. In *Ewachniuk v. British Columbia (Director of Employment Standards)*, 1998 CanLII 6454 (BCCA), the British Columbia Court of Appeal held that that the mere fact that one of the two persons provides needed financial support to a business does not, in turn, make him a "partner" with the principal of that business. Of relevance to this appeal are the words of the trial judge, adopted by Hollinrake, J.:

> *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.*

50. (What was then section 20 is more or less identical to what is now section 95 of the *Act*.)

51. I am satisfied that, for the reasons previously given (see paragraph 38 above), the Director's conclusion that the relationship of VHL to the Appellant goes beyond that of debtor to creditor, is sound.

52. The Appellant again relies on *Jordan Enterprises* but, in my view, that decision is unhelpful given that the employer company and the associated company in that matter were formed at different times, for different reasons, and had different shareholders, directors, and businesses. That is, the employer company and the associated company were entirely disparate entities; the same cannot be said of VHL and the Appellant.

- *The Director erred by misapprehending the evidence.*

53. The Appellant argues that the Director misapprehended the evidence by concluding that actions undertaken by Mr. Kwok were in a capacity other than as director of VHL or CWF.

54. It points to the evidence of Mr. Kwok, who says that until his resignation in February 2015, he was acting in his capacity as the director of VHL and, thereafter, in his capacity as director of, basically, anyone but the Appellant.

55. With respect, in making this argument I believe that the Appellant misses the point, entirely.

56. That Mr. Kwok was wearing more than one hat is not disputed. Arguing that Mr. Kwok was wearing his VHL hat on day one, his CWF hat on day three, and his Appellant hat on day two, does not adequately answer the question of whether there is common control and direction.

57. With respect to Mr. Kwok's post-resignation communications, I note the following:

(a) On March 12, 2015, Mr. Kwok sent a letter on VHL letterhead to several VHL employees. In it, he provides detail regarding anticipated VHL financing, and confirms that "we are determined to get Viceroy back on track as quickly as we can." Whether or not I accept the Appellant's argument that Mr. Kwok ceased to have authority vis-à-vis VHL from and after his resignation, it seems to me that he continued to act in some capacity for or with respect to VHL, and it is not unreasonable to conclude that he remained involved in directing the affairs of VHL.

(b) On March 24, 2015, Mr. Kwok sent a second letter, not on letterhead, which he signed as or on behalf of the "Ownership Group". This letter clearly makes reference to efforts to secure funding and to put Viceroy "back on track". It is not clear to me who the "Ownership Group" is, but it would not be patently unreasonable to conclude that it meant the owners of VHL which, given the ownership structure, could be said to include the Appellant.

(c) On April 8, 2015, Mr. Kwok sent a third letter, which he signed as "Owner of Viceroy Homes", and which the Appellant argues means CWF. That particular conclusion is not so easy to draw.

58. Common control and direction does not mean that Mr. Kwok acts in his capacity as director of the Appellant to guide the affairs of VHL. Rather, it means, at least in part, that the same person guides the affairs of VHL and the Appellant.

59. That Mr. Kwok was managing the Appellant is undisputed. That Mr. Kwok was participating in the management of VHL (and holding himself out as a manger both before and after February 27, 2015) is clear, on the evidence.

60. At best, one can opine that the lines between the various roles filled by Mr. Kwok are blurred, and it is difficult to say, with certainty, in what capacity he was acting at any given time. The resulting level of confusion speaks in favour of, not against, the Director's findings, particularly when viewed against the backdrop of a nested ownership structure created in 2012 in order to facilitate the VHL acquisition.

61. In my view, the Director has not misapprehended the evidence.

- *The Director erred in finding the existence of a statutory purpose.*

62. The Appellant says that the Director erred in failing to properly analyze the evidence in relation to the fourth *Invicta* condition - that is, the Appellant says that the Director did not fully consider whether or there is a statutory purpose for making the one employer declaration.

63. In *Invicta*, the Tribunal said this:

> One of the purposes of the *Act* is to ensure employees in the province receive the basic standards of compensation and conditions of employment. The *Act* not only sets the basic standards of compensation and conditions of employment but also provides a comprehensive scheme for the enforcement of the *Act*, including some collection procedures such as claims of lien, court order enforcement and seizure of assets in appropriate circumstances. It is in the enforcement provisions of the *Act* where Section 95 has been placed. The statutory purpose requirement is met if the one employer determination is for the purpose of enforcing basic standards of compensation and conditions of employment. It is not inconsistent with that purpose to make the one employer declaration for the purpose of facilitating the collection of wages owing under the *Act*.

64. In my view, the Director did not need to consider whether or not, in this case, there was a statutory purpose. I go so far as to suggest that a case-by-case statutory purpose analysis is generally unnecessary; a statutory purpose for section 95 was established in *Invicta*, and if the purpose of the one employer declaration is to collect unpaid wages, it need not be shown in every case where the collection of wages is the goal.

65. All in all, there is nothing that I can see in the Determination that is incorrect, patently unreasonable, or otherwise constitutes an error of law in one of the five ways enumerated in *Gemex*, and I reject the argument of the Appellant under section 112(1)(a) of the *Act*.

Did the Director violate the principles of natural justice?

66. The Appellant also challenges the Determination on the basis that the Director has failed to observe the principles of natural justice.

67. Those principles require the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2). Fairness, in turn, means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15).

68. In this instance, the Appellant argues that the Director failed to:

(a) provide sufficient reasons for the conclusion that there was common control and direction;

(b) failed to provide sufficient reasons for apparent findings of credibility.

- *Sufficiency of Reasons*

69. The Tribunal has previously adopted a "functional context-specific approach" when assessing the sufficiency of reasons (see, for example, *Kirk Edward Shaw*, BC EST # D089/10, and *Worldspan Marine Inc.*, BC EST # D005/12.)

70. Guidelines with respect to this approach and applicable to proceedings under the *Act* were established by the Supreme Court of Canada in *R. v. R.E.M*, 2008 SCC 51, starting at paragraph 15:

(a) courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments, and the trial, with an appreciation of the purposes or functions for which they are delivered;

(b) the objective is not to show <u>how</u> a decision is reached, but why;

(c) every finding or conclusion need not be explained in the process of arriving at a verdict; and

(d) there is no requirement to expound on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can logically be discerned.

- *Common Control and Direction*

71. In my opinion, the Determination sets out the basis upon which the Director concluded common control and direction:

(a) the Appellant was not a separate, unrelated, investment company, but the company holding the largest interest in VHL, albeit indirectly, and regularly provided financing to VHL, without which VHL would have been bankrupted;

(b) Mr. Kwok was the sole director of the Appellant, a director of VHL until February 2015, and involved in the management of VHL (operating under the title of managing director) both before and after his resignation as an actual VHL director;

(c) Mr. Kwok was making recommendations to the VHL management team, and while his recommendations may not always have been followed, he was clearly part of the ongoing discussion;

(d) Mr. Kwok was the party negotiating with prospective purchasers, and encouraging employees to stay with VHL even in the face of delays in the payment of wages – he was aware that complainants were working without wages, and he was a primary point of contact for them.

72. In explaining why the conclusion of common control and direction was warranted, I am satisfied that the Determination follows the guidelines set out in *R.E.M.* The Director set out the appropriate test, the evidence relating to each facet of the test, and the conclusion to be drawn. The Appellant may not agree with the result, but the Determination is intelligible, and the conclusions drawn are tied to evidence in a manner that is logical, if sometimes difficult to read.

- *Credibility*

73. In arguing that the Director failed to provide sufficient reasons for apparent findings of credibility, the Appellant focuses on what it interprets as the Director's conclusion that Mr. Kwok was acting in his capacity as a director of the Appellant when involving himself in the affairs of VHL.

74. The Appellant says that there was no meaningful analysis of, and no attempt to reconcile, conflicting evidence concerning the various roles occupied by Mr. Kwok. The Appellant says that it has no way of knowing how the Director reconciled contradictory evidence in concluding that Mr. Kwok, at material times, was acting in his capacity as a director of the Appellant.

75. I have some difficulty with this argument. Not only do I not agree that the Director made a finding that Mr. Kwok was acting in his capacity as a director of the Appellant when involving himself in the affairs of VHL, I am of the opinion that the Director had no need to make such a finding. The Director found, and the evidence corroborates a finding, that Mr. Kwok was directing the affairs of the Appellant, and concurrently involved in directing the affairs of VHL. What hat he was wearing at any given time is not as relevant as the fact he was wearing more than one hat.

76. For that reason, it does not appear to me to be detrimental to the Determination that the Director did not, in the Determination, delve into or otherwise expressly address conflicts in the evidence concerning the specific capacity in which Mr. Kwok was acting from time to time.

77. In my view, the Director clearly reviewed evidence uncovered or received during the investigative process, and considered the evidence of each witness material to a section 95 analysis. The Determination sets out in a reasonably clear manner the basis for a conclusion that common control and direction exists.

78. I point out that adequacy, not perfection, is the standard by which the Director's reasons are to be judged, and I am mindful of the comments of the Supreme Court of Canada in *R. v. Gagnon* (2006 SCC 17 at paragraph 23):

> *The requirement for sufficient reasons is not an invitation to an appellate court to substitute its perceptions of what should have been the factual and credibility findings of the trial judge when a reasonable basis for the trial judge's conclusions exists.*

79. The Determination is not perfect, but it is sufficient. In my opinion, a reasonable basis for the Director's assessment of the evidence has been set out in the Determination.

80. In my opinion, the Appellant has failed to discharge its burden to show a breach of natural justice.

Bias

81. Finally, the Appellant says that the Determination "strongly" suggests that the Director pre-judged the issues, giving rise to a reasonable apprehension of bias.

82. The Appellant says that the Director must act impartially. It points to section 30 of the *Administrative Tribunals Act*. Why, I do not really know, because the Director is not a tribunal, and that section does not apply.

83. The test for bias adopted by the Supreme Court of Canada is set out in *Committee for Justice and Liberty v. National Energy Board* [1978] 1 SCR 369, at page 394: "What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude"?

84. I do not think I am twisting the Appellant's submissions when I say that it seems like the Appellant is arguing that, because it lost, the Director must have been biased.

85. With respect, the argument is absurd.

86. In the absence of any supporting evidence, the Appellant suggests that the unfavourable finding must have been skewed, because it allows the Director an opportunity to collect wages owned by VHL, in the face of an inability to collect wages from VHL or its directors. It is lost on the Appellant, apparently, that the point of a section 95 declaration is exactly that.

87. Bias is not shown just because the Director makes findings that do not support the positions advanced by the Appellant. To the extent that it calls into question the impartiality of the Director in an investigation or adjudication, an accusation of bias should not be thrown around so lightly or casually.

88. In my view, no right-thinking person would agree that there is bias in the case, or a reasonable apprehension of bias. The Appellant has abjectly failed to satisfy its burden to demonstrate otherwise.

Conclusion

89. The *Act* was intended by our legislature to ensure that employees receive basic standards of compensation.

90. Corporations and business ventures structured in a way that protects investors while limiting risk and reducing taxes, are entirely legal. Competing with that, however, is the decree of our legislature declaring contrary to the public interest a corporate structure that allows a business to shirk obligations to employees. Rather than outlawing those structures, section 95 permits the Director to ignore them. The Tribunal ought not to capitulate with respect to a structure and management style that would so easily allow an employer to circumvent a fundamental tenet of the *Act*.

ORDER

91. For these reasons, the appeal is dismissed, and the Determination confirmed pursuant to section 115 of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal