Employment Standards TRIBUNAL

An appeal

- by -

Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd., and Oxbridge Ventures, Inc.
("the associated entities")

- 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: David B. Stevenson

FILE No.: 2010A/54

DATE OF DECISION: June 22, 2010

DECISION

SUBMISSIONS

Karim Rajani	on behalf of Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc.
Christine Ho	on her own behalf
Anne Kelley	on her own behalf
Shahab A. Rizvi	on his own behalf
Valli Tremblay	on her own behalf
Mary Walsh	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal brought under to Section 112 of the *Employment Standards Act* (the *"Act"*) by Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc. ("the associated entities") under section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 26, 2010. The Determination was made by the Director on complaints filed by forty-seven former employees of Carestation Health Centres Ltd. ("Carestation Health") who alleged that the employer had contravened the *Act*.

2. The Determination found that Carestation Health had contravened Part 3, sections 18, 21 and 26, Part 4, section 40, Part 5, sections 45 and 46, Part 7, section 58 and Part 8, section 63 of the *Act* and ordered Carestation Health to pay the complainants an amount of $327,691.01, an amount which included wages and interest.

3. The Director also imposed administrative penalties on Carestation Health under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation"*) in the amount of $6,500.00.

4. The Director associated Carestation Health with Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc. under section 95 of the *Act* and, as a result of that association, found the associated entities to have contravened the *Act* and imposed the liability of Carestation Health under the *Act* and *Regulation* on the associated entities.

5. The total amount of the Determination is $334,191.01. The associated entities have appealed the Determination, on the grounds that the Director erred in law, failed to observe principles of natural justice in making the Determination and that evidence has come available that was not available at the time the Determination was being made. The associated entities seek to have the Tribunal cancel the Determination.

6. None of the parties seeks an oral hearing on this appeal. The Tribunal has a discretion whether to hold an oral hearing on an appeal, whether or not there is a request for an oral hearing.: see Section 36 of the

Administrative Tribunals Act ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575. In this case, the Tribunal has decided an oral hearing is not necessary and this appeal can be decided on the submissions and the material submitted by all of the parties, including the section 112 (5) Record filed by the Director.

ISSUE

7. The general issue in this appeal is whether the associated entities have shown the Director has committed any reviewable error in making the Determination.

THE FACTS

8. The facts of this case are somewhat complicated by the number of complainants, business locations and various circumstances peculiar to groups of complainants.

9. Carestation Health operated eight medical clinics under the control and direction of Mr. Karim Rajani. The locations of the clinics are listed in the Determination. Each of the complainants worked at one of the eight medical clinics.

10. Mr. Rajani provided business/managerial services at all of the clinics and entered into contractual arrangements with physicians for the use of the clinics and his services. Over a period of time in 2009, Carestation Health ceased to operate the clinics or provide Mr. Rajani's services and the contractual arrangements with the physicians were ended.

11. It appears from the Record and the Determination that Carestation Health failed to pay regular wages to some of its employees in June 2009 and to most of the remainder of its employees in July 2009.

12. The Director found that most of the complainants continued to report for work and perform their duties even after having been notified that Carestation Health could not meet its July payroll obligations. The complainants also indicated they continued to receive information from Carestation Health that it was still managing the clinics and attempting to locate re-financing. Some complainants were specifically told by Carestation Health after July 15, 2009, that they were still employed and would be paid when new financing was obtained.

13. Employment with Carestation Health for most of the complainants was deemed terminated under section 66 of the *Act*. The Director used the following circumstances in determining the dates on which complainants should be deemed terminated:

    i. where a complainant had quit employment with Carestation Health because of chronic non-payment of wages, the Director used the actual date on which the complainant ended their employment as the date of deemed termination;

    ii. where a clinic closed, the Director used the date of closure as the date of deemed termination;

    iii. in the case of the Kerrisdale clinic, the Director accepted the most reasonable date for deemed termination was July 15, 2009, for the reasons expressed in the Determination; and

iv. in all other cases (being the majority of cases), the Director chose September 18, 2009 as the date of deemed termination.

14. The dates used for most of the deemed terminations are an issue in this appeal.

15. As indicated above, many of the complainants continued to work at a clinic, some receiving payment for this work from the physicians. The Director accepted these amounts were temporary loans.

16. Carestation Health produced partial payroll records in response to various Demands for Employer Records issued by the Director during the complaint investigation process. None of the records provided were fully responsive to the Demands. The Director found Carestation Health had produced no evidence concerning complainants daily hours of work, no evidence to refute claims concerning wage deductions made but not properly remitted to the complainants' insurance carrier, no records to show what wages had been paid or which amounts Carestation Health agreed were owed, no evidence refuting some complainants' overtime claims and no evidence refuting complainants' vacation pay claims: see pages R10-R11 of the Determination.

17. The Director found that Mr. Rajani was one of two directors of Carestation Health and the sole director of each of the associated entities. In considering section 95, the Director found more than one entity existed, each actively carrying on a business, common control and direction through Mr. Rajani's common directorship and operational control in each of the entities and a statutory purpose for associating the entities. The Director's decision on section 95 is contested, on error of law and natural justice grounds. The decision of the Director will be examined in more detail when considering the arguments of the associated entities on this point. The evidence relied on by the Director when considering section 95 is found at pages R19 to R21 in the Determination.

18. Carestation Health made a voluntary assignment into bankruptcy on January 22, 2010.

19. The Determination notes that several attempts were made to contact Carestation Health and Mr. Rajani to obtain information and a possible resolution of some or all of the complaints. The Determination lists a "non-exhaustive summary" of the dates and contents of "key" communications, including a January 8, 2010, communication to Carestation Health, Carestation Health Centres (Seymour) Ltd., Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc. and the directors of those entities indicating the Director intended to address the issue of whether to associate those entities under section 95 and requesting any information and submissions on that issue.

20. The associated entities have sought to introduce evidence in this appeal that was not before the Director at the time the Determination was being made. Most of this evidence relates to the section 95 issue and is introduced in the appeal primarily as general factual assertions unsupported by any objective evidence.

ARGUMENT

21. The associated entities have fashioned their arguments under six different headings, which I will identify and summarize.

1. No Injury

The associated entities say none of the complainants suffered any actual injury because all were paid wages by the physicians at the clinics when Carestation Health was unable to do so.

2. Alternate Remedy

The associated entities say the Determination is an "end run" around the bankruptcy legislation; that there is nothing in the legislative history of the *Act* indicating it pre-empts, surpasses or over-rules the protections provided to creditors in a bankruptcy.

3. Inconsistent Standards

The associated entities say the Director has applied inconsistent standards in accepting evidence from the complainants to make findings of fact for some purposes but not applying these findings of fact when determining the dates on which complainants were deemed to have been terminated. They also say that had the Director applied the evidence provided by the complainants, the dates of termination would have been mid-June for some complainants and mid-July for most of the others.

4. Misuse of Evidentiary Standards

The associated entities say the Director erred in calculating wages from evidence provided by the complainants when there were payroll and other "public records" available but not acquired or considered.

5. Sections 17, 18 and 126

The associated entities say the Director misapplied the standards required by these provisions in the *Act* in deciding the dates on which complainants should be deemed terminated.

6. Misapplication of Section 95

The associated entities say the Director erred in applying section 95 to associate unrelated companies. They also say there are several differences in the ownership and control structure of the associated entities. Several factual assertions are made here that were not made to the Director during the complaint process and amount to an attempt to introduce new evidence at the appeal stage.

22. The Director and several of the complainants have responded to the appeal.

23. The responses of the complainants generally clarify their claims in the context of the arguments made by the associated entities. All of these responses address the "no injury" argument and point out that in addition to claims for regular wages, their claims relate to one or more of: holiday pay; overtime; severance (length of service compensation); wages not covered by physicians at the clinics; and wages owed prior to July 15, 2009. None of the responses from complainants speak to the legal issues raised in the appeal.

24. The response of the Director addresses each of the points made in the appeal submission.

25. On the first argument, the Director makes the same point as the complainants: that many of the claims related to unpaid statutory and annual vacation pay and length of service compensation as well as regular wages earned before wage default. On the question of who was the employer of the claimants up to certain points in time, the Director defers to the reasoning provided in the Determination. The Director submits that the monies received by some complainants from physicians were temporary loans and should not be characterized as wages received by the complainants or credited to Carestation Health as wages paid.

26. In response to the second argument, the Director notes that the only entity subject to bankruptcy proceedings is Carestation Health Centres Ltd. None of the associated entities, against whom the Determination is made, are in bankruptcy. The Director says there is no bar to the complainants claiming wages under the *Act* against the associated entities. The Director refers to the Tribunal's decision in *More Marine Ltd., More Management Ltd. and Morecorp Holdings Ltd.*, BC EST # D078/08, in support of this position.

27. On the third argument, the Director relies on the analysis in the Determination. The Director adds that there is nothing in the *Act* requiring a finding of deemed termination under section 66 to be made on the first instance of non-payment of wages and the associated entities' position in this regard could, in some circumstances, run against the purposes of the *Act*. In the circumstances of this case, for example, accepting the position of the employer would necessitate a finding that most of the complainants were repeatedly terminated and rehired with each period of work performed for Carestation Health and successive failure to pay wages earned.

28. The Director says the suggestion by the associated entities that evidentiary standards were misused has no basis in law or fact and the appeal has failed to articulate how or in what instances this alleged error was committed. The Director says Carestation Health was provided with several opportunities during the complaint investigation to present evidence of what was paid to each of the complainants and provided only partial payroll records and made no submission against the wage claims made. Even in the appeal, the Director says the associated entities have not detailed what errors have been made in the wage calculations in the Determinations. The Director says the mere reference to further information being available with Revenue Canada and the trustee in bankruptcy does not show any error in the Determination as the appeal does not show how any of these documents bear on any issue raised in the appeal.

29. In response to the fifth argument, the Director defers to the reasoning in the Determination dealing with the dates of the deemed termination of the complainants and reiterates the position that the *Act*, including a consideration of sections 17, 18 and 126, does not dictate when a deemed termination must be found to have occurred.

30. In respect of the section 95 issue, the Director once again relies on the analysis found in the Determination and disagrees with the associated entities that control and direction in each of the entities must be found to be identical before an association under section 95 can be made. The Director says such a requirement would likely render section 95 useless. The Director also disagrees with the assertion that persons involved with the associated entities were not given an opportunity to submit evidence and argument on that issue. The Director refers to the letter dated January 8, 2010, to the entities and the directors of those entities.

31. In their final response, the associated entities provide further comments on each of its arguments. On the first argument, they challenge the assertion that the monies received by some of the complainants from the physicians in the clinics were "loans" rather than "wages" and says the Director is required to provide evidence showing the amounts received were in fact temporary loans rather than wages.

32. The associated entities have expanded their "alternate remedy" and section 95 arguments, adding on the first that those complainants who have entered into loan agreements pursuant to promissory notes are simply creditors and are entitled only to the remedies prescribed in the bankruptcy legislation; and on the second that the facts, and the consequent decision of the Director under section 95, do not support application of the "common control" doctrine at common law.

33. As well, the associated entities have introduced two new arguments – the first relating to the duty of each complainant to mitigate and, from that perspective, the legal effect of complainants having continued their

employment duties and accepted temporary loans for that work and the second relating to the legal basis for accepting new or additional evidence on the section 95 argument.

34. In respect of the latter argument, the associated entities argue an exclusion of their evidence and argument on the section 95 question would amount to a breach of that aspect of natural justice which requires all parties to be given a fair opportunity to present their case and provide answer to the other parties' positions. They suggest the relevant date for assessing whether they were given a fair opportunity to be heard on this issue is the date of the Determination – February 25, 2010 – which they say was the date on which they had any actual notice of the decision of the Director to associate them under section 95. They also note the documentary record on this issue was not disclosed to them until on or about May 10, 2010.

ANALYSIS

35. 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.*

36. 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.

37. 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.

38. If a party attempts to introduce new evidence in an appeal, the Tribunal has discretion to allow such evidence, but has consistently taken a relatively strict approach to what will be accepted. The Tribunal considers whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is 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: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, and *Senor Rana's Cantina Ltd.*, BC EST # D017/05.

39. It is apparent that all of the evidence the associated entities seek to submit in this appeal was available and could reasonably have been provided to the Director during the complaint process. The associated entities make no effort to explain why this was not done or whether there is any good reason this failing should be overlooked in this appeal. I reject the suggestion that the first notice the associated entities had of the Director's intention to consider whether to associate them under section 95, and the first opportunity to address this issue, was the date of the Determination. The letter of January 8, 2010, is clear notice that the Director was going to address section 95 in the Determination. It also outlines all of the findings made on the section 95 question and expressly invites any contrary evidence to be submitted by Mr. Rajani, the other director of the Carestation Health, and by the other entities, setting a deadline of January 22, 2010, for

submitting that evidence. It does not appear any person, including the associated entities, acted on this invitation. The Director did what was required in the context of the applicable principles of natural justice and section 77 of the *Act*: see for example, *Imperial Limousine Service Ltd.*, BC EST # D014/05. Accordingly, I reject any suggestion the associated entities were not given with an opportunity to provide a response on this issue and find they have failed to show a natural justice basis for being allowed to introduce evidence into this appeal that could reasonably have been provided to the Director before the Determination was made.

40. In a related context, the Tribunal has frequently refused to accept both evidence and argument submitted in an appeal where such evidence and argument was available and could have been provided to the delegate during the investigation: see *Tri-West Tractors Ltd.*, BC EST # D268/96; *Kaiser Stables Ltd.*, BC EST # D058/97. The principle expressed in these cases most specifically applies to the arguments made by the associated entities on the section 95 issue.

41. I will also address the mitigation argument at this point. A decision under section 66 is not a finding of "constructive dismissal". The foundation of Section 66 is the administration of a statutory provision found in the *Act*, which, as the Tribunal has repeatedly confirmed, is remedial legislation "that exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed": *Barry McPhee*, BC EST # D183/97. Such decision reflects a conclusion by the Director that there are circumstances which make it appropriate to deem an individual's employment to be terminated. In making that decision, which is a discretionary one, the Director must be guided "by the purposes and object of the *Act*, and in particular to the statutory purposes and object of the provisions relating to the termination of employment": see *Isle Three Holdings Ltd. carrying on business as Thrifty Foods*, BC EST # D084/08 (confirmed on Reconsideration, BC EST # RD124/08).

42. While the administration by the courts of the common law principle of "constructive dismissal" is subject to the duty to mitigate, the Tribunal has concluded mitigation is not a principle that is not expressed anywhere in the *Act* and does not apply to an individual's entitlement to length of service compensation under the *Act*: see for example *B. & C. List (1982) Ltd.*, BC EST # RD641/01, and *636320 B.C. Ltd. operating as Vera's Burger Shack*, BC EST # D059/03.

43. Having disposed of the above matters, I will address, in order, the six arguments raised by the associated entities in their appeal.

1. No Injury

44. There is simply no basis for this argument. As indicated above, there is a burden on the associated entities to show an error in the Determination. The dispute raised in this argument is with findings of fact and, as indicated above, the Tribunal has no authority to consider an appeal based on a dispute with findings of fact unless those findings are shown to be an error of law.

45. It is helpful at this stage to appreciate what is accepted by the Tribunal as an error of law. 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.

46. The appeal submission, although not entirely clear, seems to be arguing an error of law that would fall in the third, fourth and/or fifth category of error of law.

47. There is no indication that this argument raises a question of the proper interpretation of the *Act* or a misapplication of an applicable principle of general law.

48. The Director made findings and reached conclusions of fact on this matter. Particularly, the Director found all of the complainants were entitled to one or more of: annual and/or statutory vacation pay overtime and regular wages; and length of service compensation. As well, the Director found that monies received by complainants from some of the physicians at the clinics were in the nature of temporary loans, and were not wages, that the physicians were not the complainants' employer and that the complainants remained employees of Carestation Health, which continued to have the statutory obligation to pay the complainants for the work performed. The associated entities have not shown these conclusions were errors of law, rather than simply a disagreement by them with the findings and conclusions of fact made by the Director.

49. The Director accepted the payments made by the physicians were temporary loans, and not wages. The Director says that perspective is appropriate because the evidence indicated Carestation Health continued to be the employer (as that term is defined) of the complainants who continued to report to and perform work on assurances from Carestation Health they would be paid. There was no evidence that Carestation Health formally terminated the employment of any complainant or indicated it was distancing itself from the operations of the clinics. There was evidence that Mr. Rajani advised complainants that he remained associated with the operation of the clinics and was actively seeking re-financing to cover off the financial shortfalls.

50. There is nothing in the argument of the associated entities that persuades me the Director's decision to find Carestation Health continued to be the employer of the complainants and statutorily responsible for their regular wages until their deemed terminations was an error in principle under the *Act*. The Director, in making a Determination on respective statutory liabilities and entitlements under the *Act*, cannot make such Determination contingent on the legal effect of arrangements between those complainants who accepted monies from physicians and the physicians who advanced the monies as a temporary loan. The Director was dealing with the nature of the relationship between Carestation Health and the complainants which was both apparent and consistent with what is considered an employment relationship under the *Act*.

2. Alternate Remedy

51. Neither am I persuaded the associated entities have shown the Director committed any error by issuing the Determination. As the Director notes, the Determination has not been issued against any entity that is subject to bankruptcy proceedings. The Tribunal has concluded, as the response of the Director on the appeal indicates, that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*"BIA"*) protects an insolvent person who has engaged the processes of the *BIA* from any proceeding or order by the Director: see *More Marine Ltd. and others*, *supra.* The Director, however, has jurisdiction to make a section 95 decision and the *BIA* is no obstacle to the Director making such decision involving entities associated with the bankrupt, but not themselves in bankruptcy.

52. Consequently, this argument has no merit on the facts and is rejected.

3. Inconsistent Standards

53. This argument, in the main, challenges the decision of the Director under section 66 to deem complainants were terminated on various dates. The associated entities say the Director was required to find a termination – the associated entities incorrectly uses the term "constructive dismissal" – at the time Carestation Health first defaulted on its payroll obligation to each of the complainants.

54. There are two initial points to make concerning this argument. First, the decision of the Director under section 66 is discretionary. As noted in *Isle Three Holdings Ltd. carrying on business as Thrifty Foods*, *supra*, ". . . "termination" does not necessarily follow from a finding of "substantial alteration" of a condition of employment. It is for the Director to determine if the employment has been terminated." Second, a conclusion of a "substantial alteration" in a condition of employment can only be made by the Director after reviewing the totality of the circumstances. Once that review has been conducted, if there is a reason for exercising discretion under section 66, the Director is required to exercise that discretion in a manner consistent with the provisions and principles found in the *Act*. As the reconsideration panel noted in *Isle Three Holdings Ltd.* at para. 33:

> The *Act* is a remedial statutory scheme (see *Machtinger v.HOJ Industries Ltd.* [1992], 1 S.C.R. 986, (1992), 91 D.L.R. (4th) 491) and *Re Rizzo v. Rizzo Shoes* ([1998], 1 S.C.R. 27). It creates entitlements separate and distinct from those that might be vindicated at common law. The section 66 discretion must, therefore, be exercised having regard to the provisions of the *Act*, and the principles underlying it, and not of necessity what a court might be inclined to consider in a common law action based on an alleged constructive dismissal.

55. In the circumstances of this case, which involved numerous and continuing contraventions of the *Act* by Carestation Health and continuing employment of the complainants at the instance of Carestation Health following the earliest contraventions, I entirely agree with the Director that the associated entities argument would have the logical effect of finding repeated terminations and re-hirings (and by logical extension, finding additional contraventions of the *Act* with each successive failure to pay and deemed termination). Such a result would be inconsistent with several of the stated purposes found in Section 2 of the *Act*, including the purposes of ensuring employees in British Columbia receive at least basic standards of compensation and conditions of employment; promoting the fair treatment of employees and employers; encouraging open communication between employers and employees; providing fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*; and contributing in assisting employees to meet work and family responsibilities.

56. I also agree with the Director that the discretion given the Director in section 66 does not require a finding of deemed termination immediately upon there being a finding of "substantial alteration", although the caveat on this point is that the point in time selected for deemed termination must conform to the comment of the reconsideration panel in *Isle Three Holdings Ltd.* found above. In my view, the Director's selection of the dates of deemed termination in this case does conform to that comment.

57. The associated entities have not shown the Director made any error of law on this matter.

4. Misuse of Evidentiary Standards

58. On this argument, I find myself in agreement with the Director once again. The associated entities have failed to articulate this argument in a way that provides an appreciation of the particular aspects of the Determination which the associated entities say raise an error of law.

59. The Director adequately explains in the Determination the reasons for relying on the evidence provided the complainants. These reasons focus primarily on the failure of Carestation Health to provide complete or adequate records in response the Demands issued on them. The suggestion there are other available records is a completely worthless and useless statement, since the appeal makes no effort to identify what these records might be, where they might be, why they were not provided during the complaint investigation, how they impact on the findings made by the Director and how they demonstrate the findings made by the Director constitute an error of law.

60. The associated entities bear the burden of persuasion on the appeal and the failure to particularize the essential elements of this argument means they have not met that burden.

61. This argument is also rejected.

5. Sections 17, 18 and 126

62. This argument is simply an additional argument challenging the decision of the Director on the dates of the deemed terminations. It suffices to say these provisions do not compel a finding under section 66 that an employee has been terminated. To interpret these provisions in such a way would create results under section 66 that are not contemplated by that provision and unacceptably interfere with the discretion given to the Director to find a substantial alteration and declare a deemed termination. Otherwise, all that was said on point 3, above, also applies here and this argument is rejected.

6. Misapplication of Section 95

63. I can find no error of law in the decision of the Director to associate the entities under section 95. The Director considered the wording of section 95, correctly accepting the provision requires four conditions to be met, reviewed the available facts and decided each of the conditions were present.

64. The associated entities challenge the view of the Director that the entities are under common control or direction. They assert that, at least, Avicenna Group Holdings (Chilliwack) Ltd. and Oxbridge Ventures, Inc. are "drastically different businesses" from Carestation Health. They describe Oxbridge Ventures as a company providing financial advice and Avicenna as a holding company for real estate. Their argument suggests a test for finding "common control or direction" that requires there to be a highly integrated group of companies, all controlled and directed by one group or individual, operating all aspects of a single business. This argument places too strict a test on what is "common control or direction" under section 95 of the *Act*. How this part of the statutory provision should be addressed was described in *Invicta Security Systems Corp.*, BC EST # D349/96, as follows:

> The third precondition is directed toward the manner in which the various entities inter-relate within the common enterprise. One entity may have financial control, another may have operational control and yet another may have *de facto* control through majority shareholding or control of the Board of Directors. These examples are not meant to be exhaustive, but illustrative of how control may be demonstrated. Similarly, direction may be demonstrated in a variety of ways, but generally it will normally be found in an entity which makes significant decisions respecting how the business, trade or undertaking has been, is, or will be, run.

65. The process undertaken by the Director in considering this part of section 95 on the facts as found comfortably fit within the above expression of that condition. The Director found elements of common control of the enterprise in the financial control shown by Oxbridge and operational control by Avicenna, the *de facto* control in Mr. Rajani's control of the board of directors of all of the entities, in the interrelationship

among the entities that allowed each to support the operations of the others in a unified whole. The Director found common direction in the apparent ability of Mr. Rajani to make significant decisions respecting how each aspect of the business would be run.

66. While the associated entities might allege the information on which the Director relied is not sufficiently complete, that deficiency (if there is one) falls squarely on the choice made by Mr. Rajani and the associated entities to not participate in the investigation process on this issue. If the associated entities felt there was evidence and information that was important and would have assisted in the section 95 decision, they were given the opportunity to provide it, but did not. They cannot now be heard to complain because the consequence is adverse to them.

67. Based on the applicable tests in section 95 and the facts as found by the Director, I find no error of law in the decision of the Director to associate the entities under section 95. The argument on this issue is denied.

68. In sum, the appeal is dismissed.

ORDER

69. Pursuant to Section 115, I order the Determination dated February 25, 2010, be confirmed in the amount of $334,191.01, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal