



An appeal

- by -

More Marine Ltd. (“More”),
More Management Ltd. (“More Management”)
and Morecorp Holdings Ltd. (“Morecorp”)

- 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

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No: 2008A/61

DATE OF DECISION: August 15, 2008

DECISION

OVERVIEW

1. This is an appeal by More Marine Ltd. (“More Marine”), More Management Ltd. (“More Management”), and Morecorp Holdings Ltd. (“Morecorp”) (collectively referred to as the “More Group”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued May 7, 2008.
2. The Determination pertains to two employees and the Director has issued two separate Reasons for the Determination, one for each of the employees. The More Group has appealed the Determination in respect of each employee separately. I propose to deal with the appeals in separate decisions. This decision will relate to the appeal of the More Group in respect of the Determination pertaining to its former employee, Barrie McMillan (“McMillan”). The Determination found that More Group contravened Sections 17 and 21 of the *Act* by failing to pay McMillan all wages earned in a pay period within 8 days of the end of the pay period and for making improper or unauthorized deductions from McMillan’s wages and ordered the More Group to pay McMillan \$3,710.37 an amount which included wages and accrued interest pursuant to Section 88 of the *Act*.
3. The Determination also imposed on the More Group two administrative penalties for the said contraventions, each in the amount of \$500.
4. The total amount of the Determination, inclusive of the administrative penalties, is \$4,710.37
5. The More Group appeals the Determination on all three grounds available under Section 112(1) of the *Act*, namely, the Director erred in law in making the Determination; the Director failed to observe the principles of natural justice in making the Determination; and new evidence has become available that was not available at the time the Determination was being made.
6. The More Group has requested the Tribunal to cancel the Determination and in the alternative, to refer the Determination back to the Director.
7. The More Group has requested an oral hearing of the Appeal stating, “the process would best be served by a hearing in which we would present evidence including at least one witness”. However, the More Group does not explain how the “process would be best served by an [oral] hearing” nor what witness it wishes to call”. Section 36 of the *Administrative Tribunal’s Act* and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. In my opinion, the More Group has not made a compelling argument for an oral hearing and in my view this Appeal can be adjudicated on the written submissions of the parties without resort to an oral hearing. Accordingly, I have decided that the Appeal shall be dealt with on the basis of the Section 112 (5) “record”, the submissions of the parties, and the reasons for the Determination.
8. Finally, the More Group has requested a suspension of the Determination pending the Appeal and advised the Tribunal that it is willing to put the amounts ordered in the Determination in the trust account of its legal counsel without any further explanation or justification for the request. The Director opposes the suspension request.
9. Section 113 of the *Act* provides:

- 113(1)** A person who appeals a determination may request the Tribunal to suspend the effect of the determination.
- (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
- (a) the total amount, if any, required to be paid under the determination or,
 - (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

10. As indicated by the Tribunal in *Tricom Services Inc.* BC EST #D420/97 and *TNL Paving Ltd.* BC EST #D397/99, the Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. In this case, I am of the view that the appeal has merit in so far as More Marine and More Management are concerned, although the effect of my decision herein renders moot the issue of suspension of the Determination relating to these two companies. However, as concerns Morecorp, I am not persuaded that the appeal has merit and therefore I deny the application to suspend the Determination relating to Morecorp.

ISSUES

11. The issues in this appeal can be described as follows:
- 1. Did the Director err in law in proceeding with McMillan's complaint when More Marine had filed a Notice of Intention to Make a Proposal ("NOI") under the *Bankruptcy and Insolvency Act* ("BIA")?
12. If the answer to the first question is in the affirmative then I need not proceed with the balance of the issues, as that would be determinative of the Appeal. If, however, the answer to the first question is in the negative then the balance of the issues include the following:
- 2. Did the Director err in law in finding that More Marine, More Management and Morecorp are "associated corporations" within the meaning of Section 95 of the *Act* and thus jointly and severally liable for payment of the amounts stated in the Determination?
 - 3. Did the Director err in law in concluding that the deductions made by More Marine from the wages of McMillan were contrary to Section 21 of the *Act*?
 - 4. Did the Director fail to observe the principal of natural justice in making the Determination?
 - 5. Is there new and relevant evidence that was not available at the time the Determination was being made that would have led the Delegate to a different conclusion on the material issues?

FACTS

13. More Marine operated a tugboat and shipping business and employed McMillan as a Master on a tugboat for a number of different periods of employment between March 2003 and January 17, 2006 at a rate of \$300 per day.

14. On February 24, 2006, McMillan filed a complaint under Section 74 of the *Act* (the “Complaint”) alleging that More Marine contravened the *Act* by failing to pay him regular wages, annual vacation pay, and compensation for length of service and for making unauthorized deductions from his wages.
15. The Delegate investigated the Complaint and during his investigation considered the question of whether More Marine, More Management and Morecorp were associated corporations and therefore one employer within the meaning of Section 95 of the *Act*.
16. In the Section 112(5) “record”, there is a copy of a letter dated April 20, 2007 from the Trustee indicating that the Trustee consents to act as a Trustee under the Proposal to be filed by More Marine. This letter is stamped “received” on May 1, 2007 by the Ministry of Labour’s office in Terrace where McMillan filed his Complaint. The Section 112(5) “record” also contains a Notice of Meeting of the Creditors (the “Notice of Meeting”) in the matter of the Proposal of More Marine and attached to it is a trustee’s report on the proposal made by More Marine under the *BIA* (the “Trustee’s Report”). The Notice of Meeting is stamped received by the Ministry of Labour on October 15, 2007 and therefore the attached Trustee’s Report was in the possession of the Delegate during the investigation of the Complaint and well in advance of the issuance of the Determination.
17. The Trustee’s Report records that on April 20, 2007 More Marine and More Management had each filed a NOI under the *BIA*. The Trustee’s report also indicates that on October 2, 2007 More Marine had filed a proposal to its creditors while the proposal of More Management had been approved by a majority of the creditors with proven claims and by the Court on August 15, 2007. The Delegate also acknowledges these facts in the Determination.
18. In the Determination the Delegate notes that while he was aware during the investigation and before making the Determination that a stay of proceeding under the *BIA* was in place with respect to both More Marine and More Management, the main purposes why he proceeded with the Complaint and issued the Determination was to establish both the quantum of wages owing to McMillan and determine whether the insolvent companies, More Marine and More Management, and the solvent company, Morecorp, were associated employers under the *Act*.
19. In the section 112(5) record, there is a record of correspondence between the Director and the More Group or its counsel. I wish to refer to the pertinent correspondences starting with the Delegate’s two letters dated May 25, 2007 to Kerry Morris (“Morris”) and to his wife, Jerri Jane Morris (“Jerri”), seeking information on the precise relationship between More Marine and More Management as well as More Marine and Morecorp for the purpose of determining whether or not these three entities were associated employers within the meaning of Section 95 of the *Act*.
20. In response to the Delegate’s letters of May 25, 2007, counsel for the More Group, in his letter of June 18, 2007 to the Delegate, advised that McMillan:

Barry McMillan is substantially indebted to More Marine Ltd. for using More Marine Ltd’s credit card for personal purchases without authorization. Mr. McMillan has signed an authorization allowing More Marine Ltd. to deduct what he owes to More Marine Ltd. from his wage claim. We will obtain and forward to you the authorization and the amounts involved.
21. Counsel, in the same letter, advises the Delegate that More Management has also filed a NOI and that the *BIA* has imposed a stay of proceedings against all creditors and potential creditors of More Management.

With respect to Morecorp, counsel advises the Delegate “it is not and has never been active in business” and “has no involvement at all with the business of [More Marine]”.

22. In response to counsel’s June 18th letter, the Delegate in his letter of June 25, 2007, advises counsel that he discovered Morecorp was listed as a secured creditor for the amount of \$1.0 million on the Claim’s Register in relation to the Proposal for More Marine and asks counsel for an explanation.

23. Counsel for the More Group, in response to the Delegate’s June 25, 2007 letter, advises in his letter of June 26, 2007 that:

Morecorp Holdings Ltd. is the shareholder of More Marine Ltd. and it advanced monies to More Marine in order to help More Marine pay its indebtedness. It took the precaution of obtaining security for the advances. In essence, Morecorp Holdings Ltd. made More Marine Ltd. a shareholder’s loan.

24. The Delegate, in his reply correspondence of same date to counsel, provides his preliminary conclusion that Morecorp is an associated employer of More Marine and explains:

The test for whether corporations, firms, syndicates or associations should be considered associated employers is whether they are carrying on a business, trade or undertaking under common control or direction. Morecorp contributes to the transportation services provided by More Marine as the vehicle through which the ownership of More Marine and Morecorp channel financing for the operations of More Marine. Kerry Andrew Morris is the controlling mind of both companies, is the sole officer and director of More Marine, and is the sole director of Morecorp and, with his spouse Jerri-Jane More, one of two officers of Morecorp. The two companies have the same registered and records offices. It would appear, based on the evidence available at this time, that there is sufficient basis of finding that Morecorp should be treated as an associated employer pursuant to Section 95 of the *Act*.

25. The Delegate also invites counsel to make further submissions if counsel is at odds with the Delegate’s conclusion that Morecorp is an associated employer. While counsel did not follow up or respond to the Delegate’s invitation with any further submissions on the said issue, counsel sent the Delegate a letter dated June 28, 2007 with respect to More Marine’s position regarding McMillan’s claims. In particular, counsel reiterates More Marine’s position (earlier conveyed to the Delegate in More Marine’s letter of April 3, 2007) that McMillan used the company credit card to make personal and unauthorized purchases and owes More Marine more than the latter owes him.

26. The Delegate, in his reply letter of June 29, 2007, points out to counsel that McMillan’s claims were a subject of an extensive investigation by the Delegate and encloses his preliminary findings presented to More Marine in his previous letter to More Marine on January 29, 2007 (before counsel’s involvement) wherein the Delegate found the wage assignment agreement defective and More Marine’s deductions from McMillan’s wages inappropriate. The Delegate concludes with an invitation to counsel for “input on the question of the association of the three Employer companies” but none was forthcoming.

27. With respect to the wage assignment agreement, the Delegate notes in the Determination that the document purported to be the wage assignment document is dated November 14, 2005 and it reads, in part:

I Barrie McMillan authorize my employer, More Marine Ltd., to deduct from my wages, costs arising from the purchase of unapproved items and repair costs of company equipment due to negligence and lack of attention whilst on the job.

28. The Delegate notes in the Determination that while any deductions by More Marine for repairs to the company's equipment under the purported assignment agreement would contravene the provisions of the *Act*, there was no such deduction made by More Marine. All deductions by More Marine were for items other than repairs to the company's equipment such as for cigarette purchases and the like. However, according to the Delegate, there was nothing in these transactions "to indicate that the purchases were in any way 'unauthorized'". Furthermore, the Delegate notes that there was not any "clear evidence in any case that these purchases were made by or on behalf of Mr. McMillan. It simply appears that the bills were reviewed by someone subsequent to the purchases being made and the responsibility for the costs was ascribed to Mr. McMillan". Having said this, the Delegate goes on to conclude that he is unable to find that "the deductions were legitimate and clearly authorized by an assignment" and therefore More Marine's deductions from McMillan's wages contravened Section 21 of the *Act*.

29. With respect to the Delegate's conclusion that More Marine, More Management and Morecorp are associated employers under Section 95 of the *Act*, it should be noted that the Delegate relies on the following additional materials contained in the Section 112(5) "record":

- i. The BC On-line Company search for Morecorp Holdings Ltd. on May 1, 2007 showing Morris as the sole director of Morecorp and also its President and his wife, Jerri, as the as the Secretary;
- ii. The BC On-line search for More Management conducted on May 1, 2007 showing Morris as the sole director and officer of More Management;
- iii. The BC On-line search conducted on February 13, 2006 showing Morris as the sole director and officer of More Marine;
- iv. The Trustee's Report relating to More Marine wherein the Trustee describes the operations of More Marine as follows:

The Company was incorporated on October 1, 1999. With equipment leased from More Management Ltd., the Company provided services such as bulk freight transportation, ro/ro barging and log barging and towing along the West Coast of British Columbia.

- v. The Trustee's Report on the Proposal for More Management wherein the Trustee describes the operations of More management as follows:

The Company was incorporated on July 8th, 1977 and started operations in the beginning of 1998. With two tugboats and barges, the Company provided services such as: bulk freight transportation, ro/ro barging and log barging and towing along the West Coast of British Columbia.

On October 1, 1999, More Marine ("Marine") was incorporated. Although the Company's business operations were transferred over to Marine, the Company retained ownership of the equipment and leased it to Marine. At this point,

purchasing of equipment to lease to Marine became the Company's sole purpose. As a result, Marine and the Company are inextricably linked.

- vi. The Statements of Affairs provided with respect to the insolvency of More Marine listing Morecorp as a secured creditor of More Marine in the amount of \$2.0 million and as an unsecured creditor of the same in the amount of \$2,403,248.94;
- vii. The Statements of Affairs provided with respect to the insolvency of More Management listing Morecorp as a secured creditor of More Management in the amount of \$2.0 million and as an unsecured creditor of the same in the amount of \$848,484.00;
- viii. The correspondence of the More Group's counsel referenced earlier wherein counsel for the More Group states that Morecorp is not and has never been in active business or had any involvement in the business of More Marine followed with a subsequent letter wherein counsel notes that Morecorp is the shareholder of More Marine and has advanced monies to More Marine in order to assist the latter in paying its indebtedness.

30. After considering all of the evidence of the relationship between More Marine, More Management and Morecorp, the Delegate concludes in the Determination that each of the three companies is under the control and direction of Morris. The Delegate further observes that the evidence of the Trustee establishes that the sole reason for the business of More Management was to purchase equipment to lease to More Marine while Morecorp's association or relationship is as a shareholder of More Marine and provider of secured and unsecured financing totalling in excess of \$7.25 million to both More Marine and More Management. Therefore, the Delegate concludes, that More Marine, More Management and Morecorp are associated employers within the meaning of Section 95 of the *Act*.
31. After making the Section 95 determination, the Delegate goes on to find that More Group contravened sections 17 and 21 of the *Act* for failing to pay McMillan regular wages in the amount of \$624.00 and making unauthorized deductions totalling \$2,645.44 from McMillan's wages and awards McMillan a total of \$3,710.37 inclusive of interest pursuant to Section 88 of the *Act*. However, with respect to the remainder of McMillan's claims, the Delegate rejects or dismisses them.
32. The Delegate also levies two penalties of \$500 each under the *Regulations* against the More Group for contraventions of Sections 17 and 21 of the *Act* and orders More Marine, More Management and Morecorp to pay the full amount of the award by way of "a certified cheque or money order made out to the Director of Employment Standards".
33. After making the Determination, the Delegate filed a claim for the full amount ordered in the Determination against the More Group with the Trustee in the matter of the proposal of More Management and the latter disallowed the claim stating:

The debtor company [More Management] was determined to be associated with More Marine Ltd. on May 7, 2008, the date of the issuance of the determinations by [the Director]. Accordingly the claim as against the debtor company [More management] is a 'post-filing' claim (a claim arising subsequent to April 20th, 2007) and is not a claim provable in the Proposal.

MORE GROUP'S SUBMISSIONS

34. I have carefully reviewed the More Group's extensive Appeal submissions submitted by Morris. While I do not intend to reiterate all of the submission here, I will refer to the gist of those submissions under the relevant subheadings below corresponding to the More Group's appeal grounds.

(i) Error of Law

35. With respect to the More Group's error of law ground of appeal, there are several arguments that the More Group is advancing. First, the More Group submits that as a result of More Marine's filing of the NOI with the Office of the Superintendent of Bankruptcy under the *BIA*, there is a stay of proceedings against More Marine. More Group also continues its submissions related to this argument in its submissions under the natural justice ground of appeal where it indicates that the Director by failing to recognize the effect of the NOI and the stay of proceedings "has sought to provide" McMillan a fraudulent preference.

36. A second argument of the More Group under the error of law ground of appeal challenges the Director's conclusion that More Marine, More Management and Morecorp are associated employers under the meaning of Section 95 of the *Act* on the basis that the Delegate did not identify or take into consideration in making the Determination certain relevant facts including the share ownership of More Marine. In particular, the More Group states that the delegate failed to consider that More Marine was incorporated in October 1999, but only commenced its business in February 2000. Morecorp owns 50% of the shares of More Marine and the balance of the shares are owned by 599583 B.C. Ltd. The More Group then reviews the business history of More Marine and its dealings with its major customers and how the business relationship led More Marine's decision to become "a front-line supplier of freight services to the mid-coast" and proceed with the acquisition of and, in some cases, lease certain equipment from various parties including More Management. In particular, at one point, More Marine leased two barges from More Management and six highway trailers. However, More Group states that for more than two years, More Management has not leased any barges to Marine and sold off all its barges save only one, which it employs as a dock.

37. More Group then refers to the long-term contract that More Marine entered into with Alcan and the consequent litigation with Alcan.

38. More Group also submits that More Management holds no shares in More Marine and never has. Instead, More Management's shares are directly held by Morecorp Holdings and Morris is the sole director and officer of Morecorp while Morris' wife, Jerri, resigned from her position as a secretary of Morecorp on April 1, 2004.

39. More Group also points out that the Delegate failed to consider that on December 16, 2004, More Marine entered into a loan agreement (the "Loan Agreement") with North Point Mezzanine Limited Partnership ("North Point"). According to the More Group, the loan transaction required More Marine to execute a share transfer document, which More Group claims transferred "all legal control of [More] Marine to [North Point] in exchange for a loan". Therefore, the More Group argues that while Morris was the sole officer and director of More Marine, "effective control of the companies lay with North Point". In support of the said submission, More Group attaches four share pledge agreements, the first one, dated December 16, 2005, is between North Point, Morris and Morecorp whereunder Morris pledges his shares of Morecorp in favour of North Point as collateral security for the payment of a loan in the principal

amount of \$1.35 million purportedly made by North Point to More Marine under the Loan Agreement. The second share pledge agreement is between North Point, Morecorp and More Marine whereunder Morecorp pledges its security interest in certain shares of More Marine to North Point as a continued collateral security for the payment of the \$1.35 million loan made by North Point to More Marine under the Loan Agreement. The third share pledge agreement is between North Point, Morecorp and More Management whereunder Morecorp pledges its security interest in certain shares of More Management in favour of North Point as collateral security for the payment of the \$1.35 Million loan made by North Point to More Marine under the Loan Agreement. Finally, the last share pledge agreement is between North Point, 599583 B.C. Ltd. (“599583”) and More Marine, whereunder 599583 pledges its interest in certain shares of More Marine to North Point as collateral security for the payment of the \$1.35 million loan made by North Point to More Marine under the Loan Agreement.

40. The third submission of the More Group under the error of law ground of appeal is based on its clear misunderstanding that the Director, in the Determination, is pursuing the directors and/or officers of the More Group personally for the amount payable to McMillan under the Determination. As the Determination did not involve a section 96 determination against the directors and officers of any of the companies concerned, I will not reiterate the More Group’s submissions in this regard here as they are irrelevant in this appeal.
41. The final submission of the More Group under the error of law ground of appeal is that the Delegate “rejects the right of the company to employ a legally suitable written and executed authorization to make payroll deductions for unapproved personal expenses charged to the company by Barry McMillan”. The More Group further submits that it can “produce witnesses, statements, and document in support of these assignments (sic) and request a chance to do so at a hearing.”

(ii) Natural Justice

42. With respect to the natural justice ground of appeal, the More Group’s argument under this ground, in part, is an extension of its argument under the error of law ground of appeal that the process initiated by More Marine under the *BIA* should not be subverted by the Director and that the Director’s Determination has the effect of providing a fraudulent preference to McMillan.
43. Also under the natural justice ground of appeal, the More Group argues that the Director failed to “accurately and honestly consider the legitimacy of the expenses assessed to Mr. McMillan” because at no time did McMillan deny making telephone calls or purchasing personal goods on the company’s credit.
44. Finally, under the natural justice ground of appeal, the More Group makes an allegation of bias against the Delegate stating that the Delegate is “acquainted with one or both of the claimants and is thus less than impartial in these proceedings”.

(iii) New Evidence

45. With respect to the new evidence ground of appeal, the More Group provides certain records and documents showing that Morris is the sole director of Morecorp and a declaration that his wife, Jerri, never acted in the capacity of a secretary of Morecorp. More Group also encloses documents indicating

that the position of secretary of Morecorp was filled by Morris on April 1, 2004 and encloses relevant supporting documents for the current year.

46. The More Group also, under the new evidence ground of appeal, alleges:

The Delegate gave no inkling as to what course of analysis he was pursuing and his failure to ask if we could support the assignment charges assessed to McMillan caused [More] Marine to assume they were not at question (sic).

47. The More Group argues that it is able to support its position regarding the alleged unauthorized charges incurred by McMillan “with signed receipts, ... sworn statements, and ...direct evidence by witnesses”.

FURTHER APPEAL SUBMISSIONS OF THE MORE GROUP

48. In addition to the submissions of the More Group with respect to the three identified grounds of appeal, More Group has presented another 2 ½ pages of submissions critiquing numerous findings of fact of the Delegate in the Determination ending with the bare assertion suggesting bias on the part of the Delegate in making the Determination. More Group alleges that the Determination is simply “an opinion or belief” held by the Delegate and “not necessarily one held by the Minister” and goes on to further state that “(t)his is particularly important because of information which we have received that suggests that [the Delegate] is acquainted with one or both of the claimants and is thus less than impartial in these proceedings”. While I will, under the heading Analysis, deal with the allegation of bias, I do not wish to reiterate the other submissions critiquing the findings of facts of the Delegate as these submissions, in my view, constitute re-argument and not a proper basis for an appeal. There is also nothing in those submissions that would constitute “new evidence” under the test delineated in *Re: Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 171(QL) since it is the type of evidence that could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the Complaint and at the least prior to the Determination being made.

49. Similarly, I find that the More Group’s reply submissions dated July 29, 2008 in response to the submissions of the Director delineated below, constitute re-argument and not a proper basis for appealing and therefore, I do not wish to reiterate them here.

DIRECTOR’S SUBMISSIONS

(i) Error of Law

50. In response to More Group’s submission that the Director, in making the Determination, is circumventing the process under the *BIA* which both More Marine and More Management are involved in, the Director submits that the Delegate has addressed in the Determination that there is a stay of proceedings in place with respect to both More Marine and More Management and that the “primary reason for the issuance of the Determination was to establish whether [More Marine] and [More Management] and Morecorp were associated employers within the meaning of Section 95 of the *Act*”. The Director further points out that this point is significant “in that Morecorp is not involved, as a debtor, in the *BIA* proceedings and is not covered by any stay of proceedings”. The Director further acknowledges that for McMillan to collect any outstanding wages from More Marine, a proof of claim has to be filed with the Trustee and with respect to More Management, a proof of claim was indeed filed and the Trustee found the claim against More Management was a “post filing claim and, therefore, not effected by the *BIA* proceedings”.

51. With respect to the More Group's submissions relating to its concern that the directors and officers of the companies comprising the More Group are being pursued or held personally liable for outstanding wages referred to in the Determination, the Director points out that no determination has been issued against the directors or officers of any of the companies and should it become necessary to investigate this issue further, both Morris and his wife, Jerri, will "will be given a full opportunity to put forward evidence with respect to this issue".
52. With respect to More Group's argument that the Director erred in law in finding the three companies, More Marine, More Management, and Morecorp are associated employers, the Director notes that the Delegate sent correspondence to More Management and Morecorp on May 25, 2007 advising that the Delegate was investigating the issue of whether they were associated employers with More Marine and "request[ed] a detailed description of the relationship between the companies". The Director notes the exchange of correspondences between him and counsel up to and including June 29, 2007 and points out that counsel did not raise any argument "with the association of [More] Management, perhaps because it had sought protection from creditors, and provided only a short comment with respect to Morecorp". The Director indicates that the "evidence submitted [by counsel] was considered and addressed in the Determination".
53. With respect to the More Group's assertion that North Point was the controlling mind of More Marine or any of the companies comprising the More Group, the Director submits that North Point was "far from being the controlling mind of any of the companies" and was simply "the primary secured creditor whose attempt to collect on [the loan debt] led [More] Marine and [More] Management to seek the protection of BIA."
54. In response to the allegations of the More Group that the description of the businesses carried out by More Marine and More Management in the Determination are inaccurate, the Director asserts that that these descriptions were "derived from the reports of the Trustee on the Proposal and, in most instances, are direct quotes from those reports".
55. With respect to the More Group's argument that the Delegate failed to give effect to a validly constituted assignment of wages to meet McMillan's credit obligation, the Director states that this subject was dealt with in the Delegate's preliminary assessment and the More Group responded on the subject in its letter of April 3, 2007 but "provided no substantial evidence which would lead to an alteration of the preliminary assessment".

(ii) Natural Justice

56. The Director vigorously rejects the allegation of the More Group that he "gave no inkling as to what course of analysis he was pursuing" and led or mislead the More Group to believe that the expenses deducted from McMillan's wages was not anymore an issue as "demonstrably false". The Delegate supports his position by referring to his correspondence to More Marine's counsel dated June 29, 2007 as raising concerns to the More Group "about the inadequacy of the evidence in support of the deductions."
57. Finally, with respect to the More Group's allegation of bias on the part of the Delegate because the latter is allegedly "acquainted with one or more of the claimants and is thus less than impartial in these proceedings", the Director counters the said allegation as "patently false and utterly without foundation". The Delegate further explains that his only contact with McMillan has been over the telephone and his

contact with the other claimant (who is the subject of a separate decision) has been “across the counter at the Terrace office of the Employment Standards Branch”.

(iii) New Evidence

58. With respect to the documents produced by the More Group as “new evidence” which pertain to identification of Morris’ and his wife Jerri’s status vis-à-vis Morecorp, the Director notes that these documents were not submitted during the investigation of the Complaint and while there is no evidence suggesting that they were not available or would not have been available during the investigation, there is nothing in these documents that would have the effect of altering the findings in the Determination, according to the Director.

59. The Director concludes by asking the Tribunal to uphold the determination.

SUBMISSIONS OF MCMILLAN

60. McMillan was afforded notice of the appeal of the More Group and provided submissions of both the More Group and the Director but did not respond in this appeal.

ANALYSIS

61. I propose to deal with all three grounds of appeal of the More Group below, in the reverse order in which they have been presented in the Appeal.

(i) New Evidence

62. The More Group has presented corporate documents identifying the status of Morris as well as his wife, Jerri, vis-à-vis Morecorp and while I very much doubt that the documents presented by the More Group would qualify as “new evidence” under the test delineated in *Re: Merilus Technologies Inc., supra*, [2003] B.C.E.S.T.D. No. 171(QL) since they constitute the type of evidence that, with the exercise of due diligence, could have been discovered and presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made, I do not have to rule on this issue for the simple reason that it is not relevant in this appeal. To further explain, in my view, the More Group has adduced the “new evidence” in question, to counter its concern that the Determination somehow pursues personally the directors and officers of the companies and particularly Morris’ wife, Jerri. Since the Determination does not concern or deal with a determination under section 96 of the *Act* against any directors or officers of any of the companies concerned in this decision, the More Group’s submissions and evidence under the new evidence ground of appeal are irrelevant in this appeal.

63. With respect to the More Group’s allegation that the Delegate “gave no inkling as to what course of analysis he was pursuing” and led the More group to believe that the expenses deducted from McMillan’s wages was not anymore an issue, I agree with the Director that this is more appropriately dealt with under the natural justice ground of appeal and I will accordingly deal with it in the next section.

(ii) Natural Justice

64. With respect to the More Group's assertion under the natural justice ground of appeal that the Director in making the Determination has sought to provide a fraudulent preference to McMillan, I propose to deal with this allegation under the More Group's error of law ground of appeal below as it is an extension of its argument under the latter ground of appeal that as a result of More Marine's filing of the NOI with the Office of the Superintendent of Bankruptcy under the *BIA*, there is a stay of proceedings against More Marine
65. With respect to the More Group's assertion that the Delegate is "acquainted with one or more of the claimants and is thus less than impartial in these proceedings," I find this assertion is without any merit or foundation. There is absolutely no evidence of bias or impartiality on the part of the Delegate in this proceeding and I would like to admonish the More Group and also make it clear to any others out there who intend to make such a frivolous allegation as the More Group has in this case that it is plain wrong to attempt to sully the reputation of an adjudicator without any real evidence of bias and this Tribunal will not tolerate such conduct on any party's part.
66. With respect to the allegation of the More Group that the Delegate "gave no inkling as to what course of analysis he was pursuing" and led the More group to believe that the expenses deducted from McMillan's wages was not anymore an issue, I find there is no support for this allegation. To the contrary, I find support for the Delegate's position in light of the Delegate's letter of June 29, 2007 to counsel for the More Group enclosing the Delegate's earlier preliminary assessment that clearly put into issue the subject of the deductions More Marine made from the wages of McMillan. Therefore, the More Group cannot have been misled or lead to believe that the deductions made by More Marine from McMillan's wages were not in issue or resolved in favour of More Marine or the More Group.

(iii) Error of Law

67. With respect to the matter of the assignment agreement and the contention of the More Group that the letter of November 14, 2005 executed by McMillan constituted a valid assignment on his part allowing More Marine to make the deductions for his alleged unauthorized personal expenditures, I refer to section 21 of the *Act*, which provides:
- 21** (1) Except as permitted or required by this *Act* or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this *Act* applies to the recovery of those wages.
68. Section 21 unequivocally prohibits an employer from deducting any part of the employee's wages for any purpose unless it is permitted elsewhere in the *Act*. The section that one needs to examine conjunctively with the foregoing is Section 22 of the *Act*, which governs employee's written assignments and provides:
- 22** (1) An employer must honour an employee's written assignment of wages

- (a) to a trade union in accordance with the *Labour Relations Code*,
- (b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the *Income Tax Act* (Canada),
- (c) to a person to whom the employee is required under a maintenance order, as defined in the *Family Maintenance Enforcement Act*, to pay maintenance, and
- (d) to an insurance company for insurance or medical or dental coverage.
- (e) [Repealed 2003-65-5.]

(2) [Repealed 2003-65-5.]

(3) An employer must honour an assignment of wages authorized by a collective agreement.

(4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

69. While the Delegate concludes that he could not find the deductions by More Marine from McMillan's wages to be legitimate or authorized under the purported assignment because there was nothing in the transactions that would indicate to him that they were "unauthorized" or made by or on behalf of McMillan, I find the purported assignment troubling for a different reason. In my view, the purported assignment agreement is not the type of assignment that is permitted under the *Act*, particularly under section 22, and therefore More Marine cannot overcome the prohibition under Section 21 of the *Act*. More specifically, in my view, the only relevant provision in Section 22 that could allow More Marine to except itself from the application of Section 21 is Subsection 22(4) which provides that "(a)n employer may honour an employee's written assignment of wages to meet a credit obligation". This Subsection, in my view, requires specificity in any written assignment of an employee with respect to the amount of liability or credit obligation, the date it was incurred, and to whom the amount is owed (*Re Triple S Transmission Inc.* [2003] B.C.E.S.T.D. No. 141 (QL); *Re E.V. Towmasters Services Ltd.*, [1997] B.C.E.S.T. No. 462 (QL)). In the case at hand, while the purported assignment agreement specifies the name of the employer, More Marine, who may make deductions from McMillan's wages, it fails to identify the amount of liability or the credit obligation and when it was incurred. In my view Subsection 22(4) does not contemplate a blanket assignment of the type that the More Group has produced and is relying upon in this case. Accordingly, I find the assignment agreement invalid and I need not consider whether or not the Delegate erred in concluding that there was not sufficient evidence to establish that the transactions in question were "authorized" or if there was sufficient evidence to establish that they were made by or on behalf of McMillan.

70. With respect to the matter of the impact of the *BIA* on the Determination of the Director, I refer to Part III, Division I of the *BIA*, which allows an insolvent person to make a proposal to its creditors. The proposal, once accepted and approved, becomes a new "contract" as it were between the debtor and his or her creditors regarding repayment of the debtor's debts and allows the insolvent person to avoid a formal declaration of "bankruptcy".

71. Pursuant to Section 69 of the *BIA*, on the filing of a NOI under Section 50.4 by an insolvent person, there is a stay of proceedings against the insolvent person. In particular, Section 69 (1)(a) provides:

Stay of proceedings – notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy....

72. In the case at hand, McMillan filed the Complaint on February 24, 2006. Subsequently, on or about May 1, 2007, the Delegate's office received a letter dated April 20, 2007 from the Trustee under the Proposal to be filed by More Marine. Subsequently, on October 15, 2007, while the investigation of the Complaint was underway and before the Determination was made, the Delegate's office received the Notice of Meeting of the Creditors in the matter of the Proposal of More Marine together with the Trustee's Report.

73. The Trustee's Report records that More Marine and More Management had each filed a NOI under the *BIA* on April 20, 2007 and that More Marine had filed a proposal to its creditors on October 2, 2007 and the proposal of More Management had been approved by a majority of the creditors with proven claims and by the Court on August 15, 2007. As indicated previously, the Delegate also acknowledges these facts in the Determination.

74. The Delegate, as previously indicated, also acknowledges in the Determination that he was aware during the investigation and before making the Determination that a stay of proceedings under the *BIA* was in place with respect to both More Marine and More Management but he was proceeding with the Complaint for the purposes of issuing a determination to establish both the quantum of wages owing to McMillan and whether the insolvent companies, More Marine and More Management, and the solvent company, Morecorp, were associated employers under the *Act*. After making the Section 95 determination and finding the three companies to be associated employers the Delegate states in the Determination "I order More Marine Ltd. and More Management Ltd. and Morecorp Holdings Ltd. to pay \$18,989.36" (an amount that a determination relating to one other employee in addition to McMillan) and requests all three companies to "send a certified cheque or money order made out to the Director of Employment Standards."

75. If it were not for More Marine and More Management seeking the protection of the *BIA*, I would have no difficulty in affirming the Delegate's decision in its entirety as I find the Director's decision compelling and agree with his substantive analysis leading to the finding that More Marine, More Management and Morecorp are associated employers within the meaning of Section 95 of the *Act*. However, since More Marine and More Management both filed their NOIs under the *BIA* prior to the Determination while the investigation into the Complaint was underway, I find that Section 69(1) of the *BIA* is an obstacle for the Delegate as concerns any proceeding or order against More Marine and More Management. Section 69(1) is quite clear in providing that that none of the debtors' creditors "has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy". In light of this provision, it is my view that the Delegate, in this case, was without jurisdiction to proceed with the Complaint and make a determination against More Marine and More Management. I find that the Delegate erred in law in ordering these companies, in the Determination, to pay the amounts found owing to McMillan and the

related administrative penalties. In my view, once both More Marine and More Management filed their NOIs under Section 50.4 of the *BIA* thereby triggering a stay of proceedings under Section 69(1) of the *BIA*, McMillan's claim against More Marine and More Management could only be addressed in accordance with the scheme of distribution provided in the *BIA*. Therefore the Determination against More Marine and More Management must fall.

76. Having said this, I find that the Delegate, notwithstanding the filing of the NOIs by More Marine and More Management, had the requisite jurisdiction to make the section 95 determination and I agree with that determination. Since Morecorp is an associated employer with More Marine and More Management and not in bankruptcy or under the protection of Section 69(1) of the *BIA*, the Determination as against Morecorp stands.

ORDER

77. Pursuant to Section 115(1)(a) of the *Act*, I order that the Determination dated May 7, 2008 be cancelled as against More Marine Ltd. and More Management Ltd. and confirmed against Morecorp Holdings Ltd.

Shafik Bhalloo
Member
Employment Standards Tribunal