

An appeal

- by -

Worldspan Marine Inc.

-and by-

27222 Developments Ltd.

-and by-

Lee Taubeneck aka Leland Alan Taubeneck, a Director of Queenship Marine Industries Ltd. and Officer of Worldspan Marine Inc.

-and by-

James B.E. Hawkins, an Officer of Worldspan Marine Inc. and Crescent Custom Yachts Inc.

-and by-

Steven L. Barnett, a Director of Worldspan Marine Inc.

- of Determinations issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: David B. Stevenson

FILE Nos.: 2011A/50, 2011A/83, 2011A/84,
2011A/85, and 2011A/86

DATE OF DECISION: September 29, 2011

DECISION

SUBMISSIONS

Dean P. Davidson	counsel for Worldspan Marine Inc., 27222 Developments Ltd., and Steven L. Barnett, a Director of Worldspan Marine Inc.
M.J. (Peggy) O'Brien	counsel for Lee Taubeneck aka Leland Alan Taubeneck, a Director of Queenship Marine Industries Ltd. and Officer of Worldspan Marine Inc.
Guy Holeksa	counsel for James B.E. Hawkins, an Officer of Worldspan Marine Inc. and Crescent Custom Yachts Inc.
Adele J. Adamic	counsel for the Director of Employment Standards

OVERVIEW

1. On March 18, 2011, a delegate of the Director of Employment Standards (the “Director”) issued a Determination against Worldspan Marine Inc, Queenship Marine Industries Ltd., and Crescent Custom Yachts Inc. The Director found Queenship Marine Industries Ltd. and two other entities, Worldspan Marine Inc. and Crescent Custom Yachts Inc., met the statutory requirements for being associated under section 95 of the *Act* and, exercising the discretion provided in that section, declared those entities to be associated for the purposes of the *Act*. I shall refer to this Determination as the “associated employer Determination” and to the entities, collectively, as the “Associated Employer”.
2. The associated employer Determination was made on behalf of ninety-seven former employees of Queenship Marine Industries Ltd., some of whom had complained to the Director alleging they had been terminated from their employment and were not paid all wages owed.
3. The Director conducted an investigation under section 76(2) of the *Employment Standards Act* (the “*Act*”). The Director found the *Act* had been contravened and that the former employees were owed wages and interest in the amount of \$1,208,481.23.
4. The Director also imposed administrative penalties under Section 29(1) of the *Employment Standards Regulation* in the amount of \$1,000.00.
5. On April 25, 2011, Worldspan Marine Inc. (“Worldspan”) filed an appeal of the associated employer Determination. The Director and several of the former employees filed responses to the appeal.
6. The Director issued additional Determinations in respect of the circumstances that generated the associated employer Determination.
7. On June 2, 2011, the Director issued separate Determinations against Lee Taubeneck, also known as Leland Alan Taubeneck, James B.E. Hawkins and Steven L. Barnett under section 96 of the *Act*. An appeal of the Determination against Mr. Taubeneck was filed with the Tribunal on July 8, 2011, and appeals of the Determinations against Mr. Hawkins and Mr. Barnett were filed on July 11, 2011.

8. On June 3, 2011, the Director issued a Determination against 27222 Developments Ltd. including that entity in the associated employer Determination. This Determination was appealed on July 11, 2011.
9. On June 14, 2011, counsel for Worldspan provided the Tribunal with a copy of an Order (the “Order”) of the Supreme Court of British Columbia (the “Court”), dated June 6, 2011, made pursuant to an application before the Court under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “*CCAA*”), and advised the Tribunal that all proceedings before the Tribunal were stayed by the Order. The Order contained provisions that stayed proceedings affecting the Petitioners, which included all of the entities covered by the associated employer Determination, until June 23, 2011.
10. On June 15, 2011, the Tribunal ordered a temporary stay of the associated company Determination appeal filed by Worldspan and advised the parties, in correspondence dated June 16, 2011, that the continuation of the stay of the appeal would be revisited after June 23, 2011.
11. On June 23, 2011, on application to the Court, the Order was continued until July 23, 2011.
12. On June 24, 2011, the Tribunal sought submissions from counsel for Worldspan on whether the Court ordered stay applied to the appeal before the Tribunal and ought to be continued indefinitely.
13. Submissions on that matter were received from counsel for Worldspan on July 4, 2011.
14. On July 5, 2011, the Tribunal invited responses from the Director and the former employees affected by the associated employer Determination on whether the Court’s Order required the Tribunal to continue to stay the appeal process.
15. On July 14, 2011, the Tribunal invited counsel for Mr. Taubeneck, for Mr. Hawkins, and for 27222 Developments Ltd. and Mr. Barnett to make submissions on that question and its effect on the appeals filed by those persons.
16. The Director and the affected former employees were provided an opportunity to respond to any submissions received from those individuals.
17. Pending the outcome of this decision, the Tribunal has taken no further steps on any of the appeals covered by this decision.

ISSUE

18. The issue in this matter is whether the Tribunal must, or ought to, stay the appeals covered by this decision pending the outcome of the *CCAA* proceedings in the Supreme Court of British Columbia.

FACTS

19. Many of the basic facts are set out above: an associated employer Determination was issued by the Director against Worldspan and others on March 18, 2011; that Determination was appealed; other Determinations were issued by the Director against another corporate entity and some of the director/officers of the entities which were made liable for wages in the Determinations; some of those Determinations have been appealed.
20. On June 6, 2011, as a result of events which need not be detailed in this decision, Worldspan, and three wholly owned subsidiaries, Queenship Marine Industries Ltd., Crescent Custom Yachts Inc., and 27222

Developments Ltd., were granted an Order and stay of proceedings in the Supreme Court of British Columbia under section 11 of the *CCAA*. The Order and stay was directed at proceedings by creditors of Worldspan and others in both the Federal Court of Canada and the British Columbia Supreme Court and by the Director.

21. For the purpose of this decision, the Court's Order included the following provisions:

14. Until and including June 23, 2011, or such later date as this Court may order (the "**Stay Period**"), no action, suit or proceeding in any court or tribunal (each, a "**Proceeding**") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of the Petitioners and the Monitor or with leave of this Court, and any and all Proceedings currently underway against or in respect of the Petitioners or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing collectively being "**Persons**" and each being a "**Person**") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Petitioners and the Monitor or leave of this Court. For greater certainty, the Petitioners, on the one hand, and Harry Sargeant III and Comerica Bank, on the other, shall be at liberty to proceed to have determined as between them the issues of liability and priority of their respective claims, subject to any further directions of this Court.

16. Nothing in this order, including paragraphs 14 and 15, shall: (i) empower the Petitioners to carry on any business which the Petitioners are not lawfully entitled to carry on; (ii) affect such investigations suits or proceedings by a regulatory body as are permitted by section 11.1 of the *CCAA*; (iii) prevent the filing of any registration to preserve or perfect any mortgage, charge or security interest (subject to the provisions of Section 39 of the *CCAA* relating to the priority of statutory Crown securities); or (iv) prevent the filing of a lien or claim for lien or the commencement of a proceeding to protect lien or other rights that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such lien, claim of lien or Proceeding except for the service of the initiating documentation on the Petitioners.

...

20. During the Stay Period, and except as permitted by Section 11.03(2) of the *CCAA*, no proceeding may be commenced or continued against the directors or officers of the Petitioners with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Petitioners whereby any of the directors or officers are alleged under any law to be liable in their capacity of directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Petitioners, if one is filed, is sanctioned by this Court or is refused by the creditors of the Petitioners or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of the Petitioners that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for the service of the initiating documentation on the applicable director or officer.

22. The above terms in the Order are grounded in the scope of the power of the Court to grant stays in *CCAA* proceedings, as described in sections 11.02 and 11.03 of that act, and in section 11.1.

23. Subsection 11.02(1) of the *CCAA* allows the Court to grant a stay for a period of 30 days; subsection 11.02(2) allows the Court to extend the initial grant of stay for a further period provided the Court is satisfied such an order is appropriate and the insolvent company demonstrates it has acted, and is acting, "in good faith and with due diligence". Worldspan and its affiliates have applied for and been granted additional stay periods.

24. Under section 11.03 of the *CCAA*, the Court may, in an order made under section 11.02, prohibit proceedings against directors of companies subject to *CCAA* proceedings, provided such proceedings arose before the company filed for restructuring under the *CCAA*.
25. Section 11.1 of the *CCAA* reads:
- (1) In this section, “regulatory body” means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.*
- (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body’s investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.*
- (3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court’s opinion*
- (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and*
- (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.*
- (4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.*

ARGUMENT

26. Counsel for Worldspan, who is also counsel for 27222 Developments Ltd. and for Steven L. Barnett, says the appeal proceedings under the *Act* that are now before the Tribunal are caught by the terms of paragraph 14 of the Court’s Order and must be stayed until the Court ordered stay is removed. The initial submission of counsel did not address the effect of the exception in paragraph 16 of the Order for “proceedings by a regulatory body as are permitted by section 11.1 of the *CCAA*”.
27. Counsel for Mr. Taubeneck and counsel for Mr. Hawkins submit the appeal proceedings before the Tribunal affecting those individuals are caught by the Court’s Order and must be stayed. Neither submission addresses the exception in paragraph 16 of the Order.
28. Counsel for the Director says the Tribunal is a “regulatory body”, as that term is defined in section 11.1 of the *CCAA* and submits the appeal proceedings before the Tribunal fit comfortably within the exception described in paragraph 16 (ii) of the Order. Counsel says that because the Tribunal is excepted from the stay provisions in the Order, it may do what the *Act* requires it to do.
29. In final reply, counsel for Worldspan, 27222 Developments Ltd., and Mr. Barnett says the Tribunal is not a “regulatory body” as that term is defined in section 11.1 of the *CCAA* and, accordingly, does not fall within the exception created in respect of proceedings before such bodies in that provision. Counsel for Worldspan argues the Tribunal is neither “prescribed” to be a regulatory body for the purposes of the *CCAA* nor is its role the “enforcement or administration of an Act” or a piece of legislation. Counsel for Worldspan argues the function of the Tribunal is quasi-judicial – one of examination, variation and confirmation, not one of regulating or administering the *Act*.

ANALYSIS

30. The central question in this matter is whether the Tribunal is a “regulatory body” as that term is defined in section 11.1 of the *CCAA*. If so, it is excepted from the Order of the Court made under section 11.02 of the *CCAA*. A secondary question is whether the Tribunal should, on its own motion, continue the temporary stay invoked in June 2011.
31. The submissions of counsel for Worldspan, 27222 Developments Ltd., and for Steven L. Barnett and counsel for the Director note that the current version of section 11.1 of the *CCAA* is of recent origin and no case law has considered the scope of the definition of “regulatory body” in subsection 11.1(1). To reiterate, a “regulatory body” in section 11.1 of the *CCAA* “means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act”.
32. I accept the Tribunal is not prescribed to be a regulatory body for the purposes of the *CCAA*. I do not accept, however, that the Tribunal does not have functions relating to the enforcement or administration of the *Act*.
33. The Tribunal performs a function that clearly relates to the administration of the *Act*. It is exclusively responsible for administering the appeal and reconsideration provisions of the *Act*. That responsibility engages several of the statutory purposes of the *Act* found in section 2: to ensure employees receive at least basic standards of compensation and conditions of employment; that employees and employers are treated fairly; and to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
34. I do not find the argument, made by counsel for Worldspan, 27222 Developments Ltd., and Steven L. Barnett, that the Tribunal simply performs an adjudicative role under the *Act* to be either entirely accurate or compelling.
35. While there is an obvious adjudicative aspect to the function of the Tribunal, it would be wrong to look at that function in isolation from the *Act* as a whole. The function of the Tribunal is integral to the framework of the *Act* as a whole. Unless the Tribunal is able to perform its function, the function of the Director under the *Act* can be frustrated and the entire scheme of the *Act*, which is expressed in the above purposes, breaks down. The following excerpt from *BWI Business World Incorporated*, BC EST # D050/96, briefly describes the legislative framework of the *Act*, at page 3:

The current Act was brought into force on November 1, 1995, culminating a process that began when Professor Mark Thompson was appointed as a Commissioner to review the province’s employment standards legislation. Professor Thompson made numerous recommendations that were contained in a report entitled “Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia” which was transmitted to the Minister of Skills, Training and Labour on February 3, 1994. In his report, Professor Thompson specifically criticized the internal appeal process that existed under the old Employment Standards Act and recommended that an appeal from a Director’s order should be heard by an independent tribunal established for that purpose. Thus, the Employment Standards Tribunal was created.

Under the current Act, the adjudicative process is triggered by the filing of a complaint with the Director of Employment Standards under section 74. The Director also has the authority to conduct an investigation in the absence of a complaint [section 76(3)]. Once a complaint has been filed, the Director has both an investigative and an adjudicative role. When investigating a complaint, the Director is specifically directed to give the “person under investigation” (in virtually every case, the employer) “an

opportunity to respond” (section 77). At the investigative stage, the Director must, subject to section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately make a decision that affects the rights and interests of both the employer and the employee. In my view, the Director is acting in a quasi-judicial capacity when conducting investigations and making determinations under the Act [cf. *Re Downing and Graydon* 21 O.R. (2d) 292 (Ont.C.A.)].

All complaints result in a determination being made under section 79 of the Act. If the determination results in a pecuniary award in favour of the complainant, the Director is given various statutory powers to enforce the determination including the right to file the determination with the British Columbia Supreme Court in which case the determination can be enforced as an ordinary court judgment (section 91).

Once a determination has been made, the Director is obliged to “serve any person named in the determination with a copy of the determination” along with the reasons for making it (section 81). Any person so served (i.e., the employer or the employee) may then appeal to the Employment Standards Tribunal under section 112.

36. The importance of appreciating this particular nature of the *Act* was expressed by the Supreme Court of Canada who recognized employment standards legislation is intended to provide “... a relatively quick and cheap means of resolving employment disputes”: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. The intention and key objective of such legislation is to provide broad access to minimum standards in employment matters where it would often be unaffordable or otherwise inaccessible and thus, from a practical perspective, unobtainable. See also *Rizko & Rizko Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.
37. This core concern of the *Act* is reflected in its appeal process. As explained by the Tribunal in *J.C. Creations Ltd.*, BC EST # RD317/03, in respect to the report leading to the establishment of the Employment Standards Tribunal in 1995: The advice the Commission received from members of the community familiar with the appeal system, the staff of the Ministry and the Attorney General was almost unanimous. An appeal system should be relatively informal, with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry.
38. As indicated above, the Tribunal is fundamentally responsible for administering this aspect of the *Act*.
39. Even though the Tribunal does no enforcement of the requirements of the *Act*, or of Determinations made under the *Act*, it has a key responsibility in ensuring the Director’s enforcement function under the *Act* can be efficiently, fairly and correctly carried out.
40. The argument of counsel for Worldspan, 27222 Developments Ltd., and Steven L. Barnett also ignores that the function of the Director is also, in many respects, adjudicative, as noted in the excerpt above from *BWT Business World Incorporated*. The Director exercises adjudicative, or quasi-judicial, functions in relation to making Determinations, the Tribunal exercises such functions in relation to appeals and reconsiderations of Determinations. The actual functions performed by the Director and the Tribunal under the *Act* do not, however, derogate from their respective roles ensuring the *Act* operates as it was intended by the legislature and recognized by the Courts.
41. For the above reasons, I find the Tribunal to be a “regulatory body” as that term is defined in section 11.1 of the *CCAA*.
42. For the same reasons, together with the fact that the *Act* is socially beneficial legislation broadly premised on the need to protect employees, the Tribunal does not find it would be appropriate to continue the stay on its own motion. While I appreciate the purpose of the *CCAA* is to facilitate compromises and arrangements

between companies and their creditors and to provide an effective facilitative process, the *CCAA* also contemplates that such processes should reflect and accommodate the public interest being protected by legislation such as the *Act* and by the function of bodies such as the Tribunal administering such legislation. When viewed from that perspective, the process contemplated by the *Act* is best served by concluding the appeals. It may be that a completion of the process contemplated by the *Act* will assist in facilitating an arrangement under the *CCAA*, as it will at least have the effect of finally determining the issue and scope of liability under the *Act* of the parties affected by the Determinations under appeal. I also note that under subsection 11.1(3) of the *CCAA* any of the parties may ask the Court to extend the stay to the Tribunal's processes.

DECISION

43. For the above reasons, the temporary stay issued by the Tribunal on June 15, 2011, is ended and the appeals referred to in this decision will proceed. The Tribunal will continue to perform the function assigned to it under the *Act*, unless the Court orders otherwise.

David B. Stevenson
Member
Employment Standards Tribunal