Employment Standards TRIBUNAL

An appeal

- by -

Beach Place Ventures Ltd.
("Beach Place Ventures")
-and-
Black Top Cabs Ltd.
("Black Top Cabs")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2017A/98

DATE OF DECISION: December 13, 2017

DECISION

SUBMISSIONS

Robert W. Grant, Q.C.	counsel for Beach Place Ventures Ltd. and Black Top Cabs Ltd.
Ali Abadi-Asbfroushani	on his own behalf
Sukh Kalia	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Beach Place Ventures Ltd. ("Beach Place Ventures") and Black Top Cabs Ltd. ("Black Top Cabs") – I shall refer to these two firms jointly as the "appellants" – pursuant to section 112 of the *Employment Standards Act* (the "*ESA*") and it concerns a Determination issued on June 7, 2017, by Sukh Kaila, a delegate of the Director of Employment Standards (the "delegate").

2. By way of the Determination, the delegate ordered "Beach Place Ventures Ltd. and Black Top Cabs Ltd. carrying on business as Black Top and Checker Cabs" to pay Mr. Ali Abadi-Asbfroushani (the "complainant") the total sum of $6,591.04 on account of unpaid vacation pay ($4,934.77), statutory holiday pay ($1,467.57) and section 88 interest ($188.70). Further, and also by way of the Determination, the delegate levied five separate $500 monetary penalties against the appellants and thus the total amount payable under the Determination is $9,091.04. The monetary penalties were levied based on the appellants' contraventions of sections 27 (failure to provide written wage statements), 28 (failure to keep payroll records), 45 and 46 (failure to pay statutory holiday pay) and 58 (failure to pay vacation pay) of the *ESA*.

3. The appellants say that the Determination should be cancelled, or at least varied, because the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b) of the *ESA*). In particular, the appellants assert that the complainant was not an employee of either firm and, accordingly, is not entitled to the wage protection benefits prescribed by the *ESA*.

4. The record before me shows that the firm name "Black Top and Checker Cabs" has been registered with the BC Registry as a sole proprietorship with Beach Place Ventures Ltd. named as the proprietor. Beach Place Ventures and Black Top Cabs are separate business corporations and the two corporations share the same registered and records office; two of the three individuals listed in the BC Registry's records (as of the spring 2016) as corporate directors for each firm are common to each firm.

5. As is discussed later on in these reasons, the delegate did *not* issue a section 95 "common employer" declaration whereby Beach Place Ventures and Black Top Cabs were treated "as one employer for the purposes of [the] *Act*" and thus jointly and separately (severally) liable for the complainant's unpaid wages and the monetary penalties. Rather, the delegate, at least implicitly, found that both firms were independently liable to the complainant as an "employer" as defined in subsection 1(1) of the *ESA*.

6. In my view, and for the reasons that follow, the Determination must be cancelled and the matter referred back to the Director for purposes of being investigated afresh or for a new hearing.

BACKGROUND FACTS

7. On May 5, 2016, the complainant filed an unpaid wage complaint naming "Beach Place Ventures dba Black Top Cabs Ltd." as his employer. The complainant asserted that he was employed as a taxi driver with his employer from February 1997 to April 24, 2016, when he was placed on an "indefinite suspension". The complainant stated that he typically worked 11.5 hours per day, five days per week and earned $175 per day. The complainant claimed "compensation for lost wages".

8. In a statement appended to his complaint form, the complainant stated that Beach Place Ventures "asserts all it's taxi driver employees are to be considered self-employed" [*sic*]. He continued: "...on April 27, 2016 CRA [presumably, the Canada Revenue Agency], after discussion with Beach Place Ventures, rendered a decision that I was an employee of the company in insurable and pensionable employment" and that "this decision, being in conflict with Company policy, resulted in my being suspended from employment, indefinitely, less than thirty minutes after the company was informed".

9. This latter assertion seemingly raised an allegation of retaliation contrary to section 83 of the *ESA*:

> 83 (1) An employer must not
>
> (a) refuse to employ or refuse to continue to employ a person,
>
> (b) threaten to dismiss or otherwise threaten a person,
>
> (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
>
> d) intimidate or coerce or impose a monetary or other penalty on a person,
>
> because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.

10. The complaint was the subject of an oral complaint hearing before the delegate on July 21, 2016. Approximately 11 ½ months later, the delegate issued the Determination and his accompanying "Reasons for the Determination" (the "delegate's reasons") that are now before me on this appeal. This lengthy delay was, in part, attributable to the fact that following the conclusion of the hearing, the delegate solicited further submissions from the parties and this submission process was not completed until sometime in October 2016 (delegate's reasons, page R2).

The Determination

11. The delegate addressed two principal issues: first, whether the complainant was an "employee", as defined in subsection 1(1) the *ESA*, or an "independent contractor"; second, assuming he was an "employee", what was his unpaid wage entitlement?

12. With respect to the question of the complainant's status (employee or independent contractor?), if he were held to be an employee, then one or more persons must have been his "employer". In that regard, as previously noted, the delegate did *not* issue a section 95 declaration but, rather, found each of the appellants liable to the complainant as a separate employer (see delegate's reasons, page R2):

> Counsel [who appeared for both Beach Place Ventures and Black Top Cabs] submits Beach Place is subsidiary [*sic*] of Black Top Cabs Ltd. with common shareholders and directors and provided evidence on behalf of both entities. While Beach Place provides dispatch services, management of credit card payments, posting of taxis available for rental and assisting owners and drivers negotiate the use of spare taxi shifts, Black Top Cabs Ltd. holds the taxi licenses issued by the regulatory authorities on behalf of the taxi owners and allows them to operate as such. Black Top Cabs Ltd. also holds title to the taxis and insures them as a fleet with the Insurance Corporation of BC ("ICBC"). Both Black Top Cabs Ltd. and Beach Place's expenses are funded directly by owners through shareholder assessments and each shareholder contributes to a global operating account that is used for the operations [*sic*] operating expenses. Finally, Beach Place provides their service exclusively to taxi's [*sic*] driven under the Black Top name. Accordingly, both are named in this determination.

13. The delegate's reasons set out further details, as recounted by one of the appellants' witnesses, regarding the integrated nature of the "Black Top Cab" taxi business (at page R9):

> ...Black Top Cabs Ltd. and Beach Place were created for the purpose of governing a cooperative taxi business for the shareholders of Black Top and providing shared services to the taxi owners. Black Top holds legal title to over 200 taxi licences issued by the City of Vancouver and the Passenger Transportation Board ("Licences"). Shareholders hold the ultimate rights to operate Black Top taxis, and the right to all of the revenue earned through the operation of their taxi. They commonly lease those rights to other drivers, including other shareholders and persons who are not shareholders. Beach Place provides the dispatch, accounting, and matchmaking services to the shareholders, for the benefit of their businesses. Approximately half of the taxi trips made by Black Top taxis are dispatched through a central computerized dispatch system, with the other half being flagged by customers off the street. Drivers may reject any trips dispatched to them.

14. The delegate also noted, at pages R7 – R9 of his reasons, various other information concerning the integrated nature of the "Black Top Cabs" business model including the following:

- each individual taxi vehicle is purchased and owned by a Black Top Cabs shareholder but registered in Black Top Cab's name for insurance purposes;
- each taxi is separately licensed by the City of Vancouver and the B.C. Passenger Transportation Board; Black Top Cabs is the licensee but apparently holds the two licences as some sort of trustee for the shareholder who beneficially owns and controls the vehicle in question;
- the taxi owners/shareholders, in turn, frequently lease their vehicles to drivers under terms and conditions negotiated directly between the owner and the driver and this arrangement takes the form of a fixed fee for each shift; the driver is entitled to retain all of the fares generated during the course the shift and "ordinary repairs and maintenance are paid for by the Primary Drivers [*i.e.*, the shareholders or a long-term lessee of the vehicle in question] of the taxi and

incorporated into their rental price [and] accident repairs, or the associated insurance deductible, are paid by the owner, who then charges the driver responsible for the accident" (page R8).

15. The delegate determined that the complainant was in an employment relationship with each of Black Top Cabs and Beach Place Ventures. In reaching this conclusion, the delegate considered the inclusive, rather than exclusive, statutory definitions of "employee" and "employer", and observed that in interpreting these provisions, he should bear in mind the *ESA* is remedial legislation and, as such, "any interpretation must take into account the purposes of the Act [and] an interpretation that extends that protection is to be preferred over one that does not" (page R11). In particular, the delegate made the following factual findings relevant to the complainant's status:

- the complainant was required to use Beach Place Ventures' dispatch system and Black Top Cabs required all drivers to attend a training and orientation session regarding Beach Place Ventures' dispatch and payment systems (page R11);
- "...it was Black Top and its shareholders who controlled access to the car and the dispatch system [and] removing access to the dispatch system was used a method [*sic*] of penalizing drivers for various infractions" (page R12);
- "[the complainant] was also dependent upon Beach Place for processing non-cash transactions [since] his fares were calculated through their meter and they processed the credit and debit transactions for his trips and reconciled 'overcharges', hence controlling his access to payment" (page R12);
- "[the complainant] was also required to fill out Black Top trip logs, drive under the Black Top name and logo and abide by their driver standards or face consequences as set out in the 'Code 6' documents [and] Black Top created and enforced the rules and regulations as included in their written directives, procedures and forms and through these directed and controlled [the complainant] in how he performed his work" (page R12);
- "There is little to indicate that [the complainant] was in business for himself [as] he does not have a formal business, GST account or pay WorkSafeBC or other premiums, and the tax documents he provides are in his name...CRA ruled he was an employee under their definition of such [and] I accept it was Black Top's shareholders who were the benefactors of any appreciation of their business and value of the taxi licenses and [the complainant's] efforts as a taxi driver reasonably benefitted their enterprise." "Equally important, any depreciation or negative impact was also borne by these shareholders as the investment [the complainant] had in Black Top was limited by his rental fee" (page R12);
- "While I accept [the complainant] could earn greater [*sic*] by picking up more fares, he had no real discretion in how much to charge as he was limited by the meter rate and number of bookings or flags available. Furthermore, while he was paid a flat daily rate to access the taxi, Black Top's fee rate sheet also indicates that they played a considerable role in setting and communicating amounts paid to drive the taxis. The work he performed driving various taxis for Black Top for almost 20 years was ongoing and integral to the operation of the taxi business. Although Beach Place argues he provided his services to a different taxi company at some point,

there is no evidence this was recent or a routine undertaking. Furthermore, their suggestion he was able to and did sub-contract his driving work is unconvincing" (page R12);

- "...I accept Beach Place exercised control over dispatching by reserving the right to discipline non-compliant drivers, including locking them out of the dispatch system and impeding their ability to earn fares...[and] the evidence also indicates [the complainant] was paid through Beach Place's accounting system periodically as evidenced by overcharge forms submitted by Beach Place which reference the forms will only be processed for taxi cabs received directly from the [Beach Place] office [and] this factor indicates a level of control over how [the complainant] is paid" (page R13); and
- "I accept [the complainant] had some discretion in his day performing his driving duties. However, I find Beach Place exercised the overall control and direction over [the complainant] during his work through application of their policies, rules and dispatching practices, factors which are supportive of an employment relationship" (page R13).

16. The delegate also turned his mind to various factors that are relevant, as a matter of common law, to the question of an individual's status. Specifically, and with respect to the common law "four-factor" test (see *Montreal v. Montreal Locomotive Works Ltd.*, 1946 CanLII 353 (Privy Council) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983), the delegate noted "the most significant equipment utilized by the Complainant was the taxi cab that was owned and largely maintained by Black Top shareholders and insured by Black Top [and] Black Top paid for all costs associated with the licensing and insurance of the vehicle and its shareholders paid for the majority of repairs and maintenance" (pages R13 – R14). The delegate noted that Black Top Cabs maintained the dispatch system, which was a type of business "tool" and, when viewed comprehensively, "all of the significant equipment, tools and supplies including the vehicle bearing the Black Top logo driven by the Complainant were owned by Black Top and its shareholders" (page R14).

17. As for the matter of financial risk, "Black Top was responsible for insuring and maintaining the taxi driven by [the complainant, who] was not exposed to financial risk arising from the ownership and operation of the vehicle" (R14). "Black Top also paid the cost of the taxi licence including all expenses relating to its handheld credit card and debit machines [and the complainant] had minimal financial investment in the operation of the taxi" (page R14). With respect to the factor, "opportunity to profit", the delegate noted that the complainant "paid a fixed rental amount to drive the taxi" and only received the difference between his collected fares each shift (which were fixed meter rates) and the vehicle rental rate. "There is little evidence to show he was able to negotiate different rental rates...or increase the value of his fares" and thus the complainant did not have "a substantial opportunity for profit beyond, for example, a commission sales person, who was paid on the volume of sales completed" (page R14).

18. Finally, in determining that the complainant was an employee rather than an independent contractor, the delegate noted that he had been in a continuing and ongoing relationship with Black Top Cabs since early 1998 and, given his typical four-shift workweek, he was in a position of economic dependence. The delegate made the following comments regarding the relationship between the complainant and Black Top Cabs (at page R15):

> ...the finding of an employment relationship is to be based on an assessment of the total relationship of the parties by examining various factors, but with no set formula. Some evidence may point in one direction and other information may point in the opposite direction. That is the case with this complaint. However, based on the evidence before me, I find Black Top exercised significant control and direction over [the complainant] through dispatching and pay functions and managing his behaviour through the application of driver policy as well as other rules and regulations. Accordingly, I find that [the complainant] was an employee as contemplated under the Act and Black Top was his employer. (my underlining)

19. The delegate did not make a similar express finding that the complainant was also an employee of Beach Place Ventures. Given the evidence before the delegate regarding common direction and control, Beach Place Ventures might have properly been included in a section 95 declaration together with Black Top Cabs (and I make no affirmative finding in that regard), but the delegate did not issue such a declaration. The only reference to section 95 in the delegate's reasons is as follows (at pages R15 – R16):

> Beach Place argues that in the alternative, if [the complainant] is an employee, he is an employee of Mr. Sihota [one of the Black Top shareholders] and not Beach Place as he primarily drove taxi cab #21. However, in review of the dispatch logs, it is clear [the complainant] drove over 30 taxis between 2014 and 2016. While taxi cab #21 was used for the majority of his driving, his services were far from exclusive to that vehicle. …
>
> Mr. Sihota was one of several shareholders of Beach Place and was able to operate his taxi under the Black Top name and through its licence. In turn, I accept that Mr. Sihota may reasonably constitute one of the functional components of a single service which is fundamentally Black Top's taxi cab operations. While there may be evidence that Mr. Sihota, if a separate entity, may be associated with Black Top under section 95 of the Act. I find no statutory purpose in such an analysis at this juncture. Should such a purpose arise, parties will be notified and provided a full opportunity to submit evidence and argument on the issue of association under the Act.

20. Having determined that both Black Top Cabs and Beach Place Ventures separately employed the complainant, the delegate then addressed his unpaid wage claim. Relying on trip sheets and dispatch logs, the delegate found that the complainant was entitled to statutory holiday pay for three statutory holidays worked during the last six months of his employment (see section 46) and a further average day's pay for statutory holidays that he did not work (see section 45). The delegate also awarded the complainant 6% vacation pay.

THE REASONS FOR APPEAL

21. Although the appellants have grounded their appeal under both the "error of law" and "breach of natural justice" grounds (subsections 112(1)(a) and (b) of the *ESA*), their fundamental position is captured in their counsel's submission: "The issue in this appeal is whether [the complainant] was an employee under [the *ESA*], and, if so, whether Black Top was his employer under the [*ESA*]".

22. Counsel also makes the following assertion: "...the Delegate decided that '[the complainant] was an employee under the Act and Black Top was his employer' [and] he awarded vacation and holiday pay, and levied administrative penalties against Beach Place" (underlining in original text). As a preliminary matter, the formal order to pay is the Determination and not the delegate's reasons. The Determination orders each of

Beach Place Ventures and Black Top Cabs to pay the complainant the total sum of $6,591.04 and both firms are liable for $2,500 in monetary penalties.

23. That said, the Determination should reflect the delegate's findings as set out in his reasons. In that regard, and as I noted earlier, while the delegate did refer to the fact that Beach Place Ventures provided dispatch and certain accounting services for the taxi drivers' benefit, his ultimate finding was that "[the complainant was an employee as contemplated under the Act and Black Top was his employer" (page R15). The delegate did not issue a section 95 declaration pursuant to which both Beach Place Ventures and Black Top Cabs would be a single employer for purposes of the *ESA* and thereby jointly and separately liable for the complainant's unpaid wages. The delegate did *not*, in his reasons, make an express finding that Beach Place Ventures had ever employed the complainant.

24. The delegate's findings with respect to monetary penalties are set out at pages R18 – R19 of his reasons. Although it may well have been the delegate's intention to include both Beach Place Ventures and Black Top Cabs in his discussion regarding penalties, the stubborn fact is that the *only* party specifically named as having contravened the various provisions of the *ESA*, and thereby triggering a monetary penalty for each contravention, is Beach Place Ventures.

25. I will return to these matters but, at this juncture, I propose to address the fundamental question raised by this appeal, namely, the complainant's legal status (employee or independent contractor).

The Complainant's Legal Status

26. The appellants' counsel's argument is predicated on a number of factual assertions most, but not all, of which are not particularly contentious:

- "Black Top is a corporation which holds taxi licences on behalf of its shareholders...each taxi vehicle is owned and operated by two shareholders, with one owning the day shift and the other the night shift for that taxi."
- "Black Top is the sole shareholder of Beach Place...Beach Place provides administrative, accounting, and dispatch services to taxis and its shareholders. To perform this work, Beach Place has employment relationships with dispatchers, bookkeepers, clerks, and managers. Black Top shareholders pay for the services provided by Beach Place through shareholder assessments".
- "Black Top's shareholders are the owner-operators of the taxis. They earn revenue by driving their taxi during their shift, by renting the taxi and the shift to a licenced driver...The Complainant was not a shareholder and did not own a taxi or a taxi shift. Instead, he leased taxi shifts directly from Black Top shareholders and from third parties who held taxi leases. The Complainant kept all of the fares he earned during the rental period."

27. The appellants say that the delegate made several errors of law that flow from his factual findings or from inferences he drew from the undisputed facts in evidence. Among other things, the appellants say that the delegate failed to adequately differentiate between Beach Place Ventures and Black Top Cabs and, essentially, treated both firms as a single entity "despite their distinct corporate personalities and differing roles in the co-

op". The appellants also say the delegate fell into a similar error in conflating "Black Top with its shareholders" and that "if the two were not conflated, there would be no evidence supporting the finding of an employment relationship". The appellants maintain that the delegate improperly disregarded the legal principle that shareholders are separate and distinct from the corporation in which they hold shares as well as the legal distinction between legal and beneficial ownership. On this latter point, the appellants say: "This principle is important to this case because it is the beneficial owners of the taxis and licences who for all practical purposes are the true owners of their taxi businesses. It is the beneficial owners who bear all the costs associated with the operation of the particular taxi that they own, including the costs of operating Black Top and Beach Place".

28. The appellants assert that, contrary to the delegate's statement at page R12 of his reasons, the complainant did not "drive various taxis for Black Top for almost 20 years" but, rather, rented taxis from Black Top shareholders and drove on his own account. The appellants also say that the delegate erred when he stated, at page R12, that he was not convinced the complainant was entitled, and in fact did, occasionally sub-contract his leased taxi to another individual.

29. The appellants assert that the delegate erred in finding that the complainant was obliged to use the dispatch system and that Beach Place Ventures "controlled his access to payment" for non-cash transactions. The appellants say that the delegate's finding, at page R12 of his reasons, is simply factually incorrect: "neither Black Top nor Mr. Sihota provided invoices issued by him or evidence he reported his income as or was considered an independent contractor".

30. The appellants summary position regarding the fundamental threshold question concerning the complainant's status is as follows:

> In this case, the total lack of any commercial relationship between the Complainant and the Appellants (they did not pay him and he did not pay them, <u>at all</u>) is fundamentally incompatible with the concept of employment (i.e., a relationship where A purchases the labour of B with a view to profiting from the fruits of that labour)...The Complainant was not "engaged" to perform services by Appellants [*sic*], or at all. He has no contractual relationship with the Appellants, and is not paid by them, through wages or otherwise...Rather, the Complainant and other drivers simply purchase the opportunity to use the equipment and rights from shareholders, with a view to exploiting their own labour for their own profit.
>
> (<u>underlining</u> in original text)

Breach of Natural Justice

31. The appellants' position regarding whether the delegate failed to observe the principles of natural justice in making the Determination largely flows from their fundamental argument that the delegate erred in law in finding that there was an employment relationship between the complainant and each of Beach Place Ventures and Black Top Cabs. Specifically, the appellants say that the delegate "failed to keep an open mind" and "employed an extremely cursory and one-sided analysis that predetermined the finding of an employment relationship". Finally, on this point, the appellants maintain that the delegate's reasons were wholly inadequate inasmuch as the delegate did not undertake a "serious analysis of the evidence", did not address

the obvious credibility concerns and failed to explain why one individual's evidence was preferred over another's evidence or why "undisputed" evidence was not accepted.

THE RESPONDENTS' POSITIONS

32. The complainant, not surprisingly, takes issue with the appellants' assertion that he was not an employee. He points to the Canada Revenue Agency's ("CRA") decision that he was an employee – by letter dated April 26, 2016, CRA ruled that he was employed with "Beach Place Ventures Ltd. operating as Black Top and Checker Cabs for the period from January 24, 2015 to January 1, 2016". Although he did not use the specific term, the thrust of his submission in this regard is that the matter of his employment status has already been determined and, consistent with the doctrines of *res judicata* and issue estoppel, his status as an "employee" has been finally determined. He also notes that WorkSafeBC has apparently ruled that the taxi drivers are not independent contractors but rather "workers" under the *Workers Compensation Act*.

33. The complainant also says that he has provided all relevant documents and that some of the evidence submitted by the appellants "is replete with misrepresentations".

34. The delegate says that the appellants' submission misconstrues or otherwise does not accurately reflect the evidence that was before him. The delegate submits that "to the extent the shareholders are self-employed taxi drivers who need the services of Black Top to operate, the record and the business reality sufficiently demonstrate that the Appellants also need vehicles and the services of drivers, including the Complainant, to conduct any viable business".

35. With respect to his finding that the complainant was required to use Beach Place Ventures' dispatch system, the delegate notes that the complainant had an economic incentive to use the dispatch system (and did so) and had no other practical alternative (other than, perhaps, exclusively relying on "flags") and also relied on Beach Place Ventures to process his non-cash fares. In the circumstances, the delegate argues that insofar as the complainant had a "choice" to use the dispatch and accounting services provided by Beach Place Ventures, that choice "can only be characterized as an illusion of choice".

36. By way of response to the appellants' argument that the complainant had the right to "sub-contract" his shift to another driver, the delegate notes that the appellants did not submit any evidence that would have shown the complainant would have received any monetary benefit on this account and, in any event, "the practice of arranging drivers for owners/operators [does not disqualify the complainant] from being an Employee under the Act". The delegate finally says that the appeal "is merely an attempt to re-argue the case on its merits in an attempt to arrive at a different conclusion".

37. The delegate, while very much aware of the CRA ruling regarding the complainant's status, nonetheless says that it can be ignored since it is based on "different statute, with distinct remedial purposes that are not necessarily the same as the Employment Standards Act". This latter statement may reflect the delegate's present position, but no such argument can be found in the delegate's reasons and I do not think it appropriate for the delegate to, in effect, bootstrap his reasons for decision by way of a submission to the Tribunal on appeal.

THE "COMMON EMPLOYER" PROVISION: SECTION 95

38. Among other issues, this appeal raises the possible application of section 95 of the *ESA* (generally known as the "common employer" provision):

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

39. As discussed above, the delegate did not make a section 95 declaration such that the two appellants would be deemed to constitute one employer for purposes of the *ESA*. Although the delegate alluded to the possibility of issuing a section 95 declaration as against Mr. Sihota and Black Top Cabs, the delegate found "no statutory purpose" for doing so "at this juncture" (page R15). In light of the inter-related and integrated nature of the overall "Black Top" taxi operation, I invited the parties to file submissions regarding the possible application of section 95 in this case.

40. The complainant did not file any submissions regarding section 95. The delegate, in his submission, noted that while he did not "pursue an analysis of Section 95 of the Act during the time of the original determination" he also left open the possibility of revisiting that matter "if a statutory purpose were to arise" at a later juncture. The delegate's current position is "that there is a strong prima facie case to be made that all the entities described above [Beach Place Ventures, Black Top Cabs and "any or all individual beneficial owners"] are associated as the facts of this case conform to the four part test outlined in Section 95 of the Act".

41. The appellants' counsel has advanced two principal points with respect to section 95. First, and relying on the Tribunal's decision in *Bridge*, BC EST # D091/07, counsel says that section 95 cannot be used to establish the existence of an employment relationship. Second, since the complainant was self-employed, section 95 is irrelevant.

FINDINGS AND ANALYSIS

Section 95

42. At the outset, I wish to reiterate that no section 95 declaration has been issued in this case. The delegate says that there is a strong *prima facie* case for associating one or more entities as a single employer under section 95. That may be so (and I make no finding in that regard), but in my view it is not open to the Tribunal, on appeal, to issue such a declaration (see, for example, *Cruisers Pit Stop Diner*, BC EST # D047/99; see also *Iida*, BC EST # D078/03). Section 95 is clear – only the Director of Employment Standards is empowered to issue a section 95 declaration. The Tribunal's appeal jurisdiction *vis-à-vis* a section 95 declaration is solely

to adjudicate whether such a declaration should be varied, set aside or confirmed consistent with the subsection 112(1) statutory grounds of appeal (for example, the Tribunal could cancel a section 95 declaration if the Director erred in law in issuing the declaration).

43. Insofar as the appellants' counsel's submission regarding section 95 is concerned, I do not find the *Bridge* decision to be particularly relevant to the "common employer" issue that might arise in this case. *Bridge*, fundamentally, was a decision about the timeliness of an unpaid wage complaint, not section 95 – the discussion regarding section 95 was tangential to the main issues raised in the appeal. Mr. Bridge argued (and for the very first time on appeal) that one firm – which had entirely ceased operations nearly 1½ years before his complaint was even filed – should be associated with another firm. It was in this context that the Tribunal held that there was no proper statutory purpose to be served by a section 95 order, since the effect of such an order would have been to create a liability (because associated firms are treated as if they are one employer and are thereby jointly and separately liable for an employee's unpaid wages) for unpaid wages that could not have otherwise existed. Ultimately, the Tribunal held that Mr. Bridge's complaint was properly dismissed as untimely (see BC EST # RD051/08 and BC EST # RD044/09).

44. While I accept counsel's assertion that section 95 requires that there be an underlying employment relationship between the complainant and the "consolidated" notional entity that is deemed to be a single employer as a result of the section 95 declaration, I do not accept that each and every constituent firm or entity must be shown to meet the statutory definition of "employer" *vis-à-vis* the complainant. As the Tribunal observed in *HOC Center for Progressive Medicine Victoria Inc.*, BC EST # D023/06, at para. 17: "Where the conditions for a decision under Section 95 of the *Act* are present, the result is to treat the associated entities as one person for the purposes of the *Act*, whether or not the claimant has actually been employed by all of the entities that are associated" (my underlining).

45. More recently, in *Spes*, BC EST # D061/13, the Tribunal cancelled a determination and referred an unpaid wage complaint back to the Director, specifically to consider whether a section 95 declaration would be appropriate, in circumstances where the Director conducted two separate investigations against two employers that the complainant identified in his original complaint. The Tribunal's key findings regarding the section 95 issue were as follows (paras. 22 – 24):

> … While I am not intending to prejudge the matter and do not want this decision to be taken as such, I find the evidence adduced by [the complainant] (which forms part of the Director's "record") raises the question of whether Preferred Painting and Remdal are "associated employers" within the meaning of section 95 of the *Act*. This question…should have been considered by the Director in the investigation of and, ultimately, in the determination of [the complainant's] complaint. It may very well be that the determination of the Director may be the same at the end of the day but separating the investigation of Remdal and Preferred Painting and considering separately evidence relating to each neglects consideration of an important question, namely, whether Preferred Painting and Remdal are associated employers.
>
> …the question of whether or not Preferred Painting and Remdal are "associated employers" under Section 95 of the *Act* is materially relevant and should have been properly considered by the Delegate in context of the complaint…the Delegate's failure to consider it in context of [the complaint] (whether due to the Director's decision to investigate Remdal separately or not) is, in my view, a failure of natural justice on the part of the Director.

> In the circumstances, I find the appropriate course of action is to cancel the Determination and refer the matter back to the Director with specific instructions to consider or assess all evidence, whether obtained in context of the Director's investigation of [the complaint] against Preferred Painting or in the Director's separate investigation of Remdal, with a view to determining the nature of the relationship between Remdal and Preferred Painting and [the complainant] in context of Section 95 of the *Act*...

46. The appellants' counsel submits: "It would be inappropriate to use s. 95 as a means of establishing the existence of an employment relationship in the first place". I have a few comments regarding this submission.

47. First, section 95 must be not be narrowly construed consistent with the following principle stated in *0708964 B.C. Ltd.*, BC EST # D015/11, at para. 27:

> ...The legislative objective underlying section 95 is to ensure that employees' wage claims are not defeated by niceties of legal form. Although it is perfectly permissible for individuals to organize their business affairs in order to limit legal risk, or to maximize tax advantages, by conducting the business through separate legal entities, the effect of both the common law and section 95 is to ensure that employees are not unfairly disadvantaged by such arrangements.
>
> (see also *Worldspan Marine Inc.*, BC EST # D005/12, at paras. 87 *et seq.*)

48. Second, while I accept that there must be an "employment" rather than an "independent contractor" relationship, that employment relationship may be found in the nexus between the "business, trade or undertaking" that is operated by or through the associated entities, and the complainant; there is no necessary requirement that all, or indeed any, of the constituent entities be independently characterized as an "employer" of the complainant. In my view, section 95 only requires that there be an employment relationship between the complainant and the "business, trade or undertaking" that is operated by or through the associated firms.

49. In determining whether separate entities should be associated, the following factors may be appropriately taken into account (*0708964 B.C. Ltd.*, *supra*, at para. 32):

- there must be at least two separate entities that are being "associated";
- the nominal employer is not particularly relevant and there is no need that a formal contract of employment subsist as between the employee and the entities that are being "associated";
- the entities must be jointly carrying out some business, trade or other activity although the business, trade or activity in question need not necessarily be the only one that each entity is carrying on;
- "common control or direction" may be determined based on financial contributions from one entity to another (although this factor, standing alone, in not determinative); the fact that one entity is economically dependent on another entity, interlocking shareholdings and directorships; common management principals (*e.g.,* corporate officers and other key employees); sharing of resources (including human resources) among the various entities; asset transfers at non-market transfer prices; operational control by one entity over the affairs of another entity; joint ownership of key assets and operational integration

50. Accordingly, in making a section 95 declaration, the Director should first consider whether the evidence shows that there is a business, trade or undertaking carried on by or through two or more constituent entities (which may be separate business corporations, partnerships or individuals), and then determine if there is an employment relationship between that business, trade or undertaking and the complainant(s). The Director need not find that there are separate employment relationships between the complaint(s) and each of the constituent entities that form the integrated business vehicle. If there are separate entities carrying on a common business enterprise, and there is an employment relationship between the complainant(s) and that enterprise, the Director must then consider whether it is appropriate to issue a section 95 declaration; in other words, is there a proper statutory purpose for issuing a section 95 declaration (see *Invicta Security Systems Corp.*, BC EST # D349/96, and *660 Management Services Ltd. et al.*, BC EST # D147/05, reconsideration refused: BC EST # RD044/06)?

51. Black Top Cabs is apparently the sole shareholder of Beach Place Ventures and the beneficial owners of the taxis are apparently the only shareholders of Black Top Cabs. The evidence before the delegate appears to indicate that one or more entities were involved in the operation of a taxi business under the trade name "Black Top & Checker Cabs" including Beach Place Ventures (which provides, among other things, dispatch and accounting services and manages credit card payments), Black Top Cabs (the entity that, among other things, holds the actual taxi licences and is the registered and insured owner of all the vehicles in the "Black Top" fleet); and the individual shareholders of Black Top (who are the beneficial owners of the vehicles in question, the principal financial backers of the enterprise and the individuals who negotiate taxi operating agreements with other drivers). The evidence relating to this common taxi business enterprise was largely provided by Beach Place Ventures and Black Top Cabs during the hearing before the delegate.

52. While I am not affirmatively finding that it is appropriate for the Director to issue a section 95 declaration such that Beach Place Ventures, Black Top Cabs and one or more of the individual shareholders are joined as single employer for purposes of the *ESA*, I am persuaded that this is an issue that should be returned to the Director to be heard or investigated. It may be the case that, when considered independently, neither Beach Place nor Black Top Cabs meets the statutory definition of employer *vis-à-vis* the complainant. However, as was the situation in *Spes*, *supra*, the key question is not whether the complainant was employed by one or both (or neither) of Beach Place Ventures and Black Top Cabs but, rather, whether Beach Place Ventures, Black Top Cabs and possibly other individuals operated an integrated taxi business under the "Black Top & Checker Cabs" moniker which, in turn, employed the complainant.

53. In *Spes*, the Tribunal cancelled the determination under appeal and referred the matter back to the Director so that the various issues arising from the possible application of section 95 would be addressed (a similar order was also issued in *Cruisers Pit Stop Diner Ltd.*, *supra*). In my view, a "referral back" order is called for in this case so that the possible application of section 95 may be properly addressed. As discussed, above, the statutory authority to issue a section 95 declaration is vested in the Director, not the Tribunal.

Additional Considerations

54. Separate and apart from the section 95 issue, I have other concerns regarding the Determination and, in my view, these concerns also militate in favour of cancelling the Determination and referring the matter back to

the Director to be either investigated afresh or reheard. I propose to only briefly address these matters inasmuch as the Director will be addressing them in any new investigation or hearing.

55. First, and as noted above, the complainant in his initial complaint clearly stated that he believed the employer indefinitely suspended him because he was asserting his rights under the *ESA*. Although the complainant did not specifically refer to section 83 of the *ESA*, in my view, the only reasonable inference to be drawn from the wording of his complaint is that he was asserting a breach of section 83 (and that, in turn, would trigger his entitlement to a make whole remedy under subsection 79(2) of the *ESA*).

56. I recognize that the complaint was the subject of a complaint hearing rather than an investigation and that the delegate's role is quite distinct under each adjudicative process. That said, there is an overarching requirement that the *ESA* be interpreted and applied in a manner that is consistent with the section 2 "purposes" provision. At the hearing, the complainant testified through an interpreter; the respondents were represented by legal counsel. There was an imbalance in the relative ability of the parties to present their evidence and argument and the complainant had raised – at least by reasonable inference – a section 83 claim in his original complaint. The complainant further raised the "retaliation" issue, at least by inference, during his testimony before the delegate (see page R5 of the delegate's reasons) and expressly in his post-hearing written submission. Subsections 2(b) and (d) of the *ESA* state that two of the purposes of the *ESA* are to ensure "fair treatment" of the parties and "fair and efficient" dispute resolution. The delegate did not address the possible contravention of section 83 of the *ESA* and, in my view, fairness dictates that he ought to have do so.

57. Second, both in his complaint and in his later written submission to the delegate, and although the complainant did not use this term, he raised a *res judicata* / issue estoppel question inasmuch as the complainant asserted that his status as an "employee" of Beach Place Ventures was the subject of a prior binding determination by the CRA. While I do not necessarily accept that this is a meritorious argument, it is my view that the delegate should not simply have ignored this submission. Although there is, in my view, a reasonable argument that the prior CRA decision did not settle the question of the complainant's status as a matter of *res judicata* (see *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460), I am of the opinion that it was a breach of the principles of natural justice for the delegate to simply ignore the matter.

58. Third, a central argument raised by the appellants' counsel is that the delegate "conflated" the operations of the two separate business corporations into a single entity in finding that there was an employment relationship. I am persuaded that there is some merit to counsel's contention in this regard. At page R2 of his reasons, the delegate recounted counsel's submission that "Beach Place is subsidiary of Black Top Cabs Ltd. with common shareholders and directors" and the delegate also referred to the separate functions that each corporation, as well as the Black Top shareholders, undertook with respect to an integrated taxi business. Having identified the integrated nature of the business enterprise, but without ever making a section 95 declaration, the delegate then simply stated: "Accordingly, both [corporations] are named in this determination".

59. Since the delegate did not issue a section 95 declaration, in my view, the delegate could not find that either firm was an employer by relying on evidence of the integrated nature of the business enterprise. Rather, the evidence relating to each corporation should have been separately and independently considered when determining if either was an "employer" of the complainant under the *ESA*. However, the delegate's reasons

do appear to suggest that he looked at some factors unique to one firm in determining whether the other firm was an "employer" (see, for example, the delegate's discussion regarding "control and direction" at page R13 and regarding "integration" at page R15 of his reasons). At pages R13 – R14, the delegate appears to have relied on evidence singularly relating to the Black Top shareholders in finding that Black Top Cabs was an employer.

60. Further, and more problematically, the delegate's ultimate finding, at page R15, was as follows: "I find that [the complainant] was an employee as contemplated under the Act and Black Top was his employer" (my underlining). Notwithstanding this finding, the Determination indicates that *both* Black Top Cabs and Beach Place Ventures are liable for the complainant's unpaid wages. In my view, the delegate's reasons fall well short of adequately explaining why Beach Place Ventures and Black Top Cabs were each independently determined to be an employer of the complainant. This deficiency regarding the delegate's reasons could be characterized as either an error of law or a natural justice breach.

61. I have a second natural justice concern as it relates to the appellants. The record before me shows that all of the documents emanating from the Employment Standard Branch were addressed, or otherwise directed, to "Beach Place Ventures Ltd. coba Black Top and Checker Cabs". The Notice of Complaint Hearing was directed solely to this same addressee. I have scrutinized the subsection 112(5) record provided by the Director and I am unable to find any indication therein that the Director ever put Black Top Cabs Ltd. (a separate business corporation from Beach Place Ventures Ltd.) on notice that this latter firm might be named in a determination as an employer of the complainant. The record includes a "registered mail trace sheet" that lists various addressees, including Beach Place Ventures and several individuals, but there is not a single reference to a registered letter being sent to Black Top Cabs.

62. If, during the course of the hearing – or at some later point – the delegate came to the view that it might be appropriate to name Black Top Cabs, separate from Beach Place Ventures, as an employer, it was incumbent on the delegate to give notice of this intention and to afford Black Top Cabs a proper opportunity to respond. While the record includes submissions to the delegate from legal counsel for Beach Place Ventures, there are no such comparable submissions in the record filed on behalf on Black Top Cabs. This omission buttresses my view that the delegate never formally advised Black Top Cabs that it might be named as an employer in a determination.

63. Finally, the appellants' counsel maintains that it made an application to the delegate for the production of the complainant's income tax records "but the delegate refused to produce these documents" and, in addition, "the Appellant also asked the Delegate to draw an adverse inference from the fact that the information was not disclosed, which the Delegate failed to consider and clearly did not do so". The delegate, in his written submission, expressed a very different version of events:

> With respect to tax returns, the Employment Standards Branch was requested by the Appellants to ask the Respondent to provide particular tax documents prior to the hearing. The Branch requested the said documents and exchanged what was received from [the complainant]. At no time did the Appellants request the Employment Standards Branch to order the production of the tax records in question. Furthermore, the Appellant failed has failed [*sic*] to indicate how filing taxes as a self-employed individual, as the Respondent acknowledged he did, has any bearing on whether or not an individual is an employee under the Act.

64. I am unable to determine, based on the record before me, which of these two fundamentally divergent versions of events actually occurred. Since this matter is being returned to the Director for a fresh investigation or rehearing, all of the issues relating to the production/relevance of documents may be reargued.

ORDER

65. Pursuant to subsections 115(1)(a) and (b) of the *ESA*, the Determination is cancelled and the complainant's complaint is referred back to the Director to be investigated afresh or reheard.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal