Employment Standards TRIBUNAL

An appeal

- by -

Canada Rockies International Investment Group Ltd. and Chao Chen
("CRIIG" and "Mr. Chen")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2014A/94

DATE OF DECISION: December 23, 2014

DECISION

SUBMISSIONS

David M. Smart and Matthew Beharry	counsel for Canada Rockies International Investment Group Ltd. and Chao Chen
Jim Ross	on behalf of the Director of Employment Standards
Lynn Ranger	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Canada Rockies International Investment Group Ltd. ("CRIIG") and Chao Chen ("Mr. Chen") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 27, 2014.

2. The Determination found that CRIIG should be associated under section 95 of the *Act* with Canadian Rockies Mining Group Ltd. ("CRMG") as one employer (the "Employer") and that the Employer had contravened Part 3, sections 17, 18 and 21, Part 4, section 40, Part 5, sections 45 and 46, Part 8, section 63 of the *Act* and Part 8, section 46 of the *Employment Standards Regulation* (the *"Regulation"*) in respect of the employment of Tao Li, Wang Zong Lu, Jian Wang, Chang Jie Li, Oscar Guo, Hai Yu Fu, Ning Lian Cao, and Bing Xie (collectively, the "Complainants") and ordered the Employer to pay wages to the Complainants in the amount of $96,034.23 and to pay administrative penalties in the amount of $4,000.00. The total amount of the Determination is $100,034.23.

3. The Tribunal accepts the appeal as filed on behalf of CRIIG, but Mr. Chen has no status to bring an appeal of the Determination at issue in this decision. He was neither named in the Determination as a person who had contravened a requirement of the *Act* or *Regulation* nor was he served, as that term is applied in the context of the appeal provisions of the *Act*, with the Determination; he was only provided a copy of the Determination made against the Employer.

4. CRIIG appeals the Determination on the grounds the Director erred in law and failed to observe principles of natural justice in making the Determination.

5. On July 30, 2014, the Tribunal acknowledged to the parties that an appeal had been received from CRIIG, requested production of the section 112(5) "record" (the "record") from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.

6. The "record" was provided by the Director to the Tribunal and a copy was sent to CRIIG. On September 25, 2014, the Tribunal noted CRIIG had not objected to the completeness of the "record" and reiterated that the appeal would be reviewed without seeking submissions from any of the other parties.

7. On October 8, 2014, CRIIG supplemented their initial appeal with a further submission that withdraws some of the arguments made in the original submission filed with the appeal delivered to the Tribunal on September 25, 2014.

8. On, October 23, 2014, the Tribunal advised the parties that the appeal would not be dismissed and on November 6, 2014, the Tribunal invited submissions from the parties. The Tribunal has received a submission from the Director. None of the other parties has responded to the invitation for submissions.

9. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the "record".

ISSUE

10. The issues in this appeal are whether the Director erred in law and whether the Director failed to observe principles of natural justice in making the Determination.

THE FACTS

11. CRMG and CRIIG operated a placer mining business on mining claims owned by Yong Chang Chen (Y.C. Chen"), who operates a wilderness resort and recreational vehicle campground proximal to the placer mine site.

12. The Complainants filed complaints alleging the Employer had contravened the *Act* by failing to pay all wages owed. They were employed by the Employer over two discreet periods of time. Tao Li, Wang Zong Lu, and Jian Wang (the "2010 Complainants") were employed by the Employer for varying periods of time between April and October 2010. Chang Jie Li, Oscar Guo, Hai Yu Fu, Ning Lian Cao, and Bing Xie (the "2012 Complainants") were employed by the Employer for varying periods of time between May and October, 2012.

13. In support of their claims, the Complainants, generally, provided evidence of hours worked. One Complainant had kept a daily record for all the employees, although Bing Xie provided his own record.

14. The Determination notes the Complainants attended fact finding meetings on March 19 and 20, 2013, at which they outlined their complaints, clarified some issues and responded to questions from the Director.

15. The position of the Employer in response to all of the complaints except that filed by Bing Xie, was that all of the Complainants were paid in full for all hours worked. To support its position, the Employer produced various T4 slips, Records of Employment and a partial record of hours worked for some of the Complainants. The Employer produced a record of hours for a group of complainants which it subsequently acknowledged were compiled after the fact by Y.C. Chen.

16. Over the course of the investigation of the complaints, the Director issued several Demands for Employer Records which were only partially met.

17. On January 31, 2013, the Director delivered Notices of Fact Finding Conference to the parties. One of the Notices applied to the 2012 Complainants. The fact finding meeting for these Complainants was scheduled for March 19, 2013. Another fact finding meeting was scheduled for March 20, 2013, for the 2010 Complainants. Each of the Notices indicated the objective of the fact finding meetings was to make an "effort to establish the facts and/or resolve the issues" and contained the following sentence:

> The Branch Investigator may make a Determination based on information before him, **even if you choose not to participate or be represented at the meeting.** (**bolding** included)

18. On March 18, 2013, the Director received a communication over the signature of Vernon Hu ("Mr. Hu") advising the authorized representative for the Employer, Shaobo Guo ("Mr. Guo") was in China dealing with a family emergency and would not be able to attend the meeting. The communication also advised that Mr. Chen was on a business trip and would not be available. Mr. Hu, however, appears from the section "record" to have attended the March 20 meeting.

19. In a communication dated March 21, 2013, Mr. Hu introduced himself as "basically the caretaker for Chao Chen and Martin Guo". He asked the Director if he could be provided with "what has been filed, and what the facts are". He indicated the Employer would prepare their "official response in the shortest time possible".

20. In responding, the Director, among other things, referred Mr. Hu to a January 17, 2013, contact letter that outlined the complaints of the 2012 Complainants. That letter instructed the Employer, if the claims were disputed, to provide reasons for that position in writing along with any supporting documents for that position. The "record" does not indicate there was any response to the letter.

21. As a result of inquiries by the Director, Mr. Hu identified himself in a March 28, 2013, e-mail, as Business Manager, and Martin Guo as Assistant Manager for CRIIG. He stated "the two of us will be responding to requests regarding" on behalf of the Employer to two files involving the Complainants.

22. On March 28, 2013, the Director sent Mr. Hu material relating to the 2010 Complainants.

23. On April 10, 2013, Mr. Guo delivered the general response of the Employer on the associated employer issue and a more particularized response to the 2012 Complaints.

24. There was a response that specifically addressed the complaint of Bing Xie that argued Bing Xie was never an employee of the Employer. The Employer submitted Bing Xie had signed an agreement to market and distribute jade harvested from the Employer's placer properties as an agent.

25. The Director disagreed with the position of the Employer and found Bing Xie was an employee of the Employer for the purposes of the *Act*. The basis for that finding is set out in the Determination.

26. The response relating to the other 2012 Complainants contained the following statement of position for all of them:

> . . . the Company categorically denies all allegations filed by the 6 complainants and rejects all claims on owed salaries and wages. All claimants except Brian Lao and Bing Xie, signed employment contracts with the Company, which will be provided separately, together with complete payroll and time records. The records are self explanatory and should serve to dismiss the claims in question. We will nevertheless provide point-by-point response to individual claims separately, as would be the case with Lao and Xie.

27. The "point-by-point response to individual claims" comprised four *pro forma* three point submissions that differed only in the Complainant to whom it was referring. Each of the responses contains the following assertions:

- the Company doesn't owe the Complainant any wages;

- each Complainant was paid an extra $5.00 an hour;
- the contract indicates a wage rate of $20.00 an hour, but the Company started to pay $25.00 an hour from July 2;
- the Company kept a "two week period timesheet" that each employee was asked to signed at the end of each period with the notation: *the wages settled without objection;*
- the Company and the employees made an agreement that payroll could be paid by check before they came back to Vancouver;
- the total payroll would be based on the period payroll record each employee signed; and
- some employees drove on May 5, 6 and 7 on the way to the work site, but there was an oral agreement to start paying from the first day at the work site.

28. The Director did not accept the documents and records provided by the Employer, finding the Complainants provided more consistent and corroborated evidence.

ARGUMENT

29. Counsel for CRIIG has organized his argument in the appeal submission under five points. He submits the Director committed errors of law and failed to observe principles of natural justice in the following respects:

a. by failing to provide the Employer with notice of the full nature and extent of the claims of the 2012 Complainants and failed to disclose key evidence;

b. by failing to provide sufficient reasons and adopting a method of assessment that was wrong in principle regarding the 2012 Complainants;

c. by reaching the conclusion Bing Xie was an employee and failing to disclose key evidence on the issue of his status;

d. by committing errors that irreparably prejudiced the Director's decision on the 2010 Complainants; and

e. by imposing administrative penalties that were unreasonable and excessive.

30. I shall summarize each of these arguments under the five errors alleged to have been made by the Director.

Lack of Notice/Failure to Disclose

31. Counsel for CRIIG submits the Employer was not provided with notice that the Complainants' claims and the amounts found to be owed in the Determination were, or would be, different than what was set out in correspondence from the Director. He says the Notice of Fact Finding Conference set out the amounts that were being investigated, that the Determination does not reflect those amounts nor does the Determination explain why the final amounts are "fundamentally different" from what was claimed. Counsel supposes the difference is attributable to the Complainants being allowed to present evidence and make claims that were different than their initial claims and was accepted by the Director without CRIIG being allowed to know these claims and to respond to them. He says the circumstances amount to a failure by the Complainants to disclose their full claims and the Director's acceptance of these changes is a breach of natural justice.

32. In the alternative, counsel for CRIIG submits the Determination allowed claims to be made that were statute barred. He says none of the Complainants sought overtime, unpaid statutory holiday pay or unpaid vacation pay in their initial complaints and are now barred by section 74(4) of the *Act* from seeking it.

33. Counsel for CRIIG says the above submissions are supported by the "record" which indicates significant portions of "key evidence" provided by the Complainants were not given to the Employer. In the category of this non-disclosed evidence, counsel identifies:

a. Nian Lian Cao's wage calculation and daily work logs;

b. Hai Yu Fu's cheque deposit slip and bank statement and six cheques from CRIIG;

c. Oscar Guo's October 18, 2012, letter and daily work logs; and

d. Chang Jie Li's deposit slip and bank statement and monthly work calendar.

34. Counsel submits these documents were central to the above Complainants' claims and were relied on by the Director. He says CRIIG disputes the authenticity and accuracy of the non-disclosed documents. He adds that the Director breached section 77 by not providing CRIIG with an opportunity to see the documents and breached principles of natural justice by failing to disclose them.

Insufficient Reasons/Unreliable Reliance

35. Counsel submits the Director failed to provide sufficient reasons for the calculations made. He says this position is supported by the "record" which suggests there is no basis for the calculations. He says the Director has calculated the wages owed to the 2012 Complainants without setting out the hourly rate, indicating whether the hourly rate changed during the Complainants' employment was incorporated into the calculation; setting out when the regular hours were worked and setting out when the overtime hours were worked. He notes the "record" contains no summary or tabulation of the hours worked by the 2012 Complainants. Counsel submits that without such information it is impossible to assess the validity and legitimacy of the conclusions drawn by the Director.

36. Counsel submits the above failures and omissions by the Director constitute an error of law.

37. Counsel adds that by not providing calculations and summaries, the Director has adopted a method of assessment that is unverifiable and therefore wrong in principle.

Failure to Disclose/Error on the Status of Bing Xie

38. Counsel for CRIIG submits the Director breached principles of natural justice by failing to disclose a key piece of evidence – a cheque made payable to Bing Xie from CRIIG, dated 2012/09/24 and marked "Re Payroll – until March 14, 2014. Counsel also notes the disclosure of the cheque was made to Martin Guo, who advised the Director he no longer worked for CRIIG and the information should be sent to them, but never was. Counsel submits CRIIG did not issue the cheque to Bing Xie and were denied the opportunity to present this information to the Director.

39. Additionally, counsel for CRIIG submits the Director failed to apply the appropriate criteria in deciding Bing Xie was an employee. He says the Director failed consider the concepts of control, chance of profit and risk of loss as relevant criteria and apparently relied on irrelevant and inappropriate criteria in deciding the relationship between CRIIG and Bing Xie.

Effect on 2010 Claims

40. Counsel argues the errors made addressing the claims of the 2012 Complainants had a prejudicial cumulative effect on the Director's adjudication of the claims of the 2010 Complainants, which is found in the failure of the Director to differentiate between the two groups in terms of claims made, evidence produced, evidence relied upon and credibility. The argument made by counsel suggests the records provided by either the 2010 Complainants or the 2012 Complainants were not credible and the Director failed to assess their credibility independently and on the merits of each, rather than on the impact the Director's perception of the evidence provided by one group on his perception of the credibility of the other.

Unreasonable Administrative Claims

41. Finally, counsel submits the administrative penalties imposed on CRIIG were unreasonable and excessive. Counsel points to the administrative penalties for contravening sections 45 and 46 of the *Act* and for failing to respond to a Demand for Employer Records for which the Employer had only four days to respond.

42. In response, the Director submits the appeal should be dismissed.

ANALYSIS

43. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

> ***112*** *(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was being made.*

44. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

45. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle.

46. This appeal is grounded in a claim that the Director failed to observe principles of natural justice in making the Determination and erred in law. The former ground is based on a failure to disclose, a lack of notice and acting unreasonably. The latter ground is based on failure to provide reasons, misconstruing the test for determining employee status under the *Act* and mishandling evidence.

47. I shall address each argument as they have been set out in the appeal submission, noting first that arguments initially made in the July 25, 2014, appeal submission challenging the association of CRIIG and CRMG under section 95 and alleging the Director failed to provide the Employer with sufficient opportunity to examine and respond to evidence and records produced by the 2010 Complainants have been abandoned.

Lack of Notice/Failure to Disclose

48. Based on all the material in the "record", with one exception, I find the Employer, which includes CRIIG, knew the case against them and was given a reasonable opportunity to respond. The appeal raises the question of whether CRIIG was accorded the degree of procedural fairness mandated by section 77 of the *Act* and by principles of natural justice in the circumstances of this case.

49. In the Tribunal reconsideration decision *Inshalla Contracting Ltd.*, BC EST # RD054/06 (Reconsideration of BC EST # D168/05) the panel summarized the operative principles that apply to the obligation of the Director conducting an investigation to ensure procedural fairness (at paras. 22-25):

> An investigation under the *Employment Standards Act*, does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. Indeed, the attributes of natural justice may vary according to the character of the decision and the context in which it applies: *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602. The appropriate procedures will in each case depend on the provisions of the statute and the context in which they are applied: *Downing v. Graydon,* (1978) 21 O.R. (2d) 292. It has been held, for example, that the Director during an investigation should not be placed in a procedural strait-jacket: *Isulpro Industries Inc.,* BC EST #D405/98.
>
> In the case of investigations under the *Employment Standards Act* the duty of fairness will almost invariably require notice to the employer and employee. The general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. It will also give the parties other opportunities to resolve the dispute with the assistance of the Employment Standards Branch.
>
> To participate in the decision making by a public body or public official, however, individuals must possess sufficient information to enable them to make representations on their own behalf, to effectively prepare their own case and answer the case they have to meet. It is therefore a fundamental element of the duty of fairness at common law that prior notice be given to those entitled to participate in a decision.
>
> Section 77 of the *Employment Standards Act* relates specifically to investigations under the Act. It provides as follows:
>
> > *77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*

50. In *Cyberc.Com AD & Host Services Inc. operating 108 Tempo and La Pizzaria*, BC EST # RD344/02, the Tribunal indicated that section 77 does not require the production of the whole of the investigative file prior to issuing the Determination and is not intended to allow for a form of "discovery". It requires only that the Director make meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective. In *Emergency Health Services Commission*, BC EST # D132/09, the Tribunal noted, at

para. 74, the Director's obligation under section 77 is to provide a general, not a specific, overview of the nature of the possible contraventions of the *Act*:

> . . . a party is not necessarily entitled to the entirety of the evidence that may have been presented to the Director. The crux of the statutory obligation is that a person under investigation has enough information to permit an informed response, not that every scintilla of information is disclosed. The question in each case is whether the party has been provided with sufficient particulars of a claim to make the opportunity to respond effective.

51. The material conveyed to the Employer, which includes CRIIG, provided sufficient particulars of the claims being made by the Complainants and gave the Employer a more than reasonable opportunity to respond to the claims contained in that material. All of the complaint forms were provided to the Employer. All of the complaint forms contained the particulars of the claims being made by each of the Complainants. Each of the complaint forms filed by the 2012 Complainants indicated the Complainant had worked at least 10 and up to 14 hrs a day, 7 days a week.

52. As well, the Director conducted fact finding meetings. The Employer decided not to participate in those meetings, advising the Director one day before the scheduled dates for the meetings that no representative of CRIIG would be attending. CRIIG did, however, send an "observer", Mr. Vernon Hu, to one of the meetings. Mr. Hu was later named as an additional representative for CRIIG. Following the fact finding meetings, the Director communicated with Mr. Hu and, at his request, provided complaint and information forms. Had CRIIG fully participated in the fact finding meetings, they may well have obtained further information concerning the specifics of the complaints they now argue was not disclosed.

53. The argument of counsel for CRIIG that the final amounts of the wages awarded to the Complainants reflects their being allowed to present evidence and make claims that were different than their complaints is wrong. The differences between the amounts set out in the initial claims and the Determination is exclusively attributable to the Director fulfilling the statutory mandate of ensuring employees receive at least the minimum requirements of the *Act*. As the Tribunal observed in *660 Management Services Ltd.*, BC EST # D147/05 (Reconsideration refused BC EST # RD044/06), at para. 26:

> . . . There is nothing in Section 74, or in any other provision of the *Act*, that either requires a complainant to specifically identify the particular contraventions which have taken place or to indicate what is owed. Providing this information at an early stage undoubtedly assists the Director in administering the complaint process, but to suggest it delineates the scope of the Director's jurisdiction is unsupported by any provision and, as the Director has argued, is inconsistent with the general authority of the Director to ensure compliance with the *Act*.

54. I also reiterate that the Notice of Fact Finding Conference indicates the Director "may make a Determination based on information before him, **even if you choose not to participate or be represented at the meeting.**" (emphasis included)

55. The "record" does indicate the Director received additional information relating from *some* of the Complainants regarding overtime hours and this information was considered in making the Determination. I also observe that the position of CRIIG, both before and following the fact finding meetings, was that none of the Complainants were owed any wage and that the total payroll was based on the payroll period record provided by the Employer, that each employee had signed. It should also be noted that CRIIG had been provided with a record of hours worked from some of the 2012 Complainants and that record of hours was denied by them. The Director, however, accepted these records and accepted they represented the hours worked for all of the 2012 employees on the site (with the exception of Bing Xie). There is no indication the

position of CRIIG would have been different if each of the Complainants had attached this record to their complaint.

56. I do not accept the submission that the overtime, annual vacation and statutory holiday claims were filed out of time. For the reason expressed immediately above, the filing of a complaint with the Director triggers all of the entitlements provided by the *Act*. There is nothing in the *Act* that requires every contravention to be identified by a complainant and claimed in the complaint form or that precludes the Director from ensuring the minimum standards guaranteed by the *Act* are provided to the employee who seeks the entitlements of the *Act*.

57. With one exception, which I will address below, I dismiss this ground of appeal.

Insufficient Reasons/Unreliable Reliance

58. I reject this argument. The reasons provided by the Director, when read as a whole, in the context of the "record", the arguments made and with an appreciation of the purposes or function for which they are set out, are adequate: see *R. v. R.E.M.*, 2008 SCC 51, [2008] S.C.J. No. 52 (Q.L.). All of the "deficiencies" in the Determination that are alleged are answered by examining the result reached by the Director in light of the findings made from the evidence accepted by the Director and applied to the provisions of the statute, including the purposes expressed in section 2 of the *Act*.

59. In any event, I find the issue raised by this argument is not one over which the Tribunal has authority. It is obvious that the decision on both the rates of pay and the hours of work were based on evidence provided by the Complainants and, as such, were findings of fact. Notwithstanding the submissions made in the appeal, I am not persuaded there is either a breach of principles of natural justice or an error of law in these findings. There is no authority for the Tribunal to consider appeals that are aimed at findings of fact which do not raise an error of law.

Failure to Disclose/Error on the Status of Bing Xie

60. This aspect of the appeal raises a matter of concern.

61. I do not accept the Director erred in law in determining Bing Xie was an employee under the *Act*. I accept the evidence as found by the Director, taken on balance, points to employment status under the *Act*. Notwithstanding the somewhat cursory analysis of the principles and policies that assist in determining an individual's status, I find the Director did not fail to apply the "appropriate criteria" to this issue.

62. The argument made by counsel for CRIIG on this issue engages in a common error made by appellants by either failing to recognize or refusing to acknowledge that the "law" relating to an individual's status under the *Act* is not determined by common law tests or criteria, but by an application of the provisions of the *Act*. In that respect, I confirm the following statement from *Project Headstart Marketing Ltd.*, BC EST # D164/98:

> . . . I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee".

63. The appeal submission of CRIIG do not address the challenge to the Director's decision concerning the status of Bing Xie in the context of the definition of "employee" and "employer" in section 1 of the *Act*, which broadly defines the term "employee" to include, *inter alia*, a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work

normally performed by an employee". An "employer" is defined as including a person "who has or had control or direction of an employee", or "who is or was responsible, directly or indirectly, for the employment of an employee".

64. Many decisions of the Tribunal have considered the issue raised here and all have made it clear that the definition of "employee" is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the *Act*, see, for example, *Kelsey Trigg*, BC EST # D040/03, *Christopher Sin*, BC EST # D015/96, *Jane Welch operating as Windy Willows Farms*, BC EST # D161/05 and *North Delta Real Hot Yoga Ltd. carrying on business as Bikram Yoga Delta*, BC EST # D026/12.

65. The limitations of applying the common law tests have been expressed by the Tribunal in a number of decisions, including *C.A. Boom Engineering (1985) Ltd.*, BC EST # D129/04, where the Tribunal noted:

> The common law tests originated chiefly for the purpose of determining whether an employer could be held vicariously liable for wrongs done by its employee, and not for the purpose of determining whether an employee is entitled to the minimum protections of the *Act*. The inadequacies of the common law tests have been noted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, and by the Federal Court of Appeal in *Wolf v. Canada*, 2002 F.C.A. 96.

66. That is not to say the common law tests have been ignored entirely. Common law tests are useful by reason of the fact that they delineate the factors which should be examined when considering whether, in the circumstances, an employment relationship has been created. In *Cove Yachts (1979) Ltd.*, BC EST # D421/99, the Tribunal listed a number of factors as being potentially relevant to determining whether a person is an employee or an independent contractor:

- the actual language of the contract
- control by the employer over the "what and how" of the work
- ownership of the means of performing the work (e.g. tools)
- chance of profit/risk of loss
- remuneration of staff
- right to delegate
- discipline/dismissal/hiring
- right to work for more than one "employer"
- perception of the relationship
- integration into the business
- intention of the parties
- is the work for a specific task or term?

67. Not all of the above factors will be present in every case. In a very real sense it is counter-productive to spend a significant amount of time analyzing the relationship from the perspective of common law tests and criteria. It unnecessarily complicates the issue and invites appeals such as this one. The Tribunal has repeatedly said the question of the status of a person under the *Act* is determined in the context of the definitions of "employee", "employer" and "work". The only appropriate "test" is whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *Act*.

68. Accordingly, while the common law tests remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions, which must in turn be interpreted in light of the policy objectives of the *Act*. The Supreme Court of Canada made the following statement in *Machtinger v. HOJ Industries Ltd.* [1992], 1 SCR 986, 91 DLR (4th) 491 at 507, concerning Ontario employment standards legislation, that applies equally to the *Act*:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is favoured over one that does not.

69. The following excerpt from *Kimberley Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST # RD114/05) succinctly and correctly summarizes the law of the *Act* when considering the issue of whether a person is an employee under the *Act*:

> The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:
>
> > The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her own tasks.
> >
> > It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

70. On a fair and reasonable reading of the Determination it is apparent the Director identified and considered several of the factors evolving from common law tests the Tribunal has identified as being potentially relevant, including the language of the contract, remuneration, ownership of the means of performing the work and whose business is it. Viewed in this respect, the Director approached the issue in the manner required by the *Act* and endorsed by the Tribunal. No error of law is shown in how the Director assessed the relationship and clearly there is no error because the Director did not conduct a detailed analysis of the concepts of control, chance of profit and risk of loss.

71. Having reached a conclusion on the alleged error of law, I nevertheless find the Director failed to observe principles of natural justice in dealing with the claim of Bing Xie. This conclusion arises from the handling of the cheque addressed in the Determination at page R25. A copy of this cheque was provided to the Director by Bing Xie. During the investigation, CRIIG had referred to a cheque they had made out to Bing Xie, then cancelled, which they characterized as a "loan". The Director "presumed" the copy provided by Bing Xie was the same cheque. The copy provided by Bing Xie was marked "RE payroll". The Director found this

designation to be significant. The Director attempted to provide CRIIG with a copy of the cheque by sending it to Mr. Guo on March 14, 2014. Mr. Guo advised the Director on March 24, 2014, that he no longer worked for CRIIG and the material in the March 14 communication should be directed to them. The Director acknowledged this information on March 25, 2014, but the material was not sent to CRIIG. The Determination was issued on June 27, 2014.

72. As indicated above, I find the cheque was considered significant in the Director's analysis of the status of Bing Xie under the *Act*. The significance of this piece of evidence to the analysis of this issue separates it from the other material which CRIIG argues was not disclosed to them by the Director and in respect of which there is no indication it was either "key", as argued by CRIIG, or exclusively relied on by the Director in making findings on the 2012 complaints.

73. The obligation of the Director under section 77 of the *Act* is fully enunciated above. The central feature of this obligation in the circumstances at play here is the requirement to "make reasonable efforts to give the person under investigation with the opportunity to respond". The crux of the statutory obligation is to ensure that a person under investigation has enough information to permit an informed response. The question in each case is whether the party has been provided with sufficient particulars of a claim to make the opportunity to respond effective. The cheque was produced late in the investigation; it apparently conflicted with information provided by CRIIG; the material before the Director on the status of Bing Xie under the *Act* was ambiguous; the cheque was significant to the analysis; the Director did not attempt to follow up on the information from Mr. Guo that he no longer worked for CRIIG. Fairness alone would suggest CRIIG should have been given an opportunity to comment on what Bing Xie had provided and I do not accept the effort undertaken by the Director to provide CRIIG with the cheque and allow a response was "reasonable" in the circumstances.

74. In this appeal, counsel for CRIIG says CRIIG "did not issue the Bing Xie cheque", but were denied the opportunity to provide this information to the Director.

75. I find the failure to give CRIIG a reasonable opportunity to respond to this evidence to be a contravention of section 77 and a denial of natural justice in the circumstances. CRIIG must be given that opportunity. It may not, in the final result, make any difference to the Director's conclusion that Bing Xie is an employee under the *Act*, but natural justice requires it be given. As a result, that portion of the Determination dealing with the claim of Bing Xie is cancelled and that matter is referred back to the Director.

Effect on 2010 Claims

76. This argument is premised on the assertion that the Director breached the *Act* and principles of natural justice by failing to disclose documents relating to the 2012 Complainants. Apart from a general absence of any "cogent evidentiary basis" for the argument, I have found the Director did not, with the exception of the issue relating to Bing Xie, breach the statute or principles of natural justice in dealing with the 2012 complaints.

77. It is also apparent from the appeal submission that the arguments are not only without an evidentiary basis, they are substantially grounded in what can only be described as speculation about the Director's thought processes in dealing with all of the 2012 complaints. A central aspect of this argument challenges findings of fact made by the Director about the credibility of the records provided by the 2010 and/or the 2012 Complainants without showing there is any error in them. As indicated several times earlier in this decision, the Tribunal has no authority to consider appeals challenging findings of fact unless those findings raise a question of law. None is shown here. More specifically, the appeal does not show the Director acted on a

view of the facts concerning the claims of the 2010 and/or the 2012 Complainants that could not be reasonably entertained.

78. This argument is dismissed.

Unreasonable Administrative Claims

79. I reject this argument. The administrative penalty system does not provide the Director or the Tribunal with any discretion regarding imposing an administrative penalty once a contravention of the *Act* has been found: see *Kimberley Dawn Kopchuk*, *supra*. There can be no argument that CRIIG repeatedly violated the *Act* in respect of the Complainants over a considerable period of employment in 2010 and 2012. The findings in the Determination are valid; the penalties are mandatory.

80. Even if I could alter the penalties, I would not do so as I find, in the circumstances, they are neither unreasonable or excessive.

81. This argument is dismissed.

ORDER

82. Pursuant to section 115 of the *Act*, I order that the portion of the Determination dealing with the claim of Bing Xie be cancelled and the matter involving the status of Bing Xie under the *Act* be referred back to the Director. In all other respects, I order the appeal dismissed and the Determination dated August 1, 2014, confirmed.

David B. Stevenson
Member
Employment Standards Tribunal