

An appeal

- by -

Lions Concrete Ltd.  
(the “Employer” or “Lions Concrete”)

- 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

**ADJUDICATOR:** Ib S. Petersen

**FILE No.:** 2001/386

**DATE OF DECISION:** April 12, 2002

## DECISION

### APPEARANCES/SUBMISSIONS

Mr. Matthew Westfal	counsel, on behalf of Lions Concrete
Ms. Nola Ries	counsel, on behalf of the Attorney General of British Columbia
Ms. Adele Adamic	counsel, on behalf of the Director of Employment Standards

### BACKGROUND

This decision arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination of the Director issued on April 23, 2001. The Determination concluded that a large number of employees were owed \$193,015.61 by the Employer on account of overtime wages and statutory holiday pay.

The Employer appealed the Determination and took issue, first, with the employee status of some of the complainants listed in the Determination, one question being whether three of those found to be employees were, in fact, managers for the purposes of the *Act*. The Employer argues that Mr. Jorge Esquivel, Mr. Tony Lopes and Mr. Jose Vieira are managers. Second, the Employer also questioned whether the amounts set out in the Determination were, in fact, payable in the 24 month period before the date of their complaint or termination. At the hearing, the Employer’s counsel conceded, following a review of the Director’s records during the morning break, that the amounts were, in fact, payable in that period. In the result, the only issue on the merits of the Determination, per se, was the management status of Mr. Esquivel, Mr. Lopes and Mr. Vieira. In my earlier decision, following the hearing, I concluded that they were foremen, or first line supervisors, not managers, and, therefore, employees for the purposes of the *Act*.

### THE CONSTITUTIONAL ISSUE

As noted on my earlier decision, the Employer also raised the issue of the constitutionality of the overtime and statutory holiday provisions in the *Act*. The Employer argued that these provisions contravened Section 2(d) of the Canadian Charter of Rights and Freedoms. In the circumstances, I decided that the constitutional issues could properly be severed from the issue of employee status.

On March 28, 2002, the Employer filed and served its constitutional challenge. On April 4, 2002, counsel for the Attorney General of British Columbia indicated that it wished to make submissions on the challenge. Before those submissions were made, however, the Employer withdrew the challenge by letter dated April 9, 2002. In light of that withdrawal, which was the only outstanding issue, I am of the view that the appeal must be dismissed.

**ORDER**

I order that the Determination dated April 23, 2001 be confirmed.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**