

An appeal

- by -

Fast Trac Enterprises Ltd.  
("Fast Trac")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2002/633

**DATE OF HEARING:** April 14, 2003

**DATE OF DECISION:** April 29, 2003

## DECISION

### APPEARANCES:

Albert G. Constantini, Vice-President	for Fast Trac Enterprises Ltd.
Gregory J. Arbour, Barrister & Solicitor	for Robert Glen
Adele Adamic, Barrister & Solicitor & Mark Hale, I.R.O.	for the Director of Employment Standards

### OVERVIEW

This is an appeal filed by Fast Trac Enterprises Ltd. (“Fast Trac”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Fast Trac appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on November 29th, 2002 (the “Determination”).

The Director’s delegate determined that Fast Trac owed its former employee, Robert Glen (“Glen”), the sum of \$4,317.46 on account of one week’s wages as compensation for length of service, statutory holiday pay, overtime pay, vacation pay and section 88 interest.

Fast Trac, in its appeal documents (prepared and filed by Mr. Albert G. Constantini on the company’s behalf), challenges the Determination on the basis of alleged errors of fact and law. In addition, Fast Trac says that the delegate’s investigation was tainted by breaches of the rules of natural justice.

This appeal was set for hearing at the Tribunal’s offices in Vancouver on April 14th, 2003. At the outset of the hearing, counsel for the Director made a motion that Fast Trac’s representative, Mr. Albert G. Constantini (“Constantini”), be prohibited from appearing as the agent for Fast Trac in these proceedings. Counsel for the Director did not object to Mr. Constantini appearing as a witness solely for the purpose of testifying about relevant facts and circumstances relating to Mr. Glen’s unpaid wage claim. Counsel for Mr. Glen supported the Director’s counsel’s motion.

After hearing all parties, I reserved decision on the motion and indicated that I would issue written reasons with respect to the motion and the further conduct of this appeal. Accordingly, these reasons address only those latter two matters.

### BACKGROUND FACTS

Many of the relevant facts regarding the Director’s motion are set out in a recent decision of the B.C. Supreme Court, *Fast Trac Enterprises Ltd. v. Riverfront Corporation Centre Ltd. et. al.*, 2002 BCSC 1399. Mr. Justice Taylor’s reasons for decision were issued on October 15th, 2002 and, as of the date of hearing of the Director’s motion, a formal order had not yet been entered.

The following factual summary is taken from Justice Taylor's reasons.

Mr. Constantini, a former lawyer, was disbarred as a result of various serious acts of malfeasance on April 4th, 1986. His misconduct led to parallel criminal charges for perjury and fabrication of evidence for which he was incarcerated. After his disbarment, Mr. Constantini continued to do legal work and otherwise represent various companies in which he was a shareholder, manager or "alter-ego".

On October 29th, 1992 Mr. Justice Thackray (as he then was) issued an order prohibiting Mr. Constantini from appearing in court on behalf of a company known as Dunhill Construction Ltd. in five separate actions and directed Dunhill to appoint new counsel. On January 8th, 1993, an essentially identical order was issued by Thackray, J. in four other Supreme Court actions involving Dunhill.

On August 12th, 1999, and as a result of an application filed by the Law Society of British Columbia ("Law Society"), Mr. Constantini consented to a Supreme Court order prohibiting him from engaging in the practice of law but this order specifically did not prohibit Mr. Constantini from: "Acting on behalf of corporations of which he is an officer or director, where [Constantini's] legal activities form a limited portion of his activities for that [corporation] and where he receives no remuneration directly for the provision of legal services."

Thereafter, and despite the Consent Order which specifically prohibited Mr. Constantini from holding himself out as a lawyer, he continued to describe himself on various occasions and in several court pleadings as "in-house counsel" or a "solicitor" or a "retired lawyer" acting for a particular corporate entity. Taylor, J. described these breaches of the Consent Order--which Mr. Constantini denied--as having occurred "and not out of mere inadvertence".

Counsel for the Law Society thus applied for a very wide-ranging prohibition preventing, *inter alia*, Mr. Constantini from "appear[ing] as counsel, advocate or representative in any proceeding". This application was largely successful. I quote from Taylor, J.'s decision:

[57] Counsel for the [Law Society] says that the time has come to prevent this mischief by simply denying Constantini the right to appear in the trial courts of this province.

[58] Despite Constantini's assurances that he will not repeat his past conduct, experience indicates that these are likely to be hollow promises. It is also clear that an order similar to one issued in August 1999 will also prove to be insufficient...

[63] The public is protected by ensuring that those who are unqualified, either in terms of competence or moral standing, are not given the right to practice law. It is evident that it was seen to be necessary to protect the public from Constantini, leading to his disbarment in 1986.

[64] Regardless of the wording of the *Legal Profession Act* with regard to who may or may not practice law, it is the courts that retain the discretion to permit persons other than barristers to be heard...

[69] ...What is germane to the issues discussed by McIntyre, J.A. [in *Venrose Holdings Ltd. v. Pacific Press Ltd.* (1978), 88 D.L.R. (3d) 523], is that the right of audience does not exist in absolute terms, rather, it is a privilege granted, albeit generously, to non-lawyers when necessary...

[74] The test to be applied when a person who is not a member of the Law Society seeks to represent a corporation is, in essence, a determination of whether it is necessary or proper that he or she do so. The term "necessary" refers to an economic reason, namely the financial inability to retain counsel. The term "proper" refers to whether the person seeking permission to appear is an

appropriate person under the circumstances, a determination which may require an examination of the track record and abilities of the applicant...

[79] It is clear from what has occurred since August, 1999 that it would be impossible to ensure Constantini's compliance with the terms of that or any other form of limiting order. Through the voluminous nature of the law suits and correspondences, as well as the plethora of affidavits of various litigants and counsel who have had first hand experience with Constantini's brand of litigation, there emerges a pattern of non-compliance. In the face of this, any assertions of future compliance by Mr. Constantini must be viewed as meaningless and certainly unreliable.

[80] Constantini has misrepresented himself in breach of s. 15(4)(a) of the *Legal Profession Act*. He has variously described himself as an in-house counsel and solicitor. He has also misrepresented the nature of the consent order, couching it in terms that imply court and [Law Society] authorization for him to conduct litigation in the manner that he does. The actual essence of that order was to permit exceptions, not to authorize conduct. His misrepresentations are not confined to litigants and counsel. Indeed, he has even perpetuated the myth of his status before courts whenever his appearances have been questioned...

[82] I am of the view that the terms of the August 1999 order cannot be meaningfully enforced because they are based upon a requirement that Constantini self-police--something that he has regrettably shown himself incapable of doing. The public can have no assurance that any injunctive order at this stage will be observed. Any detection of this kind of lack of observance is, at best, a random "catch as catch can" process.

[83] Constantini's manner of conduct toward both lay and represented litigants is, in my view, reason enough to deny him the right of audience in any proceeding before the trial courts of this Province.

[84] Accordingly, there will be an order denying Mr. Constantini the privilege of appearing on behalf of any corporation before this court and neither may he appear before the Provincial Court of British Columbia...

[89] However, for the reasons I have earlier expressed in terms of the [Law Society] application, Constantini is prohibited from providing any legal advice or services to any corporation or doing any act that constitutes the "practice of law" as defined by the *Legal Profession Act*.

## THE PARTIES' POSITIONS

Counsel for the Director submits that Mr. Justice Taylor's order extends to appearances before administrative tribunals and that Mr. Constantini's involvement in this appeal should be restricted to giving evidence about factual matters within his personal knowledge about Mr. Glen's unpaid wage claim. Counsel for the Director says that only a properly qualified lawyer ought to be given the right to appear and act as counsel on behalf of Fast Trac. Counsel for Mr. Glen supported the Director's counsel's position.

Mr. Constantini submitted that as a Fast Trac officer (he is neither a director or shareholder), he is entitled to appear and act as Fast Trac's representative in this proceeding. He further submits that as a "duly authorized officer" of Fast Trac he is entitled to appear on behalf of Fast Trac in any court in the province and that, in this matter, he is "giving legal advice to myself" and "acting for myself" since he appears to consider his personal interests and Fast Trac's interests to be coincident. Mr. Constantini asserts that his involvement in these proceedings as Fast Trac's representative does not contravene Taylor, J.'s order and that his representation of Fast Trac before the Tribunal does not amount to "practising law" as defined in the *Legal Profession Act*. Indeed, with respect to Taylor, J.'s order, Mr. Constantini submits: "While the

order...is under appeal (which will be heard sometime this fall) we take the position that same is not relevant to these proceedings” (March 30th, 2003 submission to the Tribunal). It should be noted that Mr. Constantini has not sought a stay of Taylor, J.’s order pending the hearing of the appeal.

## FINDINGS AND ANALYSIS

While the Tribunal does not have any formal rule governing the right of parties to be represented by an agent who is not a duly qualified lawyer, the Tribunal has ordinarily allowed parties to be represented by agents. In the case of a corporate party who is not represented by legal counsel, that party’s agent is, very often but not always, an officer or director of that firm. In general, the Tribunal’s only concern in the latter case is ensuring that the agent has been duly authorized by the corporation to appear and make submissions on its behalf.

In the absence of a formal rule, I would consider the Tribunal’s practice regarding appearances by agents to be governed by section 107 of the *Act* which allows the Tribunal, subject to its rules, to “conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing”.

In general, the Tribunal has authority over its own adjudicative process subject to the overarching constraint of the rules of natural justice (*D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Accordingly, for example, the Tribunal has issued orders for the exclusion of witnesses (*Collectrite Services Kelowna Ltd.*, B.C.E.S.T. Decision No. D240/00) and prohibiting one party from tape recording an appeal hearing (*Galter Holdings Ltd.*, B.C.E.S.T. Decision No. D289/00). Similarly, I am of the view that the Tribunal has the authority to refuse an audience to an agent who is not authorized to appear on behalf of a party or who is acting in an obstreperous or otherwise objectionable manner.

In the instant case, Mr. Constantini has been authorized to appear on behalf of Fast Trac and although he has aggressively pursued what he considers to be Fast Trac’s rights and interests, I cannot conclude that his conduct has been impermissibly objectionable or disruptive. Nevertheless, I cannot ignore Taylor, J.’s order nor the legal principles upon which it was founded.

Mr. Justice Taylor, at paragraphs 83 and 84 of his reasons (see above), specifically enjoined Mr. Constantini from appearing in either the B.C. Supreme Court or the B.C. Provincial Court “on behalf of *any* corporation”. This directive surely extends to Fast Trac. Even though Mr. Constantini does not apparently concede that latter point, he asserts, in any event, that the order does not extend to appearances before administrative tribunals including the Employment Standards Tribunal.

However, Taylor J.’s order also specifically enjoins Mr. Constantini “from providing any legal advice or services to any corporation or doing any act that constitutes the ‘practice of law’ as defined by the *Legal Profession Act*”.

Section 1 of the *Legal Profession Act* states that the:

“practice of law” includes

- (a) appearing as counsel or advocate,
- (b) drawing, revising or settling...
  - (ii) a document for use in a proceeding, judicial or extrajudicial...

- (iv) a document relating in any way to a proceeding under a statute of Canada or British Columbia...
- (e) giving legal advice...
- (g) making a representation by a person that he or she is qualified or entitled to do anything referred to in paragraphs (a) to (e)...

The material before me unequivocally shows that Mr. Constantini, at least in the context of the instant proceedings, is “practising law” in that he:

- made submissions and appeared before the Tribunal, not merely as a witness but, rather, expressly as counsel or advocate for Fast Trac;
- prepared and filed a notice of appeal and many other submissions as counsel or advocate for Fast Trac;
- provided legal advice to Fast Trac with respect to its rights and obligations under the *Act* regarding Mr. Glen’s unpaid wage complaint; and
- made representations during the course of these proceedings that he i) is “in-house counsel for [Fast Trac]” (November 23rd, 2001 submissions to the Director); ii) “has practised law in this province since 1961” (February 8th, 2002 submission to the Director); iii) has been “appearing before the courts of this province and quasi judicial boards for over forty-two years” (January 29th, 2003 submission to the Director).

Despite the foregoing, the section 1 definition also provides that certain activities do not constitute practising law including “any of those acts [listed in subsections (a) to (g)] if not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed”. Mr. Constantini relies on this latter exclusion. I make two observations regarding this submission.

First, Taylor J.’s order, at paragraph 89, has *two* separate components, namely, “providing any legal advice or services to any corporation” (an order that encompasses Fast Trac) *or* “doing any act that constitutes the ‘practice of law’ as defined by the *Legal Profession Act*”. If Mr. Constantini’s representation of Fast Trac in these proceedings does not contravene the second component, in my view, it most certainly contravenes the first.

Second, the “*pro bono*” exclusion must be read in light of subsection 15(3)(a) of the *Legal Profession Act* which states that the *pro bono* exception *does not apply* if the person providing the *pro bono* legal services “is a member or former member of [the Law Society] who is suspended or has been disbarred...”. Mr. Constantini was disbarred on April 4th, 1986 and his membership has never been reinstated.

Finally, Mr. Constantini says that he is entitled to the benefit of subsection 15(1)(a) of the *Legal Profession Act*. This provision states that a person is not practising law if they are “an individual party to a proceeding acting without counsel solely on his or her behalf”. Mr. Constantini, at one point during argument before me, maintained that he was acting on his own behalf but later resiled from that position. Regardless of what Mr. Constantini’s actual position may be, the simple fact is that he is *not* a party to these proceedings; his status in this appeal is solely that of a representative of Fast Trac. This appeal does not concern a section 96 determination issued against him in his personal capacity. Accordingly, he cannot rely on the section 15(1)(a) exemption.

In light of the foregoing, I order that Mr. Constantini be prohibited from making any legal argument or legal submissions on behalf of Fast Trac in this appeal. To put it another way, my order simply recognizes and effectuates the terms of Taylor, J.'s valid and subsisting order. My order does not prohibit Mr. Constantini from providing evidence, based on his own personal knowledge, regarding the relevant facts and circumstances with respect to Mr. Glen's unpaid wage claim.

## **FURTHER DIRECTIONS AND ORDERS**

At the conclusion of the hearing of the motion, all parties expressed the view that this appeal could be adjudicated on the basis of written submissions. In my view, this is not a particularly complicated matter and can readily be adjudicated solely on the basis of written submissions (see section 107 of the *Act*). I might add that the parties have previously filed detailed and lengthy submissions and I would not expect, in the ordinary course of events, that any party would have anything further to meaningfully add to the material that has already been filed. Nevertheless, I will allow the parties one final opportunity to provide submissions to the Tribunal.

Mr. Constantini vigorously expressed the view that regardless of my ruling on the motion, Fast Trac would not be retaining independent legal counsel to act on its behalf. Even so, I think it appropriate to give Fast Trac one last opportunity to reconsider its position. Accordingly, all parties will be given 21 days from the issuance of these reasons to file, if they choose to do so, a final submission with respect to this matter. Mr. Constantini, for his part, may only file a submission setting out the relevant facts and documents within his own personal knowledge. If Fast Trac wishes to file any legal argument, that submission may only be prepared and filed by a barrister and solicitor duly qualified to practise law in the province of British Columbia.

The Tribunal's Administrator will advise the parties regarding the actual deadline by which all final submissions must be received.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**