

An appeal

- by -

683115 B.C. Ltd. operating as Certified Drywall
(“Certified Drywall”)

- 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.: 2005A/102

DATE OF HEARING: November 23, 2005

DATE OF DECISION: December 20, 2005

DECISION

SUBMISSIONS

Douglas Dent	on behalf of 683115 B.C. Ltd.
Alan Faulkner	on his own behalf
Ruth Atterton	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by 683115 B.C. Ltd. operating as Certified Drywall (“Certified Drywall”) of a Determination that was issued on May 6, 2005 by a delegate of the Director of Employment Standards. The Determination found that Certified Drywall had contravened Part 3, Sections 18 and 28, Part 4, Section 40, Part 5, Section 45 and Part 7, Section 58 of the *Act* in respect of the employment of Alan Faulkner (“Faulkner”) and ordered Certified Drywall to pay Faulkner an amount of \$10,751.31, an amount which included wages and interest.
2. The delegate also imposed an administrative penalty on Certified Drywall under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$2500.00.
3. The total amount of the Determination was \$13,251,31.
4. Faulkner has not appealed the Determination, although he has submitted a request to review the decision of the Director to calculate his wage claim on minimum wage rate rather than on a rate of \$27.00 or \$30.00 an hour, which he says accords with the rate he was paid by Certified Drywall for extra work and which approximates the industry rate for a ticketed journeyman performing supervisory functions. This request represents an appeal of the Determination which, in the circumstances, cannot be considered by the Tribunal as it does not comply with the statutory requirements for an appeal found in Section 112 of the *Act*. Consequently, even if the appeal is denied in whole or in part, Faulkner’s request will not be accepted or considered by the Tribunal.
5. Certified Drywall says the delegate committed several errors in law and failed to observe principles of natural justice in making the Determination. Certified Drywall also says evidence has become available which was not available when the Determination was made. I will attempt to summarize the essential elements of the grounds of appeal:
 - (i) the delegate erred by attributing all of the liability to the corporate entity of Certified Drywall when that entity did not exist during most of the period for which wages were found to be owing;
 - (ii) the delegate was biased and that bias affected how the investigation was conducted and coloured findings of fact made by the delegate;

- (iii) the delegate erred in law in deciding Faulkner was an employee for the purposes of the *Act*;
- (iv) the delegate failed to observe principles of natural justice by concluding the investigation and issuing the Determination knowing that Certified Drywall had not submitted all of the information relevant to the claim made by Faulkner;
- (v) there is additional relevant evidence that was not provided to the delegate because the delegate unreasonably imposed a deadline which counsel for Certified Drywall was unable to meet; and
- (vi) even if Faulkner was an employee for the purposes of the *Act*, the delegate erred in calculating the amount of wages owed to him.

6. The allegation of bias is based on an assertion that the delegate who investigated and decided Faulkner's complaint openly admitted in conversation with counsel for Certified Drywall that she held a bias in favour of deciding that an employer/employee relationship exists. That allegation was not denied by the delegate in her reply to the appeal. The allegation and the absence of any response to the allegation has raised a concern for the Tribunal about whether the investigation and adjudication by the delegate was unbiased and whether the question of Faulkner's status under the *Act* was objectively decided. Applying the test for reasonable apprehension of bias adopted by the Tribunal (see, among other cases, *Dusty Investments Inc. (dba Honda North)*, BCEST #D043/99 (Reconsideration of BCEST #101/98)), I am satisfied the evidence gives rise to a reasonable apprehension of bias in the investigation and Determination as it relates to the status of Faulkner under the *Act*. There is no finding of any actual bias on the part of the delegate, but clearly the comment made, and not denied, gives rise to a reasonable concern as to her neutrality on that issue.
7. As a result of this conclusion, and consistent with the approach of the Tribunal in other cases where a reasonable apprehension of bias has been established, the Tribunal has decided it is appropriate to provide Certified Drywall with an opportunity to present its evidence, including any additional evidence, and argument on Faulkner's status under the *Act* to a panel of the Tribunal at an oral hearing. The parties were advised that an oral hearing on the appeal would be held. It should be noted at this juncture that in any event Certified Drywall had requested an oral hearing in the appeal, citing two reasons for the request - to allow additional information and to allow for an assessment of credibility. It is probable that except for the concern on the allegation of bias, no oral hearing would have been conducted.
8. At a pre-conference hearing, attended by counsel for Certified Drywall and Faulkner, the parties were advised that the only issue to be addressed in the oral hearing would be the issue of Faulkner's status under the *Act*. This direction was based on a conclusion, which was conveyed to the parties, that should Faulkner be found to be an employee under the *Act*, any question concerning the wage calculations made by the delegate could be decided from the material in the file, with consideration being given to what was added in the appeal submissions.
9. The parties were also advised at the pre-hearing conference that the subsection 112(5) Record, the written submissions of the parties and the additional information and evidence provided by Certified Drywall with the appeal and by Faulkner in his reply to the appeal would be considered in addressing the issue of Faulkner's status under the *Act* without the necessity of resubmitting all of that material in the oral hearing. Finally, the parties were given leave to submit further evidence, subject to some conditions

(which were met by both parties), and further argument at the oral hearing. The procedure adopted, conveyed to the parties and agreed by them recognizes that procedurally an appeal to the Tribunal should reflect the statutory purposes and objectives of fairness and efficiency.

ISSUE

10. The issue in this appeal is whether the delegate erred in deciding Faulkner was an employee of Certified Drywall for the purposes of the *Act* and, if Faulkner is an employee under the *Act*, whether the delegate erred in calculating the wages owed and attributing all of the liability for the payment of wages to the corporate entity.

THE FACTS

11. Certified Drywall is a construction company performing construction on commercial and residential projects in the province. The Determination noted that Certified Drywall, as a corporate entity, was a successor to an unincorporated business carried on by the principals of Certified Drywall, Eric and Melody Sokolowski, under the same name. The term Certified Drywall was used in the Determination to refer to both the successor company and the predecessor business. It is convenient for the purposes of making this decision to continue to utilize the single term to describe both entities.
12. Faulkner was employed, using that term in a broad and neutral sense, by Certified Drywall as a drywall installer. In June 2004, Faulkner filed a complaint under the *Act* alleging Certified Drywall had contravened the *Act* by failing to pay regular wages, overtime wages, annual vacation and statutory holiday pay and length of service compensation. He also claimed Certified Drywall had made deductions from his wages. The key assertions of fact in the complaint were:
 - Faulkner started working for Certified Drywall in 2000;
 - He was hired as an apprentice tapper;
 - He was paid \$12 an hour at the start;
 - As he continued to work with Certified Drywall his wage was increased to \$20 an hour and then to \$35.00 an hour for his last 8 months;
 - He periodically asked for “paperwork” and inquired about “taxes” and was given vague assurances;
 - Deductions were made from his wages to cover the cost of living in a house owned by Mr. Sokolowski;
 - He paid expenses related to the operation of the company truck, travelling to company projects and rooming in towns where the projects were being done;
 - He was told, commencing sometime in 2004, that he was a “sub-contractor” and Certified Drywall would not be providing any paperwork;

- He stopped working for Certified Drywall on February 24, 2004;
- He drove a Certified Drywall truck and carried Certified Drywall business cards;
- He was sent to pick up men and materials to take to job sites for Certified Drywall;
- He collected, or recorded, the hours worked by himself and the other workers on his crew and faxed them to Certified Drywall;
- The money to pay him and the other workers on his crew was often deposited into his bank account and he was told to pay the other workers himself;
- Revenue Canada had ruled that he was an employee of Certified Drywall and provided him with EI benefits.

13. The complaint included more than 100 pages of material.

14. Certified Drywall was notified of the complaint in a letter dated July 27, 2004 from the delegate. It briefly outlined the nature and the amount of the claim being made by Faulkner. The letter requested a response to the complaint from Certified Drywall by August 16, 2004, which included a request to provide written reasons, payroll information and any other supporting documents if the claim was disputed. On or about August 13, 2004, as a result of a discussion between the delegate and legal counsel for Certified Drywall, the time for response was extended to September 13, 2004. The response of Certified Drywall, which is substantial and includes a submission prepared by legal counsel for Certified Drywall, a document containing comments signed by Mrs. Sokolowski and approximately 150 pages of supporting material, was delivered to the delegate on September 15, 2004. Included in the material were eight documents entitled "Sub-Contractor Questionnaire". The document itself had been prepared by Certified Drywall and filled in by each of eight individuals who had, apparently worked with Faulkner. The general position of Certified Drywall to the complaint was succinctly set out in the following passage:

In a nutshell, Certified Drywall's response is based on one very simple fact: Allan Faulkner was NOT an employee of Certified Drywall; he was a sub-contractor.

15. The submission provides a substantive analysis of the position of Certified Drywall which includes the following points:

- from early 2000 to the end of 2002, Faulkner was employed by Lorna Ashton, who sub-contracted with Certified Drywall;
- from January 1, 2003 to approximately February 23, 2004, Faulkner sub-contracted directly with Certified Drywall, during which time he engaged and paid several persons as his employees;
- the tax returns filed by Faulkner and Lorna Ashton during this period were relevant to a consideration of Faulkner's status as a sub-contractor;
- Faulkner was paid amounts that far exceeded an amount that would be paid to any one employee at the hourly rates at which Certified Drywall engaged employees;

- the amounts paid to Faulkner by Certified Drywall during the period he sub-contracted directly, which were listed in the submission, supported a conclusion that he hired and paid his own employees;
- Faulkner's ability to set and control his own hours of work was dictated by the realities of the demand and flow of work on a construction project and not by Certified Drywall;
- Faulkner's relatively long relationship with Certified Drywall was explained by two factors: first, he was a reputable and reliable sub-contractor; and Certified Drywall was able to generate a steady flow of work for him;
- Faulkner supplied his own tools; and
- Faulkner had a chance to profit through his endeavours and exposed himself to the risk of loss.

16. That submission was provided to Faulkner, who made a response to the delegate on October 4, 2004.
17. This response was faxed to legal counsel for Certified Drywall on October 6, 2004. On October 18, 2004, legal counsel for Certified Drywall corresponded with the delegate, indicating some of the pages of the October 6 fax were not received and raising an allegation that Faulkner had fabricated the complaint against Certified Drywall in order to "obtain a measure of revenge and monetary reward" against one of the principals of Certified Drywall. There was also some comment about whether the delegate had interviewed the individuals identified by Certified Drywall as being able to provide relevant information concerning the nature of the relationship between Certified Drywall and Faulkner.
18. On October 26, 2004, the delegate corresponded with counsel for Certified Drywall, enclosing a complete copy of the reply from Faulkner, indicating an intention to interview as many persons as necessary to ascertain the relationship between Faulkner and Certified Drywall, making reference to a decision on Faulkner's status by Revenue Canada and requesting a response from Certified Drywall on some of the matters raised by Faulkner. Counsel for Certified Drywall provided a partial response to the delegate in a letter dated November 2, 2004. The letter states a more comprehensive reply would be filed when counsel received instructions from Certified Drywall.
19. In a letter dated November 29, 2004, the delegate asked counsel for Certified Drywall for any further information regarding Faulkner's allegations and for assistance in locating any of the witnesses identified in Certified Drywall's submissions or, alternatively, to provide the delegate with any evidence those witnesses might have. In another letter of the same date, the delegate identified several witnesses for whom messages had been left but from whom no reply had been received.
20. On or about February 24, 2004, Faulkner submitted additional information to the delegate. This information was forwarded to counsel for Certified Drywall in a letter dated February 24, 2005 asking for any comment. Counsel acknowledged receipt of the information in a letter dated March 3, 2005 which indicated he had forwarded the information to Certified Drywall for their consideration.
21. In a letter dated March 5, 2005, the delegate notified counsel for Certified Drywall that the process of writing the Determination on Faulkner's complaint was starting and asking counsel to advise Certified Drywall that everything submitted prior to writing the Determination would be considered. The letter indicated a hope that the Determination would be completed by March 31, 2005.

22. In a letter dated March 12, 2005, counsel for Certified Drywall filed a submission to the delegate which addressed the following points:
- notwithstanding the *Act* limits liability to a six month window, the entire history of the relationship between Faulkner and Certified Drywall has to be examined on the issue of his status;
 - Certified Drywall supplied apparel to many of the sub-contractors when they complained about their clothing expenses and viewed it as a way of obtaining a little cheap advertising for Certified Drywall.
23. Counsel also expressed some concern that the delegate had not contacted all of the individuals “who confirmed they had been employees of Faulkner” and offered his assistance in having the individuals contact the Director.
24. In a letter dated March 12, 2005, counsel for Certified Drywall advised the delegate he would prepare final submissions “within the next week or so”. In a letter dated March 31, 2005, counsel for Certified Drywall wrote the delegate advising he expected to submit further information by April 4, 2005.
25. In a letter to counsel for Certified Drywall dated March 31, 2005, the delegate asked for clarification on five matters identified in the letter. The letter included the following:
- . . . if I do not get a response I will proceed with the Determination without the information.
26. In a letter dated April 4, 2005, counsel for Certified Drywall acknowledged receipt of this letter and advised that he expected to submit further information by April 6, 2005. In a letter dated April 6, 2005, counsel for Certified Drywall advised the delegate that his clients were on vacation and not able to instruct him, indicating he expected to submit further information by April 12, 2005. In a letter dated April 12, 2005, counsel for Certified Drywall advised the delegate that his clients were going to be on vacation longer than he originally understood and would not be able to provide their response to the delegate’s March 31, 2005 letter for another week.
27. The material suggests some verbal messages passed between the delegate and counsel for Certified Drywall after April 12, but no written response to the March 31 letter was received by the delegate prior to the issuance of the Determination. Certified Drywall has submitted their response to the March 31 letter with this appeal in a two page document which bears the date April 18, 2005. As well, the appeal includes two pages prepared by Certified Drywall summarizing hours worked by Faulkner on various projects between August 23, 2003 and February 24, 2004 and payments made to Faulkner by Certified Drywall over that same period. Those documents have been added to the material in this appeal.
28. With his reply to the appeal, Faulkner has attached a substantial number of documents. Many of these documents are included in the record. Some of them are new, but were filed to support aspects of earlier submissions made by Faulkner.
29. At the hearing, Certified Drywall presented five witnesses. I need only summarize the evidence of each.

30. Chris Parfitt said he worked for Faulkner from sometime in 2002, did a few jobs - he identified a job in the British Properties (West Vancouver), a big job in Vancouver and a house in Whistler - then he quit. He said Faulkner “took him on”. In his view, he was working for Faulkner. Faulkner paid him for his work with a cheque from his personal account. He described a job in Vancouver where the crew had done some work for which they were being paid 20¢ a square foot for the drywall that was installed. There was a discussion about what each member of the crew would be paid for their part in that work. He said the crew decided that three of them would be paid an hourly rate for their work, which would come “off the top”, and Mr. Parfitt and Faulkner would “split the rest”. Certified Drywall was involved in all of the jobs that he worked on. He said that about a year ago, Faulkner had approached him and asked for a letter saying Parfitt had worked for Certified Drywall and that he had not been paid. Mr. Parfitt says he told Faulkner that he had finally been paid for his work, so he was OK and would not write any letter. Mr. Parfitt identified the Sub-Contractor Questionnaire that he had filled out and acknowledged its truthfulness. Mr. Parfitt agreed that he was picked up and transported to each job by Faulkner in a “Certified Drywall” vehicle. He said that Faulkner told him Mr. Sokolowski set the rate of pay on the jobs he worked.
31. Mr. Parfitt did not say Faulkner asked him to fabricate a story that he had been an employee of Certified Drywall, did not say that he was hired by Faulkner as an employee (which in any event would have contradicted what he indicated in the questionnaire) and did not say he worked for Faulkner on projects where Certified Drywall was not involved.
32. Darryl Schwanke said he started working sometime in 2000 doing casual labour for Certified Drywall. He has known Mr. Sokolowski for about 10 years and Faulkner for about 5 years. He said Faulkner contracted with Certified Drywall to do the “boarding”. He said he was mainly a “finisher” and that he and Faulkner would often be on the same project doing different parts of the drywalling job. Mr. Schwanke is paid based on footage. He invoices Certified Drywall for his work. There is no written contract between he and Certified Drywall. He has worked exclusively for Certified Drywall as, “they always had enough work”. Mr. Schwanke identified the Sub-Contractor Questionnaire that he had filled out and acknowledged its truthfulness. In some respects his oral evidence was inconsistent with the information he provided in the questionnaire. There was an attempt to clarify obvious inconsistencies. Mr. Schwanke said he worked for Faulkner when he helped Faulkner do some boarding and that Faulkner sometimes worked for Mr. Schwanke doing taping and finishing. He would charge Certified Drywall for any taping and finishing work Faulkner did. He did not say how Faulkner would receive payment for that work. He had never received a T-4 from Certified Drywall.
33. Mr. Schwanke did not say why he believed himself to be employed by Faulkner and did not say that he believed his status with Certified Drywall to be the same as that of Faulkner.
34. Dale Steeves said he is Mr. Sokolowski’s brother-in-law. He said he presently earns his living by sub-contracting his services, mostly but not exclusively, to Certified Drywall. He said Faulkner was working for Certified Drywall as a sub-contractor and he did some work for Faulkner, including removing scrap. He issued no bills for his work and was supposed to be paid 2¢ a square foot by Faulkner for scrap removal, but was not fully paid. He was eventually paid by Certified Drywall for this work. Mr. Steeves said he started to work “directly” for Certified Drywall in 2002. He considers himself an independent sub-contractor and files his tax returns on that basis. He does boarding, taping and scrap removal and gets paid for that work on the amount of board feet produced. Mr. Steeves is not registered with WCB but has had his own GST number for just over a year from the date he testified. Mr. Steeves identified the Sub-Contractor Questionnaire that he had filled out and acknowledged its truthfulness.

35. Mrs. Sokolowski said she has been the office administrator for Certified Drywall since 1995. She rarely has direct contact with people who work for Certified Drywall. She issues most of the cheques, T-4 slips and, starting in 2002, the T-5018 slips. She said that when Certified Drywall was a proprietorship, the process for paying those who worked for Certified Drywall, which she identified as sub-contractors and hourly, was quite informal. Usually, Mr. Sokolowski would tell her how much to pay to any person and she would issue payment in that amount. The amounts were apparently not supported by any invoices or other record. Revenue Canada did an audit a few years ago and she was told by them to issue a T-4 to Faulkner. Revenue Canada found that Faulkner was an employee. Certified Drywall appealed the decision, but has since withdrawn that appeal. Mrs. Sokolowski believes they are able to reinstate the appeal, but no decision had been made by Certified Drywall whether they will.
36. She said Certified Drywall was not “on top” of the paperwork in 2003; that when she wrote cheques, “it was all verbal”; sometimes she would be told what the cheque was for, sometimes not. She said she prepared the Sub-Contractor Questionnaire. If a cheque was made out by Mr. Sokolowski, it was usually because he was on the site at the time. Mr. Sokolowski continues to go from job-to-job, checking on the work being done. At the present time, all cheques are computer generated and there is better control.
37. Since 2001, Mrs. Sokolowski has owned and operated a sign company that produces logos, graphics and other designs. This company makes clothing for businesses, including Certified Drywall. Mrs. Sokolowski is a director of Certified Drywall. Mr. Sokolowski does the job sites and she does the bookwork. She said that Certified Drywall is the drywall contractor and hires sub-contractors to do the work. She acknowledged the several vehicles pictured in the material submitted by Faulkner are all registered to Certified Drywall, although she said the acquisition of some of those vehicles by Certified Drywall was for reasons relating to the personal circumstances of some of the “sub-contractors” (including Faulkner) and they were in the process of transferring some of the vehicles to some of those individuals.
38. Mr. Sokolowski is a principal of Certified Drywall. He said Faulkner did boarding for Certified Drywall as a sub-contractor on a handshake agreement. He said much of the relationship between he and Faulkner, and how it was administered, is explained by their friendship. He said “every house we did was the same . . . I bid on a house and contracted out parts of it . . . he did his job, hired his guys”. Mr. Sokolowski described the process of bidding a job. He would measure up the prospective job, determining, as a starting point, how many square feet of board would be involved. He then would break down all of his costs, which he identified as office, boarding (which was typically costed out at 18-20¢ a square foot), taping, beading, stipple and clean-up, add his 20 - 30% profit and submit the bid. Later he said if he got the job, he would order the material required for it, call Faulkner and say, “when can you go in?”
39. He said Certified Drywall had expanded rapidly over a three year period prior to early 2004. He said that expansion was hard on everyone. He said it “all went to hell” with Faulkner in one day and Faulkner left. There was an issue about Devon Crosby not getting paid. Certified Drywall paid some people, including Devon Crosby, amounts of money. Mr. Sokolowski said Devon Crosby was Faulkner’s “employee”; he worked for Faulkner.
40. Mr. Sokolowski described his own role on a job as being like a “project manager”. He had two or three jobs going at once during 2003 and had to run around and make sure the expectations of the clients were being met. He described how extra work and changes were handled, saying he and Faulkner would “barter” about how much Faulkner would be paid for extra work or changes. Usually, Faulkner was paid

an hourly rate for that work. Mr. Sokolowski would put a mark up on that rate and bill the extra work or changes to the client through Certified Drywall. Mr. Sokolowski said getting paid for extra work is sometimes difficult.

41. Mr. Sokolowski described part of his involvement with the job schedule as being to put in more people, by moving sub-contactors from one job to another. The example he provided of this involvement related to the day Faulkner quit. He said Faulkner was on a job with “Rob and Dave”. He said Faulkner was “the boss” on that job. Mr. Sokolowski had just had a “blow-out” with Mr. Crosby about his son not getting paid and he called Faulkner on the job. He said Faulkner got upset, told Mr. Sokolowski he’d had enough and left the job. Faulkner would not answer any of Mr. Sokolowski’s subsequent calls. He thought his “helpers” - Rob and Dave - had also left. He said, “I had a job that I had to get done. I sent four men (identified as Chris Parfitt, Grant (no last name given) and his brother and Dale Steeves) in there to help out. I lost 1½ days because of all this stuff, that is a lot to lose on a job.” He described how he would schedule eight to ten days for the boarders to get their part of the job done before he sent in the tapers.
42. Mr. Sokolowski described how Faulkner came to work for Certified Drywall and how payments were made to him early in the relationship. He indicated that at some point in 2003, Certified Drywall started to put references on the cheques and started getting invoices for the work done. He said Faulkner may have bid on a job for Certified Drywall that he did not work on, but did not identify what job or jobs that might have been. He said he supplied a vehicle to Faulkner, and to “other friends” (he identified Darryl Schwanke and Dale Steeves). He characterized these vehicles as “personal vehicles”, but said they were also used as company vehicles. He said Certified Drywall acquired those vehicles as personal favours to the individuals because those individuals’ personal circumstances would not allow them to purchase the vehicle directly. He said Certified Drywall provided uniforms and t-shirts as part of “an image thing” and because some of the workers - the boarders and tapers particularly - were complaining about their clothes being ruined. He said it was “part friendship, part business”.
43. Mr. Sokolowski said Certified Drywall typically bid \$1.20 - \$1.30 a square foot for a drywall job, 18-20¢ of which was paid for boarding.
44. Faulkner presented evidence from two witnesses in addition to his own evidence.
45. Gary Crosby is the father of Devon Crosby. He said he met Faulkner in 2002, or thereabouts, when Mr. Sokolowski was moving into the house next door to him. He said he introduced himself to Mr. Sokolowski and was, in turn, introduced to Faulkner by Mr. Sokolowski who referred to Faulkner as “his foreman”. He said he was talking to Faulkner over the fence one day and asked if Certified Drywall was hiring. Faulkner replied that he would call Mr. Sokolowski and immediately made a telephone call in front of Mr. Crosby. He said his son started work with Certified Drywall on a job in Bridge Lake. He said his son worked for about two months and got paid only about 30% of what he had earned. His son was issued a T-5018 from Certified Drywall. He said he tried to get his son’s money from Certified Drywall and spoke to Mr. Sokolowski. He also tried to get a T-4 from Certified Drywall but was told his son was a sub-contractor, a notion which Mr. Crosby said he found unacceptable since his son was a minor at the time. He said that in any event, he asked Certified Drywall to provide him with a receipt for all of the charges imposed on him by Certified Drywall as they could be used as tax deductions. No receipts were ever provided. He said in his view, his son was never an employee of Faulkner. He said he never saw his son picked up for work in anything other than a Certified Drywall vehicle, which was usually towing a Certified Drywall trailer.

46. He said he talked to Employment Standards on his son's behalf, but was too late file a complaint.
47. He said his son could not testify directly as he was in Kamloops attending school. He said his son worked for Certified Drywall out of town for about 4 or 5 weeks in 2003 and while out of town stayed in a place called "Annie's Attic" which was supplied by Certified Drywall.
48. Mr. Crosby did not say he saw Mr. Sokolowski controlling or directing any work. He said nothing about any person coming to take Faulkner's tools, truck and cell phone or about Faulkner being fired. There was no reference to any video tape.
49. Danny McDonald said he was not an employee of Faulkner. He was hired by Mr. Sokolowski in November or December 2001 and worked on Mr. Sokolowski's house at Bridge Lake. He had worked for a couple of hours before he ever met Faulkner. He understood Faulkner was a supervisor. He said there were a number of people on the crew on that job. He was paid by Mr. Sokolowski and was picked up and driven to work in a Certified Drywall vehicle, sometimes one driven by Faulkner, other times by one driven by Dale Steeves.
50. He got a t-shirt and a T-5018. He was paid hourly, kept track of his own hours and gave those hours to Certified Drywall. He worked in Whistler and on other jobs for Certified Drywall. He stopped working for Certified Drywall in early 2003. Mr. Sokolowski set his rate of pay. Deductions were made from his hourly wage.
51. He is now working for Faulkner. While he was with Certified Drywall, he talked with Mr. Sokolowski directly. Faulkner instructed him on what to do on the jobsite. He thought Dale Steeves was another supervisor. He usually gave his hours directly to Mr. Sokolowski. He received his pay by both cheque and cash. He got the cash from Mr. or Mrs. Sokolowski and, on a few occasions, from Faulkner after talking with Mr. Sokolowski.
52. Faulkner identified and provided evidence on the documents he submitted with his reply to the appeal. He answered questions concerning cheques that had been made out to Lorna Ashton by Certified Drywall in 2000 and 2001. He said he used money that was paid to him by Certified Drywall on specific cheques to pay other people, as he was instructed to do by Mr. Sokolowski.
53. The delegate made findings of fact in the Determination. While I am not bound by these findings of fact, having accepted there is a reasonable apprehension of bias that might have coloured those findings and the conclusions drawn from them, it is appropriate to identify what findings were made and what conclusions were drawn in order to test their validity against a neutral and objective examination of the Record, the additional material and the evidence given in the oral hearing. The following represents only a summary and is exclusive of the reasons provided and evidence relied on which led the delegate to her findings and conclusions:
- Certified Drywall hired Faulkner and directed and controlled when and where Faulkner would work;
 - Certified Drywall allowed Faulkner to perform work normally done by an employee, including dry walling and supervising staff;

- Certified Drywall set the rate of pay for Faulkner, requested Faulkner to complete time sheets for both him and for other staff on site and terminated Faulkner in a manner more consistent with an employer/employee relationship than a contractual relationship;
- Faulkner agreed to work under the guise of an independent contractor;
- The relationship between Faulkner and Certified Drywall had not changed in the period from early 2000 to February 2004 - Certified Drywall would bid a job, including the work Faulkner did, would direct Faulkner to where and when he was working, would require Faulkner to complete a Certified Drywall time sheet showing what work he had done and would pay Faulkner on the basis of the number of hours worked or board feet that he laid;
- Faulkner carried Certified Drywall business cards indicating he was an installation supervisor for Certified Drywall, drove a Certified Drywall vehicle with Certified Drywall logos and wore a Certified Drywall uniform;
- When Faulkner was terminated, the persons identified by Certified Drywall as Faulkner's crew continued to work for Certified Drywall;
- Certified Drywall instructed Faulkner how much the other staff were to be paid and deposited an amount of money into Faulkner's account which Certified Drywall decided was sufficient to pay the other staff and Faulkner;
- There was no evidence from Certified Drywall showing how Faulkner was remunerated;
- The evidence provided by the witnesses whose names were submitted by Certified Drywall suggested it was Certified Drywall who had final control of their work and wages, although it was clear Faulkner was their supervisor;
- There was no evidence that Faulkner had a chance of profit or risk of loss in any of the work he performed and had no investment in Certified Drywall;
- It was not disputed that Faulkner had no knowledge of the amount of any bids made by Certified Drywall for a project;
- Faulkner's remuneration was based solely on the daily hours of work he submitted to Certified Drywall and were unrelated to any profit made by Certified Drywall on a project;
- Faulkner's responsibilities as a drywaller, framer and supervisor were integral to Certified Drywall's business;
- Certified Drywall bid on a project assuming Faulkner would be their supervisor and would perform the work as required.

^{54.} In calculating the wages owed to Faulkner, the delegate accepted his record of hours worked as being correct, noting that Mrs. Sokolowski, one of the principals of Certified Drywall, had indicated she could provide the Director with Faulkner's daily hours of work, but had not done so. An attempt has been made in this appeal to rectify that omission.

ARGUMENT AND ANALYSIS

55. The grounds upon which an appeal may be made are 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 made.

56. An appeal is not a complete re-investigation of the complaint, it is an error correction process.

57. I shall first deal with the status of Faulkner under the *Act*. If I find he was not an employee, it will not be necessary to address whether the delegate erred in allocating all of the wage liability to the corporate entity and whether the delegate erred in calculating the wages owed.

58. In my view, any concerns about whether the delegate failed to comply with principles of natural justice or whether the delegate was biased no longer need to be addressed. Even accepting there have been natural justice breaches by the delegate, there is a line of authority that natural justice breaches at one level of administrative decision-making can, in some cases, be cured by subsequent administrative proceedings at a higher level. I have conducted a hearing based on the existence of a reasonable apprehension of bias and made findings based on the evidence provided and the submissions made by the parties during both the complaint and appeal process and the hearing before me. In view of my findings on the merits following the hearing before me, any breach of natural justice committed by the delegate and any concerns over potential bias has been cured in these appeal proceedings as the parties have had the opportunity to address the issues raised with respect to the alleged denial of natural justice both through the appeal process and through the oral hearing (*Cyberbc.Com AD & Host Services Inc.*, BC EST #RD344/02; *O'Reilly*, BC EST #RD165/02 and *Modern Logic Inc.*, BC EST #D151/02).

59. Counsel for Certified Drywall submits Faulkner was not an employee under the *Act*, but was an independent contractor. He says the relationship between Faulkner and Certified Drywall should be assessed by examining that relationship from its beginning in 2000 to its end in February 2004. He says the historical nature of the relationship is important. Counsel for Certified Drywall argues that there are several aspects of the relationship which demonstrate Faulkner was an independent contractor and not an employee of Certified Drywall:

- Certified Drywall issued no T-4's to Faulkner during the time he worked;
- Faulkner agreed to work as an independent contractor;
- While Certified Drywall bid the jobs on which Faulkner worked, the work Faulkner did was sub-contracted to him and he had the choice of accepting the work or not;
- Faulkner's work was not supervised by Certified Drywall;
- There is no evidence that Certified Drywall "directed and controlled" when and where Faulkner would work;

- Certified Drywall had no role in determining Faulkner’s hours of work; they were set by Faulkner himself;
- Faulkner hired people to work for him and paid them himself;
- Certified Drywall and Faulkner negotiated a contract rate of compensation for the work done by Faulkner;
- Faulkner had his own tools;
- Faulkner’s abandonment of the work he was performing on a job site in February 2004 is more consistent with a sub-contractor abandoning his contract than with an employee being terminated;
- The length of the relationship between Certified Drywall and Faulkner is equally consistent with a relationship between a contractor and trusted sub-contractor as with an employment relationship;
- No inference or conclusion can be drawn from the fact that Faulkner, and other workers on Certified Drywall jobs, wore t-shirts and ball caps bearing the Certified Drywall logo;
- The compensation provided to Faulkner is consistent with a “cost-plus” contract in the construction industry;
- Faulkner had a chance to profit on the work he performed and carried a risk of loss;
- The “integration” of Faulkner in the business of Certified Drywall was consistent with the chain of interdependency between contractors and sub-contractors on a construction project.

60. Faulkner argues he was an employee of Certified Drywall and points to those aspects of the relationship between he and Certified Drywall that were outlined in his complaint. He says, as well, that he had no GST number, no business, except for his personal tools, he did not provide or pay for any equipment or supplies used on any job he worked and he had no chance of profit or risk of loss. He pointed to the evidence of Mr. Sokolowski that Mr. Sokolowski decided the rate for the boarding component of the jobs Certified Drywall bid and that was what was paid.

61. The starting point for any analysis of whether a person is, or is not, an employee under the *Act* is the definition of employee and employer in Section 1, which says:

“employee” includes

- (a) *a person, including a deceased person, receiving or entitled to wages for work performed for another,*
- (b) *a person the employer allows, directly or indirectly, to perform work normally performed by an employee,*
- (c) *a person being trained by an employer for the employer’s business,*
- (d) *a person on leave from an employer, and*
- (e) *a person who has a right of recall;*

“employer” includes a person

- (a) *who has or had control or direction of an employee, or*
- (b) *who is or was responsible, directly or indirectly, for the employment of an employee;*

62. Wages is defined in the *Act* as including, “salaries, commissions or money, paid or payable by an employer to an employee for work”. Work means the labour or services an employee performs for an employer. The definitions of employee and employer are inclusive, not exclusive. While it has been noted by the Tribunal that the legislative provisions are somewhat circular, it has been accepted that the *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I agree with the following comment from *Machtinger v. HOJ Industries Ltd.*, supra, that:

. . . 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.

63. Whether a person is an employee under the *Act* or an independent contractor is predominantly fact driven. While common law tests may be helpful, in the final analysis, it is the *Act* that must be interpreted and applied. The statutory definition of “employee” casts a somewhat broader net than the common law tests (see *Project Headstart Marketing Ltd.*, BC EST # D164/98). As well, in considering the common law tests, the Tribunal has recognised their inadequacies, reflecting a view expressed 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. The Supreme Court held there is no one conclusive test that can be universally applied at common law to determine whether a person is an employee or an independent contractor and that:

. . . 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 or her 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 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 circumstance of the case. (at paras. 47 and 48)

64. In determining the nature of a relationship the Tribunal has typically looked beyond the language used by the parties and, as indicated above, while there is no single all-encompassing test that applies in the context of the *Act*, the total relationship of the parties must be considered, with a view to determining “whose business is it?” (see, for example, *Kelsey Trigg*, BC EST #D040/03 and *C.A. Boom Engineering (1985) Ltd.*, BC EST #D129/04).

65. There is no evidence that Faulkner had his own business and no evidence that the work he did was for any business other than Certified Drywall’s business. The argument made by counsel for Certified Drywall about the “chain of interdependency” between contractors and sub-contractors in construction might have had some merit if there was such evidence. The investment Faulkner may have in his personal tools is no indication of his status as an independent contractor. Many workers in the construction industry, including carpenters, bricklayers, electricians, truck drivers and equipment operators, will supply their own tools without that circumstance having any bearing on their status as employees of the contractor hiring their skills. For some workers, such as the truck driver and the equipment operator, the investment

in their own tools can exceed a hundred thousand dollars. In this case, what is more telling - and goes to the conclusion that the business in which Faulkner was engaged belonged to Certified Drywall and not Faulkner - is that Faulkner supplied none of the material used on the jobs he worked. Certified Drywall purchased the material, which included wallboard, screws, nails, tape, bead, angles and joint filler, for each job. One of Faulkner's responsibilities, likely because he drove a Certified Drywall truck pulling a Certified Drywall utility trailer and because he was usually the first worker on site, was to either receive at the job site or pick up the material Certified Drywall had ordered for the job. There was no investment by Faulkner in any of this material.

66. On the evidence, I reject the suggestion by Certified Drywall that Faulkner hired and paid his own workers. There is no evidence of that.
67. Faulkner said he did not take on any workers unless their hiring was approved Mr. Sokolowski. There is evidence to support Faulkner. For example, Mr. Sokolowski recounted his recollection of the hiring of an individual referred to as "Cowboy". Included in that recollection was the following response to how "Cowboy" (a person allegedly hired by Faulkner) got hired, "He'd done some boarding work, so we thought we'd give him a try." I also have the evidence of Mr. Crosby and Mr. McDonald, which I accept on that point. Mr. Crosby said, from his perspective, it was Certified Drywall who had hired his son after Faulkner had his employment approved by Mr. Sokolowski. Mr. McDonald said it was Mr. Sokolowski who hired him (initially as a labourer) and paid him, even when he worked on Faulkner's crew. Counsel for Certified Drywall says I should not give effect to the evidence of Mr. Crosby or Mr. McDonald in that regard. I do not intend to ignore that evidence. I find it consistent with the objective evidence and it is not affected by any of the evidence provided by Mr. Parfitt, who said only that from his perspective, it was Faulkner who "took him on" and paid him. Mr. Parfitt's evidence, however, was silent on whether Faulkner sought approval from Mr. Sokolowski before he was taken on. I add that this omission is typical of the information provided by the several individuals who filled out the questionnaire prepared by Mrs. Sokolowski.
68. I give no weight to the questionnaires of individuals who did not appear before me and little weight to the questionnaires of those who did. In that context, I reiterate my concern about Mr. Schwanke's evidence. He said in his evidence that he started working for Certified Drywall as casual labour in 2000 and that he has worked exclusively for Certified Drywall since then. Yet in the questionnaire he filled out, he says Faulkner hired him. It is unlikely Faulkner hired him in 2000. I appreciate there is some difference between Faulkner and Certified Drywall about their relationship from April 2000 to December 2002. The position of Certified Drywall in this process has been that from April 4, 2000 to December 2002, Faulkner was working for another sub-contractor to Certified Drywall and that it was only after December 2002 that Faulkner hired and paid other persons (including Mr. Schwanke) to work as his employees. If that is so, it has not been explained how Faulkner was in a position to hire anyone. Faulkner said he was hired by Certified Drywall in April 2000 as a taper apprentice at \$12.00 an hour. In that capacity, it is highly improbable he could have hired Mr. Schwanke.
69. The record keeping of Certified Drywall for the jobs they performed while Certified Drywall was a proprietorship was described by Mrs. Sokolowski as "all verbal". If she wrote a cheque, Mr. Sokolowski would tell her what the amount of the cheque should be. Sometimes he would tell her what it was for, sometimes he would not. Sometimes Mr. Sokolowski would write the cheque and she would just enter the amount into the books. Since Certified Drywall considered all work to be "sub-contracted", I give no effect to notations on cheques indicating the amount on the cheque was for "sub-contracting".

70. After incorporation, Mrs. Sokolowski said the record keeping was more documented. Cheques written were supported by invoices. Certified Drywall has provided a list of cheques written to Faulkner over the period August 24, 2003 to February 24, 2004. The implication of the submission accompanying the list was that these cheques represented amounts paid to Faulkner for his work, which he used, in turn, to pay his employees. Included in the material provided by Faulkner are three cheque stubs, for cheques dated 20/01/2004, 13/02/2004 and 16/02/2004. The notations on these cheques, made by Certified Drywall, show the cheques are advances to “Denny” and “Nick”, payments to Faulkner, Rob Wurmlinger, Dave Laidlaw and “Nick”. The total amount of the three cheques is \$4,047.00, of which \$500.00 was designated as payment to Faulkner. These cheques, and others like them, “invoices” made out to Certified Drywall by Dave Laidlaw for work he did in October 2003, a person who was supposedly “employed” by Faulkner, material showing that hours worked by others were being recorded - on a Certified Drywall time sheet prepared by Mrs. Sokolowski which has a place for the name of that “employee” and his “supervisor” - and submitted to Certified Drywall for payment and the evidence of Mr. McDonald cause me to accept Faulkner’s evidence and his position that he was only, in effect, used by Certified Drywall as a conduit for paying the workers on his crew. I will add three other points relating to the time sheets and their relationship to my findings.

71. First, Certified Drywall provided Faulkner with the time sheets, instructed him to complete them and deliver them to Certified Drywall’s office. Faulkner said that Mrs. Sokolowski prepared a notebook for him in December 2003 (when Certified Drywall was incorporated) for his time sheets. She attached a handwritten post-it note to the front of the notebook which says:

ALL time sheets MUST be in the office + signed before a check will be issued. Thanks

72. Second, Mrs. Sokolowski’s evidence that the reference to “employee” on the time sheets means nothing is ingenuous when considered in context with other evidence, particularly the letter of December 12, 2003 to “All Members of Certified Drywall”, which advised those “members” (including Faulkner) the Certified Drywall was now a corporation, that the “members” would now be paid bi-weekly, complete with government deductions, that all hours had to be signed and in the office no later than the 10th and 26th of each month and thanking them for their services as sub-contractors. There is also the submission made by Mr. and Mrs. Sokolowski to the Tribunal in August 2005, where they say:

Mr. Faulkner also claims he was an “employee” because he had to keep track of hours on provided “Certified Drywall Time Sheets”. When reviewing the two sheets submitted, it is clear that he is keeping track of his own crew’s hours, footage installed as well as their rates of pay. both of these sheets dated after our incorporation , when we were in the process of switching all Subcontractors to employee status, . . .

73. The mere fact that Certified Drywall could unilaterally decide to convert all sub-contractors to employees also speaks volumes about the control Certified Drywall had over their so-called “sub-contractors”.

74. Third, the evidence concerning the time sheets puts a context on the cheques that were written to Faulkner after December 2003, which show those cheques included payments to other persons for the hours Faulkner recorded for them on the time sheets and submitted to Certified Drywall.

75. All of that was directed and controlled by Certified Drywall.

76. There was evidence from Mr. Sokolowski that he set the schedule for the work. The size of the job and the nature of the schedule dictated how the work was done. If Mr. Sokolowski wanted the job to go

faster, he had the option of placing more boarders on the project. That is apparent from his evidence concerning how he responded to Faulkner leaving the job on February 24, 2004 and what he could do if a project was falling behind schedule.

77. The evidence strongly supports Faulkner's submission that Certified Drywall exercised considerable control over his activities. When a job was acquired by Certified Drywall, Faulkner was not asked to provide a bid independently of the price Mr. Sokolowski had decided on for the boarding work to be done. He was told where to go and when to go there. He was expected to go as he was directed by Mr. Sokolowski. There is no evidence that Faulkner was given the choice of accepting or rejecting the work he was assigned by Mr. Sokolowski. Mr. Sokolowski had already decided what the job required and the material was ordered before Faulkner got to the job. It is fair to say that once on the job, Faulkner was responsible for directing the work and ensuring it was completed as scheduled. In that sense, I accept the suggestion from Counsel for Certified Drywall that his activities on a job site would resemble those of a sub-contractor. There is, however, a substantial difference between Faulkner and a sub-contractor; Faulkner was not directing his employees and was not operating his business, but was there working on behalf of Certified Drywall. The events of February 24, 2004 indicate how seriously Certified Drywall viewed Faulkner's responsibilities to them in that regard.
78. The evidence from Mr. Sokolowski is that Certified Drywall profited from the work done by Faulkner and his crew. Faulkner was paid no more (unless there were extras or non-boarding work involved) than his share of the price bid by Certified Drywall on the boarding component of the job. Understandably, his share of the value of the work done was more because he had more responsibility and experience than other persons on his crew, but he could not change the price of the boarding component of the job and his share was based exclusively on the labour he contributed to the job. I also cannot ignore the evidence that when Mr. Sokolowski bid a job, he already had a clear understanding (based on his years of experience and his knowledge of the abilities of the people working for him) of how many workers it would take, and how long, to do each part of the job he was bidding and his calculation of the cost to do the job and the profit Certified Drywall would make was substantially based on that experience. From time to time, Faulkner would measure up a job, but he was not doing that for his own purposes, but so that Mr. Sokolowski could prepare a bid for the job.
79. Faulkner could also increase his earnings on a job by performing labour on other parts of the job - assisting the tapers with their work (if asked) or performing extras and other work (such as scrap removal). The evidence surrounding the extras also support my conclusions on this point. Mr. Sokolowski said he and Faulkner would mutually agree before the job started what hourly rate was going to be paid for extras. It is clear from the evidence and the submissions, however, that the rate Faulkner would be paid for extras was decided by Certified Drywall and corresponded to a generally accepted rate in the business for extra work. More telling, however, was the evidence that while Faulkner received the agreed hourly rate for extras, Certified Drywall added a mark up, or profit, on that hourly rate before it was passed on to the client and carried the risk of loss if the client refused to pay for the extras. The suggestion that the arrangement between Faulkner and Certified Drywall on the extra work was consistent with a "cost-plus" arrangement in the construction industry ignores that on the evidence the only "cost-plus" arrangement was between Certified Drywall and its client, where Certified Drywall would pass on the cost it incurred in performing extra work - which was the amount paid to Faulkner - and place a mark up on that cost - which was Certified Drywall's. Faulkner was simply paid an hourly rate by Certified Drywall for the work he did; he added nothing to that rate when he performed the work.

80. The consequences of Faulkner refusing to perform the work he was assigned to do is reflected in the events February 24, 2004 and are much more akin to the consequences that would befall an employee who refused to work than a “sub-contractor” who refused to fulfill his contract. The response was very personal and clearly indicated that Faulkner was not, as Certified Drywall asserted in one of the submissions, “free to come and go as he chose”. Faulkner was not provided with an opportunity of replacing himself with other workers and continuing to carry on with the “contract”. He was let go while other persons on the crew continued to work. Mr. Sokolowski added four more boarders to catch up with the 1½ days that were lost. Mr. Sokolowski attended Faulkner’s residence after he left the job and recovered a cell phone and seized a Certified Drywall vehicle.
81. There are other aspects of the evidence that speak to the nature of the relationship - that Faulkner drove a Certified Drywall vehicle pulling a Certified Drywall trailer, carried Certified Drywall business cards identifying him as “Installation Supervisor”, was provided with clothing adorned with a Certified Drywall logo. These matters might be explained in isolation as pointing neither one way or the other, but when considered with other evidence they weigh heavily toward indicating an employment relationship.
82. For the above reasons, I find that the relationship between Certified Drywall and Faulkner was that of employer and employee for the purposes of the *Act*.
83. The two remaining matters relate to the calculation of the wages owed to Faulkner and the decision of the delegate to impose liability for the wages on the corporate entity. Both of these issues can be decided from the material in the file and the written submissions of the parties. I advised the parties at the pre-hearing conference of my intention to do that if I concluded Faulkner was an employee under the *Act* and they accepted that process.
84. I will first address the matter of the calculation of the wages. While the appeal raises the issue of the calculation of the amount of wages owing to Faulkner, it says very little about it. The appeal includes the following:
- Even if the Tribunal is not convinced that a relationship of contractor to sub-contractor existed, however, there is clear evidence that the complainant was paid far more than he had earned and the delegate deliberately neglected to obtain that information (submitted herewith and referred to above) prior to making her Determination.
85. The contention related to the above submission, which was supported by two one page documents, the first providing a calculation by Certified Drywall of the number of hours worked by Faulkner from August 23, 2003 to February 24, 2004 and the second listing the amounts of cheques paid to Faulkner between August 24, 2003 and February 24, 2004, was that Faulkner had worked 990.70 hours and had been paid \$43,078.00, and that amount represented all he was owed even as an employee.
86. Regardless of other concerns I might have about the calculation of the number of hours worked by Faulkner, it is fundamentally suspect because it is confined only to the piecemeal contracts on which Faulkner worked and does not include hours related to extra and additional work done by him. More to the point, however, is that the appeal does not show how the delegate erred by accepting Faulkner’s record of hours worked.
87. I have already addressed the matter of the cheques issued to Faulkner in another context. To summarize, those cheques were for work performed by Faulkner and by others who worked on his crew. I have referred to the evidence relating to three cheques made out to Faulkner in amounts totaling \$4,047.00,

only \$500.00 of which was for work done by him. The additional evidence provided by Certified Drywall does not show Faulkner was paid “far more than he earned”.

88. If anything, the additional material raises some question about the decision of the delegate to calculate the wages owed at minimum wage, since it acknowledges Faulkner was paid \$27.00 an hour for extra and additional work. However, as I have noted above, the request from Faulkner to have that matter reviewed by the Tribunal did not comply with the statutory requirements for filing an appeal. The request was delivered well past the time limited for appeal in Section 112 of the *Act*, did not comply with the Tribunal’s rules for filing an appeal and was unaccompanied by any request for an extension of the time limits or any reason for the delay.
89. There is no error shown in the calculation of the wages owing to Faulkner made by the delegate and, accordingly, no basis for changing those calculations; nor is there any basis for canceling any of the administrative penalties. Those administrative penalties are mandatory where a finding of a contravention of the *Act* is made in a Determination (see *Director of Employment Standards (Re Summit Security Group Ltd.)*, BC EST #RD133/04 (Reconsideration of BC EST #D059/04)).
90. Finally, Certified Drywall says the delegate erred by attributing all of the liability to the corporate entity of Certified Drywall when that entity did not exist during most of the period for which wages were found to be owing. In reply, the delegate says that Section 97 of the *Act* is a complete answer to this argument. In his final response, counsel for Certified Drywall makes three points: first, the delegate made a factual error in finding the corporate entity of Certified Drywall became liable to pay monies before its date of incorporation; second, while the delegate could have invoked Section 97 of the *Act* after finding the principals of the unincorporated business were liable for wages for some of the period, that was not done; and third, while not denying a “successorship”, it was not by way of a name change but through a disposition from the unincorporated entity to the corporate entity.
91. The Determination contains the following background information:
- 683115 B.C. Ltd. carries on business as Certified Drywall and is a successor to the unincorporated business carried on by the principles of the Company under that name.
92. Section 97 of the *Act* reads:
- 97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.*
93. This provision was the subject of the Tribunal’s decision *Lari Mitchell and others*, BC EST #D107/98 (Reconsideration of BC EST #D314/97), where it was accepted that Section 97 is triggered by a disposition and no concomitant termination of employment prior to the completion of the disposition. In such circumstances, an employee’s existing rights under the *Act* are merely transferred from the predecessor (the former employer) to the successor (the new employer). The successor is required to assume all of the predecessor’s liabilities and obligations towards an employee. Where Section 97 applies, it is unnecessary to speak of determining the predecessor’s liability as though it were something distinct from that of the successor. The liability belongs to the successor after the disposition.
94. Accordingly, there was neither a factual nor a legal error made by the delegate in finding Certified Drywall (the corporate entity) to be liable for all liabilities and obligations, including those of the

unincorporated entity, toward Faulkner for the claim period. The fact of a successorship was acknowledged in the September 2004 submission of counsel for Certified Drywall. The delegate incorporated that admission, and its effect under the *Act*, into the Determination. There was no need for the delegate to make a “finding” that there were amounts owing by principals of the unincorporated entity before the disposition. The Director found wages to be owing for the claim period. The liability for those wages belongs to the corporate entity and, potentially, its directors and officers.

95. The appeal is dismissed.

ORDER

96. Pursuant to Section 115 of the *Act*, I Order the Determination dated May 6, 2005 be confirmed in the amount of \$13,251.31 together with an interest that has accrued under Section 88.

David B. Stevenson
Member
Employment Standards Tribunal