

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*, R.S.B.C. 1996, c. 113

-by-

Hamerlock Couplings Inc.  
("Hamerlock Couplings")

-and-

Phil M. Bain  
("Bain")

-and-

Herbert L. Tobias  
("Tobias")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE Nos.:** 99/44 (Tobias Appeal);  
99/45 (Bain Appeal);  
99/79 (Hamerlock Couplings Appeal)

**DATE OF HEARING:** April 12th, 1999

**DATE OF DECISION:** May 19th, 1999

**DECISION**

**APPEARANCES**

Joseph Willmott                   for Hamerlock Couplings Inc.

Herbert L. Tobias on his own behalf

Phil M. Bain                   on his own behalf

Raymond Prevost               on his own behalf

Adele Adamic &  
William Bull                   for the Director of Employment Standards

**OVERVIEW**

I have before me three appeals all brought pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 20th, 1999 under file number 86-229 (the “Determination”).

The Director’s delegate determined that Hamerlock Couplings Inc. (“Hamerlock Couplings”) and a firm described as “Hamerlock Coupler U.S.A.”--the correct corporate name is Hamerlock Coupler U.S.A. Inc.--were “associated corporations” as defined by section 95 of the *Act*. The Director’s delegate also determined that these latter two firms owed \$33,788.53 to their former employee, Raymond Prevost (“Prevost”), on account of unpaid salary, vacation pay and interest.

Although copies of the Determination were mailed to both the appellants Herbert L. Tobias and Phil M. Bain, in their alleged capacities as officers or directors of Hamerlock Couplings, neither Mr. Tobias nor Mr. Bain is personally liable under the Determination inasmuch as the Director has not proceeded against them under section 96 of the *Act* (which provides that corporate directors and officers may be personally liable for up to 2 months’ wages owed by the corporation). At some point, the Director may proceed against Messrs. Tobias and Bain personally but, at

present, neither Mr. Tobias or Mr. Bain have any personal liability under the Determination against which they have appealed and, accordingly, their two appeals--E.S.T. File Nos. 99/44 and 99/45, respectively--must be dismissed pursuant to section 114(1)(c) of the *Act*.

## **ISSUES TO BE DECIDED**

In E.S.T. File No. 99/79 Joseph Willmott, the sole remaining officer and director of Hamerlock Couplings, appeals the Determination, solely on behalf of Hamerlock Couplings. The principal ground of appeal is that Prevost was not an employee of either firm but, rather, at all material times was an independent contractor. Hamerlock Couplings also says that Prevost's unpaid wage claim is inflated. Mr. Willmott conceded at the appeal hearing that Hamerlock Couplings and the its U.S.A. subsidiary, Hamerlock Coupler U.S.A. Inc., were properly declared to "associated corporations" under section 95 of the *Act*. I should add that no one appeared on behalf Hamerlock Coupler U.S.A. Inc. nor has that firm filed an appeal with respect to the Determination--this latter firm is no longer operating, as is the case with Hamerlock Couplings, and I understand that both firms are now insolvent although no formal insolvency proceedings have yet been filed.

## **FACTS AND ANALYSIS**

Hamerlock Couplings was founded in June 1994 to bring to market a trailer hitch invented by one Arthur Hamerl. In the fall of 1996 the appellant firm planned a North American product launch and to that end a Florida subsidiary--Hamerlock Coupler U.S.A. Inc.--was incorporated. Glen Lau, of Glen Lau Productions, was retained to carry out the marketing campaign in the United States and was appointed the chief executive officer of the U.S. subsidiary. Unfortunately, the business did not thrive and there are now various lawsuits, either ongoing or contemplated, resulting from the effective insolvency of both firms including an "shareholder oppression action" filed by Prevost and others in the B.C. Supreme Court.

Prevost's involvement with the appellant commenced in 1994 when he did some market research for the firm--he invoiced Hamerlock Couplings for this work using his company name "Berelle Enterprises". Willmott testified that in August

1996 a decision was made to have Glen Lau Productions coordinate all marketing activities both in Canada and the United States and that, at that point, Prevost was retained, as an independent contractor, by Glen Lau Productions, although Prevost's duties would continue to focus on marketing the product in Canada. According to Willmott, Prevost was to "handle Canadian sales" which involved meeting with major retailers, recreational vehicle dealers and securing purchase orders for the product. Although Prevost had a home office, he also attended Hamerlock's Delta office/warehouse facility about once a week and he was provided with various promotional literature and a sample product.

Prevost was issued Hamerlock business cards that described him as Hamerlock's "Canadian Sales Manager"; he was provided with company letterhead that showed his home office as the company address; in the company's promotional material Prevost was listed as the "Canadian Sales Manager". In the Minutes of a Hamerlock Couplings Board of Directors' meeting held in Florida on December 16th, 1996, Prevost was said to be "handling Canada primarily through distributorships, dealers and retail...". Prevost was reimbursed for his travel expenses. Mr. Willmott was unable to say how many hours Prevost devoted to his duties each week. In sum, Prevost was to be paid a monthly stipend and had no opportunity to profit; but for the fact that his wages were not paid, he similarly had no risk of loss (recall that his expenses in carrying out his duties were paid for by Hamerlock).

According to the evidence of Glen Lau (who testified via teleconference), Prevost reported to Lau and he (Lau) considered Prevost to be an employee of the U.S. firm who was responsible for all marketing activities in Canada. However, the operating funds (including Prevost's wages) required by the U.S. firm were supposed to be provided by Hamerlock Couplings. According to Lau, the U.S. firm is effectively bankrupt and the entire business venture proved to be a "total disaster". In any event, Lau does not place any particular blame for that situation on Prevost who "did all he could"; "he sent in orders that couldn't be shipped"; "Ray did everything he could"; "Ray reported regularly to to me every day or so".

Prevost testified that he strongly believed in the product and was an original investor. In August 1996, when he began to report to Mr. Lau, he agreed to work as the Canadian Sales manager at a monthly salary of \$2,500 and that while he was reimbursed for his out-of-pocket expenses (nearly \$22,000) he never received his monthly stipend. He pressed on despite that precarious financial situation because he felt that the company would eventually prove successful and, as an investor

(Prevost's investment totalled some \$47,000), he hoped that his continuing efforts to generate Canadian sales would ultimately also protect his (and some of his friends') investment. He travelled throughout western Canada and Ontario and devoted some 50 hours each week to his duties. He originally tendered a resignation in March 1997 but was persuaded to continue on, however, in September 1997 all operations ceased. On September 17th, 1997, Prevost received a faxed termination letter from Glen Lau which stated, in part:

“I deeply regret having to terminate your services with Hamerlock Coupler U.S.A. Inc., a sole subsidiary of Hamerlock Couplings, Inc. The termination will be effective as of today's date--September 17, 1997. This in no way reflects on your services to the company. You have done an outstanding job considering the circumstances.

I would appreciate it, if you would send me a detailed outline of the money that is owed to you to date. After I've had a chance to review it, I will send you a letter confirming that amount.”

Prevost, in response to Lau's request for a “detailed outline” regarding Prevost's unpaid wages, sent Lau a document on Hamerlock letterhead entitled “Statement-Invoice” that showed a total amount payable as at September 30th, 1997 of \$23,629.90. On September 29th, Lau faxed a letter to Prevost, dated September 26th, 1997, which states, in part: “...I have reviewed your expense account reports and back salary that is owed to you. I find them to be correct.”

Based on the above evidence--including Lau's acknowledgement that Prevost was employed by the U.S. firm--I find that Prevost was employed, during the period September 1996 to September 1997, by the U.S. subsidiary to sell the product in Canada. While the parties, for their own reasons, structured their relationship so that Prevost (or more correctly, his holding company, Berelle Enterprises) would be paid a monthly stipend--without any payroll deductions--the essence of the parties' relationship was that of employer-employee. There is nothing unusual about this case--in every respect, Prevost's duties and responsibilities were in no material way different from any other employed sales representative; he devoted his entire working hours to the marketing of the company's product and he took direction from, and otherwise regularly reported to, his employer. Given the uncontested finding that Hamerlock Couplings and the U.S. subsidiary were “associated corporations”, it follows that both firms are “jointly and separately liable” for Prevost's unpaid wage claim.

As for the amount of that unpaid wage claim, I find that the delegate erred in awarding Prevost \$30,000 (based on a monthly stipend of \$2,500) plus 4% vacation pay and interest. Prevost himself, in his September 17th, 1997 statement, claimed that he was owed \$23,629.90 not \$30,000. Although there is no evidence before me to show that Prevost received any payments other than for reimbursement of out-of-pocket expenses, I see no reason to award Prevost an amount larger than he himself originally claimed. While Prevost's employment was terminated without proper written notice--he was entitled to 2 weeks' notice under section 63 of the *Act*--his claim for unpaid wages includes his stipend for the entire month of September and thus, in effect, encompasses his claim for termination pay.

There being no evidence before me that Prevost received any vacation pay during the period September 1996 to September 1997, he is also entitled to an additional 4% vacation pay allowance plus interest.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be varied and that Prevost be awarded the following:

Unpaid regular wages:	\$23,629.90
Vacation pay:	<u>\$ 945.20</u>
Total:	<u>\$24,575.10</u>

plus interest to be calculated by the Director in accordance with section 88 of the *Act*.

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