



An appeal

- by -

Theodore (Ted) W. Myrah, a Director or Officer of No. 289 Taurus Ventures Ltd. -and- Prema Systems Ltd. -and- 544553 B.C. Ltd. -and- 546414 British Columbia Ltd. (associated corporations)

("Myrah")

- 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:** David B. Stevenson

**FILE No.:** 2001/131

**DATE OF DECISION:** May 23, 2001

## DECISION

### OVERVIEW

This is an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Theodore (Ted) W. Myrah (“Myrah”) a Director or Officer of No. 289 Taurus Ventures Ltd. - and- Prema Systems Ltd. -and- 544553 B.C. Ltd. -and- 546414 British Columbia Ltd. (associated pursuant to Section 95 of the *Employment Standards Act*) (“the companies”) of a Determination which was issued on January 24, 2001 by a delegate of the Director of Employment Standards (the “Director”). The appeal submission also indicates it has been brought on behalf of Barry Wayne Ferguson, another director or officer of the companies. The appeal of Mr. Ferguson will be the subject of a separate decision.

An earlier Determination (the “corporate Determination”), dated August 28, 2000, had concluded that the companies had contravened Part 3, Sections 17(1), 18(1) and 27(1), Part 7, Section 58(3) and Part 8, Section 63(2)(b) of the *Act* in respect of the employment of John Babcock (“Babcock”) and ordered the companies to cease contravening and to comply with the *Act* and to pay an amount of \$253,544.83. The Determination under appeal concluded that Myrah was a Director or Officer of the companies and as such was required to pay an amount of \$17,907.20, the extent of his statutory obligation under Section 96 of the *Act*.

Myrah has appealed the Determination on several grounds, which may be summarized under the following points:

1. Babcock was not an employee of any of the companies;
2. the Determination wrongly concluded that Babcock received “payroll cheques” from any of the companies;
3. if Babcock was an employee for the purposes of the *Act*, the calculation in the Determination of the amount owed is wrong because certain non-cash forms of payment were not taken into account as part of the compensation paid to Babcock;
4. the Determination was premature in light of ongoing civil litigation involving Babcock; and
5. the Determination contains findings of fact that are not supported by any evidence and which were either untrue or denied.

Myrah had previously filed an appeal of the corporate Determination. The appeal was dismissed because Myrah lacked the authority to bring the appeal as three of the four companies affected by the corporate Determination were in bankruptcy and Myrah had been removed as a director and officer of those companies (see *Re No. 289 Taurus Ventures Ltd. and others*, BC EST #D547/00). In that decision, the Tribunal stated:

The appeal is dismissed. This decision does not foreclose the right of Mr. Myrah to file an appeal of any Determination issued pursuant to Section 96 of the *Act*

imposing liability on him as a director and/or officer. In the event the Tribunal received such an appeal, it is improbable that the merits of this Determination would not be addressed.

Notwithstanding the above comment, the Director has raised a preliminary objection to this appeal, arguing Myrah may not use this appeal as an opportunity to appeal the corporate Determination. The Director seeks a decision on this objection, reserving the right to make further submission on the merits.

The Director relies on the Tribunal's decision in *Re Penner and Hauff*, BC EST #D371/96, which referred to and relied on two earlier decision of the Tribunal, *Re Kerry Steinemann*, BC EST #D180/96 and *Re Perfecto Mondo Bistro*, BC EST #D205/96. In all of those cases, the Tribunal found that a director or officer, in an appeal from a Determination issued under Section 96 of the *Act*, was precluded from seeking to relitigate the liability of the company. The decisions of the Tribunal are based on two grounds: the doctrine of issue estoppel and the purpose of the legislation. In *Re Kerry Steinemann*, the Tribunal stated:

Issue estoppel operates to prevent a party from raising an argument at a later proceeding if the following conditions are present:

1. The same question has already been decided;
2. The previous decision was final; and
3. the parties to the decision, or their privies, were the same persons as the parties, or their privies, to the proceeding in which the estoppel is raised.

The Tribunal also stated, referring to the Court's decision in *Stelmaschuk v. Dean*, (1995) 13 C.C.E.L. (2d) 220, [1995] 9 W.W.R. 131:

In the *Stelmaschuk* case, the purpose of the local employment standards statute provided an additional basis for finding that relitigation would be an abuse of process. The purpose of that legislation was to ensure that employees were paid by their employers and to protect employees from insolvent employers. Relying upon a British Columbia Court of Appeal decision, *Evans v. British Columbia (Employment Standards Board)*, (1983) 149 D.L.R. (3d) 1 (B.C.C.A.), the court held that it was consistent with the aims of the legislation to impose liability on the directors and to preclude them from relitigating the company's liability. The enforcement mechanisms of the legislation was meant to be quick and inexpensive and it would be counterproductive to those aims to have constant relitigation of the same issues.

The Tribunal, as well as the courts, have taken the view that a director or officer of a company is, for the purposes of applying the doctrine of issue estoppel, a privy of the company. The

rationale for taking that approach has largely been justified by finding the director or officer to be a controlling or operating mind of the company. The difference in this case is that Myrah was not a director of three of four of the companies when the corporate Determination was issued, had no control over the management or business of the companies and, as the Director so forcefully pointed out in raising the preliminary objection to Myrah bringing an appeal of the corporate Determination, had no legal authority to conduct an appeal of the corporate Determination. The “party” to the corporate Determination, and the person with authority in respect of it on behalf of the bankrupt companies, was the Trustee in Bankruptcy, not Myrah. The Director argues this matter should be overlooked because Myrah could have sought an assignment of the Trustee in Bankruptcy’s right to appeal. That misses the point. If the doctrine of issue estoppel, as applied in previous Tribunal decisions, is to be applied in this case, I must be convinced that Myrah was a party, or was a privy, to the proceeding in which the estoppel is raised. I conclude, however, that, as a matter of fact and of law, he was not. The preliminary objection is dismissed.

The Director has sought to reserve the right to file submissions on the merits of the appeal if the preliminary objection is dismissed. In my view there is sufficient material in the file to convey the Director’s position on the merits of the appeal and it is not necessary to delay a decision on the appeal any longer by allowing further submissions.

## ISSUES

There are three general issues raised in this appeal: whether the Director was wrong to have concluded that Babcock was an employee for the purposes of the *Act*; whether, if Babcock was an employee; there was an error in the corporate Determination in the calculation of the amounts owing to Babcock and whether the issuance of the corporate Determination was premature.

## FACTS

The facts were extensively explored in the corporate Determination, and I do not intend to recite them all in this decision. Few facts are directly challenged by Myrah. The appeal is more focussed on addressing the legal conclusions drawn by the Director from the established facts.

The corporate Determination, at the top of page 2, stated:

The above named businesses have been associated pursuant to Section 95 of the Employment Standards Act. The reasons for doing so are:

- Babcock provided copies of various payroll cheques given to him which show he was paid by each of the named companies at various times. . . .

In response to that statement, Myrah says “. . . Babcock was never provided with any “payroll cheques from any of the Companies . . .” and “. . . Babcock was never issued a cheque from

Prema . . .”. No support for those statements has been provided. The first point is simply semantics, since Myrah does not accept Babcock was ever an employee and, consequently, did not pay him as an employee. The second point is very minor, and even if Myrah is correct that Babcock was never issued a cheque from Prema, the balance of the reasons given for the decision to associate the companies under Section 95 of the *Act* are sufficient to support that decision. I also note the decision to associate the companies has not been appealed.

Myrah also takes issue with the statement in the corporate Determination, at page 6, that:

. . . I have very little information from the employer. Only Myrah has spoken with me and he was able to confirm very little. Attempts to reach Ferguson were unsuccessful. It appears that the employer does not wish to participate in this investigation.

While not denying the general tenor of the above statement, Myrah denies that only one telephone message was left for the investigating officer and alleges that several unsuccessful attempts were made to contact her during July and August, 2000. No support was provided for the allegations made by Myrah, although he says that such information is available through his long distance telephone records. Myrah has not established any basis for discounting the statement in the corporate Determination. Even if I accepted that Myrah made several unsuccessful attempts to contact the investigating officer, that would not justify interfering with the corporate Determination.

Myrah points out in his appeal that the corporate Determination acknowledged Babcock had received a car and that insurance and expenses on the car were paid for by Mr. Ferguson. As well, Myrah says that Babcock received a house from Mr. Ferguson. In respect of some dealings arising between Babcock and Mr. Ferguson concerning the house, the appeal denies two findings of fact made in respect of those dealings. There are two responses to those denials that immediately arise. First, they have nothing to do with Myrah and do not figure in any way in his appeal. For that reason, there is no need to address them in the context of this appeal. Second, and in any event, they appear in the corporate Determination as part of Babcock’s statement of facts. There is no indication in the corporate Determination that those statements were either accepted or rejected by the investigating officer. They are not carried over into the findings of fact made in the corporate Determination and, in the final analysis, had no impact on the final result in the corporate Determination. On analysis, they are irrelevant to any conclusion reached in the corporate Determination.

The corporate Determination sets out nine points of fact supporting the conclusion that Babcock was an employee. None of those facts have been challenged in the appeal. Babcock also provided the investigating officer with a comprehensive list of job duties, which was referred to in, and attached to, the corporate Determination. Nothing in this list has been disputed by Myrah.

## ARGUMENT AND ANALYSIS

The Director contends that the appeal should be summarily dismissed because of the failure or refusal of Myrah to participate and cooperate in the investigation of the appeal, citing *Re Tri-West Tractors Ltd.*, BC EST #D268/96 and *Re Kaiser Stables Ltd.*, BC EST #D058/97. Alternatively, the Director says that if the appeal is not summarily dismissed, Myrah should not be allowed to introduce any new evidence that should have and could have been provided during the investigation. I entirely agree with the latter part of the Director's position, particularly as it relates to the argument that Babcock was not an employee. As a practical matter, however, it makes little difference to the appeal, as Myrah did not introduce any relevant new evidence.

The primary basis for the appeal is the contention that Babcock was not an employee of any of the companies. The burden is on Myrah to show on a balance of probabilities the Determination is wrong in its conclusion that Babcock was an employee for the purposes of the *Act*. In the appeal, Myrah says only Babcock "was never issued a T4 or record of employment (at his request)" and this was never addressed in the Determination. On the other hand, the Determination, noting that Babcock was considered to be a very credible witness, contains an outline of the information provided by Babcock. Myrah has not shown any of that information is wrong. A list of job duties, prepared by Babcock and attached to the Determination, was provided. None of that has been challenged. Simply put, Myrah has not met his burden.

Myrah argues the Director should have taken into account "all amounts (cash and non-cash) already received" by Babcock. There is no identification in the appeal of any "cash" amounts that were not taken into account by the Director. Babcock acknowledged receiving \$19,000.00 in wages from April, 1998 to April, 2000 and this amount was adjusted against the total wages found to be owing. The Determination did not include any adjustment for the value of the housing or the car, insurance and expenses. There was no error in that regard. In *Re Skeena Valley Guru Nanak Brotherhood Society*, BC EST #D361/00 (Reconsideration of BC EST #D 470/99 and BC EST #150/00), the Tribunal confirmed that Section 20 of the *Act* does not contemplate the payment of wages "in kind". The Tribunal referred to comments from *Re Heichman (c.o.b. Blue Ridge Ranch)*, BC EST #D184/97:

The answer to the issue of whether the wages payable to Guthrie may be adjusted by the value of the accommodation provided to him by the employer lies in whether the definition of "wages" in the *Act* can be interpreted to include the value of accommodation where it is provided by the employer.

...

While the definition is inclusive, rather than exhaustive, it would be unreasonable to extend the definition to include the value of gratuitous benefits provided by the employer. That conclusion is reinforced by Section 20 of the *Act* that requires all wages to be paid in negotiable Canadian currency.

Myrah submits that the corporate Determination was premature in light of the ongoing civil litigation involving Babcock and Mr. Ferguson. Under subsection 76(1) of the *Act*, the Director, unless one of the circumstances set out in subsection 76(2) applies, is statutorily required to investigate a complaint made under Section 74 of the *Act*. Subsection 76(2) gives the Director a discretion to refuse to investigate a complaint in certain circumstances, including where:

*(e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator;*

There are several possible responses to this ground of appeal - the subject matter of the complaint to the Director and the subject matter of the court proceeding are not the same; the relevance of the court proceeding to the Employment Standards complaint will only become apparent at the enforcement stage; and the court proceeding does not involve Myrah or any of the companies and could not possibly justify a discontinuance of the Employment Standards investigation against them. The complete answer, however, lies in the fact that the Director's authority to refuse to investigate or to continue to investigate in the face of circumstances described in subsection 76(2) is discretionary. There is nothing in the appeal to suggest there is any basis upon which the Tribunal would interfere with the decision of the Director to continue the investigation into Babcock's complaint and to issue the various Determinations, including the corporate Determination.

I can see nothing else in the appeal that needs to be addressed. Myrah does not dispute that he was a Director or Officer of the companies between April, 1998 and April, 2000, the period in which the Determination found wages were earned by, and payable to, Babcock nor has Myrah disputed whether his personal liability is properly limited to two months wages for Babcock. For the above reasons, the appeal is dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated January 24, 2001 be confirmed in the amount of \$17,907.20, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**