



An appeal

- by -

Barry Wayne Ferguson, 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)

("Ferguson")

- 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.: 2001/132

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 Barry Wayne Ferguson (“Ferguson”), 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”). This appeal has not been filed directly by Ferguson, but has been brought on his behalf by Theodore (Ted) Myrah, another director or officer of the companies.

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 Ferguson 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*.

The grounds of appeal raised by Ferguson are identical to those raised by Mr. Myrah in his appeal. The two appeals were, in fact, contained in the same document. Myrah’s appeal was considered and decided in *Re Theodore (Ted) 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)*, BC EST #D It would be simple enough to dismiss Ferguson’s appeal on the same reasoning as set out in that decision. That might, however, suggest the Tribunal accepts that Ferguson is allowed to challenge the conclusions and findings of fact made in the corporate Determination.

The Director has questioned the extent to which the Tribunal should consider Ferguson’s appeal when he failed to participate and cooperate in the investigation of the complaint. The Director refers to, and relies on, the Tribunal’s decisions in *Re Tri-West Tractors Ltd.*, BC EST #D268/96 and *Re Kaiser Stables Ltd.*, BC EST #D058/97.

The corporate Determination notes that unsuccessful efforts were made to contact Ferguson for information regarding the complaint filed by Babcock:

Messages were left for Ferguson at his home number and cell phone. There was no response.

. . .

Myrah was reached. He stated that he wasn't familiar with the exact nature of Babcock's employment relationship as Ferguson had dealt directly with the arrangements with Babcock. . . . he suggested I contact Ferguson directly.

. . .

. . . I advised I had left messages for Ferguson and requested Myrah to contact him on my behalf as well.

. . .

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

Ferguson has not denied any of the above statements nor attempted to explain why he did not respond to the messages left for him or otherwise participate or cooperate in the investigation.

In *Re Tri-West Tractors Ltd.*, the Tribunal stated:

This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination, then later filing appeals of the Determination when they disagree with it. An appeal under section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

This appeal is a clear example of the circumstances intended to be encompassed by the above statement. Ferguson failed or refused to participate in the investigation that resulted in the corporate Determination. He now seeks to challenge the conclusion that Babcock was, for the purposes of the *Act*, an employee of the companies, the calculation of wages owed and the decision of the Director to investigate and issue the corporate Determination. In seeking to do so, he challenges findings of fact made in the corporate Determination, denies factual assertions contained in the corporate Determination and alleges facts inconsistent with conclusions made in the corporate Determination. He could have provided all of that information during the investigation, but apparently chose not to do so. He will not be allowed to do so in this appeal. There is, accordingly, no valid ground of appeal against the corporate Determination.

There is nothing else in this appeal that needs to be addressed. The appeal does not challenge the conclusion that Ferguson 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 does it raise any question concerning whether Ferguson's personal liability is properly limited to two months wages for Babcock.

The appeal by Ferguson 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*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal