

An appeal

- by -

McCulloch Bros. Landscape Contracting Inc., (in Bankruptcy)  
-and by-  
Lancelot N. McCulloch, Director/Officer of McCulloch Bros. Landscape  
Contracting Inc., (in Bankruptcy)  
("McCulloch" and "McCulloch Bros.")

- 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.:** 2001/372 and 2001/373

**DATE OF DECISION:** July 30, 2001

## DECISION

### OVERVIEW

This decision addresses two appeals filed pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), one by McCulloch Bros. Landscaping Contracting Inc. (In Bankruptcy) (“McCulloch Bros.”) and the other by Lancelot N. McCulloch, a Director/Officer of McCulloch Bros. Landscaping Contracting Inc. (In Bankruptcy) (“McCulloch”) of two Determinations, which were issued on April 20, 2001 by a delegate of the Director of Employment Standards (the “Director”).

The first Determination was a corporate Determination made against McCulloch Bros. which concluded that McCulloch Bros. had contravened Part 3, Section 18(1) and Part 7, Section 58(3) of the *Act* in respect of the employment of Jason Bencze, Roland Feltren, Greg Goulet and Ken Sidorchuk (collectively, the “complainants”) and ordered McCulloch Bros. to cease contravening and to comply with the *Act* and to pay an amount of \$5,120.79. The second Determination was a director/officer Determination which concluded that McCulloch was a Director or Officer of McCulloch Bros. and as such was required to pay an amount of \$5,120.79, the extent of his statutory obligation under Section 96 of the *Act*.

McCulloch, on his own behalf and on behalf of McCulloch Bros., has listed several reasons for the appeal. To summarize, they are:

1. McCulloch Bros. ceased to be the employer of the complainants on February 1, 2000 and their employment was transferred to another company, Terra Designworks Ltd. (“Terra”) as of February 2, 2000.
2. McCulloch Bros. ceased operating on February 1, 2000.
3. Any wage claims, including claims for length of service compensation, should be the responsibility of Terra.
4. The wage claim of one of the complainants, Greg Goulet, is not based in fact.

### ISSUE

The issue raised in this appeal is whether McCulloch or McCulloch Bros. has shown there is any error in the Determination.

## PRELIMINARY ISSUE

The circumstances of this appeal raises a preliminary issue about the authority of McCulloch to bring an appeal on behalf of McCulloch Bros., a company which is in bankruptcy. In *Re Fyfe*, BC EST #D080/00, the Tribunal stated:

Section 71(2) of the *Federal Bankruptcy and Insolvency Act* states that: “on an assignment [into bankruptcy], a bankrupt has ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this *Act* and to the rights of secured creditors, forthwith pass and vest in the trustee named in the . . . assignment.” The trustee in turn is given wide authority to deal with the bankrupt’s property. For example, the trustee may, with the permission of the inspectors ‘bring, institute or defend any action or other legal proceeding relating to the property of the bankruptcy [see s. 30(1)(d)]. Thus, on bankruptcy, the bankrupt’s property (subject to certain conditions that have no application in this case) vests in the trustee who is given, for the most part, exclusive authority to deal with that property.

Accordingly, Canadian Neon does not have the legal authority to appeal the Determination as that right lies solely with Canadian Neon’s licenced trustee - in this case, KPMG Inc. Whether Fyfe filed this appeal in his personal capacity, or as an agent of Canadian Neon, the same result holds: the appeal is simply not properly before the Tribunal and thus this appeal is dismissed. (emphasis added)

There are several other decisions of the Tribunal that are consistent with *Re Fyfe*.

On occasion, a Trustee in bankruptcy has assigned to a director or officer the authority to bring an appeal of a Determination on behalf of the bankrupt, but there is nothing in the material indicating that McCulloch or McCulloch Bros. has been given such authority. The appeal by McCulloch Bros. is dismissed.

The same considerations and concerns do not accompany an appeal by a director/officer of a Determination issued under Section 96 of the *Act*.

## FACTS

McCulloch was a director/officer of McCulloch Bros. at all relevant times. The Determination is very brief in its recitation of the basis upon which the Determination was issued:

## ALLEGATIONS

The complainants allege that they were owed unpaid wages and compensation for length of service when McCulloch Bros. Landscape Contracting Ltd. went into bankruptcy on October 25, 2000.

## REASONS

I have completed my investigation into these allegations. The amounts set out below were agreed upon by the employer and the complainants. The complainants had agreed to withdraw their claims for compensation for length of services. The agreement was reached prior to bankruptcy, after which the agreement was withdrawn. The investigation revealed that the employer went into bankruptcy on October 25, 2000, owing wages to the complainants.

## ARGUMENT AND ANALYSIS

The appeal is largely based on a submission that the outstanding wage claims covered by the Determination should be the responsibility of Terra. In response to that submission, the Director says that all wages covered by the Determination were earned and became payable to the complainants prior to February 1, 2000 and were properly the responsibility of McCulloch Bros. That assertion of fact has not been contradicted or contested by McCulloch. If it is McCulloch's position that Terra should assume McCulloch Bros.' unpaid wage obligations to the complainants because it assumed uncompleted contracts of McCulloch Bros. and employed the complainants on those contracts, he is wrong. It may be circumstances exist that would make Terra liable as well as McCulloch Bros. for the unpaid wages of the complainants, but there is nothing on the facts of this case that would relieve McCulloch or McCulloch Bros. from their obligations and liabilities under the *Act* for unpaid wages earned by the complainants as employees of McCulloch Bros.

The argument that McCulloch Bros. should not be liable for length of service compensation is groundless, but is also irrelevant as neither Determination included a claim for length of service compensation under Section 63 of the *Act*.

In respect of the submission by McCulloch that Greg Goulet's claim for wages is not based in fact, I note from the Determination that the amounts owed to the complainants were stated to have been agreed to by McCulloch. The appeal does not address how the Director was wrong about that. I accept that the amounts found to be owed to the complainants were agreed and accepted by McCulloch. Notwithstanding, the burden in this appeal is on McCulloch to show there is an error in the Determination. The only complainant whose claim amount has been appealed by is Greg Goulet and McCulloch has failed to provide any support in this appeal for his contention that the wage claim by Greg Goulet has no basis in fact. He has not met the burden on him to show the Determination was in error.

The appeal of McCulloch is also dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determinations dated April 20, 2001 be confirmed in the amount of \$5,120.79, 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**