



An appeal

- by -

Robyn Bourgeois operating Robyn Bourgeois Painting and
3717 Investments Ltd. operating Student Works Painting
(Associated pursuant to section 95 of the Employment Standards Act)
(Appeal by 3717 Investments Ltd.)

- 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.: 2001/406

DATE OF DECISION: September 6, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by 3717 Investments Ltd. operating Student Works Painting (“Student Works Painting”) of a Determination issued on May 3, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Robyn Bourgeois Painting (“Bourgeois”) and Student Works Painting should be considered associated under Section 95 for the purposes of the *Act*, and that the associated companies had contravened Parts 3, Section 18, Part 4, Sections 34 and 40, Part 5, Sections 44, 45 and 46 and Part 7, Section 58 of the *Act* in respect of the employment of Angela Daniels, Tina Fenwick Kevin Gulbransen and Sean Mckinnon (“the Complainants”) and ordered the associated companies to cease contravening and to comply with the *Act* and to pay an amount of \$1,151.85.

The appeal contends that Student Works Painting should not have been associated with Robyn Bourgeois operating Robyn Bourgeois Painting under Section 95 of the *Act*.

ISSUE

The issue in this appeal is whether 3717 Investments Ltd. operating Student Works Painting should have been associated with Robyn Bourgeois operating Robyn Bourgeois Painting under Section 95 of the *Act*.

FACTS

For the purpose of this appeal, I need only refer to those facts which related to the decision to associate the companies under Section 95 of the *Act*.

The Complainants were directly employed by Robyn Bourgeois operating Robyn Bourgeois Painting, who ran a painting business in and around Vernon, B.C. That entity operated as a franchisee of 3717 Investments Ltd. operating Student Works Painting under an agreement described as the 2000 Franchise Agreement.

During the investigation of the complaints, Bourgeois stated that Student Works Painting had control and direction of her company because Student Works Painting directed and/or controlled number of aspects of her business, from where she should buy the paint to where and how she deposited her business profits.

The Determination noted, and relied on, several factual conclusions, which were derived predominantly from an analysis of the 2000 Franchise Agreement between Student Works Painting and Bourgeois. The Director found that a number of provisions in the Agreement,

relating to financial arrangements, business development and operational control, established common control or direction. The Determination noted the following financial arrangements:

- the Franchisor, Student Works Painting, was to set up an account in their name;
- the Franchisee, Bourgeois, was to receive all customer payments payable to Student Works Painting and deposit those payments to the account set up by Student Works Painting;
- Student Works Painting controlled the account, paying Bourgeois' accounts payable, labour, materials, miscellaneous and royalty payments from the account;
- Bourgeois could request payment from Student Works Painting of the profits of the her business from the account if the account balance exceeded \$1000.00; and
- Student Works Painting would assist in arranging a line of credit for Bourgeois with paint and equipment suppliers approved by Student Works Painting, for the purpose of allowing Bourgeois to purchase paint and equipment from those suppliers.

In respect of the business development aspects, the Determination found elements of common control or direction in the following matters:

- a requirement that Bourgeois study training manuals provided by Student Works Painting;
- a requirement that Bourgeois meet Student Works Painting's training expectations for Franchisees, including full attendance at a weekend training seminar, pre-reading the materials provided, completing estimating assignments prior to the seminar, demonstrating punctuality, conformity to a dress code and attend other training as may be required by Student Works Painting;
- directing conformity to how Bourgeois dealt with customers, with Student Works Painting reserving the right to intervene if Bourgeois' conduct in that regard was unsatisfactory;
- controlling how Bourgeois was required to deal with workers, warranty work and reporting to Student Works Painting;
- a requirement that Bourgeois follow all policies, procedures and systems presented by Student Works Painting;
- a provision that Student Works Painting would supply several business forms required by Bourgeois, including contracts, payroll forms, estimate forms, scheduling forms and planners;

- a requirement that Student Works Painting would provide Bourgeois, if she was a first time operator, with a District Manager with some responsibility for assisting her in the development of the business;
- Bourgeois was issued 150 clients contracts and was responsible for returning all those contracts, with a \$50.00 charge levied by Student Works Painting for each missing contract to cover the cost of auditing contracts; and
- Student Works Painting would provide advertising materials to Bourgeois.
- Finally, the Determination identified the following aspects of operational control as demonstrating common control or direction:
 - Bourgeois was required to make weekly telephone reports to Student Works Painting, to maintain records, accounts and status of all business activities according to standards set by Student Works Painting;
 - Bourgeois was required, on notice, to allow inspection or examination of her business records;
 - Bourgeois agreed to appoint Student Works Painting to establish a line of credit with a major supplier to enable Bourgeois to acquire the necessary equipment and supplies;
 - Student Works Painting agreed to negotiate the terms of supply and payment with suppliers for Bourgeois;
 - the Agreement stated that Bourgeois had to obtain executed contracts for sales by specified dates;
 - Bourgeois was required to retain \$500.00 in her account to allow for warranty costs caused by poor workmanship; and
 - the Agreement provided for specific instructions about how the business must be closed.

The Franchise Agreement described the relationship between the Student Works Painting and Bourgeois as follows:

2. Relationship

This Agreement does not in any way create an employer/employee relationship between the Franchisee and the Company or the employees of the Franchisee and the Company. It is understood between the parties that the Franchisee shall be an independent contractor operating his/her own business. The parties shall not be construed as joint venturers, partners or agents of each other. The Franchisee shall not carry out any work or

provide any painting services without paying the Company the royalty called for herein and otherwise pursuant to the terms of this Agreement. The Franchisee understands that because he/she is running his/her own business, he/she is solely responsible for the wages of his/her employees, paint bills, and other liabilities incurred in the operation of his/her business.

I accept that Bourgeois essentially ran the day-to day operations of her business: she acquired her own WCB number; advertised for employees, interviewed and hired the employees; set their wage rates and conditions of employment; scheduled those employees for work, assigned them jobs, supervised, or arranged supervision for, the work and the employees; and generally ran the day-to-day aspects of her business. There were a few occasions where a Student Works Painting representative became involved in the day-to day operations of Bourgeois. On one such occasion, Student Works Painting became involved, at Bourgeois' request, in a dispute with a customer concerning some work that had not been properly performed by Bourgeois' employees.

I also accept that Bourgeois did not fully comply with her obligations under the 2000 Franchise Agreement, particularly in respect of the requirement to report regularly.

ARGUMENT AND ANALYSIS

Section 95 of the *Act* states:

95. If the director considers that businesses, trades, or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
 - (b) if so, they are jointly liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

The Determination correctly states that the above provision contains four preconditions to its application:

1. There must be more than one individual, firm, syndicate or association;
2. Each of those entities must be carrying on a business, trade or undertaking;
3. There must be common control or direction; and
4. There must be some statutory purpose for treating the entities as one employer.

I also agree with the Determination that nothing on the facts raises any question of whether the first two preconditions have been satisfied. Student Works Painting contends in its appeal

submission that the first precondition has not been satisfied, but the argument does not appear to appreciate the nature of that precondition. In deciding whether this precondition is satisfied, no consideration is given to the nature of the relationship between the entities or whether there is common control and direction. Those considerations arise in examining the third and the fourth preconditions. All the first point addresses is whether the entities being considered under Section 95 of the *Act* are separate and legally distinct and there is no doubt that Bourgeois and Student Works Painting were separate and legally distinct from the other.

The central areas of dispute in this appeal are whether the Determination was correct in concluding there was common control and direction and whether there was any statutory purpose to associating Student Works Painting with Bourgeois under Section 95 of the *Act*.

Student Works Painting argues there is no common control or direction. Some degree of reliance has been placed on a Tribunal decision on another appeal by Student Works Painting, *Re 3717 Investments Ltd. operating Student Works Painting*, BC EST #D337/98. In that decision, the Tribunal considered an appeal of a Determination that had found Student Works Painting to be the employer of employees of a franchisee. The Tribunal concluded there was no employment relationship between the franchisee and Student Works Painting, allowed the appeal, cancelling the Determination. That conclusion turned on whether the relationship between the franchisee in question and Student Works Painting was an entrepreneurial relationship or an employment relationship. In reaching its conclusion, the Tribunal stated:

There is no doubt that through the device of the Owner-Operator [Franchise] Agreement Student Works Painting has a significant degree of control over certain important aspects of the franchisee's business. They have been listed above. However, this control falls short, in my opinion, of establishing an employer-employee relationship between the franchiser [sic] and the franchisee.

I have no doubt from a review of the evidence that the experience of the franchisee is an *entrepreneurial* one.

The matters listed in the decision included all of those matters identified in the Determination under appeal in this case.

On the matter of whether the employees of the franchisee could be considered employees of Student Works Painting under the *Act*, the Tribunal in decision BC EST #D337/98 also stated:

The employees themselves, like the complainants in this case, are hired by the franchisee and are aware from the outset that they are employees of the franchisee and not the Company.

It is clear that there was no relationship between the employees of the franchisee and Student Works Painting that could support a finding that such persons were employees of Student Works Painting.

At the hearing of the above appeal, the Tribunal was invited by the Director to consider whether Student Works Painting and the franchisee were associated companies under Section 95 of the *Act*, but the Tribunal declined the invitation, indicating the issue was not before the Panel hearing that appeal. This appeal raises that question directly.

Student Works Painting has pointed out that the Director has relied almost exclusively on parts of the 2000 Franchise Agreement in reaching a conclusion on direction or control without taking into account the position put forth by the company and without a sufficiently objective consideration of whether there was any “real” direction or control of Bourgeois’ business. Student Works Painting has submitted that:

. . . any control at all would have resulted in a whole different story of how Bourgeois’ business was run. . . . Common direction and control would have seen Bourgeois run a successful business and if not would not have seen her pay out her painters either personally or by injecting cash into her account.

While Student Works Painting has taken issue with several factual findings in the Determination, I have carefully reviewed the material, and have read the Tribunal’s decision, BC EST #D337/98, and accept that the factual findings made in the Determination are rationally supported by the material. The real issue is whether those findings support a conclusion that there is common control or direction between Bourgeois and Student Works Painting. That does not mean, of course, that the conclusions drawn from those facts are correct.

The Director has argued that the condition of common control or direction is satisfied by the existence of the franchising arrangement. The Director has relied on the Tribunal’s decision *Re Ritchie*, BC EST #D049/97 and the Labour Relations Board decision *Re White Spot Ltd.*, BCLRB Dec. No. B352/96. In the former case, the Tribunal dismissed an appeal against a finding that a franchisor and franchisee were associated companies for the purposes of the *Act*. The Tribunal found the evidence “clear that the franchisor and the franchisee jointly administer and manage the convenience store in question” I do not find this decision to be of much assistance, as the facts are quite different from this case.

In the latter case, the Labour Relations Board was reconsidering a decision of another panel of the Board, which had found White Spot Ltd. and Gilley Restaurants Limited, two entities to a franchise arrangement, to be common employers for the purposes of the *Labour Relations Code* (the “Code”). The Board extensively examined the issue of franchising in the context of the common employer provision of the *Code*. The starting point of the Board’s analysis appears to be the conclusion that some degree of control by the franchisor over the business of the franchisee was an inherent feature of any franchising arrangement. The Board described the objectives of the franchisor in such arrangements:

To protect its interests, every franchisor seeks to retain some degree of control of the franchise structure through standardization of operations, products, and services. These standards are imposed upon and often communicated to the franchisee through operations manuals and training courses. The franchisee agrees

to conform to these standards in the franchise agreement, the principal contractual arrangement that binds the franchisor and the franchisee. In order to ensure that the franchisee conducts its operations in accordance with the standards, almost every franchise agreement confers some form of inspection rights upon the franchisor.

The Board included several descriptions and definitions of franchising in its decision, including the following excerpt from J. George Vesely, *Franchising As a Form of Business Organization - Some Legal Problems*, (1977) 2 Can. Bus L.J. 34:

. . . a franchise is essentially the grant of a right to operate a business, which business involves the use of the grantor's trade mark or trade name, and some substantial control of the grantee's operation of the business by the grantor. Without the trade mark or trade name, there can be no franchise at all, and it is the element of control that distinguishes, in our view, a franchise from either a bare licence or an employment contract.

The Board recognized three basic types of franchising arrangements, "Product Distribution", or "Product and Trade Name", franchising, "Master Franchising" and "Business Format Franchising". The last type of arrangement was described:

In later years a more controlled type of franchising has evolved known as "Business Format Franchising" under this arrangement, the franchisor provides the franchisee with a total package including training, trademarks, logos, standard design for buildings, standard furnishings, colour schemes and uniforms for employees, marketing plans, operating systems, formulas and continuous advice. The franchisor dictates how the business will be operated by the franchisee including pricing policy, standards of cleanliness, hours of operation, sources of supply, hiring and training practices, quality of service and so on. In return, the franchisee must usually pay an initial franchise fee and continuing fees on a royalty basis to the franchisor, as well as adhere strictly to the rules/guidelines set out by the franchisor. For the franchise concept to be successful, all franchisees must project the same image and maintain the same standards of quality and service.

The Board found the franchise arrangement in the case before them to occupy "the end of the spectrum which employs more extensive legal and operational controls such as is found in the Business Format Franchising arrangement" and that the prerequisite for common control or direction for the purposes of Section 38 of the *Code* had been satisfied. In doing so, the Board also conveyed this caution:

We will . . . proceed cautiously in regard to the development of policy in this area. For instance, we do not see the general framework of a franchise arrangement, such as royalties, advertising fees, trademarks, physical plant, and so on as satisfying the prerequisite of common control or direction. Generally, the

approach we have taken in this franchising context is consistent with the Board's previous jurisprudence on common control or direction. . . . That is not to say all types of franchising arrangements will be found to exhibit the degree of control and direction which exists on the present facts. As already noted, a Business Format Franchising arrangement typically employs more extensive legal and operational controls.

I have found the decision of the Board, while not binding, to be very helpful in assisting in a consideration of the issue before me.

Further pronouncements by the Board on the same point have also been very helpful. Very recently, the Labour Relations Board has issued another decision in a common employer application involving a franchise arrangement, *Re KFCC/Pepsico Holdings Ltd.*, BCLRB Decision No. B283/2001 (Leave for Reconsideration of BCLRB No. B225/98). The decision examined the prerequisites of common control or direction and a labour relations purpose in franchise arrangements in an application under Section 38 of the *Code*.

In respect of the prerequisite of common control or direction, the decision re-assessed the Board's reasoning and conclusions in *Re White Spot Ltd.* Early in the decision, the Board confirmed that a consideration of Section 38 applications to franchise arrangement was primarily a factual exercise:

. . . the degree of control exercised by a franchisor cannot be determined solely by reference to the type of franchise system under consideration or the formal contractual agreements. The Board will look to the actual relationship between the parties to the franchise agreement. To determine the actual control exerted in a franchise arrangement all of the relevant components of the franchise venture must be examined. This is a factual determination to be made on the totality of the evidence.

The Board, affirming the relevant criteria for assessing common control or direction, discussed the application of those criteria in the context of a franchise arrangement, and stated:

As identified in *CCAG*, the relevant criteria to consider in assessing common control or direction are: common ownership, financial control, contractual arrangements, control of labour relations, common management, interrelationship or interdependence of operations, and representation to the public as a single integrated employer or business: *White Spot*, p. 51.

Generally, in reviewing "common control or direction" the Board examines the degree of influence passing between "associated or related activities or businesses" based on the *CCAG* factors. Much of the Board's common employer jurisprudence has focused on double breasting, as in the construction industry where a typical common employer finding is based on common ownership, the existence of a single guiding force or dominance by one enterprise. The Board in

CCAG defined “single guiding force” to mean “operational control vested in one individual, between the companies” (p. 140). We agree with this definition but also see the concept as including control by a common board of directors, common officers, a parent corporation, etc. In circumstances where a single guiding force is found, a common employer declaration is usually enough to provide guidance to the parties regarding their respective rights.

By contrast, franchising does not feature common ownership and may not feature a single guiding force. The absence of common ownership or a single guiding force was addressed by the *White Spot* reconsideration panel as follows:

To satisfy the common control or direction criterion, there does not have to be actual legal control or ownership; nor does there not have to be a single guiding force who has complete control of the day-to-day operations. The interdependence of the operations may be sufficient. Throughout this decision we have used a number of different terms interchangeably as reflected in the case law (operational interrelationship, functional coherence and interdependence, economic interdependence, or functional integration). We conclude that these terms fall within the umbrella term: functional interdependence. Functional interdependence suggests a mutuality of operation where complete or exclusive control need not be vested solely in one entity. Rather, control or direction over the factors, which have been traditionally used to ground a common employer declaration, may be shared between two or more entities.

Thus, the *White Spot* reconsideration panel affirmed that common control or direction could be established in circumstances where no one corporate entity or person has complete or exclusive control or direction. However, we note that mutuality of operations or functional interdependence is only one of the seven *CCAG* factors. If common control or direction is to be found it is in the degree of control exercised by the franchisor over the franchisee through all of the *CCAG* factors, including functional interdependence.

This view is a departure from the implication left by the decision of the Board in *Re White Spot Ltd.* that functional interdependence in a franchise arrangement was, *per se*, indicative of common direction or control. In *Re KFCC/Pepsico Holdings Ltd.*, the Board has indicated it is only one of seven factors to be considered by the Board in determining whether there is common control or direction and, following on that, must, together with the other factors, demonstrate a substantial degree of control by the franchisor over the franchisee. The Board also recognized that the element of control is typical of any franchise arrangement, but common control and direction is not established unless substantial control by the franchisor over the franchisee is present:

That raises the question of what degree of control by the franchisor will be sufficient to establish common control or direction. In our view the degree of

control by the franchisor over the franchisee must be substantial. By substantial we mean “of real importance or value, of considerable amount”: The Concise Oxford Dictionary, 7th ed., (Oxford, 1986). It is both a qualitative and quantitative test.

The objective is to determine, on a factual analysis of the behaviour of the parties, as well as the contractual arrangement, how much and what kind of influence is exerted over the franchisee by the franchisor:

It is clear from these cases that while there are a myriad of influences that may impact on a business in a commercial sense, it is the concentration of those influences in one source, the franchisor, that distinguishes the franchise setting for the purposes of Section 38 of the Code. But that is not all. The Board will also look at the kinds of influence exercised by the franchisor. Thus, in the franchising context, the Board looks to see how much influence and what kind of influence is funnelled through the hands of the franchisor. The Board would be looking to see if the franchisor exercises control over a representative cross-section of the *CCAG* factors, particularly a cross-section of those that have a direct impact on collective bargaining, in order to determine whether the franchisor enjoys substantial control or direction over the franchise.

The Board did acknowledge that there was a spectrum along which an analysis of common control or direction would proceed. At one end of the spectrum would be circumstances where common control or direction by the franchisor is clear:

If the franchisor exerts considerable operational influence over a cross-section of the *CCAG* factors affecting daily operations, cost of supplies, price of goods or services sold, and control over labour relations and human resource matters such as the direction of the workforce, including issues of staffing, hours of work and discipline, to name but a few, the chances of establishing common control or direction increase with the degree of influence. Indeed, a franchisor’s control may be so intrusive that any day-to-day decision of the franchisee is subject to the franchisor’s approval. At that end of the spectrum, the franchisor may well resemble a single guiding force.

At the other end of the spectrum:

... where the franchisee exercises substantial control, and the franchisor exercises virtually no control, common control or direction will clearly not be made out. In addition, if the franchisee exercises substantial control and the franchisor enjoys only some control there too, common control or direction will not be made out. The issue of labour relations purpose would then not arise.

The Board summarized this point:

Whatever the distribution of control over the spectrum, the determination of whether there is common control or direction will have to be made based on the circumstances of each case. To that end, the question of where on the spectrum the franchisor's influence becomes substantial and thus sufficient to support a finding of common control or direction is a question of fact to be determined from the totality of the evidence in each case. Accordingly, it is not possible to formulate in advance what will amount to sufficient franchisor control to constitute common control or direction.

The approach outlined by the Board in *Re KFCC/Pepsico Holdings Ltd.* for deciding a question of common control or direction in a franchise arrangement for the purposes of the *Code* is equally applicable and appropriate to a consideration of the same question under Section 95 of the *Act*.

On the facts in this case, I am not satisfied that the precondition of establishing common control or direction for the purposes of Section 95 of the *Act* has been met. On an assessment of the facts of this case and of the franchise arrangement generally, I cannot conclude that Student Works Painting exerted the degree or kind of operational influence over Bourgeois necessary to justify a finding of common control or direction. I return to the Tribunal's decision in BC EST #D337/98, where the Tribunal made the following general comment concerning the operation of a Student Works Painting franchise:

The successful operation of the franchise on a day-to-day business is in the hands of the franchisee. She hires her own staff without interference from Student Works Painting. It is trite to say that attracting and retaining good employees must be a key objective of any business. The franchisee must decide how to find and attract good people to join her business. She must decide what she can afford to pay her employees, within the constraints of the law and the reality of the market place. Those employees become registered for Workers' Compensation insurance under the name of the franchisee. The franchisee does all of these things without interference from or the involvement of the Company, other than the assistance it provides on an administrative level.

That statement is an accurate reflection of the facts in this case. Bourgeois had a substantial degree of day-to-day control over how she ran her business. The Director says that is not particularly cogent as day-to-day operation of the business by the franchisee is typical of every franchise arrangement. I do not agree that day-to-day operational control is not important. It is an aspect of the actual relationship between the franchisor and franchisee that must be considered. I agree with, and adopt, the Board's view in *Re KFCC/Pepsico Holdings Ltd.*, that how much influence and what kind of influence is exerted, or not exerted, by the franchisor on the daily operations of the franchisee is a relevant, and key, consideration. In my view, it is significant that Student Works Painting had no input into advertising for, interviewing, selecting,

hiring, assigning and supervising the work of, setting wages and hours of work for or disciplining and dismissing employees.

In respect of other factors that might demonstrate common control or direction, there is no common ownership between Student Works Painting and Bourgeois. While Student Works Painting does have some financial control of Bourgeois, I do not view such control to be much more than part of the general framework of a franchise agreement. The Board, in *Re KFCC/Pepsico Holdings Ltd.* addressed the impact of such matters on a common employer determination under the *Code*:

. . . the original panel in its interim decision unanimously adopted the *White Spot* reconsideration panel's observation that it did not see "the general framework of a franchise agreement such as royalties, advertising fees, trademarks, physical plant, and so on as satisfying the prerequisite of common control or direction" (para. 35). The majority in this case later quoted that same passage again with approval. We understand this commentary to mean that the inclusion within a franchise agreement of matters such as royalties, advertising fees, trademarks and physical premises do not, in and of themselves, provide a sufficient basis on which to find common control or direction. As well, control over signage or the registered trademark has little or no impact on the running of the day-to-day business from an operational standpoint. Nonetheless, we observe that control over the setting of advertising fees or the levying of royalties may in some cases be relevant to financial control over the operation of the business.

In making these observations we wish to emphasize that if a franchise agreement is limited to the "general framework" matters discussed above, the likelihood of success on a common employer application is limited. Without evidence of greater operational influence by the franchisor, the chances of establishing common control or direction, let alone establishing a labour relations purpose, are remote. The franchisor's influence may amount to no more than one of those diffuse sources of commercial influence with which every business contends. Further, the fact that a franchisor may exercise some control over the *CCAG* factors may not be sufficient to establish substantial control by the franchisor. In all of these circumstances, it is open for the Board to conclude that the franchisee more closely resembles an independent business and that there is no common control or direction.

In this case, the Determination found elements of financial control in the requirements that Bourgeois have all payments in respect of sales deposited to an account set up and administered by Student Works Painting, that Bourgeois had to maintain a balance of \$1000.00 in the account, that Student Works Painting arranged a line of credit for Bourgeois with suppliers and that Student Works Painting was able to retain \$500.00 of the account for a period of time to cover potential warranty work. In my view, none of those matters affected Bourgeois' ability to carry

on her business independently of Student Works Painting or that any of those matters substantially influenced the daily operations of Bourgeois.

There is no indication in the material of any commonality of management between Bourgeois and Student Works Painting. There is an interrelationship or interdependence of operations and representation to the public as a single integrated employer or business. Those matters fall entirely within the general framework of a franchise arrangement. They have little or no impact on the running of the day-to-day business from an operational standpoint.

Even if some of these matters are not caught within the general framework of a franchise arrangement, they do not amount to a substantial degree of control or direction of Bourgeois by Student Works Painting. The Determination outlines a comprehensive list of matters demonstrating Student Works Painting exercised control or direction over Bourgeois. None of those matters, however, has been shown to have substantially influenced the daily operation of Bourgeois as an independent business. There is ample support for the conclusion that Bourgeois made all her own decisions relating to the operation of the business without interference from Student Works Painting. There is nothing in the material to indicate, looking at the actual relationship between Student Works Painting and Bourgeois, that Student Works Painting had the degree of control or direction necessary to satisfy the precondition to a finding of common control or direction under Section 95 of the *Act*.

The appeal succeeds on the above grounds.

While it is unnecessary for the purpose of this decision, I will comment briefly on the requirement that there must be a statutory purpose for associating Student Works Painting and Bourgeois under Section 95 of the *Act*. The Determination set out the statutory purpose as follows:

The purposes of the Act as set forth in Section 2 supra, states that on [sic] purpose is to “(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment . . .”. The basic standards of compensation include the payment of wages, statutory holiday pay and annual vacation pay to an employee. Further, Bourgeois states that due to her financial situation, she is unable to pay the outstanding wages owing to the four complainants.

Turning once again to the decision in *Re KFCC/Pepsico Ltd.*, the Board stated:

We note that while consideration of the issue of common control or direction is the first step in the Section 38 analysis, the findings of common control or direction may be relevant to the second step in the Section 38 analysis, the issue of labour relations purpose. Consideration of the issue of labour relations purpose is fundamental to the Board's discretion to grant or deny a common employer declaration even where common control or direction exists.

In deciding whether to exercise its discretion to grant the declaration, the Board must give careful consideration to the relationship between the type and degree of control being exercised by the respective parties to a franchise arrangement and the factors relevant to labour relations purpose. Understanding the relationship between the degree of control exercised by each entity in the franchise arrangement and the labour relations purpose, will assist the Board in deciding whether to grant the declaration, and the appropriate remedy to be fashioned in the event the declaration is granted.

That approach commends itself to the Tribunal. The Tribunal, of course, would have to consider the validity of the statutory purpose being advanced against the facts of the case, the purpose of Section 95 of the *Act* and the the objects and purposes of the *Act*, particularly those found in Section 2. The Tribunal will also rely on its labour relations expertise in exercising its discretion on whether to grant a common employer declaration. From that perspective, it will be relevant that Section 95 is found among the enforcement provisions of the *Act* and that the primary purpose and objective of the *Act* is to ensure employees receive basic standards of compensation and conditions of employment. Were the requisite of a valid statutory purpose being considered, it would be significant that the Tribunal has concluded, in BC EST #D337/98, that Student Works Painting was not an employer of the employees of a franchisee for the purposes of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 3, 2001 be varied by cancelling the conclusion that Robyn Bourgeois operating Robyn Bourgeois Painting and 3717 Investments Ltd. operating Student Works Painting are considered to be associated companies under Section 95 of the *Act* and excluding 3717 Investments Ltd. operating Student Works Painting from the Determination.

David B. Stevenson
Adjudicator
Employment Standards Tribunal