

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 -

Monchelsea Investments Ltd.
("Monchelsea")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 97/545

DATE OF DECISION: October 23, 1997

DECISION

OVERVIEW

This is an appeal by Monchelsea Investments Ltd. ("Monchelsea") pursuant to s. 112 of the *Act*. The appeal is from a Determination issued by Dave Ages, a delegate of the Director of Employment Standards on June 25, 1997. The Determination required Monchelsea to pay a sum of money owing to an employee of Pacific Jade Inc., a company to which Monchelsea was alleged to be associated pursuant to section 95 of the *Act*.

Monchelsea filed an appeal on July 18, 1997. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Pacific Jade Inc. was the owner of a building at 425 Carrall Street in Vancouver, at which Donald T. Berg was employed as maintenance man. On April 25, 1997, a Determination was made requiring Pacific Jade Inc. to pay wages and compensation for length of service to Mr. Berg in the amount of \$1,889.38. Mr. Berg had been employed by this company between March, 1996 and February 4, 1997, when he was terminated without notice and apparently without just cause. On November 1, 1996, tenants in the building were notified by Pacific Jade Inc. that in order to effect refinancing of the building, the property was being transferred to Monchelsea Investments Ltd.

According to a company search conducted on March 12, 1997, there was one principal of Pacific Jade Inc., who was President and Secretary of the company: Mr. Barry Roughton. On May 28, 1997, a company search was conducted respecting Monchelsea Investments Ltd. and it was determined that Mr. Roughton also held the position of director of that company, although Mr. Gary B. Atkinson was President/Secretary and Mr. Stephen Henry was also a director.

There is no evidence before as to exactly when Monchelsea assumed ownership of the building in question, but there is in the file a Tenant Estoppel Certificate executed by D.E.R.A. (which I presume to be the Downtown Eastside Residents' Association) dated October, 1996, stating in part that this tenant acknowledges having been advised that Monchelsea has entered into an agreement to purchase the building. The Determination sets out the following findings of fact: Mr. Berg's employment continued uninterrupted and unchanged after the building was sold by Pacific Jade Inc. to Monchelsea; his pay cheques continued to be issued on accounts in the name of Pacific Jade Inc.; he was given a termination notice written on Pacific Jade Inc. letterhead; the termination notice was signed by Mr. Roughton.

In its submission on the appeal, Monchelsea argues that it was at no time the employer of Mr. Berg, and that Monchelsea and Pacific Jade Inc. "were in no way associated or affiliated during Nov. 96, Dec. 96, Jan. 97 [*sic*]." I note this assertion of no association is limited only to these three months, and Monchelsea provides no evidence to support any of its arguments, particularly that Mr. Berg was never its employee. It is not disputed, in any event, that Monchelsea was the owner of the building at the time Mr. Berg was terminated, and I find that Monchelsea presents no facts that would cast doubt on the Director's conclusion that Monchelsea continued the employment of Mr. Berg after it purchased the building.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Monchelsea is a corporation associated with Pacific Jade Inc. and so is liable for wages and other amounts owing to Mr. Berg.

ANALYSIS

Section 95 of the *Act* reads as follows:

Associate Corporations

- 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 and separately 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.

This tribunal has adopted a four step test to determining whether entities are associated under this provision: (1) whether is there any legal vehicle or vehicles through which business may be conducted by the entities; (2) whether the entities are carrying on business; (3) whether there is a common control or direction over the entities; (4) whether there is a statutory purpose for treating the entities as one employer (see *Invicta Security Systems Corp. v. Director of Employment Standards*, BC EST #D349/96).

I find that both entities were involved in owning and operating a building at 425 Carrall Street in Vancouver. No party to this appeal has presented any evidence as to exactly when Monchelsea assumed ownership of the building in place of Pacific Jade Inc. (or whether this change of ownership has in fact occurred). The onus rests squarely on Monchelsea, however, to demonstrate to me how the Determination is incorrect, and I have been presented with no evidence to counter the findings of fact in the Determination. Any ambiguity on this point is resolved, in my view, by the fact that Mr. Berg's pay cheques and termination notice were handled by Pacific Jade Inc. If this corporation was no longer involved in the business after October, 1996 (the date of the tenant estoppel certificate), then the only explanation I can see for its continued involvement is that it was carrying on this business together in some way with Monchelsea.

With regard to the third step in the test, Mr. Roughton is a director of both Pacific Jade Inc. and Monchelsea. It was submitted by Monchelsea -- again without any evidence in support -- that Mr. Roughton was not a director of Monchelsea during November and December, 1996 and January, 1997. The significance of this three-month period was not made clear to me by Monchelsea. It may confirm my assumption that the change of ownership occurred in October, 1996, but it does not assist in resolving the matter of Mr. Berg's termination notice being issued on Pacific Jade Inc. letterhead. For the purposes of this appeal, I am satisfied that there was common direction over

these two companies by Mr. Roughton and a three-month hiatus as alleged does not affect my conclusion.

Finally, there is a statutory purpose for treating these two companies as one employer, as I understand Mr. Berg's wages remain unpaid despite the earlier Determination made against Pacific Jade Inc.

Even if I am mistaken in any of the above conclusions, there is more than enough evidence in this appeal to justify a Determination against Monchelsea as a successor employer under section 97 of the *Act*, and also to make a Determination against Mr. Roughton personally as a director of Pacific Jade Inc. under section 96 of the *Act*.

ORDER

After carefully considering the evidence and argument, I dismiss the appeal and confirm the Determination made by Dave Ages on June 25, 1997. I also order that Monchelsea pay interest on the award to Mr. Berg pursuant to section 88 of the *Act*, from the date of his complaint.

Ian Lawson
Adjudicator
Employment Standards Tribunal