

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 -

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 issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/651

DATE OF DECISION: December 22, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by 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 August 28, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination 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 companies appeal the Determination on several grounds:

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.

The companies ask that the Determination be set aside.

The Tribunal has decided an oral hearing is not required.

ISSUE

The issues raised by the above grounds of appeal are whether the conclusion that Babcock was an employee for the purposes of the *Act* was wrong, whether, if Babcock was an employee, there was an error in the calculation of the amounts owing and whether the issuance of the Determination was premature.

PRELIMINARY ISSUE

The Director has raised a preliminary objection to the appeal. Mr. Myrah has indicated that the appeal is brought on behalf of himself and Mr. Ferguson, who are identified as directors and officers of the companies. The Director says that Mr. Myrah does not have the legal authority to bring the appeal, relying on the following assertion of fact:

1. Ted Myrah does not have any legal authority to appeal the Determination on behalf of No. 289 Taurus Ventures Ltd., Prema Systems Ltd. or 544553 B.C. Ltd. As each of these companies is bankrupt, the legal authority to bring and continue an appeal rests solely with the Trustee in Bankruptcy.

The Director refers to the decision of the Tribunal, *Re Fyfe*, BC EST #D080/00, where the Tribunal stated:

Section 71(2) of the *Federal Bankruptcy and Insolvency Act* states that: “on an assignment [into bankruptcy], a bankrupt has ceased 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 Mr. Myrah has been given such authority.

I accept the preliminary objection.

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.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated August 28, 2000, in the amount of \$253,544.83 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal