

An appeal

- by -

Brunswick Avenue Holdings Ltd., Brunswick Avenue Restaurant Ltd., 600136
British Columbia Ltd., and 600317 British Columbia Ltd. (Associated pursuant
to Section 95 of the Employment Standards Act)

(the “associated companies”)

- 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.: 2001/693

DATE OF DECISION: December 31, 2001

DECISION

OVERVIEW

This is an appeal by 600317 British Columbia Ltd. (“600317”) under Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination by the Director of Employment Standards (the “Director”) dated September 7, 2001 (the “Determination”). The Determination associated several companies, Brunswick Avenue Holdings Ltd., Brunswick Avenue Restaurant Ltd., 600136 British Columbia Ltd., and 600317 British Columbia Ltd. (the “associated companies”) under Section 95 of the *Act*. The Determination concluded the associated companies had contravened Part 3, Section 18 and Part 8, Section 63 of the *Act* in respect of the employment of approximately 37 employees and ordered the associated companies to cease contravening and to comply with the *Act* and to pay an amount of \$22,003.91.

600317 says the Director was wrong to have included it in a decision under Section 95 of the *Act*.

ISSUE

The issue in this case is whether the Director was wrong to have associated 600317 under Section 95 of the *Act*.

FACTS

The Determination arose out of complaints filed with the Director following the closure of a restaurant and brewing company in Prince George.

The facts relevant to the issue raised by this appeal are included in the following excerpts from the Determination:

600317 British Columbia Ltd. started operation 28 January 2000 and is currently in receivership. This company acquired a second mortgage on the 611 Brunswick Street, Prince George property and all fixed assets. Court order H00196, filed in the Supreme Court of British Columbia, 21 December 2000 (attachment 5), shows 600317 British Columbia Ltd. acquired the building and equipment (all fixed assets) of Brunswick Avenue Restaurant Ltd. Directors for the company are Achiam, Gammel, Gary Clarke (*Clarke*), Rebecca Sinclair (*Sinclair*) and Richard Suen (*Suen*). Suen resigned September 2000. Minutes of a director’s meeting also include Dr. Jan Berg (*Berg*) as a director.

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The evidence of Directors Gary Clarke, Radosav Gajic, Rebecca Sinclair, Wilhelm Gammel, the receiver Don Manning, and on court document #H001996 filed in the Supreme Court of British Columbia, Vancouver Registry, I find:

- Brunswick Avenue Restaurant Ltd. was incorporated 21 December 1994 and is currently in receivership. The company operated the restaurant at 611 Brunswick Street. Directors for this company were Arthur Achiam (Achiam), Wilhelm Gammel (Gammel), Richard Douglas (Douglas), Jim Fors (Fors), Rad Gajic (Gajic). Gajic resigned in 1998.
- Brunswick Avenue Holdings Ltd. operated from 14 August 1998 and appears to be ongoing. This company owned the building located at 611 Brunswick Street, Prince George, B.C., in which the business of Brunswick Avenue Restaurant was operating at the same time. Directors for the company are Achiam, Gammel, Daniel Lewis (Lewis) and Kenneth Iaci (Iaci).
- 600317 British Columbia Ltd. started operation 28 January 2000 and is currently in receivership. This company acquired a second mortgage on the 611 Brunswick Street, Prince George property and all fixed assets. By court order 4 July 2000 this company acquired the building and equipment (all fixed assets) of Brunswick Avenue Restaurant Ltd. Directors for the company are Achiam, Gammel, Gary Clarke (*Clarke*), Rebecca Sinclair (*Sinclair*) and Richard Suen (*Suen*). Suen resigned September 2000. Minutes of a director's meeting also include Dr. Jan Berg (*Berg*) as a director.

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- There are four separate legal entities
- Each of the companies carried on a business
- All businesses operated from 28 January 2000 until 19 January 2001
- The businesses were all in relation to the property and/or running the restaurant/pub/micro brewery located at 611 Brunswick Street, Prince George, B.C.
- Common control and direction is provided through directors Achiam, Gammel, Fors and Gajic.
- Ownership of the building and assets transferred from Brunswick Avenue Holdings Ltd. to Brunswick Avenue Restaurant Ltd., then to 600317 British Columbia Ltd.
- There is an action against 600316 British Columbia Ltd. as the party in possession of the Mortgaged Lands and as the holder of a possessory interest in the Personal Property.
- The association is for the purpose of providing unpaid wages to the employees of 600317 British Columbia operating as Buffalo Brewing Company.

600317 B. C. Ltd. - was incorporated 28 January 2000 and is currently in receivership. The purpose of this entity was to rescue the investment in

Brunswick Avenue Restaurant Ltd. This company obtained a second mortgage on the property located at 611 Brunswick Street, Prince George, B.C.; acquiring all fixed assets (building and equipment) of Brunswick Avenue Restaurant Ltd.

The Determination found common control and direction in the directors, officers and management of 600317 relative to the other associated companies.

The appeal elaborates on the history and purpose of 600317 and its relation to the other associated companies. The appeal says the company was created by local investors in Brunswick Avenue Restaurant Ltd. to be used as a vehicle for securing their investment by foreclosing on the property. Apparently, the company obtained the right to foreclose but lacked the funds to complete the process. The appeal takes issue with the conclusions that any of the directors of 600317, except for Achiam, who did not attend any meetings and resigned “quite early into his term”, were ever directors of the other associated companies and that 600317 carried on any business. The appeal says that, in fact, 600317 existed to take the property away from the other associated companies.

The appeal speaks to some involvement of 600317 in organizing an orderly closure of the business, which at the time had been abandoned by the directors and/or officers of the other associated companies.

The Director and two of the complainants have filed replies to the appeal. The reply of the Director notes that 600317, for a period commencing approximately January 28, 2000 until December 31, 2000, had operational control of the business and made day to day decisions concerning the business, including decisions relating to the closure of the business. Employee cheques were signed by Clarke, a director of 600317 and those cheques identified the payor as 600317 British Columbia Ltd. DBA Buffalo Brewing Co.

ARGUMENT AND ANALYSIS

The basis of the appeal of 600317 is that the role and structure of that company made it distinct from the other companies that were associated by the Director under Section 95 of the *Act*. 600317 was operationally and functionally unrelated to the other companies. While there was one director or officer of 600317 that was common to any of the other associated companies, that person did not attend any meetings of 600317 and resigned quite early into his term.

The Director argues that 600317 carried on the business from late January, 2000 to December 31, 2000. While acknowledging Achiam shows as the only common director between 600317 and the other companies, the Director says there was an element of common control that arose from the appointment of Gammel, who was a director and/or officer of two of the other associated companies, as the operating manager for 600317 during the period it operated the business.

The submissions from the two complainants add their views to the merits of the decision, but do not add to the facts upon which the companies were associated.

After reviewing the facts and the submissions, I am satisfied the decision of the Director to associate 600317 with the other companies was the correct decision. It is apparent that all of the associated companies were engaged in a common enterprise, even though I also accept that 600317 was involved in that enterprise with a different objective than the other associated companies. That objective, however, does not alter the fact that 600317 did carry on the business, there was common control or direction among the entities carrying on the business and there was a statutory purpose for the declaration. There is nothing in Section 95 that requires the objective of the entities associated for the purposes of the *Act* to be the same. 600317 created employment and, like the other associated companies, also created liabilities for wages under the *Act*. For the purposes of the *Act*, the objectives of the associated companies were identical - to attempt to successfully operate a business and to create or maintain employment in order to meet that objective. The *Act* says that work must be paid for and other statutory obligations associated with the work performed, such as annual vacation pay and length of service compensation, must be satisfied.

I do not accept, as asserted by 600317 in the appeal, that their only role was to conduct an orderly closure of the business. It is clear that their primary objective was to continue the business as a going concern, if possible. When sufficient additional funds could not be raised to continue the business, the decision was made to close it.

Nor does the *Act* require that the commonality of control or direction be perfect, in the sense that the same persons must be involved in all of the entities. Consistent with the nature of the *Act*, the concept of control or direction referred to in Section 95 should be applied in a way that gives effect to the broad remedial nature of the legislation. The Director may look to several aspects of control or direction, including operational control or direction, financial control or direction or *de facto* control or direction when considering whether this condition has been met.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 7, 2001 be confirmed in the amount of \$22,003.91, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal