An application for Reconsideration

- by -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2012A/34

DATE OF DECISION: May 30, 2012

DECISION

SUBMISSIONS

Christy Jin	on behalf of Jin Fine Cuisine Group Ltd. (a dissolved company)
Michelle J. Alman	counsel for the Director of Employment Standards

OVERVIEW AND SUBMISSIONS

1. This is an application by the Director of Employment Standards (the "Director") for a reconsideration of decision # D027/12 (the "Original Decision"), issued by the Tribunal on March 12, 2012.

2. By way of background, between August 31, 2009, and April 3, 2010, Bia Xia Luo, Qiao Ling Tan, Grace Hsiu Chen Chiang, and Yu Ling Zhu (collectively the "Complainants"), pursuant to section 74 of the *Employment Standards Act* (the "*Act*"), filed their individual complaints (collectively the "Complaints") against their employer King's Taste Foods Inc. ("KTF") alleging the latter contravened the *Act* by failing to pay them wages earned during the period March 2009 to February 2010.

3. A delegate of the Director investigated the Complaints and based on his corporate search of KTF on March 10, 2010, found that the latter was incorporated in March 2006, and Lily King ("Ms. King") was its sole director.

4. Based on the evidence adduced by the Complainants in the investigation, the delegate also found that some of the Complainants' wages had been paid from an account held by another company, namely, Jin Fine Cuisine Group Ltd. ("JFC"). The Delegate conducted a corporate search of JFC on March 10, 2010, and found that it was incorporated on February 28, 1994, and Christie Jin ("Ms. Jin") was its sole director and Ms. King, her mother, its officer.

5. A subsequent corporate search of JFC by the delegate on October 5, 2011, showed that JFC was voluntarily dissolved on August 9, 2010; a few months after the delegate had started his investigation of the Complaints and corresponded with both KTF and JFC.

6. In the record adduced by the Director in this application, I note there are several pieces of correspondence from the delegate, prior to JFC's dissolution. More specifically, there is a demand by the delegate to KTF for employer payroll records on December 9, 2009, followed by letters of March 4, 2010, to KTF, March 10, 2010, to both KTF and JFC and May 19, 2010, to KTF, JFC, Ms. Jin, and Ms. King. The follow-up letters reiterated the earlier request for payroll records and disclosed the evidence of the Complainants and invited KTF, JFC, Ms. King and Ms. Jin to respond and issued them an unequivocal warning that failing any evidence to the contrary from them, he would make a formal determination against both KTF and JFC, which may also lead to a liability determination against the officers and directors of both companies for up to 2 months' wages. It is also noteworthy that the delegate, in his correspondence with the parties, suggests that a section 95 "association" was being investigated between KTF and JFC.

7. On August 9, 2010, (which is also the date of the voluntary dissolution of JFC) the delegate sent a further letter to Ms. Jin informing her that he had now been informed that on January 11, 2010, Ms. King had filed for personal bankruptcy in Ontario where she was residing and assets of KTF had been disposed of. As a

result, the delegate stated it now fell to JFC and its remaining director, Ms. Jin, to take responsibility for outstanding wages owed to the Complainants. The delegate invited Ms. Jin to respond if she did not believe that wages were owed to the Complainants, but Ms. Jin did not respond. Subsequently, the delegate sent two further letters to Ms. Jin dated April 8 and April 12, 2011, (the latter also addressed to KTF) in Ontario informing her that he was in the process of issuing a determination holding JFC and Ms. Jin responsible for the wages claimed by the Complainants. However, the delegate did not receive any response from her.

8. Having afforded KTF, JFC, Ms. Jin, and Ms. King ample opportunity to participate in the investigation of the Complaints and these parties having failed to participate or respond to the delegate's correspondence, the latter went ahead and made his determination on December 5, 2011, (the "Determination"). In the Determination, the delegate decided to "associate" KTF and JFC as a single employer pursuant to section 95 of the *Act* and found the employer had contravened Part 3, sections 17 and 18, Part 4, section 36, Part 5, sections 45 and 46 and Part 7, section 58 of the *Act* in respect of the Complainants and ordered the employer to pay an amount of $6,365.68, an amount which included wages and interest.

9. The delegate also imposed administrative penalties totalling $1,000.00 on the employer pursuant to Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*").

10. The total amount of the Determination was $7,365.68.

11. On January 2, 2012, Ms. Jin, using her personal name on the Appeal Form, appealed the Determination on the sole ground that evidence has become available that was not available at the time the Determination was being made. I note that although Ms. Jin used her personal name in the Appeal Form, in her submissions in support she indicated she was appealing the Determination as a director (or more correctly, a former director) of the dissolved company, JFC. I also add that under the *Act,* Ms. Jin as "a person served with the determination" has standing to appeal it and she did just that on behalf of JFC only.

12. In the appeal, Ms. Jin argued that KTF employed her as a general manager during 2006 to 2010 and in her capacity as a general manager she was responsible for and did hire employees for KTF. She stated she did not hire the Complainants for JFC.

13. Ms. Jin also explained that when KTF experienced financial difficulty and its bank account was frozen, her mother, Ms. King, asked her for help and she obliged by paying some of KTF's employees from JFC's bank account. She also explained that she had entered into a loan agreement with Ms. King dated June 28, 2010, which she presented with her appeal submissions. The loan agreement is not between JFC and KTF or Ms. King but instead between Ms. Jin in her personal capacity with Ms. King. Ms. Jin submitted that that as a result, KTF still owes JFC $40,000 which she borrowed from the bank on a line of credit. She stated that she has no way of recovering this money due to KTF's bankruptcy.

14. The Tribunal Member, in his Reasons for the Original decision, agreed with the Director's argument and rejected the evidence of Ms. Jin on appeal, as it did not qualify as "new evidence" since it was the sort of evidence that was available during the investigation of the Complaints and could have been provided to the Director then. According to the Member, Ms. Jin, having failed or refused to participate in the complaint process and ignored the delegate's correspondence, cannot be allowed to introduce "new evidence" at this stage as it would be inconsistent with the objects and purposes of the *Act* and contrary to the approach of the Tribunal in similar cases.

15. Having said this, the Member went on to find that Ms. Jin's submissions raised an argument that the Director's section 95 "association" of KTF and JFC amounted to an error of law, although Ms. Jin did not

expressly invoke the error of law ground in her submissions. In the interest of addressing the substance and not the form of the appeal as is the practice of the Tribunal, the Member sought to consider this argument and examined the preconditions to an application of section 95 of the *Act* delineated in Tribunal decision BC EST # D349/96, *Invicta Security Systems Corp.*

16. In allowing the appeal and cancelling the Determination, the Member stated:

> The seminal decision in respect of the interpretation and application of section 95 is *Invicta Security Systems Corp.*, BC EST # D349/96. In that decision, the Tribunal examined the language of the provision and, among other things, identified four preconditions to an application of section 95:
>
> 1. There must be more than one corporation, individual, firm, syndicate or association;
> 2. Each of these 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.
>
> As well, the Tribunal provided the following description of how each of these preconditions would apply:
>
> > The reference to "corporation, individual, firm, syndicate or association" in the first precondition is sufficient to capture any legal vehicle through which a business may be conducted. The second precondition requires the entities sought to be included in a Section 95 determination to be "carrying on" a business, trade or undertaking, in the sense that the entity is not defunct or completely withdrawn from the business, trade or undertaking which would bring them into a Section 95 determination. The third precondition is directed toward the manner in which the various entities inter-relate within the common enterprise. One entity may have financial control, another may have operational control and yet another may have de facto control through majority shareholding or control of the Board of Directors. These examples are not meant to be exhaustive, but illustrative of how control may be demonstrated. Similarly, direction may be demonstrated in a variety of ways, but generally it will normally be found in an entity which makes significant decisions respecting how the business, trade or undertaking has been, is, or will be, run.
> >
> > The final precondition identifies the need for a statutory purpose. One of the purposes of the Act is to ensure employees in the province receive the basic standards of compensation and conditions of employment. The Act not only sets the basic standards of compensation and conditions of employment but also provides a comprehensive scheme for the enforcement of the Act, including some collection procedures such as claims of lien, court order enforcement and seizure of assets in appropriate circumstances. It is in the enforcement provisions of the Act where Section 95 has been placed. The statutory purpose requirement is met if the one employer determination is for the purpose of enforcing basic standards of compensation and conditions of employment. It is not inconsistent with that purpose to make the one employer declaration for the purpose of facilitating the collection of wages owing under the Act.
>
> In the circumstances of this case, I find the Director erred in law in associating the two entities as one employer. The Determination indicates a finding by the Director, which is supported by the material in the "record" that the business of King's Taste Foods Inc. had shut down in early 2010; its sole director filed for personal bankruptcy in January 2010. Jin Fine Cuisine Group Ltd. was voluntarily dissolved on August 9, 2010. There is no indication that the company continued to be, and remains, in business notwithstanding its dissolution.
>
> The Determination was issued December 5, 2011 – almost two years after King's Taste Foods Inc. shut down and nearly sixteen months after Jin Fine Cuisine Group Ltd. was dissolved. While the Director

> makes a finding that "the business was being carried on by both KTF and JFCG", I can only accept that finding as referring to a period considerably in the past, as the evidence and the Determination indicate King's Taste Foods Inc. had shut down its business in early 2010 and there is no evidence that Jin Fine Cuisine Group Ltd. was carrying on a business when the association was made. The findings of fact made in the Determination and the material in the "record" make it unlikely that Jin Fine Cuisine Group Ltd. continued to carry on business after it was dissolved. The precondition requiring the entities to be "carrying on business", and the language of section 95, speaks in the present tense. As stated in the excerpt from Invicta Security Systems Corp., supra, that precondition operates "in the sense that the entity is not defunct or completely withdrawn from the business".
>
> The Determination does not show the associated entities were carrying on business when the Determination was made, and on this basis, I allow the appeal and cancel the Determination. (BC EST # D027/12)

17. As indicated, the Director is seeking a Reconsideration of the Original Decision. I have carefully reviewed all of the submissions of counsel for the Director, but I will focus mainly on the submissions that are ultimately dispositive of this Reconsideration application and not other submissions. The substantive basis of the Director's Reconsideration application is summarized at page 2 of counsel's submissions where the latter argues the Member erred in law in cancelling the Determination for the following reasons:

> a. The member's ruling that an association under section 95 cannot be made if the associated entities are not still operating when the Director's determination issue defeats the statutory purpose underlying section 95;
>
> b. Section 346(1) of the Business Corporations Act, S.B.C. 2002, c. 57 (the "BCA"), permits legal proceeding (defined in BCA's section 1(1) as including an "administrative or regulatory action or proceeding") that were commenced against a company before its dissolution to be continued as if the company had not been dissolved or to be brought within two years after the dissolution of the company as if it had not been dissolved; and
>
> c. The facts as set out in the Determination and in the record included with the Director's response to the appeal indicate that the voluntary dissolution of Jin's on August 10, 2010 took place after the Director's Delegates had made numerous efforts to contact KFT, Jin's and Ms. Jin herself about the possibility that Jin's would be associated with KTF, and the consequence of personal liability for the directors and officers of Jin's. By cancelling the Determination on the grounds of the voluntary dissolution of Jin's before issuance of the Determination, the Member's Decision rewards a tactic that was intended to defeat the Acts enforcement mechanisms under sections 95 and 96.

18. The Director's counsel further submits that the aforementioned errors have serious implications for other cases in the future and not simply the instant case because the Member's Original Decision has the effect of:

> a. undermin(ing) the statutory purposes of the enforcement provisions of the *Act*; and
>
> b. encourag(ing) attempts to misuse the dissolution provisions of the BCA to avoid liability under the *Act*.

19. The Director's counsel also argues that the Member's interpretation of section 95 of the *Act* in the Original Decision conflicts with some previous decisions of the Tribunal that upheld determinations in circumstances where at least one company was not operating at the time the Director issued a decision associating the defunct company with a company carrying on a business. In particular, the Director lists the following decisions in support of this assertion: *Funk*, BC EST # D195/04, *0708964 B.C. Ltd.*, BC EST # D015/11, *International Steelworks Industries Ltd. and SWI Steelworks Inc.*, BC EST # D294/02 and *SCC Industries Ltd.,* BC EST # D021/98.

20. In the case of *Funk, supra,* counsel for the Director states the matter involved a determination that was issued against a company while it was struck from the B.C. Corporate Registry. While the Tribunal in *Funk* referred the matter back to the Director to investigate the status of an individual who was named as a co-employer of the complainant with the struck company, the Tribunal commented that by virtue of the operation of section 346(1)(b) of the BCA, "the liability of a dissolved corporation continued for two years after its dissolution".

21. The Director's counsel further argues that section 95 of the *Act* does not include the words "when the Determination was made" and there is no basis to import those words in the provision. Counsel also calls for a contextual and purposive approach to the interpretation of the provision and refers to the decision of the Supreme Court of Canada in *Machtinger and HOJ Industries*, [1992] 1. S.C.R. 986, [1992] S.C.J. No. 41 (Q.L.) to argue that an interpretation of the *Act* that encourages employers to comply with its minimum requirements and so extends its protections to as many employees as possible is to be preferred to one that does not. In this regard, counsel also notes that one of the purposes of the *Act* is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment (section 2(a) of the *Act*) and argues that the Tribunal Member's interpretation of section 95 runs counter to this purpose as it prevents the Director from recovering wages from an entity that participated in the contravention of the *Act* or from its directors and officers (under s. 96(4)). Therefore, argues counsel, an interpretation of section 95 that permits the Director to associate entities even after entities have ceased doing business or have been dissolved when determinations are issued should be preferred over one that does not. More specifically, counsel argues for an interpretation of section 95 that allows for the Director to associate entities, even if one of them is defunct at the time of the determination, provided both entities carried on business at the time the wages were earned or became payable.

22. Finally, counsel refers to section 346 and 347 of the BCA as well as the definition of "legal proceeding" in section 1(1) of the BCA which includes an administrative or regulatory action or proceeding and argues that the language of BCA allows the Director to continue an already-commenced investigation of a complaint against a company after the company's dissolution or, for up to two years after its dissolution. Therefore, counsel argues, the voluntary dissolution of JFC did not create any impediment under the BCA to the Director's continuing ability to pursue JFC and the Member was wrong in law in cancelling the Determination solely because the Determination was issued after the date of JFC's dissolution.

23. In her submissions in response to the Director's, Ms. Jin reiterates the evidence she presented as "new evidence" previously in the appeal of the Determination, which evidence the Tribunal Member rejected in the appeal as it was evidence that was available during the investigation of the Complaints and should have been presented then. More specifically, the evidence Ms. Jin reiterates is that the Complainants were not JFC's employees but KTF's. She also adopts in her submissions the reasoning of the Member in the Original Decision that JFC was dissolved on August 9, 2010, and there is no evidence it carried on business after it dissolved when the Determination was made. Implicit in her submissions is the suggestion that the Tribunal Member properly cancelled the Determination based on his finding that the Director erred in law in associating JFC and KTF under section 95 of the *Act*. Ms. Jin also adduces a written statement from her mother, Ms. King, which states that the Complainants were not employees of JFC and the latter, therefore, is not responsible for unpaid wages to the Complainants and suggests that the receiver of the bankrupt KTF should be contacted with respect to unpaid wages.

24. Counsel for the Director has submitted a reply dated May 10, 2012, in response to Ms. Jin's submissions and I have reviewed them but do not find it necessary to reiterate them here or rely upon them to decide this Reconsideration application.

25. Pursuant to section 36 of the *Administrative Tribunal's Act* (the "*ATA*"), which is incorporated in the *Act* (S. 103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, an oral hearing of the reconsideration application is not necessary and I will, therefore, adjudicate the Director's reconsideration application based on the written submissions of the parties and a review of both the Determination and the Original Decision.

ISSUES

26. In a reconsideration application, there is always a threshold issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the Original Decision. If the Tribunal, in determining the threshold issue, is satisfied that the case is appropriate for reconsideration the Tribunal will then proceed with consideration of the substantive issues or the merits of the application. In this case, the substantive issue is whether the Tribunal Member erred in law in cancelling the Determination based on his interpretation of section 95 of the *Act* and particularly his finding that the entities sought to be associated under section 95 of the *Act* must be "carrying on business" at the time when the Determination is made.

ANALYSIS OF THE PRELIMINARY ISSUE

27. With respect to the preliminary or a threshold issue of whether the Tribunal should exercise its discretion to reconsider the Original Decision, I note that in *Re Eckman Land Surveying Ltd.,* BC EST # RD413/02, the Tribunal stated that "reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal". It is only in exceptional circumstances that the Tribunal will agree to reconsider a decision because the *Act* intends that the Tribunal appeal decisions be final and binding. This was clearly expressed in an earlier decision of the Tribunal in *Voloroso*, BC EST # RD046/01, where the Tribunal expressly called for a restraint in the exercise of its reconsideration power in section 116 of the *Act:*

> … The Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute …
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the 'winner' is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, or best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

28. Having said this, the most noteworthy and often quoted decision governing the Tribunal's reconsideration power in section 116 of the *Act* is the Tribunal's decision in *British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.*), BC EST # D313/98. In *Milan Holdings*, the Tribunal delineated a two-stage process governing its decision to exercise the reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the Member; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) whether the applicant has raised questions of law, fact, principle, or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases; and (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

29. After weighing the above factors in the first stage, if the Tribunal concludes that the application is inappropriate for reconsideration, the Tribunal will reject the application and provide its reasons for not reconsidering it. However, if the Tribunal finds that one or more issues in the application are appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage involves consideration of the substantive issues raised by the reconsideration.

30. The circumstances where the Tribunal favours exercising its discretion to reconsider include, but are not limited to:

a. Failure to comply with the principles of natural justice;

b. Mistake of law or fact;

c. Significant new evidence that was not reasonably available to the original panel;

d. Inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts;

e. Misunderstanding or failure to deal with a serious issue; and

f. Clerical error

31. Based on the guidelines, both statutory and in the Tribunal's own decisions referred to above, as well as the submissions of the Director on the preliminary issue which I have carefully reviewed and considered, I am persuaded that this is a case where the Tribunal should exercise its discretion in favour of reconsidering the Original Decision because the Director's application raises questions of law and principle which are very significant and warrant a review, particularly because of their importance to both employers and employees and because of their implications in future cases. There is now, perhaps more than ever, a need for greater clarity on the constituent elements of or preconditions to an application of section 95 of the *Act* as there appears to be some inconsistency between some previous decisions of the Tribunal (particularly those the Director relies upon in the Reconsideration application and the one the Tribunal Member relies on, *Invicta Security Systems Corp., supra*, in the Original Decision).

32. I also find that counsel for the Director, in her submissions, has made out an arguable case of sufficient merit concerning the substantive issues in the Director's Reconsideration application such as to warrant a reconsideration of the Original Decision. This conclusion will become more evident in my consideration of the substantive issues under the heading "Analysis" below.

33. Finally, in the interest of fully considering the balance of the factors governing the determination of the preliminary issue as set out in *Milan Holding*, I note the Director's application is filed in a timely fashion, does not involve a preliminary ruling made in the course of an appeal and does not fall in the category of applications where the applicant's primary focus is to have the reconsideration panel re-weigh evidence already provided at the appeal stage.

34. Accordingly, I am of the view that this is an appropriate case for the Tribunal to exercise its discretion in favour of reconsidering the Original Decision.

ANALYSIS

35. As indicated previously, the substantive question in the Director's Reconsideration application is whether the Member erred in law in cancelling the Determination based on his interpretation of section 95 of the *Act* and particularly his injection of the precondition that the entities sought to be associated under section 95 of the *Act* must be "carrying on business" at the time when the Determination is made.

36. Section 95 of the *Act* states:

> *Associated employers*
>
> **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 employer 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, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

37. Arguably, section 95 of the *Act* is derived from the common law doctrine of common employer. At common law, the common employer doctrine allows the court to treat separate legal entities, in appropriate cases, as a single employer for the purposes of attaching liability for such things as outstanding wages or termination or severance pay. It essentially protects employees and ensures their "wage claims are not defeated by niceties of legal form". In *Sinclair v. Dover,1987 CanLii 2692,* the BC Supreme Court delineated the following justification for common employer determination:

> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings and interlocking directorships. The essence of that relationship will be the element of common control.

38. In the Original Decision, the Member, in interpreting the section 95 of the *Act*, relied upon the Tribunal's earlier decision in *Invicta Security Systems Corp., supra*, which delineated the following four preconditions to a decision to associate under section 95, namely:

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.

39. Since the Member did not take issue with the existence of any of the above preconditions in the Director's decision to associate KTF and JFC under section 95 of the *Act* but one; the second condition, I will only focus on the latter precondition in my decision and not any others, although I note there are some submissions of the counsel that touch on the other preconditions above.

40. With respect to the second precondition in *Invicta Security Systems, supra*, the Tribunal in that case elaborated stating that this precondition required the entities sought to be associated "to be 'carrying on business', trade or undertaking, in the sense that the entity is not defunct or completely withdrawn from the business, trade or undertaking which would bring them into a section 95 determination". In the Original Decision, the Member evidently relied on this passage and the present tense language of section 95 to conclude that the entities sought to be associated are required to be carrying on business when the determination is made. Since JFC

had voluntarily dissolved by the time of the Determination, the Member cancelled the Determination because it failed to show "the associated entities were carrying on business when the Determination was made".

41. I note in *Invicta Security Systems, supra*, the Tribunal was not faced with a determination associating a defunct entity with an operating entity, although one of the entities had filed a proposal in bankruptcy. However, I note that in the cases the Director's counsel relies on, namely, *Funk*, *supra*, *0708964 B.C. Ltd.*, *supra*, *International Steelworks Industries Ltd. and SWI Steelworks Inc.*, *supra* and *SCC Industries Ltd.*, *supra*, the Tribunal upheld determinations in circumstances where at least one company was not operating or struck off the company register at the time the Director issued a determination associating the defunct company with another or, alternatively, the Tribunal did not cancel the determination associating the companies because one of the companies was defunct or struck off the company register at the time of the determination.

42. In light of the apparent inconsistencies in the decisions, it is necessary that section 95 of the *Act* be revisited in this case with a view to flushing out its proper interpretation. Having said this, in my view, the logical place to start is by looking to the *Interpretation Act*, R.S.B.C. 1996 c.238. Section 8 of the *Interpretation Act* provides:

> ***Enactment remedial***
>
> **8** Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

43. In the case of the *Act,* one of the objectives is to ensure that employees in British Columbia receive at least basic conditions of employment (section 2(a)), which surely must include payment of earned wages. Section 95 is intended to facilitate this objective and ensure employee's "wage claims are not defeated by niceties of legal form" as this section allows the Director, by "associating" entities that conduct business together "under common control and direction" and treating them as a single employer, to enforce established liability for employees' wages.

44. Having said this, I also note that in *Rizzo and Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27, the Supreme Court of Canada determined that giving full effect to the true meaning, intent and spirit of the legislation must be a primary consideration in all cases involving statutory interpretation. In *Rizzo*, the Supreme Court adopted a passage from *Dreidger's Construction of Statutes* (2nd ed., 1983) which discussed the approach to be taken in statutory interpretation that echoes section 8 of the *Interpretation Act*:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

45. Also noteworthy in the Supreme Court's decision in *Rizzo* is its view of the counterpart to the British Columbia *Employment Standards Act*, namely, the *Employment Standards Act* of Ontario:

> Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner.

46. In addition to the approach to statutory interpretation in *Rizzo*, another important and very relevant principle of statutory construction identified by the Supreme Court can be found in *Canadian Oxy Chemicals Ltd.* v. *Attorney General of Canada*, 13 C.C.C. (3d) 426 (1999) (SCC) where the Supreme Court stated that statutes

should be read to give words their most obvious and ordinary meaning which accords with the context and intent of the enactment. Major, J. speaking for the Court, stated:

> …only where there is a genuine ambiguity between two or more plausible readings, each equally in accordance with the intentions of statute, do the courts need to resort to external interpretative aids. (para.14)

47. In the case at hand, with great respect to the Member, the interpretation in the Original Decision of section 95 of the *Act* fails to take into consideration the scheme and object of the *Act*, the remedial nature of the enactment as well as the statutory interpretative principles delineated in *Rizzo* and *Canadian Oxy* decisions. It appears that the Member unduly focused on the present tense language of the provision to the exclusion of the purpose and objects of the *Act*. This apparently led the Member to interpret section 95 narrowly-by injecting a requirement that the entities associated under section 95 must be carrying on a business when the determination is made- rather than broadly and generously as required by the Supreme Court of Canada in *Rizzo*, *supra*, particularly in the case of benefits conferring legislation such as the *Act*.

48. As indicated previously, one of the stated objectives of the *Act* is delineated in section 2(a), namely, to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. Ensuring employees receive wages they earn surely comes within this important objective of the *Act* and section 95 exists to ensure their "wage claims are not defeated by niceties of legal form". Section 95 should be interpreted consistently with this statutory objective. In my view, therefore, the Member's interpretation of section 95 of the *Act* and particularly his injection of the requirement that associated entities must be carrying on business at the time when the determination is made, is inconsistent with the scheme and object of the *Act* and cannot stand. Instead, the interpretation that is consistent with the scheme and object of the *Act* and one that takes into consideration the remedial nature of the *Act* is one which requires the associated entities to be carrying on business at the relevant time when wages were earned by the complainant(s).

49. I also note that while the decision in *Invicta Security Systems*, *supra*, prescribes, in the second of the four preconditions to an application of section 95, the requirement that entities sought to be associated "must be carrying on a business", there is no specific or express requirement in section 95 that the entities must be carrying on a business *at the time the determination is made*. Importing or injecting such a requirement in section 95 has the effect or potential of creating absurd results, incompatible with the object of the *Act*. For example, such a requirement would have the effect of allowing an employee who starts his claim slightly earlier than his colleagues and obtains a determination a day before an entity sought to be associated with another dissolves (voluntarily or not) an advantage over his colleague who gets a determination the day after the entity dissolves. While I appreciate that the BCA, in section 346(1) permits legal proceedings (which arguably includes administrative or regulatory proceedings under the *Act*) that were commenced against a company before its dissolution to be continued as if the company had not been dissolved or to be brought within two years after dissolution of the company as if it had not been dissolved, I do not think I need to go outside the *Act* and rely upon the provisions of BCA (as helpful as they may be) in this case. As Justice Iocobbucci stated in *Rizzo*, *supra*, at paragraph 27, "the legislature does not intend to produce absurd results". Therefore, I find that the interpretation of section 95 by the Member in the Original decision cannot stand.

50. Having said this, I also add that in this case, based on the facts adduced, to uphold the interpretation of section 95 propounded by the Tribunal Member would lead to an unreasonable and inequitable result, which the legislature could not have intended. In saying this, I am referring to the fact that Ms. Jin and by extension JFC, was aware of the Complaints and chose not to participate in the investigation of the Complaints. Further, as early as March 10, 2010, Ms. Jin was also aware of the possibility of the Director's associating

KTF and JFC and her own potential wage liability as a director and officer of JFC and chose to dissolve JFC in August 2010. In the circumstances, to accept the interpretation of section 95 of the *Act* as the Member has interpreted it in the Original Decision not only militates against the object of the *Act* set out in section 2(a), but it has the effect of allowing JFC and by extension (under s.96) Ms. Jin to avoid liability under the *Act* and denying the Director the ability to attempt to recover wages from an entity that participated in the contravention of the *Act*.

51. Finally, I want to point out that I have considered Ms. Jin's submissions on behalf of JFC in this application. I do not find her submissions persuasive; they are not really responsive to the substantive submissions of the counsel for the Director and only reiterate the position she took on behalf of JFC in the Appeal. I also find that her submission of Ms. King's statement is inappropriate at this stage of the proceeding; it does not qualify as new evidence because it is evidence that was available during the investigation of the Complaints and should have been produced then. Therefore, I have decided not to consider it.

52. In the circumstances, I find the Member erred in law in his interpretation of section 95 of the *Act* and I have decided, therefore, to allow the Director's Reconsideration application.

ORDER

53. Pursuant to section 116 of the *Act* the Original Decision # D027/12 issued on March 12, 2012, is cancelled and the Determination dated December 5, 2011, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal