An Application for Reconsideration

- by -

Canwood International Inc.
("Canwood")
- and –
James G. Matkin
("Matkin")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2009A/044 & 2009A/045

DATE OF DECISION: June 22, 2009

DECISION

SUBMISSIONS

James Matkin	on his own behalf and on behalf of Canwood International Inc., Xiu Lan Chen, Adrian Sau Ming Loh and Ying Ying
Ib S. Petersen	on behalf of Olaf Bork
Andres Barker	on behalf of the Director of Employment Standards

OVERVIEW

1. I have before me two separate applications for reconsideration both filed by Mr. James Matkin on behalf of, respectively, Canwood International Inc. and on his own behalf and on behalf of other Canwood International Inc. directors/officers who were separately named in section 96 determinations (all statutory references, unless otherwise noted, are to the *Employment Standards Act* or "*ESA*"). In my view, neither application is meritorious. My reasons supporting that conclusion are set out below.

SUMMARY OF PRIOR PROCEEDINGS

The Determinations

2. Olaf Bork ("Bork") filed an unpaid wage complaint against Canwood International Inc. ("Canwood") and on September 9, 2008 a complaint hearing was conducted before a delegate of the Director of Employment Standards (the "delegate"). Mr. Bork's complaint alleged that he was entitled to a $60,000 bonus relating to the completion of a railway spur line connecting Canwood's operations at Kersley (about 22 kilometers south of Quesnel) to an existing CN rail line. At the complaint hearing both parties were represented by legal counsel (Canwood's counsel being a current director and officer, a person trained as a lawyer and the former Executive Director of the Law Society of British Columbia, Mr. James Matkin, who is also a party in these proceedings) and both parties offered oral testimony. Mr. Bork testified on his own behalf and Canwood's witnesses were Mr. Matkin and two other principals of the company, David Chau and Adrian Loh.

3. There were three principal issues before the delegate: First, was Mr. Bork an "employee" and thus entitled to the benefit of the wage recovery provisions of the *ESA*?; Second, was there, in fact, a bonus agreement in place and, if so, was Mr. Bork entitled to payment of the bonus in light of the agreed qualifying provisions?; and Third, was Mr. Matkin expressly or impliedly authorized to bind Canwood to payment of the bonus?

4. The delegate issued written reasons on November 12, 2008 upholding the complaint and ordering Canwood to pay Mr. Bork wages (the bonus) in the sum of $60,000 together with $2,400 in concomitant vacation pay (*ESA*, section 58) and a further $2,200.24 representing section 88 interest (the "Canwood Determination"). The delegate also levied a section 98 monetary penalty against Canwood in the amount of $500. Thus, the total amount payable under the Canwood Determination was $65,100.24. Briefly, the delegate concluded that at all material times Mr. Bork was a Canwood "employee" and was not otherwise disentitled from pursuing his claim on the ground that he was a "controlling mind" of Canwood (delegate's reasons at pages R9 - R11); the only qualifying provision relating to payment of a $60,000 bonus was the successful completion of the rail spur line (delegate's reasons at page R13); and that Mr. Matkin, being a Canwood director and its president,

had the actual (or, at the very least, the implied) authority to legally bind Canwood to the bonus arrangement in question (delegate's reasons at page R15).

5. On December 12, 2008, the delegate issued a separate determination against Mr. Matkin personally pursuant to section 96(1) of the *ESA* in the amount of $13,520 representing two months' unpaid wages (the "Matkin Determination"). The delegate, in her brief accompanying reasons, concluded that Mr. Matkin was a Canwood director and officer as of October 14, 2007 when Mr. Bork's unpaid wage claim crystallized.

The Appeals to the Tribunal

6. On December 18th, 2008 Mr. Matkin filed appeals with respect to both the Canwood Determination and the Matkin Determination. Mr. Matkin asked the Tribunal to cancel both determinations on the ground that the delegate erred in law in issuing them (*ESA*, section 112(1)(a)). Although Mr. Matkin's appeal documents seemingly only purported to appeal the Canwood and Matkin Determinations, the Tribunal accepted that the appeal was intended to be an appeal on behalf of all of the Canwood directors or officers who were independently identified in separate section 96 determinations.

7. Mr. Matkin's appeal documents referred to various "jurisdictional" errors (for example, that the Canwood/Bork relationship was subject to federal rather than provincial employment standards legislation – an issue, incidentally, that was not argued before the delegate) and "interpretation" errors (for example, whether Mr. Bork was an "employee" within section 1 of the *ESA*) allegedly committed by the delegate. Although the appeals were not explicitly founded on the "new evidence" ground of appeal (*ESA,* section 112(1)(c)), the appellants did submit new evidence some of which was found to relate to the constitutional issue and therefore relevant and admissible for purposes of the appeals. The new evidence that did not relate to the constitutional issue was excluded. The appellants also raised, in their written submissions, a "natural justice" argument (*ESA*, section 112(1)(b)) that touched on the legal question of whether Mr. Bork was an "employee" under the *ESA*.

8. The two appeals were considered together for purposes of adjudication and decided by Tribunal Member Stevenson based on the written submissions of the parties. Member Stevenson rejected the Appellants' request for an oral hearing holding that the issues raised were not particularly complex and that the additional cost and delay that would be occasioned by an oral hearing could not be justified in this instance. The record before me indicates that the parties (as well as the delegate) filed detailed submissions regarding the issues in dispute.

9. On March 2, 2009 Member Stevenson issued written reasons for his decision (BC EST Decision # D023/09) confirming both the Canwood Determination and the Matkin Determination. Member Stevenson concluded that, for the most part, the matters raised on appeal related to arguments that were advanced and considered by the delegate and he was not prepared to find that the delegate's various conclusions on these points (for example, whether Mr. Bork was an "independent contractor" versus an "employee" or was otherwise disentitled from pursuing an *ESA* unpaid wage claim because he was a "controlling mind" of Canwood) should be set aside.

10. As alluded to above, the one issue that was not raised before the delegate concerned whether Mr. Bork's claim should have been dismissed on constitutional grounds; more particularly, the argument advanced was that Mr. Bork's claims should have been filed under federal employment standards legislation because Canwood was a federal employer engaged in international trade and commerce or was a "partner" firm with a federally-regulated railway or was a firm that fell under federal jurisdiction because of its business relationship with various First Nations communities. For purposes of this argument, Canwood relied on one or more of

sections 91(2), (10) and (24) of the *Constitution Act, 1867*. Member Stevenson concluded that these various "constitutional" arguments were wholly devoid of both factual and legal merit. For example, Member Stevenson suggested that to a degree Canwood overstated the scope of its business relationship with First Nations communities and that there was no evidence showing Canwood operated either an inter-provincial or international trucking or shipping enterprise. As for the legal merit of the constitutional argument, Member Stevenson found no evidence in the record before him of a legally mandated "functional integration" with a federal undertaking nor did he find any evidence of a "partnership" between Canwood and CN Rail.

11. With respect to the Matkin Determination (and, by extension, to the other director/officer determinations that were also issued), Member Stevenson concluded that while there was some lack of clarity surrounding Mr. Bork's precise wage bargain, the approach taken by the delegate neither unreasonably underestimated nor overstated his "2-month unpaid wages" entitlement. The delegate could have chosen one of several calculation methodologies that would have produce comparably higher (based on $12,000 per month wage) or lower (perhaps only $1,000 per month) resulting figures and, in the end result, opted for a "mid-range" approach. Member Stevenson commented (at para. 104): "In the final analysis, however, the calculation of the wages owed is a matter that is uniquely within the realm of the Director [and] in this case, the wage calculations…are not shown to be unreasonable or absurd…they are based on evidence that was before the Director and are justifiable on that evidence."

THE APPLICATIONS FOR RECONSIDERATION

12. By way of an application dated March 31, 2009 Mr. Matkin asks the Tribunal to exercise its discretion to reconsider its decision to confirm the Canwood Determination. Canwood's application includes the Tribunal's Reconsideration form to which is attached a lengthy written brief. I also have before me reply submissions from Mr. Bork's legal counsel dated April 27, 2009 and from the delegate dated April 23, 2009 as well as a final reply submission filed by Mr. Matkin on behalf of Canwood dated May 12, 2009.

13. By way of an application dated April 1, 2009, Mr. Matkin filed an application for reconsideration, on his own behalf and "on behalf of all directors and officers of Canwood of the Director/Officer Determination and approved by the Tribunal on March 2, 2009". It is my understanding that in addition to the Matkin Determination, section 96 determinations were also issued against Xiu Lan Chen, Adrian Sau Ming Loh and Ying Ying. These latter section 96 determinations were all issued on December 12th, 2008 each in the amount of $13,520. This application also includes the Tribunal's Reconsideration form and an attached memorandum. In regard to this particular application, counsel for Mr. Bork and the delegate filed common reply submissions that address both reconsideration applications as does Mr. Matkin's final reply submission dated May 12, 2009.

14. In the Canwood reconsideration application, Mr. Matkin requests the Tribunal to conduct an oral hearing "because of the complexity and novelty of the issues decided by the Tribunal". In the reconsideration application relating to the section 96 determinations, Mr. Matkin simply asks for an oral hearing. In my view, there is absolutely no justification for an oral hearing to be conducted in either application. The issues before me are far from novel or complex. This case is not markedly dissimilar from many cases that come before the Tribunal where there is a claim for unpaid wages and some controversy between the parties relating to the nature of their relationship and/or the terms and conditions of the wage bargain in question.

15. I propose to address each reconsideration application in turn.

RECONSIDERATION OF THE "CANWOOD" DECISION

16. Mr. Matkin, on behalf of Canwood, initially suggests the notion that he would have orally agreed to pay Mr. Bork a $60,000 bonus without attached conditions relating to the company's financial viability and without formal board approval is untenable. Mr. Matkin says: "This so called Corporate determination of the bonus must assume the President [*i.e.*, Mr. Matkin] is living on another planet because he would agree in these desperate times to bind the company for a $60,000 bonus without any financial conditions and without the board's approval. This assumption makes no sense and makes the President look foolish indeed." [Canwood's March 31, 2009 submission at page 3]. However, whether the bonus makes any sense from a commercial point of view is not the issue now before me. One might well agree that the bonus arrangement was ill conceived from Canwood's point of view and ought not to have been negotiated. Nevertheless, the issue before me on a reconsideration application is considerably narrower. I am not conducting a hearing *de novo* where the entire dispute is to be reviewed afresh. Rather, my task is to determine, in essence, if there are compelling reasons to set aside the Tribunal's decision to confirm the Canwood Determination because, for example, the Tribunal committed fundamental breaches of natural justice in adjudicating the appeal or otherwise made significant errors of law (see, *e.g.*, *Zoltan T. Kiss*, BC EST Decision # D122/96; *Director of Employment Standards (Milan Holdings Inc.)*, BC EST Decision # D313/98).

17. Mr. Matkin says that the Canwood Determination should be set aside on the grounds that the Tribunal:

- Made several fundamental errors of law;
- Breached the principles of natural justice in making its decision;
- Seriously misstated the facts in reaching its conclusion to confirm the Canwood Determination;
- Erred in determining that evidence submitted by Canwood relating to an alleged "conflict of interest" on the part of Mr. Bork was not relevant; and, finally
- Failed "to deal with [two] significant issue(s) in the appeal".

18. The Tribunal's reconsideration power is a discretionary statutory power. The Tribunal has adopted a two-stage approach to its reconsideration power. At the first stage, the Tribunal reviews the application to determine:

> …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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST Decision # D313/98 at page 7)

In *Milan Holdings, supra*, the Tribunal also observed (at page 7) that the Tribunal should not embark on the second stage of the reconsideration process if the "application's primary focus is to have the reconsideration panel effectively 're-weigh' evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence)".

19. In my view, the application for reconsideration of the Canwood Determination does not pass the first stage of the *Milan Holdings* test since it represents nothing more than an attempt to re-argue issues that have already been adjudicated (and, correctly, in my view) by the Tribunal.

Alleged Errors of Law

20. I will first address the six alleged errors of law made by the Tribunal. First, Canwood argues that Mr. Bork was an "independent contractor" rather than an "employee" and thus the delegate ought to have summarily dismissed his unpaid wage complaint. This issue was argued without success before the delegate (see Canwood Determination, pages R13 – R14) and again before the Tribunal (see Member Stevenson's decision, pages 12 – 13). Second, Canwood says that Mr. Bork was not legally entitled to pursue a claim under the wage recovery provisions of the *ESA* since he was a "controlling mind" of Canwood. This issue was unsuccessfully argued before the delegate (see Canwood Determination, pages R9 – R11) and again before the Tribunal (see Member Stevenson's decision, page 13). In my view, the reconsideration application regarding these two points amounts to nothing more than a simple statement of disagreement with the conclusions initially reached by the delegate and subsequently affirmed by the Tribunal. In short, these issues have been argued, decided, re-argued and then decided again. I see no reason to embark on a third review particularly when these issues overwhelmingly strike me as having been correctly decided.

21. Third, Canwood says that both the delegate and the Tribunal erred in their interpretation of written communications between Mr. Bork (an e-mail) and Mr. Matkin (a reply letter) that referred to the disputed "bonus". Mr. Matkin says that simply because these communications do not "spell out that the bonus is discretionary or that there are other conditions then the bonus is unconditional and mandatory" (Canwood's March 31, 2009 submission, page 15). Mr. Matkin says that such a conclusion is an "overarching and mistaken application of the law [and] flies in the face of common sense and contract law" (Canwood's March 31, 2009 submission, page 15). This submission, once again, simply reiterates arguments that were made before the delegate and again before the Tribunal and, in each case rejected (see Canwood Determination, pages R11 – R13; Member Stevenson's decision, pages 13 – 17). I should add that, in my view, there is nothing inherently nonsensical about a bonus arrangement that was limited to one condition (namely, in this case, the successful completion of the rail spur line) nor is there any principle of contract law that would call into question the delegate's finding (subsequently confirmed by the Tribunal). The delegate was obliged to make findings about the terms and conditions of the bonus in the face of conflicting evidence. In essence, as was noted by Member Stevenson, the delegate's conclusions regarding the bonus amounted to findings of fact that could properly have been reached based on a consideration of the totality of the evidence presented by the parties.

22. The fourth, fifth and sixth alleged errors of law relate to the delegate's findings of fact. Certainly, findings of fact can constitute errors of law where the disputed "facts" are not credibly supported by the evidence that was before the fact-finder. Of course, it is not uncommon for adverse parties to take wholly incompatible views about the "facts" relating to the dispute in question (as was the case here). Canwood says that its "ability to pay" was an implied term in the bonus agreement and that the delegate and the Tribunal erred in finding "performance is not a criteria of an executive bonus" and that both "ability to pay" and performance beyond the simple completion of the spur line were implied terms and conditions of the bonus arrangement. On this latter point, Canwood argues that the Tribunal made a patently unreasonable decision in finding "that a bonus is not for performance and is simply wages earned". With respect to the sixth alleged error of law, Canwood says: "There is an error in law by the Director inferring that 'Canwood was bound to pay' the bonus because Mr. Matkin did not respond to some emails from Mr. Bork about the bonus."

23. As I noted above, the parties had completely divergent views about the terms and conditions relating to bonus. The delegate ultimately concluded that there was one – and only one – condition relating to the bonus, namely, the completion of the rail spur line. Canwood's "ability to pay" at the point in time when the bonus became payable was not found to be a component part of the bonus scheme. Perhaps it should have been, but the delegate found there was no such provision in the bonus scheme and that finding was open to him on the evidence. Member Stevenson noted at para. 79 of his reasons that there is no general legal principle that implies an "ability to pay" provision into any and all bonus schemes. I agree with that observation. I am not aware of any legal authority that stands for the general interpretive principle advanced by Canwood. Further, once it was determined that the bonus represented a contingent liability, payable in money (in this case, in the amount of $60,000) as an incentive, provided that certain production was achieved (namely, the completion of the rail spur line), it follows that the bonus was a form of "wages" as that term is defined in section 1 of the *ESA*.

24. With respect to the delegate's conclusions regarding the e-mail/letter communications, it appears to me that Canwood has fundamentally misstated the essence of the delegate's conclusions. The delegate did not find that the bonus was payable simply because Mr. Matkin never challenged Mr. Bork's assertion that there was an existing $60,000 bonus agreement in place between the parties. This issue is addressed at pages R12 – R13 of the Canwood Determination. In my view, the only fair reading of the delegate's reasons is that he took Mr. Matkin's (an experienced businessman and lawyer) failure to question Mr. Bork's written assertion regarding his existing bonus entitlement as evidence that tended to corroborate Mr. Bork's position while at the same time tending to undermine Canwood's position. Canwood's failure to challenge Mr. Bork's assertion regarding his existing bonus entitlement simply resulted in the delegate drawing an evidentiary inference. It is important to note precisely what Mr. Matkin stated on behalf of Canwood in a letter to Mr. Bork dated April 27, 2007 regarding the bonus:

> This will confirm you [sic] salary has been $6500 per month with the right of performance bonuses. You will for example be entitled to a bonus of $60,000 on successful completion of the CN rail spur at the Kersley Sort Yard.

I cannot say (and I share Member Stevenson's view of the matter set out at para. 67 of his reasons) that the delegate erred in drawing a reasonable (albeit perhaps not the only possible) inference from the undisputed facts relating to the parties' correspondence (Mr. Bork's April 26, 2007 e-mail to Mr. Matkin and the latter's so-called "comfort letter" dated April 27, 2007 written by way of response).

Alleged Breaches of the Principles of Natural Justice

25. Mr. Matkin, in his March 31, 2009 submission filed on behalf of Canwood framed the natural justice issue as follows (at page 5):

> Canwood submits it was unreasonable and unfair for [the delegate] to take such an active role in the appeal process including an attempt to amend an admitted error in his award by calling it only technical when it is obviously substantive. Also it is unreasonable for the Tribunal to simply cast aside the substantive error in reasoning admitted by [the delegate] in his Determination and hold it is irrelevant.

26. Canwood's argument on this point flows from the discussion found at paras. 68 – 77 of Member Stevenson's reasons. The delegate, at page R13 of his reasons, stated: "Given that Canwood has not presented any direct evidence that there were other terms and conditions attached to the bonus, I have not found many factors that may direct me towards a finding that the completion of the rail spur was the only condition attached to receiving the bonus." A literal reading of this sentence could lead one to conclude that, in fact, the delegate was of the view that there were other terms and conditions in the bonus scheme beyond the completion of

the rail spur line; certainly, that is the position adopted by Canwood. On the other hand, the central finding in the Canwood Determination was that, indeed, there *was* only one condition, that being the completion of the rail spur line. The disputed sentence appears to stand in conflict with the balance of the Canwood Determination. The delegate, in the course of his January 15, 2009 submission (at page 4) made in the course of the appeal proceedings suggested that the sentence contained an error and should have read: "Given that Canwood has not presented any direct evidence that there were other terms and conditions attached to the bonus, I have not found many factors that may direct me towards a finding that the completion of the rail spur was not the only condition attached to receiving the bonus." The delegate's submission continued: "Although unfortunate and perhaps embarrassing, the omission is a technical irregularity, and section 123 of the [*ESA*] provides that such irregularities do not invalidate a proceeding."

27. I wholly endorse Member Stevenson's approach to this particular problem. In essence, Member Stevenson did not rely on section 123 to correct an "irregularity". Rather, he accepted the delegate's concession that an error was made and observed that correcting the error simply allowed this one sentence to stand consistently with the balance of the delegate's reasons.

28. I also note, to the extent it may be relevant, that the Director does have the statutory authority to vary a determination (*ESA*, section 86) but must do so, in the event of any appeal, "within 30 days of the date that a copy of the appeal request was received by the director". Although the record before me is not crystal clear, it appears that Canwood forwarded copies of its appeal documents to the Director on December 18, 2008 and the delegate's submission in which he asked that the Canwood Determination be "corrected" (*i.e.*, "varied") was issued and filed on January 15, 2009. To the extent that anything of consequence flows from the matter (and I agree with Member Stevenson that Canwood's argument on this score is wholly unconvincing), the Canwood Determination may well have been validly varied under section 86(2) in any event.

29. It follows from the above discussion that I am not satisfied Canwood has raised even a *prima facie* case that the principles of natural justice were breached insofar as this particular issue is concerned.

Alleged "Serious Mistakes in Stating the Facts"

30. Canwood advances a two-pronged attack under this heading. First, it says that Member Stevenson was "confused" about the relationship between itself and various First Nations bands. I presume, although this is not entirely clear in Canwood's submissions, that it is advancing this position in support of its constitutional argument that Mr. Bork's unpaid wage claim fell outside the ambit of the *ESA* since his employment contract was subject to federal, rather than provincial, employment standards legislation. Having reviewed Canwood's submissions on this point, I cannot conclude that Member Stevenson's decision evinces any confusion (see Member Stevenson's decision at para. 49 regarding this matter). Canwood's submission, on the other hand, is somewhat contradictory. Canwood asserts that the Tribunal "concluded wrongly" than Canwood's business dealings were not limited to First Nations organizations but then also asserts that "of course there will be other non-aboriginal relations because the business is about marketing trees". It is still not clear to me how the fact that Canwood has some business dealings with First Nations communities (as well as dealings with other non-aboriginal business corporations) transforms the governing jurisdiction with respect to Mr. Bork's employment contract from the provincial to the federal sphere.

31. The second alleged factual "misstatement" concerns whether Mr. Bork's bonus was payable even on the assumption that completion of the rail spur line was the only qualifying condition. Canwood, in its March 31, 2009 submissions says (at page 17):

> In fact when Mr. Bork left the employ of the company in September, 2007, CN had not started to lay track for the siding. CN did not commence laying track until the second week of October. Construction of the siding was not complete until October 20, 2007. The siding was not commission [sic] for use by Canwood until Jan. 2008.

32. Canwood's argument on this point is predicated on one accepting that Mr. Bork's status as a Canwood "employee" ended as of late September 2007 and thereafter he continued to work for Canwood as an "independent contractor" until the parties' relationship completely ceased in the early spring of 2008. However, the delegate specifically rejected Canwood's argument that Mr. Bork ceased to be an employee as of September 2007 and thereafter continued working for Canwood as an independent contractor (see Canwood Determination, pages R13 – R14). Member Stevenson confirmed the delegate's determination regarding Mr. Bork's post-September 2007 "employee" status (see Member Stevenson's decision at paras. 55 – 57) and, as noted above, I wholly concur with both the delegate's and Member Stevenson's conclusions that Mr. Bork continued to be a Canwood employee throughout his association with that firm from September 2005 to the spring of 2008.

Evidence Relating to Mr. Bork's Alleged "Conflict of Interest"

33. This issue was not raised during the hearing process before the delegate and was only raised very late in the submission process before the Tribunal. In short, Canwood says that Mr. Bork, perhaps as far back as 2005 was in a conflict of interest due to a position he apparently held with a company based in Hong Kong that was a competitor of Canwood. Mr. Bork, through his counsel, denies that he was in a conflict of interest. Member Stevenson addressed this matter at paras. 106 – 108 of his reasons, holding the conflict allegation to be wholly irrelevant to whether or not Mr. Bork was entitled to a bonus. So far as I can determine, Canwood's present position on this point (set out at pages 20 – 22 of its March 31, 2009 submission) is that if the conflict were proven (and, of course, it has not been and the matter was never raised before the delegate), the bonus agreement would be, as a matter of law, void *ab initio*, or at the very least, voidable at Canwood's option.

34. Canwood's submission on this point seems to be that the bonus agreement could be void or voidable based on (I assume, since the submission is not clear on this point), the common law doctrine of unilateral mistake. Although not argued, the alleged conflict, if proven, might also, I suppose, raise questions about whether Mr. Bork was unjustly enriched. Canwood asserts (at pages 21 – 22 of its March 31, 2009 submission):

> The conflict if proven would mean if there was a bonus contract with Mr. Bork (which is not admitted) it was made under mistaken assumptions about the conduct of Mr. Bork that made the contract void or voidable and undermine completely any obligation by Canwood to grant Mr. Bork a reward or bonus…
>
> Contract law is clear that if the fresh evidence proves there was a conflict of interest then the bonus contract (if there was one) was reached on an assumption that is not true and the bonus contract is void ab initio.

35. Mistake may arise where both parties are under fundamental misapprehensions regarding the nature of their performance obligations or the surrounding circumstances. This form of mistake is sometimes called "bilateral" mistake and may be further categorized as "common mistake" (where both parties share the same misapprehension; see, *e.g., Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575) or "mutual mistake" where both parties are under different misapprehensions. Bilateral mistake generally gives rise to a void contact. Clearly, if there was a mistake in this case, it was not bilateral in nature. The other form of mistake, "unilateral mistake", arises where only one party is under a misapprehension about the nature of the parties' bargain and generally leads to the underlying contract being voidable not void (*i.e.*, the contract is

presumed to be valid until it is rescinded by the innocent party). Rescission, if granted by the court, means that the contract is declared to be void *ab initio* (*i.e.*, the contract is deemed to have been invalid from its inception).

36. Canwood's case on this point is, if anything, possibly a case of unilateral mistake. However, the Tribunal is not a court of general jurisdiction having the legal authority to declare contracts void or voidable based on an equitable principle such as unilateral mistake nor does it have the power to make compensatory orders in favour of an employer based on the equitable principle of unjust enrichment. If Canwood wishes to pursue this matter further, it seems to me that the proper forum is the civil courts. Even if the Tribunal has such a jurisdiction, I am of the view that Canwood's evidence falls well short of raising even a *prima facie* case of unilateral mistake in light of the governing principles set out in decisions such *The Queen (Ontario) v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678. I fail to see how Canwood can successfully argue that it was fundamentally mistaken about the nature of the bonus agreement or about its terms and conditions.

37. What Canwood appears to be saying is that if it had been fully aware of Mr. Bork's alleged conflict it would have terminated his employment (allegedly for cause) and thus would never entered into the disputed bonus agreement (see Member Stevenson's decision at para. 106). In essence, Canwood's claim is actually grounded in the employee's implied duties of loyalty and faithful service and concomitant disclosure obligations. As Member Stevenson noted in his reasons, if the issue before the Tribunal concerned whether or not Mr. Bork was entitled to section 63 length of service compensation, the matter of the alleged conflict of interest may have been relevant in determining if Canwood was relieved from having to pay section 63 compensation since it had just cause for dismissal (based on the conflict). However, as Member Stevenson noted in his reasons, Mr. Bork's entitlement to section 63 compensation for length of service has never been at issue in these proceedings.

The Tribunal's Alleged Failure to Address "Significant Issues in the Appeal"

38. Canwood alleges that the Tribunal failed to deal with two "significant issues". It appears to me that insofar as these two arguments are concerned, Canwood's submission simply repackages arguments that I have previously addressed and determined to be lacking in any presumptive merit. The first argument relates to the previously discussed matter of the wording of the Canwood Determination and, in particular, the delegate's submission to the Tribunal that the Canwood Determination contained an error (the word "not" was omitted) in a sentence addressing whether there was more than one qualifying condition relating to the bonus. Canwood submits (March 31, 2009 submission, pages 23 – 24) that "the Determination must speak for itself and it is improper to expand on the original decision by making substantive changes in its reasoning". Canwood says, relying on *Mission Bingo Association*, BC. EST Decision # D592/01, that the "right course of action [was] to send the case back for a new hearing" (page 23). Finally, on this particular point, Canwood asserts that "the rulings of the [delegate] and [Member] Stevenson on this issue make both decision makers look biased" (page 24).

39. In my judgment, Canwood's reliance on *Mission Bingo Association* is fundamentally misplaced. *Mission Bingo Association* concerned two separate determinations. By way of the first determination, confirmed on appeal and never challenged beyond the initial Tribunal appeal level, a particular entity was identified as the complainant's employer and ordered to pay the complainant compensation for length of service. Some time later, the delegate issued an essentially identical determination against another entity that, in the delegate's view, was "essentially the same entity" as that named in the first determination. On appeal to the Tribunal, the Director took the position that the second determination was not much more than an amended version of the first determination with one employer's identity having been replaced by another – a simple technical

amendment. The Tribunal rejected the Director's position and cancelled the second determination on the grounds that, first, the second employer was denied a full opportunity to respond the complainant's unpaid wage claim from the outset of the Director's investigation and, second, on the ground that the Director had no legal authority to vary a determination after it had been confirmed by the Tribunal (the Director's remedy, at that point, was to seek reconsideration of the Tribunal's initial decision to confirm the first determination). For my part, I am totally mystified as to how *Mission Bingo Association* assists Canwood in this case. I note, simply for the sake of completeness, that Canwood in its submission has not provided me with any cogent argument on the matter. Canwood's submission on this point amounts to nothing more than a bald assertion that *Mission Bingo Association* is "directly relevant", followed by a lengthy quotation from that latter decision.

40. As for the not so veiled allegations of bias against the delegate and Member Stevenson, I note that these assertions are wholly unsubstantiated by any further particulars and, indeed, I think it most improper for Mr. Matkin, a person trained as a lawyer, to have made such wholly unsubstantiated assertions.

41. The second alleged "failure" is set out in Canwood's March 31, 2009 submission (at page 24) in the following terms: "An issue not covered in the Determination of the appeal is the right of the company to roll back an executive bonus when the executive falls short in his performance and company [sic] falls short of success at the end of the year". This argument simply revisits the question, addressed earlier in these reasons, of whether there were other terms and conditions in the parties' bonus scheme and, in particular in the context of the present argument, whether Canwood reserved to itself the right to cancel the bonus if the company were facing a straitened financial situation when the bonus fell due. Canwood says that employers in this province routinely secure this sort of reservation and that is reasonable to imply such a term into Mr. Bork's bonus scheme. I do not doubt that some employers might negotiate such reservations. Regrettably (viewing the matter from Canwood's point of view), and as Mr. Matkin himself concedes, perhaps foolishly, there was no evidence that Canwood negotiated this sort of reservation in this case. Nor is this reservation provision one that can, *as a matter of law*, be implied (as might, in some cases, a "reasonable notice of termination" provision) into the parties' agreement.

42. I have now addressed each and every one of the arguments Canwood advanced in support of its application for reconsideration of the Tribunal's decision to confirm the Canwood Determination. In each case, I have found that the arguments do not raise even a *prima facie* case to set aside the Tribunal's decision and, accordingly, the application simply fails to pass the first stage of the two-stage reconsideration analytical framework. However, even if I were inclined to proceed to a more detailed analysis of the various arguments advanced, I would have dismissed all of them as lacking any substantive merit. I now turn to the reconsideration application concerning the section 96 determinations.

RECONSIDERATION OF THE "SECTION 96" DECISION

43. As noted above, although only Mr. Matkin formally appealed the section 96 determination issued against him, the Tribunal proceeded on the understanding that Mr. Matkin's appeal was on behalf of all of the Canwood directors/officers who were named in separate section 96 determinations. Mr. Matkin filed a reconsideration application relating to the section 96 determinations expressly on his own behalf and "on behalf of all directors and officers of Canwood". The directors'/officers' two arguments relating to the section 96 determinations are set out in Mr. Matkin's submission, dated April 1, 2009, appended to the reconsideration form. I propose to address each of the arguments raised in the reconsideration application in the order in which they are set out in Mr. Matkin's April 1, 2009 submission.

44. The first argument concerns whether the Tribunal should, in effect, intrude into the Director's enforcement powers and Mr. Matkin asks the Tribunal to "allow Canwood to pay the bonus deemed owing to Mr. Bork

over time" (page 2). The simple response to this suggestion is that the Tribunal has absolutely no authority under the *ESA* to dictate how and when wages found due and payable under a determination will be collected. The only statutory power the Tribunal has in regard to enforcement is its limited power to suspend a determination pending the adjudication of the appeal and then only on certain conditions (see *ESA*, section 113).

45. The second point concerns the calculation of the bonus amount: "Canwood reiterates its argument on appeal about the error in calculating the amount owing personally by the directors in the event the company defaults on the prosecution" (page 2). As is conceded, the directors are simply asking the Tribunal on reconsideration to change a decision that was made after a full consideration of the parties' respective positions – and without there being any new evidence or argument – in the appeal decision. In such circumstances, I do not think it appropriate to embark on a reconsideration of the "calculation methodology" adopted by the delegate and confirmed by Member Stevenson's decision.

46. I will, however, make one further comment on the calculation methodology. The *ESA* defines both "wages" and "regular wages". Corporate directors and officers may be held personally liable for up to "2 months' wages". That being the case, I see no principled reason for excluding the monies payable under the bonus when calculating the individual directors' 2-month unpaid wage obligation. If I am correct in this, it seems to me that, if anything, the amount fixed by the section 96 determinations may well understate the true liability obligation. However, Mr. Bork has not challenged this aspect of the section 96 determinations and so I will simply say that I see no reason to disturb Member Stevenson's decision on this point.

ORDER

47. The applications to reconsider the Tribunal's decision relating to the Canwood Determination and to reconsider the accompanying section 96 determinations are both refused. It follows that pursuant to section 116(1)(b) of the *ESA*, BC EST Decision # D023/09, issued by Member Stevenson on March 2, 2009, is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal