Employment Standards TRIBUNAL

An application for Reconsideration

- by -

More Marine Ltd. and More Management Ltd. and Morecorp Holdings Ltd.
("MoreCorp")

- 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: David B. Stevenson

FILE Nos.: 2008A/110 and 2008A/111

DATE OF DECISION: December 8, 2008

DECISION

SUBMISSIONS

Kerry Morris	on behalf of MoreCorp Holdings Ltd.
John Dafoe	on behalf of the Director

OVERVIEW

1. MoreCorp Holdings Ltd. ("MoreCorp") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of two decisions, BC EST #D078/08 and BC EST#D079/08, made by the Tribunal on August 15, 2008 (the "original decisions"). The original decisions considered appeals of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 7, 2008. The Determination was issued following the investigation of complaints filed by two individuals, Barrie McMillan ("McMillan") and Rodney Worth ("Worth"), which alleged they were owed wages by More Marine Ltd. The Determination contained separate reasons addressing the claims of each individual. The Director associated MoreCorp with More Marine Ltd. and one other corporation, More Management Ltd., under section 95 of the *Act* and found the individuals were owed wages and interest from the associated employers totalling $16,989.36. The Determination also imposed administrative penalties on the associated employers in the amount of $2000.00.

2. The Determination was appealed by the associated companies. The appeal raised the following issues common to both McMillan and Worth:

> Did the Director err in law in proceeding with Worth's complaint when More Marine had filed a Notice of Intention to Make a Proposal ("NOI") under the *Bankruptcy and Insolvency Act* ("*BIA*")?
>
> Did the Director err in law in finding that More Marine, More Management and MoreCorp are "associated corporations" within the meaning of Section 95 of the *Act* and thus jointly and severally liable for payment of the amounts stated in the Determination?
>
> Did the Director fail to observe the principal of natural justice in making the Determination?
>
> Is there new and relevant evidence that was not available at the time the Determination was being made that would have led the Delegate to a different conclusion on the material issues?

3. The appeal also raised a discreet issue relating to McMillan:

> Did the Director err in law in concluding that the deductions made by More Marine from the wages of McMillan were contrary to Section 21 of the *Act*?

4. Because More Marine Ltd. and More Management Ltd. had filed Notice of Intention under section 50.4 of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the *"BIA"*), the Tribunal Member making the original decisions felt compelled, by application of section 69 of the *BIA* to cancel the Determination as it applied to those corporations. The Determination was confirmed against MoreCorp.

5. MoreCorp brings this application on the basis that both the Determination and the original decisions erred in associating MoreCorp with the other two corporations under the *Act* because MoreCorp is a federally regulated company in respect of which there is no provincial jurisdiction and erred in assuming a jurisdiction over the employment of McMillan and Worth with More Marine Ltd. The central assertions relating to this application are found in the following excerpts from the reconsideration submission:

> MoreCorp Holdings Ltd. is a federally regulated entity, which has only had operations on airports, and controlled energy buying groups operating throughout Alberta, Saskatchewan and Manitoba. It's airport operations include Vancouver International Airport, and Victoria International Airport, and have included at various times, federal mediation and conciliation processes, under federal jurisdiction, regarding union labour contracts involving the Machinist and Aero Space Workers. Thus MoreCorp is a federally regulated entity and the law is clear that a company can't operate under two labour code schemes.
>
> Further, at minimum the marine operations of More Marine Ltd., namely the complaint filed by Barrie McMillan, is a federal labour code matter as More Marine was engaged in international voyages hauling logs and other cargo's to the United States. This issue has only just been brought to our attention by counsel, with the explanation that Master's, as Barrie McMillan was, are covered by employment law under the Canada Shipping Act, and not the provincial Employment Standards Act. . . .
>
> . . . We believe the same to be true for Rodney Worth, as a company can't have concurrent employment standards law applicable to its activities.

ISSUE

6. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application, whether the Director had any constitutional jurisdiction over the employment of McMillan or Worth, will be considered.

ANALYSIS OF THE PRELIMINARY ISSUE

7. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, which reads as follows:

> *116. (1) On application under subsection (2) or on its own motion, the tribunal may*
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> *(a) reconsider any order or decision of the tribunal, and*
>
> *(b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section*
>
> *(3) An application may be made only once with respect to the same order or decision.*

8. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to "*promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is the original decision.

9. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

10. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

11. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

12. The Director objects to MoreCorp raising the constitutional jurisdictional issue for the first time at this stage. There is some dispute about whether this issue was raised earlier, but I do not need to decide that question as I do not agree that MoreCorp is precluded from raising this issue on that basis. Whether the Director had the constitutional jurisdiction to make the Determination is a matter that can properly be raised at any stage of the process and must be addressed because jurisdiction over the employment relationship is fundamental to the validity of the Determination and, of course, to the authority of the Tribunal to consider the Appeal.

13. I accept this application warrants reconsideration.

THE FACTS

14. The issue here is one of the constitutional jurisdiction of the Director over the complaint, both in the sense of jurisdiction over the employment of the individuals and over the business of MoreCorp. It is well established that to determine constitutional jurisdictional issues, certain kinds of "constitutional facts" are

required. In each case a constitutional jurisdictional question involves a functional, practical judgment about the factual character of the undertaking (see *Arrow Transfer Co. Ltd.* [1974] 1 Can. L.R.B.R. 29).

15. The presentation of a set of facts is essential to an analysis of the constitutional jurisdictional question, as noted in the following comments from the Supreme Court of Canada in *Northern Telecom Ltd. v. Communication Workers of Canada*, [1980] S.C.R. 115:

> One thing is clear from the earlier discussion of the applicable constitutional principles. In determining whether a particular subsidiary operation forms an integral part of the federal undertaking, the judgment is, as was said in *Arrow Transfer*, a "functional, practical one about the factual character of the ongoing undertaking". Or, in the words of Mr. Justice Beetz in *Montcalm*, to ascertain the nature of the operation, "one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors" and the assessment of those "normal or habitual activities" calls for a fairly complete set of factual findings.

16. The burden is on the MoreCorp to provide the factual basis for a conclusion that the Director and the Tribunal had no jurisdiction over the employment of McMillan and Worth and that the business of MoreCorp is one which is federally regulated. I refer to a further comment from the Supreme Court in the *Northern Telecom Ltd.* case which applies here and which I adopt it in the context of this application:

> I am inclined toward the view that, in the absence of the vital constitutional facts, this Court would be ill-advised to essay to resolve the constitutional issue which lurks in the question upon which leave to appeal has been granted. One must keep in mind that it is not merely the private interests of the two parties before the Court that are involved in a constitutional case. By definition, the interests of two levels of government are also engaged. In this case, the appellant did not apply to the Court, pursuant to Rule 17 of the Supreme Court Rules, for the purpose of having a constitutional question stated. If the appellant had intended to raise a question as to the constitutional applicability of the Canada Labour Code, then the obligation was upon the appellant to assure that the constitutional issue was properly raised. As no constitutional question was stated nor notice served upon the respective Attorneys General, the Court lacks the traditional procedural safeguards that would normally attend such a case and the benefit of interventions by the governments concerned.

17. While I have, over the objections of the Director, accepted MoreCorp may raise a constitutional jurisdictional question at this stage, I also accept that this issue was not properly raised at any stage of the process leading to this application.

18. The constitutional jurisdictional facts relating to McMillan are minimal. He was employed as a Master on a tugboat operated by More Marine Ltd.

19. The record confirms that Mr. Morris, in his appeal submission dated July 29, 2008, raised the question of whether the employment of McMillan with More Marine Ltd. was within the jurisdiction of the Director. The reference to jurisdiction is very brief, alluding only to the fact that McMillan was a master on a tugboat, to case law that Mr. Morris had provided to the Tribunal with a July 17, 2008 submission and to "the inability for provincial statutes to effect [sic] federal maritime law matters". The case law provided by Mr. Morris in support of the quoted assertion is a decision of the Supreme Court of Canada in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437. That case dealt with the applicability of a provincial statute to several maritime negligence claims resulting from two boat accidents causing serious injury and death. The Court concluded that while provincial superior courts had jurisdiction over maritime fatal accident

claims by dependants under section 646 of the *Canada Shipping Act*, Part XIV of the *Canada Shipping Act* sets out the statutory regime under which such claims may be brought and provincial statutes dealing with negligence claims are not constitutionally applicable in the context of a maritime negligence law action.

20. There is nothing in any of the material or the submissions on the constitutional jurisdictional question that relates the result in that case to the arguments made in this application. This case does not involve a negligence claim, it involves a wage claim – an employment matter. There is nothing in the *Canada Shipping Act* dealing with minimum standards of employment. In any event, the parties in the *Ordon Estate* case accepted there was federal jurisdiction over the subject matter at issue, which is not the case here, where federal jurisdiction over McMillan's employment is very much disputed.

21. In this application, Mr. Morris says More Marine Ltd. "was engaged in international voyages hauling logs and other cargos to the United States". The Director challenges that assertion, noting first that no evidence has been provided in support of it and, second, that it is inconsistent with More Marine Ltd.'s own description of their "normal and habitual" activities as involving the transport of goods within the coastal waters of British Columbia. In his final reply, Mr. Morris says there is evidence comprising "boxes of waybills", which could be provided, although they have not.

22. This application has also expanded the constitutional jurisdictional argument from McMillan's employment to include the employment of Worth and the business of MoreCorp.

23. There is a complete absence of material constitutional facts in this case relating to Worth. The constitutional jurisdiction over of his employment depends entirely on whether More Marine Ltd. is shown to be a federal undertaking. Mr. Morris argues that if McMillan's employment falls within federal jurisdiction, then Worth's employment must also fall into federal jurisdiction because there cannot be both federal and provincial employment standards jurisdiction over More Marine Ltd.'s employees.

24. The Determination indicates Worth was employed as a truck driver for More Marine Ltd. The record suggests his employment was confined to driving within the province. There is no indication of any extra-provincial activity on his part or of any inter-provincial trucking activity by More Marine Ltd. generally.

25. In the application submission, Mr. Morris stated that MoreCorp is a federal undertaking because it has had airport operations and controlled energy buying groups in Alberta, Saskatchewan and Manitoba. In his reply, the Director challenges that assertion, noting the position of MoreCorp during the investigation was that "it is not and never has been active in business". The Director says a search of the federal mediation and conciliation service database did not turn up any record of MoreCorp nor did the Canada Industrial Relations Board have any record of a certificate of bargaining authority issued in respect of MoreCorp.

26. In his final reply, Mr. Morris has acknowledged that the operations he described were not carried on in the name of MoreCorp, but were performed under the trade names of VanAero Flight Services and All Things Energy.

27. Once again, there is no attempt by Mr. Morris to provide any facts that might demonstrate or confirm that MoreCorp is a federal undertaking. What is clear is that MoreCorp itself is not engaged in any federal undertaking in its own name. What is not clear is how MoreCorp can be said to be carrying on a federal

undertaking, even assuming the businesses of VanAero Flight Services and All Things Energy are federally regulated employers.

28. There is almost a complete absence of constitutional facts in this case. This deficiency is attributable to More Marine Ltd. and MoreCorp.

29. Those facts which are present in this case are not helpful to MoreCorp on this application. The most relevant of those facts indicate the "normal and habitual" activities of More Marine Ltd. were wholly provincial in character.

ANALYSIS

30. In the Director's submission, there is reference to the decision of the Tribunal in *Jerry Becker, Operating as Becker's Pilot & Hotshot Services*, BC EST #D406/01 (Reconsideration denied BC EST #RD640/01). That decision applies particularly to the argument relating to More Marine Ltd. It described an analysis for determining constitutional jurisdiction over labour and labour relations flowing from provisions of the *Constitution Act* and decisions of Canadian courts:

> The starting point of the jurisdictional analysis is Section 92(10)(a) of the *Constitution Act, 1867*:
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
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> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
>
> (b) Lines of Steam Ships between the Province and any British or Foreign Country; ...
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> In *Re Eastern Canada Stevedoring Company Limited*, [1955] S.C.R. 529, the Supreme Court of Canada found there is a jurisdiction in the Parliament of Canada to legislate with respect to labour and labour relations in those situations in which labour and labour relations are: (a) an integral part of or necessarily incidental to the headings enumerated under s. 91 of the Constitution Act; (b) in respect to federal government employees; (c) in respect to works and undertakings under Sections. 91(29) and 92(10); and (d) in respect of works, undertakings or businesses in Canada but outside of any province.

31. In Section 91 of the *Constitution Act*, the federal government is given legislative authority over shipping and navigation. Subsection 91(29) assigns those matters "as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

32. The *Becker* decision referred to the certain legal premises applicable to a consideration of constitutional jurisdiction over labour and labour relations, taken from the *Northern Telecom Ltd.*case:

> 1. Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

> 2. By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
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> . . .
>
> 5. The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
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> 6. In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

33. The decision also referred to several leading cases that have established the following principles:

> 1. The whole undertaking, which is in fact being carried on, determines the jurisdiction within which it falls. One must look at the "pith and substance" of the activity. Whether or not there is an interconnecting activity depends upon the facts of each case and the "pith and substance" of the applicable Act or Regulation (*Attorney-General for Ontario et al. v. Winner et al.*, [1954] 4 D.L.R. 657 (P.C.), at pages 679-680).
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> 2. The undertaking that connects or extends into another province must do so on a regular and continuous basis to be found to be within federal jurisdiction, regardless of whether the extra-provincial work is greater or less than the intra-provincial work. Percentages are not a sound basis upon which to determine "regular and continuous" (*Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497 (H.C.J.), at page 508).
>
> 3. Extra-provincial trips do not have to be predetermined in order to be considered "regular and continuous". In certain cases, where the "applicant stands ready at any time to engage in hauls outside the boundaries of the [province] at the instance of any of its customers, and for that purpose has gone to the pains and expense of acquiring transport permits and licences from a number of jurisdictions" may be sufficient to constitute "regular and continuous" *(Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84 (H.C.J.), at pages 88-89).
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> 4. In assessing the facts in relation to "regular and continuous", a qualitative as opposed to a quantitative approach is proper (*Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.*, (1983), 44 O.R. (2d) 560 (C.A.), at page 570).

34. In the specific context of federal authority in respect of shipping, the Supreme Court, in its decision *Agence Maritime Inc. v. Canada Labour Relations Board*, [1969] S.C.R. 851, which is also referred to in the Director's submission, found that the provisions of section 91(29) and section 92(10)(a) and (b) of the *Constitution Act* are collectively intended to exclude maritime shipping undertakings whose operations are carried on within the boundaries of a single Province from federal jurisdiction.

35. On the available facts in this case indicating the business of More Marine Ltd. was carried on within the coastal waterways of British Columbia, it cannot be said that More Marine Ltd. was engaged in the operation of a federal work, undertaking or business and, as such, its employees are not employed upon or in connection with a federal work, undertaking or business. This conclusion applies to the employment of both McMillan and Worth.

36. In respect of the business of MoreCorp, there is simply no factual basis that would justify a consideration of whether its business is federally regulated.

37. The application for reconsideration is denied.

ORDER

38. Pursuant to Section 116 of the *Act*, I order the original decisions confirmed.

David B. Stevenson
Member
Employment Standards Tribunal