

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

ADJUDICATORS: Kenneth Wm. Thornicroft, Panel Chair
Norma Edelman
M. Gwendolynne Taylor

FILE No.: 2003/16 and 2003/17

DATE OF DECISION: June 6, 2003

DECISION

OVERVIEW

This is an application filed by the Director of Employment Standards (the “Director”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of two decisions that were issued by Adjudicator Stevenson on December 10th, 2002--B.C.E.S.T. Decision Nos. 542/02 and 543/02.

These latter two decisions addressed essentially identical legal and factual issues that arose in two appeals of essentially identical determinations issued by a delegate of the Director on July 9th, 2002. Each of the two determinations was appealed to the Tribunal and, after considering the two appeals, Adjudicator Stevenson issued separate decisions and orders pursuant to which each determination was cancelled.

Having considered the application for reconsideration, we are of the view that it must be dismissed.

PREVIOUS PROCEEDINGS UNDER THE ACT

The Determinations

As noted above, the two separate appeals before the adjudicator concerned essentially identical determinations that were issued by the same Director’s delegate on July 9th, 2002. The determinations, each in the amount of \$1,605,171.92, were issued against, respectively, Scott Dow (“Dow”) and Thomas Winters III (“Winters”). In each case, the style of cause identified the individual and then continued: “operating as Growthexperts Group Inc.”.

The liability in question represents unpaid wages (regular wages, vacation pay, compensation for length of service and group termination pay) owed to some 400 former employees of an Alberta corporation that operated a telemarketing business in British Columbia, Growthexperts Group Inc. (“Growthexperts”). Although Growthexperts was lawfully incorporated in Alberta it did not register with the B.C. Registrar of Companies as an extraprovincial company -- its failure in this latter regard contravened section 297 of the *Company Act* which states that extraprovincial companies (i.e., corporate bodies incorporated outside, but carrying on business in, British Columbia) must register in B.C. within 30 days after commencing business operations in this province. Growthexperts was formally declared bankrupt on December 5th, 2001.

In light of Growthexperts’ bankruptcy (and concomitant inability to pay the employees’ unpaid wage claims), the Director issued determinations reflecting the employees’ unpaid wages against Messrs. Dow and Winters in their respective personal capacities. For convenience, we shall refer to these latter two determinations as the “Dow” and “Winters” Determinations, respectively. Although the delegate determined that Dow and Winters were both officers and/or directors of Growthexperts, the determinations were not issued pursuant to section 96 of the *Act*, which places limits on the personal liability of corporate directors and officers. Rather, the determinations were issued against Dow and Winters in their alleged capacity as “proprietors”.

The Director’s delegate determined that Dow and Winters could be held personally responsible for the employees’ unpaid wages because each was a “proprietor” of Growthexperts’ business operations carried

on in British Columbia. This latter finding, set out at page 2 of each of the determinations, is reproduced below:

The company, Growthexperts Group Inc. is not a company registered with the Registrar of Companies for the Province of British Columbia nor is it extra provincially [sic] registered. This is an Alberta registered company with it's [sic] operations in B.C. *Because of the company is not [sic] registered in this Province, our office is dealing with the Directors and/or Officers of the company as Proprietors of Growthexperts Group. Inc. (our italics)*

The delegate made the following identical findings of fact against Dow and Winters at pp. 3-4 of the determinations:

It has been determined that Mr. Dow and Mr. Thomas Winters III, were the only Directors or Officers at the time of the Bankruptcy. Both Mr. Winters and Mr. Dow, as Directors of Growthexperts Group Inc., signed the resolution making the assignment into Bankruptcy. For this reason, our office has not recognized the resignation letter provided by Mr. Winters.

The Determination is not being issued against Mr. Dow and Mr. Winters as Directors of this company based on the provisions of Section 96 of the Employment Standards Act. Rather, because of a failure to incorporate GROWTHEXPERTS GROUP INC. in this Province [sic, we presume the delegate meant to refer to the failure to register as an extraprovincial company rather than a failure to incorporate an entirely new company], it has no Directors or Officers. *As they were the executives with control of the company as of the date of Bankruptcy, they are being considered as Proprietors operating this business. (our italics)*

As noted above, the employees' unpaid wage claims included regular wages, vacation pay, compensation for length of service and termination pay and totalled, with interest, \$1,605,171.92; determinations were issued against each of Dow and Winters for this latter amount.

The Dow and Winters Appeals

Dow (EST File No. 2002/407) and Winters (EST File No. 2002/408) both appealed the determinations issued against them. Among other arguments, each suggested that they could not be held lawfully accountable for the employees' unpaid wages as "proprietors" (to be contrasted with their possible liability as directors) of the business affairs of Growthexperts and that, in any event, the employees' unpaid wages claims had been incorrectly calculated. In addition, Mr. Winters maintained that he resigned his Growthexperts directorship on September 15th, 2001.

In reasons for decision issued in the Dow appeal (B.C.E.S.T. Decision No. D542/02), the adjudicator dismissed the appeal as it related to the calculation of the employees' unpaid wages. However, the adjudicator accepted Dow's argument "that he should not have [been] made liable as though Growthexperts was a proprietorship" (Reasons for Decision, p. 3) and, accordingly, allowed the appeal and cancelled the determination. At page 5 of his decision, the adjudicator stated:

...I want to be clear that my decision to cancel the Determination flows from the conclusion that the Director erred in treating Growthexperts as a proprietorship and Dow as...personally liable for the entire wage liability of that 'proprietorship'. *I have not reached any conclusion on the liability of Growthexperts as a corporation or of Dow as a director/officer of a corporation. (our italics)*

In reasons for decision issued in the Winters appeal (B.C.E.S.T. Decision No. D542/02), the adjudicator held that the appeal failed as it related to the calculation of the employees' unpaid wage entitlements and with respect to the delegate's conclusion that Winters was a director of Growthexperts when the employees' unpaid wage claims crystallized. As in the Dow appeal, however, the adjudicator concluded that the delegate erred in holding Winters personally liable as a "proprietor" and, accordingly, issued an order cancelling the determination. The adjudicator summarized his decision and reasons in the following paragraph (Reasons for Decision, p. 5):

Winters has failed to show the wage liability calculations made by the Director were wrong in any respect. The Director erred in treating Growthexperts as a proprietorship and Winters as...personally responsible for the entire wage liability of that 'proprietorship'. Winters has not demonstrated the Director erred in concluding Winters was a director/officer of Growthexperts during the relevant period of time. *I have not reached any conclusion on the liability of Growthexperts as a corporation or of Winters as a director/officer of a corporation.* (our italics)

THE APPLICATION FOR RECONSIDERATION

The Director's request for reconsideration of both appeal decisions is contained in a single submission from her legal counsel dated and filed March 7th, 2003. Counsel for the Director submits that the adjudicator's decisions "contain serious errors of law", namely:

- "The Adjudicator's finding in both Decisions that the directors or officers of unregistered extraprovincial corporation are not personally liable for the wage debt of the un-registered corporation is contrary to decisions of the B.C. Supreme Court and the provisions of s. 313 of the *Company Act*...; and
- The Adjudicator's reasoning citing s. 96 of the [Act] as grounds to cancel the Determinations against Dow and Winters for their personally [sic] liability arising from the operation in B.C. of an un-registered extraprovincial corporation was patently unreasonable in that it makes an absurdity of the extraprovincial company registration requirements and related penalties provisions of the *Company Act*."

Mr. Dow opposes the Director's application on the grounds that it was not filed in a timely fashion (it was filed approximately three months after the appeal decisions were issued) and that it is improper for the Director to, in effect, advance an entirely new legal justification for his personal liability by way of an application for reconsideration. This new legal argument concerns section 313 of the *Company Act*.

Mr. Winters did not file a reply to the Director's application.

FINDINGS AND ANALYSIS

We do not consider this application to be timely (see *Unisource Canada Inc.*, B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel*, B.C.E.S.T. Decision No. D279/00). We consider that the Director has not provided a reasonable explanation for the tardy reconsideration application and we are of the view that Mr. Dow has suffered some prejudice in this matter.

The uncontradicted evidence before us is that Mr. Dow, in mid-January 2003, contacted the delegate who issued the determinations and was advised that the two files had been "shelved" as "inactive". Not

unreasonably, Mr. Dow took that comment to mean that these proceedings had concluded and, undoubtedly, was relieved to learn that his potential liability under the determination had been finally resolved in his favour. Counsel for the Director says that the untimely application did not prejudice either Mr. Dow or Mr. Winters. We do not agree.

Having been advised by the Director's delegate that this matter was, in effect, closed, Mr. Dow was then free to pursue business interests unfettered by a potential claim that, if successful, would in all likelihood necessitate his personal bankruptcy. Mr. Dow, in his March 29th, 2003 submission to the Tribunal, stated that after being advised that the determination issued against him would not be pursued any further: "I closed the book on this experience and set out to get my life back on track...". A person's ability to pursue business interests is necessarily constrained when one is facing a potential \$1.6 million personal liability. We can envision a real potential for prejudice in a situation where one is told that they do not face any potential liability, only to be told three months later that a very substantial personal liability may yet be imposed on them.

Counsel for the Director advised the Tribunal, in writing, on January 17th, 2003 that she intended to seek reconsideration of the Dow and Winters appeal decisions and that the application "will be issued in a timely manner". Approximately, two months later, the instant application was filed. The explanation for the untimely application provided by the Director amounts to not much more than "heavy workload". It should be remembered that this is an application for reconsideration of two appeal decisions cancelling determinations each in excess of \$1.6 million. The inevitable time pressures that all parties face to a greater or lesser degree will rarely, except in the most unusual circumstances, excuse a tardy application. There are no such unusual circumstances here.

Further, in our view, the present application is not so much an application for reconsideration as it is an attempt to fashion entirely new determinations. We agree with Mr. Dow's observation that the legal argument now being advanced by counsel for the Director represents an entirely new legal basis for asserting personal liability against Messrs. Dow and Winters. The argument raised by counsel for the Director concerning section 313 of the *Company Act* was not advanced on appeal nor was it the basis upon which the determinations were issued. There is no explanation why the delegate failed to address this argument in the determinations or why the Director failed to raise it on appeal. We note that during the appeal proceedings, counsel for the Director was provided with a copy of the appeals and subsequent submissions, so there was no lack of opportunity to raise this argument on appeal. Generally, the Tribunal's reconsideration power under section 116 of the *Act* is not intended to allow a party to augment submissions made on appeal nor is the reconsideration process intended to allow a party to advance new arguments which could have been made to the original panel on appeal. This view is consistent with section 2(d) of the *Act* which states one of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes and with section 110 of the *Act* which emphasizes the notion of finality to Tribunal decisions.

For the above reasons we decline to exercise our discretion to reconsider the two decisions of the adjudicator in this matter.

We also observe that had we decided to the contrary, we would have dismissed the application on the substantive grounds, for the reasons that follow.

An "extraprovincial company" is defined in section 1 of the *Company Act* as meaning, *inter alia*, "a corporation...duly incorporated otherwise than by or under an Act of the Legislature, that carries on

business in British Columbia”. A “corporation”, also defined in section 1 of the *Company Act*, “means a company, body corporate, association or society, or body politic and corporate, *however and wherever incorporated*, but does not include a municipality, or a corporate sole” (our *italics*). Finally, a “company”, as defined in section 1, “means a company incorporated or continued under this Act, and includes an existing company and an amalgamated company”.

Thus, the *Company Act* draws a distinction between a “company”--which is incorporated or continued in British Columbia pursuant to the provisions of the *Company Act*--and a “corporation”--which includes a variety of incorporated entities that were incorporated in *any* foreign jurisdiction. We might add that section 29 of the *Interpretation Act* also includes a definition of “corporation” that is very similar to that contained in the *Company Act* (including the phrase “where and however incorporated”) except that the definition includes municipal corporations. Growthexperts, although not a “company”, is nevertheless a “corporation” as defined in both the *Company Act* and the *Interpretation Act*.

If an extraprovincial company (*i.e.*, a foreign corporation carrying on business in B.C.) fails to register in accordance with the provisions of the *Company Act* it cannot sue in the province’s courts for breach of a B.C. contract, it cannot hold or acquire real property and it has committed an offence for which it may be fined (section 312). Of more immediate relevance to this application, section 313 of the *Company Act* states that:

Offence

313. Every person who acts as an agent or representative of or in any other capacity for an extraprovincial company that is not registered as required by section 297 is

- (a) personally liable for the debts and obligations incurred by the person as agent, and
- (b) commits an offence and is liable to a fine not exceeding \$50 for every day during which the company continues unregistered.

Counsel for the Director notes that the two determinations ought to have been upheld because “Dow and Winter are indeed personally liable for the wage debt of Growthexperts because their corporation operated in B.C. as an unregistered corporation while Dow and Winter were its registered or *de facto* directors” (Director’s March 7th submission, p. 7).

We have several concerns with the Director’s position. First, and foremost, the determinations were *not* issued against either Dow or Winters under section 313 of the *Company Act*. As we said earlier, this latter provision was not mentioned in the determinations nor was it ever advanced as a justification for upholding the determinations on appeal--this argument was only advanced on reconsideration and it ignores the fact that the matter of personal liability based on director or officer status has not been adjudicated by this Tribunal in this case. In other words, there is no decision on this point to “reconsider” and we express no view on whether Dow and Winters could be held liable under section 313 of the *Company Act*.

Second, the adjudicator’s reasons for decision clearly indicate that the determinations were cancelled due to the delegate’s legal error in treating the two directors (Dow and Winters) as “proprietors” for purposes of the *Act*. The Director does not challenge that conclusion and we entirely agree with the adjudicator that a corporate director does not somehow become transformed into a “proprietor” simply because the corporation of which they are a director is not extraprovincially registered under the *Company Act*. A “proprietorship” is an unincorporated business enterprise directed and controlled by a single natural person--see *Black’s Law Dictionary*. We might add, simply for the sake of completeness, that if Dow and

Winters jointly owned and controlled an unincorporated business, they would then be partners under the *Partnership Act*, not proprietors.

The delegate's conclusion, set out at page 4 of the two determinations, that Growthexperts did not have any directors or officers is patently incorrect. Growthexperts, despite not having been extraprovincially registered, was nonetheless a "corporation" as defined in both the *Company Act* and the *Interpretation Act*. We note, as did the adjudicator, that section 96 of the *Act* refers to directors or officers of a "corporation"--which includes a firm such as Growthexperts, an Alberta corporation that was not extraprovincially registered--rather than of a "company". It is simply untenable to suggest that Dow and Winters ceased to be corporate directors or officers solely by virtue of the fact that Growthexperts was not extraprovincially registered.

Third, in our view counsel for the Director has mischaracterized the reasons for decision of the adjudicator. The adjudicator's reasons were narrowly focused; he simply rejected the delegate's legal conclusion that Dow and Winters were "proprietors" and thus personally liable for the employees' unpaid wage claims. As the italicized portions of the adjudicator's decisions (see above) clearly indicate, the adjudicator did not make any finding vis-à-vis the appellants' possible personal liability flowing from their status as corporate directors or officers. He never held that Dow or Winters could not be personally liable as directors or officers of Growthexperts--that latter point was specifically set to one side.

In sum, we have several concerns that lead us to conclude that the Director's application for reconsideration should not be allowed. We have found that the application is untimely, the application is based on a legal argument not advanced in the determinations or on the appeals, and the application does not establish any error in the appeal decisions. For these reasons we dismiss the application.

ORDER

The Director's application, made pursuant to section 116(2) of the *Act*, to vary or cancel the two decisions of the adjudicator is dismissed. Pursuant to section 116(1)(b) of the *Act*, the appeal decisions of Adjudicator Stevenson issued in this matter (B.C.E.S.T. Decision No. D542/02 and D543/02) are confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator, Panel Chair
Employment Standards Tribunal

Norma Edelman
Vice-Chair
Employment Standards Tribunal

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal