

An appeal

- by -

Peter Young, a Director or Officer of World Hockey Association Corp.  
(“Young”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C.113* (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2007A/130

**DATE OF DECISION:** January 16, 2008

## DECISION

### SUBMISSIONS

Peter Young	on his own behalf
Amanda Clark Welder	on behalf of the Director

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Peter Young, a Director or Officer of World Hockey Association Corp. (“Young”) of a Determination that was issued on September 21, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Young was a director/officer of World Hockey Association Corp. (“WHA”), an employer found to have contravened provisions of the Act, and was personally liable under Section 96 of the Act for an amount of \$18,631.86.
2. In this appeal, Young challenges the Determination on several grounds. He says the Director failed to observe principles of natural justice in making the Determination and erred in law by relying on the corporate records of WHA to establish who is a director or officer of that employer, by concluding Young was an officer of WHA and failing to provide Young with a reasonable opportunity to respond. Young also says there is evidence available which was not available when the Determination was made.
3. Young does not seek an oral hearing on the appeal.
4. The Tribunal has a discretion whether to hold a hearing on an appeal and if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

5. The issue in this appeal is whether the Director erred in issuing a Determination against Young as a director/officer of WHA.

### THE FACTS

6. On April 25, 2007, the Director issued a Determination against WHA (the “corporate Determination”) in favour of four employees in the amount of \$20,637.66. The Director also issued administrative penalties in the amount of \$2000.00. The Determination was sent to WHA, with copies delivered to its registered and records office and to its listed directors and officers, including Young.

7. The Determination was appealed under Section 112 of the *Act*, was considered by the Tribunal and was dismissed on August 12, 2007 in decision BC EST #D063/07.
8. The Determination indicates that an on-line search of search of the Registrar of Companies – Extra-Provincial Summary showed WHA was registered in British Columbia as an extra-provincial company on October 4, 2006. The foreign jurisdiction was listed as Florida; the date of incorporation in that jurisdiction was shown as September 19, 2003.
9. A search of the Florida Department of State, Division of Corporations, “Corporations Online” search (the “Florida Search”) indicated that “as of March 29, 2007, there were five directors/officers of WHA: William R. Smith, Robert M. Hull, Peter Young, Esther Briner and Rieghardt van Enter. The address listed for each of the directors/officers was address shown as the head office of WHA in British Columbia - #101, 5521 192 Street, Surrey. That address was the same as the address from which the WHA operated. The office had been closed before the issuance of the corporate Determination.
10. The Determination also describes two other documents found through the Florida Search, one filed December 21, 2005 and the other filed September 18, 2006, which name Young as a director/officer of WHA.
11. The Determination recites other evidence relating to the finding that Young was a director/officer of WHA. The Director had discussions with Young, who denied having been a director/officer of WHA.
12. On March 29, 2007, the Director sent correspondence to WHA which included copies of documents acquired through the Florida Search. The correspondence requested submissions on the question of who were directors/officers of WHA. Young was provided with a copy of this correspondence. In response, Young contacted the Director by telephone and once again denied being a director/officer of WHA.
13. During this process, Young, while denying his involvement as a director/officer of WHA, did not provide any evidence to the Director in support of that denial.
14. The Director relied on the corporate records and the absence of any credible and cogent evidence showing the corporate records were inaccurate to support a finding that Young was a director/officer of WHA. On the balance of evidence, the Director did not accept that he was recorded as a director/officer without his authorization.

## **ARGUMENT**

15. Young argues that he was never notified that an investigation was being done on whether he might be found personally liable under Section 96 of the *Act* and, as a consequence, had no opportunity to respond or to provide evidence demonstrating he was not a director/officer of WHA.
16. Young also argues that the Director erred in law in the following ways:
  - by presumptively relying on the correctness of the corporate records of WHA to establish who is a director or officer of WHA until that presumption is rebutted;
  - by finding he was an officer of WHA without evidence to support that finding or, alternatively, by taking a view of the evidence that could not reasonably be entertained; and

- by violating principles of natural justice, both in the context of not knowing the case against him and in the context of being given insufficient information with which to assess the calculation by the Director of the amounts owing under section 96.
17. Finally, Young says evidence has come available that was not available when the Determination was made.
18. The Director has submitted a response on each of the arguments raised by Young. The Director says Young did receive notice that an investigation was being conducted to determine who was a director/officer of WHA and was given an opportunity to respond.
19. In reply to the argument relating to the alleged errors of law, the Director says:
- the Tribunal has consistently endorsed the presumptive correctness of corporate records;
  - the finding that Young was a director and officer of WHA is supported by the corporate records as well as other evidence received during the investigation; and
  - there was no violation of principles of natural justice.
20. On the new evidence argument, the Director says without knowing the evidence which Young seeks to introduce on appeal, it is difficult to do anything other than express the considerations which the Tribunal applies to appellants who seek to add new evidence at the appeal stage. The Director refers to the Tribunal's decisions in *Senor Rana's Cantina Ltd.*, BC EST #D017/05; *Tri-West Tractor Ltd.*, BC EST #D268/96; *Kaiser Stables Ltd.*, BC EST #D58/98; and *Specialty Motor Cars (1970) Ltd.*, BC EST #D570/98 as setting out the operative principles.
21. In his final reply, Young reiterates his assertion that he was never advised there was an investigation of him personally, expands on the argument that the Director committed an error of law. He acknowledges there is no evidence available that was not already available at the time the Determination was made.

## ANALYSIS

22. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

*112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) the director erred in law;*
- (b) the director failed to observe the principles of natural justice in making the determination;*
- (c) evidence has become available that was not available at the time the determination was made.*

23. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds.
24. I do not accept Young's argument that he was never notified the Director was conducting an investigation of who was a director or officer of WHA, what the consequence of that investigation might be for those persons who appeared on corporate records as directors/officers of WHA or that he was not provided an opportunity to state his position and provide evidence to support it.
25. The Director says Young acknowledged receipt of the March 29, 2007 correspondence from the Director. That correspondence included a section with the heading, "**Directors/Officers of the WHA**". Included in that section was a description of the information which the Director had acquired to that point on who were the directors/officers of the WHA, and stated, in part:
- . . . I have retained a copy of the Florida Department of State, Division of Corporation, Corporation Online report for the WHA (copy enclosed). This document indicates that as of September 18, 2006 the following individuals were directors/officers of WHA: William R. Smith, Robert M. Hull, Peter Young, Esther Briner and Reighardt Van Enter. . . .
- Based on the information I have before me, I am satisfied that these individuals were directors/officers at the time wages were earned or became payable and as such would be personally liable under Section 96 of the Act for any unpaid wages up to a maximum of two months wages per employee. . . .
- . . . if you disagree that any of the individuals listed were directors/officers please provide me with your written submission along with supporting documents to this office.
26. There is nothing in the Section 112 record indicating Young provided a written submission or any documents in response to this correspondence.
27. The March 29, 2007 correspondence put Young on notice of the Director's intention to decide who was a director/officer of WHA, expressed a preliminary view on that matter, provided to Young, and the other persons named, the information that had been acquired up to that point and offered Young, and the other persons named, the opportunity to respond. On those facts, there was no breach of the requirements in Section 77 of the *Act* or of any principles of natural justice. This ground of appeal is dismissed.
28. The ground of appeal alleging error of law is a bit difficult to comprehend, since it seems to depend largely on the assertion that Young was not given notice or opportunity to respond, neither of which I accept. In his argument on this ground, Young says he was "not invited to rebut that presumption", referring to the presumption raised by his being shown as a director/officer in the corporate records. The above excerpts from the Director's March 29, 2007 correspondence indicate that is an incorrect assertion.
29. As it relates to the presumption that the director is allowed to draw from the information contained in corporate records, I confirm the decisions of the Tribunal in *Wilinosky*, BCEST #D106/99 and *Director of Employment Standards (Re Laurent Michalkovic)*, BC EST #RD047/01, which have accepted and applied the following propositions:
1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.

2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

30. On an application of those propositions, the Director did not commit an error of law in finding Young was a director/officer of WHA.

31. Young says, however, that the director erred in finding he was an officer of WHA. He says there was no evidence or she took a wrong view of available evidence. I do not accept there was no evidence. The Section 112 record contains corporate documents which identify Young as the Secretary for WHA. Applying the above propositions, that evidence raises a rebuttable presumption, but Young has done nothing to rebut it. No error of law has been shown in the Director's conclusion that Young is both a director and officer of WHA.

32. Young raises a question concerning the calculation of the amount of his personal liability under Section 96 of the *Act*. He says that because he has no access to the payroll records, he cannot say whether that calculation is right, in fact or in principle. There are two bases for rejecting this submission.

33. First, I reiterate that the appeal process in the *Act* is an error correction process, with the burden on Young in this appeal to show an error on one of the statutory grounds. Saying that he doesn't know whether the calculations are correct does not assist the process or provide any reason for finding an error in law justifying setting aside the Determination. Young has failed to meet the burden on him in respect of this matter.

34. Second, Young is precluded from arguing the issue of WHA's wage liability in this appeal. The payroll records could only be relevant to the wages owed to each of the complainants. The issue of the amount of wages owing has been decided by the Director, and confirmed by the Tribunal in BC EST #063/07. In this appeal, Young is limited to arguing those issues which arise under Section 96 of the *Act*, which in this context is whether the amounts accurately reflect amounts for which a director is liable under that provision. The basis for the calculation of those amounts is clearly set out in the Determination. He has provided no evidence to challenge the conclusion of the Director's delegate that the wages payable under the Determination are within the limit on wages for which a director is liable under Section 96 of the *Act*.

35. This ground of appeal is dismissed.

36. As I have indicated above, Young has abandoned the ground of appeal based on new evidence.

37. Accordingly, the appeal is dismissed.

**ORDER**

38. Pursuant to Section 115 of the *Act*, I order the Determination dated September 21, 2007 be confirmed in the total amount of \$18,631.86.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**