

Appeals

- by -

Lee Taubeneck also known as Leland Alan Taubeneck, a Director of Queenship Marine Industries Ltd. and an Officer of Worldspan Marine Inc.,

James B.E. Hawkins, an Officer of Worldspan Marine Inc. and Crescent Custom Yachts Inc.,

- and -

Steven L. Barnett, a Director of Worldspan Marine Inc.

– of Determinations 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)

and

An application for suspension

- by –

James B.E. Hawkins, an Officer of Worldspan Marine Inc. and Crescent Custom Yachts Inc.

– of a Determination issued by –

The Director of Employment Standards
(the “Director”)

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/84, 2011A/85, 2011A/86
2011A/95

DATE OF DECISION: January 23, 2012

DECISION

SUBMISSIONS

M.J. (Peggy) O'Brien	counsel for Lee Taubeneck also known as Leland Alan Taubeneck, a Director of Queenship Marine Industries Ltd. and an Officer of Worldspan Marine Inc.
Guy Holeksa and Dean P. Davison	counsels for James B.E. Hawkins, an Officer of Worldspan Marine Inc. and Crescent Custom Yachts Inc.
Dean P. Davison	counsel for Steven L. Barnett, a Director of Worldspan Marine Inc.
Karpal Singh	on behalf of the Director of Employment Standards
Adele J. Adamic	counsel for the Director of Employment Standards

OVERVIEW

1. This decision addresses appeals filed pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Lee Taubeneck, also known as Leland Alan Taubeneck ("Mr. Taubeneck"), James B.E. Hawkins (Mr. Hawkins"), and Steven L. Barnett ("Mr. Barnett") of three Determinations issued on June 2, 2011, by a delegate of the Director of Employment Standards (the "Director"). The Determinations, respectively, found that Mr. Taubeneck was a Director of Queenship Marine Industries Ltd. ("Queenship") and an officer of Worldspan Marine Inc ("Worldspan), that Mr. Hawkins was an officer of Worldspan and Crescent Custom Yachts Inc. ("Crescent"), and that Mr. Barnett was a director of Worldspan, entities found to have contravened provisions of the *Act* by failing to pay wages, compensation for length of service and group termination pay to ninety-seven former employees. Mr. Taubeneck, Mr. Hawkins, and Mr. Barnett were each found to be personally liable under Section 96 of the *Act* for an amount of \$733,616.28, an amount which included wages and interest.
2. Mr. Taubeneck, Mr. Hawkins, and Mr. Barnett have each appealed the Determinations made against them. Because of the commonality in the issues raised in each appeal, the similarity of the submissions, and the generic response to the appeals filed by the Director, I am able to answer these appeals in one decision. Where appropriate, I shall refer to Mr. Taubeneck, Mr. Hawkins, and Mr. Barnett, collectively, as the "appellants".
3. Mr. Taubeneck has appealed on the basis that he was a not a director of Queenship or an officer of Worldspan at the time wages were earned or should have been paid. In the alternative, Mr. Taubeneck says he was given no information from the Director on how his personal liability was calculated and no opportunity to provide any input or evidence concerning either the decision of the Director to make him personally liable or the amount of the liability. He says, in any event, the calculation of his alleged personal liability is incorrect.
4. Mr. Hawkins has appealed on the grounds that the Director erred in law by incorrectly applying the laws relating to section 95 and 96 of the *Act* to the circumstances and failed to observe principles of natural justice in making the Determination.

5. Mr. Hawkins also seeks a suspension of the Determination under section 113 of the *Act* pending the outcome of this appeal and the outcome of the collection activity against the entities associated under section 95 of the *Act* and made liable under other Determinations.
6. Mr. Barnett has appealed on the same grounds as Mr. Hawkins.
7. The Tribunal has discretion whether to hold an oral hearing on an appeal, but has decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) “record”.

ISSUE

8. The issue is whether Mr. Taubeneck, Mr. Hawkins, and/or Mr. Barnett have shown there is any reviewable error in the Determination.

THE FACTS

9. The Determinations set out necessary and relevant background, including the fact that on March 18, 2011, the Director issued a Determination against Worldspan, Queenship and Crescent (the “associated employer Determination”). The Director had found Queenship and the two other entities, Worldspan and Crescent, met the statutory requirements for being associated under section 95 of the *Act* and, exercising the discretion provided in that section, declared those entities to be associated for the purposes of the *Act*. On June 3, 2011, the Director added 27222 Developments Ltd. (“27222”) to the associated employer Determination, associating that entity with the entities in the associated employer Determination, and including 27222 in the liability that had been imposed in the associated employer Determination.
10. The associated employer and 27222 Determinations found that wages were owed to the affected employees in the amount of \$1,180,565.17 and that the associated employers and 27222 were liable for that amount plus interest and administrative penalties in the amount of \$1,000.00.
11. The associated employer and 27222 Determinations were sent to the associated employers and 27222, to the registered and records offices of each associated company and to each director and officer of those companies. The Determinations included notice to the directors and officers explaining their personal liability under the *Act*.
12. I will add here that the associated employer Determination and the Determination including 27222 as an associated employer were appealed. Those appeals have been considered and dismissed by the Tribunal in BC EST # D005/12.
13. Each of the Determinations under appeal here, and the findings and analysis supporting them, are brief. The following sets out the relevant findings and conclusions in each Determination.

The Determination against Mr. Taubeneck

14. The Determination against Mr. Taubeneck indicates that on June 17, 2010, a BC Corporate search showed Worldspan was incorporated on July 20, 2004, and listed its registered and records office as 1500 Royal Centre, 1055 West Georgia Street in Vancouver. Mr. Barnett and Chris Blane were listed as directors. Mr. Hawkins and Mr. Taubeneck were listed as officers. Mr. Blane was shown as a director during the period when employee wages were earned and should have been paid.

15. The Determination also indicates a BC Corporate search conducted on April 26, 2010, showed that Queenship was incorporated as an extra-provincial company on July 10, 2002, and listed its head office as 1500 Royal Centre, 1055 West Georgia Street in Vancouver. An online search of the Federal Corporate Information registry conducted on October 20, 2010, showed Mr. Taubeneck was listed as a director of Queenship.
16. On those facts, the Director found Mr. Taubeneck personally liable under section 96 of the *Act*, as a director of Queenship and an officer of Worldspan, for up to two months' wages for each affected employee. The wages comprised regular and overtime wages, length of service compensation, group termination pay, and interest. The Director calculated the wage entitlement (up to two months' wages) for each of the affected employees from the payroll records provided by the employer, applying a formula that is set out in the Determination.

The Determination against Mr. Hawkins

17. The Determination against Mr. Hawkins indicates that on June 17, 2010, a BC Corporate search showed Worldspan was incorporated on July 20, 2004, and listed its registered and records office as 1500 Royal Centre, 1055 West Georgia Street in Vancouver. Mr. Barnett and Chris Blane were listed as directors. Mr. Hawkins and Mr. Taubeneck were listed as officers. Mr. Blane was a director of Worldspan during the period when employee wages were earned and should have been paid.
18. The Determination also indicates that a BC Corporate search conducted on October 20, 2010, showed Crescent was incorporated on April 18, 2005, and listed its head office as 1500 Royal Centre, 1055 West Georgia Street in Vancouver. Mr. Hawkins was listed as the officer for Crescent.
19. On those facts, the Director found Mr. Hawkins personally liable under section 96 of the *Act*, as a director of Worldspan and an officer of Crescent, for up to two months' wages for each affected employee. The wages comprised regular and overtime wages, length of service compensation, group termination pay, and interest. The Director calculated the wage entitlement (up to two months' wages) for each of the affected employees from the payroll records provided by the employer, applying a formula that is set out in the Determination.

The Determination against Mr. Barnett

20. The Determination against Mr. Barnett indicates that on June 17, 2010, a BC Corporate search showed Worldspan was incorporated on July 20, 2004, and listed its registered and records office as 1500 Royal Centre, 1055 West Georgia Street in Vancouver. Mr. Barnett and Chris Blane were listed as directors. Mr. Hawkins and Mr. Taubeneck were listed as officers. Mr. Barnett was a director of Worldspan during the period when employee wages were earned and should have been paid.
21. On those facts, the Director found Mr. Barnett personally liable under section 96 of the *Act*, as a director of Worldspan, for up to two months' wages for each affected employee. The wages comprised regular and overtime wages, length of service compensation, group termination pay, and interest. The Director calculated the wage entitlement (up to two months' wages) for each of the affected employees from the payroll records provided by the employer, applying a formula that is set out in the Determination.

22. None of the Determinations contain any extensive analysis of either section 95 or 96 of the *Act*. The Determinations simply state the following summary of the legal effect of section 96:

Section 96 of the Act states that a person who was a director or officer of a corporation at the time wages of an employee were earned and should have been paid is personally liable for up to two months' wages for each employee.

ARGUMENT

23. I shall summarize the arguments made on behalf of each of the appellants and the response to those arguments by the Director and any other party who has submitted a response.

The Appeal by Mr. Taubeneck

24. Counsel for Mr. Taubeneck says the Director erred in finding Mr. Taubeneck was a director of Queenship and an officer of Worldspan as he had submitted his written resignation as a director of all Worldspan companies effective March 31, 2010. Counsel also submits Mr. Taubeneck was never provided with any information from the Director showing how his alleged personal liability was calculated. Counsel says Mr. Taubeneck was hired as a consultant for Queenship, took all of his direction from the owners of the Worldspan group, Chris Blane and Steven Barnett. Counsel says if Mr. Taubeneck is found to be an officer of Worldspan, he had no ability to authorize, permit or acquiesce in the contraventions of the *Act* by that company.

The Appeal by Mr. Hawkins

25. Counsel for Mr. Hawkins submits the Director erred in law, citing several reasons for this submission:
- a) Worldspan, Queenship, and Crescent, are subject to a proceeding under an insolvency act;
 - b) Worldspan, Queenship, and Crescent are in receivership;
 - c) Mr. Hawkins was not a director or officer of Queenship, which was the sole employer of the affected employees;
 - d) Worldspan, Queenship, and Crescent are not associated employers under section 95 of the *Act*; and
 - e) Mr. Hawkins was not a director or officer of Worldspan and Crescent since March 25, 2010.
26. Counsel for Mr. Hawkins also submits the Director breached principles of natural justice by failing to contact him or asking him to provide evidence or information of his involvement with Worldspan or any of the other companies.

The Appeal by Mr. Barnett

27. The appeal filed by counsel for Mr. Barnett substantially echoes the appeal filed by counsel for Mr. Hawkins. Each of the first four reasons given in Mr. Hawkins' appeal is listed in Mr. Barnett's appeal, as is the natural justice issue, with appropriate name changes to reflect it is Mr. Barnett's appeal.
28. The appeals by Mr. Hawkins and Mr. Barnett rely heavily on the exemptions against personal liability provided to a director or officer of a corporation in section 96(2) (a) and (b).

The Director's Response

29. The Director has filed a generic response to the appeals, one which addresses the issues raised in each, making necessary changes for each appeal.
30. The Director's responses correctly note the scope of appeal for a director/officer for liability imposed under section 96 is limited to arguing those issues which arise under that provision: whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2).
31. The Director also correctly notes that the effect of section 96(4) is to provide that when corporations are associated under section 95 of the *Act*, the wage liability imposed on the associated corporations can be applied to all of the directors and officers of those associated corporations.
32. Counsel for the Director appears to accept that Mr. Taubeneck filed his resignation as a director of Queenship, but argues that even a person who is not formally named as a director of a corporation can be found to be a director for the purposes of the *Act* if they continue to exercise functions, tasks and duties that are typical of a corporate director. Counsel for the Director contends Mr. Taubeneck continued to function as a director of Queenship after his resignation.
33. In respect of the submission by Mr. Hawkins, the Director also contends the evidence indicates he continued to function as an officer of Worldspan and Crescent after he purported to resign.
34. Counsel for the Director submits none of the exemptions found in section 96(2) apply.

Employees' Response

35. The Tribunal has received two submissions from affected employees in response to Mr. Hawkins' appeal. Neither addresses the appeal in the context of section 96 of the *Act* and do not need to be summarized in this decision. The same persons filed a similar submission in the appeals by Worldspan, of the March 18, 2011 Determination, and 27222, of the June 3, 2011 Determination, and they have been considered in those appeals.

Appellants' Reply

36. The appellants have each filed a reply to the submission of counsel for the Director.
37. Counsel for Mr. Taubeneck notes that the Director has not argued the written resignation of Mr. Taubeneck was not effective as of March 31, 2010. Counsel takes issue with many of the assertions of fact made by the Director concerning Mr. Taubeneck's role with the Worldspan companies or the *CCAA* process following his resignation.
38. Counsel for Mr. Hawkins and Mr. Barnett has filed the same substantive reply on behalf of both. In substance, the replies provide further submissions on whether Worldspan, Queenship, and Crescent were "subject to a proceeding under an insolvency Act", reiterate that the appointment of a monitor under the Court's *CCAA* order "is akin to being in receivership" and re-argue the positions that Mr. Hawkins and Mr. Barnett were not directors or officers for the purposes of section 96.

ANALYSIS

39. For the purposes of addressing the issues in this appeal, the essential parts of section 96 of the *Act* read:

96. (1) *A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.*
- (2) *Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for*
- (a) *any liability to an employee under section 63, termination pay or money payable in respect of individual or group termination, if the corporation is in receivership,*
- (b) *any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,*

40. It is well established that a person challenging a director/officer Determination is limited to arguing those issues which arise under section 96: whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). The director/officer is precluded from arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # 180/96. Accordingly, the arguments that question the correctness of the section 95 Determinations may not be raised in any of the director/officer appeals. That matter was raised and dealt with in the appeals of the associated employer and 27222 Determinations and will not be considered again in this decision.

41. Mr. Taubeneck and Mr. Hawkins claim they were not a director and/or officer of any of the associated entities at the time wages were earned and should have been paid.

42. In respect of Mr. Taubeneck, even accepting his resignation as a director of Queenship was valid – and I note in this regard that he was the sole director of that company¹ – a person may still be found to be a director of a corporation, even though not formally listed in the corporate registry, if that person exercises functions, task and duties that are typical of a corporate director: see, for example, *Erwin Penner and Beverly Hauff*, BC EST # D371/96, and *Jim Kovacs*, BC EST # D076/97. There is a dispute between counsel for Mr. Taubeneck and counsel for the Director about whether Mr. Taubeneck continued to perform the functions of a director after he submitted his resignation.

43. In respect of Mr. Hawkins, the same principle applies and the same assertions are made by counsel for the Director, which is that he continued to perform the functions, tasks and duties of an officer of Worldspan and Crescent after his purported resignation from his positions with those companies.

44. It is well established that a person listed in the corporate registry as a director or officer is presumptively liable under section 96 of the *Act*: see *David Wilinofsky and Ron J. Wilinofsky*, BC EST # D106/99. It is open to the person identified in those records as a director or officer to show, by clear and cogent evidence, that the Registrar's records are inaccurate: see *Director of Employment Standards (Re Michalkovic)*, BC EST # RD047/01. There may be circumstances where it would be inappropriate to find a person to be a director or officer of a corporation despite being recorded as such, but these circumstances will be rare and exceptional and will not

¹ There is a notation in Exhibit "O" of Mr. Taubeneck's May 24, 2011, affidavit, in the Internal Corporate Information Summaries, that while Mr. Taubeneck had resigned as a director of Queenship, "his resignation cannot be filed with the Corporation Canada because the CBCA requires a min of 1 director in a Corporation."

be made simply on whether the individual actually performs the duties, functions or tasks of a director/officer.

45. Applying the above principles, I am unable to find any error in the findings by the Director that Mr. Taubeneck and Mr. Hawkins were, at least, officers of the associated employer.
46. I appreciate there is some dispute about whether Mr. Taubeneck could be found to have been “functioning” as a director of Queenship following his resignation as a director from the “Worldspan Marine related companies”. I do not, however, need to resolve that dispute as there is no dispute that he continued to be listed as an officer of Worldspan in the corporate registry. There is no argument that the corporate records in that regard are inaccurate and I can find no circumstances that would make it inappropriate to find him to be an officer of a corporation for the purposes of section 96 of the *Act*.
47. In respect of Mr. Hawkins, he was listed as an officer of Worldspan and Crescent in the BC Corporate Registry when the Determination was issued. The information the Director found in the Registry is supported by the information found in Mr. Taubeneck’s May 24, 2011, affidavit, which provided Internal Corporate Information Summaries as of October 22, 2010. Interestingly, those summaries reflect Mr. Taubeneck’s resignation of March 31, 2010, as a director of Queenship, but say nothing of any resignation by Mr. Hawkins from any role in Worldspan or Crescent. Mr. Hawkins bears the burden of showing, on clear and cogent evidence, that the information contained in the Corporate Registry is inaccurate. He has failed to meet that burden. I find Mr. Hawkins has not shown there was any reviewable error by the Director in finding he was an officer of Worldspan and Crescent at the relevant time. Nor has he shown there are any circumstances that would make it inappropriate to find him to be an officer of a corporation for the purposes of section 96 of the *Act*.
48. Before addressing the challenges to the amount of the liability imposed on the appellants, which would include a consideration of the natural justice issue, I shall deal with the question of whether circumstances exist that would relieve the appellants from personal liability under subsection 96(2).
49. I would add at this juncture that while it was not raised as an argument by Mr. Taubeneck when his initial appeal submission was filed with the Tribunal, counsel joined issue on this argument in her final reply in response to the submission filed on behalf of the Director to Mr. Taubeneck’s appeal and adopted the arguments submitted by the counsel for Mr. Hawkins and Mr. Barnett on behalf of Mr. Taubeneck.
50. The submissions on this matter need to be set out in greater detail.
51. Section 96(2) (a) and (b) has been reproduced above. The appellants argue that the facts of this case bring them within the exemptions stated in both subsections 2 (a) and 2 (b).
52. The appellants say they are not liable under section 96(2) (b) because Worldspan, Queenship, and Crescent are subject to proceedings under an insolvency act, which they identify as proceedings under the *Bankruptcy and Insolvency Act (Canada)* (“the *BLA*”) and *Companies’ Creditors Arrangement Act (Canada)* (the “*CCAA*”). They note that “insolvency Act” is defined in section 1 of the *Act* as meaning, “*the Bankruptcy and Insolvency Act (Canada), the Companies’ Creditors Arrangement Act (Canada) or the Winding-up and Restructuring Act (Canada)*”.
53. They rely on facts not set out or referred to in the Determination, but which are found in the section 112 “record”: that Worldspan, Queenship, and Crescent became involved in a proceeding under the *BLA* on or about April 29, 2011, when the client who commissioned the building of a 144 custom yacht, Harry Sargeant

III (“Mr. Sargeant”), filed a Notice of Civil Claim against Worldspan, Queenship, and Crescent and a Petition for Application for Bankruptcy Order against Worldspan in the Supreme Court of British Columbia (the “Court”); and became involved in a proceeding under the *CCAA* on May 27, 2011, when Worldspan, Queenship, Crescent, and others filed a Petition with the Court for an Order and Stay of Proceedings under section 11 of the *CCAA*.

54. Counsel for the appellants argue that, based on the above timeline, Worldspan, Queenship, and Crescent have been subject to proceedings under the *BLA* and/or the *CCAA* since April 29, 2011. They say that whether one or both of these acts are considered the effect is the same: the corporation was subject to a proceeding under an insolvency Act at the time the Determinations against the appellants were issued.
55. Counsel for the appellants examine the wording of section 96(2) (b) and argue that the use of the present tense suggests the corporation must be presently under insolvency proceedings; that there is no indication the proceeding must have been underway at any specific previous time. Counsel refer to the decision of the Court in *Canadian Automated Data Services Ltd. v. Rob Bentley*, 2004 BCA 408, as providing an interpretation of this provision. On the basis of the comments of the Court in that case, counsel argue the liability of the appellants under section 96 did not arise until the Determinations were issued against them, which was June 2, 2011, and that date was subsequent to the commencement of the *BLA* and *CCAA* proceedings.
56. Counsel for the appellants also say they fall within the exemption described in section 96(2) (a) as Worldspan, Queenship, and Crescent were “in receivership” as a result of the *CCAA* order issued by the Court on June 6, 2011. Counsel argue that the stay order and the appointment of a monitor in the *CCAA* stay order is equivalent to being placed “in receivership”. Counsel argue the four day gap between the Determination and the issuance of the stay order and appointment of the Monitor is insignificant and should not affect the conclusion that Worldspan, Queenship, and Crescent were “in receivership” on or before the date the Determination was issued. They argue that even though the Court’s order followed the Determination by four days, a principled approach should be followed that recognizes the Court’s order was issued in respect of proceedings that began much earlier than the date of the Determination.
57. The Director’s response to the section 96 arguments flows from the assertion that, until June 6, 2011, there were only “applications” under an insolvency Act. Counsel says it would create mischief if an application under an insolvency Act could be made and never pursued, but have the effect of preventing the imposition of liability on directors and officers of corporations for wages. Counsel notes that notwithstanding the application made by Mr. Sargeant, for a bankruptcy order against Worldspan, no such order has been made and no receiver has been appointed; none of the associated companies have been placed into bankruptcy.
58. Counsel for the Director submits that a view of section 96(2) that would have Worldspan, Queenship, and Crescent subject to two “proceedings”, one under the *BLA*, the other under the *CCAA*, at the same time and without ever having appeared in a Court, presented evidence, made arguments and received a ruling from the Court is not a reasonable analysis of the meaning of that term. Such analysis gives no effect to the remedial and benefits conferring nature of the *Act* or the purposes set out in section 2.
59. Counsel for the Director finds some support in the language of the stay order, which, with one exception, bars any proceeding against the directors and officers of, *inter alia*, Worldspan, Queenship, and Crescent during the stay period. Counsel says the language does not bar a proceeding against the directors and officers prior to the stay being put in place and to read the *Act* more narrowly than the Court would be inconsistent with its remedial nature. Counsel reiterates that a “proceeding” in section 96(2) must mean more than simply making an application and the “oversight and decision” of a Court is required to transform an application into a proceeding and trigger the exemptions found in section 96(2). Counsel submits that it was not until

June 6, 2011, – after the Determinations had been made – that the appellants were subject to the “proceedings, oversight and protections under the *CCAA*”.

60. Finally, counsel says the Court has not appointed a receiver for the companies. She notes that, in fact, the companies opposed such an appointment in the *CCAA* petition, arguing it would interfere with their attempts to restructure.

61. As a matter of statutory interpretation of section 96, the Tribunal has accepted and followed the view expressed in Court decisions such as *Machtinger v. HOJ Industries Ltd.* [1992], 1 S.C.R. 986, (1992), 91 D.L.R. (4th) 491 and *Re Rizzolo & Rizzolo Shoes* [1998], 1 S.C.R. 27 in finding that employment standards legislation such as the *Act*, is benefits conferring legislation, and must be construed in a broad, generous and purposive manner, with any doubt arising from statutory construction to be resolved in favour of claimants. Any provisions that adversely impacts on benefits conferred must be narrowly construed. In other words, the Tribunal prefers an interpretation which encourages employers to comply with the minimum requirements of the *Act* and so extends its protection to as many employees as possible, over the one that does not.

62. The Tribunal has also adopted the view, expressed in *Albert Kenneth Archibald*, BC EST # D090/00, that provisions of the *Act* imposing personal liability on corporate directors and officers are an extraordinary exception to the general principle that such persons are not personally liable for corporate debts and such provisions should be narrowly construed.

63. Finally, the Tribunal has indicated, in *Roger Ogden* (“Ogden”), *Director/Officer of CJS Victoria Inc., operating Copper John’s Café*, BC EST # D093/04, that the *Act* is very specific in regard to the circumstances in which exemptions will be triggered and they are not triggered unless and until the express terms of the provisions are met.

64. I will first respond to the argument that Worldspan, Queenship, and Crescent are “in receivership”. Before the *Act* was amended in May 2002, section 96(2) (a) read:

- (2) *Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for*
- (a) *any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act Canada) or to a proceeding under an insolvency Act,*

65. The amendment changed section 96(2) (a) to the current language, which introduced a broader exemption from section 96(1) liability where the corporation was subject to action under section 427 of the *Bank Act* or to a proceeding under an insolvency Act than if the corporation was in receivership. Two points follow from a reading of the language as it was and as it is. First, it would not have been necessary in the pre-amendment language to refer to both “receivership” and “a proceeding under an insolvency Act”, which is defined to include the *CCAA*, if the former included the latter. Such a reading would create a redundancy in the language and it is an objective of statutory interpretation to avoid redundancy. Second, it is an unreasonable reading of the current language to suggest the terminology “in receivership” in section 96(2) (a), which provides a limited exemption from director/officer liability, was intended by the legislature to include a *CCAA* proceeding which, under section 96(2) (b), provides a director or officer with a broader exemption from liability, one for “all wages”. It follows that I do not accept that the appointment of a monitor in the context of a *CCAA* proceeding can be found to be placing a corporation “in receivership” as that term is used in section 96(2) (a) the *Act*.

66. In respect of the argument that Worldspan, Queenship, and Crescent were subject to “a proceeding under an insolvency Act” at the time the determinations were made, this question involves a matter of statutory interpretation. The relevance of this argument for the appellants flows from the Tribunal’s decision in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, where the Tribunal held that Determinations against officers and directors issued prior to the corporate employer making an assignment into bankruptcy are valid. They are not valid if they are issued after the assignment is made.
67. As indicated above, the definition of insolvency Act includes the *BLA* and the *CCAA*. There is no dispute that there was, at least, a proceeding under the *CCAA*. The dispute among counsel for the parties is when that “proceeding” occurred in relation to the Determinations; that is, whether there was any proceeding under an insolvency Act when the Determinations were issued.
68. Counsel for the Director argues there was no “proceeding” under the *BLA* when the Determinations were issued, as there was never a successful application under that Act, and the matter under the *CCAA* was not yet subject to the “oversight and decision” of a court at the time the Determinations were issued. Counsel for the appellants say there was a “proceeding” under both the *BLA* and the *CCAA* before the Determinations were issued.
69. Applying the approaches expressed in the above statements to the facts of this case and adopting the approach to statutory interpretation endorsed by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes, supra*, I find the correct interpretation of the contentious language compels a conclusion that Worldspan, Queenship, and Crescent were “subject . . . to a proceeding under an insolvency Act” when the Determinations were issued. My reasons for that conclusion follow.
70. The term “proceeding” is not defined in the *Act*. It is clear that the use of that term in section 96(2) (b) refers to a legal proceeding. None of the parties have argued otherwise and the Tribunal has taken the approach that the exemptions in section 96(2) (a) and (b) do not arise except in the context of a formal legal proceeding. This point is reflected in the following comment from *Albert Kenneth Archibald, supra*, at page 6:
- Assuming, for the sake of argument only, that CentruX was, practically if not in a formal legal sense, insolvent when Hutchinson was terminated, I am nonetheless of the view that the defence only applies when that state of affairs (*i.e.*, insolvency) has been recognized through some sort of formal insolvency proceeding. In my view, that result flows from the use of the phrases “*is in receivership*” and “*is subject to action under section 427 of the Bank Act*” or subject to “*a proceeding under an insolvency Act*”. In this case, the “proceeding” under the federal *Bankruptcy and Insolvency Act* was not filed until some three months after Hutchinson’s employment had already been terminated.
71. The point is also reflected in what a “proceeding” is under an insolvency Act; it is a court proceeding. Section 43 of the *BLA* allows one or more creditors to file an application *in court* for a bankruptcy order against a debtor; sections 9 and 10 of the *CCAA* provide that an application under that Act may be made *to a court* (in British Columbia, the Supreme Court), “by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made”; and section 12 of the *Winding-Up and Restructuring Act* (Canada), allows a winding-up order to be sought by way of petition *to a court* (in British Columbia, the Supreme Court).
72. It follows that one must look for the meaning of the term “proceeding” in the context of a legal proceeding and in that context, the *Interpretation Act* [RSBC 1996] chapter 238, provides the following, in section 39:

The definitions section of the Supreme Court Act, so far as the terms defined can be applied, extends to all enactments relating to legal proceedings.

73. Section 1 of the *Supreme Court Act* [RSBC 1996] chapter 443 defines proceeding:

“proceeding” includes an action, suit, cause, matter, appeal, petition proceeding or requisition proceeding;

74. Invariably, a “proceeding” before the Court, whether it is started by notice of civil claim, petition or requisition, commences when it is filed with the Court. In the circumstances here, the proceeding under the *BLA* was filed on April 29, 2011; the proceeding under the *CCAA* was filed on May 27, 2011. Both of those dates precede the Determinations. Counsel for the Director says the Tribunal should not find there was a “proceeding” under an insolvency Act until the Court decided the *BLA* applied (which has never occurred) and, in the case of the *CCAA*, until the Court decided the applicant was entitled to protection under that Act, but has not provided any basis on which the term “proceeding” can be read as some way other than its defined meaning applied in its grammatical and ordinary sense. I do not find a reasonable reading of the term “proceeding” requires either the direct involvement or some order of the Court in order to meet the definition of that term in the *Supreme Court Act*. I note in the June 6, 2011, oral judgement of Mr. Justice Pearlman, at para. 15, he notes that Mr. Sargeant “has commenced two proceedings in this court”, one of those being the petition for a bankruptcy order against Worldspan under the *BLA*. While such comments are not necessarily determinative, its use by the Court in that context and in what appears to be its ordinary sense, is telling.

75. Counsel for the Director urges the Tribunal to consider that the *BLA* petition has not been addressed by a court and is apparently in abeyance. That may be so, but that state of affairs may also indicate nothing more than that the *BLA* petition, like some other legal proceedings, were captured by the stay order issued by the Court in the *CCAA* proceeding. It provides no reason not to consider that matter to be a proceeding as that term is used in section 96(2) (b).

76. In making this decision, I have carefully considered the argument made by counsel for the Director that the interpretation of section 96(2) (b) urged by counsel for the appellants, and accepted by me, could be subject to significant abuse. My only response is that the experience of the Tribunal has not shown the interpretation and application of section 96(2) has, to date, created significant abuses of the wage collection provisions of the *Act*. If that experience changes, it may be that the legislature can be requested to review the scope of the exemptions provided and amend the legislation. It is not, however, for the Tribunal to alter or ignore what is, on its face, a clear direction from the legislature to relieve directors and officers from all or part of their personal wage liability in the specific circumstances described.

77. I do note this, however; the proceeding under the *BLA* was against Worldspan only. As such, only the directors and officers of Worldspan would be entitled to rely on the exemption that was triggered by the *BLA* proceeding. That may not affect the final result, as I have found that Worldspan, Queenship, and Crescent, and others, were subject to a proceeding under the *CCAA* when the Determinations were issued and the directors and officers of those companies could not be made personally liable for the two months’ wages of the affected employees.

78. As a result, the exemption under section 96(2) (b) applies to the appellants and the Determinations must be cancelled.

79. Based on the above decision, I do not need to address either the opportunity to respond argument and the challenge to the wage amount made by counsel for Mr. Taubeneck or the natural justice arguments made by counsel for Mr. Hawkins and Mr. Barnett. As well, I do not need to address the section 113 request made by Mr. Taubeneck.

ORDER

80. Pursuant to section 113 of the *Act*, I order the Determinations dated June 2, 2011, be cancelled.

David B. Stevenson
Member
Employment Standards Tribunal