

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Robert Douglas Robb  
Director / Officer of Makah Agencies Inc.  
(" Robb ")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 95/026

**DATE OF DECISION:** April 4, 1996

## DECISION

### OVERVIEW

This is an appeal by Robb pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. DDET 000013 issued by the Director on November 17, 1995. In this appeal Robb claims that the wages determined to be owing by the Director are not supported by the facts and that the Determination should be cancelled.

Consideration of this appeal falls under the transitional provisions of the Act. Section 128(3) of the Act states:

*If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director, or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including Section 80 of this Act, as a complaint under this Act.*

I have completed my review of the written submissions provided by Robb, Trevor Copp (“Copp”), Michael Jeroski (“Jeroski”) and the information provided by the Director.

### FACTS

Copp, Jeroski and W. David Hansen (“Hansen”) were employed by Makah Agencies Inc. (“Makah”) as Sales Representatives.

Makah, upon the request of a creditor and with the consent of Robb, was placed under the control of a Receiver / Manager effective November 10, 1994.

Makah was subsequently petitioned into bankruptcy on March 3, 1995.

At the first meeting of creditors convened by the bankruptcy trustee, Robb confirmed in the “Statement of Affairs” documents that Copp, Jeroski and Hansen were owed money by Makah.

Subsequently, the Director issued Determination No. CDET 000080 on November 17, 1995 against Makah Agencies Inc. in the amount of \$30482.23. There was no appeal of this Determination.

A search of the Registrar of Companies conducted on March 29, 1995 indicates that as of March 21, 1995, Robb was listed as the President / Secretary of Makah Agencies Inc.

### ISSUE TO BE DECIDED

The issues to be decided in this appeal are:

1. Were Copp, Jeroski and Hansen owed wages by Makah ?
2. Was Robb a director / officer of Makah at the time wages were earned or should have been paid to Copp, Jeroski and Hansen ?

## **ARGUMENTS**

Robb contends in his submissions that only an oral hearing will be able to completely address the issues surrounding this appeal. Robb also contends that wages owing if any, were owed by Mitsubishi Canada and / or Steven Simonyi-Gindele who was acting as the receiver manager. Robb further contends that he has not had the opportunity to review the records as the bankruptcy trustee has not made such records available to him. Robb finally makes numerous allegations with respect to, the employment status of Hansen, the lack of experience of the sales representatives, the employees operating their own “companies” while employed by Makah, his “personal” payment of employee expenses and the accuracy of the calculation of wages owing.

Copp and Jeroski contend in their submissions that there is no need for an oral hearing as the business records of Makah are sufficient to establish the claim for wages owing and further that those records clearly contradict the contentions of Robb.

The Director contends in the information provided that the records considered in calculating the wages owing were those provided by the accountant for Makah. The Director also contends that the Statement of Affairs signed by Robb for the first meeting of creditors clearly confirms that wages were owing to Copp, Jeroski and Hansen. The Director further notes that there has been no appeal of Determination No. CDET 000080 issued against Makah Agencies Inc. The Director finally contends that Robb was, at all material times, a director / officer of Makah and therefore, pursuant to the provisions of section 96 of the *Act*, he is liable for up to two months unpaid wages for each employee.

## **ANALYSIS**

While this appeal is of a determination against a director / officer of a company, Makah, I must also consider the circumstances which gave rise to the issuance of the determination against the corporate entity, Makah, as those facts provide the foundation for the determination now being appealed.

There is no need to conduct an oral hearing into this matter as the business records of the company are sufficient to determine the issues in question.

The onus in this appeal rests with the appellant, Robb. As noted above, Robb’s submissions contain a number of allegations with respect to the issues.

The allegations by Robb are clearly contradicted by the business records provided by the accountant for Makah and the information provided by the Director, including the Statement of Affairs from the bankruptcy trustee which lists wages as owing to Copp, Jeroski and Hansen.

I find that on the balance of probabilities, the evidence and information contained in the business records and the information provided by the Director to be preferred to the unsubstantiated and contradictory allegations submitted by Robb.

Upon consideration of the allegations contained in Robb's submissions, I find that:

- Hansen was an employee of Makah at all material times;
- there was no evidence provided to prove that any of the employees owned or operated their own "companies" at the time they were employed by Makah;
- the payment of employee expenses by Robb and/or Makah was a function of the terms and conditions of the employment contract;
- the wages set forth as being owing on the determination are for a period ending October 31, 1994, prior to the receiver / manager becoming involved, and for a period when Robb was clearly in charge of Makah.

Furthermore, Determination No. CDET 000080 issued against Makah Agencies Inc. for the wages owing was not appealed.

I conclude, on the evidence before me, that Makah owes wages to Copp, Jeroski and Hansen.

I must now determine whether Robb is personally liable pursuant to section 96 of the *Act* for up to 2 months unpaid wages for Copp, Jeroski and Hansen.

Section 96 states:

***"Corporate officer's liability for unpaid wages***

***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 month's 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 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,*

*(b) vacation pay that becomes payable after the director or officer ceases to hold office, or*

*(c) money that remains in an employee's time bank after the director or officer cease to hold office.*

*(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1)."*

Robb's submission does not challenge the fact that he was listed by the Registrar of Companies report as a director / officer of Makah Agencies Inc. at the time wages were earned or should have been paid.

I am satisfied that the calculation of the 2 months unpaid wages performed by the Director and set forth on Determination No. DDET 000013 is correct.

For these reasons, I conclude that Makah Agencies Inc. owes wages to Copp, Jeroski and Hansen and further that Robb was a director / officer of Makah Agencies Inc. at all material times.

**ORDER**

Pursuant to Section 115 of *Act*, I order that Determination No. DDET 000013 be confirmed in the amount of \$20450.66

*"Hans Suhr"*

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

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