

An appeal

- by -

Roger Ogden, Director/Officer of  
CJS Victoria Inc. operating Copper John's Café  
("Ogden")

- 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

**TRIBUNAL MEMBER:** M. Gwendolynne Taylor

**FILE No.:** 2003A/309

**DATE OF DECISION:** March 9, 2004

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Roger Ogden (“Ogden”) of a Determination that was issued on October 27, 2003 by a delegate of the Director of Employment Standards (“Director”). The Director found that Ogden was personally liable by operation of Section 96 of the Act for unpaid wages owed by CJS Victoria Inc., in the amount of \$4,199.11.

By Determination dated August 29, 2003, the Director had determined the liability of CJS Victoria Inc. (CJS). That Determination was not appealed.

Ogden has appealed the section 96 director/officer determination, on the grounds that the Director breached the principles of natural justice and new evidence is available. Ogden’s main argument on appeal is that the corporation was insolvent at the date of closure of the business but cost prevented formal filing of insolvency. Ogden also noted that there was a possibility that investors would pay the amount determined, but this will not happen. Ogden asks the Tribunal to cancel the Determination.

### ISSUES

Has Ogden established that the Director failed to observe principles of natural justice, or has he established grounds for presenting new evidence?

### FACTS

CJS Victoria Inc. operated Copper John’s Café, employing a number of employees. CJS ran into financial difficulty, closed the business in early August 2003 and was unable to pay wages owing. The Director reviewed the payroll records and determined the amount of wages owing. On August 29, 2003, the Director issued a Determination for wages owing and for two administrative penalties of \$500 each for contraventions of sections 16 (wages) and 58 (vacation pay).

On October 27, 2003, the Director issued the Order of personal liability against Ogden, pursuant to section 96 of the Act.

### ARGUMENT

Section 96(1) of the Act provides that a director or officer of a corporation is liable for up to 2 months unpaid wages for each employee. Section 96(2) exempts a director or officer for personal liability if, among other reasons, the corporation is in receivership or is subject to action under s. 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act.

The Director replied to the appeal noting that there was no evidence of any formal receivership or statutory insolvency proceedings. Accordingly, the exceptions in s. 96(2) do not apply.

Ogden submitted that there were a number of reasons that formal bankruptcy or insolvency was not declared and invited the tribunal to hear evidence that the company was indeed insolvent, albeit not formally.

## **ANALYSIS AND DECISION**

The appeal is brought under section 112 of the *Act*:

- 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 being made.

Ogden alleges that the Director breached the principles of natural justice and asks to present new evidence.

From a review of the written materials, it is apparent that there is no exemption from section 96(1) in these circumstances. The evidence that Ogden wants the tribunal to consider is not determinative given that the legislation only exempts formal insolvency. Ogden acknowledges that there is no formal insolvency, for a variety of reasons. Ogden has not seriously advanced an argument that the Director failed to observe principles of natural justice.

I find that Ogden has not established grounds to cancel or vary the Director's Determination.

## **ORDER**

The appeal is dismissed and the Determination dated October 27, 2003, is confirmed.

---

**M. Gwendolynne Taylor**  
**Member**  
**Employment Standards Tribunal**