

An appeal

- by -

Richard Evans,  
a Director of Tyhee Gold Corp.  
("Mr. Evans")

- 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:** Shafik Bhalloo

**FILE No.:** 2016A/13

**DATE OF DECISION:** March 21, 2016

## DECISION

### SUBMISSIONS

Jill Thorpe

counsel for Richard Evans, a Director of Tyhee Gold Corp.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Richard Evans (“Mr. Evans”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 15, 2015 (the “Determination”).
2. The Determination concluded that Mr. Evans was a director of Tyhee Gold Corp. (“TGC”), an employer found to have contravened provisions of the *Act* at the time wages owed were earned or should have been paid to Ravina Narsaiya (“Ms. Narsaiya”) and Carolyn Cornell (“Ms. Cornell”) (collectively, the “Complainants”) and, as such, was personally liable under section 96 of the *Act* for an amount of \$20,486.04 inclusive of accrued interest pursuant to section 88 of the *Act*.
3. In his Appeal Form, Mr. Evans has checked off two boxes for grounds of appeal, namely, the Director erred in law in making the Determination and new evidence has become available that was not available at the time the Determination was made. He is seeking the Tribunal to refer the Determination back to the Director.
4. It should be noted that Mr. Evans’ appeal was received by the Tribunal on January 21, 2016, one (1) day before the expiry date for filing the appeal. Accompanying his Appeal Form was a single page of written submissions, signed by Mr. Evans, containing his submissions on the merits of the Appeal and a request for an extension of 60 days “to determine the appropriateness of an appeal and to prepare an appeal” because of his “recent awareness” of “important and material facts”. Both the Appeal Form and the written submissions of Mr. Evans were sent to the Tribunal by email, dated January 21, 2016, by Mr. Evans’ counsel, Jill Thorpe (“Ms. Thorpe”).
5. By emailed correspondence to Ms. Thorpe, dated March 2, 2016, the Tribunal granted Mr. Evans an extension until 4:00 p.m. March 9, 2016, to file any additional documents in support of his appeal.
6. On March 8, 2016, Ms. Thorpe provided written submissions to the Tribunal including a copy of TGC’s Press Release dated May 29, 2015, announcing Mr. Evan’s resignation effective immediately.
7. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the appeal and written submissions made by Mr. Evans, and my review of the section 112(5) “record” (the “Record”) that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Employment Standards Tribunal (the “Tribunal”) has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1). If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Complainants will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

## ISSUE

8. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

## THE FACTS

9. The Complainants filed a complaint under section 74 of the *Act* alleging that TGC contravened the *Act* by failing to pay them all wages, including compensation for length of service. The Director investigated the complaint and, on August 26, 2015, issued a determination against TGC (the “corporate determination”) which found TGC liable for wages to the Complainants in the total amount of \$41,480.54 inclusive of interest. The Director also imposed an administrative penalty on TGC in the amount of \$500.00. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to TGC with copies to the registered and records office and to the directors and officers of TGC individually. The appeal period for the corporate determination expired on October 5, 2015, and no appeal was filed by TGC, and the latter did not pay the amount ordered in the corporate determination.
10. On July 9, 2015, the delegate conducted a BC Online: Registrar of Companies – Corporation Search of TGC which showed that TGC was incorporated on March 3, 1993, and Mr. Evans was listed as a director.
11. On December 1, 2015, the delegate conducted a further BC Online corporate search of TGC, which confirmed that Mr. Evans was still listed as a director. The searches confirmed that Mr. Evans was a director between January 1, 2014 and May 29, 2015, when the Complainants’ wages were earned or should have been paid.
12. As a result, the delegate issued the Determination against Mr. Evans, holding the latter personally liable for up to two (2) months’ unpaid wages for each of the Complainants.
13. As there was insufficient evidence to indicate that Mr. Evans authorized, permitted or acquiesced in contravention of the *Act*, he was not found liable for the administrative penalty levied against TGC.
14. Mr. Evans appeals the Determination based on the “error of law” and “new evidence” grounds of appeal, and is seeking the Tribunal to refer the Determination back to the Director.

## SUBMISSIONS OF MR. EVANS

15. In his written submission (the “First Submissions”) on the merits of the appeal that accompanied his Appeal Form, Mr. Evans states:

My appeal for extension is based on three bases: 1) I have not been a director of Tyhee Gold Corp since my resignation in May, 2015 and therefore not privy in a timely manner to communications and negotiations between the company and the British Columbia Employment Standards Department, 2) The Determination incorrectly states my address as being the company address in Vancouver and incorrectly states that I was a director on July 1, 2015 and December 1, 2015 during the period that the company and the Employment Standards administration were conducting discussions omitting me from timely communications, and 3) recent information of which I have only become aware today indicates that one, or both, of the claimants may be ineligible under the appropriate law due to their professional qualifications and status in the company at the time.

Finally, during my tenure as an independent director of Tyhee I always insisted in board meetings that the company meet all legal obligations. However, after resigning I was no longer in contact with the company nor in any position to advise or vote on the discussions and negotiations with the British Columbia Employment Standards Department regarding this case or any other company matters.

Because of my recent awareness of these important and material facts, I respectfully request an appeal extension of 60 days to determine the appropriateness of an appeal and to prepare the appeal.

16. In the further submissions on behalf of Mr. Evans provided to the Tribunal on March 8, 2016 (the “Second Submissions”), Ms. Thorpe, states:

My client, Mr. Evans, resigned from Tyhee board of directors on May 29, 2015 and was no longer involved nor had access to the company’s dealings regarding the labour claim in question. Please see attached Press Release issued by Tyee Gold [*sic*] announcing his resignation on May 29, 2015. He was unaware of the demand and in no position to influence the company’s response to it. A review of the record indicates that the claim and subsequent correspondence between the claimants, the BC government and Tyhee, took place from July to December, 2015. While Mr. Evans acknowledges that he was a director during the alleged non-payment period, the company has continued to operate without having filed bankruptcy since that time. The decision to not pay the claimants demand has been a decision of the Tyhee board months after he departed.

17. The Press Release of TGC dated May 29, 2015, attached to the Second Submissions, states that Mr. Evans resigned “as a member of the Company’s Board of Directors, effective immediately, due to an increased business workload involving increased duties and obligations on other public corporate boards.”

18. Ms. Thorpe also attaches a copy of section 31 of the *Employment Standards Regulation* (the “*Regulation*”) and argues that Ms. Narsaiya’s claim is “barred” under section 31(b) as she is an excluded professional under the *Act* because she “received her CMA (Certified Management Accountant) designation in October of 2000”. Ms. Thorpe states that she obtained the information about Ms. Narsaiya’s designation by phoning the Chartered Professional Accountants of British Columbia.

## ANALYSIS

19. Section 96 of the *Act* provides as follows:

### 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 months’ unpaid wages for each employee.
- (2) Despite subsection (1), a person who was a director or an 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 terminations, if the corporation is in receivership,
  - (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,
- ...

20. It is settled law in the Tribunal's decisions pertaining to an appeal of a determination made under section 96 of the *Act*, the appellant is limited to arguing only those issues that arise under section 96 of the *Act*, namely:
- Whether the person was a director when the wages were earned or should have been paid;
  - Whether the amount of liability imposed is within the limit for which a director may be found personally liable;
  - Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
21. It is also settled law that the director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96). Therefore, Mr. Evans may not make any submissions questioning or raising the matter of the correctness of the corporate determination in this appeal. However, in the First Submissions, Mr. Evans raises the issue of the status of one, or both, of the Complainants to make a claim under the *Act* because of their "professional qualifications and status in the company". In the Second Submission, his counsel, Ms. Thorpe, narrows the focus on Ms. Narsaiya stating that the latter is "barred" under section 31(b) of the *Regulation* from making a claim under the *Act* because she is an excluded professional under the *Act* due to her CMA designation dating back to October 2000.
22. A similar argument to Ms. Thorpe's above challenging the status of Ms. Narsaiya to lodge a complaint under the *Act* is also advanced by other directors and officers of TGC in their separate appeals of their individual section 96 determinations. As I have said in these other appeals, and reiterate here, any submission that challenges the status of either Complainant under the *Act* is a challenge to the merits of the corporate determination and, therefore, inappropriate to raise in the appeal of a section 96 determination. The appropriate time for raising the issue of the status of Ms. Narsaiya to file a complaint under the *Act* would have been in the appeal of the corporate determination by TGC, but TGC failed to appeal the corporate determination.
23. Having said this, I now turn to the issues that are relevant under an appeal of a section 96 determination starting with whether Mr. Evans was a director of TGC when the wages were earned or should have been paid to the Complainants. The Tribunal has consistently stated in its decisions that corporate records, which the Director can rely on to establish director and officer status, raise a rebuttable presumption that a person is a director/officer. That is, a director/officer can successfully raise a defense to section 96 liability by showing, on credible and cogent evidence, that the Registrar's records are inaccurate, either because he or she resigned or is not properly appointed (*Wilinofsky*, BC EST # D106/99, and *Michalkovic*, BC EST # D056/00). However, in *Michalkovic*, the Tribunal held that it would be a rare and exceptional circumstance where a person recorded as a director with the Registrar would not be found to be a director for the purposes of section 96. In this case, Ms. Thorpe, in the Second Submissions, states that Mr. Evans resigned as a director of TGC on May 29, 2015. While the corporate searches conducted by the delegate on July 1 and December 1, 2015, show that he continued being a director of TGC, Ms. Thorpe produces TGC's Press Release dated May 29, 2015, to show that TGC announced Mr. Evans' resignation as a director of TGC effective immediately. I find the Press Release effectively rebuts the presumption arising from the corporate searches that Mr. Evans continued being a director of TGC past May 29, 2015, and on the dates the searches were conducted.
24. However, it is noteworthy that Ms. Thorpe also states in her submissions that "Mr. Evans acknowledges that he was a director during the alleged non-payment period", that is, between January 1, 2014, and May 29, 2015, when the Complainants' wages were earned or should have been paid. This, effectively, is an admission on Mr. Evans' part that the Complainants' wage claims crystallized during Mr. Evans' directorship of TGC.

Therefore, Mr. Evans' resignation on May 29, 2015, does not immunize him from liability for any unpaid wage claims that have already crystalized; rather, the resignation only defeats post-resignation claims (see *Re Abraxis Security Inc.*, BC EST # D091/10).

25. I also note that Ms. Thorpe states in the Second Submissions that TGC "continued to operate without having filed bankruptcy since that time" and the decision not to pay the Complainants wages owing to them was a "decision of the Tyhee board months after [Mr. Evans] departed". I do not find either of these submissions extinguish, mitigate or lessen Mr. Evans' liability under section 96 of the *Act*.
26. I also note that Mr. Evans does not dispute *the amount of personal liability* imposed on him, which amount is within the limit of his personal liability set out in section 96 of the *Act*. He also does not adduce any evidence that indicates circumstances that might exempt him from personal liability under section 96(2) of the *Act*.
27. As for Mr. Evans' claim, in the First Submissions, that he was "not privy in a timely manner to communications and negotiations between the company and the British Columbia Employment Standards [Branch]", I note that the Director only commenced the investigation into the Complainants' complaints after they filed them with the Branch on June 2 and June 4, 2015, respectively. The Record shows correspondence to TGC from the delegate on June 29, 2015, advising TGC of the complaints and requesting employer records. There is also a reply letter to the delegate from Harjinder Gill, an officer and CFO of TGC, responding to the Demand for Employer Records. If Mr. Evans had left TGC by then it is conceivable that he would not be "privy in a timely manner to communications" between the Branch and TGC. However, I fail to see how this mitigates his obligations under section 96 of the *Act*.
28. I also note that Mr. Evans states in his First Submissions that "[t]he Determination incorrectly states [his] address as being the company address in Vancouver". Based on the Appeal Form, Mr. Evans' current address is in San Francisco, California. There is no evidence of any prejudice suffered by Mr. Evans as a result of the Determination showing his address as TGC's address in Vancouver. He appears to have received the Determination and filed his appeal in a timely manner on January 21, 2016, before the expiry of the appeal date. Further, he was also granted additional time, until March 9, 2016 (approximately 47 days after the expiry date for filing his appeal), to file further documents and submissions in support of his appeal. In the circumstances, I do not find Mr. Evans to have suffered any prejudice.
29. Mr. Evans also submits in the First Submissions that during his term as a director of TGC he "always insisted in board meetings that the company meet all legal obligations". He states that after he resigned, he was no longer in contact with the company, nor in any position to vote or advise on the discussions and negotiations with the Branch regarding the Complainants' cases or any other company matters. Whether or not Mr. Evans, during his directorship of TGC, insisted at board meetings that TGC meet all company obligations is not a relevant consideration under section 96 of the *Act* or a defence to liability under the said section.
30. In conclusion, I am not persuaded that Mr. Evans has established any basis for me to interfere with the Determination under either of his grounds of appeal - "error of law" or "new evidence". That is, I am neither persuaded that evidence has become available that was not available at the time the Determination was being made, nor am I persuaded that the delegate made any palpable or overriding error, reached a clearly wrong conclusion of fact or acted without any evidence or on a view of the evidence that could not be entertained. To the contrary, I find the Determination is well reasoned and based on appropriate interpretation of the law.

31. In the result, I find that Mr. Evans' appeal of the Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

**ORDER**

32. Pursuant to section 115 of the *Act*, I order the Determination, dated December 15, 2015, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**