

An application for suspension

- by -

Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde
Films Inc.

(“Shaw”)

- 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.: 2010A/72

DATE OF DECISION: August 10, 2010

DECISION

SUBMISSIONS

David G. Wong	Counsel for Kirk Edward Shaw, a Director and Officer of Guardian Films Inc. and En Garde Films Inc.
Donald W. Bobert	Counsel for the Writers Guild of Canada
Michelle Allman	Counsel for the Director of Employment Standards

OVERVIEW

1. This decision addresses a request by Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc. (“Shaw”) under section 113 of the *Employment Standards Act* (the “*Act*”) to suspend the effect of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 21, 2010.
2. The Determination accepted the authority of the Director under section 3(8) of the *Act* to enforce a Consent Order issued by an arbitrator in British Columbia appointed under an Independent Production Agreement (“the Agreement”) between the Writers Guild of Canada and The Canadian Film and Television Production Association, to which Guardian Films Inc. and En Garde Films Inc. were bound by virtue of having signed a voluntary recognition agreement on January 7, 2005.
3. Exercising the authority allowed under section 3(8), the Director found Shaw was a Director and Officer of Guardian Films Inc. and En Garde Films Inc. and ordered Shaw to pay an amount of \$147,579.30.
4. Shaw has appealed the Determination and, coincidentally, seeks to have the effect of the Determination suspended until the appeal is decided.
5. Counsel for Shaw says there is a strong case on appeal and it would be unfair and prejudicial to Shaw if the effect of the suspension is not suspended in its entirety.
6. The Director and the Writers Guild of Canada (the “Writers Guild”) oppose the section 113 application.
7. The Director disagrees that the appeal has merit. Alternatively, the Director says even if the Tribunal accepts there is some merit on the face of the appeal, Shaw has not established any circumstances that would justify depositing an amount smaller than what is owing under the Determination. The Director says no funds have been deposited with the Director, although an undetermined “token amount” has been suggested by Shaw, and the possibility of Shaw’s personal bankruptcy has been suggested.
8. The Writers Guild also disagrees there is any merit to the appeal. They also submit Shaw has only alleged prejudice and a Determination cannot be suspended on a “mere allegation”.

ANALYSIS

9. Section 113 of the *Act* reads:

113. (1) *A person who appeals a determination may request the tribunal to suspend the effect of the determination.*
- (2) *The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either*
- (a) *the full amount, if any, required to be paid under the determination, or*
 - (b) *a smaller amount that the tribunal considers adequate in the circumstances of the appeal.*

10. As the Tribunal has noted in several section 113 applications, there are two questions involved in a request under section 113. The first question is whether the Tribunal should suspend the effect of the Determination. The applicant has the burden of showing a suspension is warranted. The second question is whether, if a suspension is appropriate, on what terms it should be granted; for recent examples, see *Mickey Transport Ltd.*, BC EST # D005/10 and *Carestation Health Centres Ltd., Avicenna Group Holdings Ltd. and Oxbridge Ventures, Inc.*, BC EST # D062/10.
11. On the first question, the Tribunal will not suspend a Determination pending appeal as a matter of course. The Tribunal has indicated it is prepared to order a suspension of the Determination where the appeal “might have some merit”: *Tricom Services Inc.* BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99. It is not, however, a function of the Tribunal considering a request under Section 113 to conduct an extensive analysis of the merits of the appeal. It is sufficient that the Tribunal satisfies itself that the appeal, or even parts of it, may have some merit.
12. In considering the suspension request, the Tribunal has also considered other factors, such as the financial hardship on the applicant of allowing the Director to enforce the amount of the Determination and the potential prejudice to both the applicant and the employees in denying or granting the requested suspension.
13. On the second question, the Tribunal is limited in its authority under section 113 by the conditions set out in subsection 2(a) and (b); unless the full amount of the Determination has been deposited with the Director, or circumstances are established that would justify the Tribunal accepting some lesser amount may be deposited, the Tribunal may not exercise its discretion under Section 113.
14. The default position is to require the entire amount of the Determination to be deposited with the Director. If the deposit of a smaller amount is sought, there is a burden on the applicant to establish the circumstances that would justify that result.
15. I am not satisfied the Determination should be suspended in this case. The merit of the appeal is equivocal and, as such, is not a supporting factor. The potential prejudice to the beneficiaries of the arbitration and the Determination by a further and continuing delay governs this application. In making this decision, I do not reject the submission by counsel for Shaw that there is some prejudice to Shaw if he is required to pay the full amount of the Determination. I do not accept the suggestion of counsel for the Writers Guild that prejudice to Shaw in that sense is “mere allegation”. In some cases, and this is one, prejudice is apparent in the amount required to be paid. In this case, however, like in many other cases, the stated potential effect on Shaw – personal bankruptcy – is speculative and does not advance a suspension request, since to some extent it reinforces the need for the Director to act expeditiously on the Determination.
16. Even if I were to accept it is appropriate to grant a suspension, it would not be appropriate to grant such suspension without requiring anything less than the full amount of the Determination be deposited with the Director. This appeal is not about varying the Determination to some lesser amount; it is an all or nothing

appeal. “Tokenism” in the amount paid on the Determination, as apparently suggested by Shaw, is not a proper reflection of the obvious intention of the legislature in drafting section 113 of the *Act*.

ORDER

17. Pursuant to section 113 of the *Act*, the suspension request is denied.

David B. Stevenson
Member
Employment Standards Tribunal