

An appeal

- by -

Hal Porteous, a de facto Director of Only Rock Inc.  
(“Porteous”)

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2010A/87

**DATE OF DECISION:** September 10, 2010

## DECISION

### SUBMISSIONS

Hal Porteous	on his own behalf
Cara McBeath	on her own behalf
Hans Suhr	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an application, made pursuant to section 109(1)(b) of the *Employment Standards Act* (the “*Act*”), to extend the time for appealing a determination. I am adjudicating this application based on the parties’ written submissions (filed by the appellant, Hal Porteous, the respondent employee, Cara McBeath and by the Director’s delegate) and, in addition, I have reviewed the section 112(5) record that was before the delegate when the determination under appeal was issued.
2. Mr. Porteous also applied for a suspension of the determination pursuant to section 113 of the *Act*, however, in light of the fact that the full amount of the determination has been deposited into the Director’s trust account to be held pending the outcome of these proceedings, the Tribunal, by way of a letter to the parties dated August 10, 2010, chose not to issue a suspension order (Tribunal File Number 2010A/88).
3. This is not a typical case in keeping with the fact that an order extending the appeal period is equally quite atypical. Despite the very lengthy period of time that has elapsed between the issuance of the determination and the filing of the appeal (nearly two years), I am of the view that the appeal period should be extended. My reasons for reaching this conclusion are set out below.

### BACKGROUND FACTS

4. On November 15, 2007, Cara McBeath (“McBeath”) filed an unpaid wage complaint under section 74 of the *Act*. In her complaint she identified her employer as “Only Rock Inc.”, a firm engaged in the landscaping business (using manufactured rock). She identified the business “owner” as Albert Richards (“Richards”) but also, in the “Details” section of the complaint form, she referred to the appellant, Hal Porteous (“Porteous”), as “the other owner”. Where a business is operated through a business corporation, the principals are not the business “owners”; rather, typically, they are shareholders who “own” their shares but not the corporation, or its assets, itself. While it appears that Mr. Porteous is a shareholder (although this is not entirely clear – he describes himself as an “investor”), shareholders are not generally, solely by reason of that status, personally liable for any corporate obligations including employees’ unpaid wages. However, if a person is a corporate director or officer, section 96 of the *Act* imposes on such persons a limited personal liability for employees’ unpaid wages.
5. The Director’s delegate conducted an investigation and on April 18, 2008, issued a determination ordering Only Rock Inc. to pay Ms. McBeath the sum of \$4,160.35 on account of unpaid wages and section 88 interest (the “Corporate Determination”). Further, and also by way of the Corporate Determination, the Director’s delegate levied three separate \$500 monetary penalties (see *Act*, section 98) against Only Rock Inc. Thus, the total amount payable under the Corporate Determination is \$5,660.35.

6. Since the Director was apparently unable to collect any monies owed pursuant to the Corporate Determination, on July 25, 2008, the same delegate issued the determination now before me, namely, a determination against Mr. Porteous in the amount of \$4,160.35 (representing two months' wages payable to Ms. McBeath) along with accompanying "Reasons for the Determination" (the "delegate's reasons"). This determination – the "Section 96 Determination" – was issued pursuant to section 96(1) of the *Act*, a provision that makes corporate directors and officers personally liable for 2 month's unpaid wages for each employee of the corporation. As is noted in the delegate's reasons, the corporate records reviewed by the delegate indicated that there was only one director, namely, Albert Nelson Richards ("Richards"). I am not aware if a determination has been issued against Mr. Richards. Mr. Porteous is not named in any corporate records as either a director or officer of Only Rock Inc. and thus the Section 96 Determination was issued against him on the basis that he was a "*de facto*" (or functioning) director consistent with the Tribunal's jurisprudence (see, for example, *Penner and Hauff*, BC EST # D371/96).
7. The Section 96 Determination was mailed, by registered mail, to Only Rock Inc.'s business address and was returned to the Director from Canada Post as "unclaimed". The delegate says that the Section 96 Determination was mailed to the business address since this was "the only contact information available at the time" (delegate's August 4, 2010, submission).
8. Determinations may be filed in the B.C. Supreme Court pursuant to section 91 of the *Act* and thereafter enforced as an ordinary order of that court. Mr. Porteous says that he was wholly unaware of the fact that the Section 96 Determination had been issued against him until he learned, apparently in February of this year (2010), that a judgment had been registered against real property he owned. He learned about the judgment when he was renewing an existing mortgage. As I understand the situation, the judgment was removed from title when the full amount of the Determination was paid into the Director of Employment Standards' trust account (where the funds currently stand). Mr. Porteous then directed his legal counsel to look into the matter and in June of this year Mr. Porteous learned that the judgment registered against his property was in fact the Section 96 Determination. According to the delegate in his August 4, 2010, submission: "The filing of a certificate of judgment is a normal part of the collection process utilized by the Employment Standards Branch. This Determination had also been forwarded to the court bailiff in the location of the business for collection. The court bailiff was unable to locate Mr. Porteous."
9. Mr. Porteous delivered a letter to the Tribunal on June 30, 2010, that did not obviously constitute an appeal of the Section 96 Determination (it was more in the nature of a letter explaining the situation from his perspective) but on July 2, 2010, he filed an appeal notice (using the Tribunal's Form 1).
10. Mr. Porteous asks the Tribunal to cancel the Section 96 Determination on the ground that it was issued in breach of the principles of natural justice (see section 112(1)(b)).
11. Since, on the face of things, the appeal is late – according to the notice contained in a text box at the bottom of the second page of the Section 96 Determination, Mr. Porteous had until 4:30 P.M. on September 2, 2008, to file his appeal – the Tribunal, by letter dated July 5, 2010, invited the parties to file submissions regarding whether the appeal period should be extended pursuant to section 109(1)(b) of the *Act*.
12. As noted above, having now considered the parties' submissions, I am of the view that the appeal period should be extended.

## FINDINGS AND ANALYSIS

13. The time limits governing appeals to the Tribunal are set out in section 112(3) and depend on whether the party bringing the appeal was personally served with the determination (21 days) or served by one of registered mail, electronic mail or fax (30 days). Where the person was served by registered mail, subsections 122(1) and (2) provide that if the determination was “sent by registered mail to the person’s last known address” it “is deemed to be served 8 days after the determination...is deposited in a Canada Post Office”.
14. The appeal period does not begin to run against a person unless and until that person has been lawfully served (or deemed to have been served) with the determination. In the instant case, the Section 96 Determination was sent to Mr. Porteous at the usual business address of Only Rock Inc. and it was also sent to the company’s registered and records office which is the very same business address. The delegate says: “The Director’s Determination was mailed July 25, 2008, to the only contact information available at the time, the business address [and that] this document was returned by Canada Post as ‘unclaimed’.”
15. Mr. Porteous appeals the Section 96 Determination on the ground that the delegate failed to observe the principles of natural justice in making it and, more particularly, says that “I was never served notice of any claim against myself”.
16. It appears that Mr. Porteous was never lawfully served with the Section 96 Determination and thus an appeal period has never commenced running against him (see *Diamond*, BC EST # D108/04). If I am wrong in this conclusion, I would nonetheless extend the appeal period since, in my opinion, there was a clear and manifest failure to observe the principles of natural justice in terms of notifying Mr. Porteous before the Section 96 Determination was issued. The strong *prima facie* case, combined with the lack of any significant prejudice to anyone (the entire amount payable under the Section 96 Determination is held in trust), leads me to conclude that an extension of the appeal period should be ordered.
17. The phrase “person’s last known address” is not defined in the *Act*. Although it appears that Mr. Porteous was in attendance at the business address at different points in time, there is nothing in the record before me to show what, if any, efforts the delegate made to identify Mr. Porteous’ residential address – clearly, the Director was ultimately able to identify a residential address since it registered the Section 96 Determination against his home as a B.C. Supreme Court order. There is nothing in the record to show that Mr. Porteous used the Only Rock Inc. business office as his own personal business address. I also note that Mr. Porteous was never recorded as a corporate officer or director and, therefore, this is not quite the same case as where an “official” director or officer has been served at the business address. For his part, Mr. Porteous maintains that his role was limited to that of an investor in this company – a position that Mr. Richards has corroborated in writing. In light of the foregoing, I am inclined to the view that the Section 96 Determination was never lawfully served on Mr. Porteous.
18. Quite apart from the question of lawful service, my review of the record provided by the delegate indicates that no effort whatsoever was made to contact Mr. Porteous, before the determination was issued, in order to obtain his response to his possible personal liability under section 96. The delegate did forward a letter to Only Rock Inc., dated February 29, 2008, (to the attention of Mr. Richards) seeking the company’s position regarding Ms. McBeath’s unpaid wage claim. The delegate wrote a second letter to Only Rock Inc. on March 14, 2008, but, again, this was directed solely to Mr. Richards. The Corporate Determination was issued on April 18, 2008, and was mailed to Only Rock Inc. and was also copied to Mr. Richards. Although the Determination referred to section 96 of the *Act* (the director/officer liability provision), it was only copied to Mr. Richards (at the business address). I find it somewhat odd that the Corporate Determination was not also copied to Mr. Porteous given that delegate’s reasons appended to the Corporate Determination

specifically identified Mr. Porteous as a person “who was financially involved with the business and who was involved in the majority of the company’s financial issues” (record, page 37; Mr. Porteous is also mentioned at page 39). The Corporate Determination was sent to the company’s business/registered and records office (the same address), to Mr. Richards (at the business address) and to Ms. McBeath. It was not sent to Mr. Porteous.

19. I cannot find a single reference in the record to any communication by the delegate with Mr. Porteous before the Section 96 Determination was issued. Further, the delegate appears to acknowledge in his August 4, 2010, submissions that no one from the Employment Standards Branch ever contacted Mr. Porteous directly before the Section 96 Determination was issued. The only reference to any sort of notice to Mr. Porteous is set out at page 2 of the delegate’s submission where he refers to a conversation between Ms. McBeath and Mr. Porteous, after the Corporate Determination was issued, regarding the payment of former’s unpaid wages.
20. Section 77 of the *Act* states: “If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.” I query whether that obligation has been satisfied in this case. On the face of the record before me, Mr. Porteous appears to have a very strong *prima facie* case on appeal (see, for example, *Field*, BC EST # D034/03 and *Nam*, BC EST # D102/04). That fact, combined with my concern about whether the appeal period has even commenced running (due to lack of lawful service), leads me to conclude that this is an exceptional case where, despite the lengthy delay in question, the appeal period should be extended. I propose to extend the appeal period to July 2, 2010, the date that Mr. Porteous’ Appeal Form was filed with the Tribunal.

## ORDER

21. Pursuant to section 109(1)(b) of the *Act*, I order that the appeal period be extended to July 2, 2010. Accordingly, this appeal is properly before the Tribunal.
22. Section 114(2)(a) states: “Before considering an appeal, the tribunal may (a) refer the matter back to the director for further investigation”. On the basis of the information set out in the delegate’s reasons, it appears that there was a sufficient evidentiary record for his conclusion that Mr. Porteous was functioning as a director (or perhaps, more accurately, as an officer) when Ms. McBeath’s unpaid wages “were earned or should have been paid”. On the other hand, Mr. Porteous was denied the opportunity to hear and respond to the evidence relied on in support of the delegate’s finding that he was a “*de facto* director”. Although the Tribunal does have some fact-finding powers (see, for example, section 112(1)(c)), that is not its principal function and in an appeal to the Tribunal the original complaint is not re-heard *de novo* (that is, an entirely new hearing that proceeds without regard for the prior adjudicative process). Bearing in mind that one of the stated purposes of the *Act* is “to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the *Act*]” (section 2(d)), I am of the view that the most fair and efficient way to address this matter is to refer it back to the Director so that Mr. Porteous may be given a full and fair opportunity to respond to the assertion that he was a “*de facto*” director (or officer) when Ms. McBeath’s unpaid wage claim crystallized.
23. After Mr. Porteous has been given an opportunity to present his evidence and argument to the Director, and the parties are then able to reconsider the totality of the evidence, it may be that the parties will reach an accord. If not, and if Mr. Porteous still wishes to pursue the matter by way of an appeal, the Tribunal will have the benefit of a more complete record before it. Thus, although I have extended the appeal period such that this appeal is now properly before the Tribunal, I am referring the matter back to the Director for further investigation pursuant to section 114(2)(a) of the *Act*.

24. The funds currently held in the Director's trust account shall not be distributed except with the written consent of the parties or by order of the Tribunal or a court of competent jurisdiction.
25. If the matter does come back to the Tribunal, I do not consider myself seized of this appeal.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**