

An appeal

- by -

Douglas Ewing Smith, Director and Officer of Zed Data Systems Corp.  
(the "Appellant")

- 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

**ADJUDICATOR:** Ib S. Petersen

**FILE No.:** 2003A/134

**DATE OF DECISION:** July 8, 2003

## DECISION

### FACTS AND ANALYSIS

This is an appeal by Mr. Smith, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination of the Director issued on May 7, 2003. The Determination concluded that Mr. Smith was a director or officer of Zed Data Systems Corp. (the “Employer”) at the material time. This was based on records from the Registrar of Companies as of January 9, 2003. The Delegate concluded that Mr. Smith’s liability as an officer or director was \$2,822.39 in favour of an employee, Mr. Ben Lew, who was owed regular wages for the period of October 14 to 18, 2002, vacation pay, statutory holiday pay, overtime wages and compensation for length of service.

The material facts are not in dispute. Mr. Smith resigned as a director and officer (president) on December 12, 2001. He did so by providing a written resignation to the registered office of the company. Mr. Smith provided the Delegate with this information. He also indicated that he attempted to file a notice with the Registrar of Companies. Apparently the Registrar was not willing to accept the notice until another director was appointed.

Mr. Smith says he was not a director or officer at the material time.

In Re The Director of Employment Standards, BCEST #RD047/01, reconsideration of D056/00, the panel summarized the relevant legal principles as follows:

In our view, in summary, the case law reviewed here and in *Wilnofsky* stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation’s registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

It is unlikely for a person to be an officer without his or her consent, although that consent may be implied from the circumstances. I think, as well, subject to some statutory or other rule, that a person can revoke such consent and resign. Moreover, under the Company Act, RSBC 1996, c. 62, a person must consent to be a director, a consent that can be revoked (Section 112(2)). Section 130 of the Company Act provides expressly that a director ceases to hold office when he or she resigns:

- 130 (1) A director ceases to hold office when his or her term expires in accordance with the articles or when he or she
  - (a) dies or resigns,
  - (b) is removed in accordance with subsection (3),
  - (c) is not qualified under section 114, or
  - (d) is removed in accordance with the memorandum or articles.
- (2) Every resignation of a director becomes effective at the time a written resignation is delivered to the registered office of the company or at the time specified in the resignation, whichever is later.
- (3) A company may, despite any provision in the memorandum or articles, remove a director before the expiration of the director's term of office by special resolution, and, by ordinary resolution, may appoint another person in his or her stead.

While the Registrar of Companies--apparently--did not accept the filing of Mr. Smith's notice, he validly resigned in accordance with the provisions of the Company Act (Section 130(2)) and, thus, in my view, has successfully rebutted the presumption that he was a director or officer, at least from December 12, 2001. There is nothing to suggest that Mr. Smith was functioning as a director or officer subsequent to December 12, 2001.

I would uphold the appeal.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated may 7, 2003, be cancelled.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**