

An appeal

- by -

John Devries, a Director or Officer of  
496284 B.C. Ltd. operating as Design Works

- 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:** John M. Orr

**FILE No.:** 2001/99

**DATE OF DECISION:** May 23, 2001

## DECISION

### OVERVIEW

This is an appeal by John Devries (“Devries”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination (File No.100-170) dated January 22, 2001 by the Director of Employment Standards (the “Director”). The Determination is made against Devries personally as if he were a director or officer of 496284 B.C. Ltd. (the “company”) operating as Design Works. Devries submits that he was not a director or officer of the company during the time that the liability was incurred.

### FACTS AND ANALYSIS

The Director issued a Determination against the company on December 20, 2000 in relation to unpaid wages. The corporate Determination was not appealed and remains unpaid. On January 22, 2001 the Director issued a Determination against Devries alleging that as a director or officer he was personally liable for up to two months unpaid wages for each employee. The amount personally owing under the director’s Determination is \$1,668.55.

The evidentiary basis for the finding that Devries was a director or officer of the company is that a search from BC Online Corporate Registry showed that Devries was registered as a director of the company at the time the wages were earned or should have been paid. The Director’s delegate refers throughout the Determination to director and officer but does not clearly distinguish between these two positions.

Section 96 provides in part:

96. (1) a person who was a director or officer of Corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to two months unpaid wages for each employee.

It is not self-evident who is a director or officer of a company. In the reconsideration decision *Re: Director of Employment Standards - (Michalkovic)*, BCEST #RD047/01 the Tribunal analysed the issues surrounding director/officer status and summarised their findings as follows:

In our view, in summary, the case law reviewed here and in *Wilinofsky* (BCEST #D106/99) 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 the circumstances where it would be inappropriate to find 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.

In this case Devries has produced substantial evidence and documentation to show that he resigned as a director and officer of the company on June 01, 1998. The wages were earned between July 1999 and February 2000. Devries has supplied a copy of a signed written resignation together with a resolution of the company dated June 30 1998 accepting his resignation. He has also provided a copy of the Corporate Registry Form 10 and 11, dated June 1, 1998, confirming for registration purposes that Devries had ceased to be a “director”.

In addition, Devries has provided a letter from the corporate solicitor confirming that the notice of change of director was filed in 1998. The solicitor points out that the change of officers is only registered at the time of the filing of the Annual Report for the company. The company has not filed an annual report since 1998.

I am satisfied that Devries ceased to be a registered director of the company in June 1998. It is still necessary to decide whether or not Devries acted as an officer of the company after he ceased to be registered as a director. As stated in *Michalkovic*

It is clear, on the Tribunal's case law, that the person may be a director or officer without being recorded as such in the company's records (see, for example, *Gordon*, BCEST #D537/97; *Penner and Hauf*, above (BCEST #D371/96); *Okrainetz*, BCEST #D354/97. In the cases mentioned, the Tribunal applied a functional test and considered whether or not the person in question exercised the functions, duties or tasks that a corporate director or officer would, in the usual course of events, would (*sic*) exercise.

In this case the employee states that Devries was referred to on one occasion as a “partner” of the person running the business at the time the wages were earned. The only reference in the Determination to any functions, duties or tasks that may have been performed by Devries to indicate that he may have functioned as an officer was a bare statement that “The evidence

confirmed that you participated in the activities of the company during the time wages were earned”.

In my opinion, once the presumption is rebutted, the onus is on the complainant, or the Director, to establish that the alleged director or officer actually performed the functions of a director or officer.

In *Wilinofski*, supra, the adjudicator adopted the following:

“... where an individual is recorded as officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer... of the company... This presumption, however, may be rebutted by credible and cogent evidence that the Registrar’s records are inaccurate ... the burden of proving that one is not a corporate director or officer rests with the individual who denies such status”

However, in my opinion, once the individual has rebutted the presumption that arises from the records then the onus shifts to the party that alleges that the individual was a *de facto* director or officer.

In my opinion, Devries has provided credible and cogent evidence that the Registrar’s records were not current at the time the wages were earned. He has clearly rebutted any presumption that might arise from the records. There is no probative evidence to find that Devries was a *de facto* officer (or director) of the company and therefore I conclude that the Determination must be cancelled.

## **ORDER**

I order, under Section 115 of the *Act*, that the Determination is cancelled.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**