

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.:** 2001/186

**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 Penalty Determination (File No.100-170) dated February 8, 2001 by the Director of Employment Standards (the “Director”). The Penalty 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 determination included a penalty against the corporation in the amount of \$500.00 for failing to produce records during the investigation. The corporate determination was not appealed and remains unpaid. In January a determination was issued against Devries personally alleging that as a director or officer he was personally liable for up to two months unpaid wages for each employee. The amount personally assessed under the director’s determination was \$1,668.55.

On February 8, 2001 the Director issued a further determination against Devries as a person liable to pay the penalty under section 98 of the *Act*. It is this determination that is the subject of this appeal.

The evidentiary basis for the finding that Devries was a director or officer of the company was 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.

In a previous decision I concluded that Devries was not on officer or director of the company at the time that the wages were earned or should have been paid. I will not reiterate those reasons here as they can be found in: *Re: John Devries*, BCEST #D257/01.

Section 98 provides further that:

98. (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.
- (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

In this case Devries 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 supplied a copy of a signed written resignation together with a resolution of the company dated June 30 1998 accepting his resignation. He 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 provided a letter from the corporate solicitor confirming that the notice of change of director was filed in 1998. The solicitor pointed 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.

In the previous decision I was satisfied that Devries ceased to be a registered director of the company in June 1998. I was also satisfied that there was no evidence that could support a conclusion that he functioned as a director or officer of the company at the relevant time.

In accordance with section 98 persons other than directors or officers may also be subject to penalties under the *Act*. Pursuant to subsection 2 if a corporation contravenes a requirement an “employee” or “agent” who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

In this case, the only reference in the determination to any functions, duties or tasks that may have been performed by Devries to indicate that he may be liable under subsection (2) is a bare statement that “The evidence confirmed that you participated in the activities of the company during the time wages were earned”. There is no reference to his activities at the time of the contravention that gave rise to the penalty.

There is no evidence set out in the determination or the Director’s submissions that could establish that Devries was an “employee” or an “agent” of the company at the time of the contravention. There is also no evidence tendered to indicate that, even if he was an employee or agent, he authorised, permitted, or acquiesced in the contravention.

In my opinion the onus is on the Director to show that the person being penalized was an employee or agent and that the person authorized, permitted, or acquiesced in the contravention

that gave rise to the penalty. In the absence of such cogent evidence the penalty is not appropriate and must be cancelled

**ORDER**

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

---

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