

An appeal

- by -

Brian MacPherson, a Director or Officer of Sudden Fine Printing Ltd.
(“MacPherson”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/189

DATE OF DECISION: June 25, 2002

DECISION

OVERVIEW

This is an appeal filed by Brian MacPherson (“MacPherson”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. MacPherson appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “delegate”) on March 11th, 2002 (the “Determination”) pursuant to section 96(1) of the Act which provides as follows:

Corporate officer’s liability for unpaid wages

96. (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.

By way of the Determination, the Director’s delegate ordered MacPherson to pay the sum of \$7,078.66 on account of unpaid wages (vacation pay) and section 88 interest owed to five former employees of a firm known as A.K.A. Rhino Prepress & Print Inc. (“Rhino”). The Determination was issued against Mr. MacPherson by reason of his status as a director and officer (vice-president) of a corporation that was “associated” with Rhino (see section 95 of the Act), namely, Sudden Fine Printing Ltd. (“Sudden Fine Printing”)

By way of a letter dated May 29th, 2002 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on the parties’ written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

1. BACKGROUND FACTS

As noted above, the Determination was issued pursuant to section 96(1) of the *Act*. On November 19th, 2001, some four months prior to the issuance of the Determination now under appeal, the Director issued a section 95 (the “associated corporations” provision) determination against Rhino and two other firms (namely, Sudden Fine Printing and a third company, Pacific Image Color Inc.) ordering those firms to pay the sum of \$14,586.59 on account of unpaid wages and interest owed to former Rhino employees. This latter corporate determination was not appealed and the governing appeal period has now expired.

It is my understanding that all three companies named in the November 19th corporate determination were formally declared to be bankrupt on or about April 25th, 2001.

Since the employees’ unpaid wage claims were not satisfied, the instant section 96 Determination was issued against, inter alia, Mr. MacPherson. The particulars of the unpaid wage claims now before me [after giving full effect to the 2-month wage liability ceiling set out in section 96(1) of the Act] are set out below:

<u>Employee</u>	<u>Vacation Pay</u>	<u>Interest</u>	<u>Total Award</u>
Stanley Chan	\$1,728.04	\$84.57	\$1,812.61
Seth McNamara	\$ 989.89	\$48.44	\$1,038.33
James Oldman	\$ 798.61	\$39.08	\$ 837.69
Scott Watson	\$2,019.80	\$98.85	\$2,118.65
Lorne Wedley	\$1,212.06	\$59.32	\$1,271.38
Totals	\$6,748.40	\$330.26	\$7,078.66

REASONS FOR APPEAL

Mr. MacPherson's reasons for appealing the section 96 Determination are set out in a letter dated April 3rd, 2002 appended to his notice of appeal and in a subsequent submission dated May 23rd, 2002. While Mr. MacPherson does not dispute that he was a director and officer of Sudden Fine Printing, he says that this latter firm was not the "employer" of the complainants and that it only supplied equipment to Rhino.

FINDINGS

The evidence before shows that Rhino was incorporated (on October 29th, 1998) as a result of a form of "joint venture" agreement that was entered into between Sudden Fine Printing and Pacific Image Color Inc. on or about September 4th, 1998. Under the terms of this agreement, a company known as Sudden Graphics Ltd. was to hold 40% of Rhino's shares and Pacific Image Color Inc.'s parent company was to hold the 60% balance. All of the employees of the two parties' operating firms were terminated and some (but not all) were rehired by Rhino as of January 1st, 1999.

As noted above, Mr. MacPherson says that Sudden Fine Printing was not the "employer" of the complainants. So far as I can gather, that assertion appears to be accurate. Indeed, one of the employees, Mr. Wedley, has filed a submission specifically asserting that he was not employed by Sudden Fine Printing but, rather, by Rhino. The Director's delegate, in her April 19th, 2002 submission, does not take issue with Mr. MacPherson's position in this particular regard.

While the three associated firms may be held (subject, of course, to the federal Bankruptcy and Insolvency Act) jointly and severally liable for the employees' unpaid wages, only directors and officers of an "employer" firm may be held personally liable under section 96(1) of the *Act*--see *ICON Laser Eye Centres Inc. et al.*, BC EST # RD201/02. In this case, it seems clear that the only connection between Mr. MacPherson and the employer firm (Rhino) is that Mr. MacPherson was a director and officer of a corporation that was associated with the employer firm under section 95 of the *Act*. That sort of indirect relationship does not, of itself, provide a proper legal foundation for Mr. MacPherson's personal liability under section 96(1): see *ICON Laser, supra*.

Accordingly, Mr. MacPherson's appeal is allowed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal