Employment Standards TRIBUNAL

An appeal

- by -

Rock'N Meers Holdings Ltd. and by
Clifford Rock, Director of Rock'N Meers Holdings Ltd.

- 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: David B. Stevenson

FILE No.: 2003A/166, 2003A/167, 2003A/168, 2003A/169, 2003A/182, 2003A/183, 2003A/184 & 2003A/185

DATE OF DECISION: October 21, 2003

DECISION

SUBMISSIONS

Kimberly L. Grant, Digby R. Leigh	counsel for Clifford A. Rock and Rock N' Meers Holdings Ltd.
Steven M. Lum	on behalf of PricewaterhouseCoopers Inc.
Dinah Purewal and Sam Sasani	on behalf of themselves
Luke Krayenhoff	on behalf of the Director of Employment Standards
Michelle Alman	counsel for the Director of Employment Standards

OVERVIEW

This decision addresses appeals brought under Section 112 of the *Employment Standards Act* (the *"Act"*) by Rock'N Meers Holdings Ltd. ("Rock'N Meers") and Clifford Rock, Director of Rock'N Meers Holdings Ltd. ("Rock"), of Determinations that were issued on May 8, 2003 by a delegate of the Director of Employment Standards (the "Director") against Rock'N Meers (the "corporate Determinations") and Rock (the "director/officer Determinations") and applications brought by the Rock'N Meers and Rock under Section 113 of the *Act* to suspend the effect of the Determinations.

The corporate Determinations concluded that Rock'N Meers had contravened Section 18 the *Act* in respect of the employment of Dinah Purewal ("Purewal") and Sam Sasani ("Sasani") and ordered Rock'N Meers to cease contravening and to comply with the *Act* and to pay an amount of $16,555.00 to Purewal and $14,930.00 to Sasani. The director/officer Determinations concluded Rock was a director of Rock'N Meers at the time wages were owed to Purewal and Sasani and, under Section 96 of the *Act*, ordered Rock to pay an amount of $11,531.00 to Purewal and $14,430.00 to Sasani.

Where it is applicable, I shall refer to Rock'N Meers and Rock, collectively, as the appellants.

The appellants say the Director failed to observe principals of natural justice when making the Determinations by allowing only 74 minutes to provide a reply to preliminary findings made by the Director and say the Director erred in law in finding Purewal and Sasani to be employees of Rock'N Meers.

Rock says the Director erred in law in finding him liable under Section 96 of the *Act*. In support of this ground for appeal, and as a separate ground of appeal, Rock says new evidence has become available that was not available at the time the director/officer Determinations were being made. Rock also says the Director failed to observe principles of natural justice in making the director/officer Determinations when it failed to provide him with notice and an opportunity to respond.

The appellants have requested the Tribunal suspend the effect of the Determinations pending the outcome of the appeals.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUES

The issues are framed by the grounds of appeal outlined above: did the Director err in law in concluding Purewal and Sasani were employees for the purposes of the *Act* or in finding Rock liable under Section 96 of the *Act*; has new evidence has become available that would affect the director/officer Determinations; did the Director fail to observe principals of natural justice in making the corporate and director/officer Determinations; and should the Tribunal should suspend the effect of the Determinations pending the outcome of the appeals.

PRELIMINARY OBJECTION

The Director has raised a preliminary objection to Rock bringing the appeals on behalf of Rock'N Meers, asserting there is no clear evidence that Rock has been authorized by the Trustee in Bankruptcy to do so and, relying on the Tribunal's decision in *Glen Fyfe*, BC EST #D080/00, say the appeals should be dismissed.

In reply, the appellants say that Rock has the written authorization of the Receiver to bring the appeals on behalf of Rock'N Meers and, in the circumstances, that is all that is necessary.

The facts indicate the Receiver and the Trustee in Bankruptcy are the same entity, PricewaterhouseCoopers Inc. ("PwC"). The letter authorizing Rock to bring the appeals on behalf of Rock'N Meers is from PwC. While the letter identifies PwC as Receiver of Rock'N Meers, there is no reason to presume the same authority would not have been issued to Rock by PwC in its capacity as Trustee of Rock'N Meers. While I agree with much of the Director's submission, it is nonetheless unclear why I should not accept the letter from PwC as evidence that Rock has been granted the authority by both the Trustee and Receiver to file the appeals for Rock'N Meers, even if such grant of authority from the Trustee is more apparent rather than actual. In the absence of some reason for making such a distinction, dismissing the appeals by Rock'N Meers would in my view only delay consideration of these appeals and would otherwise serve no useful objective. I wish to make clear this view is not intended to suggest any change in the Tribunal's view that directors and officers of bankrupt companies have no authority to file appeals on behalf of the bankrupt company, but is a practical approach to the circumstances of this case which suggest PwC, in its capacity as Trustee, would confirm the authority of Rock to file the appeals for Rock'N Meers, just as it did in its capacity of Receiver.

The Tribunal accepts the appeals filed by Rock on behalf of Rock'N Meers.

THE SUSPENSION REQUEST

FACTS

The request to suspend the effect of the Determinations pending the outcome of the appeals was received by the Tribunal on June 19, 2003. Enclosed with the request were copies of Land Title searches of two properties jointly owned by Rock and Marjorie Jean Rock. These searches were provided to the Tribunal as evidence of Rock's ability to pay the amounts set out in the Determinations in the event the appeals were unsuccessful.

ARGUMENT AND ANALYSIS

Section 113 of the *Act* reads:

> *113. (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination*
>
> *(2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either*
>
> *(a) the full amount, if any, required to be paid under the determination, or*
>
> *(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.*

In *Tricom Services Inc.*, *supra*, the Tribunal stated that:

> . . . it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the "total amount" of the determination is posted; a "smaller amount" should only be ordered if such lesser amount would be "adequate in the circumstances of the appeal".

Section 113 does not provide the Tribunal with authority to suspend the effect of a Determination merely on being satisfied of the applicant's ability to pay. A precondition to the Tribunal considering any request to suspend the effect of a Determination is an indication the applicant has deposited the full amount of the Determination, or some lesser amount the Tribunal considers adequate in the circumstances, with the Director. There is no such indication in the request and, accordingly, the Tribunal will not consider it.

THE APPEALS

THE FACTS

The Determinations and submissions have provided the following information relating to the issues raised by the appeals:

- Purewal and Sasani worked as pharmacists for Rock'N Meers at a Pharmasave pharmacy in Abbotsford from August 2002 to December 2002 at a rate of $50.00 an hour.
- Rock'N Meers went into receivership on December 24, 2002.
- PwC was appointed Receiver under the terms of a General Security Agreement, dated July 23, 2001, between Rock'N Meers and the Bank of Montreal.
- Purewal claimed she was owed wages for 308.75 hours worked between August 2, 2002 and December 11, 2002. The Director accepted her claim.
- Sasani claimed he was owed wages for 283 hours worked between November 4, 2002 and December 17, 2002. The Director accepted Sasani was owed wages for 277.5 hours worked in that period.
- Rock'N Meers was represented during the investigation by Mr. Steven Lum, of PwC.

- On May 7, 2003, the delegate sent correspondence containing the preliminary findings on the claims of Purewal and Sasani to Mr. Lum, asking for a response by the end of that day if Mr. Lum disagreed with those findings. No response was received.
- Rock'N Meers was assigned into bankruptcy on, or about, June 5, 2003.
- A search of the Corporate Registry showed that during the relevant period Rock was a director/officer of Rock'N Meers.

ARGUMENT AND ANALYSIS

Failure to Comply with Natural Justice

The appellants argue the Director failed to provide reasonable opportunity to respond to the claims made by Purewal and Sasani, which is both a breach of the requirements of Section 77 of the *Act* and a breach of the natural justice requirement of procedural fairness. This argument is based on the limited period of time given to Mr. Lum by the Director to respond to the preliminary findings letter sent to him on May 7, 2003. That letter was received by Mr. Lum at 2:46 pm on May 7, indicating the deadline for responding was 4:00 pm that same day. In their August 28, 2003 reply submission, the appellants also raise the argument that in any event the Receiver had no authority to deal with Purewal and Sasani's wage claims; that the only proper person to have responded to those claims was Rock and he was never given any notice of the claims nor had any opportunity to respond.

In reply, the Director says the wage claims being made by Purewal and Sasani, which included a statement that the rate of pay was $50.00 an hour and a list of the days and hours worked, were communicated to the Receiver on or about March 7, 2003. In other words, the Director says Mr. Lum had all the relevant information for two months prior to the issuance of the preliminary findings letter on May 7, 2003. The Director has filed an affidavit from the delegate responsible for the file with her reply, in which the delegate states that in conversations with Mr. Lum on May 7, 2003, he confirmed that he had received that information, but had not responded to it, and that when he was requested by the delegate to check company payroll to confirm or deny the accuracy of the information provided by Purewal and Sasani, refused, saying he was aware Purewal and Sasani were owed money and didn't disagree with their claims for hours, but wasn't interested in confirming or challenging those claims. Those statements were not challenged by the appellants. In response to the suggestion that the Receiver had no authority to deal with the wage claims, the Director says the authority of the Receiver to take possession of the property (as that term is defined in the security agreement) of Rock'N Meers, to realize on the property and to distribute the proceeds of the property as directed by the Bank necessarily includes the authority to deal with claims for unpaid wages.

On this last point, I agree with the Director. On a proper reading of the Appointment of Receiver for Rock'N Meers, the authority to deal with claims for unpaid wages is implicit in the power given to the Receiver to "realize on the Property and distribute the proceeds thereof" and to "make any arrangements or compromises which it thinks expedient with regard to the Property" of Rock'N Meers.

I also agree with the Director that there was no failure to observe principles of natural justice when the Receiver was required to file any disagreement with the preliminary findings by 4:00 pm on May 7, 2003. Mr. Lum had all the essential information relating to the claims on March 7, 2003, two months before he was asked to identify any disagreement with the information provided by Purewal and Sasani and to

provide any information relating to areas of disagreement. The May 7 letter added nothing to the material already in Mr. Lum's possession for two months. He confirmed that with the delegate on May 7. He also confirmed what was already suggested by his failure or refusal to involve himself in the "self help" process, which was that he had no intention of participating in, or cooperating with, the claim or investigation process. The appellants say the information provided through the "self help" process is irrelevant to whether they were given a fair, and statutorily required, opportunity to know the complaints and to respond to them. I disagree. As I indicated above, in this case the information provided in the "self help" kit gave Mr. Lum notice and complete details of the essential elements of the claims.

As well, "self help" is the first step in a redesigned complaint resolution process introduced in the amendments to the *Act* that came into effect in May of 2002. It is a step contemplated in paragraph 76(3)(d) and is consistent with the purposes of the *Act* described in Sections 2(c) and (d). The objective of "self help" is that it will both alert the employer to the particulars of the claim and provide a foundation for constructive discussion and, hopefully, resolution. A refusal by the employee to engage that process can have adverse impact on his or her complaint. There are no direct consequences identified in the *Act* for the failure or refusal of the employer to participate in that process, but fundamentally, the consequences should be no different than if the employer had failed or refused to participate in an investigation (see *Tri-West Tractors Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97). In other words, it is offensive to the statutory purposes and to provisions designed to foster a cooperative and expeditious resolution of complaints for an employer to fail or refuse to participate in the process, then later claim some ignorance of the nature and elements of the complaint (at the same time suggesting that one of the other parties was responsible for that) or that there was insufficient opportunity to respond to allegations and information in the complaint.

In this case, had Mr. Lum done what is contemplated by the *Act*, Rock'N Meers would have clearly understood every aspect of the claims made by Purewal and Sasani and would have already formulated a response to them. If that had been done, as it should have, it was an easy thing to convey that response to the Director in the time allowed in the May 7 letter.

Mr. Lum conveyed to the delegate his refusal to participate in the investigation. There is no indication in the material or in the submissions from the appellants that Mr. Lum would have expressed his disagreement with the preliminary findings even if he had been given additional time. He had already expressed his view that Purewal and Sasani were "independent contractors" and the delegate considered and addressed that position in the Determinations. As the affidavit of the delegate notes, Mr. Lum was forewarned that he would have only a brief time to respond to the preliminary findings; he raised no objection to that nor did he communicate with the delegate after the May 7 letter was sent, requesting more time or expressing concerns about the time allowed.

I do not accept that the procedure denied Rock'N Meers an opportunity to respond or was otherwise unfair. The concerns identified in this ground were created by Mr. Lum arising from his failure or refusal to participate in the complaint resolution process contemplated by the *Act*.

For the foregoing reasons, I dismiss the natural justice ground of appeal raised by the appellants.

Rock has also raised a natural justice issue in respect of the director/officer Determinations. He says the delegate gave him no notice of his intention to issue the director/officer Determinations and had no opportunity to make any submission on whether he could be held personally liable under Section 96 of the *Act*. I agree with Rock on this point, but find that the failure to provide notice and allow submissions

has been cured in these appeals (see *O'Reilly*, BC EST #RD165/02 and *Modern Logic Inc.*, BC EST #D151/02).

The question of Rock's personal liability under Section 96 of the *Act* will be addressed later in this decision.

Fresh Evidence

The appellants say there is fresh evidence relating to the amount found owing to Purewal and Sasani, and specifically relating to the rate of pay and the hours worked by both. This ground of appeal is related to the natural justice argument in this sense – if there was no failure to give the appellants a reasonable opportunity to respond then this "new evidence" was information that could have, and should have, been developed in response to the information provided by Purewal and Sasani in the "self help" document and considered by the Director during the investigation. I note again that the delegate, in his affidavit, says he verbally requested Mr. Lum to "check company payroll to confirm or deny the accuracy of Purewal's and Sasani's wage claims" and Mr. Lum refused. That assertion has not been challenged. It is trite that the Tribunal will normally refuse to allow a party that has failed or refused to participate or cooperate with an investigation to introduce evidence on appeal that should have been provided during the investigation process (see *Tri-West Tractors Ltd.*, *supra* and *Kaiser Stables Ltd.*, *supra*).

Even if I accepted the appellants could submit "new evidence", they nonetheless bear the burden of demonstrating the conclusion of the Director, that both Purewal and Sasani were engaged by Rock'N Meers at a rate of $50.00 an hour for the hours accepted, was wrong. There is nothing in the appeal that comes close to satisfying that burden.

There is no affidavit from Rock (or any other person), for example, relaying discussions that might have taken place with Purewal and Sasani when they agreed to work at the Abbotsford Pharmasave and which might have included discussions about the hourly rate each would be paid for working at that location. The appeal contains only the assertions that Purewal's hourly rate was $40.00 and Sasani's hourly rate was $32.50, supported by payroll information from another Pharmasave pharmacy ("Pharmasave #272) in Vancouver, at which Purewal and Sasani worked when they agreed to go to the Abbotsford Pharmasave. The relevance of the payroll information from Pharmasave #272 is unexplained in the appeal. Purewal and Sasani, in their reply, say it has no relevance as the hourly rate agreed upon for working at the Abbotsford Pharmasave reflected the additional cost to them of traveling to Abbotsford as well as a concern by Rock'N Meers that because of a shortage of pharmacists generally, it might be difficult to find other pharmacists for that location. They legitimately ask why they would agree to travel 3 hours a day to work in a pharmacy for the same wage they were getting at a pharmacy minutes from their homes.

The appellants question how the Director could fail to deduct unpaid break time from the hours Purewal and Sasani claimed they worked. Once again, however, no evidence is provided by Rock'N Meers showing either of the individuals did not "work" during their breaks.

Included in this ground of appeal is the argument by Rock that the Director incorrectly calculated the liability imposed on him under Section 96 of the *Act*, assuming Rock has any liability under that provision at all. The relevant parts of that provision read:

> *96. (1) A person who was a director of 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.*

> *(2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for*
>
> *(a) any liability to an employee under Section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,*
>
> *(b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act, . . .*

Rock says the amount calculated by the Director to be owed under Section 96 does not reflect ***the equivalent*** of two month's ***normal*** wages for Purewal and Sasani. The *Act*, however, says nothing about the liability being an amount *equivalent* to two month's *normal* wages. I agree with the argument of the Director, that acceding to the position taken by Rock would require reading in the terms "normal" and "average" into subsection 96(1). That does not mean that I am entirely foreclosed from doing what is suggested by Rock, but basic principles of statutory interpretation require me to give effect to the plain and ordinary meaning of the words unless the plain meaning is inconsistent with the objectives and purposes of the legislation and the proposed meaning is one which the words are capable of bearing. The Director submits that the consequence of the proposed interpretation, which would reduce Rock's liability to Purewal and Sasani, and coincidently reduce the benefit of that provision to those individuals, is at odds with the preferred application of benefits-conferring legislation, which is found in the following statement from *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27:

> . . . benefits conferring legislation . . . ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

I agree with that statement. The provisions of the *Act* in respect of the scope of a director/officer liability are clear – it is for "*up to 2 months' unpaid wages for each employee*". The plain meaning of the words used, considered in their entire context and in a manner that is consistent with the scheme and object of the Act, do not express an intention to limit a director/officer's liability to the "*equivalent* to two month's *normal* wages". No error has been shown. In reaching my conclusion, I should add that there might other factors or circumstances which would make it appropriate for the Director to have reference to an employee's "normal" wages when deciding what amount would properly represent "*2 months' unpaid wages"*, but there is nothing in Section 96(1) that would compel that approach.

For the above reasons, I also dismiss this ground of appeal.

Error of Law

(a) Complainant's Status Under the *Act* – Employees or Independent Contractors

The appellants say the Director erred in finding Purewal and Sasani were employees and not independent contractors. The reasons supporting the finding of employee status under the *Act* is found in the following excerpt from the Purewal Determination:

> The duties of a pharmacist staffing a pharmacy are routine and not generally variable. The hours of work are dictated by the store hours, which are controlled by the employer. In this case, the fact that the complainant was paid by the hour and had not a chance of profit nor risk of loss. She was integrated into the employer's business and had an ongoing relationship with the owner. The termination of the employment relationship occurred only because the employer went into receivership.

The Sasani Determination contains identical reasoning. The appeal says:

> . . . there is insufficient evidence to support the Delegate's finding that Mr. Sasani and Ms. Purewal are employees of Rock'N Meers or independent contractors.

The appeal argues the finding of employment status was an error of law, arising from insufficient evidence to support the finding and from the fact that Purewal and Sasani had an employment relationship at Pharmasave #272, with P.S. Drugs #272 Ltd., not Rock'N Meers. Otherwise, the appeal simply restates the appellants' position that Purewal and Sasani were actually independent contactors. The findings of fact used by the Director are not addressed in the appeal. Nor does the appeal include any assertions of fact going to the nature of the individuals' relationship with Rock'N Meers that might demonstrate the individuals bore none of the indicia typical of employees (other than an assertion that they were not placed on "employee" payroll of Rock'N Meers – which in fact says nothing about their status as employees or independent contractors for the purposes of the *Act*).

Issues about whether a person is an employee or independent contractor for the purposes of the *Act* are typically decided on findings of fact applied to well established principles of law. This case is typical. The delegate has made certain findings of fact, addressing matters of control, chance of profit, risk of loss, payment and integration into Rock'N Meers' business, which if accepted, justify the conclusion reached.

Additionally, the definition of "employee" in the *Act* includes, *"a person an employer allows . . . to perform work normally performed by an employee"*. The foregoing represents a legislative presumption that persons who are performing work normally performed by employees are themselves employees. The experience and expertise of the Director, and the Tribunal, can be used to decide whether the "work" being done is *"work normally performed by an employee"*. Pharmacists engaged by businesses such as Pharmasave are normally employees of that business unless they are owners of the business in their own right. That presumption can be over-ridden on the evidence, but it is not contested in this appeal that Purewal and Sasani were employees of Pharmasave #272 or that they were performing different jobs at the Abbotsford Pharmasave than they normally performed at Pharmasave #272.

Consequently, there was ample evidence, including the absence of evidence to the contrary, upon which the Director could find Purewal and Sasani were employees under the *Act*.

The suggestion by the appellants that Purewal and Sasani could not be employees of Rock'N Meers because they were employees of P.S. Drugs #272 Ltd. is totally without merit. There is no presumption against a person being an employee of two employers at the same time.

Rock'N Meers has not demonstrated any basis upon which I may interfere with the findings made or the conclusion that Purewal and Sasani were employees of Rock'N Meers for the purposes of the *Act* and this aspect of the appeal is dismissed.

(b) Director/Officer Liability

The final issue raised in these appeals relates to the decision of the delegate to impose a personal liability on Rock for unpaid wages under subsection 96(1) of the *Act*. There is no issue that Rock was a director/officer of Rock'N Meers and, all things being equal, could be held personally liable under that provision.

Rock says, however, that he cannot be held personally liable under subsection 96(1) of the *Act* because at the time the Determination was issued, May 8, 2003, Rock'N Meers was, in the words of paragraph 96(2)(b), *"subject . . . to a proceeding under an insolvency Act"*. This ground of appeal raises an issue of statutory interpretation and depends on whether the term *"proceeding"* in paragraph 96(2)(b), must be interpreted to include the appointment of a Receiver pursuant to a security agreement.

The term ***"insolvency Act"*** is defined in the *Act* as meaning:

> . . . the Bankruptcy and Insolvency Act (Canada), the Companies' Creditors Arrangement Act (Canada) or the Winding-up Act (Canada);

There is no definition in the *Act* defining the term "proceeding".

Rock notes that Rock'N Meers went into receivership on December 24, 2002 under a security agreement with the Bank of Montreal. He argues that because the definition of "receiver" in Part XI of the *Bankruptcy and Insolvency Act*, RSC 1985, C. B-3 (the *"BIA"*) includes a person appointed under a security agreement, the act of placing Rock'N Meers in receivership was *"a proceeding under an insolvency Act"* and no personal liability for unpaid wages is imposed under subsection 96(1) of the *Act*. Rock says his position is supported by statements found in Part 11 of the Director's Interpretation Guidelines Manual to the *Act*, that "Directors or officers are not liable for unpaid wages if the business is in receivership or insolvency".

Rock also notes that Rock'N Meers went into bankruptcy on or about June 5, 2003. The fact of the bankruptcy is, however, irrelevant to the liability of Rock under Section 96 arising in Determinations issued prior to the bankruptcy (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03).

In reply, the Director notes the *Act* is remedial legislation and refers purposes found in Section 2. The Director argues the obligations that are set out in Part XI of the *BIA* on receivers appointed pursuant to a security agreement do not amount to a "proceeding" under that Act. The Director notes that there is no definition of "proceeding" in the *Act*, the *Interpretation Act*, R.S.B.C. 1996, c. 238, or in the federal *Interpretation Act*, R.S.C. 1985, c. I-21, as amended. That there is no definition of "proceeding" in any of the insolvency Acts, although there is a definition of 'foreign proceeding" in the *BIA* and the *Companies' Creditors Arrangement Act*, which indicates a "proceeding" is a judicial or administrative proceeding. The Director includes the definition of "proceeding" from *The Dictionary of Canadian Law*, D. Dukelow, ed. (Scarborough; Carswell, 1991) and refers to Section 252 of the *BIA* which suggests a "proceeding" under that Act contemplates an application to the Court. Lastly, the Director refers to the definition of "proceeding" in the Rule 1(8) of the Supreme Court Rules.

The Director argues that if the term "proceeding" included receiverships pursuant to a security agreement, paragraph 96(2)(a), which says directors or officers are not personally liable for amounts under Section 63 *"if the corporation is in receivership"*, is unnecessary and redundant.

The Director says Rock cannot rely on the comment in the Interpretation and Guidelines Manual because that document does no more than express Branch policy and does not bind either the Director or the Tribunal. The Director says that in any event, the statement referred to by Rock is wrong.

In response to the submission of the Director, Rock argues for a more expansive definition of the term "proceeding", noting that *Black's Law Dictionary* says a "proceeding" can also mean "a prescribed mode

of action for carrying into effect a legal right" and the definition of "receivership" includes a "legal or equitable ***proceeding*** in which a receiver is appointed . . .". Rock argues it is the fact of insolvency that is important, not the method of appointment. He says the *BIA* provides a comprehensive statutory regime for handling all insolvency receiverships. Specific provisions of Part XI of the *BIA* are examined and the point made that the potential for the regulation of instrument appointed receivers, and receiverships, by the courts under the *BIA* justifies a conclusion that such matters are "before the courts".

He says that defining "proceeding" as proposed in their argument does not render paragraph 96(2)(a) redundant or unnecessary because not every receivership is due to an insolvency. He points to Sections 25 and 200 in the *Company Act*, RSBC, c. 62, as examples of circumstances where a court may appoint a receiver and such appointment is unrelated to insolvency. Rock says he is not asserting the Tribunal is bound by the comments in the Interpretation and Guidelines Manual, only that it supports a view of Section 96 that is being advanced in his argument and should be given some force. In sum, Rock says the term "proceeding" should be given a broad definition that would include an instrument appointed Receiver.

An appropriate starting point for an analysis of the respective positions of the parties is to put aside any perception that the Director's Interpretation and Guideline Manual represents a definitive or compelling source for the meaning to be ascribed to particular provisions of the *Act*.

None of my comments in this area should be perceived as denigrating either the Manual or the efforts of those persons who have contributed to its creation and revision.

The Manual cannot be read without reference to the opening sections, including the section entitled "How to Use the Manual", which includes the statement that:

> The manual is meant as a *guide* for Ministry and Branch staff who are responsible for interpreting the Act on a daily basis. (emphasis added)

The Manual is exactly what it is expressed to be in the above statement. It is a guide, and can be a very useful one, but nearly eight years of experience has clearly indicated the views expressed in the Manual are not always supported on a complete and comprehensive legal analysis of relevant provisions of the *Act*. Moreover, the same experience has also clearly indicated that the Tribunal is not bound by the views expressed in the Manual.

Both Rock and the Director have made reference to the language in paragraph 96(2)(a) as supporting their respective arguments. I do not perceive that paragraph 96(2)(a) advances the interpretive issue raised in this appeal. There is no reference to either a "proceeding" or to "an insolvency Act" in the language of paragraph 96(2)(a).

When interpreting provisions of the *Act*, the Tribunal has accepted and endorsed a purposive approach, which directs that the *Act* must be read as a whole, attempting to give meaning to all the words in their entire context in a way that is consistent with the scheme and object of the Act, and the intention embodied in the words.

As indicated earlier in these reasons, the *Act* is benefits conferring legislation and ought to be interpreted in a broad and generous manner, with any doubt arising from difficulties of language being resolved in favour of the claimant. Consistent with that approach, provisions that adversely impact on benefits

conferred by application of the minimum standards should be narrowly construed. In *Machtinger v. HOJ Industries Ltd.*, supra, the Court noted:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

The right to be paid wages for work performed is one of the basic requirements protected by the *Act*. Accordingly, what is a "proceeding" for the purposes of paragraph 96(2)(b) of the *Act* should be narrowly construed. On that basis, I reject the argument made by Rock that the term "proceeding" should be interpreted expansively to include any "prescribed mode of action for carrying into effect a legal right", including the appointment of a Receiver under a security agreement, in favour of an interpretation that is more consistent with the normally accepted use of the term.

The normally accepted view of what is a "proceeding" accords with that expressed in the Director's argument, which describes a "proceeding" as a matter before a court or other body having jurisdiction. The term "proceeding" is used in seven sections of the *Act* in addition to its use in paragraph 96(2)(b). In six of those[1], the term is being used to describe a matter that is before the Director as a result of a complaint or before the Tribunal by way of appeal or application, or describes a matter which has or may be commenced before a court or other body having jurisdiction. The point being that the use of the term elsewhere in the *Act* contemplates a prescribed process that calls upon the decision maker to decide. That view is also consistent with following excerpt from Black's Law Dictionary 7th Ed., p. 1221, which describes the term in these words:

> "Proceeding" is a word used to express the business done in courts.

As well, because the jurisdiction in this Province over matters arising under the insolvency Acts, as defined, is vested exclusively in the Supreme Court, I am able to take some direction from the meaning ascribed by that Court to what is a "proceeding". The Rules govern every "proceeding" before the Court. Under Rule 1(8) of the Rules of Court, a "proceeding" is defined as meaning:

> . . . an action, suit, cause, matter, appeal or originating application and includes a proceeding under the *Divorce Act* . . .

The appointment of a Receiver under a security agreement does not involve any business being done in courts. Nor is there any "proceeding", as that term is defined in the Supreme Court Rules. The notice and reporting requirements imposed on instrument appointed Receivers in Part XI of the *BIA* do not require or involve the commencement of any court process. They only describe statutory duties imposed on such Receivers, *vis* the Superintendent of Bankruptcy, give such Receivers the right to apply to a court for directions and allow the court, on application, to make orders where such Receivers have not fulfilled their duties. Such applications, if made, could arguably be *"a proceeding under an insolvency Act"*, but that argument does not arise in the circumstances of this case, as no such applications were ever made.

This ground of appeal is dismissed.

[1] The seventh reference, in Section 65, raises the same interpretive issue that is being addressed in this decision.

ORDER

Pursuant to Section 115 of the *Act*, I order the corporate Determinations dated May 8, 2003 and the director/officer Determinations, also dated May 8, 2003, be confirmed in their respective amounts, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal