

An appeal

- by -

Judy Tiefenbach, a director or officer of Queenship Marine Construction 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:** Ian Lawson

**FILE No.:** 2003A/275

**DATE OF DECISION:** December 17, 2003

## DECISION

### SUBMISSIONS

Judy Tiefenbach on behalf of herself

Victor Lee on behalf of the Director of Employment Standards

### OVERVIEW

On June 30, 2003, Queenship Marine Construction Ltd. (“Queenship”) was ordered to pay wages and interest in the amount of \$25,214.73 to eight of its former employees. Judy Tiefenbach (“Tiefenbach”) was listed as an officer of Queenship, and on October 6, 2003, a Determination was issued which imposed upon her personal liability for the amount owing under section 96 of the *Employment Standards Act* (“Act”). The Determination ER#71913 was issued by Victor Lee as a delegate of the Director of Employment Standards. On October 30, 2003, Tiefenbach filed an appeal from this Determination pursuant to section 112 of the Act. The appeal is now decided without an oral hearing, on the basis of written submissions.

### FACTS

Queenship failed to pay the amount owing and the amount remained unpaid as of the date of the Determination. On May 23, 2003, the Director’s delegate conducted a BC On-line search with the Registrar of Companies. The search revealed that Queenship had been incorporated on February 8, 1996 and that Tiefenbach was listed as an “officer” of the company as at May 13, 2003. The register listed three directors/officers: Dan L. Fritz, who was identified as both a director and an officer, and who held the position of President; Donald J. Haslam, who was identified as an officer, and who held the position of Secretary; and Tiefenbach, who held the position of Assistant Secretary.

The Determination under appeal contains the following statement:

The Complainants’ unpaid wages were earned in 2002 and 2003. Judy Tiefenbach was a Director/Officer of Queenship Marine Construction Ltd., and was so appointed at the time the Complainants’ wages were earned and payable.

The wage and interest calculations appended to the Determination indicate the wages became payable respecting one complainant on October 25, 2002, respecting three complainants in December, 2002, and respecting the remainder in the Spring of 2003.

Tiefenbach filed a three-line submission as follows:

I know that an error has been made in the determination as I was not an officer of the corporation at the time the wages were earned, and should not be named in this determination.

Tiefenbach tendered a letter from the President of the company dated October 14, 2003, containing the following statement:

Please be advised of the following:

- 1) Judy Tiefenbach was not an officer of Queenship Marine Construction Ltd. She did however accept the position of Assistant Secretary solely for the purpose of signing such documents as were necessary to export vessels from Canada to other countries. [underscoring in the original]
- 2) Judy Tiefenbach resigned from the position of Assistant Secretary on October 11, 2002.

Tiefenbach then tendered a copy of a written resignation, apparently signed by her and dated October 11, 2002.

In view of this information, the Director's submission is that section 96 of the Act is a rebuttable presumption and Tiefenbach has presented evidence that apparently rebuts the presumption she was an officer at the relevant time.

## ISSUE

Is Tiefenbach personally liable for the amount owing as an officer of Queenship, pursuant to section 96 of the Act?

## ANALYSIS

Section 96(1) of the Act reads as follows:

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 two months' unpaid wages for each employee.

This provision was analyzed by a Reconsideration Panel of this Tribunal in *Re Director of Employment Standards (and Michalkovic)*, [2001] B.C.E.S.T.D. No. 60, BCEST #RD047/01. In that decision, it was held that a broad and remedial interpretation of the Act does not apply to the imposition of personal liability on corporate directors and officers, which is itself an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts. It was held that corporate directors are different from corporate officers, and that a functional test could be undertaken to determine whether an individual was liable as an officer, regardless whether he or she was identified as such in the corporate register. The Tribunal set out the following propositions:

96. 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.
97. 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.

98. 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.
99. The determination of director-officer status should be narrowly construed, at least with respect to section 96.

In that case, Michalkovic was listed in corporate records as an officer, and he was in fact hired as Vice-President of Technology. He argued that he was an officer in name alone, and that he did not in fact perform any duties as a corporate officer. While his argument was accepted by the Adjudicator, the Reconsideration Panel overturned that finding and held Michalkovic was not the “rare and exceptional case” and the evidence he tendered was not sufficient to rebut the presumption that the corporate record was accurate.

In the present appeal, the delegate was not aware of Tiefenbach’s alleged resignation, nor of the possibility her duties did not amount to those of an “officer.” While I have reservations that Tiefenbach could successfully argue she had no duties as an officer in light of the Michalkovic decision, her alleged resignation raises an issue I do not feel able to address adequately in this appeal. There has been no investigation behind the resignation, and no inquiry as to why the corporate records were not corrected upon her resignation being tendered. At a minimum, it seems to me that the wages of one employee may well have been earned prior to Tiefenbach’s resignation, if she did in fact resign as she alleges. Further, vacation pay forms a part of the wages owing, and it may be that a portion of each employee’s vacation pay accrued prior to the resignation.

While corporate officers and directors might have the benefit of a narrow construction of section 96, all employees are entitled to a broad and remedial construction of the Act’s other provisions. One of the purposes of the Act set out in s. 2 is “to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment.” Payment of wages is perhaps the most basic of employment standards. The legislature has deemed it a basic standard that if employees are not paid by a company, the company’s directors are liable for a maximum of two month’s wages. Indeed, section 96 reflects a long-standing legislative principle that if corporate officers and directors steer their company in such a way that employees’ wages are left unpaid, then those officers and directors are liable for a portion of the unpaid wages. The eight employees in this case should not be deprived of the ability to collect some of the wages owing to them, without a thorough inquiry into the circumstances of Tiefenbach’s alleged resignation. It is therefore appropriate to refer this matter back to the Director.

## **ORDER**

Pursuant to s. 115(1)(b) of the Act, I refer the matter of Determination ER#71913 dated October 6, 2003 back to the Director for further investigation and decision.

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**Ian Lawson**  
**Adjudicator**  
**Employment Standards Tribunal**