

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*, R.S.B.C. 1996, c. 113

-by-

Kevin Thomas Okrainetz

(“Okrainetz”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 97/370

**DATE OF HEARING:** July 11th, 1997

**BC EST # D354/97**

**DATE OF DECISION:** August 7th, 1997

**DECISION**

**APPEARANCES**

Kevin Thomas Okrainetz	on his own behalf
Dorothy A. Hamill	on her own behalf
Christopher Richardson	on his own behalf
Donna Tanchak	on her own behalf
Steven T. Wood	on his own behalf
Troy P. Worth	on his own behalf
David Ages	for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Kevin Thomas Okrainetz (“Okrainetz”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on April 18th, 1997 under file number 081433 (the “Determination”). Although Okrainetz has never been listed on the corporate records as either an officer or director of 529533 B.C. Ltd. operating as Cafe X (“Cafe X” or the “employer”), the Director, applying the “functional test”, held that Okrainetz was a director or officer of that firm and thus, by reason of section 96 of the *Act* held him liable for unpaid wages owed to 16 former employees of Cafe X. Cafe X was a small restaurant situated near the “west end” of Vancouver; the restaurant is no longer in business. Cafe X was in operation from about October to December 1996. The wage claims for all 16 employees, inclusive of interest to April 18th, 1997, totals \$9,717.54.

The appeal hearing in this matter was held in Vancouver on July 11th, 1997 at which time I heard evidence and submissions from Okrainetz, on his own behalf, from 5 of the 16 employees named in the Determination, on their own respective behalfs, and from Mr. David Ages, on behalf of the Director.

**ISSUES TO BE DECIDED**

The individual claims of the 16 complainant employees all fall below the 2-month wage threshold set out in section 96(1) and none of the other statutory defences set out in section 96(2) of the *Act* applies in the instant case.

A separate determination was issued against Cafe X and no appeal has been taken against that Determination. Accordingly, the only issue before me under the *Act* is whether or not Okrainetz was a director or officer of Cafe X when the unpaid wage claims arose, *cf. e.g., Steinemann* [1996] B.C.E.S.T.D. 320.75.30-03; *Perfekto Mondo Bistro* [1996] B.C.E.S.T.D. 320.03.20-09.

However, Okrainetz has also raised another matter, namely, whether or not a person may be held liable for unpaid wages that arose when that person was an undischarged bankrupt under the federal *Bankruptcy and Insolvency Act*.

I shall first turn to the “bankruptcy issue”.

### **APPLICATION OF THE FEDERAL BANKRUPTCY AND INSOLVENCY ACT**

Okrainetz filed for personal bankruptcy on August 21st, 1995 in the province of Alberta. The firm of Deloitte & Touche Inc. was appointed as Okrainetz’s trustee. The uncontradicted evidence before me is that Okrainetz was an undischarged bankrupt when the wage claims set out in the Determination arose and that Okrainetz continues to be an undischarged bankrupt. He expects to be discharged from bankruptcy at some future point and is currently making monthly payments to his trustee.

Section 69 of the federal *Bankruptcy and Insolvency Act* provides that once a person has made an assignment into bankruptcy “no creditor has any remedy against the insolvent person...or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy”.

However, the section 69 stay of proceedings does *not* apply to any monetary claims that arise after the date of the assignment into bankruptcy because such claims are not “provable in bankruptcy”. Thus, a creditor whose claim arises after the assignment can, without obtaining the judicial leave that would otherwise be required under the *Bankruptcy and Insolvency Act* (see s. 69.4), commence an action and recover judgment against an undischarged bankrupt [see *e.g., Richardson & Co. v. Storey* (1942) 23 C.B.R. 145; *Greenfield Park Lbr. & Bldrs.’ Suppliers Ltd. v. Zikman* 12 C.B.R. (N.S.) 115].

The wage claims in the present case all arose during the period of Cafe X’s operations from October to December, 1996 and thus can be properly characterized as “after-acquired indebtedness” for purposes of section 69 of the *Bankruptcy and Insolvency Act*. Accordingly, there was, and is, no statutory bar to the issuance of a determination against Okrainetz under the *Act*. The only issue that the Director may wish to consider is whether or not the Determination can be *enforced* as against Okrainetz prior to his final discharge from bankruptcy [see *e.g., Pelletier v. Cloutier* (1958) 38 C.B.R. 132; *Firestone Tire & Rubber Co. v. Douglas* (1940) 21 C.B.R. 343].

**LIABILITY AS A CORPORATE OFFICER OR DIRECTOR UNDER THE “FUNCTIONAL TEST”**

The Director’s position is that, notwithstanding the official corporate records, Okrainetz was a director or officer of Cafe X by reason of the “functional” test set out in the B.C. *Company Act*. The terms “director” and “officer” are not defined in the *Employment Standards Act*, so one must look to the *Company Act* for guidance. In this latter legislation, the term “director” is defined, in section 1(1), as follows:

“‘director’ includes every person, by whatever name he is designated, who performs the functions of a director;”

Although the *Company Act* does not specifically define the term “officer”, the position of “senior officer” is defined so as to include:

“...any other individual who performs functions of the corporation similar to those normally performed by an individual occupying any of [certain named offices such as president and secretary]”.

Thus, a person may be a director or senior officer even though he or she does not formally hold such a title. The key point is not whether an individual is formally named in the corporate records as an officer or director but, rather, whether that person exercises the typical functions, tasks, or duties that a corporate director or officer would, in the usual course of events, exercise--see *e.g. G. Elmitt Construction Ltd. v. Kaplan* (1992) 1 C.L.R. (2d) 219; *Penner and Hauff* [1997] B.C.E.S.T.D. 320.75.30.00-01.

The evidence before me establishes that Okrainetz:

- passed out business cards, and was introduced to staff and customers alike as an “owner” of Cafe X;
- paid some wages, by way of cash payments, directly to Cafe X employees;
- played a major role, together with the sole registered officer/director of Cafe X, Mr. Andrew Cook (Okrainetz and Cook are in a same-sex spousal relationship), in staff hiring, direction and scheduling decisions;
- in general, together with Cook, took primary responsibility for the day-to-day management of the business affairs of Cafe X.

In light of the above, I am entirely satisfied that Okrainetz exercised the functions usually ascribed to a senior corporate officer or directors. It follows, therefore, that I am satisfied that the Director has properly proceeded against Okrainetz under section 96 of the *Act*.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated April 18th, 1997 and filed under number 081433 be confirmed as issued in the amount of \$9,717.54 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**