

An appeal

- by -

Peter Tsui, a Director or Officer of 589991 British Columbia Ltd. operating as
California Grill and Sports Bar

- 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: Ib S. Petersen

FILE No.: 2002/251

DATE OF DECISION: August 26, 2002

DECISION

OVERVIEW

This is an appeal by Mr. Tsui, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination of the Director’s Delegate issued on April 3, 2002 in the amount of \$1,676.83 (the “Determination”). In that Determination, the Delegate found that Mr. Tsui was a director or officer based on the records available from the Registrar of Companies and that Mr. Tsui participated in the activities of the company at the time wages were earned. A Determination was also issued against the numbered company (the “Employer”) on April 3, 2002 (the “Corporate Determination”). The Corporate Determination was not appealed.

ISSUE

Mr. Tsui takes issue with the Delegate’s conclusions. He says that he sold the shares in the business as of August 4, 2001.

FACTS AND ANALYSIS

The Appellant has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that Mr. Tsui has met that burden and that the appeal, therefore, must be upheld.

The Tribunal’s jurisprudence with respect to director or officer status has recently been summarized in *Re Director of Employment Standards*, (BCEST #D047/01, reconsideration of BCEST #D056/00 (the “Michalkovich decision”):

In our view, in summary, the case law reviewed here and in *Wilnofsky* stands for the following propositions:

1. 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.
2. 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.
3. 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.*
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96. (Emphasis added)

As of the time of the Determination, the Employer was no longer in operation. A company search, dated July 3, 2002, indicates that Mr. Tsui was listed an officer and a director. However, an agreement, that forms part of the appeal file, states that all of the shares of the company were sold to a Mr. Scott Neilson on August 4, 2001. The reasons given for the sale was that Mr. Tsui suffered a stroke. The agreement also provided that the vendor, Mr. Tsui resigned as a director and officer and that the purchaser be appointed. There is nothing to suggest that Mr. Tsui's resignation was communicated to the Registrar of Companies.

The Delegate recommends that the Determination be cancelled. She accepts the evidence that the business was sold and that Mr. Tsui did not participate in the business after that time. In any event, she also states, in the response to the appeal, that the wages in question were, in fact, earned after the sale. The employee, in favour of whom the Determination was issued, did not file any submission.

In the circumstances, I am prepared to accept that the corporate records were inaccurate. In short, it is my view that the Determination should be set aside.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated April 3, 2002 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal