

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 -

Kathleen MacKinnon, and
SDI Storage Dimension Inc., and
2904462 Canada Ltd. dba Canadian Memory Products

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: John M. Orr

FILE No.: 2000/461, 2000/462, 2000/463, and
2000/464

DATE OF DECISION: December 7, 2000

DECISION

OVERVIEW

This decision relates to appeals filed by Kathleen MacKinnon (“MacKinnon”) pursuant to section 112 of the *Employment Standards Act* (“the Act”) from four (4) determinations dated June 09, 2000 (#ER 085-774) by the Director of Employment Standards (“the Director”).

Two of the determinations issued by the Director are against corporations presently in bankruptcy. The other two determinations are against Ms MacKinnon in her capacity as a director of those corporations.

One of the corporate determinations is against SDI Storage Dimensions Inc. (“SDI”) and the other is against 2904462 Canada Ltd. doing business as Canadian Memory Products (“CMP”). The Director found that SDI owed wages to an employee in the amount of \$2,821.81 and that CMP owed wages of \$12,887.22 to a number of employees.

The Director found that Kathleen MacKinnon was a director of both of these companies at the time that the wages were earned and therefore issued determinations in the same amounts against Kathleen MacKinnon personally in accordance with the provisions of section 96 of the *Act*.

Ms MacKinnon has appealed all four determinations.

ANALYSIS

In her appeal Ms MacKinnon submits, and provides documents to show, that both CMP and SDI were placed in receivership on the 13th day of August 1997. The companies were declared bankrupt on September 10th 1997. There is no indication in the appeal or the documentation that would indicate that the status of the companies has changed since that time. The appeals are signed by Ms MacKinnon and are dated June 19th, 2000.

As pointed out by the Director, Ms MacKinnon has no standing to appeal the corporate determinations unless such appeals were assigned to her by the trustee in bankruptcy. There is no indication in the appeal documentation that she has been given such authority and therefore these two appeals must be dismissed.

With respect to the determinations against Ms MacKinnon as a director or officer of the companies section 96 of the *Act* provides as follows:

Corporate officers 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 a corporation were earned or should have been paid is personally liable for up to two months unpaid wages for each employee.*

- (2) *Despite section (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 under a collective agreement in respect of an individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,*
 - (b) *vacation pay that becomes payable after the director or officer ceases to hold office,*

Ms MacKinnon points out that when the receiver took over control of the corporations there was money available to honour the payroll commitments. The receiver took over in midmonth and Ms MacKinnon had no opportunity to access the corporate funds to pay the wages of the employees. There was no dereliction of duty on her part. Once the receiver took over, payment to the employees was beyond her control. Ms MacKinnon even alleges that the receiver assured her that the wages would be paid.

Ms MacKinnon says, “The remedy I am seeking from the tribunal is to insist that the Bank of Montreal or the receivers of Coopers & Lybrand take their share of the responsibility”. She suggests that the receivers paid themselves \$68,000 but left the employees unpaid. She believes that it is unfair to require her to personally pay the employees wages when there was adequate money available within the corporations to meet this obligation.

I have some sympathy for Ms MacKinnon and it may be that she has a cause of action against the receivers or the trustee. She may also have a claim back against the companies under the *Law and Equity Act*. However, those matters are outside of the jurisdiction of this Tribunal.

Ms MacKinnon does not dispute that she was a director or officer of the corporations at the time that the wages in question were earned. She does not dispute the quantum of the wages claimed or that they are justly owing to the employees. The Director has only calculated those wages owing to the employees up to the date that the receiver took over management of the companies. There is no doubt that section 96(1) applies in this case to make Ms MacKinnon personally liable for those unpaid wages.

While subsection (2) of section 96 provides that a director or officer is not personally liable for some specified payments if the corporation is in receivership those exceptions have limited application to the amounts claimed in the determinations. The Director concedes that some vacation pay should have been excluded under subsection (2)(b) but wages generally are not exempted by subsection (2). A director is exempted from liability for amounts owing under section 63 – compensation for length service – or other sums of money related to termination of employment if the corporation is in receivership but there is no such exemption for wages earned and owing despite the receivership.

I must conclude that, despite the receivership and the subsequent bankruptcy, Ms MacKinnon remains personally liable for payment of the employee wages that were earned prior to the appointment of the receiver.

The Director has submitted that the determinations should be varied to take into consideration the exemption for vacation pay and points out that the liability of Ms MacKinnon as a director of SDI should be varied from \$2,821.81 to \$1,636.36.

The Director has submitted for the same reason that the liability of Ms MacKinnon as a director of CMP should be varied from \$12,887.22 to \$9,221.99.

I note in passing that the Director does not attach an identification number to the determinations other than an ER# which is not particularly helpful when there are multiple determinations involving the same or related parties. In this case I note that CMP and SDI are given the same ER number, as are the determinations against Ms MacKinnon personally. All four determinations bear the same date. It would be very helpful if each determination bore a unique identifier.

ORDER:

Pursuant to section 115 of the *Act* I order that the corporate determinations (identified by the Tribunal as files 2000/461 and 2000/463) are confirmed.

I further order that the determination against Ms MacKinnon in her capacity as a director of SDI Storage Dimensions Inc. (Tribunal File 2000/462) is varied to show that she is liable to pay the amount of \$1,636.36.

I further order that the determination against Ms MacKinnon in her capacity as a director of 2904462 Canada Ltd. doing business as Canadian Memory Products (Tribunal File 2000/464) is varied to show that she is liable to pay the amount of \$9,221.99.

John M. Orr

**John M. Orr
Adjudicator
Employment Standards Tribunal**

JMO/bls