

**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 -

Donald Crombie  
("Crombie")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No:** 1999/640

**DATE OF DECISION:** December 30, 1999

## DECISION

### OVERVIEW

This is an appeal brought by Donald Crombie (“Crombie”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 30th, 1999 under file number ER 089-307 (the “Determination”).

On April 26th, 1999 a Director’s delegate issued a determination in the amount of \$17,684.26 against OptiVest Associates Inc., B & N Vision Associates and 1207162 Ontario Inc. on account of unpaid wages owed to 6 former employees. The three named firms were found to be “associated corporations” as defined by section 95 of the *Act*. I understand that on June 7th, 1999 a second determination, in the amount of \$217.23, was issued against all three firms on account of unpaid wages owed to another former employee. I shall refer to these two determinations as the “Corporate Determinations”. Neither Corporate Determination was appealed and the time for filing an appeal has now expired in each case.

I understand that the corporations named in the Corporate Determinations have ceased active operations and that, to date, no monies have been paid to the 7 employees.

The Determination now before me was issued against Crombie pursuant to section 96(1) of the *Act* which provides as follows:

#### **Corporate officer's 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 the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.

The Determination was issued against Crombie by reason of his status as an officer and director of 1207162 Ontario Inc. when the 7 former employees’ wages were earned or should have been paid.

Crombie’s appeal is predicated on the assertion that the delegate failed to meet her obligation under section 77 of the *Act* (which states that a person under investigation must be given a reasonable opportunity to respond to allegations made against them) prior to issuing the Corporate Determinations and, in particular, Crombie says that the delegate ought not to have found that 1207162 Ontario Inc. was an “associated corporation” with OptiVest Associates Inc. and B & N Vision Associates without first giving Crombie an opportunity to make submissions regarding that matter. Crombie says that the section 95 declaration, as it relates to 1207162 Ontario Inc., “was improperly made on the basis of insufficient evidence and without the benefit of submissions from Mr. Crombie” [see Crombie’s solicitor’s October 25th, 1999 letter to the Tribunal appended to the notice of appeal].

## ISSUE TO BE DECIDED

Crombie seeks a suspension of the Determination, pursuant to section 113 of the *Act*, pending a final decision with respect to his appeal. These Reasons for Decision address only the suspension request.

## ANALYSIS

The Director opposes the suspension request on the basis that the three corporations have no assets and thus it appears that any monies collected will be secured only from Crombie and his fellow director, Jeffrey Kurtz (against whom a Determination was also issued--see EST Decision No. 542/99, issued concurrently with this decision). Alternatively, the Director requests that the Determination be suspended only if the full amount of the Determination is deposited with the Director.

It should be noted that there does not appear to be any dispute regarding the 7 employees' entitlement to unpaid wages. The employees worked in optical departments that were located in national retail department stores but were owned and operated by B & N Vision Associates (Zellers stores) and OptiVest Associates Inc. (The Bay stores). These latter two companies have ceased active operations; Revenue Canada apparently froze the companies' bank accounts which resulted in issued paycheques being dishonoured. In addition, subsequent payroll obligations were not met and thus the employees, in late January 1999, no longer continued to report for work.

According to an Ontario government report, 1207162 Ontario Inc. was incorporated in Ontario on October 31, 1996; its registered office and mailing address is the same address as that of B & N Vision Associates. It may be, although this is far from clear, that assets used by B & N Vision Associates in its operations were owned by 1207162 Ontario Inc. Jeffrey Kurtz is a principal of both companies.

Although an (unsuccessful) effort was made to contact Mr. Kurtz or some other official from OptiVest Associates Inc. or B & N Vision Associates prior to the issuance of the Corporate Determinations, it appears that no such effort was made to contact an official of 1207162 Ontario Inc. prior to the issuance of the Corporate Determinations. However, copies of the Corporate Determinations (which included a notice regarding the appeal period) were forwarded, by certified mail, to 1207162 Ontario Inc.'s registered office in Ontario (along with a brochure explaining the appeal process). As previously noted, 1207162 Ontario Inc. did not appeal either Corporate Determination. Thus, in my view, Crombie's assertion regarding lack of notice loses some of its force in light of the foregoing.

Notwithstanding the foregoing, it appears that the question of whether or not 1207162 Ontario Inc. was correctly found to be an "associated corporation" with the other two firms is not obviously frivolous given that the only rationale set out in the Corporate Determinations for making a section 95 declaration as against the numbered company was the shared office and the possibility that the numbered company owned certain assets used by the other two firms in their business operations. As counsel for Mr. Crombie rightly notes, the pivotal question of common direction and control

(as between the numbered company and the other two firms) may not have been adequately addressed in the Corporate Determinations.

Counsel for Mr. Crombie submits that the numbered company (and it should be remembered that the Director found that Crombie was a director of only this company) was merely a “passive investment vehicle” and was used solely for the purposes of making an investment in an optical business operated by OptiVest Associates Inc. Whether that is or is not the case remains to be decided; at this stage, I would only note that the matter is arguable and thus, one cannot dismiss this appeal out of hand as frivolous.

The amount of the Determination is not inconsequential; the Corporate Determinations, as well as the instant Determination, appear to have been issued by the delegate without first having sought Crombie’s input. It may be that the numbered company was not properly the subject of a section 95 declaration. On the other hand, the corporate entities appear to be entirely unable to make any payment to the employees and thus any monies that may ultimately be paid to the employees will likely be paid by one or both of Messrs. Crombie and Kurtz. Crombie, if indeed he has a valid defence to the present claim against him, could have entirely avoided these proceedings by filing a timely appeal of the Corporate Determination, at least as it related to the numbered company. The Corporate Determination was properly served on the numbered company and yet it took no steps whatever to appeal--Crombie, the numbered company’s president and director, is in large measure responsible for this failing. Finally, Crombie does not reside in the province of British Columbia rendering potential execution proceedings against him somewhat more problematic.

Given that there are two individuals who might ultimately be liable for making good the employees’ unpaid wages, and taking into account the foregoing circumstances, I am of the view that an “adequate” amount of security “in the circumstances of the appeal” would be one-half the sum due under the Determination.

## **ORDER**

Pursuant to subsection 113(2)(b) of the *Act*, I order that the Determination be suspended pending a final decision on the merits of this appeal, or further order of the Tribunal, provided that Crombie deposits with the Director, by way of a certified cheque or money order made payable to the “Director in trust”, the sum of **\$8,868.08** (eight thousand eight hundred and sixty-eight dollars and eight cents).

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