

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 -

Gary Stinka,
a Director/Officer of 3118428 Canada Inc.
operating as Moxie's Restaurant
("Gary Stinka")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 1998/684

DATE OF DECISION: December 23, 1998

DECISION

OVERVIEW

This is an appeal by Gary Stinka a director/officer of 3118428 Canada Inc. operating as Moxie's Restaurant ("Gary Stinka"), under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination which was issued by a delegate of the Director of Employment Standards ("the Director") on October 7, 1998. The Determination requires Gary Stinka to pay \$870.90 as a result of a finding that he is personally liable for a portion of the unpaid wages owing to Toresa Thibault. That liability arises from Section 96 of the *Act*.

Gary Stinka was registered with the Registrar of Companies as one of the four principals of 3118428 Canada Inc. including Kelly Robinson (President) and Brenda Fay Cappis (Secretary/Treasurer). His appeal is based on his submission that he "...never had the opportunity to act as a director" as the President and Secretary/Treasurer refused to disclose relevant business information to him.

This appeal proceeded by way of written submissions which were received from Gary Stinka, Toresa Thibault and the Director.

ISSUE TO BE DECIDED

Did the Director err in determining that Gary Stinka is liable, under Section 96 of the *Act*, to pay wages to Toresa Thibault in the amount of \$870.90?

FACTS

Toresa Thibault was employed as a part-time busperson at Moxie's Restaurant in White Rock, BC from July 24, 1994 to November 21, 1997.

Upon completing an investigation of the complaint made by Ms. Thibault, the Director determined that her former employer owed her \$1003.47 in unpaid wages plus interest. The Director issued a Determination dated August 12, 1998 requiring 3118428 Canada Inc. to pay Ms. Thibault's wages plus accrued interest. There has been no appeal of that Determination.

On October 7, 1998 the Director issued the Determination which is the subject of this appeal. In it, Mr. Stinka is found liable to pay a portion of the wages owing to Ms. Thibault by virtue of Section 96 of the *Act* (Corporate officer's liability for unpaid wages), as follows:

Findings and Conclusions

A search with the Registrar of Companies in Victoria shows that Gary Stinka was a Director/Officer of 3118428 Canada Inc. operating as Moxie's Restaurant at the time wages were owed.

Under Section 96 of the *Employment Standards Act* Gary Stinka is personally liable for up to two month's wages for Toresa Thibault.

The total amount of monies owing to Toresa Thibault is \$879.90 calculated as:

Two months wages	\$833.00
Vacation pay (4%)	\$33.32
Interest from September 8, 1998 to October 7, 1998	<u>\$4.56</u>
Total Amount owing	\$870.09

Mr. Stinka made only a brief appeal submission and did not respond to the submissions made by Ms. Thibault and the Director. His unsworn, written submission states:

This Determination is wrong because I never had the opportunity to act as a director. The President and Sec./Tres. handled all the company business with no disclosure to any of the directors in respect to the company business at all, financial, sales, profits, expenditures nothing at all. After numerous request to Kelly for this information but no information was given out.

The closure of the business came as a surprise to me, because in my last conversation with Kelly, his reply was that everything was okay, lets buy more stores.

Liability should only be on the people who ran the operation. I resigned as a director early in 1998.

(reproduced as written)

ANALYSIS

I begin by noting that Mr. Stinka does not challenge the validity or the correctness of the Determination which was issued on August 12, 1998 against 3118428 Canada Inc. operating as Moxie's Restaurant. He appeals only the Determination issued on October 7, 1998 in which he is found to be personally liable for a portion of the wages owed to Ms. Thibault by virtue of Section 96 of the *Act*.

Section 96(1) creates a personal liability for corporate officers and directors, as follows:

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.

As set out above, Ms. Thibault's employment at Moxie's Restaurant terminated on November 21, 1997 and according to his appeal submission, Mr. Stinka resigned as a director of 3118428 Canada Inc. "...early in 1998".

The Director relied on two facts to determine Mr. Stinka's personal liability under the *Act*:

1. The records obtained from the Registrar of Companies show Mr. Stinka as a director of 3118428 Canada Inc.; and
2. Mr. Stinka acknowledges that he did not resign as a director until "early 1998"

The provisions of Section 96(1) appear to support the Director's finding that Mr. Stinka is personally liable for up to 2 months wages given that he appears in the Registrar of Companies' records as a director at the time wages were earned by or should have been paid to Ms. Thibault.

However, Mr. Stinka submits that he should not be found liable under Section 96 of the *Act* because "... the President and Secretary/Treasurer handled all the company business..."

I find that I cannot agree with Mr. Stinka's submission for several reasons. First, as the appellant, Mr. Stinka bears the onus of establishing that the Director erred in making the Determination. Second, Mr. Stinka acknowledges that he was a director of 3118428 Canada Inc. until he resigned in early 1998. Third, there is no evidence (documentary or otherwise) to support his unsworn written statement. Finally, his written submission contains a significant contradiction in that while he states that the President and Secretary/Treasurer failed to disclose business information to him, he also states that his final conversation with the President (Kelly Robinson) included a discussion about the purchase of more stores.

It seems to me that the fundamental purpose for the kind of liability which is created by Section 96 is to give the Director a means by which to enforce the minimum provisions of the *Act* in those circumstances where a corporation fails to meet its statutory obligations. This is just such a situation.

For all of these reasons, I find that this appeal must fail.

ORDER

I order, under Section 116 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal