Employment Standards TRIBUNAL

An appeal

- by -

ICON Laser Eye Centers Inc. -and- Lasik Vision Canada Inc. -and- Lasik Vision Corporation
- associated as per Section 95 of the Employment Standards Act ("ICON")
(appeal by ICON Laser Eye Centers Inc.)

- and by -
Ernest Remo ("Remo")
- and -
Ghassan Barazi ("Barazi")
- and -
Kenneth Wightman ("Wightman")
- and -
Brian Hamm ("Hamm")
- and -
Robert Roy ("Roy")
- and -
Simone Mencaglia ("Mencaglia")
- and -
Don Johnson ("Johnson")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/430 – 2001/437

DATE OF DECISION: December 6, 2001

DECISION

OVERVIEW

I have before me eight appeals, all filed pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), of eight separate determinations that were issued by a delegate of the Director of Employment Standards (the "Director"). The determinations were issued following the bankruptcy of two firms, Lasik Vision Corporation and Lasik Vision Canada Inc., both of which entered into bankruptcy on April 4th, 2001. As a result of the two bankruptcies, some 81 former employees filed claims for unpaid wages including both individual and group termination pay. Many of the employees were terminated on or before March 30th, 2001 and did not receive any pay for their final pay period (commencing March 15th, 2000) nor their accrued vacation pay, compensation for length of service or group termination pay.

The Director's delegate issued a determination against ICON Laser Eye Centers, Inc. ("ICON"), a firm that is not in bankruptcy, on the basis that ICON was "associated" (see section 95 of the *Act*) with the two bankrupt firms and, accordingly, jointly and severally liable for any unpaid wages owed by one or both of the bankrupt firms to their employees (I shall refer to this latter determination as the "section 95 determination"). Although ICON is not in bankruptcy, it is my understanding that an interim receiver was appointed for ICON on June 8th, 2001; the receiver was appointed under the provisions of the *Bankruptcy and Insolvency Act.*

The other seven determinations were issued pursuant to section 96(1) of the *Act* against former directors or officers of ICON. The section 96 determinations were issued on the basis that the individuals in question were directors and/or officers of ICON and, by reason of that latter firm's "association" with the two bankrupt firms (the actual employers of record), were personally liable for up to 2 months' wages for each former employee of Lasik Vision Corporation and Lasik Vision Canada Inc. I shall refer to these latter seven determinations collectively as the "section 96 determinations".

Sections 95 and 96 of the *Act* provide as follows:

> **Associated corporations**
>
> 95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
>
> > (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

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.

(2) Despite subsection (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 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, or

(c) money that remains in an employee's time bank after the director or officer ceases to hold office.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

The 81 employees' unpaid wage claims include unpaid regular wages, vacation pay, compensation for length of service and group termination pay. The amount payable under each of the eight determinations is set out below:

Appellant	*E.S.T. File No.*	*Date Determination Issued*	*Amount of Determination*
ICON Laser Eye Centers, Inc. ("ICON")	2001/430	May 9th, 2001	$752, 915.02
Ernest Remo ("Remo")	2001/431	May 15th, 2001	$495, 911.68
Ghassan Barazi ("Barazi")	2001/432	May 15th, 2001	$495, 911.68
Kenneth Wightman ("Wightman")	2001/433	May 15th, 2001	$495, 911.68
Brian Hamm ("Hamm")	2001/434	May 15th, 2001	$495, 911.68
Robert Roy ("Roy")	2001/435	May 15th, 2001	$495, 911.68
Simone Mencaglia ("Mencaglia")	2001/436	May 15th, 2001	$495, 911.68
Don Johnson ("Johnson")	2001/437	May 15th, 2001	$495, 911.68

The respective appeals of the eight determinations were filed on June 4th, 2001 by legal counsel representing all eight appellants. The grounds of appeal are set out in a letter from legal counsel to the Tribunal dated June 4th, 2001 which was appended to each appellant's appeal form.

Following a prehearing conference held on July 25th, 2001--attended by counsel for the appellants, counsel for the Director, the Director's delegate and six of the respondent employees--certain agreements and understandings were reached with respect to the conduct of these appeals. In particular, it was agreed that the issues raised by the appellants with respect to sections 95 and 96 of the *Act* would be adjudicated on the basis of written submissions.

It should be noted that the appellants have raised a number of other issues in their respective appeals, none of which is being addressed in these reasons for decision.

The relevant portion of my order issued following the prehearing conference is reproduced below:

> [Counsel for the appellants] will file written submissions in the director/officer appeals with respect to the proper application of sections 95 and 96 of the *Act.* [Counsel for the appellant's] submissions shall be delivered on or before September 14th, 2001; [Counsel for the Director] and the respondent employees shall have until October 12th, 2001 to file their submissions by way of response and [Counsel for the appellants] shall file any reply submission by no later than October 17th, 2001. Upon receipt of the parties' submissions, I will issue written reasons for decision regarding the application of sections 95 and 96 in this matter.

The Tribunal has now received written submissions from counsel for the appellants and counsel for the Director with respect to the appellants' arguments regarding sections 95 and 96 of the *Act.* None of the respondent employees filed a submission with the Tribunal. Accordingly, I shall now address the appellant's arguments with respect to sections 95 and 96 of the *Act.*

SECTION 95 AND THE BANKRUPTCY AND INSOLVENCY ACT

As I understand the situation, none of the employees was formally employed by ICON. Thus, ICON's liability for the employees' unpaid wages depends on whether or not ICON was "associated" with one or both of Lasik Vision Corporation and Lasik Vision Canada Inc.

I also understand that none of the other individual appellants was a director or officer of either Lasik Vision Corporation or Lasik Vision Canada Inc. when the employees' unpaid wage claims crystallized. The Director's delegate, by way of the determinations issued against the individual appellants, asserted that the latter were directors and/or officers of ICON and, by virtue of that status, personally

liable for unpaid wages owed by one or both of the two bankrupt firms with which ICON was "associated".

By way of section 95 of the *Act* the Director can treat several separate entities (for example, in this case, three corporations) as one person for purposes of the *Act* in which case each of the constituent entities is jointly and separately (severally) liable for any unpaid wages that may be owed to an employee of any one of the constituent firms.

Counsel for ICON submits, *inter alia,* that the section 95 determination must be set aside by reason of the provisions of the federal *Bankruptcy and Insolvency Act* ("*BIA*") and, in particular, section 69.3(1) which states:

> Subject to subsection (2) and sections 69.4 and 69.5 on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,until the trustee has been discharged.

As for claims "provable in bankruptcy", section 121(1) of the *BIA* states:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge, by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Lasik Vision Corporation and Lasik Vision Canada Inc. entered into bankruptcy on April 4th, 2001; the section 95 determination was issued on May 9th, 2001. Unquestionably, the unpaid wage claims filed by the former employees of the two bankrupt firms constitute "claims provable in bankruptcy". Further, if the section 95 determination ordered one or both of the two bankrupt firms to pay monies on account of unpaid wages, that order would arguably run afoul of section 69.3(1) of the *BIA* inasmuch as such an order to pay would constitute an "action, execution or other proceeding" against the bankrupt firms.

However, the only "order to pay" contained in the section 95 determination is an order directed to ICON; neither Lasik Vision Corporation nor Lasik Vision Canada Inc. is the subject of any payment order. On the other hand, the effect of the section 95 determination (leaving aside, for the moment, the paramount provisions of the *BIA*) is to make ICON and the two bankrupt firms *all* individually liable for the employees' unpaid wages. Indeed, the determination expressly indicates (at page 6) that to be so:

> ...I have determined that as per Section 95 of the Employment Standards Act, ICON Laser Eye Centers, Inc. -and- Lasik Vision Corporation -and- Lasik Vision Canada Inc. are associated and jointly and separately liable for payment of the

> amount stated in this determination, and the *Act applies to the recovery of that amount from any or all of them.* (my *italics*)

Counsel for ICON submits, with respect to the above-quoted portion of the section 95 determination, the following (at page 6 of his submission):

> The determination does not simply state that the corporations are associated. It specifically states that ICON and [the two bankrupt firms] are jointly and separately liable for [the two bankrupts firms'] debts. This is a necessary step for collection of the debt under the scheme of the Act, but the Determination as stated provides for recovery against [the two bankrupt firms] which the BIA prohibits. (underlining in original)
>
> Section 95 states that the Director may determine that two or more entities are one person for the purposes of the Act. That section does not give the Director the discretion to select the provisions of the Act to which that Determination will apply. On May 9, 2001 the Director determined that [the bankrupt firms] and [ICON] were one person for that Act. Under the Determination, the conclusion that ICON owes [the bankrupt firms'] former employees for unpaid wages has the same force and effect as determining that [the bankrupt firms] owes its former employees unpaid wages. This proceeding is precluded by s. 69 of the BIA and, accordingly both the Determination against ICON and the Determinations against the Officers and Directors which flow from it, are made in contravention of the BIA and cannot stand.

I am not satisfied that the section 95 determination is a nullity. It must be remembered that section 95 creates a joint and several liability only with respect liabilities arising under the *Act.* ICON is not in bankruptcy and, thus, section 69.3 of the *BIA* is not relevant insofar as ICON is concerned. In my view, the Director's inability to pursue the bankrupt firms for the employees' unpaid wages via the enforcement provisions of the *Act* does not result from the Director having "selected" what entity she wishes to pursue. Rather, the matter of enforcement as against the two bankrupt firms was taken out of the Director's hands by operation of law, namely, section 69.3 of the *BIA.*

Nevertheless, and in light of the provisions of section 69.3 of the *BIA*, the section 95 determination is incorrect at least to the extent that it purports to affirm the Director's right to utilize the wage recovery provisions of the *Act* to collect the employees' unpaid wages by, for example, seizing the assets of one or both of Lasik Vision Corporation and Lasik Vision Canada Inc. (see Determination at page 6, quoted above). It should be recalled, however, that ICON is the *only* party directed, by way of the section 95 determination, to pay the employees' unpaid wages.

The provisions of the *BIA* do not immediately operate so as to extinguish the liability of the two bankrupt firms for the employees' unpaid wages. Rather, under the *BIA* the employees--and all

other creditors--will have their claims addressed in accordance with the scheme of distribution provided for in the *BIA*. Ultimately, some portion of the employees' wage claims may indeed be extinguished because, in a bankruptcy, the estate will never be sufficient to satisfy all creditors' claims (that, of course, follows from the very nature of bankruptcy proceedings where, by definition, liabilities exceed assets).

In my view, it does not follow that simply because the Director cannot collect the employees' unpaid wages from the bankrupt firms (because of the provisions of the *BIA*), that circumstance somehow immunizes ICON from any liability. In very many cases, a section 95 determination is issued precisely because the "employer of record" is effectively "judgment-proof". Section 69.3(1) limits the commencement of proceedings only as against the *bankrupt* and not against any other person or entity to whom the bankrupt might, in a legal sense, be "related" (say, as in this case, by virtue of a section 95 declaration).

ICON and the two bankrupt firms were declared, pursuant to section 95 of the *Act*, to be *one person*, but only for purposes of the *Act*, and as a result of that declaration ICON was held liable for the employees' unpaid wage claims. It must be remembered, however, that ICON's liability to the former employees is statutory rather than contractual. ICON's liability does not flow from its status as an "employer" of the employees in question (among other things, ICON apparently did not exercise any "control or direction" over the complainants nor did it hire them in the first instance--see section 1 definition of "employer"). Further, if ICON was, in fact, an "employer" of the complainants, then a section 95 declaration is superfluous since ICON's liability would not depend on whether it was associated with one or both of the bankrupt firms (*i.e.,* the "actual" employers).

Absent the bankruptcy proceedings, all three firms would be jointly and severally liable for the employees' unpaid wages by reason of the section 95 declaration. In the ordinary course of events, a section 95 determination would order all three firms to pay the unpaid wage claims. However, in this case, two of the firms cannot be ordered to make payment because of the provisions of the *BIA* and, indeed, the Director has not issued a monetary order against either of the two bankrupt firms. However, before ICON can be ordered to pay it must first be determined that the four statutory criteria set out in section 95 have been satisfied (see *Invicta Security Systems Corp.*, B.C.E.S.T. Decision No. D249/96). Accordingly, the Director's delegate was obliged to consider the relationship among the three firms involved in this case.

As noted above, I am of the view that the delegate erred in stating, at page 6 of the Determination, that the two bankrupt firms were "liable for payment of the amount stated in this determination" or that the wage recovery provisions of the *Act* could be utilized to recover any monies from the bankrupt firms. Any recovery from the two bankrupt firms must go forward under the provisions of the *BIA*. However, in my opinion, the fact that one or more of a number of "associated firms" is bankrupt does not preclude the Director from issuing a section 95 declaration so long as at least one of the associated firms is not bankrupt and, further, provided that any order to pay is only directed to the firm(s) not in bankruptcy.

In sum, I am not satisfied that the section 95 determination is void as against ICON by reason of the *BIA*.

ICON submits that the section 95 determination ought to be cancelled or varied on other grounds, however, I am not addressing those arguments at this time. I shall now turn to the next issue before me, namely, the proper interpretation and application of section 96 of the *Act*.

SECTION 96 AND "ASSOCIATED CORPORATIONS"

It bears repeating that the section 96 determinations were issued on the basis that the individuals in question were directors and/or officers of ICON and, by reason of that latter firm's "association" with the two bankrupt firms (the actual employers of record), were personally liable for up to 2 months' wages for each former employee of the two bankrupt firms. For the purposes of the following analysis, I shall assume that the section 95 declaration with respect to ICON was correct, although the validity of the declaration has not been conceded by ICON and may yet have to be adjudicated.

Counsel for the individual directors/officers submits that section 96 should be narrowly construed; counsel for the Director, in her submission (at page 4) stated:

> The appellant argues for a "narrow" interpretation of sections 95 and 96 of the [*Act*], saying that as the sections depart from the common law, and more specifically, from corporate law, they ought to be narrowly interpreted. The Director submits that this is not a proper or recognized basis for interpretation of remedial statutes such as the [*Act*].

While I agree that the *Act*, in general, ought to be interpreted in a generous manner, the position espoused by counsel for the Director with respect to sections 95 and 96 is inconsistent with both judicial and Tribunal jurisprudence. In *Archibald* (B.C.E.S.T. Decision No. D090/00) I noted:

> Both our Court of Appeal and the Supreme Court of Canada have repeatedly stressed that employment standards legislation, being "benefits-conferring" legislation, should be interpreted in a "broad and generous manner" [*cf. e.g., Helping Hands Agency Ltd. v. B.C.* (1995), 131 D.L.R. (4th) 336 (BCCA); *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27]. On the other hand, our Court of Appeal and the Supreme Court of Canada have both recognized that the imposition of a personal unpaid wage liability on corporate officers and directors is an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts. Accordingly, while the *Act* as a whole is to be interpreted in a broad and generous fashion, the provisions imposing a personal liability on corporate directors and officers should be narrowly construed [see

> *e.g., Barrette v. Crabtree Estate, supra.*; *Re Westar Mining, supra.*; *Jonah v. Quinte Transport (1986) Ltd.* (1994), 50 A.C.W.S. (3d) 435 (Ont. S.C.)].

This interpretative approach has recently been affirmed by the Tribunal in *Director of Employment Standards and Michalkovic* (Reconsideration Decision No. RD047/01).

The principal submissions made by counsel for individual appellants are set out below (appellants' submission at page 3):

> In the event the corporations are treated as one person for the purposes of the *Act*, then the *Act* makes them jointly and separately liable for the payment of the amount stated in a Determination and the *Act* applies to the recovery of the amount from any or all of them. The reference to "they" and "them" in Subsection (b) of Section 95 clearly refers solely to the corporations that are being associated. Nowhere in Section 95 is there any indication that this liability extends to directors and officers of an associated company. If the legislature had intended to extend this liability beyond corporations (or other employer entities) to directors and officers it would have stated so in Section 95 or 96. There is no such language in either section to support such an extension of liability.
>
> Given that this type of legislation must be narrowly construed in terms of imposing liability on directors and officers, there is a requirement for clear and unambiguous language prior to such liability being imposed. There is no such clear and unambiguous language. On the contrary, Section 95 only purports to create liability for other associated corporations (or other employer entities).
>
> Similarly, Section 96 makes no reference to a director or officer being held liable for the wage debts of an associated company...
>
> ...there is nothing in Section 95 or 96 which says "officers and directors of an associated corporation are liable". Section 96 merely imposes liability on a person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned. Clearly the strict interpretation of Section 96 is that it only applies to the directors and officers of the corporation which failed to pay the wages. If the legislature had intended that directors and officers of an associated company could be held liable they would have clearly stated so in Section 96.
>
> (underlining in original)

Section 95 does not explicitly make directors or officers of the associated firms personally liable for employees' unpaid wages. However, subsection 95(b) states that the associated firms are jointly and separately liable for the amount of the determination "and this Act applies to the recovery of that amount from any or all of them". Section 96, which imposes personal liability

on corporate directors and officers, appears in Part 11 of the *Act*, namely, the “enforcement” provisions of the *Act.* Section 96 is an essential component of the wage recovery scheme created by the *Act.*

Nevertheless, under section 95, the *associated firms* are jointly and separately liable for the employees’ unpaid wages and the wage recovery provisions are specifically targeted at those very same associated firms (“any or all of *them*”). In this case, *none* of the individual directors or officers was “associated” with any of ICON and the two bankrupt firms (I note that *individuals* can be included in a section 95 declaration).

In my view, this point does not turn on whether section 95 ought to be interpreted “narrowly”; on a plain and ordinary reading of the statutory language, directors and officers of associated firms are not liable for employees’ unpaid wages absent their being personally designated in the section 95 declaration itself.

I now turn to section 96. The personal liability imposed on directors and officers under section 96(1) is predicated on their being an *employment* relationship between the employee and the corporation of which the individual is a director or officer--“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 I have previously observed, a section 95 declaration does not make an associated firm an “employer” of the employees in question. Section 95 is unlike, say, section 38 of the *Labour Relations Code* which specifically states that several entities may be treated as one “employer” for purposes of the *Code.* Indeed, as I have also noted, if the associated firm is an “employer”, there is no need for a section 95 declaration--liability for unpaid wages can be imposed directly without having to resort to section 95. The personal liability imposed on directors and offices under section 96(1) flows from their having been a director or officer of the corporate employer when the employees’ unpaid wage claims crystallized.

In this case, none of the employees earned any wages by providing employment services to ICON. None of the employees was employed by ICON. None of the individual appellants was a director or officer of either of the bankrupt firms--the actual employers. Given that section 96 must be construed narrowly, I fail to see how directors or officers of an associated corporation can be held personally liable for unpaid wages owed by another employer even if that other employer was “associated” with the firm of which the individual is a director or officer.

In order to interpret section 96(1) in a manner consistent with the Director’s position, one must read in the following italicized words: “A person who was a director or officer of a corporation, *or of another corporation declared to be associated with that corporation under section 95*, 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.” I do not think it appropriate to read in such language; such an approach, in my view, constitutes a very (perhaps

even overly) liberal and generous interpretation rather than the narrow construction that section 96 must be given.

In this case, not only is personal liability inconsistent with the language of the statute, such liability is inconsistent with the underlying policy of section 96. In *Archibald, supra.*, I stated:

> In *Barrette v. Crabtree Estate* [1993] 1 S.C.R. 1027 the Supreme Court of Canada observed that it is appropriate to hold corporate officers and directors personally liable for unpaid wages because such individuals are in the best position to know whether the corporation can meet its ongoing payroll obligations and, when the corporation fails to do so, the resulting losses should not be borne entirely by the comparatively more vulnerable employees.
>
> While, to some, it may seem harsh that corporate officers and directors are personally liable for employees' unpaid wages, it should be noted that there are various limitations on their liability; it is not "open-ended". First, the liability is "capped" at 2 months' wages per employee; second, officers and directors have the ability to limit their liability by ensuring that employees' wages are kept current; third, in the event of a impending payroll shortfall, directors can further limit their continuing liability through resignation; and fourth, officers and directors are not liable for compensation for length of service if the corporation is in receivership, bankruptcy or is the subject of some other similar insolvency proceeding.

Most, perhaps even all, of these policy considerations break down if personal liability is imposed on directors and officers of associated firms. If individuals are directors or officers of the bankrupt employer, their liability (subject to statutory defences) is clear. However, should individuals who never were directors or officers (either formally, or via the "functional" test) of the bankrupt employer nonetheless be held personally liable for employees' unpaid wages?

As noted above, directors and officers of the employer firm can take certain actions to limit their personal exposure but, for the most part, these actions are simply not open to directors and officers of an associated corporation. For example, how are the directors/officers of a third party firm to know if the actual employer is in financial difficulty? They may have such knowledge, but I do not think that such prior knowledge can be routinely presumed. Why should their own firm, which may not be in financial trouble, have to bear the loss of their expertise (through resignation) so that these individuals might limit their personal exposure under section 96? Not being directors or officers of the employer (and thus having no legal or institutional authority with respect to direction and control of the actual employer's business affairs), how can these individuals limit their liability by ensuring that employees' wages are kept current, or, if there are to be terminations, that proper written notice is given?

Section 96(1) creates a form of statutory "vicarious liability". In my view, if the legislature intended to create a form of vicarious liability "once removed" (by holding directors/officers of

the employer firm, as well as directors/officers of "associated firms", liable for unpaid wages owed by the employer firm), that intention should have been expressly set out in the legislation.

It follows from the foregoing comments that the individual appellants' appeals are allowed and that the section 96 determinations must be cancelled.

The individual appellants' alternative section 96(2)(a) argument

In light of my conclusion that the section 96 determinations should be cancelled, I do not find it necessary to address whether the ICON directors and officers are entitled to the benefit of the defence set out in section 96(2)(a) of the *Act.*

ORDER

Pursuant to section 115 of the *Act,* I order that the seven section 96 determinations be cancelled.

Inasmuch as I have not addressed all of the grounds of appeal of the section 95 determination, ICON's appeal of that determination (E.S.T. File No. 2001/430) will be set down for hearing at the earliest convenient date to all parties.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal