

Section 96 of The Employment Standards Act: Balancing Competing Interests

Introduction

With the imposition of statutory liability on directors and officers under the *Employment Standards Act* (the “Act”), the legislature of British Columbia has sought to achieve a balance between the interests of corporate directors and officers, on the one hand, and employees on the other. Since its introduction in 1980 (see section 19 of the former *Employment Standards Act*), section 96 of the Act has been the subject of much commentary in case law regarding its scope and interpretation. While it is accepted that the overall purpose of the Act is to protect the rights of employees, British Columbia courts have indicated that it is not meant to punish employers.

Section 96 determinations may have serious financial consequences for corporate directors and officers and, thus, are often appealed to the Employment Standards Tribunal (the “**Tribunal**”). The Tribunal strives to conform to the overall intent of the Act, while simultaneously ensuring that corporate directors and officers are not unfairly penalized. The interpretation of section 96 has posed an interesting dilemma for the Tribunal as this section runs contrary to the long-standing principles of both common and corporate law that directors are not personally liable for the debts of a corporation. In *Albert Kenneth Archibald*,¹ the Tribunal stated:

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 article examines case law governing the liability of corporate directors and officers under section 96 of the Act. It includes an overview of section 96 and the practical considerations that arise from the operation and interpretation of this provision. Following this overview is an analysis of some of the fundamental principles that are engaged by section 96 determinations, including the balance of interests in the interpretation of section 96, the identification of corporate officers or directors, the application of the “functional” test, the definition of “wages” under the Act, and the use of statutory defences. The article concludes by examining the doctrine of issue estoppel as it pertains to section 96 determinations.

Legislative framework

Section 96 of the Act states, in part:

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 an officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,

(b) any liability to an employee for wages, if the corporation is subject to action under s. 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,

(c) vacation pay that becomes payable after the director or officer ceases to hold office, or

(d) 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) or (2.1).

(4) In this section, "director or officer of a corporation" includes a director or officer of a corporation, firm, syndicate or association that the director treats as one employer under section 95.

The Director of Employment Standards (the “**Director**”) is entitled to collect a maximum of two months’ wages from each director/officer named, as long as the amounts collected do not exceed the actual amount owed to the various employees.² The Director may impose liability against a corporate employer in excess of two months for the total wages owed to each employee.

A determination is only issued against a director/officer when it has also been issued against the corporate employer under section 112 and the latter has not paid the amount ordered in the corporate determination. However, where the corporate employer has ceased to operate and there is perceived risk that the employee may not be paid the wages ordered in the corporate determination the Tribunal may issue the two determinations simultaneously.³

The Director will not permit directors and officers of a corporation to use the Act to recover wages from their corporation unless they can demonstrate that an employment relationship exists independent of their duties as a director or officer.⁴

The Tribunal commonly sees situations where a corporate officer or director appeals a section 96 determination with the intention of re-opening litigation regarding the issues or merits of the corporate determination. In most cases, the time for appealing the corporate determination has expired by the time the section 96 determination is made. As a result, the director/officer who is subject of the section 96 determination and collection proceedings, in the absence of any relevant basis to appeal the section 96 determination specific to him or her, may find himself or herself invoking matters that should have been raised in an appeal of the corporate determination. Such an appeal by the director/officer will likely be dismissed by the Tribunal.⁵

Fundamental principles

Summarized below are key principles that are engaged in appeals of section 96 determinations.

(i) *Balancing of Interests of Corporate Officers and Directors and Employees*

How should section 96 be construed in light of the interpretation of the Act as employee protection legislation? Should there be limitations placed on liability grounded under section 96? The case law has struggled with these issues and reflects an appropriate balancing of the competing interests concerning section 96 determinations.

The *Archibald*⁶ decision considered the concept of directors' and officers' liability for unpaid wages if the corporation enters receivership or declares bankruptcy. The Tribunal noted that the former *Employment Standards Act* only imposed liability for wages that were "payable" whereas, under the new Act, the directors' and officers' liability extends to unpaid wages that are both "earned" and "payable". The corporate officer and director appealed the determination on the basis of the section 96(2)(a) defence which relieves personal liability against a corporate officer and director for compensation length of service if the corporation was involved in a formal insolvency proceeding. The threshold question for the Tribunal was whether this defence applied in the circumstances of this case.

According to the Tribunal, the change in the statute was prompted by the British Columbia Court of Appeal decision in *Re Westar Mining Ltd.*,⁷ which was a leading case under section 19(1) (the predecessor to section 96 of the Act). The Court of Appeal upheld the trial judge's finding that section 19(1) created a "payable" test under which the directors were not liable for holiday pay accrued but not yet payable. The Tribunal in *Archibald* held that the key consideration under the section 96(2)(a) defence is when the compensation for length of service was "payable" rather than "earned". The Tribunal observed that compensation only becomes payable on termination of the employment pursuant to section 63(4) of the Act. Accordingly, the Tribunal allowed the appeal and overturned the determination against the corporate officer and director.

Officers and directors have the ability to limit their liability by ensuring that employees' wages are up to date. If it is anticipated that the corporation will be unable to meet its payroll, they can limit their exposure to further liability by resigning their positions. In the event that the corporation is in receivership, bankruptcy or involved in some other formal insolvency process, the directors remain liable for most unpaid wage claims; however, they are not liable for compensation for length of service. The claims for compensation for length of service and termination pay are exempted by the section 96(2)(a) defence. As can be seen by case law, the imposition of personal liability of corporate officers and directors is an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts.

The application of section 96 demonstrates a balanced approach that serves to protect employees while ensuring that the liability of corporate officers and directors is governed according to a strict reading of the provision.

(ii) Identification of a Director or Officer under Section 96 of the Act: A Rebuttable Presumption

Although the Act does not define a "director" or "officer" of a corporation,⁸ recent decisions of the Tribunal under section 96 have referred to the definitions of "director" and "senior officer" as found in the *Business Corporations Act*.⁹ Directors and senior officers are defined in the *Business Corporations Act* as follows:

"director" means,

- (a) in relation to a company, an individual who is a member of the board of directors of the company as a result of having been elected or appointed to that position, or
- (b) in relation to a corporation other than a company, a person who is a member of the board of directors or other governing body of the corporation regardless of the title by which that person is designated;

"senior officer" means, in relation to a corporation,

- (a) the chair and any vice chair of the board of directors or other governing body of the corporation, if that chair or vice chair performs the functions of the office on a full time basis,
- (b) the president of the corporation,
- (c) any vice president in charge of a principal business unit of the corporation, including sales, finance or production, and
- (d) any officer of the corporation, whether or not the officer is also a director of the corporation, who performs a policy making function in respect of the corporation and who has the capacity to influence the direction of the corporation

The Director has the ability to issue a section 96 determination against a director or an officer without holding a hearing, based on the corporate records filed with, and maintained by, the Registrar of Companies. As noted in the leading Tribunal decision in *Wilnofsky*,¹⁰ when corporate records indicate that an individual is a director or an officer of a corporation, a presumption arises that the individual does in fact hold the position in question. The burden of proving that one is not a corporate director or officer rests with the individual. The presumption described above must be rebutted by credible and cogent evidence that the Registrar's records are inaccurate, for example where the individual resigned and the documents were not processed correctly or where an individual was not properly appointed.

**(iii) Identification of a Director or Officer under Section 96 of the Act:
The Functional Test**

Pursuant to section 96, the Director has the discretion to impose personal liability against an individual as a corporate director or officer, even if that individual is not identified as such in the corporate records. This determination is based on the "functional" test, which considers whether or not the individual exercises the typical functions or tasks of a corporate director or officer throughout the course of his or her normal duties.¹¹ Activities associated with the role of director or officer may include the following:

- regular attendance at the place of business;
- direction of employees;
- ownership of equipment, tools, furniture and furnishings;
- representing the company to creditors, suppliers, and customers; and
- representing oneself as an owner.¹²

The functional test can only be employed by the Tribunal in limited circumstances where a director or officer has not been identified in its corporate records.¹³

(iv) Liability of Corporate Directors and Officers for "Associated" Corporations

Under section 96(4), directors and officers of a corporation are personally liable for unpaid wages of individuals employed by an associated corporation, firm, syndicate, or association that the Director regards as a single employer under section 95. t.

In *ICON Laser Eye Centres Inc.*,¹⁴ the Tribunal considered eight appeals, all filed pursuant to section 112 of the Act, with respect to one corporate determination issued by the Director against ICON Laser Eye Centres Inc. ("ICON") and seven determinations against former directors or officers of ICON pursuant to section 96. In this case, the employees were owed wages by associated corporations of ICON, Lasik Vision Corporation and Lasik Vision Canada Inc., who were both in bankruptcy.

The Tribunal noted that while the individual appellants were directors or officers of ICON, they did not hold those positions with the associated corporations at the time of the employees' claims. The Tribunal held that a finding of personal liability in this situation ran contrary to policy considerations, given that these directors or officers were not in a position to exercise control over the management and operations of the associate corporations.

On reconsideration, in *ICON Laser Eye Centres Inc.*,¹⁵ the Director submitted, inter alia, that the Tribunal erred in its interpretation and application of section 96 by failing to give a "broad and liberal" interpretation to the provisions of section 96. The Tribunal dismissed this argument and maintained that in order for liability to be established against officers and directors of a corporation, an employment relationship must exist between the individual claiming under the Act and the specific corporation. In support of this position, it was noted that the intention of the Act is to ensure that the responsibility for paying wages rests with the employer.

In *Turner*,¹⁶ the Tribunal had an opportunity to revisit the decision in *Icon Laser Centres, Inc.* (confirmed on reconsideration) after the amendment of the Act. In this case, a director of a corporation had been found liable for unpaid wages of former employees of a charitable institution, which was an associated entity of the corporation. On appeal, the appellant took the position that, although he acted as a volunteer director of the charitable organization, he was immune from liability pursuant to section 45 of the *Employment Standards Regulation*.¹⁷ Section 45 immunizes directors and officers of charities from personal liability if they are unsalaried and receive only reimbursable expenses from the charity.¹⁸

Pursuant to the amended provisions of the Act, which was in direct response to the Tribunal's decision in *Icon Laser Centres, Inc.*, the Tribunal held that associated entities are considered to be a single employer for purposes of the statute and, therefore, are jointly and severally liable for any unpaid wage claims under section 96 of the Act. The Tribunal found that section 96(4) holds directors and officers of the employer corporation vicariously liable for employees' unpaid wages subject to a 2-month wage cap per employee and other defences outlined in subsection (2).

Ultimately, the *Turner* appeal was dismissed on the grounds that the determination was made against him in his role as a director of the numbered company, not in his capacity as director/officer of the charity. This case demonstrates that, under section 96, an officer of a for-profit firm will not be able to escape vicarious liability on the basis that the associated entity in question is a charitable organization.

(v) The Interpretation of "Wages" under the Act

Pursuant to section 96, two months' wages are equal to the employee's wages for two months, plus applicable vacation pay. If the employee's earnings vary on a month to month basis, earnings can be averaged. As the period in which to determine an average wage is not specified by legislation, the Director may consider a period that is reasonable under the circumstances. This may be up to six months before the date of the complaint or before termination of employment, whichever is earliest. "Regular wage" is defined at section 1 of the Act as follows:

- (a) if an employee is paid by the hour, the hourly wage,
- (b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,
- (c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,

- (d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and
- (e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;

Subsection (2) limits the financial liability on the part of officers or directors by excluding any responsibility for compensation for the following:

- length of service, termination pay, or money payable in respect of either individual or group termination if the corporation is in receivership;
- any amount of wages owing if the corporation is subject to a proceeding under an insolvency Act or under section 427 of the *Bank Act*; or
- vacation pay that was not payable until after the officer or director ceased to hold office, or money that remained in an employees' overtime bank after the officer or director ceased to hold office.

Section 96(1) provides for an unpaid wage liability cap based on an employee's monthly wage. As such, the unpaid wage liability of a director or officer is the lesser of two months' of the employee's "regular wage" or the actual amount of the employee's unpaid wages.

In certain situations a monetary penalty may be levied for failure to comply with the Act. Under section 29 of the *Employment Standards Regulation*, monetary penalties do not constitute wages; however, pursuant to section 98(2) of the Act,¹⁹ corporate directors, officers, employees and agents may be found personally responsible for monetary penalties. The scope of section 98(2) is wider than section 96 given that employees and agents, as well as officers and directors, may be found personally liable; however, under the former provision, liability can only be determined where there has been authorization, consent, or acquiescence by the individual at issue in the contravention by the corporation.

(vi) Statutory Defences to Section 96 Findings of Personal Liability

When challenging a determination made under section 96 of the Act, the appellant is limited to arguing the following:

1. that he or she was not a director or officer at the time the wages were earned or should have been paid;
2. that the calculation of the director or officer's personal liability is inaccurate; or
3. that in cases where a penalty has been assessed, the director or officer should not be personally liable for the penalty on the grounds that he or she did not authorize, permit or acquiesce in the contravention.

In *Jiang*²⁰ the Tribunal considered the law governing corporate directors'/officers' liability in the context of two directors who claimed that they should be absolved of liability because they were subject to oppressive conduct by their fellow directors. The Tribunal held that any discretion for the Tribunal to release a director from liability under the Act as a result of oppressive conduct or due diligence must emanate from the Act itself, the *Employment Standards Regulation*, or where appropriate, pursuant to the *Administrative Tribunals Act*. Based on a review of a number of leading authorities, the Tribunal dismissed the appeal and held that a director could not be absolved of liability simply because he or she has suffered oppression at the hands of other directors or where he or she has been duly diligent in seeking to have the corporation operate properly and that unpaid wages are up to date..

(vii) Issue Estoppel

On appeal, an appellant may not raise the same arguments that were introduced at the time of the original determination against the company. There are two exceptions to the issue estoppel doctrine, namely, where there has been fraud in the rendering of the initial determination against the corporation, or if the directors or officers have fresh evidence not previously available where the corporate determination was made. Section 96 is not intended as an additional opportunity to challenge the company's liability for wages, but rather is designed to protect employees against insolvent employers.²¹

In *Perfekto Mondo Bistro Corporation*²², the Tribunal held that, pursuant to section 96 of the Act, once a determination has been issued against a corporate entity, its directors or officers are barred from challenging subsequent determinations issued against them personally if the following criteria applied:

1. the identical issue had been previously decided in the corporate determination;
2. the corporate determination was final; and
3. the previous decision involved the same parties or their privies.

The Tribunal held that the appeal did not meet the required criteria and, in fact, would only have merit if the directors had not held their positions at the material time or the determinations exceeded the two month wage limit set out in section 96(1). As such, the appeal was dismissed.

Conclusion

The case law related to section 96 since the inception of that provision has been clarified and refined in order to establish a practical framework that effectively serves both the Director and directors and officers. Given the competing interests of corporate directors and officers and employees, the Tribunal has strived to create a balance that upholds the Act's intent to protect employees while at the same time ensuring that directors and officers are only made liable in appropriate circumstances. Moving forward, there is no doubt that the Tribunal will be faced with challenging new arguments; however, based on its previous responses, one can expect that the Tribunal will continue to interpret issues within the context of established legal principles and precedents.

* The views expressed in this article are those of the authors and do not reflect the official view or position of the Employment Standards Tribunal.

¹ *Albert Kenneth Archibald*, BC EST #D090/00.

² *Rajinder Brad*, BC EST #D056/07.

³ See *Harvey Malo, A director of Foothills Acoustics Ltd.*, BC EST #D029/14.

⁴ *Sunwest Glazing Inc.*, BC EST #D037/01.

⁵ *Xiandong Zheng*, BC EST #D118/12.

⁶ *Albert Kenneth Archibald*, *supra*.

⁷ (1996), 25 B.C.L.R. (3d) 297 (C.A.).

⁸ The Act defines a "director" in context of the administration of the Act to mean the Director of Employment Standards appointed under the *Public Service Act*.

⁹ *Mark Landy*, BC EST #D096/10.

¹⁰ *Wilnofsky*, BC EST #D16/99.

¹¹ *Michalkovic*, BC EST #RD047/01.

¹² *Kevin Thomas Okrainetz*, BC EST #D354/97.

¹³ *Lucille M. Pacey*, BC EST #D125/09.

¹⁴ *ICON Laser Eye Centres Inc.*, BC EST #D649/01.

¹⁵ *ICON Laser Eye Centres Inc.*, BC EST #RD201/02.

¹⁶ *Nigel Patrick Turner*, BC EST #D213/00.

¹⁸ **Under the heading** “*Exclusion from liability provisions*”, section 45 provides: “Section 96 of the Act does not apply to a director or officer of a charity who receives reasonable out-of-pocket expenses but no other remuneration for services performed for the charity.”

¹⁹ Under the heading “Monetary penalties”, s. 98(2) provides: “If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.”

²⁰ *Guijing Jiang*, BC EST #D074/06.

²¹ *Steinemann*, BC EST #D180/96.

²² *Perfekto Mondo Bistro Corporation*, BC EST #D205/96.