**LRB File Nos 079-18 to 089-18**

**IN THE MATTER OF:**

An Appeal of Wage Assessment Number 9078 pursuant to section 2-75 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, as amended, (the "*SEA*") and a hearing pursuant to section 4-2 of the *SEA*



**BETWEEN:**

Dayan Goodenowe,

APPELLANT,

- and -

Erin Bingham, Christine Johnson, Michelle Bonk, Michelle Gursky, Alix Hayden, Vaishali Roge, Ravinderjit Batta, Sujeema Abeysekara, Chong Gao, Michelle Flowers & Oluwole Ogunrinde,

RESPONDENTS (COMPLAINANTS),

- and -

Director of Employment Standards, Ministry of Labour Relations and Workplace Safety,

RESPONDENT.

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**PRELIMINARY RULING**
May 21, 2019

T. F. (TED) KOSKIE, B.Sc., J.D.

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**REPRESENTATIVES:**

Appellant, Dayan Goodenowe, Self Represented

Complainants (Respondents), Erin Bingham & Michelle Flowers, Self Represented

Complainants (Respondents), Christine Johnson, Michelle Bonk, Michelle Gursky, Alix Hayden, Vaishali Roge, Ravinderjit Batta, Sujeema Abeysekara, Chong Gao & Oluwole Ogunrinde, Not Represented

Johanna Van Parys, for the Respondent, Director of Employment Standards

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## 1. INTRODUCTION

[1] Dayan Goodenowe ("Goodenowe") appealed[1] (the "Appeal") Wage Assessment No. 9078[2] (the "Assessment") issued pursuant to section 2-74 of *The Saskatchewan Employment Act* (as amended)[3] (the "*SEA*") by the Director of Employment Standards (the "Director") on February 20, 2018.

[2] The Assessment directed Goodenowe to pay $87,860.06--comprising $10,686.35 to Erin Bingham ("Bingham"), $14,095.76 to Christine Johnson ("Johnson"), $8,076.92 to Michelle Bonk ("Bonk"), $14,095.76 to Michelle Gursky ("Gursky"), $21,704.13 to Alix Hayden ("Hayden"), $5,817.31 to Vaishali Roge ("Roge"), $4,474.84 to Ravinderjit Batta ("Batta"), $894.96 to Sujeema Abeysekara ("Abeysekara"), $4,271.43 to Chong Gao ("Gao"), $1,708.57 to Michelle Flowers ("Flowers") and $2,034.03 to Oluwole Ogunrinde ("Ogunrinde").

[3] By Orders dated June 5, 2018, the Labour Relations Board ("LRB") selected me to hear and determine the Appeal.

## 2. FACTS

[4] In February 2000, Goodenowe caused his holding company, Yolbolsum Canada Inc.("YBCI"), to apply for a patent (the "Patent") of a method for "non-targeted complex analysis" to identify and treat certain diseases.

[5] In December 2000, Goodenowe caused Phenomenome Discoveries Inc. ("PDI") to be incorporated under *The Business Corporations Act* of Saskatchewan. YBCI was then its first and sole shareholder.

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[1]Appeal and $500.00 hand delivered to the Director on March 15, 2018

[2]Wage Assessment No. 9078 dated February 20, 2018

[3]S.S. 2013, c. S-15.1

[6] YBCI granted PDI an exclusive licence to develop the Patent commercially.

[7] Over the next approximate fourteen years, PDI carried on business and, during same, attracted several investors and shareholders–one was Golden Opportunities Fund Inc. ("GOFI").

[8] On or about March 29, 2010, GOFI lent money (the "Loan") to PDI and secured same with a debenture (the "Debenture").

[9] Goodenowe testified that he effectively lost:

a) his power as a director of PDI in 2014; and

b) all operational control of PDI in 2015;

as a result of what he characterized as schemes or conspiracies orchestrated by some PDI employees, directors and shareholders.

[10] On March 12, 2015, the Loan matured and became payable. On June 8, 2015, GOFI agreed with PDI not to demand payment before March 29, 2016, but reserved the right to do so sooner if PDI committed an act of bankruptcy or insolvency that jeopardized its position under the Debenture.

[11] Goodenowe was elected for a one year term as a director of PDI at its shareholders' meeting on September 30, 2015. Goodenowe testified it was his understanding that, after the expiration of the one year term on September 30, 2016, he would no longer be a director of PDI.

[12] By the end of October 2015, GOFI concluded that PDI was unable to meet its liabilities generally as they came due and, consequently was insolvent and had committed acts of bankruptcy. Goodenowe testified that he took issue with this conclusion.

[13] On November 10, 2015, GOFI demanded that PDI repay the Loan by November 20, 2015. It did not.

[14] GOFI applied to the Court of Queen's Bench of Saskatchewan (the "Court") for an Order appointing FTI Consulting Inc. ("FTI") as Receiver of the property, assets and undertaking of PDI.

[15] The Court:

a) appointed FTI as the Interim Receiver of the assets, undertakings and property of PDI on December 3, 2015 (the "Interim Receivership Order");

b) amended and extended the Interim Receivership Order on December 21, 2015, January 14, 2016, and January 21, 2016; and

c) appointed FTI as the Receiver and manager (the "Receiver") of the assets, undertakings and property of PDI on February 25, 2016 (the "Receivership Order").

[16] The Interim Receivership Order and Receivership Order provided, *inter alia*, that:

a) the Receiver was empowered to manage, operate and carry on the business of PDI;

b) subject to the employee's rights to terminate their employment, all employees remained employees of PDI until the Receiver terminated their employment; and

c) the Receiver would not be liable for any employee-related liabilities, other than such amounts as it may specifically agree in writing to pay.

[17] As of December 3, 2015–the date of the Interim Receivership Order–PDI had enough

cash on hand for the Receiver to terminate PDI employees and pay all wage obligations.

[18] Goodenowe resigned from his position as President and CEO of PDI on July 5, 2016. After that, he no longer had any kind of involvement in the operation of PDI.

[19] No meetings of the shareholders or directors took place after the Receiver was appointed. The Receiver did not provide Goodenowe with any reports pertaining to PDI.

[20] On August 18, 2016, all of the directors of PDI, except Goodenowe, resigned. The Receiver subsequently registered these resignations with the Saskatchewan Corporate Registry, but did not register the changes with respect to President and CEO.

[21] The Receiver terminated:

a) four employees–Abeysekara, Gao, Flowers and Ogunrinde–on August 29, 2016, and paid them their wages up to and including August 31, 2016; and

b) another seven employees–Bingham, Johnson, Bonk, Gursky, Hayden, Roge & Batta–on October 31, 2016, and paid them their wages up to and including October 31, 2016.

[22] Goodenowe testified:

a) the Receiver alone decided to terminate the employees;

b) he did not know the employees were going to be fired; and

c) he was not in a position to affect such matters at that point.

[23] The Complainants lodged complaints with the Director alleging the Receiver had not paid

them for notice and annual vacation pay as required by the *SEA*. The Director:

a) found the complaints to be well founded;

b) searched the corporate profile for PDI and found Goodenowe to be the only director appearing thereon; and

c) because of the Receivership Order, issued the Assessment against Goodenowe only.

## 3. ISSUES

[24] The issue herein is whether Goodenowe is liable as a corporate director for the wages owing to Bingham, Johnson, Bonk, Gursky, Hayden, Roge, Batta, Abeysekara, Gao, Flowers and Ogunrinde (the "Complainants").

## 4. DECISION

[25] I rule Goodenowe is not liable for the wages owing to the Complainants.

[26] I allow the Appeal.

## 5. REASONS

### 5.1 LEGISLATION

[27] The relevant provisions of the *SEA* are as follows:

> **Interpretation**
> 1-2(1) In this Act:
>
> . . .

(b) "business day" means a day other than a Saturday, Sunday or holiday;

. . .

**Corporate directors liable for wages**
2-68(1) Subject to subsection (2), notwithstanding any other provision of this Act or any other Act, the corporate directors of an employer are jointly and severally liable to an employee for all wages due and accruing due to the employee but not paid while they are corporate directors.

(2) The maximum amount of a corporate director's liability pursuant to subsection (1) to an employee is six months' wages of the employee.

. . .

**Wage assessments**
2-74(1) In this Division, "adjudicator" means an adjudicator selected pursuant to subsection 4-3(2).

(2) Subject to subsection (4), if the director of employment standards has knowledge or has reasonable grounds to believe or suspects that an employer has failed or is likely to fail to pay wages as required pursuant to this Part, the director may issue a wage assessment against either or both of the following:

(a) the employer;

(b) subject to subsection (3), a corporate director.

(3) The director of employment standards may only issue a wage assessment against a corporate director if the director has knowledge or has reasonable grounds to believe or suspects that the corporate director is liable for wages in accordance with section 2?68.

(4) The amount of a wage assessment that the director of employment standards may assess is to be reduced by an amount that the director is satisfied that the employee earned or should have earned during the period when the employer or corporate director was required to pay the employee the wages.

(5) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (4).

. . .

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(5) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (4).

(6) If the director of employment standards has issued a wage assessment pursuant to subsection (2), the director shall cause a copy of the wage assessment to be served on:

(a) the employer or corporate director named in the wage assessment; and

(b) each employee who is affected by the wage assessment.

(7) A wage assessment must:

(a) indicate the amount claimed against the employer or corporate director;

(b) direct the employer or corporate director to, within 15 business days after the date of service of the wage assessment:

(i) pay the amount claimed; or

(ii) commence an appeal pursuant to section 2-75; and

(c) in the case of a wage assessment issued after money has been received from a third party pursuant to a demand issued pursuant to Division 4, set out the amount paid to the director of employment standards by the third party.

(8) The director of employment standards may, at any time, amend or revoke a wage assessment.

. . .

**Commencement of appeal to adjudicator**

2-75(1) Any of the following may appeal a wage assessment:

(a) an employer . . . who disputes liability or the amount set out in the wage assessment;

. . .

2-75(2) An appeal pursuant to this section must be commenced by filing a written notice of appeal with the director of employment standards within 15 business days after the date of service of a wage assessment.

. . .

(4) If the appellant is an employer or a corporate director, the employer or corporate director shall, as a condition of being eligible to appeal the wage assessment, deposit with the director of employment standards the amount set out in the wage assessment or any other prescribed amount.

(5) The amount mentioned in subsection (4) must be deposited before the expiry of the

period during which an appeal may be commenced.

. . .,

**Adjudicator – duties**
4-2 An adjudicator shall:

(a) hear and decide appeals pursuant to Part II and conduct hearings pursuant to Division 5 of Part II;

(b) hear and decide appeals pursuant to Division 8 of Part III; and

(c) carry out any other prescribed duties.

**Selection of adjudicator**
4-3(1) The director of employment standards and the director of occupational health and safety shall inform the board of an appeal or hearing to be heard by an adjudicator.

(2) On being informed of an appeal or hearing pursuant to subsection (1), the board shall select an adjudicator.

**Procedures on appeals**
4-4(1) After selecting an adjudicator pursuant to section 4-3, the board shall:

(a) in consultation with the adjudicator and the parties, set a time, day and place for the hearing of the appeal or the hearing; and

(b) give written notice of the time, day and place for the appeal or the hearing to:

(i) in the case of an appeal or hearing pursuant to Part II:

(A) the director of employment standards;

(B) the employer;

(C) each employee listed in the wage assessment or hearing notice; and

(D) if a claim is made against any corporate directors, those corporate directors; and

(ii) in the case of an appeal or hearing pursuant to Part III:

(A) the director of occupational health and safety; and

(B) all persons who are directly affected by the decision being appealed.

(2) An adjudicator may determine the procedures by which the appeal or hearing is to be conducted.

(3) An adjudicator is not bound by the rules of law concerning evidence and may accept any evidence that the adjudicator considers appropriate.

(4) An adjudicator may determine any question of fact that is necessary to the adjudicator's jurisdiction.

(5) A technical irregularity does not invalidate a proceeding before or by an adjudicator.

(6) Notwithstanding that a person who is directly affected by an appeal or a hearing is neither present nor represented, if notice of the appeal or hearing has been given to the person pursuant to subsection (1), the adjudicator may proceed with the appeal or the hearing and make any decision as if that person were present.

(7) *The Arbitration Act, 1992* does not apply to adjudications conducted pursuant to this Part.

**Powers of adjudicator**

4-5(1) In conducting an appeal or a hearing pursuant to this Part, an adjudicator has the following powers:

(a) to require any party to provide particulars before or during an appeal or a hearing;

(b) to require any party to produce documents or things that may be relevant to a matter before the adjudicator and to do so before or during an appeal or a hearing;

(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:

(i) to summon and enforce the attendance of witnesses;

(ii) to compel witnesses to give evidence on oath or otherwise;

(iii) to compel witnesses to produce documents or things;

(d) to administer oaths and affirmations;

(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the adjudicator considers appropriate, whether admissible in a court of law or not;

(f) to conduct any appeal or hearing using a means of telecommunications that permits the parties and the adjudicator to communicate with each other simultaneously;

(g) to adjourn or postpone the appeal or hearing.

(2) With respect to an appeal pursuant to section 3-54 respecting a matter involving harassment or a discriminatory action, the adjudicator:

(a) shall make every effort that the adjudicator considers reasonable to meet with the parties affected by the decision of the occupational health officer that is being appealed with a view to encouraging a settlement of the matter that is the subject of the occupational health officer's decision; and

(b) with the agreement of the parties, may use mediation or other procedures to encourage a settlement of the matter mentioned in clause (a) at any time before or during a hearing pursuant to this section.

**Decision of adjudicator**

4-6(1) Subject to subsections (2) to (5), the adjudicator shall:

(a) do one of the following:

(i) dismiss the appeal;

(ii) allow the appeal;

(iii) vary the decision being appealed; and

(b) provide written reasons for the decision to the board, the director of employment standards or the director of occupational health and safety, as the case may be, and any other party to the appeal.

(2) If, after conducting a hearing, the adjudicator concludes that an employer or corporate director is liable to an employee or worker for wages or pay instead of notice, the amount of any award to the employee or worker is to be reduced by an amount that the adjudicator is satisfied that the employee earned or should have earned:

(a) during the period when the employer or corporate director was required to pay the employee the wages; or

(b) for the period with respect to which the employer or corporate director is required to make a payment instead of notice.

(3) The employer or corporate director has the onus of establishing the amount by which an award should be reduced in accordance with subsection (2).

(4) If, after conducting a hearing concerned with section 2-21, the adjudicator concludes that the employer has breached section 2-21, the adjudicator may exercise the powers given to the Court of Queen's Bench pursuant to sections 31.2 to 31.5 of The Saskatchewan Human Rights Code and those sections apply, with any necessary modification, to the adjudicator and the hearing.

(5) If, after conducting a hearing concerned with section 2-42, the adjudicator concludes that the employer has breached section 2-42, the adjudicator may issue an order requiring the employer to do any or all of the following:

(a) to comply with section 2-42;

(b) subject to subsections (2) and (3), to pay any wages that the employee has lost as a result of the employer's failure to comply with section 2-42;

(c) to restore the employee to his or her former position;

(d) to post the order in the workplace;

(e) to do any other thing that the adjudicator considers reasonable and necessary in the circumstances.

[28] The relevant provisions of *The Business Corporations Act*[4] ("*BCA*") are as follows:

**Election of directors**
[101](3) Subject to clause (b) of section 102, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not

[4]R.S.S. 1978, c. B-10

later than the close of the third annual meeting of shareholders following the election.

. . .

Incumbent directors
[101](6) Notwithstanding subsections (2), (3) and (5), if directors are not elected at a meeting of shareholders the incumbent directors continue in office until their successors are elected.

. . .

**Ceasing to hold office**
103(1) A director of a corporation ceases to hold office when:

(a) he dies or resigns;

(b) he is removed in accordance with section 104; or

(c) he becomes disqualified under subsection (1) of section 100.

**Effective date of resignation**
(2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

. . .

**Liability of directors for wages**
114 Directors of a corporation are jointly and severally liable, in accordance with Part II of The Saskatchewan Employment Act, to employees for wages.

. . .

**Reliance on statements**
(4) A director is not liable under section 113, 114 or 117 if he relies in good faith upon:

(a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or

(b) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

## 5.2 ANALYSIS

[29] The Director alleges that Goodenowe is liable, by virtue of his status as a director of PDI and PLSI, for unpaid wages owing to the Complainants. The *SEA* provides the following with respect to employer liability for unpaid wages:

**Corporate directors liable for wages**
2-68(1) Subject to subsection (2), notwithstanding any other provision of this Act or any other

> Act, the corporate directors of an employer are jointly and severally liable to an employee for all wages due and accruing due to the employee but not paid while they are corporate directors.
>
> (2) The maximum amount of a corporate director's liability pursuant to subsection (1) to an employee is six months' wages of the employee.
>
> (3) Subject to subsections (4) and (5), a corporate director's liability pursuant to this section is payable in priority to any other unsecured claim or right in the corporate director's property or assets, including any claim or right of the Crown.
>
> (4) The payment priority set out in subsection (3) is subject to section 15.1 of The Enforcement of Maintenance Orders Act, 1997.
>
> (5) A corporate director who is an employee of the corporation is not entitled to the benefit provided to employees by subsection (3).

[30] In evaluating whether Goodenowe is liable for unpaid wages to any of the Complainants, I am aware of two essential, but conflicting interpretive principles relevant to the questions presented. In *Rizzo & Rizzo Shoes Ltd. (Re)*[5] and *Machtinger* v *HOJ Industries Ltd.*,[6] the Supreme Court of Canada held that remedial legislation that confers benefits, like the provisions of the *SEA* at issue here, should be construed in a broad, generous and purposive manner. Any doubts should be resolved in favour of the claimants to extend these benefits to as many employees as possible, and to encourage employers to meet the minimum obligations under the *Act*. However, these provisions run counter to the general expectation that directors are not liable for the debts of the corporation. A clear statement of these principles can be found in *Canadian-Automatic Data Processing Services Ltd.* v *Bentley*:

> The obligation of corporate directors and officers under the Employment Standards Act is a statutory exception to the general rule that the separate legal personality of a corporation insulates principals of the company from liability for its debts. The justification for this exception is the particular vulnerability of employees compared to other creditors. This was recognized in *Barrette* v. *Crabtree Estate*, 1993 CanLII 127 (SCC), [1993] 1 S.C.R. 1027, 101 D.L.R. (4th) 66, 10 B.L.R. (2d) 1, where L'Heureux-Dubé J., speaking for the Court at pp. 1042-3, underlined the point with a reference from a leading text:
>
> > Iacobucci, Pilkington and Prichard ... justify the protection at issue here by the special vulnerability of employees as compared with other creditors of the corporation:
> >
> > This liability is an intrusion on the principle of corporate personality and limited liability, but it can be justified on the grounds that directors who

[5][1998] 1 SCR 27, 1998 CanLII 837

[6][1992] 1 SCR 986, 1992 CanLII 102

> authorize or acquiesce in the continued employment of workers when the corporation is not in a position to pay them should not be able to shift the loss onto the shoulders of the employees. Other creditors who supply goods and services to a failing corporation are not entitled to this kind of preference, but neither are they as dependent on the corporation as employees, nor as vulnerable. (*Canadian Business Corporations (1977)*, at p. 327.)[7]

[31] Adjudicators have held that the exceptional nature of this remedy suggests that these same provisions should be narrowly construed to ensure that director liability is not unjustifiably enlarged beyond the limited purpose for which the exception was created.[8]

### 5.2.1 Liability for wages owing to Abeysekara, Gao, Flowers & Ogunrinde

[32] The evidence in the record shows that the Receiver terminated the employment of Abeysekara, Gao, Flowers and Ogunrinde on August 29, 2016. Goodenowe's one-year term as a director of PDI and PLSI had not expired at the time of these terminations. However, he contends that he should not be liable for any outstanding wages payable to these employees for the following reasons:

a) he was unable to exercise his powers as a director because a group of minority shareholders abused their veto powers beginning sometime in 2014;

b) he was unable to exercise operational control over the corporations because of an illegitimate takeover bid in 2015;

c) in reality, he had no control from and after the Interim Receivership Order;

d) when possible, he acted prudently to protect the interest of the employees of the corporation; and

e) it would be inequitable to hold him responsible for the unpaid wages, since the inability

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[7] 2004 BCCA 408 (CanLII) at para. 57.

[8] See for example: *Archibald* v *Director of Employment Standards* (2000), BC EST #D090/00

to pay was the result of the improper actions of others–PDI employees, shareholders and Board Members and the Receiver.

[33] The recent decision in *Thiele* v *Hanwel*[9] gives guidance with respect to the issues raised by Goodenowe in this appeal. In that decision, the appellants alleged that they were "outside" directors of the employer corporation and had no involvement with the day-to-day operations of the organization. Further, they alleged that another director, who was not an appellant, had sole control over the management of the company. The appellants alleged, and it was generally accepted, that a significant sum of money had been misappropriated by the director responsible for managing the company. At the least, it was clear that decisions made by the non-appellant director had led to the inability of the corporation to pay the outstanding wages. It was argued that forcing the remaining directors to pay the outstanding wages would effectively revictimize them for the fraud that had been committed. The appellants sought a variation of the wage assessment that would hold the managing director solely responsible for the unpaid wages.

[34] The decision, which affirmed the position of the adjudicator on this point, determined that section 2-68 of the *SEA* creates a scheme of strict liability for unpaid wages. An adjudicator is not able to shield some directors from liability, or to impose liability on a particular director, based on a factual finding regarding who is responsible for the wages being unpaid. The adjudicator's original comment is worth reproducing in full:

> As I explained to Mr. Bruun at the beginning of the hearing, the unfairness of holding the Appellants responsible for outstanding wages given Barry Ireland's actions cannot factor into my decision. My authority comes for the Act. Both *The Saskatchewan Employment Act* and its predecessor provide that directors of a corporation are jointly and severally liable to an employee for all debts due for services performed, not exceeding six months' wages, while they were directors (section 2-68 [the SEA] and section 63 [*The Labour Standards Act*]). The Acts also provide that "wages" includes (sic) vacation pay and pay in lieu of notice.
>
> I respectfully disagree with the Appellants' position that I have the authority to rule that liability should rest solely with Barry Ireland. I do not control who is or is not named in a Wage Assessment. The Director of Employment Standards makes that decision. With respect to director's liability, the legislation is clear. I am bound by the legislation. Lack of involvement in the corporation is not a defence. Due diligence is not a defence. The misappropriation of funds by one of the directors or secret agreements between and employee(s) is not a defence. When it

[9] 2016 CanLII 98644 (SK LRB)

comes to unpaid wages, there is no defence.[10]

[35] With respect to the claim made by the appellant directors that they were the victims of fraud, the adjudicator determined that, even if fraud were properly before her, and it was adequately proven, it would not displace the joint and several liability of the directors for the unpaid wages, as the phrase "joint and severally liable" is sufficiently clear.[11]

[36] Goodenowe submitted a significant amount of uncontradicted evidence about the actions of various employees, shareholders, creditors and directors of PDI and PLSI. He alleged that these individuals acted improperly and were the ultimate cause of the PDI and PLSI receivership. I found Goodenowe to be credible and I accept his evidence. I am sympathetic to his position. It is apparent that he made substantial efforts to continue the operations of the corporations and to protect the interests of its employees. However, the arguments advanced by Goodenowe with respect to Abeysekara, Gao, Flowers and Ogunrinde cannot act as a defence to his liability under section 2-68 of the *SEA*.

[37] Goodenowe has also alleged that he should not be responsible to reimburse Abeysekara, Gao, Flowers and Ogunrinde because he lacked either the status or powers of a director as contemplated by the *SEA*. I will address this argument in conjunction with my comments on the remaining employees.

### 5.2.2 Liability for wages owing to Bingham, Johnson, Bonk, Gursky, Hayden, Roge & Batta

[38] Goodenowe's submission maintains that he should be not be responsible for the wages owing to Bingham, Johnson, Bonk, Gursky, Hayden, Roge & Batta, who were terminated on October 31, 2016. My comments about the employees who were terminated on August 29, 2016, apply equally to this group of employees.

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[10] *Ibid* at para. 43.

[11] *Ibid* at para. 47.

[39] Goodenowe is unable to escape liability under section 2-68 of the *SEA* by demonstrating that he took prudent steps to protect employees, or by demonstrating that others are at fault for the unpaid wages. However, Goodenowe argues that, during the relevant time period, he had ceased to be a director of PDI and PLSI. As a result, he alleges that he is not responsible for paying wages to the employees terminated on October 31, 2016. There were three arguments advanced on this point:

a) his term as a director expired on September 30, 2016;

b) he resigned as director at some point prior to October 31, 2016; and

c) his responsibilities and powers as a director were terminated when the corporations were placed into receivership.

#### 5.2.2.1 Goodenowe's term as a director expired on September 30, 2016

[40] Goodenowe introduced into evidence a document entitled "PDI Management Proxy Circular."[12] This document shows that a shareholder meeting was scheduled to take place on September 30, 2015. Goodenowe testified that the meeting did take place and that he was elected for a one-year term, at that time. This would mean that his term expired on September 30, 2016. I accept Goodenowe's evidence and find that he was elected to a one-year term beginning on September 30, 2015.

[41] Goodenowe testified that he understood that, after the expiry of his term, he would no longer be a director of the corporations. However, section 101(6) of the *BCA* provides the following:

> **Incumbent directors**
> (6) Notwithstanding subsections (2), (3) and (5), if directors are not elected at a meeting of shareholders the incumbent directors continue in office until their successors are elected.

[12] Appellant's Exhibit RR

[42] As noted by the Director, there is no evidence provided that would suggest that a further shareholder meeting was held at which new directors were appointed.

[43] By virtue of section 101(6) of the *BCA*, Goodenowe remained a Director after the conclusion of his term on September 30, 2016–the expiry of his term does not impact on his status as a director of the corporations.

#### 5.2.2.2 Goodenowe resigned as director at some point before October 31, 2016

[44] The *BCA* provides the following with respect to the resignation of corporate directors:

> **Ceasing to hold office**
> 103(1) A director of a corporation ceases to hold office when:
>
> (a) he dies or resigns;
>
> (b) he is removed in accordance with section 104; or
>
> (c) he becomes disqualified under subsection (1) of section 100.
>
> **Effective date of resignation**
> (2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

[45] I accept, based on the evidence before me, that during the relevant time, Goodenowe continued to be listed as a director of PDI and PLSI in the Corporate Registry (the "Registry"). The Director argues that this is dispositive of the issue.

[46] This argument has been widely considered in Ontario where its *Business Corporation's Act* establishes a rebuttable presumption in favour of the information contained in the Registry:

> **Notice to directors or shareholders**
> 262(3) A director named in the articles or the most recent return or notice filed under the Corporations Information Act, or a predecessor thereof, is presumed for the purposes of this Act

to be a director of the corporation referred to in the articles, return or notice.[13]

[47] This approach is frequently applied in the context of director liability for unpaid wages and under various taxing statutes. An example can be found in *Karl Kenny a Director of Marport C-Tech Ltd.* v *Dennis Derouin*.[14] In considering whether the director had effectively rebutted the presumption in favour of the corporate filings, the Board analyzed various documents and weighed the testimony of witnesses to reach a factual determination whether the resignation had occurred.

[48] The law has been applied in a similar manner, notwithstanding differences in the underlying statutes, in British Columbia as well. In *Holt* v *Director of Employment Standards*,[15] the Tribunal recognized that the presumption created by a corporate record search is rebuttable where there is credible and cogent evidence that those records are inaccurate.

[49] Saskatchewan has a similar provision in section 247(2) of the *BCA*, that also creates a rebuttable presumption in favour of the information contained in the Registry:

> **Notice to directors and shareholders**
> 247(2) A director named in a notice sent by a corporation to the Director under section 101 or 108 and filed by the Director is presumed for the purposes of this Act to be a director of the corporation referred to in the notice.

[50] The provision contained in Alberta's *Business Corporations Act*, which is substantively the same as Saskatchewan's, has also been held to create the rebuttable presumption.[16]

[51] The impact of the presumption was well-summarized in *Mineault v. Oneil Noel*:[17]

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[13] R.S.O. 1990, c. B.16, s. 262 (3).

[14] 2016 CanLII 7043 (ON LRB)

[15] *British Columbia Employment Standards Tribunal*, March 7, 2007

[16] *Bustin (Tele Distribution Corporation)* v *Ahmad*, 2015 CanLII 39415 (ON LRB) at para. 14

[17] 2017 CanLII 14512 (ON LRB) at para. 15

> By establishing a presumption under section 246(2), the Act recognizes that there may be limited circumstances where the information disclosed by corporate filings may be rebutted by evidence that a person is no longer a director despite being listed as a director (including evidence under section 103). In these circumstances, the question of when the director ceased to hold office is a question of fact that must be established by evidence. In the absence of clear evidence that rebuts the presumption, it is inconsistent with the purpose of establishing director liability for a director to retroactively change his or her status by filing a notice long after he or she is no longer a director, and to be entitled to rely only upon that notice to establish that he or she is not a director.

[52] On July 5, 2016, Goodenowe formally resigned as President and CEO. The September 29, 2016, Corporate Profile Report[18] shows Goodenowe was not only a director of PDI, but that he was also its President and CEO. The inclusion of this incorrect information in the Corporate Registry bolsters the position that there should be a rebuttable presumption concerning the information contained in the Registry.

[53] The evidence before me is clear that Goodenowe did not submit a written resignation to the Corporations Branch. He testified that he did not believe this was required because of the expiry of his term and the appointment of the Receiver. The Director reiterated Goodenowe's failure to provide a clear written resignation. I have nonetheless considered whether Goodenowe submitted an effective resignation by another means consistent with his obligations under section 103(2) of the *BCA*.

[54] In *Kasumu* v *Musah*,[19] the Court reviewed a number of cases where an effective resignation was deemed to have been made, notwithstanding a failure to submit a formal written resignation to the corporation:

> [23] Section 256(1) of the ABCA provides that a notice required to be sent to a corporation may be delivered or sent by registered mail to its registered office or a post office box designated as its address for service. Notwithstanding this, there is ample case law dealing with effective notice given by other means, as long as the resignation is in fact sent to or received by the corporation. As one might expect, the cases more often involve a director who is anxious to have her resignation declared effective in order to limit liability rather than a director trying to argue that her own resignation was not effective.
>
> [24] Resignations have been declared effective when sent to the company's trustee in bankruptcy (when no other directors remained; *Hart v. Lefebvre*, 1999 CanLII 14939 (ON SC),

[18]Exhibit D-4

[19]2018 ABQB 242 (CanLII)

> 1999 Carswell Ont 4678 (Ont SC), orally to the other directors (*Perricelli v. R*, 2002 CarswellNat 1346 (TCC)), to the company's president (*Parisien v. R*, 2004 TCC 276 (CanLII)) and to the corporate lawyer (*Price v. R*, 2008 TCC 153 (CanLII); *Chell v. R*, 2013 TCC 29 (CanLII) and *Marra v. R*, 2016 TCC 24 (CanLII)).
>
> [25] Two principles emerge; first, the resignation must be "meaningfully communicated" (*Hart v. Lefebrve*, supra at para. 5) and second, the resignation must be "capable of objective verification" (*Chriss v. R*, 2016 FCA 236 (CanLII), leave to the SCC dismissed).

[55] I have reviewed the cases referred to in the passage above and I agree that a resignation can be submitted in an effective manner, even where a director fails to provide a written notice directly to the corporation.

[56] The decision of Mr. Justice Barrington-Foote in *EMW Industrial Ltd.* v *Good*[20] provides some guidance on this issue.

[57] In *EMW Industrial*, Good was the only shareholder and employee of EMW Industrial Ltd. (EMW), and was a director of EMW Employee Holding Co. ("Employee Co."). His resignation letter basically said that he was resigning from his employment with EMW for a variety of reasons and that he wanted to clear up the issue of his shares as soon as possible. In his decision, Justice Barrington-Foote specifically referenced the fact that Good did not refer to Employee Co. in his letter of resignation, even though he was a director of Employee Co.

[58] In the case at hand, Goodenowe resigned on July 5, 2016, as President and CEO of PDI. His evidence indicates that he no longer had any involvement in the operations of PDI after his resignation. I find this to mean his involvement as a President, CEO and director. His resignation as President and CEO, coupled with not having any involvement in the operations of PDI, indicates that the resignation letter intended to relate to all of his roles and capacities.

[59] In *EMW Industrial*, Mr. Justice Barrington-Foote said:

> [16] On October 6, 2017, Mr. Good sent a "letter of resignation from EMW Industrial, and its subsidiary company or companies", effective October 27, 2017 [resignation letter]. His resignation letter referred to his shares in Employee Co., stating that he had "no clue on this stuff"

[20] 2019 SKQB 47

> and that he wanted to "just to 'rip off the band-aid' and hopefully clear everything up as soon as possible, and move on".
>
> . . .
>
> [41] Turning now to the application of the law to the facts of this case, I will deal first with the allegation that Mr. Good has continuing fiduciary duties as a director of Employee Co., and is breaching those duties. Mr. Good deposed that he intended to resign as a director and shareholder of Employee Co. and said so in his resignation letter. Although his resignation letter does not refer to Employee Co., counsel for the applicants, when asked if Mr. Good resigned, said Mr. Good sent a letter relating to termination as a shareholder and a director. Mr. Good expressly states in his March 27, 2018 affidavit that his resignation letter was intended to relate to "all of his roles and capacities". The respondents did not claim they did not understand he wished to resign Further, there is – other than the evidence he was invited to either a shareholders' or directors' meeting – no evidence the applicants continued to treat him as a director or that he has acted as such since his resignation.

[60] Similar to the situation in *EMW Industrial*, there is no evidence suggesting that the Receiver continued to treat Goodenowe as a director of PDI–or that he was invited to a shareholders' or directors' meeting–after the Receivership Order was issued. I am satisfied that Goodenowe expressed a clear intent to withdraw from all remaining roles in the corporations and that his intention was objectively ascertainable. At the time the employees were terminated, Goodenowe had no role within the corporations. The following considerations have helped me in coming to that conclusion:

a) the Receivership Order gave all control over the operations of PDI to the Receiver and, therefore, Goodenowe did not retain any control over PDI as a director;[21]

b) the errors contained in the Corporate Registry;[22] and

c) Goodenowe's letter of resignation was intended to relate to all of his roles and capacities within PDI as the Receivership Order was in place and he no longer exercised any

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[21] See ss. 91 & 118(4) of the *BCA*, para. 19 of the Director's written submissions & *Swertz*

[22] The error indicating that Goodenowe was still the President and CEO of PDI shows that when the Receiver was appointed, it decided it was no longer necessary to ensure appropriate records were filed in the Corporate Registry. This also calls into question whether a formal letter of resignation by Goodenowe would have been recorded in the Corporate Registry in any event. This is supported by section 91 of the *BCA* which takes the power away from directors until the receiver is discharged.

control.

[61] It is important to note that in *EMW Industrial*, Good stated in paragraph 41 of his Affidavit that his resignation letter was intended to relate to "all of his roles and capacities." Goodenowe did not tender the same kind of evidence. Instead, he testified that he did not make explicit reference to resigning as a director because of the Receivership Order and the expiry of the term.

[62] I refer to a further comment made by the Court in *Swertz* (at paragraph 14) concerning section 103(1)(a) of the *BCA* and the formal resignation requirement:

> The appellant being the shareholder and director of the company can be forgiven for being unaware of the intricacies and niceties of the *Business Corporations Act* in not writing his company (himself) a letter of resignation.

[63] Based on the foregoing, I conclude that Goodnowe did effectively resign from his role as a director on July 5, 2016.

#### 5.2.2.3 Goodenowe's responsibilities and powers as a director were terminated when the corporations were placed into receivership

[64] Goodenowe argues that it would be unjust, and contrary to the purpose of the provisions in the *SEA* to hold him liable for the unpaid wages, as the appointment of the Receiver effectively stripped him of the power to fulfill his obligations under the *Act*. For this proposition, he refers me to *Bull* v *Klaptchuk*.[23] There, the Court affirmed an adjudicator's decision, holding that the appointment of a receiver-manager terminated the director's responsibility to pay outstanding wages. The following passages are particularly relevant here:

> [5] In reaching her conclusion, the adjudicator relied upon the judgment of this Court in Todoshichuk v. Marchenski Lumber Co. Ltd., 1983 CanLII 2335 (SK QB), [1983] 5 W.W.R. 162; (1983), 40 Sask. R. 200, and held that the appointment of the Receiver Manager constituted a change in management of the company which relieved the respondent of liabilities imposed by

[23] 2004 SKQB 274 (CanLII).

> s. 63 of the Act. She found, on the evidence before her, that after the appointment of the Receiver Manager the respondent, even though he continued to manage the day-to-day operations of the company and carried on as its sole director, he did so with very little authority. This was because the orders which stayed proceedings by the Receiver Manager nevertheless empowered it to monitor the ongoing operations to such an extent that it maintained effective control. As a result, she came to the view that the respondent did not have the ability to make the company comply with its obligations to employees including holding monies in trust to cover wages accruing due. Section 56(1.1) of the Act requires this to be done. She stated that there were assets available to pay the employees' claims, but these assets were taken into possession by the Receiver Manager and not paid over. Thus, her final conclusion was that the respondent's responsibility under s. 63 ended on August 14, 2001, when the Receiver Manager seized possession of the assets and took control of the company.
>
> [6] This passage appears at page 16 of the adjudicator's decision:
>
> > After August 14, 2001 Peter Klaptchuk, either in his capacity as management or as a director of Peter's Sewer Service, had no authority to hold any company funds in trust. In the case where a Receiver Manager has seized control of a company and has taken possession of all of the assets of the company and a director has no powers nor control, it is reasonable to impute that the Receiver Manager has taken the assets subject to the statutory trust set out in Section 56(1.1) of the Act. It would therefore seem to be an unjust and inequitable result if a director is removed from any ability to comply with Section 56 yet is held liable personally to pay pursuant to Section 63.

[65] Both Goodenowe and the Director acknowledge that the case was overturned on appeal.[24] Goodenowe argues that the case was overturned on factual grounds. The Court of Appeal concluded that the director did retain the ability to manage the corporation despite the appointment of the receiver. The Director addressed this argument in their written submission as follows:

> [28] In *Bull*, the sole director had applied for and been granted a stay of proceedings under *The Companies' Creditors Arrangement Act* after a creditor initiated receivership proceedings. In considering whether the equivalent of s.2-68 under the former *Labour Standards Act*, the Court of Appeal overturned the Court of Queen's Bench on factual grounds relating to the appropriate date of the employee's termination. Indeed, the Court of Appeal commented at paragraph 9 that the stay order did nothing to limit the liability of the corporate director as might have been possible.
>
> [29] The Court of Appeal was not ruling on whether or not a corporate director's liability vanished upon the appointment of a receiver; rather, they were correcting an insupportable factual determination based on the evidentiary matrix of that particular case.[25]

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[24] *597383 Saskatchewan Ltd.* v *Bull*, 2005 SKCA 54 (CanLII).

[25] Written Submissions on behalf of the Director of Employment Standards.

[66] I concur with the view that the decision of the Court of Appeal was factual in nature and did not answer the question of whether the appointment of a receiver under a different set of facts, could have the effect of terminating the obligations of a director under employment standards legislation.

[67] At paragraph 10, the Court of Appeal in *Bull* stated:

> Here, on the stark facts, what the respondent did was go in, obtain a stay which effectively ended the powers of the receiver manager and resume operation under the supervision of an inspector (also Deloitte Touche) and maintain the employees in continuous employment. He now seeks, in our view, inconsistently, to say that he can take advantage of the stay to exercise his powers as a director, but that he should not be fixed with liabilities therefore despite there being no such limitation in the stays he received from time to time. In our view, this is manifestly impossible.

[68] I have reviewed the February 25, 2016, Receivership Order and I find that the situation in the matter before me is easily distinguishable from that in *Bull*. Here, the Receiver was granted comprehensive and exclusive authority to manage the affairs of PDI and PLSI. I accept the evidence of Goodenowe that, after the appointment of the Receiver, he had no ability to direct the corporation in a way that would protect the interests of the employees. Furthermore, I accept as fact that, after the appointment of the Receiver, Goodenowe ceased acting as a director of the corporations and had no further involvement in the management of the business. This stands in stark contrast to the facts in *Bull*, where the director obtained a stay of proceedings and continued to play an active role in the management of the company.

[69] Goodenowe testified that, at the time the Receiver was appointed, there were sufficient assets to pay the outstanding wages to the remaining employees. It was the clear responsibility of the Receiver to do so. By virtue of the Receivership Order, the Receiver cannot be held liable for the failure to make these payments, but it would not be consistent with the purpose of the provisions of the *SEA* to hold Goodenowe responsible for that failure.

[70] *Swertz* v *MNR*,[26] a decision of the Tax Court of Canada (TCC), addressed the effect of the appointment of a receiver and its impact on the status of a director. Paragraphs 13, 15 and

[26] *Swertz* v. *Minister of National Revenue*, [1990] 1 C.T.C. 2160, 90 D.T.C. 1056.

18 of the decision stated:

> On that date sole and effective control passed to the receiver and the appellant was excluded from any direction or control of the company operations. There was no formal resignation and the Minister relies on the provisions of section 103 of the Business Corporations Act which requires a written resignation be sent to the corporation on the resignation of a director. On the other hand, section 91 of the Business Corporations Act reads as follows:
>
> > 91. If a receiver-manager is appointed by the Court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.
>
> . . .
>
> To all intent and purposes, once the receiver stepped in on August 13, 1989, he had no further opportunity to oversee the operation of the company.
>
> . . .
>
> The decision not to pay Revenue Canada Taxation was the decision of the receiver and the Canadian Imperial Bank of Commerce. When the appellant learned of the failure to make Revenue Canada remittances he was not in a position to affect matters.

[71] The appellant owner of Swertz Bros. Construction Ltd. was assessed pursuant to the provisions of the *Income Tax Act (ITA)* for the failure of the company to remit source deductions to Revenue Canada after the receiver was appointed. At the time the receiver was appointed, the company had sufficient funds in its bank account to cover the amount due for the remittances. The appellant owner argued that he used due diligence but was powerless to do anything after the receiver was appointed. On the other hand, the Minister argued that the appellant was liable for the remittances as a director of the corporation since he had not resigned in writing as required by the *BCA*.

[72] The TCC held that the appellant had exercised due diligence until the receiver was appointed, and that he could not be expected to know of the requirement to resign in writing. Section 91 of the *BCA* was also referred to as it precludes directors from exercising any of their powers after the appointment of a receiver. The TCC found that the appellant was not liable for the failure of the company to remit the employee deductions after the receiver was appointed.

[73] An important distinction to be made between cases involving director liability under the

*ITA* and wage liability cases under the *SEA* is that the *ITA* allows for a defence of due diligence. Subsection 227.1(3) if the *ITA* states:

> A director is not liable for a failure under subsection (1) where he exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

[74] The Director argues that the Receivership Order did not dissolve the Board of Directors, and that Goodnowe must then remain in the role.[27] Although the Receivership Order does not expressly dissolve the Board of Directors, it strips the director of all of his authority to direct the corporations in favor of the Receiver.

[75] As referenced in *Swertz*, section 91 of the *BCA*, coupled with the Receivership Order, would mean that Goodenowe had no further opportunity to oversee the operation of PDI once the Receiver was appointed.

[76] Although it is understood that:

a) the *BCA* does not have an express due diligence defence provision; and

b) case law, such as *Thiele v Hanwel,* has confirmed that there is not a due diligence defence available to directors;

it would be inconsistent with the purpose of director liability under the *SEA* to hold Goodnowe personally responsible for wages when he had no status or authority to impact the corporations.

[77] Goodenowe's evidence shows that at the time of the Interim Receivership Order (December 3, 2015), PDI had sufficient funds to pay all wage obligations. Goodenowe was not involved in the termination of the employees after the date of the Interim and/or final Receivership Order and should therefore not be liable for the unpaid wage obligations of the

[27] Para. 30 of the Director's written submission

Receiver.

[78] Another TCC decision that speaks to the consequences of the appointment of a receiver is *Osborne* v *Minister of National Revenue*, another case in which the appellants had failed to cubmit a written resignation:

> It is clear from the evidence presented that the appellants did not resign as directors of the Company at any time and were therefore directors of the Company at all relevant times unless they ceased to be directors on February 14, 1986 or at the latest on March 3, 1986 as a result of the appointment of the receiver and the actual appearance of the receiver at the situs.[28]

[79] The Court made the following comment at paragraph 16:

> What the learned trial judge meant by that statement, as I see it, was from a time when the directors ceased to be in a position in law and in fact to exercise the powers of a director. In that case he concluded that as of that date, they were stripped of their powers as officers of the Company and they were nothing more than employees under the receiver-manager's direction and were entitled to the benefit of the limitation period under subsection 227.1(4) of the Act.

[80] At paragraph 19, the Court held:

> I find as a fact that the appellants ceased to be directors of the Company as of February 14, 1986 as that was the date the receiver-manager was appointed and indeed according to the evidence I find that the directors had no more power to act after that date.

[81] In addition, I note subsection 118(4) of the *BCA*, which states the following:

> Reliance on statements
> 118(4) A director is not liable under section 113, 114 or 117 if he relies in good faith upon:
>
> (a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
>
> (b) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

[28] [1991] 2 C.T.C. 2756, 91 D.T.C. 1283 at para 14.

[82] Goodenowe was not provided with any documentation in relation to the operation of the corporations after the appointment of the Receiver. This was entirely consistent with his understanding that all matters relating to the corporations, and to the payment of the employees, were to be resolved by the Receiver. I find that Goodenowe should be entitled to rely on the information provided to him which established that sufficient funds were available to satisfy the employment-related obligations and that the Receiver now had the authority and duty to make the necessary payments if and when the Receiver terminated the employment contracts.

[83] I remain aware of the special nature of section 2-68 of the *SEA*, which creates a public policy exception to the general principle that directors are not liable for the debts of the corporation. The purpose of this exception is to ensure that directors do not "authorize or acquiesce in the continued employment of workers when the corporation is not able to pay them."[29]

[84] Consistent with this, I find that Goodenowe resigned as a director of the corporations on July 5, 2016. If I am mistaken in so concluding, I would nonetheless conclude that the February 25, 2016, Receivership Order terminated Goodenowe's obligations pursuant to section 2-68 of the *SEA*. Accordingly, he is not liable for the unpaid wages with respect to any employee terminated after those dates. This includes the four employees terminated on August 25, 2016 and the seven employees terminated on October 31, 2016.

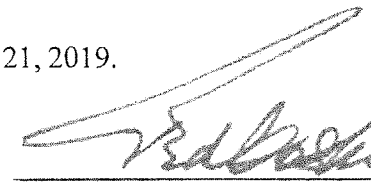
[85] This result is unfortunate for the employees who should have been entitled to collect compensation in relation to the wages owing. It is with regret that I note that the Receiver failed in its obligation to pay the required amounts to the employees upon termination. The Receivership Order clearly grants immunity to the Receiver in connection with any unpaid wage obligations. It is of further concern to me that it appears the other directors of PDI all resigned immediately prior to the termination of the employees at effectively the same time. I am left to infer that they, unlike Goodenowe, were informed that the employees would be dismissed and that they could avoid potential liability by resigning at that time. Finally, I note that

[29] *Supra* note 7.

Goodenowe's resignation was not reflected in the Corporate Registry as it should have been. The Receivership Order may have foreclosed the remedy that would otherwise be available to the employees as against the Receiver. However, it would be inconsistent with the purpose of the *SEA* to hold Goodenowe accountable for the decisions made by the Receiver and the corporations after he ceased to act as a director.

[86] For the reasons above, I allow the Appeal.

Dated at Saskatoon, Saskatchewan, on May 21, 2019.



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