



An appeal

- by -

Xiang Ma
("Ms. Ma")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Shafik Bhalloo

FILE NO.: 2019/52

DATE OF DECISION: August 19, 2019

DECISION

SUBMISSIONS

Xiang Ma on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Xiang Ma (“Ms. Ma”), a Director of C1Stop Canada Inc. (“C1”), has filed an appeal of a section 96 determination that was issued on April 16, 2019 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Ms. Ma was a director of C1, an employer found to have contravened provisions of the *ESA*, at the time wages were earned or should have been paid to Sijia Ma (the “Employee”), and as such, was personally liable under section 96 of the *ESA* for wages in the amount of \$3,741.18 inclusive of interest.
3. In her appeal, Ms. Ma submits that evidence has become available that was not available when the Section 96 Determination was being made. While the Appeal Form shows that she is seeking to have the Section 96 Determination varied, her appeal submissions suggest that she is seeking a cancelation of the Section 96 Determination.
4. In correspondence dated May 30, 2019, the Tribunal notified the Director and the Employee that it had received Ms. Ma’s appeal and was enclosing the same for informational purposes only. The Director and the Employee were also advised that no submissions on the merits of the appeal were being sought from any of them at this time. The Tribunal also requested from the Director to provide a copy of the section 112(5) “record” (the “Record”).
5. On June 11, 2019, the Tribunal received the Record from the Director and forwarded a copy of the same to the Employee and to Ms. Ma. Both were provided an opportunity to object to its completeness by 4:00 p.m. on June 26, 2019, but neither did. Accordingly, the Tribunal accepts the Record as complete.
6. On July 9, 2019, the Tribunal sent correspondence to the parties advising them that a Panel is assigned to decide the appeal.
7. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Section 96 Determination, Ms. Ma’s submissions, and my review of the Record when the Section 96 Determination was being made. If I am satisfied that Ms. Ma’s appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite the Employee and the Director to file reply submissions on the merits of the appeal. Ms. Ma will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

8. The issue of this appeal is whether Ms. Ma has shown any basis for this Tribunal to cancel the Section 96 Determination.

THE FACTS

9. By way of background, C1 operates an immigration consulting service in Richmond, British Columbia.
10. The Employee was employed with C1 as an office administrator from April 9, 2018, to July 25, 2018.
11. After the termination of her employment, the Employee filed a complaint under section 74 of the *ESA* alleging that C1 contravened the *ESA* by failing to pay her regular wages, vacation pay, compensation for length of service, and reimbursement of business costs (the “Complaint”).
12. On December 12, 2018, the delegate of the Director conducted a hearing of the Complaint and issued a determination on April 16, 2019 (the “Corporate Determination”) finding C1 to have contravened the provisions of the *ESA* and the *Employment Standards Regulation* (the “Regulation”).
13. The Corporate Determination ordered C1 to pay the Employee wages and interest totaling \$3,741.18. The Corporate Determination also levied administrative penalties in the amount of \$1,500 under section 29 of the *Regulation* against C1 for contraventions of sections 17 and 18 of the *ESA* and section 46 of the *Regulation*. The total amount of the Corporate Determination is \$5,241.18.
14. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent by registered mail to C1’s registered and records office address on Shell Road, Richmond, British Columbia, and to its two directors, Ms. Ma and Harry Piao (“Mr. Piao”) at the mailing address provided for them in in the B.C. Online Corporate Registry search of C1 conducted by the delegate on October 1, 2018. It should be noted that the registered and records office address for C1 and the mailing address of Mr. Piao remained the same in the subsequent Corporate Registry search of C1 by the delegate on March 7, 2019, but Ms. Ma, at that time, had ceased to be a director of C1.
15. As at the date of this appeal decision, C1 has not appealed the Corporate Determination and the time for filing the appeal expired on May 24, 2019.
16. While Ms. Ma participated at the hearing of the Complaint, it was not on behalf of C1 but on her own behalf to provide evidence regarding her directorship of C1 and to dispute her personal liability for any wages found owing to the Employee in advance of any determination by the director against C1.
17. Since no one represented C1 in the hearing, the delegate feared that C1’s assets would disappear and accordingly, issued the Section 96 Determination against Ms. Ma on the same date as the Corporate Determination.
18. In the Reasons for the Section 96 Determination (the “Reasons”), the delegate of the Director summarizes the evidentiary basis for the Section 96 Determination against Ms. Ma.

19. The delegate notes in the Reasons that, at the hearing of the Complaint, Ms. Ma provided evidence regarding her directorship. She submitted the Incorporation Agreements for C1 and 11156366 B.C. Ltd. and a record of her hours of work for July 2018.
20. The delegate also notes that Ms. Ma stated she had previously worked with Mr. Piao between 2014 and 2016. In early April 2018, according to Ms. Ma, Mr. Piao “begged” and “tricked” her into becoming a director for C1. He told her that he needed her to sign contracts and/or documents as a director because he had a bad reputation. He told her that she would not be liable for anything. As a result, she agreed to become a director, but maintained that she was only an employee of C1.
21. As an employee of C1, she stated she worked as a general manager performing accounting, payroll, administrative work, and human resources responsibilities. She did not approve payroll of C1, but Mr. Piao did. She only assisted Mr. Piao and took direction from him. She was not involved in or contributed to making any strategic decisions relating to C1. She did sign an application on behalf of C1 to open a business account with WeChat.
22. In May 2018, when she did not receive wages, she concluded that Mr. Piao was not reliable. She then had multiple conversations with him to discuss her resignation as a director of C1 but wanted to continue to work as an employee of C1. However, Mr. Piao would get mad and begged her to stay on as a director of C1 because he needed her to sign documents on behalf of C1.
23. Ms. Ma stated that the incorporation documents of C1 listed the Name of Incorporator as 11156366 B.C. Ltd. and showed Mr. Piao as owner of 100% of the shares of 11156366 B.C. Ltd. She stated that she did not own any shares of C1.
24. The delegate also notes that Ms. Ma testified that all employees of C1 were dismissed on July 25, 2018, and that she was a director of C1 until after all the employees were dismissed. She officially resigned as a director of C1 at the end of July 2018.
25. At the hearing, she submitted her text message correspondences dated August 25, 2018, and September 14, 2018, with Mr. Piao. In the August 25 text message, she asks Mr. Piao when he “could finish the process (resignation)” from C1, and in the September 14 text messages she asks, “have you done of (sic) my resignation of (sic) Director?”
26. The Record indicates that on October 1, 2018, the delegate conducted a BC Registry Services online corporate search of C1. The search, with a currency date of September 17, 2018, showed that C1 was incorporated on April 2, 2018, and Ms. Ma was listed as one of two directors of C1 along with Mr. Piao. A subsequent search on March 7, 2019, with a currency dated of January 15, 2019, listed Mr. Piao as the sole director.
27. On November 30, 2018, a Notice of Change of Directors was filed, and Ms. Ma ceased to be a director of C1 as of July 31, 2018. In the result, the delegate states the search confirmed that Ms. Ma was a director of C1 between April 9, 2018, and July 25, 2018, when the Employee’s wages were earned or should have been paid.

28. The delegate also notes that Ms. Ma did not dispute that she was a director when the Employee's wages were earned and should have been paid. While Ms. Ma stated that she discussed her resignation as a director of C1 with Mr. Piao multiple times, she only officially resigned as a director at the end of July 2018.
29. According to the delegate, the crux of Ms. Ma's argument at the hearing was that she should not be held liable for unpaid wages to the Employee because she herself was only an employee of C1 and did not perform any functions, tasks, or duties of a director or exercise authority of a director.
30. In rejecting Ms. Ma's argument that she was not a director of C1 at the material times, the delegate contended that exceptions to the personal liability of a director under section 96(2) of the *ESA* do not include any discretion to relieve a director who is listed in the corporate registry from unpaid wage liabilities based on a functional test of a director. The delegate went on to elaborate as follows:
- Corporate records raise a rebuttable presumption that a person is a director. In other words, the Director of Employment Standards may presumptively rely on those records to establish that a person is a director. While Xiang Ma never acted as a director, her liability under Section 96 as a listed director in the corporate records and the presumption of correctness is not rebutted. (See *Edward McHollister* BC EST # D099/08 and *Lucile M. Pacey* BC EST #D121/04) Therefore, the fact that Xiang Ma never acted as a director does not relieve her of her liability for unpaid wages.
31. The delegate also rejected Ms. Ma's contention that she should not be personally liable for unpaid wages to the Employee because 11156366 B.C. Ltd. was the incorporator of C1 and Mr. Piao owned 100% its shares and she did not personally profit from C1's business. According to the delegate, neither share ownership in nor financial gain from the company's business are relevant considerations in determining liability under section 96 of the *ESA* where one is listed as a director or officer in the corporate records.
32. The delegate also did not find persuasive Ms. Ma's submissions that she was "tricked" by Mr. Piao into becoming a director and promised by him that she would not incur any liability acting as a director of C1. The delegate stated that while Ms. Ma may not have been aware of the implications and responsibilities of a listed director on corporate records, her liability under section 96 is not mitigated because she was "uninformed, misinformed or misled about the potential risks of being named a director (*Dyan Judith Van Dam*, BC EST #D080/04.)". The delegate went on to add:
- This holds true for misrepresentations and even fraudulent conduct by other directors. (See *Edward McHollister* BC EST # D099/08.) I find that Xiang Ma is not relieved of her liability under section 96 of the Act based on misrepresentation or oppressive conduct.
33. Accordingly, the delegate concluded that Ms. Ma was a corporate director of C1 from April 9, 2018, until July 31, 2018, during which wages were earned and owed to the Employee and she is personally liable for up to two months' unpaid wages.
34. Since the Corporate Determination calculated the total amount owing to the Employee as \$3,741.18, far less than the total of the two months' wages of the Employee (who was earning \$3,000 per month plus 4% vacation pay of \$240), the delegate held that Ms. Ma was personally liable to pay the Employee the full amount owing.

35. As for the administrative penalties levied against C1 in the Corporate Determination, the delegate found there was no evidence that Ms. Ma authorized, permitted, or acquiesced in the contraventions of C1 and did not find her responsible for the penalties.

SUBMISSIONS OF MS. MA

36. Ms. Ma contends that evidence has come available that was not available at the time the Section 96 Determination was being made. More particularly, Ms. Ma submits three documents. The first is a document titled “RELEASE AND WAIVER OF LIABILITY CONSENT AGREEMENT” (the “Release and Indemnity Agreement”). The document is purportedly signed by Mr. Piao, Ms. Ma, and a witness, Kenny Lo (“Mr. Lo”). According to Ms. Ma, Mr. Lo was a former work colleague of hers and a friend of Mr. Piao.

37. The Release and Indemnity Agreement provides that Mr. Piao is releasing and indemnifying Ms. Ma from “all liability, claims, demands, losses or damages caused or alleged to be caused in whole or in part by the operation of C1Stop Canada Inc.”.

38. The second document is a letter from Ms. Ma to Mr. Piao with a subject heading “Letter of Resignation” and dated April 3, 2018 (the “April 3 Resignation Letter”). The document is purportedly signed by a witness whose signature has a likeness to Mr. Lo’s purported signature in the Release and Indemnity Agreement. It is also purportedly signed by Mr. Piao. It reads as follows:

I am writing to clarify to you that your decision to name me a Director of C1Stop Canada Inc. is not appropriate as I am a regular employee and do not have any shares or interest of (sic) your company.

I will be performing my regular line of duty regardless of the executive title you have awarded me. Earning my regular wages and hours are still my commitment.

39. The third document is letter from Ms. Ma to Mr. Piao dated May 30, 2018, with a similar subject heading to the April 3 Resignation Letter: “Letter of Resignation” (the “May 30 Resignation Letter”). It is purportedly signed by Mr. Piao and witnessed by Mr. Lo. It reads as follows:

I resign as a director of, together with any other office or appointment held by me with C1STOP CANADA INC (sic)

My resignation is effective immediately. Whereas my Manager duty (sic) shall retain.

40. In her written submission in the appeal, Ms. Ma states that when Mr. Piao asked her to be a director of C1, which he was planning to incorporate in April 2018, she was not interested. However, as a “condition” of her agreement, she states:

[He] agreed the (sic) concept of my letter of resignation and Release and waiver of liability consent agreement that I submitted (sic) him on Apr 3, 2018 to clarify that I was a regular employee and he waived my liability for (sic) director.

May 30, 2018 was the date I handed in my resignation letter to Harry Piao and asked him to process my resignation. ... He held the paper until recently as I need it (sic). This letter verified that I already ceased to be a director on May 30, 2018 and effective immediately. So I was not a director when C1stop Canada Inc (sic) owed Yu Zhang wage (sic) in July, 2018.

...

Overall, I already resigned from the position of director of C1stop Canada Inc. on May 30, 2018 so I should not be personal (sic) liable for wage (sic) of \$2,155.66 owed to Yu Zhang of July, 2018 (sic)

ANALYSIS

41. Section 96 of the *ESA* provides as follows:

Corporate officer's liability for unpaid wages

- 96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
- (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 section 427 of the *Bank Act (Canada)* or to a proceeding under an insolvency Act, ...

42. It is settled law in the Tribunal's decisions that in an appeal of a determination made under section 96 of the *ESA*, the appellant is limited to arguing only those issues that arise under section 96 of the *ESA*, namely:

- Whether the person was a director when the wages were earned or should have been paid;
- Whether the amount of liability imposed is within the limit for which a director may be found personally liable;
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

43. The director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96).

44. It is also settled law in the Tribunal's decisions that corporate records, which the Director can rely on to establish director and officer status, raise a rebuttable presumption that a person is a director/officer. A defence to section 96 liability can be successfully raised if a director/officer can show, on credible and cogent evidence, that the Registrar's records are inaccurate, either because the person resigned or is not properly appointed (see *Wilnofsky*, BC EST # D106/99, and *Michalkovic*, BC EST # D056/00).

45. Mr. Ma relies on the "new evidence" ground of appeal in section 112(1)(c) of the *ESA* arguing that evidence has come available that was not available when the Section 96 Determination was made. The

purported “new evidence” she adduces consists of the following three documents: (1) the Release and Indemnity Agreement; (2) the April 3 Resignation Letter; and (3) the May 30 Resignation Letter.

46. The Tribunal has held that admission of “new evidence” is discretionary (see *Re Merilus Technologies*, BC EST # D171/03). The Tribunal has established the following four-part test for admitting new evidence on appeal:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.

47. It is important to note that the requirements above are conjunctive and not alternative requirements. That is, a party adducing new evidence on appeal must meet all four criteria set out in *Merilus Technologies* above before the Tribunal will admit new evidence (See *Corinex Communications Corp.*, BC EST # D043/09; *Khela Excavating Ltd.*, BC EST # D141/15; *Grand Construction Ltd.*, BC EST # D018/13).

48. Ms. Ma appears to challenge the Director’s finding that she was a director of C1 at the time the Employee’s wages were earned or should have been paid. She has provided evidence in the form of the April 3 Resignation Letter and May 30 Resignation Letter as well as the Release and Indemnity Agreement. I do not find the documents above satisfy all of the criteria in *Merilus Technologies, supra*, for the following reasons.

49. First, none of the documents in question meet the first criterion in *Merilus Technologies*. All of the documents had to exist at the time the Section 96 Determination was made. The April 3 Resignation Letter is dated April 3, 2018, and Ms. Ma’s written submission in the appeal suggest that the Release and Indemnity Agreement was also in existence on April 3, 2018, as she states she submitted both to Mr. Piao on the same date. The May 30 Resignation Letter is dated May 30, 2018, and Ms. Ma states she handed the document to Mr. Piao on the same date. While she states Mr. Piao “held the paper until recently as I need it (sic)”, there is nothing in the submissions indicating when she requested the latter document from Mr. Piao or why the other documents were not produced earlier if she had them in her possession. I am not convinced why all three documents could not, with the exercise of due diligence, have been discovered and presented to the Director during the adjudication of the Complaint and prior to the Corporate Determination or the Section 96 Determination being made. Ms. Ma also fails to shed any light on what, if any, efforts she made to obtain any one or more of these documents if she did not have them in her possession at the time of the hearing or adjudication.

50. Secondly, while some of the documents in question may be said to be relevant or material to the issue of Ms. Ma’s liability under section 96 of the *ESA*, I am not persuaded that the documents and the evidence contained therein can be said to be credible or reasonably capable of belief. While the Section 96 Determination was made at the same time as the Corporate Determination on April 16, 2019, it is

noteworthy that Ms. Ma attended at the hearing of the Complaint to give evidence relating to her directorship of C1. One would think that she would present the documents at the hearing or mention their existence or share their contents when giving her evidence, particularly since she submits that they were created between April 3 and May 30, 2018, inclusive, which is more than seven months before the hearing of the Complaint. Similarly, it is also curious, if the documents existed on the dates indicated in the documents themselves, why Ms. Ma fails to mention them or their contents in her single page, undated written submission contained in the Record (which submission appears to have been presented to the delegate before or at the hearing of the Complaint). I find it more probable than not that Ms. Ma's failure to present the documents to the delegate or make any mention of their existence or their contents, whether in her evidence at the hearing or in the written submissions contained in the Record, is because they did not exist and probably came into existence for the appeal of the Section 96 Determination.

51. Related to the issue of the credibility, or lack of it, of the evidence in the documents in question, it is also curious that Ms. Ma would sign the April 3 Resignation Letter one day after C1 was incorporated and possibly around the same time as providing a written consent to act as a director of C1 as required by the *Business Corporations Act* [SBC 2002] c. 57 (see sections 123 and 124). Adding to the lack of veracity of the evidence in the documents, and particularly the May 30 Resignation Letter, is that Ms. Ma, as indicated by the delegate in the Reasons, "confirmed that she was a director of C1Stop until after all the employees were dismissed" on July 25, 2018. The corporate search by the delegate also indicated that on November 30, 2018, a Notice of Change of Directors was filed, and Ms. Ma ceased to be a director of C1 as of July 31, 2018. In the circumstances, it is more probable than not that Ms. Ma, for the purpose of the appeal, had changed her evidence presented during the hearing of the Complaint. In the result, I find the documents in question are not credible or capable of belief.
52. Lastly, I do not find the documents possess high probative value such that if believed, they could, on their own, or when considered with other evidence, have led the Director to a different conclusion on a material issue - which in this case is whether Ms. Ma was a director of C1 at the time wages of the Employee were earned or should have been paid by C1. In the case of the Release and Indemnity Agreement, if it came into existence on April 3, 2018, (as Ms. Ma submits), it is immaterial to whether Ms. Ma is personally liable under section 96 because the document does not extinguish her personal liability arising under section 96. She cannot contract out of the section 96 liability even if the Employee was a signatory to the agreement as section 4 of the *ESA* would make such an agreement unenforceable. As for the April 3 Resignation Letter and the May 30 Resignation Letter, neither of these are probative, particularly in the face of the evidence of Ms. Ma herself at the hearing that "she was a director of C1Stop until after all of the employees were dismissed" on July 25, 2018, and the Notice of Change of Directors filed on November 30, 2018, showing that Ms. Ma resigned as a director of C1 as of July 31, 2018.
53. The facts also do not show that circumstances described in section 96(2) of the *ESA* would apply to relieve Ms. Ma from personal liability.
54. Lastly, I also find the delegate's legal analysis in the Reasons is correct and persuasive when she states that exceptions to the personal liability of a director under section 96(2) of the *ESA* do not include any discretion to relieve a director who is listed in the corporate registry from unpaid wage liabilities based on a functional test of a director. I also find the delegate is correct in stating that share ownership in or financial gain from the company's business are not relevant considerations in determining liability under section 96 of the *ESA* where one is listed as a director or officer in the corporate records. The delegate is

also correct, and I agree with her, that while Ms. Ma may not have been aware of the implications and responsibilities of a listed director on corporate records, her liability under section 96 is not mitigated because she was uninformed, misinformed or misled about the potential risks of being named a director.

55. In sum, I find no basis for allowing the “new evidence” or interfering with the Section 96 Determination. I find there is no reasonable possibility that this appeal can succeed, and it is dismissed under section 114 (1) (f) of the *ESA*.

ORDER

56. Pursuant to section 115 of *ESA*, I confirm the Section 96 Determination made on April 16, 2019, against Ms. Ma, a former Director of C1, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal