

An appeal

- by -

William Holt, a Director or Officer of
Nobility Environmental Software Systems Inc.

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2006A/140

DATE OF DECISION: March 7, 2007

DECISION

SUBMISSIONS

Gary R. Fraser, Barrister and Solicitor on behalf of William Holt

Victor Lee on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by William Holt pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards ("the Director") issued October 7, 2005. I have allowed Mr. Holt's application for an extension of time in which to file his appeal (BC EST #D123/06)
2. Christopher Clibbon filed a complaint against Nobility Environmental Software Systems Inc. ("N.E.S.S."), alleging that N.E.S.S. had breached the *Act* by failing to pay regular wages.
3. The Director's delegate investigated the complaint, and on November 8, 2004, issued a Determination in which he determined that N.E.S.S. had breached the *Act*. He also determined that Mr. Clibbon was entitled to wages and interest in the total amount of \$18,667.82.
4. Kenneth Strong, a Director of the sole shareholder of N.E.S.S., appealed the Determination. The Tribunal dismissed the appeal on March 18, 2005. (BC EST #D035/05).
5. When N.E.S.S. did not settle the Determination, the delegate issued a Determination against Mr. Holt pursuant to section 96 of the *Act*. The delegate noted that the Determination was sent to N.E.S.S., with copies to the registered and records office, and to Mr. Holt, the Director and Officer of N.E.S.S. The delegate found that Mr. Clibbon's wages were earned between October 15, 2002 and April 9, 2003, and that Mr. Holt was a Director or Officer of N.E.S.S. during that time.
6. The delegate determined that Mr. Holt was personally liable for two month's unpaid wages in the total amount of \$11,786.67, plus interest.
7. Mr. Holt contends that the delegate erred in law in finding that he was a director or officer of Nobility at the material time.
8. Section 36 of the *Administrative Tribunals Act ("ATA")*, which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

9. Whether the delegate erred in finding that Mr. Holt was a director or officer of N.E.S.S. at the time Mr. Clibbon's wages were earned, and thus liable for those wages under section 96 of the *Act*.

FACTS AND ARGUMENT

10. Counsel for Mr. Holt contends that the delegate erred in relying solely on October 26, 2004 B.C. OnLine corporate search results. He says that the corporate search indicates that, as of October 5, 2004, no officer information was filed as of November 21, 2001. Mr. Fraser argues that there was no evidence on which the delegate could conclude Mr. Holt was an officer of Nobility at any time.
11. Mr. Holt's counsel also contends that the evidence discloses that Mr. Holt resigned as a director from N.E.S.S. on July 19, 2001. He submits that the evidence is that Mr. Holt's resignation, although filed in N.E.S.S.'s minute book by its administration officer, Monique Cornish, was never forwarded to the Registrar of Companies because of her understanding that it would not be accepted and because N.E.S.S. had insufficient funds to engage a lawyer to obtain legal advice on how she was to deal with the issue. Ms. Cornish filed an affidavit in support of Mr. Holt's appeal declaring that she had been unable to locate the minute book.
12. Counsel for Mr. Holt further submits that the evidence is that Ms. Cornish sent Mr. Holt a letter on October 18, 2002 in which she asked him to sign an annual report and Notice of Director's forms. The evidence indicates that Mr. Holt did so and returned them to Ms. Cornish, but she does not recall what she did with those forms.
13. Counsel for Mr. Holt argues that while corporate records, available primarily through the Registrar of Companies, raise a rebuttable presumption that a person is a director or officer, it is open to the director or officer to prove on a balance of probabilities that the records are inaccurate (*Re British Columbia (Director of Employment Standards)*, BC EST #RD 047/01). He further contends that both Mr. Holt and Ms. Cornish have provided sworn statements that Mr. Holt resigned as a corporate director on July 19, 2001.
14. Counsel further relies on section 130(2) of the *Company Act* which provides that every resignation of a director becomes effective at the time a written resignation is delivered to the registered office of the company or at the time specified in the resignation, whichever is the later. He also relies on the Tribunal's decision in *Re Newcom Concepts Corp.* (BC EST #D062/02) for the proposition that delivery of a written letter of resignation to record's office of the company constitutes effective resignation. He submits that a company's failure to file the resignation with the Registrar of Companies does not invalidate the resignation.
15. Consequently, counsel for Mr. Holt contends that there is no evidence Mr. Holt was an officer or director of N.E.S.S. at the time Mr. Clibbon's wages were earned, and that the Determination should be cancelled.
16. The Director's delegate argues that the fact that Mr. Holt was not an officer of N.E.S.S. does not relieve him of liability as a director of the company.
17. The delegate submits that the *Business Corporation Act* provides that a company must have at least one director, and that Mr. Holt was the last remaining director of N.E.S.S. He submits that Mr. Holt's

resignation was therefore, “null and void”. He submits that any such resignation, even if it had been forwarded on to the B.C. Corporate Directory for registration, would have been refused as it would have left the company without any directors.

18. Further, the delegate submits that although Mr. Holt replied to Ministry letters in 2003 and 2004, he did not provide the Ministry with any change of address or telephone number at which he could be contacted.
19. The delegate submits that Mr. Holt remains a director of the company until the dissolution of the corporation, and is therefore personally liable under section 96.
20. In reply, counsel for Mr. Holt submits that the relevant law to apply to the facts of this case is the *Company Act* as the *Business Corporations Act* did not come into force until March 2004, approximately three years after Mr. Holt submitted his letter of resignation. He argues that there is nothing in the *Company Act* that provides that a director’s resignation is not effective if the director is the only director of the company.

ANALYSIS

21. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
22. The purposes of the *Act* are:
 - (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
 - (b) to promote the fair treatment of employees and employers;
 - (c) to encourage open communication between employers and employees;
 - (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
 - (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
 - (f) to contribute in assisting employees to meet work and family responsibilities. (s. 2)
23. One of the mechanisms established under the *Act* to meet these objectives, and in particular, the objective that employees receive basic standards of compensation, is set out in Part Eleven (Enforcement). Section 96 protects employees against insolvent employers through making directors and officers of a corporate entity jointly and severally liable for up to two months’ unpaid wages for each employee of the corporation, unless the corporation is in bankruptcy.

24. The Tribunal has followed the decision of the Supreme Court of Canada *Re Rizzo & Rizzo Shoes* [1998], 1 S.C.R., and *Machtinger v. HOJ Industries Ltd.* [1992], 1 S.C.R. 986) in finding that the *Employment Standards Act* is benefits conferring legislation, and as such, must be construed in a broad, generous and purposive manner, with any doubt arising from statutory construction to be resolved in favor of claimants. Any provisions that adversely impacts on benefits conferred must be narrowly construed. In other words, the Tribunal prefers an interpretation which encourages employers to comply with the minimum requirements of the *Act* and so extends its protection to as many employees as possible, over the one that does not.
25. In *Archibald* (BC EST #D090/00) the Tribunal held that, notwithstanding the interpretive principles enunciated in *Rizzo* and *Machtinger*, 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, and therefore, these provisions must be narrowly construed.
26. The Tribunal has held that corporate records raise a rebuttable presumption that a person is a director. A defence to section 96 liability can be successfully raised if a director can show, on credible and cogent evidence, that the Registrar's records are inaccurate, either because the person resigned or is not properly appointed, or the documents were not properly processed: (*Wilinofsy* (BC EST #D 106/99) and *Michalkovic* (BC EST #D047/01)
27. In *Michalkovic* the Tribunal held that it would be a rare and exceptional circumstance where a person recorded as a Director with the Registrar would not be found to be a director for the purposes of section 96.
28. The *Company Act* (R.S.B.C. 1996, c. 62) ("CA") was repealed and replaced by the *Business Corporations Act* (S.B.C. 2002, c. 57) ("BCA") in March, 2004. However, for the purposes of this decision it is not necessary that I decide which *Act* applies to the facts, since the relevant provisions of both are essentially the same.
29. Section 51 of the *BCA* and section 333 of the *CA* provide that a company must annually, within 2 months after each anniversary of the date on which the company was recognized, file with the registrar an annual report in the form established by the registrar containing information that is current to the most recent anniversary. Both *Acts* also provide that a company have at least one director. (*BCA* s. 120, *CA*, s. 108)
30. The October 26, 2004 Corporate Search shows Mr. Holt as Nobility's sole Director. That information was effective as of November 24, 2001, the date of the last annual report filed. This information demonstrates that, even though Mr. Holt purportedly resigned on July 19, 2001, a company representative nevertheless filed an annual report that indicated he continued to be a director.
31. Mr. Holt has not demonstrated the Corporate search results to be wrong. He has not demonstrated that the alleged resignation was recorded in the company's corporate record book, or that his purported resignation would have been legally effective.
32. Furthermore, there is no evidence Mr. Holt ceased to act as a Director or Officer (see *Penner and Hauff*, BC EST #D371/96). Given that Mr. Clibbon performed work for Nobility until April 9, 2003, it is clear that the company was a going concern until that time. If Mr. Holt was not a Director at that time, it raises the question as to who the directing mind of the company was. Mr. Holt does not address that issue other than to deny that he had anything to do with the company after July 19, 2001.

33. I am not persuaded that Mr. Holt has provided cogent and compelling evidence to demonstrate that he was no longer a Director at the time Mr. Clibbon's wages were earned, and I dismiss the appeal.

ORDER

34. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated August 12, 2005, be confirmed in the amount of \$3,916.43, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

William Holt, a Director or Officer of
Nobility Environmental Software Systems Inc.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2006A/140

DATE OF CORRIGENDUM: March 12, 2007

CORRIGENDUM

I issued Decision # D022/07 on March 7, 2007. In that Decision there was an error in the Order on page 6.

The corrected Order is as follows:

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated October 7, 2005 be confirmed in the amount of \$11,786.67, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal