

**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

- by -

Laurent Michalkovic  
(" Michalkovic ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 1999/575

**DATE OF HEARING:** January 24, 2000

**DATE OF DECISION:** February 4, 2000

**DECISION**

**APPEARANCES:**

Laurent Michalkovic	on his own behalf
No appearance	on behalf of Stuart Sellers
No appearance	on behalf of Stephen Smith
No appearance Standards	on behalf of the Director of Employment

**OVERVIEW**

This is an appeal brought by Laurent Michalkovic (“Michalkovic”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 31st, 1999 under file number ER 096-154 (the “Determination”).

On August 30th, 1999, a determination was issued against Softwex International Ltd. (“Softwex”), in the amount of \$4,494.22, reflecting compensation for length of service (see section 63 of the *Act*) payable to two former Softwex employees, Stuart Sellers and Stephen Smith. In the Determination now under appeal, the Director’s delegate held that Michalkovic was a director of Softwex International Ltd. and, pursuant to the provisions of section 96 of the *Act*, was therefore liable for the compensation for length of service payable to Messrs. Sellers and Smith.

Michalkovic’s appeal was heard at the Tribunal’s offices in Vancouver on January 24th, 2000. Although Michalkovic appeared and testified on his own behalf, somewhat surprisingly, the delegate chose not to appear at the hearing. Similarly, neither complainant employee appeared at the appeal hearing.

**ISSUE TO BE DECIDED**

Michalkovic’s position is that he was *never* a director of Softwex although he admits he was listed as an officer of the company.

**DETERMINATION**

Section 96 of the *Act* provides, subject to certain exceptions, that a corporate director or officer may be held liable for up to 2 months’ unpaid wages for each employee of the corporation.

Monies payable as compensation for length of service are considered to be “wages” as defined in section 1 of the *Act*.

The Determination is rather unclear as to whether or not Michalkovic is alleged to have been an officer or a director (or both) of Softwex. The Determination is in the form of a letter addressed to Michalkovic which contains the following reference at the outset:

**Re: Director of Employment Standards**  
**-Vs-**  
**Laurent Michalkovic, a Director or Officer of Softwex International Ltd.**  
**Amount Owing: \$4,494.92**

On the first page in the Determination, in the body of the letter, the delegate asserts that “You [*i.e.*, Michalkovic] are a Director of Softwex International Ltd. (a copy of Company Search attached).” The Determination then continues: “Based on the evidence from [Softwex C.E.O.], you were a Director or Officer of this company at the time these wages were earned or should have been paid.” At the top of page 2 of the Determination, the delegate states that a “BC OnLine” corporate search shows “Laurent Michalkovic was listed as a Director/Officer” and continues “Laurent Michalkovic was a Director/Officer of Softwex International Ltd. and was so appointed at the time the wages were earned and became payable.” Finally, the Determination states:

**Determination**

You are Director of Softwex International Ltd. and personally responsible for full amount payable. [sic]

**FINDINGS**

As noted above, the Determination does not clearly indicate whether the Director is proceeding against Michalkovic as a Softwex director or as an officer. In my view, section 96 determinations ought to unequivocally indicate whether the person is alleged to have been an officer or director or both. One could certainly make a good argument that the Determination only claims against Michalkovic as a Softwex director in which case the Determination must be cancelled since Michalkovic was not a Softwex director. In any event, regardless of whether the Director is proceeding against Michalkovic as a Softwex director or a Softwex officer, the Determination, in my opinion, cannot stand.

As noted above, the Director’s delegate relied on a “BC OnLine” corporate search, undertaken on August 16th, 1999, as evidence of Michalkovic’s status as a Softwex director and officer. However, that search specifically indicates that Michalkovic is *not* a Softwex director; rather, the search states that Michalkovic is a Softwex officer, namely, the “Vice-President, Technology”. There is *no evidence* before me--recall that neither the Director’s delegate nor the complainants testified before me--that would suggest Michalkovic performed the *functions* (see *Penner and Hauff*, B.C.E.S.T. Decision No. 371/96) of a Softwex director during the material time frame.

As for the claim that Michalkovic was a Softwex officer at the material time, although the corporate search shows that Michalkovic was a Softwex officer when at least one of the two complainants' claims for compensation for length of service crystallized (in late February 1999), Michalkovic asserts that he never was a "real" officer of Softwex.

The uncontradicted evidence before me shows that Michalkovic did not have any of usual authorities or powers associated with a corporate officer--he did not have signing authority nor any authority to hire or fire personnel; his main task with the company was to provide software programming expertise. Michalkovic did not report to Softwex's president but, rather, to another Softwex officer. In effect, his "officer" title was merely that--a title that the company bestowed upon him in an effort to improve Michalkovic's "status" with Softwex customers. Prior to being made a "vice-president" in February 1998, Michalkovic held the title "project manager" or "technical manager"; Michalkovic's job duties did not change in any fashion in February 1998 when the vice-president title was given to him. Indeed, his responsibilities were lessened since fewer company employees reported to Michalkovic after February 1998 (now 2) than had formerly been the case. It might also be noted that Michalkovic's monthly salary was a mere \$250 more than that of one of the two complainants.

Finally, Michalkovic's termination letter, dated February 26th, 1999, refers to the necessity of "laying-off" some Softwex "staff" including Michalkovic. This termination letter refers to Michalkovic being terminated from his "position", not from his "office". Under the *Company Act*, directors are elected by shareholders and, in turn, officers are appointed by directors. If, in fact, Michalkovic was a Softwex officer, he could only have been removed by a director's resolution--that, of course, was not the situation here; Michalkovic was simply terminated, as were other employees, on the basis of a decision taken by Softwex's president.

As this Tribunal has previously noted, corporate searches only raise a *rebuttable presumption* regarding an individual's status (see *Wilnofsky*, B.C.E.S.T. Decision No. 106/99). Further, one may be considered to be an officer or a director even if not so named in corporate records (see *Penner and Hauff*, B.C.E.S.T. Decision No. 371/96) and logic would suggest that the opposite result may also hold.

In my view, this Determination must be cancelled because, first, it is predicated on the demonstrably false assertion that Michalkovic was a Softwex director. Second, even if it could be said that the Determination was issued on the alternative basis that Michalkovic was a Softwex officer (and I have some very real concerns about that point), the uncontradicted evidence before me clearly shows that Michalkovic's duties in the organization were not those that might ordinarily be ascribed to a corporate officer.

The term "officer" is not defined in the *Act*. A company must have at least two "officers", namely, a president and a secretary "and other officers as are provided for by the memorandum, the articles or by resolution of the directors" [see *Company Act*, s. 133(1)]. Michalkovic was neither the president nor the secretary of Softwex and there is no evidence before me that Softwex's articles of association required that the company have a "Vice-President--Technology". There is no evidence before me that Michalkovic was appointed a vice-president

by way of a resolution passed by Softwex's board of directors. In section 1 of the *Company Act* "senior officers" are defined as including vice-presidents, however, the language of the statutory definition appears to suggest that only individuals who exercise some significant authority regarding the company's direction and control fall within its ambit.

As for the quantum of the Determination, even if Michalkovic was a Softwex officer, and assuming the Determination was properly issued against him on that basis, Michalkovic's employment with Softwex ended prior to that of the complainant, Stuart Sellers. Accordingly, the Determination cannot stand insofar as Michalkovic is held liable for termination pay owing to Sellers since Michalkovic was no longer a Softwex officer when Sellers' claim for compensation for length of service crystallized.

It should be noted that Michalkovic voluntarily made a \$1,000 payment to the Director on account of his liability as set out in the Determination and thus, at best, would now only have a further liability for the balance of Stephen Smith's unpaid wages claim (something less than \$300 including interest).

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

I do not conceive that I have any authority with respect to the \$1,000 sum that was previously paid by Michalkovic and which, I understand, is currently being held in trust by the Director. However, given my decision to cancel the very Determination pursuant to which the payment was made, it would follow that those monies ought to be returned to Michalkovic.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**