

An appeal

- by -

Stephen E. Gates,
a Director or Officer of Ezebiz Software (Canada) 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

ADJUDICATOR: John M. Orr

FILE No.: 2000/748

DATE OF HEARING: December 10, 2001

DATE OF DECISION: February 4, 2002

DECISION

APPEARANCES:

Stephen E. Gates	On his own behalf
Michelle Alman	Counsel for the Director of Employment Standards
Michael Taylor	Delegate of the Director of Employment Standards
Marcus Fedoruk and Sandy Smith;	Each on their own behalf

OVERVIEW

This is an appeal by Stephen E. Gates (“Gates”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination dated October 6, 2000 by the Director of Employment Standards (the “Director”). The Determination is made against Stephen Gates personally as if he were a director or officer of Ezebiz Software (Canada) Inc. (“Canada Inc.” or “the Company”). The Company had failed to pay wages to a number of employees for some months prior to going out of business and the personal Determination is in the amount of \$19,659.07. Gates submits that his registration as a director was invalid and that he never acted as a director or an officer of the company and had no actual control over the Company.

FACTS

The Company was an example of the “high-tech” phenomenon of the 1990s when computer software would be developed by companies that would go public and in many cases make significant earnings for the developers. In many cases employees would share in the risk by accepting stock options in place of wages or bonuses. “Canada Inc.” was one of several companies incorporated by Dennis Bristow (“Bristow”) during the development of a business software programme known as “Ezebiz”. The companies were set-up separately, including one in the United States, for separate functions but ultimately all for the same purpose. Gates worked with Bristow from the early development days until the Company ceased operations in July 2000.

The unrefuted evidence before me was that Dennis Bristow was the driving force of the business plans to develop the software and to take it public. He controlled all aspects of the business operations and made all final decisions down to the smallest details. There is no doubt that Bristow was the operating mind of the several companies that were set up to develop the software, market it, and take it public.

Gates was employed by Bristow and had various roles and titles associated with the different companies. Bristow was inclined to give grandiose titles to various positions in the business but

all of the evidence points to the fact that Gates was the senior management person reporting directly to Bristow. Gates held shares in at least one of the companies but not in Canada Inc.

Sadly, Dennis Bristow died subsequent to the determinations but prior to these matters being resolved. His evidence could have been most helpful in addressing the issues in this case.

In the spring of 2000 two significant events occurred. Firstly, the Company was having financial difficulties. Income was not derived from sales of the product and was dependent upon new investment. Perhaps some of the shine had gone off software development companies but at any rate new investment was slow. Secondly, Bristow was required to give up his directorships by a ruling of the British Columbia Securities Commission. Documents had to be filed to show his resignation and the appointment of new directors for the Company.

On March 15 2000 Gates signed a "Consent to Act As a Director" of Canada Inc. The consent contains a proviso as follows:

"This consent is hereby given subject to the Company securing Directors and Officers Liability Insurance for (*sic*) a reputable insurer and within one month from the date of my appointment to the Board of Directors."

On May 15 2000 a Notice of Directors was filed with the Registrar of Companies indicating that Dennis Bristow had ceased to be a director on March 15th 2000. The filing indicated that Stephen Gates had been appointed as a director on March 15th 2000.

The personal liability of a director is for two months wages and in this case the relevant time period involves the months of May, June, and July 2000. The Director issued a Determination associating the various companies but in this appeal the Determination is only in relation to Gates's involvement with "Canada Inc.". While Gates held shares, and may have been an officer and director, in one or more of the associated companies it was not argued before me that his directorship of an associated company created a personal liability in relation to "Canada Inc." See: *Icon Laser Eye Centers Inc.*, BCEST #D649/01.

The Director issued a Determination against Canada Inc. on October 6, 2000 in relation to unpaid wages for a number of employees including those who appeared at the hearing. The corporate Determination was initially appealed but that appeal was withdrawn during the course of efforts to settle the outstanding claims against the company and the associated companies.

This matter has been significantly delayed due to efforts to sell off the assets of the Company in order to meet the liability to the employees. The Director also issued a Determination against Gates that as a director or officer of Canada Inc. he was personally liable for up to two months unpaid wages for each employee. The amount personally owing under the director's Determination is \$19,659.07 plus accrued interest.

There is no dispute that Gates was registered as a director of the Company at the time the wages were earned or should have been paid although he did formally file a resignation on June 21,

2000. There were no corporate records presented to indicate that he was an officer of the corporation. The Director's delegate refers throughout the determination to director and officer but does not clearly distinguish between these two positions.

Gates maintains that his consent to becoming a director of Canada Inc. was conditional upon the acquisition of director's liability insurance within one month of the effective date of his becoming a director. Gates submits that he was not a registered director because no liability insurance had been obtained within the month set out in the proviso to his consent. He submits that while he may have been temporarily or technically a director for a month from March 15th to April 15th he ceased to be a director thereafter when the Company was unable to fulfil the condition of his consent.

Gates further claims that he never acted as an officer of the corporation and that he did not fulfil the functions of a director. He says that he never attended any meeting at which he was elected as a director and never attended any board meetings. He never participated in any elections for officers of the company and never saw or signed any board minutes. He says he had no financial authority and that he was an employee who also was unpaid by some \$25,000.00 when the business closed.

Gates testified that all significant decisions were made by Bristow. This was confirmed by the company bookkeeper who testified that Bristow made all payroll decisions in regard to the issuing or holding of cheques. She testified that even after Bristow was required to resign as a director he continued to make all management and operational decisions. In her view nothing changed in the operations of the business. She confirmed that Gates had cheque-signing authority but only signed cheques that had been pre-approved for payment by Bristow. She understood that Gates had a title of president of one of the companies but she did not know which one.

Marcus Fedoruk testified that he believed that Gates was a director or officer of the Company because he received directions from Gates and observed him direct staff in all positions. He believed that Gates had full responsibility for product development and release dates etc. He understood that Gates held himself out as speaking for the company and chaired staff meetings. Ms Smith stated that she had seen Gates chair staff meetings and it didn't make sense that Gates wasn't part of senior management.

Stuart Bristow, the son of Dennis Bristow, worked for the Company as Director of Development. He testified that Gates managed much of the day-to-day operations and helped with the business analysis for development of the program. He confirmed that no one could make final decisions except Dennis Bristow. He said that Dennis Bristow controlled all the financial affairs of the Company. He might take suggestions or advice from Gates but would make all the decisions himself.

Ms. Deborah McIntyre testified that she was Director of Graphics and Design for the Company. She said that she sat on the 'executive committee'. She described the executive committee as a group of management people that met in 1998 and 1999 but after that it dissolved as Dennis

Bristow essentially made all the decisions. She said that titles were given out to everybody. They were basically just job titles and not representative of any actual corporate position. She said that Gates was never in a position of ‘control’ within the company. Dennis Bristow controlled everything.

The Director submitted that Gates acted as a director or officer of the Company. The Director points to inconsistency in the statements of some of the witnesses called on Gates’s behalf. There was evidence that Gates acted as if he were in charge and was in effect the Chief Operating Officer.

There was employee evidence that Gates was second in command. He signed his name as General Manager and signed payroll cheques. He participated in interviewing new employees. He sat in on management meetings. It is submitted that Gates was one of the controlling minds of the Company.

ISSUE

The issue in this case is whether Stephen Gates was an officer or director of Canada Inc. and therefore personally liable for unpaid wages. This includes the issue in regard to the effect, if any, of a “conditional consent” to act as a director. If the registration was invalid the issue arises whether he performed the functions of a director or officer.

ANALYSIS

Section 96 of the *Act* provides in part:

96. (1) a person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to two months unpaid wages for each employee.

The *Company Act* of British Columbia in section 1 defines director as follows:

“**director**” includes every person, by whatever name designated, who performs functions of a director.

It should be noted that this functional definition does not apply to “**officers**” of the corporation. Neither the *Company Act* nor the *Interpretation Act* contains any definition of officer. Officers get their titles, functions and authority from the corporation itself and from its articles: *Henfrey Samson Belair Ltd. v. A.G.B.C.* (1984) 55 B.C.L.R. 241 (S.C.). It has been noted that the *Company Act* does provide a definition of “**senior officer**” that includes a functional test but in my opinion that simply emphasises that the functional test does not apply to other officers. There was no evidence to satisfy me that Gates was a senior officer of the Company. No payroll records were produced to satisfy me that he was one of the five highest paid employees. I conclude as a finding of fact that he was not a “senior officer” and thereby an officer for the

purposes of section 96. Even if I am wrong I would find that this definition was not intended to apply to Section 96 of the *Employment Standards Act* or it would have been incorporated specifically. To make the top 5 paid employees officers would be ridiculous in most small businesses and could not have been the intent of the *Act*.

There was no substantial evidence led before me of the articles of Canada Inc. and the titles, functions or authority of any officers of the Company. The Company records books were not produced. There is no evidence that Gates was actually appointed or elected as an officer of the corporation.

It appears that often the two distinct functions are merged into one overall finding of being a “director or officer” of the company. However there is often no clear analysis of the basis upon which the determination is made. It is also true that some of the Tribunal’s decisions treat the two positions collectively. However in my opinion they are quite distinct and should be analysed as such. In this case there is no evidence to conclude that Gates was an “officer” of the Company. I conclude that he was not an officer. The balance of this decision will therefore assume that the determination was based upon Gates being a “director” of the Company.

It is not always self-evident who is a director of a company. In the reconsideration decision *Re: Director of Employment Standards - (Michalkovic)*, BCEST #RD047/01 the Tribunal analysed the issues surrounding director status and summarised their findings as follows:

In our view, in summary, the case law reviewed here and in *Wilnofsky* (BCEST #D106/99) stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are inaccurate, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be the circumstances where it would be inappropriate to find a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

In relation to item no.4 above, I note what was stated on behalf of the Tribunal in *Archibald* (B.C.E.S.T. Decision No. D090/00):

Both our Court of Appeal and the Supreme Court of Canada have repeatedly stressed that employment standards legislation, being “benefits-conferring” legislation, should be interpreted in a “broad and generous manner” [*cf. e.g., Helping Hands Agency Ltd. v. B.C.* (1995), 131 D.L.R. (4th) 336 (BCCA); *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27]. On the other hand, our Court of Appeal and the Supreme Court of Canada have both recognized that the imposition of a personal unpaid wage liability on corporate officers and directors is an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts. Accordingly, while the *Act* as a whole is to be interpreted in a broad and generous fashion, the provisions imposing a personal liability on corporate directors and officers should be narrowly construed [see *e.g., Barrette v. Crabtree Estate, supra.*; *Re Westar Mining, supra.*; *Jonah v. Quinte Transport (1986) Ltd.* (1994), 50 A.C.W.S. (3d) 435 (Ont. S.C.)].

As noted previously, it is not disputed that Gates became registered as a director of Canada Inc. and was so registered during the time that the wages were earned. This is true at least up until his formal resignation dated June 21, 2000. Accordingly there is a rebuttable presumption that he was in fact a director up until that time

The analysis therefore must be a twofold process. Firstly, it is open to Gates to prove on the balance of probabilities that the Company records are inaccurate or invalid. Secondly, even if he were not a registered director, did he perform the functions of a director and thereby bring himself within the definition.

Gates submits that the registration was completed without consent. He agrees that he signed the consent on March 15th 2000 but he said that he only agreed to take the position if liability insurance was obtained. He states that his conditional consent was only valid for one month and that when the company was unable to acquire liability insurance within that time his consent was no longer valid. His consent would have expired on April 15th. The registration was filed on May 15th.

I listened carefully to the evidence presented by Steven Gates and the other witnesses. It seems clear to me that the corporate record keeping was inadequate and to say the least "sloppy". All of the evidence in this case pointed to the fact that Dennis Bristow was the operating mind of all of the various corporations even after he was required to give up his directorship. I find it quite credible that Gates was persuaded by Bristow to put his name forward as a director because of the difficulties with the Securities Commission. However, Gates was knowledgeable enough to understand the possible risks and would only consent to taking-on the position if there were liability insurance in place. So the issue turns on the effect of a conditional consent.

The Director submits that the *Company Act* does not allow for a conditional consent and that therefore the consent remained valid and no further knowledge or consent was required prior to the filing with the registrar.

The *Company Act* provides as follows:

Conditions of election or appointment of director

112. (1) no election or appointment of a person as a director is valid unless
- (a) the person consented to act as a director in writing before the election or appointment, or
 - (b) if elected or appointed at a meeting, the person was present and did not refuse at the meeting to act as a director
- (2) a consent in writing given under subsection (1)(a) is only effective until the next following annual election or appointment of directors unless the consent states it is effective until
- (a) revoked, or
 - (b) a date or time stated in it.

I accept the evidence that Gates was not elected or appointed at a meeting where he might have had the opportunity to refuse the appointment. Therefore his election or appointment is not valid unless he consented to act in writing before the appointment. In my opinion subsection 2 does contemplate that consent may have some restrictions placed upon it. The consent may be limited by date or time stated in it. In this case the consent was only valid for one month unless the company acquired liability insurance. In my opinion the consent was time limited and was only effective for one month unless the condition was fulfilled.

I note that section 115 also contemplates that the appointment of a director may be conditional. That section refers to a share qualification that may be required to be a director and provides that the directorship is vacated if the qualification is not met within two months or the time set by the articles. I only raise this to corroborate the notion that a directorship may depend upon the completion of certain conditions.

I conclude that Gates only consented to being appointed as a director of Canada Inc. if the company were able to acquire directors' liability insurance. His consent was only valid for one month if the insurance was not obtained. The insurance coverage was not obtained. After that one month the consent was no longer valid and therefore his appointment as a director was not valid either.

I am satisfied that Gates has met the onus of establishing on the balance of probabilities that the Company records are inaccurate. I am satisfied that he has met the onus of establishing that he was not, or should not have been, a registered director of the Company.

The second part of the analysis then turns on whether Gates performed the functions of a director. The tribunal has certainly held that a person who was not registered as a director or officer could in fact be found liable under section 96 where the person was a *de facto* director.

As stated in *Michalkovic* (supra)

It is clear, on the Tribunal's case law, that the person may be a director or officer without being recorded as such in the company's records (see, for example, *Gordon*, BCEST #D537/97; *Penner and Hauf*, above (BCEST #D371/96); *Okrainetz*, BCEST #D354/97. In the cases mentioned, the Tribunal applied a functional test and considered whether or not the person in question exercised the functions, duties or tasks that a corporate director or officer would, in the usual course of events, would (*sic*) exercise.

While the onus is on a registered director to rebut the presumption that he was in fact a director of the Company once that presumption is rebutted the onus is on the complainant, or the Director, to establish that the alleged director actually performed the functions of a director.

The allegations made to establish that Gates was a director of the Company are that he was in charge of most of the day-to-day operations of the business including giving directions to other employees, interviewing new staff, helping with business plans, and chairing staff meetings. He was perceived as senior management, second in command. He attended management meetings. He held various titles indicating his senior position. He was one of three people with signing authority at the bank. He signed some payroll cheques.

In my opinion these activities are not sufficient to conclude that Gates performed the functions of a director of the Company. The activities described could have been performed by any management employee.

As stated by the Tribunal in the reconsideration decision *Re: Folino* BCEST #D102/99:

The point is that mere involvement in the day-to-day operations of a business does not mean that a person is "performing the functions of a director". A bookkeeper who is given bank signing authority does not thereby become a director. A guarantor of a loan for the company does not thereby become a director. A business partner does not *per se* become a director of the company. A shareholder is not necessarily a director. A manager does not necessarily become a director (although he may owe the same fiduciary duty to the company as a director). The C.E.O. of a company, while certainly having the same fiduciary duty as a director is not a *de facto* director unless also involved in the affairs of the company. It is a question of control of both the business and affairs of the Company that are the distinguishing characteristics of a director.

In this case there is no evidence that Gates exercised any control over the "affairs" of the Company. In fact there is evidence to the contrary. Every witness who gave evidence on the point confirmed that Dennis Bristow was totally in control and made all of the significant decisions. There was no evidence of Board meetings for the Company. There was no evidence that Gates participated in the election of officers, signed minutes, or approved resolutions. There

is no evidence before me that Gates participated in setting share prices, appointment of auditors or appointing signing officers.

Gates may very well have been an officer and director of one or more of the associated companies but his personal liability here is dependent upon his position with 'Canada Inc.' and there is very little evidence to substantiate his official position or even his *de facto* position specifically with 'Canada Inc.'. It is clear that Dennis Bristow was the operating mastermind and controlling force of the whole business enterprise. While Gates may have been a senior management employee and involved in much of the decision making process the decisions were ultimately made at a higher level.

As stated in Folino (*supra*):

It is consistent with this intent that the definition of director in the *Act* be limited to persons who are in a position to control, or participate in the control of, the business and affairs of the company. In our opinion it is not intended to cast such a wide net as to include everyone in the management system of a company who has some day to day involvement in its business operations.

I conclude that on the basis of the evidence gathered during the investigation and presented at the hearing before me I cannot agree that there is sufficient evidence to find on the balance of probabilities that Steven Gates was a director of Canada Inc. I am satisfied that the appellant has met the onus of persuading me that the determination was wrong and that it should be cancelled.

ORDER

This Tribunal orders, pursuant to Section 115 of the *Act*, that the Determination dated October 6, 2000 against Steven Gates as a director or officer of Ezebiz Software (Canada) Inc. is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal