Employment Standards TRIBUNAL

An appeal

- by -

McCarney Technologies Inc. and 526053 B.C. Ltd.
("MTI" and "the Company", respectively)

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/1, 2004A/2, 2004A/7 & 2004A/8

DATE OF DECISION: May 18, 2004

DECISION

SUBMISSIONS

Elyssa L. Lockhart	on behalf of McCarney Technologies Inc. and 526053 B.C. Ltd.
Michelle J. Alman	on behalf of the Director of Employment Standards

OVERVIEW

This decision addresses appeals brought under Section 112 of the *Employment Standards Act* (the *"Act"*) by McCarney Technologies Inc. ("MTI") and 526053 B.C. Ltd. ("the Company") of a Determination that was issued on November 26, 2003 by a delegate of the Director of Employment Standards (the "Director") against MTI and the Company. The Determination associated MTI and the Company under Section 95 of the *Act* and concluded that MTI and the Company had contravened Part 3, Section 17, Part 5, Section 44, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of sixteen employees (the "affected employees") and ordered MTI and the Company to cease contravening and to comply with the *Act* and to pay an amount of $334,532.27 to the employees.

The Determination also imposed an administrative penalty of $2000.00 on MTI and the Company under Section 29 of the *Employment Standards Regulation* (the *"Regulations"*) for contravening Sections 17, 44, 58 and 63 of the *Act*.

In this appeal, MTI and the Company say the Director erred in law, failed to comply with principles of natural justice in making the Determination and that new evidence is available that was not available at the time the Determination was made. The Director has filed a response to the appeal.

A suspension request has been made by the MTI and the Company under Section 113 of the *Act* and that request will be considered, if necessary, later in this decision.

The Tribunal has reviewed the submissions and materials on file and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in these appeals is whether MTI and/or the Company have shown there is any error in the Determination that justifies the Tribunal cancelling it.

THE FACTS

MTI is a company that was, when active, engaged in the business of researching and developing mobile wireless telematic and diagnostic technology. MTI was founded by James McCarney in or around August 1987. The Determination indicates that Mr. McCarney was the president and chief operating officer of MTI until August 31, 2003. This finding is challenged in the appeal and this challenge represents some of the basis for the new evidence ground of appeal.

The Company is in the business of researching and developing internet based solutions for business applications, wireless telephony systems and call center operations. The Company was incorporated in August of 1996. Mr. McCarney is the sole director and officer of the Company.

The Director decided that MTI and the Company should be associated under Section 95 of the *Act*. The following reasons are expressed in the Determination for that decision:

- The businesses of both companies were interrelated;
- MTI had been "totally dependent" on the Company for funding over "the last several years";
- Mr. McCarney was the managing authority for both companies; and
- There was common control, notably in the financial area, and common direction as to how things were done on the operations side.

MTI ceased paying its employees on or about May 25, 2003. The affected employees filed complaints with the Director. The Director issued a Demand for Employer Records. The payroll records were provided and based on those records, the Director confirmed that wages were owed by MTI to its employees. The wages owed included regular wages, annual vacation pay and statutory holiday pay. Applying Section 66 of the *Act*, the Director decided most of the affected employees had been terminated and were owed compensation for length of service. The total amounts owed to each of the affected employees were calculated using the records provided by MTI.

There is no issue raised in this appeal about the amounts found owing by the Director to the affected employees.

Mr. McCarney was provided with a copy of the Determination, but there is no indication in the record or in the Determination that he, or the Company, was given notice of the complaints or of the Director's intention to associate MTI and the Company under Section 95 of the *Act*.

ARGUMENT AND ANALYSIS

The burden is on MTI and the Company, as the appellants, to persuade the Tribunal that the Determination is wrong and justifies the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation.

The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
(a) the director erred in law:
(b) the director failed to observe the principles of natural justice in making the determination;
(c) evidence has become available that was not available at the time the determination was made.

MTI and the Company have raised all three grounds of appeal. I shall respond to each ground, although not in the order in which they are set out in the appeal. I shall first address the natural justice ground, then the "new evidence" ground and finally the question of whether the Director erred in law in applying Section 95 of the *Act* to the facts.

Natural Justice

I agree with counsel for MTI and the Company on this point, but find that the failure to provide notice and allow submissions has been cured in these appeals (see *O'Reilly*, BC EST #RD165/02 and *Modern Logic Inc.*, BC EST #D151/02).

New Evidence

Counsel for MTI seeks to submit new evidence relating to the date on which Mr. McCarney ceased to be a director of MTI. In respect of these documents, counsel says they show the Director wrongly found Mr. McCarney continued to be the president and chief operating officer of MTI until August, 2003. The documents consist of an undated Resignation of Director, addressed to the Board of Directors of MTI, signed by Mr. McCarney and stating he is resigning as "a director and as President and Chairman of the Company", and a Notice of Directors, filed with the Ministry of Finance and Corporate Relations on March 18, 2003 and informing them that Mr. McCarney had ceased to be a director of MTI on December 19, 2002.

Counsel has also included a loan agreement between MTI and the Company, dated October 1, 1998, a general security agreement between MTI and the company, dated September 20, 2000, and confirmation of registration of the security agreement. Counsel says this information demonstrates the purely commercial relationship between the two companies.

Counsel does not say the new evidence was not available at the time the Determination was made, but that they were "effectively unavailable to the Director due to the . . . failure to adhere to principles of natural justice". Counsel says had the Company been made aware of the investigation, it would have provided the documents.

Counsel for the Director says the documents which MTI and the Company seek to have considered are not "new" in the sense contemplated by this ground of appeal. Counsel notes the registered and records offices for both companies were with the same law firm and the documents in question were in the possession and control of the companies' solicitors during the investigation.

I accept and will consider the documents submitted by MTI and the Company with the appeal. I do so not on the ground that this information is evidence that has become available since the Determination was made, but as part of curing the failure of the Director to observe principles of natural justice in making the decision to associate those companies.

Error of Law

Counsel for MTI and the Company says the decision of the Director to associate the companies under Section 95 of the *Act* cannot be sustained on an application of the facts to the requirements for associating entities under that provision. Specifically, counsel makes two submissions on this point. First, counsel submits that the financial arrangement between MTI and the Company was a purely commercial one and,

even if the Company were a venture capitalist and made an investment in MTI, resulting in some "minor degree of control" of MTI, that would not justify its being associated with MTI under the *Act*. Second, counsel submits the factual basis upon which the Director found common control or direction - that Mr. McCarney was president and chief operating officer of MTI until August 31, 2003 - was flawed. Counsel asserts that Mr. McCarney departed from MTI in December 2002 and suggests he ceased to have any involvement in MTI thereafter.

In reply, counsel for the Director countered the factual allegations made in the appeal with the following information and supporting documents:

A. A company search of MTI made on August 15, 2003 listing Mr. McCarney as President and Chair of that company;
B. A company search of the Company made on September 11, 2003 listing Mr. McCarney as the sole director and officer of the Company;
C. A March 25, 2003 press release filed with the BC Securities Commission concerning MTI and the Company having signed a letter of intent to amalgamate;
D. A second March 25, 2003 press release filed with the BC Securities Commission concerning MTI and the Company, which included the comment that the Company, "has provided the majority of funding to MTI for its operations and owns certain complimentary assets";
E. A June 4, 2003 press release filed with the BC Securities Commission containing the same comment;
F. A Quarterly Report for MTI for the period ended November 30, 2002 filed with the BC Securities Commission describing Mr. McCarney's resignation as a director and officer of MTI and his continuation as a "consultant" under "his [then] current management contract"; the Report also describes MTI's financing problems and the provision to MTI of "required funds" from the "integration" of MTI's and the Company's "vehicular systems development engineering teams";
G. A September 17, 2003 press release filed with the BC Securities Commission stating the Company has "largely funded" MTI "under a joint 1998 integrated business and technology development agreement; the press release also describes the temporary suspension of the Company's operation under that agreement pending investigation of the companies by the BC Securities Commission and describes the immediate resignation of Mr. McCarney "as an employee" of MTI and the termination of his "Consulting Agreement" with MTI following a declaration by the BC Securities Commission in early June 2003 that Mr. McCarney was "still running the show";
H. The audited financial statement of MTI describing the loans from the Company to MTI as "related party transactions" because the sole director and officer of the Company (Mr. McCarney) was the president of MTI at the time the loans were arranged and describing the future operations of MTI as being "dependent on the continued financial support of 526053 B.C. Ltd.";
I. An MTI Annual General Meeting information circular showing Mr. McCarney's ownership, either directly or through a company he controlled, of a substantial number of the voting shares in MTI; and
J. A September 29, 2003 MTI Quarterly Report for the period ending May 31, 2003 describing the Company as a related party and stating the ongoing intent of MTI and the company to amalgamate.

Counsel for the Director says that information, applied to established principles relating to the interpretation and application of Section 95, provides ample basis for the decision made by the Director to associate the Companies under the *Act*.

Counsel for MTI and the Company has not filed any reply to the submission of the Director.

The appellants have not satisfied the burden of showing there is any error in the decision of the Director to associate MTI and the company under the *Act*. While I agree that the Director erred in finding Mr. McCarney to be a director and officer of MTI until August 31, 2003, there is no reason, based on all of the material provided, for finding any error in the conclusion that Mr. McCarney was the "managing authority for both businesses". On the facts, I reject the assertion by counsel for MTI and the Company that the financial arrangement was a "purely commercial" one. The financial arrangement cannot be viewed in isolation from the other aspects of the relationship between MTI and the Company. I also reject the suggestion that Mr. McCarney ceased to have any involvement in MTI after December 2002.

The material on file supports a finding that the businesses of MTI and the Company were interrelated. Nothing in the appeal shows that conclusion was wrong. It is not relevant to that conclusion that the interrelationship of the two companies is neither perfect nor complete. In the document attached as Appendix J to the submission filed on behalf of the Director, it contains the following:

> Related Party Transactions
>
> 526053 B.C. Ltd. is a related party. The Company [MTI] under agreements with 526053 B.C. Ltd has been *jointly* developing wireless and Internet based solutions for the worldwide vehicular industries. When completed, the system will allow an unlimited number of vehicles to simultaneously communicate data through the World Wide Web.
> (emphasis added)

There are similar expressions of an interrelationship between MTI and the Company throughout the various documents, which cumulatively belie the suggestion in the appeal that there is no business connection between the two companies.

On the matter of common control and direction, it is a reasonable inference from an assessment of the financial arrangements, which were clearly non-arm's length when they were created and effectively made MTI entirely dependent upon the Company for financing, of the shareholding structure in MTI and in the continuation of the management (consulting) agreement until some time after June of 2003 that a substantial degree of control and direction of MTI was in the hands of the Mr. McCarney.

I agree completely with the submissions of counsel for the Director on her analysis of the principles relating to the interpretation and application of Section 95 and find those principles, applied to the circumstances, support the decision to associate MTI and the Company, of which Mr. McCarney was the sole director and officer.

Accordingly, the appeal is dismissed.

Disposition of the Suspension Request

As a result of my decision to dismiss the appeal, I do not need to consider the request under Section 113 of the *Act* to suspend the effect of the Determination. I will, however, note the request would not have been granted in any event for the reasons which follow. Section 113 reads:

113. (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination

(2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either

(a) the full amount, if any, required to be paid under the determination, or

(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

In *Tricom Services Inc.*, BC EST #D232/96, the Tribunal stated that:

> . . . it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the "total amount" of the determination is posted; a "smaller amount" should only be ordered if such lesser amount would be "adequate in the circumstances of the appeal".

Section 113 does not provide the Tribunal with authority to suspend the effect of a Determination merely on being satisfied of the applicant's ability to pay. A precondition to the Tribunal considering any request to suspend the effect of a Determination is an indication the applicant has deposited the full amount of the Determination, or some lesser amount the Tribunal considers adequate in the circumstances, with the Director.

There is no indication in the request or on file that the full amount, or any amount, has been deposited with the Director. Counsel for the Director says no amount has been received. That has not been contradicted by counsel for MTI and the Company. Accordingly, the Tribunal may not consider the request.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 26, 2003 be confirmed in the amount of $334,532.27, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal