

An application for suspension

- by -

Johnathan Miller, a Director or Officer of Abraxis Security Inc.  
(“Miller”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

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

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2010A/90

**DATE OF DECISION:** September 1, 2010

## DECISION

### SUBMISSIONS

Delwen Stander

Counsel for Johnathan Miller, a Director or Officer of  
Abraxis Security Inc.

Amanda Clark Welder

on behalf of the Director of Employment Standards

### OVERVIEW

1. On May 28, 2010, the Director of Employment Standards, through his delegate, issued two separate determinations pursuant to section 79 of the *Employment Standards Act* (the “*Act*”) against, respectively, Abraxis Security Inc. (“Abraxis”; the “Corporate Determination”) and Johnathan Miller, a Director or Officer of Abraxis Security Inc. (“Miller”; the “Section 96 Determination”) each in the total amount of \$12,815.58. The determination amounts represent \$11,315.58 in unpaid wages owed to six former Abraxis employees (including regular wages, vacation pay, compensation for length of service and section 88 interest) as well as \$1,500 on account of three separate \$500 monetary penalties (see *Act*, section 98). The unpaid wages and interest are payable to the individual former Abraxis employees and the monetary penalties are payable to the provincial government and are collectable by the Director of Employment Standards.
2. So far as I am aware, Abraxis has not appealed the Corporate Determination. According to the information set out in the delegate’s “Reasons for the Determination” appended to the Section 96 Determination, Abraxis’ “business has closed and the corporation is insolvent” (page R2). Mr. Miller has appealed the determination issued him in his personal capacity on the grounds that the delegate erred in law, failed to observe the principles of natural justice and because he has new evidence that was not available when the determination was issued (see *Act*, subsections 112(1)(a) to (c)). In addition, Mr. Miller seeks an order pursuant to section 113 of the *Act* suspending the effect of the Section 96 Determination pending the adjudication of the appeal.
3. These reasons for decision only address this latter application (Tribunal File Number 2010A/90). I will deal with the merits of Mr. Miller’s appeal in separate reasons for decision (Tribunal File Number 2010A/089).

### THE SUSPENSION APPLICATION

4. Section 113 of the *Act* provides as follows:

Director’s determination may be suspended

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 total 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.

5. Mr. Miller seeks an order suspending the effect of the Determination upon his depositing the sum of \$500 (five hundred dollars) with the Tribunal. Mr. Miller says, in support of this proposed order, that any larger deposit would work a significant financial hardship on him since he is the sole provider for his wife and three children. He says that he has already suffered significant financial losses by reason of his involvement with the failed business and that the deposit of something well less than the total amount payable under the determination will not prejudice the Director of Employment Standards or any of the six respondent employees. Mr. Miller also says that he has not received any financial assistance from Mr. Guy Preston in dealing with the financial fallout of the failed business. Mr. Miller describes Mr. Preston as the sole current Abraxis director, however, Mr. Preston says that he is only a 49% shareholder in Abraxis and the delegate has not determined, so far as I am aware, that Mr. Preston was an Abraxis director or officer when the six respondents' unpaid wage claims crystallized.
6. The delegate's position is simply that the entire appeal is without merit and that if a suspension order is issued, Mr. Miller should be required to deposit the full amount of the Section 96 Determination. None of the six respondent employees, although invited to do so, filed any submission with the Tribunal regarding Mr. Miller's section 113 application.
7. The Tribunal has issued several decisions in the last year that set out the governing principles in a section 113 application (see *Patara Holdings Ltd.*, BC EST # D093/09; *Mickey Transport Ltd.*, BC EST # D005/10; *Meiklejohn*, BC EST # D034/10; and *Shaw*, BC EST # D086/10). These principles may be summarized as follows:
  - The Tribunal has the discretionary authority to issue a suspension order and no party is absolutely entitled to a suspension order on any particular terms and conditions.
  - Section 113 suspension applications should be addressed through a two-stage analysis. At the first stage, the Tribunal should determine whether it should suspend the determination. If the Tribunal decides that a suspension is warranted, it should then consider what terms and conditions are appropriate.
  - The applicant bears the burden of satisfying the Tribunal that a suspension order is warranted.
  - Suspensions are not granted as a matter of course and, in general, a suspension will not be granted on any terms unless there is some *prima facie* merit to the appeal. In addressing this latter question, the Tribunal must not engage in a detailed analysis of the merits but, rather, should consider whether the grounds of appeal, as advanced, appear to raise a "justiciable issue" in light of the Tribunal's statutory powers. The Tribunal is not empowered to conduct a hearing *de novo* and thus the Tribunal should not suspend a determination if the appellant's appeal documents fail to raise, on their face, at least an arguable case that the appeal might succeed on one or more of the three statutory grounds of appeal. Thus, a bare and unparticularized allegation that the delegate failed to observe the principles of natural justice in making the determination does not pass muster.
  - In determining if a suspension should be ordered, the Tribunal may also consider whether the applicant will likely endure unreasonable financial hardship if a suspension order is not issued and whether one or more of the respondent parties will be unreasonably prejudiced if a suspension order is granted.
  - If the Tribunal is satisfied that a suspension order is warranted, the "default" condition is that the full amount of the determination be deposited with the Director of Employment Standards to be held in trust pending the adjudication of the appeal. If the applicant seeks an order that

some lesser sum to be deposited, the applicant must demonstrate why that would be appropriate given all the relevant circumstances.

## FINDINGS AND ANALYSIS

8. I have reviewed Mr. Miller's appeal grounds and I am prepared to acknowledge that, on their face, they raise serious issues of both statutory interpretation and the proper inferences to be drawn from the evidentiary record. Mr. Miller says that he is entitled to advance one or more of the section 96(2) defences given that Abraxis is insolvent. Mr. Miller says that the delegate never formally notified him about his potential section 96 liability before the Section 96 Determination was issued. He also says that he ceased to be an Abraxis director following his resignation on September 28, 2009. Without passing on the ultimate merits of these assertions, I will say that I do not consider this appeal to be frivolous. On the other hand, I also note that Mr. Miller appears to have taken a rather cavalier attitude in his dealings with the delegate during her investigation and many of the points that he now raises on appeal might have been more appropriately raised with the delegate during the investigation. My initial reaction to Mr. Miller's explanation for his failure to actively participate in the delegate's investigation is that he is perhaps taking an exceedingly literal and technical approach to the matter. That said, and as previously noted, I cannot say that the appeal, on its face, is wholly devoid of merit.
9. As previously stated, it appears that Abraxis is, as a practical matter, insolvent (although perhaps not formally insolvent) and thus the employees and the Director of Employment Standards probably have limited prospects of recovering any monies from that corporation. Mr. Miller is, at least according to the B.C. Corporate Registry office, the only corporate director and thus if the employees and the Director are unable to recover the sums payable to them under the Corporate Determination, Mr. Miller may prove to be the only viable target for recovery.
10. None of the employees – who are individually owed sums ranging from about \$244 to \$3966 – has filed any material with the Tribunal regarding the suspension request and thus I cannot say whether they would necessarily be prejudiced by a suspension order. Their greatest concern is likely that, ultimately, they may not recover the sums due to them but it is not clear whether a suspension order would materially affect their recovery prospects. I can assure the parties that I will deal with the merits of the appeal in relatively short order and that a suspension order will not affect the timeliness of my decision-making process.
11. Mr. Miller, as noted above, claims that he would suffer undue hardship if he were ordered to deposit the entire amount of the Section 96 Determination. He also says that he has suffered significant financial losses by reason of his involvement with Abraxis. On the other hand, Mr. Miller apparently has the financial wherewithal to retain legal counsel and he has not provided *any* financial statements to support his assertions of financial hardship – for example, a statement of assets and liabilities and a monthly revenue/expenditures statement. I am not prepared to accept a mere assertion of undue financial hardship, in the absence of any corroborating documentation, as proof of that assertion. Further, if indeed Mr. Miller is facing undue hardship, I suppose one could say that is all the more reason why a suspension order should not be issued if it is predicated on depositing only a token sum (in this case, the proposed \$500 deposit represents less than 4% of the total amount payable under the Section 96 Determination).
12. In light of the foregoing considerations, I am prepared to issue a suspension order in this matter but I do not think it appropriate to depart from the “default rule” that the total amount of the determination be deposited into the Director of Employment Standards' trust account.

**ORDER**

13. Pursuant to section 113(2)(a) of the *Act*, the Section 96 Determination is suspended provided the Appellant, within seven days after the date of these reasons for decision, deposits with the Director of Employment Standards the sum of \$12,815.58 to be held in trust by the Director of Employment Standards pending further order of this Tribunal or a court of competent jurisdiction. The deposit shall be made by way of cash or a certified cheque or a money order drawn on a Canadian financial institution.
14. If Mr. Miller fails to deposit the monies within seven days as directed by this Order, the Director of Employment Standards shall be at liberty to enforce the Section 96 Determination in accordance with the provisions of Part 11 of the *Act*.

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