

An appeal

- 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 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2010A/89

**DATE OF DECISION:** September 9, 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

### INTRODUCTION

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 Corporate Determination and the Section 96 Determination were issued following an investigation into the unpaid wage complaints filed by the six former employees.
2. Abraxis was a firm providing security guard and security alarm services. The six respondent former employees were, I understand, employed as security guards. They all filed unpaid wage claims when the firm closed down its operations in the early fall of 2009. Abraxis is described as being effectively insolvent but I am not aware of any formal insolvency proceedings. Abraxis has two shareholders, Mr. Miller (51%) and Mr. Guy Preston (49%), and these two individuals are apparently now engaged in litigation regarding their business affairs relating to Abraxis.
3. 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 appeals the determination issued against 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. I have previously issued reasons for decision with respect to Mr. Miller’s section 113 application (see BC EST # D090/10); these reasons for decision address the substantive grounds raised by Mr. Miller in this appeal.
4. I am adjudicating this appeal based on the parties’ written submissions and in that regard I have submissions from both Mr. Miller (filed by his legal counsel) and by the Director’s delegate. Although invited to do so, none of the six respondent former employees filed a submission with the Tribunal. In addition to the parties’ submissions, I also have before me the Section 96 Determination and accompanying “Reasons for the Determination” (the “delegate’s reasons”) and the section 112(5) record that was before the Director’s delegate (the “record”).

## GROUNDS OF APPEAL

5. Mr. Miller appeals the Section 96 Determination based on each of the three statutory grounds set out in section 112(1) of the *Act*. I shall briefly outline Mr. Miller's evidence and argument with respect to each ground of appeal to be followed by my findings and analysis with respect to those grounds.
6. There are three components to the allegation that the delegate erred in law. First, Mr. Miller says that since he resigned his directorship on September 28, 2009, he cannot be held personally liable as a corporate director under section 96(1) of the *Act*. Second, although he does not specifically point to section 96(2) of the *Act*, it appears that he says he is shielded from personal liability by one or more of the statutory defences set out in that subsection: "The Appellant submits that the Director erred at law by: ...failing to consider the legal impact of [Abraxis'] *de facto* insolvency" (June 29, 2010, submission). Third, Mr. Miller says that the Director of Employment Standards was legally obliged to proceed against Abraxis and another individual (alleged to be the only current Abraxis director), Mr. Guy Preston ("Preston"), before attempting to recover from Mr. Miller. Mr. Preston is not a party to these appeal proceedings and I understand that his position is that he was not an Abraxis officer or director when the former employees' unpaid wage claims crystallized.
7. The natural justice grounds (there are five separate allegations) principally fall into three categories. First, Mr. Miller says that he was never given proper notice that the Director was contemplating issuing the Section 96 Determination against him before it was actually issued. Second, he says that the delegate impermissibly relied on evidence provided by Mr. Preston – evidence that was tainted by Mr. Preston's personal stake in the matter. Third, Mr. Miller says that although two delegates were involved in this investigation, he "was never given the opportunity of influencing the person that determined the matter against him, or being heard by that person...contrary to the principles of natural justice" (June 29, 2010 submission).
8. The "new evidence" ground, rather than consisting of specific documents or witnesses' testimony, largely consists of categories of documents and evidence of parties that Mr. Miller says the delegate should have uncovered during her investigation.
9. Mr. Miller asks the Tribunal to refer the entire matter back to the Director to be reconsidered in light of the evidence and argument that Mr. Miller now wishes to place before the Director.

## FINDINGS AND ANALYSIS

10. In my view, the natural justice grounds should be addressed first since, if found to be meritorious, would likely result in the matter being referred back to the Director at which point all of the other arguments now before me on appeal could be placed before the Director for his consideration.

### *Natural Justice*

11. Mr. Miller's central point under this ground of appeal is captured in this assertion from his June 29, 2010, submission: "At no time has Johnathan Miller ever been given proper legal notice that he was the subject of a proceeding, individually, as opposed to corporately, as a Director of Abraxis Security Inc., (which is incorrect at law) – any notice given to Mr. Miller as a Director of Abraxis Security Inc., after his resignation on September 28, 2009, is a nullity at law, and deprives Mr. Miller of the right to notice of a proceeding against him individually."
12. I have carefully reviewed the record and I find the suggestion that Mr. Miller was never given proper notice about his potential exposure under section 96 of the *Act* to be wholly without merit. The Director's

obligation to inform a person about their potential liability under the *Act* flows from common law principles of administrative law and, more specifically, from section 77 of the *Act*:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

13. On November 12, 2009, a delegate (not the delegate who ultimately issued the determinations) wrote a letter, sent by registered mail, to Abraxis regarding the unpaid wage claims of four of the six respondent former employees. This letter was also copied, *inter alia*, to the corporation's registered and records office (the Chilliwack law firm, Baker Newby) and to Mr. Miller at both a post office box address and his residential address. Canada Post records confirm that Mr. Miller received the delegate's November 12 letter (with a signature receipt) on November 16, 2009. The delegate's November 12, 2009, letter clearly identified Mr. Miller's potential personal liability. The letter particularized the nature of the former employees' claims, referred to possible additional administrative penalties and also gave this notice regarding section 96 liability: "Please note that Directors and Officers of companies can be held personally liable for up to two months wages for each employee of the company." The delegate invited Mr. Miller to contact her at her direct telephone number. I am not aware if Mr. Miller contacted the delegate by telephone or otherwise responded to her November 12 letter.
14. Sometime between November 2009 and March 2010 the delegate who ultimately issued the two determinations assumed conduct of the investigation. This delegate sent a letter, again by registered mail, on March 11, 2010, to Abraxis with copies to various other persons including Mr. Miller who, according to Canada Post records, received and signed for the letter on March 22, 2010. This letter included a detailed summary of the unpaid wage claims filed by four of the six respondent employees and, in addition, indicated that there were other claims filed by five other specifically identified former employees. With respect to Mr. Miller's potential section 96 liability, the delegate indicated that she likely would be issuing one or more section 96 determinations and also acknowledged that there was an ongoing dispute between Mr. Miller and Mr. Preston regarding their individual status with Abraxis. She included the relevant statutory provisions and also referred to a recent B.C. Corporate Registry search (that showed Mr. Miller to be the only corporate director). She invited Mr. Miller to provide any and all documentation relevant to his status with Abraxis and, finally, she accurately summarized the Tribunal's jurisprudence regarding the director/officer liability provision and invited Mr. Miller's submissions with respect to his potential section 96 liability. If I ask myself what further information the delegate should, or even could, have provided to Mr. Miller regarding his potential section 96 liability, I am unable to identify a single thing. About 2 ½ pages of the delegate's six-page (single-spaced) March 11 letter deal with the section 96 issue. The suggestion that Mr. Miller was never given proper notice regarding his potential section 96 exposure, or provided with an opportunity to respond to his potential liability under that provision, based on the record before me, appears to be wholly untenable.
15. Simply for sake of completeness, I will add that the delegate's March 11 letter was also sent to Abraxis' registered and records office (the Chilliwack law firm, Baker Newby) and to that same law firm in its capacity as Mr. Miller's legal counsel. Baker Newby responded by letter dated March 11, 2010, indicating that while it was the registered and records office, the firm did not represent Mr. Miller. The firm referred the delegate to another lawyer whom it believed was representing Mr. Miller. The record indicates that some sort of communication was sent to this lawyer – the same legal counsel who represents Mr. Miller in these proceedings – but at that time this lawyer advised the delegate (both by telephone and in writing) that he had only provided some assistance to Mr. Miller in a Small Claims Court action and "was not retained to deal with this matter".

16. As is clear from the delegate's reasons, she did receive some information from Mr. Preston and this evidence is referred to in her reasons. Mr. Preston was quite willing, unlike Mr. Miller, to provide "his side of the story". Of course, as is clear from the preceding two paragraphs, Mr. Miller could equally have taken the opportunity (as he was invited to do) to provide his evidence and argument to the delegate. Although the delegate who commenced the investigation did not conclude it, the delegate who ultimately issued the Section 96 Determination contacted Mr. Miller and, consistent with section 77 and principles of administrative law, gave him a reasonable opportunity to provide his evidence and argument regarding his potential personal liability under section 96 of the *Act*. Mr. Miller simply failed to avail himself of the opportunity that was provided to him.
17. It follows from the foregoing discussion that I am not persuaded that the delegate failed to observe the principles of natural justice in making the Section 96 Determination. This ground of appeal is dismissed. I now turn to the alleged errors of law.

### ***Errors of Law***

18. The Tribunal has held there is a rebuttable presumption that B.C. Corporate Registry records are accurate. This presumption may be rebutted by clear and cogent evidence that the records are inaccurate (see *Director of Employment Standards and Michalkovic*, BC EST # RD047/01). In the instant case, the delegate relied on B.C. Corporate Registry records that showed Mr. Miller to be the sole director of Abraxis as of September 18, 2009, and that he had been the sole director since at least September 14, 2007. Mr. Miller was given the opportunity to rebut the presumption of accuracy but as noted above under the "Natural Justice" subheading, he simply chose not to avail himself of the opportunity that was presented to him.
19. Mr. Miller now says that the records are inaccurate and that he resigned his directorship on September 28, 2009. Even if I were inclined to now accept that this evidence is properly before me (and I am not), there is no probative value to this "fact" (assuming the resignation is *bona fide*). Section 96(1) imposes personal liability on corporate directors and officers for employees' wages (subject to a 2-month ceiling per employee) for wages that "were earned or should have been paid" while a person was a director or officer. Even if one accepts that Mr. Miller resigned his directorship on September 28, 2009, the six former employees' unpaid wages claims all crystallized prior to September 28, 2009 (see the unpaid wage "calculation sheets" appended to the delegate's reasons at pages R6 – R12). A resignation does not immunize a director or officer from liability for unpaid wage claims that have already crystallized; rather, the resignation can only defeat post-resignation claims.
20. Further, even if one is not recorded in the corporate records as a director or officer, section 96 liability may still arise if the person is *functioning* as a corporate director or officer (see *Penner and Hauff*, BC EST # D371/96). The record discloses that as of December 15, 2009, and again as of February 10, 2010 (two separate Ministry of Public Safety and Solicitor General database searches), Mr. Miller and Abraxis were the only persons identified holding the expired Security Licences pursuant to which the firm operated under the provisions of the B.C. *Security Services Act*. The record also includes extensive bank records. In the year or so before the firm ceased operations, Mr. Miller appears to have been the sole signatory on the corporate bank account and he was signing payroll cheques (including cheques payable to himself) as well as cheques that appear to relate to normal business operating expenses even after the date of his purported resignation. In such circumstances, he might well be characterized as having carried on the functions of a corporate director or officer during the "post-resignation" period.
21. Although an individual may have been a corporate officer or director when an employee's unpaid wage claim crystallized, section 96(2) sets out a series of absolute or partial defences. In this case, Mr. Miller asserts that

Abraxis' "de facto insolvency" somehow immunizes him from any personal liability. The only two defences that relate in some way to "insolvency" are 96(2)(a) and (b):

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 2 months' unpaid wages for each employee.

(2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,

(b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act, ...

22. It seems common ground among all parties that Abraxis has ceased operating and is presumably insolvent in the sense that it is unable to meet its financial obligations as they fall due and, in addition, its liabilities may exceed its assets (both of which are commonly accepted tests of "insolvency"). In her July 13, 2010, submission, the delegate states that the Corporate Determination has been filed with the B.C. Supreme Court (see *Act*, section 91) and that a court bailiff's efforts to seize and sell assets pursuant to that court's order have been unsuccessful. However, the section 96(2) "insolvency" defences require something more than *de facto* insolvency – there must be a formal receivership under subsection 96(2)(a) or active judicial proceedings under subsection 96(2)(a) (see *Rock'N Meers Holdings Ltd.*, BC EST # D297/03; *CJS Victoria Inc.*, BC EST # D042/04); *Ogden*, BC EST # D093/04). The term "insolvency Act" is defined in section 1 of the *Act* in precise and exhaustive terms: "**insolvency Act** means the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada) or the *Winding-up and Restructuring Act* (Canada)".

23. Since there is no evidence before me (nor was there any evidence before the delegate) that Abraxis was the subject of a formal receivership, or of judicial proceedings under one of the defined federal insolvency statutes, when the Section 96 Determination was issued, neither "insolvency" defence is available to Mr. Miller in this case.

24. With respect to Mr. Miller's third alleged "error of law", there is nothing in the record to indicate that Mr. Preston was an Abraxis director or officer when the employees' unpaid wage claims crystallized. He was a director when the company was first incorporated but apparently resigned long before the unpaid wage claims at issue in this appeal arose. Further, and quite apart from Mr. Preston's alleged status as a director, even if he were a director or officer, that fact does not in any way provide a defence or other relief for Mr. Miller since his liability would stand separate and apart from that of any other director or officer. Finally, the Tribunal has no authority to order the Director of Employment Standards to pursue any particular individual who is alleged to have been a director or officer at the relevant point in time. The Tribunal's decision in *Loftus*, BC EST # D694/01, provides a complete answer to Mr. Miller's submission on this score:

The liability found in that provision [section 96] is personal to each director or officer. There is no limitation or restriction on the numbers of directors or officers against whom a Determination may be issued. Specifically, there is nothing in Section 96, or any other provision of the *Act* that compels or requires the Director proceed against all of the directors or officers of a corporation that are potentially liable for wages under the *Act*.

25. If Mr. Miller believes that Mr. Preston was an Abraxis director or officer when the six respondent former employees' wage claims crystallized, he is, of course, free to provide whatever corroborating information or

documentation he may have in his possession to the Director but, ultimately, that will not in any way affect the legal validity of the Section 96 Determination issued against him.

26. I am not satisfied that the delegate erred in law in issuing the Section 96 Determination. This ground of appeal is dismissed. The only remaining ground of appeal concerns “new evidence”, the matter to which I now turn.

### ***New Evidence***

27. The test for the admission of new evidence on appeal is a strict one. It is not enough that the evidence tendered to the Tribunal was not tendered to the delegate. Rather, the appellant must demonstrate that: i) exercising all due diligence, the evidence could not reasonably have been expected to be discovered and placed before the delegate; ii) the evidence is relevant and material; iii) the evidence is credible; and iv) the evidence has significant probative value (see *Merilus Technologies Inc.*, BC EST # D171/03). None of the evidence proffered as “new evidence” is “new” in the sense that, with reasonable diligence, it could not have been collected and provided to the delegate. Further, the evidence does not appear to be material or probative in light of my findings with respect to the “error of law” grounds.
28. In my judgment, the “new evidence” ground of appeal is closely related to the “natural justice” ground in the sense that Mr. Miller maintains that this evidence was not provided to the delegate largely because he was never given proper notice about the particulars of the investigation. Mr. Miller seems to be saying that if he had been a full participant in the delegate’s investigation, this evidence would likely have been provided to the delegate. That may well be true. On the other hand, the principal reason why this evidence was not provided to the delegate is because Mr. Miller made an independent decision to simply ignore the delegate’s request that he make full and complete submissions to her. Finally, I strongly doubt that if this evidence had been provided to the delegate, it would have resulted in any different outcome for Mr. Miller. I find no merit to this ground of appeal.

### **ORDER**

29. Pursuant to section 115 of the *Act*, I confirm the Section 96 Determination as issued in the amount of \$12,815.58 together with whatever further interest that may have accrued under section 88 of the *Act* since the date of issuance.
30. My previous order (see BC EST # D090/10), made pursuant to section 113 of the *Act*, suspending the effect of the Section 96 Determination, is vacated.

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