

An appeal

- by -

Lucille M. Pacey, a Director or Officer of Mosaic Technologies Corporation  
(“Pacey”)

- 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/51

**DATE OF DECISION:** July 6, 2004



Technologies Corporation, with copies to the head office of the corporation outside the province, the head office of the corporation within the province and to the directors and officers of the corporation, including Pacey. No appeal of the Determination was filed by the corporation.

An August 20, 2003 BC On-line search of the Registrar of Companies showed that Mosaic Technologies Corporation was incorporated federally on July 19, 1983, was registered provincially on March 8, 2002. Pacey was listed as one of its directors.

The wages of the affected employees were earned prior July 11, 2003.

The Director found that Pacey was a director of Mosaic Technologies Corporation at the time wages were earned and payable and was liable for the maximum personal liability allowed under Section 96 of the *Act*.

The Director also found that Pacey personally liable under Section 98(2) of the *Act* for the amount of the administrative penalty imposed on Mosaic Technologies Corporation in the corporate Determination, presumably on the basis that she had “authorized, permitted or acquiesced in” a contravention of Sections 18, 45, 58 and 63 of the *Act*.

The appeal sets out extensive factual assertions that are not found in the Determination or in the record. Counsel for Pacey says all of these assertions, and the documents supporting them, was evidence that was not available at the time the Determination was made and should be accepted and considered by the Tribunal. It is not necessary to set out all of the factual assertions made. Some of them are challenged by the Director in her replies.

## **ARGUMENT AND ANALYSIS**

The burden is on Pacey to persuade the Tribunal that the Determination was wrong and justifies the Tribunal’s intervention. 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 complaint process.

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.*

Counsel for Pacey raises each of the above grounds of appeal and has provided extensive submissions and a substantial amount of additional evidence. I shall deal first with the matter of “new” evidence.

Counsel for the Director opposes the introduction of any additional evidence, arguing first, that Pacey had knowledge of the corporation’s contraventions of the *Act* by at least October 3, 2003 and had ample opportunity between that date and February 27, 2004 to correspond with the Director concerning her own

liability, and second that, in any event, none of the “new” evidence is relevant to the question of whether she was a director of Mosaic Technologies Corporation for the purposes of the *Act*.

The record includes letters date July 18, 2003, notifying the corporation of a complaint investigation, and August 27, 2003, containing preliminary findings in the complaint investigation. Neither were sent to Pacey. The record contains a work flow sheet of the conversations between the investigating delegate and other persons relating to the complaints. There is no record of any conversation with Pacey. The corporate Determination was delivered to Pacey. The corporate Determination does not invite submissions from Pacey. There is a notice to directors/officers attached to the corporate Determination, stating:

A Director/Officer cannot argue the merits of the Determination against the company after its appeal period has expired. After that time, there are only two grounds of appeal:

- 1) whether you were a director of the company at the time wages were earned; or should have been paid, and
- 2) whether the calculation of your personal liability is correct.

If you dispute any findings in the Determination against the company, the Company must appeal within the appeal period noted in the Determination accompanying this notice.

Section 96 of the *Act* is set out in the notice.

The corporate Determination contains no calculation of personal liability. There is no request for a response on any individual’s potential personal liability. There is no reference whatsoever to Section 98 of the *Act*.

On those facts, I do not accept that Pacey had either, in the words of counsel for the Director, “ample” opportunity or, in the words of Section 77 of the *Act*, “a reasonable opportunity” to respond to the investigation being made by the Director on her personal liability as a director/officer of the corporation under Section 96 and 98 of the *Act*.

In my view, the “new” evidence is inextricably linked to the failure of the Director to give Pacey a reasonable opportunity to respond and to a corresponding failure by the Director to comply with principles of natural justice and the “new” evidence is accepted on that basis.

It is an entirely different issue to what extent, if any, that additional information is relevant or impacts the conclusion that Pacey is personally liable under the *Act*.

The central issue on the appeal is whether the Director erred in finding Pacey was a director for the purposes of Section 96 and 98 of the *Act*. Counsel for Pacey makes two arguments. First, he argues that the test for determining director/officer status under the *Act* is a functional one, with only those persons who actually exercise the functions of a director or officer of a corporation being caught by the operative provisions and, as Pacey did not exercise any such functions, she could not be considered a director of the corporation. The second argument is that the records of the corporation are inaccurate as she did not consent, either orally or in writing, to continuing as a director past March 2003.

Counsel for Pacey refers to and relies on several decisions of the Tribunal in support of his argument for a functional test, including the reconsideration decision in *Director of Employment Standards (Re Michalkovic)*, BC EST #RD047/01. In that decision, however, the Tribunal specifically rejected a functional approach to liability under Section 96 of the *Act*, in cases where, as here, the person seeking relief from liability is listed as a director or officer of the corporation in their corporate records. Rather, the Tribunal endorsed the approach described in *Wilinosky*, BC EST #D106/99, that accepted the presumptive reliability of the company's corporate records. Based on those decisions, I am unable to accept that the question of Pacey's status for the purposes of Section 96 should be decided on a functional analysis of her duties and responsibilities with the corporation.

That does not necessarily end the matter. In *Michalkovic*, the Tribunal set out, and confirmed, the following propositions arising from the *Wilinosky* decision: that the presumption can be rebutted by the putative director or officer showing the corporate records are inaccurate or by showing circumstances exist which would make it inappropriate to find that person is a director or officer for the purposes of the *Act*; and that a determination on director/officer status under section 96 should be narrowly construed. The burden is on the person recorded as a director or officer to rebut the presumption raised in the corporate records.

On the question of the accuracy of the records, the burden requires fairly clear and cogent evidence and I do not find Pacey has met that burden. I agree with the submission of the Director that the provisions of the *Canada Business Corporations Act*, R.S.C. 1985, C-44 relied on by counsel for Pacey do not assist Pacey. The facts clearly show Pacey acted as a director subsequent to the annual general meetings of the corporation in May 2002 and in 2003 and on that basis alone confirmed her appointment to continue as a director after those meetings.

In *Michalkovic* the Tribunal also confirmed that it will be the rare and exceptional case where an individual who is listed as a director/officer in the corporate records will be found not to be a director/officer for the purposes of Section 96 of the *Act* and that such a finding will not be made simply on whether the individual actually performs the duties, functions or tasks of a director/officer. I do not find the circumstances here to be a "rare and exceptional case". The factual assertions made by counsel for Pacey, and by Pacey in her affidavit, do no more than assert that Pacey had very little involvement in, or knowledge of, the day-to-day operations of the corporation, while also confirming that Pacey did perform some (albeit few) of the duties, functions or tasks of a director.

While I have the utmost sympathy for the predicament in which Pacey has found herself, I must apply the *Act* as I find it and reject the argument that the Director erred in not addressing Pacey's liability under Section 96 on a functional analysis of her duties and responsibilities with the corporation, by not finding the records of the corporation were inaccurate or by finding her not to be a director of the corporation considering all the circumstances.

Finally, I turn to the appeal on the personal liability imposed on Pacey under Section 98(2) of the *Act*, which reads:

98 (2) *If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.*

As indicated above, the Director imposed administrative penalties on Mosaic Technologies Corporation in the amount of \$2000.00. The Director imposed personal liability on Pacey for those administrative penalties under Section 98(2). The following excerpts from the Determination address that aspect of the Determination:

Mosaic Technologies Corporation has contravened sections 18, 45, 58 and 63 of the Act which has resulted in the issuance of an administrative penalty. To date, the administrative penalty has not been paid.

Pursuant to Section 98(2) of the Act if a corporation contravenes a requirement of this Act or the Regulations a director or officer of the corporation who authorizes, permits or acquiesces in the contravention is also liable to pay the penalty.

Lucille Pacey is, therefore, personally liable for the administrative penalty.

Counsel for Pacey says the Director erred in law on this part of the Determination. Counsel for Pacey says there is no basis for the Director concluding Pacey authorized, permitted or acquiesced in a contravention of the *Act* by the corporation. He says the Director has a higher standard of proof when attempting to assign personal liability under Section 98(2) than when assigning such liability under Section 96. Counsel also says even if that burden had been met, the Director erred in imposing four separate penalties for what is, fundamentally, one contravention, being a failure to pay wages.

In response, counsel for the Director argues that, as a director of the corporation, Pacey was obligated by Section 122 of the *Canada Business Corporations Act* to be informed of the company's management and its affairs. This obligation and Pacey's apparent failure to meet it, says counsel, justifies a conclusion that Pacey acquiesced in the corporation's failure to pay wages to the affected employees. In response to the number of administrative penalties imposed, the Director says there is no discretion to decide that one administrative penalty is sufficient when four contraventions are found.

I accept this aspect of the appeal and in doing so specifically reject the notion that acquiescence in a contravention of the *Act* can be inferred from a failure on the part of a director/officer to conform to the requirements of Section 122 of that Act. First, that provision cannot be read so broadly as suggested by Counsel for the Director. Second, there is nothing in that provision which would allow for the inference sought by counsel for the Director. The notion of acquiescence involves, at least, a passive acceptance, consent or compliance with a course of conduct, which logically would seem to include some knowledge, understanding or appreciation of what that course of conduct is.

In *Competition Towing Ltd.*, BC EST #D392/99, the Tribunal has said there is a standard of proof which must be met by the Director under Section 98(2):

However, looking at the construction of Section 98(2) of the *Act* and, ignoring the reference to employees or agents of the corporation for the time being, it is only those directors or officers who have *authorized, permitted or acquiesced* to the violations of the *Act* that can be held liable for penalties imposed on corporations. Simply being a director or officer when a violation of the *Act* or of the Regulations occurs is not in itself sufficient to attract liability for penalties. In short, there is a defence for directors or officers under Section 98(2) of the *Act* which is not there under Section 96.

There is therefore a higher standard of proof that the Director must meet under Section 98(2) of the *Act* when assigning personal liability for penalties to directors or officers of corporations as

opposed to assigning liability to directors or officers for unpaid wages. Consequently, before the Tribunal confirms a determination assigning personal liability for a penalty under Section 98(2) of the *Act*, it must ensure that the Director has taken those extra steps to determine if the persons named in the determination have in fact *authorized, permitted or acquiesced* in the contravention. At the very least, in the interests of natural justice, the Tribunal should be satisfied that such persons have been given a meaningful opportunity to respond to any assertion by the Director that they had in fact *authorized, permitted or acquiesced* in the contravention. The Determination must also be clear as to the reasons why those named are being held liable.

There is nothing in the record indicating Pacey had any meaningful opportunity to respond to the question of whether she authorized, permitted or acquiesced in a contravention of the *Act* by the corporation. As well, there is no evidence in the Determination, or in the record, upon which such a finding could be made by the Director. It is an error of law to reach a conclusion of fact on no evidence. Finally, the director has also erred in law by failing to provide reasons why Pacey was being held liable (see *R. v. Sheppard*, 2002 SCC 26, 162 C.C.C. (3d) 298). As in the *Competition Towing* case, the Director seems to have assigned liability to Pacey as though it was a liability under Section 96.

The liability imposed on Pacey under Section 98(2) of the *Act* is cancelled.

Finally, counsel for Pacey argues the Director failed to comply with principles of natural justice when she was not allowed an opportunity to respond to a letter from Brian Neil. The Director says this letter was unrelated to the Determination against Pacey. Again, I agree with the Director. There is some merit to the argument the Director should not have accepted that Mr. Neil had resigned without providing other directors or officers an opportunity to take an alternative position. The reason, of course, is that Pacey has a direct and legally material interest in who is or is not liable, in addition to her, under Section 96 of the *Act*. The greater the number of directors and/or officers, the more persons there are from whom the Director may seek to satisfy the wage debt. That concern does not, however, arise out of the Determination made against Pacey and is not properly raised in this appeal. Pacey's liability under Section 96 is joint and several. It is not diminished or increased because Mr. Neil was found not to be a Director. The question of whether Mr. Neil continued to be a director/officer should be addressed under Section 86 of the *Act*.

## ORDER

Pursuant to Section 116 of the *Act*, I order the Determination date February 20, 2004, be varied to exclude liability for administrative penalties in the amount of \$2000.00. In all other respects, the Determination is confirmed in the varied amount, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**