

An appeal

- by -

Peter Buckley, a Director or Officer of
496284 B.C. Ltd. operating as Design Works

- 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.: 2001/100

DATE OF DECISION: May 23, 2001

DECISION

OVERVIEW

This is an appeal by Peter Buckley (“Buckley”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination (File No.100-170) dated January 22, 2001 by the Director of Employment Standards (the “Director”). The Determination is made against Buckley personally as if he were a director or officer of 496284 B.C. Ltd. (the “company”) operating as Design Works. Buckley submits that he never acted as an officer of the company, had no control over it, and was only a nominee director as his company had lent money to Design Works.

FACTS AND ANALYSIS

The Director issued a Determination against the company on December 20, 2000 in relation to unpaid wages. The corporate Determination was not appealed and remains unpaid. On January 22, 2001 the Director issued a Determination against Buckley alleging that as a director or officer he was personally liable for up to two months unpaid wages for each employee. The amount personally owing under the director’s Determination is \$1,668.55.

The evidentiary basis for the finding that Buckley was a director or officer of the company is that a search from BC Online Corporate Registry showed that Buckley was registered as a director of the company at the time the wages were earned or should have been paid. The Director’s delegate refers throughout the Determination to director and officer but does not clearly distinguish between these two positions.

Section 96 provides in part:

96. (1) a person who was a director or officer of 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.

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

In our view, in summary, the case law reviewed here and in *Wilinofsky* (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 this case Buckley has produced substantial evidence and documentation to show that he resigned as a director and officer of the company on March 29 and March 30, 2000. The wages were earned between July 1999 and February 2000. Therefore, Buckley was registered as an officer and director of the company at the time that the wages were earned.

Buckley submits that he has never participated in any of the activities of the company. He has not had any signing authority for the company's bank account, he has never worked for the company, he has had no involvement in day-to-day activities, nor in planning or long-term strategic activities. Buckley submits that he has never had access to, nor control over, the business records of the company and that he was simply a "nominee director". He says that he was nominated as a director by his company and his relatives who had lent significant amounts of money to Design Works. He points out that he and his family have lost approximately \$70,000.00 from the failure of the company.

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 or officer. In other words where a person clearly fulfils the functions, duties, or tasks of a corporate officer they may be found to be an officer even if not registered as one.

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.

However the Tribunal commented that:

In our view, there is no foundation for the proposition that if a person can be held to be a director by performing the duties of a director, then the “opposite result may also hold”.

Michalkovic appeared in the corporate records of his company as "vice-president, technology".

However, it was found that there was nothing that would support a conclusion that he "performed the functions ... of a director during the material time...". The uncontradicted evidence before the adjudicator showed that he did not have any of the usual authority or power associated with a corporate officer. His officer title was merely a title to improve his status with the employer's customers. The reconsideration panel concluded that Michalkovic was nevertheless an officer of the company. They concluded that:

In other words, we do not accept that there is an equivalent "flip-side" to the argument that a person may be a director or officer without being recorded as such and we do not accept that Michalkovic, however much sympathy we have for him and the circumstances he has found himself in, was not, as he put it, a "real" officer because he never fulfilled the functions of officer.

The Tribunal cited the words of the Saskatchewan Court of Queens Bench in *Dreaver v. Saskatchewan Treaty Indian Women's Council*, [1994] S.J. No. 383, at paragraph 48:

“I have already commented on the unfortunate position of Linda Bigknife-Watson but I can see no basis on which I can relieve her of liability, despite her persistently worthy effort. Her effort is a commendable reflection of the proper attitude to be taken by a director of a corporation but the result [that she is liable under the labour standards legislation] is a reminder that directors must be cognizant of their responsibilities and the potential risks of directorship.”

In this case Buckley claims that he was not a “real” director and refers to himself as a “nominee director”. As I understand his submission his company and his family had lent significant amounts of money to Design Works and as part of the security for the loans he was given a directorship in the company. It seems to me that in such a situation he would have added responsibilities to ensure the good management of the company to protect his family's investment. I do not see how this relieves him of any of his responsibilities as a director or his liability under section 96.

I conclude that Buckley was a director of the company at the time that the wages were earned and that he is therefore liable for the unpaid wages as found by the Director.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal