

An appeal

- by -

Thomas E. Mills, a Director or Officer of HLNT Networks (Canada) Inc.
("Mills")

- 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: Paul E. Love

FILE No.: 2002/024

DATE OF DECISION: June 17, 2002

DECISION

OVERVIEW

This is an appeal by Thomas Mills from a Determination dated January 3, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the “Act”), finding that Mr. Mills was a director of H.L.N.T. Networks (Canada) Inc. (“Employer”), and obliged to pay two months wages to Sean A. Collier, Farhang Fana, Paul Galvez, Karen J. Grant, Jeffrey Ho, Ramin Jalali, Tamie Johnson, Peter T. Pare, Kirstin Pickens, Darlene J. Rattai, Dorsum Satoglu, Jonathan Schwarz, Allana C. Scott, Gianpaol Veraci, Astrid Vollmerhaus, in the total amount of \$44,534.08. In my view there was no cogent evidence expressed in the Determination for a finding that Mr. Mills functioned as a director of H.L.N.T. Networks (Canada) Inc.. Mr. Mills was corporate counsel for H.L.N.T. Networks (Canada) Inc. In that role he provided advice to H.L.N.T. Networks (Canada) Inc. concerning collection actions against the company, including garnishment. As a result of garnishment actions, Mr. Mills caused his company, Garthak Enterprises Ltd., to enter into a written agreement with H.L.N.T. Networks (Canada) Inc. to receive funds in trust, on behalf of H.L.N.T. Networks (Canada) Inc. The agreement also provided that Garthak Enterprises Ltd. disburse the funds for payroll purposes in accordance with the instructions of the directors of H.L.N.T. Networks (Canada) Inc. Neither Garthak nor Mills had any discretion concerning the payment of funds. The consideration for this payroll service was the transfer of shares in H.L.N.T. Networks (Canada) Inc. from H.L.N.T. Networks (Canada) Inc. to Garthak Enterprises Ltd..

Prior to the issuance of the Determination Mr. Mills advised the Delegate of those facts, and supplied the Delegate with an unsigned copy of the payroll agreement. In this appeal Mr. Mills provided further documents retrieved from the hard drive of a computer. This was an appropriate case to exercise my discretion in favour of receiving “new documents” from Mr. Mills, and from the Employer. Rigid application of the rule in *Tri-West Tractor Ltd.*, BC EST #D268/96 would cause an injustice in this case, where the basic defence was disclosed to the Delegate before the Determination, and where the “alleged director” was having difficulty obtaining documents due to the insolvency of the corporate employer.

Imposition of liability under s. 96 of the *Act* of a corporate debt on a director, is to be scrutinized with care by the Tribunal. The leading Tribunal authorities indicate that s. 96 is an anomaly and should be given a narrow construction. On the basis of the evidence recited in the Determination, there was not a sufficient evidentiary basis for the Delegate to conclude that Mr. Mills functioned as a director, when it was clear that he was also corporate counsel, and his company provided a payroll service, for consideration, pursuant to an agreement in writing. I therefore cancelled the Determination.

ISSUE

Did the Delegate err in determining that Thomas Mills was a director of H.L.N.T. Networks (Canada) Inc.?

FACTS

This appeal was determined on the basis of written submissions from Thomas Mills, H.L.N.T. Networks (Canada) Inc., and the Delegate. None of the Employees affected by this Determination filed an appeal submission.

The Delegate issued a Determination against H.L.N.T. Networks (Canada) Inc. (“Employer”) of in the amount of \$44,534.08. The appeal period expired on November 5, 2001, and the Employer did not file an appeal of the Determination. The Delegate found that Thomas E. Mills, was a director of the Employer and was liable for up to two months unpaid wages for each employee. The Delegate found that Mr. Mills was liable for the sum of \$44,534.08 payable to the following employees: Sean A. Collier, Farhang Fana, Paul Galvez, Karen J. Grant, Jeffrey Ho, Ramin Jalali, Tamie Johnson, Peter T. Pare, Kirstin Pickens, Darlene J. Rattai, Dorsum Satoglu, Jonathan Schwarz, Allana C. Scott, Gianpaol Veraci, Astrid Vollmerhaus.

The Delegate appears to have made the finding on the basis of the following evidence set out in the Determination:

Information provided by various complainants indicate that Thomas E. Mills, as General Counsel, was party to decisions made by H.L.N.T. Networks (Canada) Inc. and did function on a day to day basis as a controlling mind of H.L.N.T. Networks (Canada) Inc. Various complainants further indicate that the reason Garthak was issuing cheques from their accounts is that H.L.N.T. Networks (Canada) Inc. did not want to use its own bank accounts due to creditor action.

Thomas E. Mills is not listed in the Companies Corporate Search as a Director or Officer of H.L.N.T. Networks (Canada) Inc., however, based on the evidence provided it is apparent that Thomas E. Mills functioned as a Director or Officer of H.L.N.T. Networks (Canada) Inc., in that he issued pay cheques for employees through his own bank account and he participated in decisions in regard to the day to day operating functions of the company.

Findings of Fact

Based on the evidence provided and on the balance of probabilities, I conclude that you were functioning as a Director or Officer of this company at the time these wages were earned or should have been paid. The evidence confirmed that you participated in the activities of the company during the time wages were earned.

Mr. Mill’s Argument

Mr. Mill’s argued that he was general counsel for H.L.N.T. Networks (Canada) Inc.. He indicated that his company Garthak Enterprises Ltd. provided a payroll service, receiving funds on behalf of

H.L.N.T. Networks (Canada) Inc., in trust and disbursing those funds in accordance with instructions of the Directors of H.L.N.T. Networks (Canada) Inc., at a time when H.L.N.T. Networks (Canada) Inc., was unable to use its corporate bank accounts due to garnishment. He denies that he was a director of the company or that he fulfilled the functions of a director of H.L.N.T. Networks (Canada) Inc..

Employer's Argument

The Employer supports the submission made by Mr. Mills, and has provided a letter to the Tribunal from its president verifying the facts alleged by Mr. Mills.

Delegate's Argument

The Delegate says that Mr. Mills and the Employer are tendering new documents, which should have been tendered during the course of the investigation. The Delegate submits that on the authority of *Triwest Tractors* and subsequent decisions, the Tribunal should not admit this information, and should confirm the Determination.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case Mr. Mills, to show that there was an error in the Determination such that I should vary or cancel the Determination. This appeal concerns s. 96 of the *Act*, which reads as follows:

- 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.

In the *Company Act*, R.S.B.C. 1996 c. 62 a "director" is defined to include every person, by whatever name designated who performs the functions of a director. Section 1 of the *Company Act*, indicates that a person can be a director if that person fulfils the functions of a Director. The functional approach is typically used by the Tribunal as an aid to interpretation, when a party carries out the functions of a director or officer, but is not named on the records in the office of the Registrar of Companies. Mr. Mills was not named in the records of the Registrar of Companies as a director of H.L.N.T. Networks (Canada) Inc.

The Tribunal recently considered the scope of s. 96 in *Director of Employment Standards*, BC EST #RD047/01 ("*Softwex*"), and in *Davrey Securities Inc.*, BC EST #D065/01. Liability imposed pursuant to s. 96 on a director and officer, for the liabilities of a corporate employer, is in law, an anomaly. The approach of the Tribunal is to scrutinize with care, liability imposed on directors, and to narrowly construe s. 96 of the *Act*.

In my view, rather than scrutinizing with care and narrowly construing s. 96 of the *Act*, the Delegate erred in law, in giving a liberal and broad interpretation to s. 96. The Delegate did not have an adequate evidentiary foundation to consider that Mr. Mills fulfilled the functions of a Director, even in the absence of documents tendered by Mr. Mills. Mr. Mills was corporate counsel for the Employer. It can therefore be expected that as corporate counsel, he would carry out tasks on behalf of his corporate employer. The Delegate does not spell out in the Determination the "day to day control" exercised by Mr. Mills, or the decisions that Mr. Mill's was alleged to have made with regard to the day to day functions of the company. The Determination does not address what information the Delegate relied on for conclusions reached, nor does the Determination identify the persons who advised of facts, so that I can determine whether the "information source" has any "testimonial capacity" or ability to give evidence in any helpful manner, on the matters in issue. The only "day to day" task identified in the Determination is the

“payroll service”, provided by Mr. Mill’s corporation, wherein he caused his corporation to pay the employees of HLNT Networks (Canada) Inc.

Short of this function, the Delegate discloses no evidence or facts in the Determination from which it can be concluded that Mr. Mill’s performed the function of a Director. The Delegate appears to have imposed liability on Mr. Mill’s and resists Mr. Mills’ appeal on the basis that Mr. Mill’s did not cooperate in the investigation with the Delegate. I note that there is some basis in the submission of Mr. Mill’s to conclude that Mr. Mill’s was having difficulty producing documentation to support his position, because he did not possess or control company records at the material time, and because of problems related to a computer hard drive. Mr. Mills did provide to the Delegate a copy of an agreement made June 1, 2001 between HLNT Networks (Canada) Inc. and Garthak Enterprises Ltd., which sets out that Garthak was to provide a payroll service on behalf of HLNT Networks (Canada) Inc. in return for HLNT Networks (Canada) Inc. issuing 100,000 common shares of HLNT Networks (Canada) Inc. to Garthak (the “payroll services agreement”).

In my view the Delegate erred in not considering the special position of Mills, as corporate counsel, and in failing to give appropriate weight to the payroll services agreement. On this appeal, Mr. Mills provided numerous documents which supported his assertion. In particular, he provided a letter from Grant R. Johnson, President of HLNT Networks (Canada) Inc. dated January 20, 2002, the salient portion of which is as follows:

Mr. Mills’ role at HLNT was limited to providing legal advice to the Company, its directors and officers. Mr. Mills did not have authority to enter contracts on behalf of HLNT nor to bind HLNT to contractual obligations. Furthermore, while Mr. Mills was frequently consulted with respect to administrative matters he did not have any authority in that regard.

At one point in the year, 2001, HLNT was subject to vigorous attempts by creditors to enforce claims against the company. When a garnishing order caused funds reserved for the HLNT payroll to be paid into court, it was determined by Mr. Brett Conkin, the COO of HLNT, and myself, that HLNT would be unable to use its existing bank accounts for fear of further garnishment. Nonetheless, HLNT did not have time to establish a new bank account and order cheques in time for the next payroll. Mr. Mills, who was advising on the risks of further creditor action, offered on behalf of his company, Garthak Enterprises Ltd. (“Garthak”) to provide payroll services on behalf of HLNT. It was agreed between HLNT and Garthak, that HLNT funds would be deposited into the Garthak bank account to be held in trust by Garthak and paid out to employees as directed by the Directors, Mr. Conkin, and myself. HLNT completed cheques drawn on the Garthak account for Mr. Mills to sign as the President of Garthak. Subject to certain restrictions placed on Mr. Mills by the Directors, Mr. Mills signed the cheques as they were presented to him. At no time did Mr. Mills exercise any discretion as to how the funds held by Garthak were to be distributed. At no time did Mr. Mills ever used his own funds to make payroll payments or pay other obligations of HLNT through Garthak or otherwise.

I am writing this letter at the request of Mr. Mills in response to the Determination made against him by the Director. I did not provide such a letter to the Director prior to the Determination because I quite simply could not fathom how Mr. Mills could be considered a director or officer of HLNT and therefore did not consider such a letter to be necessary.

Under *Tri-West Tractor Ltd.*, BCEST # D268/96 I have a discretion to admit new evidence at this hearing. I do so to prevent an injustice occurring. Further, I find that if the evidence is new evidence, Mr.

Mills had a reasonable excuse for not providing the evidence during the investigation which is contained within his letter to the Tribunal dated April 2, 2002:

I advised the Delegate on numerous occasions prior to the Determination that HLNT Networks (Canada) Inc. was insolvent and had ceased operations. I further advised the delegate that the Company had no offices or employees. The computer equipment of the Company had been sold or dismantled. Many files and other documents were in several locations, and were disorganized. Files relating to financial matters were in the hands of the auditor of the Company's parent, Healthnet International, Inc.

Since I was not in control of the Company's documents or equipment, to locate and obtain documents to *disprove* an unsubstantiated allegation that I was a *de facto* director or officer of the Company, was extremely difficult. The Delegate put me in the position of having to disprove a negative, without any guidance as to what evidence would satisfy him that I was not a director or officer.

At one point, I asked the Delegate if the contract between Garthak Enterprises Ltd. and the company for payroll services would be sufficient evidence (the "Services Contract") to disprove the allegations against me. The Delegate led me to believe that it would. I spent weeks trying to locate the services Contract to no avail. It was finally located and produced to the Delegate. The Services Contract was faxed to the Delegate prior to receiving the delegate's Determination. On December 31, 2001, I wrote the delegate to advise that the document had been located in the possession of the auditor, and that it would be produced within a week. On January 4, 2002, I faxed a copy of the Services contract to the Delegate. Copies of these letter are enclosed.

The Delegate advised me shortly after receiving the Services Contract, that the Determination had been made, that I was too late, that he was not persuaded by the Services Contract in any event, and that I should take the matter up on appeal.

Subsequent to the Determination against me, the hard-drive to the computer used by me when I was employed by the Company was located in a box in someone's basement. I had a friend re-install the hard drive and un-archive my email. It was only at this time that I located various emails which aided me in disproving the allegations against me. Those emails were produced on appeal because they were not reasonably available prior to the Determination.

In my view, conduct of Mr. Mills cannot be seen to be "failing or refusing to participate" in the investigation. Rigid application of the rule in *Tri-West Tractor Ltd.*, BC EST #D268/96 would cause an injustice in this case, where the basic defence was disclosed to the Delegate before the Determination, a key document was disclosed prior to receipt of the Determination, and where the "alleged director" was having difficulty obtaining documents due to the insolvency of the corporate employer.

Mr. Mills was general counsel or employee of HLNT Networks (Canada) Inc.. Mills, on behalf of his client, was engaged in litigation against some of the employees of HLNT Networks (Canada) Inc.. It is unclear who the Delegate relied upon, for his information, and what indeed was the information that the Delegate relied upon. Given the law in this area, particularly that s. 96 should not be given an expanded interpretation, I am satisfied that the Delegate erred in finding that Mills was functioning as a director of HLNT Networks (Canada) Inc., when pursuant to his role as a president of Garthak, Garthak provided payroll services to HLNT Networks (Canada) Inc.. There was no evidence in the determination from which the Delegate could conclude reasonably that Mills was a director of HLNT Networks (Canada) Inc. He was not named in the records at the Registrar of Companies as a Director of HLNT Networks (Canada) Inc.. He did not function as a director of HLNT Networks (Canada) Inc.. The Delegate did not

address the issue of whether Garthak was a related employer under s. 95 of the Act, but it is clear that Garthak and HLNT Networks (Canada) Inc. were not associated companies, carrying on a common business under common control.

For all the above reasons I grant this appeal.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated January 3, 2002 is cancelled.

Paul E. Love
Adjudicator
Employment Standards Tribunal