

An appeal

- by -

Carlos Yong and Robert Craig, Directors or Officer of Stratford Internet
Technologies Inc.

- 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: Ib S. Petersen

FILE No.: 2001/636 and 2001/637

DATE OF HEARING: December 10, 2001

DATE OF DECISION: December 13, 2001

DECISION

APPEARANCES:

Mr. Ron Argue	on behalf of Mr. Yong and Mr. Craig
Ms. Sandy Struss	on behalf of Mr. Eric Pinfold, Mr. Tim Kang, Mr. Robert Barrett, Mr. Jason Wozencroft, Ms. Jennifer Seymour, Ms. Caroll Turner and herself (collectively the “Employees”)
Mr. Percy Rosenberger	an Employee, witness for the Employer
Ms. Jan Pezarro	an Employee, witness for the Employer
None	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Yong and Craig pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against two Determinations of the Director of Employment Standards issued on August 17, 2001, which determined that they were liable as corporate directors or officers for two months wages to former employees of the Employer, Stratford Internet Technologies Inc. (“Stratford”), for a total of \$36,550.22. The Director’s Delegate found that they were directors or officers based on the records of the Registrar of Companies.

ISSUES

Yong and Craig appeal the conclusion in the Determination that they were directors or officers of Stratford. While there is no dispute that the records filed with the Registrar of Companies indicate that they were, indeed, directors or officers, they argue that they lost control of the company to an investor and did not function as directors or officers. As well, in the case of Yong, it is argued that his liability should be limited to the period up his resignation as a director.

FACTS

The material facts of this case are not seriously in dispute. Yong and Craig were directors and officers of Stratford according to the records of the Registrar of Companies. In mid 2000, the company ran into financial difficulties. Not to put too fine a point on it, it ran out of money, and, at that time, there were some lay-offs. A Mr. Robert Miller, who apparently operates out of Miami, Florida, agreed to invest substantial amounts of money in Stratford and, over time, he invested a total of some \$3.5 million. The loan was provided on the basis that it could be

converted into equity. In December 2000, there was – again - a cash crunch in the company and Yong and Craig had to go back to Miller for more money to keep the company afloat. That situation seems to have continued into 2001.

The evidence submitted by the Appellants was that Miller took control of the Company. He participated in directors meetings, via telephone or through his agents. He made decisions with respect to payroll and lay-off of staff. He made decisions regarding payment of the company's payables and projects and contracts the company was involved in. Ms. Pezarrom, the former chief operating officer in the latter part of 2000, and who, according to Yong, was terminated at Miller's instance, explained how Yong and Craig virtually had to go "begging" to Miller for funds, among others, to meet payroll expenses. Pezarro explained that Miller maintained "hands-on" control. Mr. Rosenberger's (a former controller/financial manager) evidence was much to the same effect.

On March 9, 2001, Yong testified, Miller forced his resignation as a director and officer. Yong continued his employment with Stratford and explained that he was involved in "some meetings but had no say" after March 9. Craig continued as a director and officer until the end of March. Miller and his brother, Mr. Michael Miller, were appointed directors as of March 9. Michael Miler became the corporate secretary in place of Yong. On Friday March 16, 2001, the two Millers petitioned Stratford into bankruptcy. Apparently this happened on March 19, the following Monday.

On May 25, 2001, the Director issued a Determination against Stratford in the amount of \$50,682.83. The Determination was forwarded to, among others, the trustee in bankruptcy. As of the expiry of the time limit, June 18, 2001, no appeal had been received.

On August 17, 2001, the Delegate issued the Determinations subject of this appeal.

ANALYSIS

The Appellants have the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that they generally do not succeed. I conclude, however, that the extent of Yong's liability be referred back to the Director.

Section 96 of the *Act* provides for personal liability for corporate directors and officers. They may be liable for up to two month's unpaid wages for each employee, if they were directors and officers at the time the wages were earned or should have been paid. Section 96 reads:

- 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 officer of a corporation is not personally liable for
 - (a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency *Act*,
 - (b) vacation pay that becomes payable after the director or officer ceases to hold office, or
 - (c) money that remains in an employee's time bank after the director or officer ceases to hold office.
- (2.1) If a corporation that is a talent agency has received wages from an employer on behalf of an employee and fails to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations,
 - (a) a person who was a director or officer of the corporation at the time the wages were received is personally liable for the amount received by the corporation from the employer, less any fees allowed under the regulations, and
 - (b) that amount is considered for the purposes of subsection (3) to be unpaid wages.
 - (3) This *Act* applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1).

In the *Director of Employment Standards*, BCEST # RD047/01, reconsideration of BCEST # D056/00, the leading case in this area, the Tribunal explored the question of corporate officers and directors and noted:

“In our view, in summary, the case law reviewed ... 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 circumstances where it would be inappropriate to find that 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.

The Appellants also relied upon the Tribunal's decision in *Re Frank Forino*, BCEST #D102/99, reconsideration of BCEST #D261/98, and, in particular, on the following, page 8:

“In providing for some degree of liability for directors in the *Employment Standards Act* the Legislature must have intended that the individuals controlling the corporate entity have some responsibility to ensure that employee wages are paid by the company in some priority to other corporate expenditures. It is consistent with this intent that the definition of director in the *Act* be limited to persons who are in a position to control, or participate in the control of, the business and affairs of the company. In our opinion it is not intended to cast such a wide net as to include everyone in the management system of a company who has some day to day involvement in its business operations.”

In my view, *Forino* is not of much assistance in the case at hand. It arose out of a situation where the person found to have been a director or officer was not recorded as such with the registrar of Companies. In the case of the *Director of Employment Standards*, above, the Tribunal stated, page 9:

“It is clear, on the Tribunal's case law, that a 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 Hauff*, above; *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 exercise.”

While I agree that “the Legislature must have intended that the individuals controlling the corporate entity have some responsibility to ensure that employee wages are paid,” I do not agree that persons who are recorded as directors or officers, as is the case here, can escape or avoid

liability by when they lose a measure of control over the company. I accept the evidence tendered on behalf of the Appellants. It is clear to me on the evidence that Miller exercised a significant degree of control over the day-to-day operations of the company. All the same, Yong and Craig remained as directors and officers, in Yong's case at least until March 9, 2001. They could have resigned and did not.

In the circumstances, it does not appear to me that this case meets one of the exceptions set out in the Tribunal's decision in the Director of Employment Standards, above, page 10, namely that

“... 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.”

In my view, the issue before the Tribunal is whether the person had the status of director or officer, and not the degree of influence over corporate decisions. I note that Craig and Yong participated in directors meetings. In the result, I dismiss the appeal of the issue that Yong and Craig were not directors and officers, in Yong's case at least until March 9, 2001. In my view, this is not the “rare and exceptional case” referred to in the Tribunal's jurisprudence.

In short, I uphold the Determination against Craig. I also uphold the conclusion against Yong at least to the extent that he was a director and officer until March 9, 2001. As such, it is clear that he, at least until that date, was recorded as an officer and director in the corporate records.

Yonug asks that the matter of his liability reflect his resignation date of March 9, and that this be referred back to the Director for further investigation. The award of wages to some employees includes wages for the period after March 9. The Delegate did not have the opportunity to consider this. A submission from the Delegate states that Yong was notified of Section 96 by letter dated April 12, 2001 and did not inform the Delegate that he had ceased to be a director or officer as of March 9. That letter was not before me and the circumstances surrounding it remains unclear to me.

The Determination against Yong is based solely on the records of the Registrar of Companies. On the face of the Determination, there is no consideration given to his status, if any, based on whether he actually performed the functions, duties or tasks of a director or officer after that date. On the evidence before me, I accept that Yong resigned on March 9, 2001. I recognize that no documents were filed with the Registrar of Companies. All the same, excerpts from the corporate minute book and other records show that Yong resigned on March 9. There is nothing before me to question the validity of those records and I accept them. In any event, despite his resignation, Yong may still have been a director or officer based on a “functional” test. In the circumstances, I leave that for the Director to determine. According to the corporate records in evidence, he ceased to be a director or officer after March 9 and his liability must--on my reading of Section 96--be reduced accordingly. He is only liable for amounts earned or payable on or before March 9, 2001 (see, for example, *Alya International Inc. and Alya Systems Inc.*, BCEST #D166/01). I refer the calculation of his liability back to the Director.

In the circumstances, my decision is to confirm the Determination against Craig and refer the calculation of Yong's liability back to the Director based on the above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 17, 2001 against Craig be confirmed.

Pursuant to Section 115 of the *Act*, I order that:

1. the Determination dated August 17, 2001 against Yong be confirmed at least to the extent that he was a director or officer at least until March 9, 2001; and
2. he is liable for amounts earned or payable on or before March 9, 2001. I refer the calculation of this liability back to the Director.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal