

An Application for Reconsideration

- by -

The Director of Employment Standards  
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

pursuant to Section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATORS:** Ib S. Petersen, Panel Chair  
Fern Jeffries  
Frank A.V. Falzon

**FILE No.:** 2000/371

**DATE OF DECISION:** January 29, 2001



evidence before the Adjudicator showed that he “did not have any of the usual authorities or powers associated with a corporate officer.” His officer title was merely a title to improve his status with the Employer’s customers. The Adjudicator considered the tribunal’s decisions in *Wilnofsky*, BCEST #D106/99 and *Penner and Hauff*, BCEST #D371/96. In the result, the Adjudicator cancelled the Determination.

The Adjudicator also noted that even on the *assumptions* that Michalkovic was a corporate officer and the Determination was properly issued, the claim against him with respect to Sellers could not stand because Sellers’ employment came to an end after Michalkovic’s and, therefore, that the latter was no longer an officer when Sellers’ claim crystalized.

We note that the Director does not take issue with the Decision with respect to Sellers. Moreover, Michalkovic voluntarily paid \$1,000 to the Director. This amount has been held in trust pending this proceeding. In a letter to the Tribunal, dated July 5, 2000, counsel for the Director has represented as follows:

“The delegate has advised that the employee, Mr. Smith, is willing to accept that \$1,000 payment from Mr. Michalkovic and that the Branch would not seek any additional sums from Mr. Michalkovic. Instead, the Branch will continue its collection efforts against other persons.”

We trust there is no misunderstanding in that regard.

## ISSUES

There are broadly speaking two issues before us. First, is the application timely? In other words, was there “unreasonable delay” in the filing of the application for reconsideration? Second, if there is no such delay, is this an appropriate case for reconsideration? More specifically, the legal issue before us boils down to the question of whether the fact that Michalkovic - a person listed on corporate records as an officer - did not perform the functions of an officer is a defence to liability under section 96 of the *Act*.

## ARGUMENTS

In this application for reconsideration, which was filed on May 26, 2000, or about three and a half months after the date of the Decision (which, as mentioned, was dated February 4, 2000) the Director argues that the Adjudicator made errors of law and that the Decision must be reconsidered. We note, as well, that the Director’s counsel on April 11, 2000 notified the Tribunal, copy to the parties, that the Director had instructed her to file an application for reconsideration. It appears that Mr. Michalkovic did not receive a copy of the letter. The Director argues that the application is timely. She says that the application is made about 3 months after the Decision was issued. In the result, she argues, based on the Tribunal’s jurisprudence, there is a “rule” that the applicant must first satisfy the Tribunal that there is a reasonable explanation for a delay in filing, and goes on to say that the “six month range is

the limit” (*Director of Employment Standards (Aries Property Maintenance)* BCEST D#179/00, reconsideration of BCEST #D209/99). In other words, the Director argues, the application is timely.

Briefly put, the Director says that the Adjudicator erred when he cancelled the Determination based on Michalkovic not performing the functions of a Director. The Director argues that the Michalkovic was properly appointed as an officer, recorded as such in the Employer’s corporate records, and is therefore liable under Section 96.

The Director does not disagree with the proposition set out in *Wilnofsky, above*, that the records of the registrar of Companies establishes a rebuttable presumption as to director/officer status. The Director takes issue with how the presumption may be rebutted. Specifically, the Director argues that a person’s failure to perform the functions of a director or officer does not constitute a defence for liability under Section 96 of the *Act*. The Adjudicator’s conclusions on this point constitutes a serious error of law which merits reconsideration. First, the Director argues that Section 96 does not require an inquiry into the actual duties of an officer. As well, the Act should be interpreted broadly to reflect its remedial purpose (*Rizzo and Rizzo Shoes Ltd.* (1998), 154 D.L.R. (4<sup>th</sup>) 193 (S.C.C.)). Second, 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.” The Director notes that under company law, a person may attract liability if he holds himself out as a director and that the so-called “indoor management rule” permits third parties dealing with corporations to presume that internal regulations of the company has been complied with. Thus, while a person may be found to be a director despite irregularities in his appointment, there is no doctrinal foundation for the opposite proposition--there is no “flip-side.” The same reasoning should apply to officers. Third, the Director points out that the duties of an officer would be difficult to define and prove. Finally, the Director argues that, in the circumstances, there was no confusion that, in fact, the Director was proceeding against Michalkovic as an officer and not a director.

Michalkovic opposes the reconsideration application. He says that the delay is “unacceptable” in circumstances without “good cause.” He also brings forward the point that the Director did not participate in the appeal hearing. He also says that an application for reconsideration should not be used as a “disguised form of appeal of an otherwise final decision.”

Michalkovic argues that he was not a “real” officer of the Employer. His submissions are consistent with his argument before the Adjudicator, namely that had no decision-making power within the company, had no signing authority, had no authority over employees and that his salary was almost the same as Sellers’. Michalkovic notes that he was terminated by the Employer in February 1999 and states that he sent his resignation (as an officer, presumably) to the registered and records office of the Employer in November (1999, presumably). It appears from Michalkovic’s submission that the Employer has been delinquent in filing its records with the Registrar of Companies. As well, Michalkovic points

to the apparent inequities in the manner in which the Director proceeded against him and not other directors or officers (who are still driving their Porches and BMWs). Michalkovic argues that it necessary to look into the function to determine officer status.

In reply, the Director argues that she did not attend the hearing before the Adjudicator because she could not have anticipated the defence “not provided for in the statute, prior jurisprudence of the Tribunal or in company law would be successful.” The Director argues that the *Act* provides limited defences to liability under Section 96. Specifically, the Director says that the corporate records raised a rebuttable presumption that a person was a director of officer. This presumption could be rebutted by evidence that the person had resigned as a director or officer (*Wilnofsky*, BCEST #D106/99). The Director then goes on to say that:

“Mr. Michalkovic based his appeal on the claim that he was not a “real officer,” although he admitted that he was named an officer of Softwex ... There was no jurisprudence from the Tribunal that the presumption established by the corporate records could be rebutted by evidence that the person was not a “real” officer. ... [T]he Adjudicator concluded that if one may be a director if ‘not so named in corporate records ... logic would suggest that the opposite result may also hold.’”

In the result, the Director argues, this is an opportunity for the Tribunal to address a significant legal issue.

## ANALYSIS

### A. Timeliness

We turn to the timeliness issue first.

In the circumstances, we agree that the application is timely. We do not, however, agree that there is a “rule” with respect to applications timeliness for reconsideration as suggested by the Director (see, for example, *The Director of Employment Standards (Unisource)*, BCEST #D122/98, reconsideration of BCEST #D172/97; *The Director of Employment Standards (Meadowvale Holdings Ltd.)*, BCEST #D530/00, reconsideration of BCEST #D532/99; *The Director of Employment Standards (MacMillan Bloedel Limited)*, BCEST #D263/00, reconsideration of BCEST #D214/99; *The Director of Employment Standards (Hewitt Rand Corporation)*, BCEST #D366/00, reconsideration of BCEST #D271/99; *The Director of Employment Standards (Labour Ready Temporary Services Ltd.)*, BCEST #D426/00, reconsideration of BCEST #D457/99). While the Tribunal has dismissed a number of applications for reconsideration based on timeliness, there is, as noted in *The Director of Employment Standards*, BCEST #D330/00, reconsideration of BCEST #D122/00), a “relative paucity of Tribunal decisions regarding what constitutes an ‘unreasonable’ delay.” In the latter case there was a 10 week delay. In the circumstances of the present application, we are not prepared to find that there was an “unreasonable” delay.

## B. Director/Officer Status

The principles applicable to an application for reconsideration are well established (see for example, *Milan Holdings Inc.*, BCEST D#313/98, reconsideration of BCEST #D559/97). First, the power to reconsider is discretionary. Second, an application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In many decisions, Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system (see, for example, *Zoltan Kiss*, BCEST #D122/96).

The issue raised in this application is whether Michalkovic was an officer of Softwex, the Employer, and, if so, what consequences flows from that in terms of liability under Section 96 of the *Act*. This, in our view, is an important issue. We are, therefore, prepared to consider the merits of the Director's application for reconsideration.

Section 96 provides in part:

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 two months' unpaid wages for each employee.

The Director argues that Section 96 does not require an inquiry into the actual duties of an officer. As well, she submits that the *Act* should be interpreted broadly to reflect the remedial purpose: *Rizzo and Rizzo Shoes Ltd.* (1998), 154 D.L.R. (4<sup>th</sup>) 193 (S.C.C.).

We do not agree with this broad proposition. It is not self-evident who is a director or officer of a company. The *Act* imposes liability on "directors" and "officers" and, as these are not defined in the *Act*, it is necessary to have regard to the *Company Act*. As well, while we accept--as has been noted in many decisions of the Tribunal--the remedial purpose of the employment standards legislation, the construction of the statute as it relates to the liability of directors and officers should take place in light of the observations made in *Archibald*, BCEST #D090/00, where the Tribunal stated:

Both our Court of Appeal and the Supreme Court of Canada have repeatedly stressed that employment standards legislation, being "benefits-conferring" legislation, should be interpreted in a "broad and generous manner" ... On the other hand, our Court of Appeal and the Supreme Court of Canada have both recognized that the imposition of a personal unpaid wage liability on corporate officers and directors is an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts. Accordingly, while the Act as a whole is to be interpreted in a broad and generous fashion,

*the provisions imposing a personal liability on corporate directors and officers should be narrowly construed ... [emphasis added]*

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.”

Though officers and directors are often considered in the same breath, it is in our view, necessary to distinguish between the two. These terms are not synonymous.

There is some support for a functional test with respect to director or officer status in the Tribunal’s jurisprudence. For example, in *Sindia (c.o.b. R. Moore Contracting Ltd.)*, BCEST #D131/99, the Adjudicator stated:

Taking that approach, with which I agree, if I accept that it is not necessary to be recorded in the official company records as a director to have liability under Section 96, *then the flip side surely has to be that being recorded as such may not be sufficient in itself to establish liability*. If the registration as director or officer is merely token and there is no accompanying exercise of typical director or officer tasks, duties or functions, liability under Section 96 may not exist... [emphasis added]

This comment, however, must be considered in the factual context of the case. In *Sindia*, which arose under Section 96 of the *Act*, dealing with director or officer liability, there was evidence that the appellant had resigned as a director or officer some years prior to the (director’s) determination under appeal. The Director argued that the appellant was a director or officer according to the Registrar of Companies at the time the corporate determination was issued, some two years after the alleged resignation. The Adjudicator decided that the evidence of the resignation could not simply be dismissed out of hand and referred the matter back to the Director for further investigation. In our view, this case does not stand for the broad proposition that there is an equal “flip-side” to the argument that it is possible to be a director or officer without being on the corporate records as such.

In *Michalkovich*, the case under reconsideration, the Adjudicator noted as follows:

“As the Tribunal has previously noted, corporate searches only raise a rebuttable presumption regarding an individual’s status (see *Wilnofsky*, BCEST #D106/99). Further, one may be considered to be an officer or a director even if not so named in corporate records (see *Penner and Hauff*, BCEST #D371/96) and *logic would suggest that the opposite result may also hold.*” [emphasis added]

In *Michalkovich*, the Adjudicator cancelled a Determination which found that Michalkovic was liable as a director under Section 96 of the *Act* for compensation for length of service to two former employees. Corporate records, attached to the Determination, indicated that he

was not a director. The records did, however, indicate that he was an officer: “vice-president, technology.” Based on the evidence before him, the Adjudicator found that there was nothing that would support a conclusion that Michalkovic “performed the functions ... of a director during the material time ...” As well, the uncontradicted evidence before the Adjudicator demonstrated that he “did not have any of the usual authorities or powers associated with a corporate officer.” His officer title was merely a title to improve his status with the Employer’s customers (*Wilnofsky*, BCEST #D106/99; *Penner and Hauff*, BCEST #D371/96. The Adjudicator disposed of the case as follows:

“In my view, this Determination must be cancelled because, first, it is predicated on the demonstrably false assertion that Michalkovic was a Softwex director. Second, even if it could be said that the Determination was issued on the alternative basis that Michalkovic was a Softwex officer (and I have some very real concerns about that point), *the uncontradicted evidence before me clearly shows that Michalkovic’s duties in the organization were not those that might ordinarily be ascribed to a corporate officer.*” [emphasis added]

Michalkovic did not have signing authority nor did he have authority to hire or fire employees. His main task was to provide computer software expertise. Michalkovic did not report to the company president but to another officer. In the result, the Adjudicator found that the officer title was merely a title.

The B.C. *Company Act* defines “director” to include “every person, by whatever name designated, who performs the functions of a director” (Section 1). Directors are elected by the shareholders to manage or supervise the management of the affairs and business of the corporation (Section 117 of the *Company Act*) and are ultimately responsible to the shareholders. They are subject to removal by the shareholders. Directors are elected to a company’s board either through presence at a shareholders meeting and not refusing the appointment or by written consent (Section 112, *Company Act*). In other words, they have to express consent to become directors.

The situation is not quite as clear for officers. Officers are appointed by the directors, and they are subject to removal by the directors. Their responsibilities are to operate the corporation in accordance with the directives of the directors. Officers are most often employees of the corporation. The *Company Act* does not define “officer.” Officers get their titles, functions and authority from the corporation itself and from its articles. The *Company Act* defines “senior officer” broadly to mean:

“the chair or any vice chair of the board of directors, the president, any vice president, the secretary, any vice-president, the treasurer or the general manager of the corporation or any other individual who performs the functions of the corporation similar to those normally performed by an individual holding those offices, and the 5 highest paid employees of the corporation, including any individual referred to in this definition”



This definition is of some assistance. The definition implies a functional test. Officers may or may not be recorded with the Registrar of Companies or in the company's official records. Typically some officers--like the president and secretary--may be found in the company's records (Section 113, *Company Act*). It is unlikely that a person is appointed president or secretary without his or her consent. As well, those titles connote some degree of performance of functions within the organization that would be consistent with the status as officers. They are, in or view, more likely to be "controlling minds" of the organization. All the same, we would generally be reluctant to accept that a person who, according to the corporate records, is an officer, is not an officer unless there is "*credible and cogent evidence that the Registrar's records are inaccurate.*" 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 may 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 an officer.

The words of the Saskatchewan Court of Queen's Bench in *Dreaver v. Saskatchewan Treaty Indian Women's Council*, [1994] S.J. No. 383, at para. 48, are apposite here:

"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 was liable under the labour standards legislation] is a reminder that directors must be cognizant of their responsibilities and the potential risks of a directorship."

There is no issue, in this case, that Michalkovic had become an officer in any involuntary manner or had not consented to this appointment.

With respect to others, claimed to be officers, but not registered or indicated as such on the corporate records, a functional test may indicate whether or not they are, in fact, officers.

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. In *Wilinofsky*, BCEST #D106/99, the leading case, relied upon by the Adjudicator in *Sindia*, the Adjudicator stated:

"... where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer ... of the company .... *This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate--the*

burden of proving that one is not a corporate director or officer rests with the individual who denies such status.” [emphasis added]

The Director points out that the duties of an officer would be difficult to define and prove. We are cognizant of those difficulties. That is why, in our view, the corporate records shift the burden to the person indicated there to be a director or officer to show by “*credible and cogent evidence that the Registrar’s records are inaccurate*”.

In our view, in summary, the case law reviewed here and in *Wilnofsky* 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 or a director or officer.
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

We wish to conclude by noting our sympathy for the predicament in which Mr. Michalkovic found himself. We wish to recognize that he has behaved entirely honourably throughout, and feels somewhat “punished” for having paid funds in good faith at an early stage in the process. We also recognize his concerns as to why enforcement efforts were directed toward him rather than against others with what might be referred to as greater “moral” culpability. Despite all this, our obligation is to apply the law as we find it, and in this case find ourselves unable to ignore the legal reality – a reality with consequences extending the beyond the facts of this case - that he falls within the terms of section 96. No issue has properly been raised before the Adjudicator concerning the exercise of the Director’s enforcement discretion as against him as compared with others, and for her part the Director has made it known not only that she is not seeking any more than the \$1000 he has already paid, but that she has in fact continued enforcement efforts against others.

**ORDER**

We grant the application for reconsideration.

Pursuant to Section 116 of the *Act*, the application for reconsideration is granted and order that the \$1,000 held in trust by the Director be paid out to Smith.

**IB S. PETERSEN**

**Ib S. Petersen  
Adjudicator, Panel Chair  
Employment Standards Tribunal**

**FERN JEFFRIES**

**Fern Jeffries  
Chair  
Employment Standards Tribunal**

**FRANK A. V. FALZON**

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