Applications for Reconsideration

- by -

24/7 Excavating Ltd.
("24/7 Excavating")
- and -
Peter Arney Larsen, a Director or Officer of 24/7 Excavating Ltd.
("Mr. Larsen")

- of Decisions issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE Nos.: 2015A/106 & 2015A/107

DATE OF DECISION: November 5, 2015

DECISION

SUBMISSIONS

W. Eric Pedersen	counsel for 24/7 Excavating Ltd. and Peter Arney Larsen, a Director or Officer of 24/7 Excavating Ltd.
Carrie H. Manarin	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an application made pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), filed by legal counsel on behalf of 24/7 Excavating Ltd. ("24/7 Excavating") and Peter Arney Larsen, a Director or Officer of 24/7 Excavating Ltd. ("Mr. Larsen"), for reconsideration of two separate, but related, appeal decisions issued by Tribunal Member Stevenson on July 7, 2015. I shall jointly refer to 24/7 Excavating and Mr. Larsen as the "applicants". In the first decision (BC EST # D066/15), Tribunal Member Stevenson refused to extend the statutory appeal period and thus confirmed a determination issued against 24/7 Excavating on October 30, 2014. In the second decision (BC EST # D067/15), Tribunal Member Stevenson dismissed an appeal filed by Mr. Larsen as having no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*). Accordingly, a determination issued against Mr. Larsen on December 16, 2014, was confirmed.

2. Although there are two separate reconsideration applications before me, the applicants' counsel filed a joint application on behalf of both 24/7 Excavating and Mr. Larsen, and given the related nature of the two determinations, I am issuing a single set of reasons addressing both applications. Tribunal File No. 2015A/106 concerns the application as it relates to 24/7 Excavating and Tribunal File No. 2015A/107 concerns the application as it relates to Mr. Larsen.

3. I have before me the submissions filed by the applicants' legal counsel and by a delegate of the Director of Employment Standards – not the same delegate who issued the two determinations. Although invited to do so, the respondent employee, Floyd Tayler ("Mr. Tayler"), did not file a submission. In addition to reviewing the applicants' and Director's submissions, I have also reviewed the subsection 112(5) record that was before Tribunal Member Stevenson when he issued the appeal decisions in question.

4. The Tribunal reviews applications for reconsideration based on the two-stage test set out in the *Milan Holdings* decision (*Director of Employment Standards*, BC EST # D313/98). At the first stage of the *Milan Holding* test, the Tribunal decides whether the application is sufficiently important so as to justify a full and complete review on the merits (the second stage). In order to pass the first stage of the test, the applicant must demonstrate that the application is not a mere attempt to reargue the position advanced on appeal but raises a compelling issue of fact, law or procedure that seriously calls into question the correctness of the impugned appeal decision.

5. Before turning to the *Milan Holdings* test, I will set out the relevant background facts. I will then consider whether this application passes the first stage of the *Milan Holdings* test with respect to one or both of the two appeal decisions. If the application passes the first stage, I will then turn to the merits of the application. If the application does not pass the first stage as it relates to one or both of the decisions, it will be dismissed and the appeal decision(s) will be confirmed.

PRIOR PROCEEDINGS AND RELEVANT STATUTORY PROVISIONS

6. This reconsideration application ultimately flows from two separate determinations issued under section 79 of the *Act*. The first determination, in the total amount of $10,532.11, was issued by a delegate of the Director of Employment Standards on October 30, 2014 against 24/7 Excavating. I shall refer to this determination as the "Corporate Determination". By way of the Corporate Determination, 24/7 Excavating was ordered to pay its former employee, Mr. Tayler, the sum of $7,532.11 on account of unpaid wages and section 88 interest. In addition, 24/7 was ordered to pay a further $3,000 on account of six separate $500 monetary penalties (see section 98 of the *Act*).

7. The second determination, in the total amount of $7,558.33, was issued on December 16, 2014 against Mr. Larsen under section 96(1) of the *Act*: "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." I shall refer to this determination as the "Section 96 Determination."

8. The same delegate issued both the Corporate Determination and the Section 96 Determination. The delegate appended "Reasons for the Determination" to the Section 96 Determination but did not prepare any reasons for the Corporate Determination. In my experience, delegates usually issue reasons concurrently with the determination, but that is not an invariable practice. Subsection 81(1.1) of the *Act* states that "a person named in a determination…may request from the director written reasons for the determination" and such a request must be made, in writing, within 7 days after service of the determination (subsection 81(1.2) of the *Act*) has been effected. At this point, "the director must provide the person named in the determination with written reasons for that determination" (subsection 81(1.3) of the *Act*). Since a request was not made within the 7-day time period, no reasons were ever issued with respect to the Corporate Determination. It is my understanding that 24/7 Excavating's legal counsel (not the same counsel acting on its behalf in the present application) made a written request for reasons on or about March 4, 2015, and that the delegate responded on March 19, 2015, stating that she would not be issuing any reasons "as the period for appeal of the [Corporate] Determination has expired". It should be noted that an appeal is not perfected unless, and within the statutory appeal period, the appellant files "a written request specifying the grounds on which the appeal is based" and "a copy of the director's written reasons for the determination" (see subsection 112(2)(a) of the *Act*). I should also note that while a compliant subsection 81(1.3) request creates a mandatory obligation to issue written reasons for decision, a delegate can issue written reasons, if that is thought appropriate, even though the request does not comply with subsection 81(1.2). There is nothing in the *Act prohibiting* the Director from issuing reasons after the "7-day request period" has expired.

9. Subsection 112(1) of the *Act* specifies the three available grounds for appealing a determination to the Tribunal. Subsections 112(2) and (3) specify how and when an appeal must be filed:

> (2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),
>
> (a) deliver to the office of the tribunal
>
> (i) a written request specifying the grounds on which the appeal is based under subsection (1),
>
> (i.1) a copy of the director's written reasons for the determination, and
>
> (ii) payment of the appeal fee, if any, prescribed by regulation [Note: currently, there is no prescribed appeal fee], and

(b) deliver a copy of the request under paragraph (a) (i) to the director.

(3) The appeal period referred to in subsection (2) is

(a) 30 days after the date of service of the determination, if the person was served by registered mail, and

(b) 21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).

10. Section 122 of the *Act* contains a "deemed service" provision:

122 (1) A determination or demand or a notice under section 30.1 (2) that is required to be served on a person under this Act is deemed to have been served if

(a) served on the person, or

(b) sent by registered mail to the person's last known address.

(2) If service is by registered mail, the determination or demand or the notice under section 30.1 (2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.

11. Both determinations were served by registered mail in accordance with the above-quoted provisions and in each determination, there was a text box containing information specifying the date by which a appeal must be filed as well as providing other information about the appeal process. The deadline for appealing the Corporate Determination was noted as "4:30 pm on December 8, 2014" and the deadline for appealing the Section 96 Determination was noted as "4:30 pm on January 23, 2015". The text box in the Corporate Determination also contained the following notice in boldface text: "**Your appeal must include a copy of the Director's written reasons for the Determination**." No such notice appeared in the text box contained the Section 96 Determination.

12. On April 1, 2015, 24/7 Excavating's previous legal counsel filed an Appeal Form and an attached memorandum (dated March 31, 2015) setting out reasons for appeal and seeking an extension of the appeal period. This appeal concerned the Corporate Determination. Counsel also filed an Appeal Form the previous day – March 31, 2015 – on behalf of Mr. Larsen concerning the Section 96 Determination. The memorandum dated March 31, 2015 setting out the reasons for appeal and seeking an extension of the appeal period was submitted as a "common submission on behalf of both appeals".

13. Since both appeals were, on their face, filed well past the appeal deadline set out in the two determinations, counsel for 24/7 Excavating and Mr. Larsen applied for an extension of the appeal periods under subsection 109(1)(b) of the *Act*: "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: …(b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired".

The Appeal Decisions

14. As noted above, Tribunal Member Stevenson issued two separate decisions relating to each of the appeals filed by 24/7 Excavating (concerning the Corporate Determination) and Mr. Larsen (concerning the Section 96 Determination). Tribunal Member Stevenson refused to extend the appeal period relating to the Corporate Determination and, accordingly, dismissed 24/7 Excavating's appeal under subsection 114(1)(b) of the *Act*: "At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or

part of the appeal if the tribunal determines that any of the following apply: …(b) the appeal was not filed within the applicable time limit".

15. With respect to the appeal of the Corporate Determination, Tribunal Member Stevenson noted several important background facts including the following relating to the timeliness of the appeal (set out as separately numbered points from 23 to 28 in para. 19 of his reasons for decision BC EST # D066/15):

> The Determination was issued on October 30, 2014;
>
> The time limited for filing an appeal expired on December 8, 2014;
>
> The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal on or before the expiry of the appeal period;
>
> The "record" indicates the Determination was sent by registered mail to the business address for 24/7 that was on file with the Branch and which is listed in the corporate records as its registered and records office, and to an address, also listed in the corporate records, as the mailing and delivery address for Peter Arney Larsen ("Mr. Larsen"), the sole director and officer of 24/7;
>
> The tracking information for the Determination provided by Canada Post indicates delivery of the Determination was attempted but was not successful;
>
> The appeal was not delivered to the Tribunal until April 1, 2015, although a form of appeal had been filed on March 10, 2015, and Mr. Larsen had communicated with the Tribunal in a letter dated March 9, 2015.

16. Counsel for 24/7 Excavating suggested that Mr. Larsen did not learn about either determination until February 26, 2015, "when Mr. Larsen received a Certificate of Judgement against him as the director of 24/7" (para. 20) and while Tribunal Member Stevenson did not appear to take issue with that assertion, he nonetheless found that the appeal period should not be extended. Tribunal Member Stevenson's key findings with respect to 24/7's subsection 109(1)(b) application are reproduced below (paras. 28 to 33):

> Section 122 of the *Act* deals with service of determinations, demands and notices under the *Act*. Subsection (1) deems a determination to have been served if it is sent by registered mail to the *"person's last known address"*. Subsection (2) deems service by registered mail *"to be served 8 days after the determination . . . is deposited in a Canada Post Office"*. [*italics* in original text]
>
> That is the case here: even though the Determination may never have physically been in 24/7's, or Mr. Larsen's, hands, subsection 122(2) deems it to have been lawfully served. The evidence in the "record" establishes the Determination was deposited with Canada Post for delivery by registered mail to the last known address of 24/7.
>
> The argument that the deemed service is "overruled" because the [Corporate] Determination was not "received by" 24/7 or Mr. Larsen has no merit.
>
> The date from which the appeal period is to be calculated is not, as argued by counsel for 24/7, February 26, 2015, but eight days from October 30, 2014.
>
> Accordingly, even accepting I should ignore the deficiencies in the form of appeal received by the Tribunal on March 10, 2015, the delay in filing this appeal is more than three months. Such delay is unreasonable. I find nothing in the appeal that explains such an unreasonable delay. In particular, I do not accept 24/7 was unaware the earlier complaint process, including the complaint hearing, had been nullified by the departure of the delegate involved in that process and that the Director intended to conduct a fresh investigation in which he needed to participate. The "record" indicates Mr. Larsen was told in late May 2013 of the problems with the earlier process and of the requirement for another investigation. He referred the new delegate to his legal counsel who was not responsive to any inquiries made for information regarding either contact information for Mr. Larsen or to the invitation for 24/7 to participate in the new investigation. The new investigation was conducted over a period of more than a

> year. Mr. Larsen was not "out of the country" or unreachable during the period over which the investigation took place. Mr. Larsen had been in touch with the legal counsel who had represented 24/7 at the complaint hearing in May 2013. The October 4, 2014, letter to that same legal counsel indicated a Determination would be made imminently, with or without 24/7's participation.
>
> In sum, 24/7 has not demonstrated there is any reason to extend the time period for filing an appeal. In the circumstances, it would be inconsistent with the purposes and objectives of the *Act* to allow the appeal to proceed. I do not need to address the failure to comply with the all of the requirements in section 112(2) in filing the appeal.

17. The Section 96 Determination was issued on December 16, 2014, and an appeal of this determination had to be filed by no later than January 23, 2015. The appeal was actually filed on March 31, 2015, and thus it was filed over two months after the statutory appeal period expired. Although the appeal of this determination could possibly have been dismissed under subsection 114(1)(b) as a late appeal, Tribunal Member Stevenson did not dismiss the appeal under this subsection but, rather, under subsection 114(1)(f): "there is no reasonable prospect that the appeal will succeed". His key findings supporting that decision are reproduced below (paras. 18 – 19 and 22 – 27 of BC EST # D067/15):

> Mr. Larsen does not challenge the Director's finding that he was a director or officer of 24/7 when the wages of Mr. Tayler were earned or should have been paid; nor does he argue the amount found owing exceeds the limit for personal liability of a director of officer under section 96 or that the circumstances described in section 96(2) apply to relieve him from personal liability.
>
> This appeal is entirely dependent on the success or failure of the corporate determination.
>
> …I have already noted this appeal is a mirror of the appeal by 24/7 of the corporate determination. That appeal was dismissed in BC EST # D066/15.
>
> Second, it is well established that a person challenging a director/officer Determination is limited to arguing those issues which arise under section 96: whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). The director/officer is precluded from arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. Accordingly, the arguments that question the correctness of the corporate determination may not be raised in this appeal.
>
> Specifically, Mr. Larsen may not question the validity of the Director finding 24/7 is liable for wages owing to Mr. Tayler.
>
> As noted above, Mr. Larsen does not argue the correctness of the Director's conclusion about his status as a director and officer of 24/7.
>
> There is no possibility this appeal can succeed and it is dismissed under section 114(f) of the *Act*.
>
> I need not address the request to extend the appeal period.

THE APPLICATION FOR RECONSIDERATION

The Appeal Decisions

18. As noted at the outset of these reasons for decision, the applicants' legal counsel filed a single reconsideration application concerning both of Tribunal Member Stevenson's decisions. Although counsel filed a single application concerning both appeal decisions, his memorandum of argument attached to the Reconsideration Application Form (Form 2) primarily concerns Tribunal Member Stevenson's decision regarding the Corporate Determination (BC EST # D066/15) at least insofar as the correctness of the original Corporate

Determination is concerned. With respect to the Section 96 Determination, counsel does not suggest that Mr. Larsen was not a director or officer of 24/7 Excavating at the relevant time; he does not contest the delegate's calculation of Mr. Larsen's 2-month unpaid wage liability (although, of course, if 24/7 Excavating has no liability to Mr. Tayler whatsoever, it follows that Mr. Larsen would equally not have any liability under section 96); and counsel has not asserted that any of the subsection 96(2) defences applies.

19. Counsel for the applicants says that the two appeal decisions "ought to be reconsidered on the basis that the principles of natural justice were not observed, and that the law governing the acceptance of late appeals was not properly applied". I should note that the application does contain one fundamental misstatement regarding why the appeals were dismissed. Counsel says:

> In its decisions of July 7, 2015, the Tribunal refused to hear the appeal on the basis that the appeal was made outside the statutory time period. The tribunal found the appellant's delay in the circumstances to be "unreasonable"…
>
> The Tribunal issued its decisions respecting the appeals on both determinations on July 7, 2015. The Tribunal dismissed both appeals on the basis that they were filed late…
>
> The Tribunal's decisions of July 7, 2015 were determined solely on the basis that the appeals were late.

20. The deadline for appealing the Corporate Determination was December 8, 2014 (the appeal was filed on April 1, 2015) and the deadline for appealing the Section 96 Determination was January 23, 2015 (the appeal was filed on March 31, 2015). While both appeals *were* filed after the appeal deadlines set out in the two determinations had passed, Tribunal Member Stevenson dismissed the appeal of only the Corporate Determination under subsection 114(1)(b) of the *Act* because it was filed after the applicable appeal deadline had expired. Tribunal Member Stevenson dismissed the appeal of the Section 96 Determination under subsection 114(1)(f) of the *Act* as having no reasonable prospect of succeeding and he specifically refrained from addressing whether it would have otherwise been appropriate to extend the appeal period under subsection 109(1)(b) of the *Act*.

Background Facts

21. There is an unusual history to these matters that is summarized in counsel's memorandum. Mr. Tayler filed an unpaid wage complaint under section 74 of the *Act* on September 14, 2011, in which he claimed over $11,000 in unpaid wages including regular wages, overtime pay, vacation pay and compensation for length of service. According to the applicants' counsel, "Mr. Taylor [sic] drove a truck for the appellant, making pickups and deliveries of cargo and storage bins". A complaint hearing was scheduled for May 14, 2012. According to an affidavit sworn on June 12, 2015, by 24/7 Excavating's former legal counsel, Duncan K. Magnus, the hearing was set for an earlier date but had been adjourned. The hearing proceeded on May 14, 2012, with both parties in attendance, before a delegate identified as "Mr. Brown". Paragraphs 4, 5 and 6 of Mr. Magnus' affidavit are reproduced, below:

> Following the hearing, the director of 24/7 Excavating, Mr. Larsen and I went to Brown's Social House, which was in the same complex as the hearing location.
>
> As we were speaking, Mr. Brown approached us and told Mr. Larsen that I had done a good job on his (24/7 Excavating Ltd. and Mr. Larsen's) behalf, and that we (24/7 Excavating Ltd. and Mr. Larsen) had been successful and he would be finding in our favour as he did not believe Mr. Taylor [sic]. He said he found my submissions respecting the credibility of Mr. Tayler very helpful. He said he would be writing reasons to such an effect.

> I understood this to mean that we had been successful in our position that Mr. Tayler was an independent contractor and not an employee of 24/7 Excavating Ltd. as he had alleged, and as such no fine would be ordered against 24/7 Excavating Ltd. or Mr. Larsen or compensation in favour of Mr. Tayler.

22. It was, of course, highly improper for the delegate to have communicated with one of the parties who had just appeared before him and, further, the delegate's oral communications do not, in law, constitute a formal determination of the issues that were before him. Nevertheless, this communication is, in my view, a relevant fact that must be taken into account when assessing 24/7 Excavating's later conduct.

23. The applicants' counsel says that, in fact, no determination was ever issued in favour of 24/7 Excavating and that there was "no communication from the Employment Standards Branch until approximately 2013, when they were informed that the matter would require a new hearing, as the previous adjudicator had departed" and that "[f]ollowing this communication in 2013, the Director [of Employment Standards] took no further steps to investigate or adjudicate the complaint until around July 2014".

24. The record before me includes a letter dated July 3, 2013, from a delegate (not the delegate who issued the determinations) to Mr. Tayler that refers to a telephone conversation on June 11, 2013, with Mr. Tayler in which he apparently indicated that he was unsure about proceeding with his complaint; he was supposed to advise the delegate about his intentions by no later than Monday, June 17, 2013, but he failed to contact the delegate. The delegate unsuccessfully attempted to contact Mr. Tayler by telephone and, by way of her July 3, 2013, letter, asked Mr. Tayler to contact her by July 17, 2013. The delegate indicated that if he failed to do so, "the file [will be] closed, and no further action will be taken by the [Employment Standards] Branch regarding this complaint".

25. Mr. Tayler apparently did advise the Employment Standards Branch that he wished to proceed with his complaint because, on July 5, 2013, this same delegate sent an e-mail to the lawyer who represented 24/7 Excavating at the complaint hearing stating "[t]he Branch is going to proceed with the investigation of Mr. Tayler's wage complaint" and requested Mr. Larsen's "contact information". Two points are to be noted about this communication. First, it came nearly 14 months after the complaint hearing concluded with no explanation whatsoever as to why a decision had not yet been rendered. Second, despite the fact that there were apparently serious credibility issues that required a careful assessment of the parties' evidence, the complaint was now going to be investigated rather than reheard at a new complaint hearing. The delegate did not explain why the Employment Standards Branch had decided to abandon holding an oral hearing despite the fact that it had earlier apparently decided that an oral complaint hearing was required. This delegate must have had some prior communication with 24/7 Excavating's former legal counsel – although there is nothing in the record to indicate the nature of any such communication – because about three weeks' prior to the delegate's July 5, 2013, e-mail, on June 20, 2013, the former counsel sent an e-mail to this delegate indicating his understanding that Mr. Larsen "is out of the country and will be away for an extended period of time due to health reasons".

26. The file then sat, apparently without anyone at the Employment Standards Branch taking any action, for *another year*. There is nothing in the record before me that purports to explain why, *more than two years after the complaint hearing concluded*, no concrete action had been taken to determine Mr. Tayler's unpaid wage complaint.

27. On July 31, 2014, yet another delegate – the delegate who ultimately issued the two determinations now before me – contacted 24/7 Excavating's former legal counsel by e-mail. The delegate stated that she had been assigned responsibility for the determination of Mr. Tayler's complaint and also stated "I realize it has been quite some time since the Branch last contacted you regarding this matter" but failed to provide any sort of explanation for the extended delay in adjudicating the complaint. The delegate sought confirmation that

this lawyer still represented 24/7 Excavating and, if not, whether he could provide Mr. Larsen's contact information. The lawyer replied by e-mail dated August 6, 2014, as follows:

> …I believe that Peter Larsen is out of the country and unreachable. I will see if I can get instructions to represent Mr. Larsen. I expect that it will take quite some time.
>
> Can you advise whether the previous arbitrator has returned to work or whether his notes were located?

28. The delegate replied by e-mail on August 11, 2014, stating that the previous adjudicator "is no longer with the Branch" and that "an investigation needs to be conducted". The delegate asked the lawyer to provide information about "what kind of time frame we're looking at". The lawyer replied, by e-mail, an hour later, stating that as far as he was aware, Mr. Larsen "is out of the country" and that although he had tried to contact Mr. Larsen, he had been unable to do so. The lawyer also indicated that, as far as he was concerned, the "hearing was completed" and that the hearing raised "significant issues of credibility". He asked whether his client would be compensated for its foregone time. On September 9, 2014, the delegate sent another e-mail to 24/7 Excavating's former legal counsel asking if he had "any success in contacting Peter Larsen" although "I'm assuming you have been unable to reach him, but [I] wanted to double check before we make a final decision on how to go forward". About an hour later, the lawyer replied: "Sorry I have had no luck".

29. On October 8, 2014, and despite not having received any confirmation from 24/7 Excavating's former legal counsel that he had any authority to act on that firm's behalf, the delegate wrote (delivered by electronic mail) to him as follows:

> …The Branch is prepared to proceed with issuing a Determination regarding the complaint based on Mr. Tayler's evidence and 24/7 Excavating's evidence…
>
> …This letter is to provide 24/7 Excavating with a final opportunity to participate in the investigation of Mr. Tayler's complaint prior to a Determination being issued.

30. Presumably, "24/7 Excavating's evidence" would not include the evidence it provided at the complaint hearing since the delegate never confirmed whether that delegate's notes were available; they are not contained in the record before me. The delegate provided her telephone number and e-mail contact information and stated that 24/7 Excavating, or its legal representative, should contact her by no later than October 22, 2014, and, if that did not occur, she would "proceed to issue a Determination based on the evidence before me" [which, it should be repeated, did not include a transcript or any other written summary of the evidence given by the parties at the May 14, 2012 complaint hearing].

31. The former counsel for 24/7 Excavating immediately replied by electronic mail on October 8, 2014, indicating the following:

- although he would continue his efforts to contact Mr. Larsen, he had no instructions to act on 24/7 Excavating's behalf;
- he was not accepting service on 24/7 Excavating's behalf and that the delegate's letter "does not constitute notice";
- "As you are aware, there was a substantial amount of oral evidence [at the May 14, 2012 complaint hearing] and findings of credibility need to be addressed – you're [*sic*] looking at documents alone is clearly not sufficient";
- and, finally: "I am also of the view that your threats to proceed without giving 24/7 Excavating notice is a clear breach of natural justice."

32. The delegate replied, by e-mail, on October 9, 2014, without responding to the substantive concerns raised by 24/7 Excavating's former legal counsel, simply saying: "Thank you for your email. I appreciate your willingness to try once more to contact Mr. Larsen". The record before me does not indicate that the delegate made any other efforts to contact Mr. Larsen apart from communications to 24/7 Excavating's former legal counsel. On October 30, 2014, the delegate issued the Corporate Determination and forwarded it, by registered mail, to 24/7 Excavating's registered and records office as recorded in the B.C. Corporate Registry.

33. There are, in my view, two salient points to be raised regarding the issuance of the Corporate Determination. First, although the delegate was (or certainly should have been) alive to the credibility issues associated with Mr. Tayler's complaint, the delegate issued a determination without any supporting reasons. While the delegate was not legally obliged to concurrently issue accompanying reasons for the Corporate Determination (see subsection 81(1.1) of the *Act*, which states that reasons need not be issued unless there is a written request for same delivered within 7 days after service of the determination), in my experience, the usual practice is that reasons are issued concurrently with, and attached to, a determination. As matters now stand, since written reasons have never been issued, one simply cannot assess whether, or to what extent, the delegate made a careful assessment of the relative credibility of the parties' evidence. Second, although the Corporate Determination was served, by registered mail, at 24/7 Excavating's registered and records office (which was its former business address rather than, as is often the case, a law firm's offices), the corporate search undertaken by the delegate on October 3, 2014, indicates that 24/7 Excavating was not then in good standing since it had not filed an Annual Report since January 8, 2012, and, further, the corporation was "in the process of being dissolved". Given these circumstances, the delegate must have realized it was highly probable that 24/7 Excavating would not receive actual notice of the Corporate Determination inasmuch as it was delivered to its former business offices. Not surprisingly, the registered envelope containing the Corporate Determination was returned with the notation "moved/unknown".

34. The Section 96 Determination was issued against Mr. Larsen 1½ months later, on December 16, 2014. There is nothing in the record indicating that the delegate made any effort to contact Mr. Larsen in the intervening period following the issuance of the Corporate Determination and prior to December 16, 2014. The delegate did concurrently issue brief "Reasons for the Determination" but these simply report the fact of the Corporate Determination, that it remained unpaid, and Mr. Larsen's status as a 24/7 Excavating director and officer at the relevant time.

35. Mr. Larsen, according to his legal counsel, resides on Mayne Island. The Section 96 Determination was mailed to a Coquitlam address shown in an August 10, 2011, B.C. Corporate Registry search conducted by the Employment Standards Branch (and in regard to 24/7 Excavating) as being Mr. Larsen's mailing and delivery address. I note that a later BC Corporate Registry search, conducted October 3, 2014, also showed Mr. Larsen's mailing address as the same Coquitlam address listed in the earlier search. However, the record is wholly devoid of any documentation that would show that the delegate made any independent efforts to confirm that the Coquitlam address continued to be Mr. Larsen's actual residential address.

36. I think it telling to note the following excerpt from the applicants' legal counsel's submission: "[The applicants] did not learn of the determination until March 4, 2015, when…Mr. Larsen was served with a certificate of judgment filed against the home where he lives on Mayne Island, B.C.". The Employment Standards Branch was able to locate a residential address for Mr. Larsen after the determinations were issued, but apparently did not undertake the same sort of search before either determination was issued.

37. According to the applicants' legal counsel, the chronology continues as follows:

> After receiving the certificate of judgment, Mr. Larsen contacted his counsel. On March 4, 2015, counsel wrote to the ESB requesting written reasons for the determination. This request was denied.
>
> Mr. Larsen filed for an appeal of the determination on March 9, 2015.

38. The material before shows that two separate appeal notices were filed with the Tribunal on March 10, 2015, but that, in each case, the appeals were incomplete. The Appeal Forms that are before me show that the Tribunal accepted 24/7 Excavating's appeal on April 1, 2015, and Mr. Larsen's appeal on March 31, 2015. Of course, even if one accepts that the appeals were filed on March 9, 2015, as asserted by the applicants' counsel, both appeals were filed well after the appeal deadlines set out in each determination (namely, December 8, 2014, and January 23, 2015) expired.

Submissions on the Merits of the Application

39. The applicants' legal counsel submits:

> …the Tribunal's decision to dismiss the appeals on the basis of delay [*sic*, as noted above, only 24/7 Excavating's appeal was dismissed on this basis] is unfair and ought to be reconsidered. This is an extraordinary case. [The applicants] fully and in good faith participated in a hearing of Mr. Tayler's complaint in May 2012. The Director's delay in adjudicating the complaint was inordinate, and a determination was not made until October 2014, over three years after the original complaint was made, and approximately two and [a] half years after the original hearing. In these extraordinary circumstances, [the applicants] ought to have been granted the opportunity to bring an appeal at the time that they did.

40. Counsel says that the applicants had a reasonable and credible explanation for not filing timely appeals, namely, "they had no idea that a determination was made against them until they were served with the certificate of judgment on February 26, 2015". Counsel notes that Mr. Larsen's current "whereabouts could have been discovered had the delegate searched land title records for his name" and that while "[t]his was apparently done in order to enforce the determination [it] was not done to serve it".

41. While counsel concedes that the determinations were served in accordance with the "deemed service" provisions contained in section 122 of the *Act*, he also says "given the inordinate delay between the filing of the complaint and the decision, a strict standard ought not to apply". Counsel further submits "[it] is not fair to deny [the applicants] an opportunity to appeal, when the reason that the delegate was unable to find them was by and large the fault of the branch, who let the file sit idle for such a long time".

42. Finally, counsel submits that Tribunal Member Stevenson did not take into account all of the relevant factors set out in *Niemisto*, BC EST # D099/96, and, accordingly, he erred in summarily dismissing the two appeals.

43. The Director's position is that this application does not pass the first stage of the *Milan Holdings* test, principally because it simply asks the Tribunal to "reweigh the facts behind the late filing of the original appeal and substitute its reasoning for that of the original Tribunal Member". In addition, the Director submits that the application does not raise any serious legal issue.

44. The Director says that the applicants' reasons for the late filing were, as found by Tribunal Member Stevenson, "not reasonable and credible". The Director says "[t]he Appellants did not receive the Determination in a timely manner because Mr. Larsen failed to participate in the dispute resolution process after he was advised in late May 2013 that it was proceeding".

45. Finally, the Director says that the applicants have not provided "a reasonable explanation as to why Mr. Larsen failed to take any steps to contact the Branch after his return to Canada on or about August 1, 2013, when he knew that a new investigation was being conducted".

FINDINGS AND ANALYSIS

Milan Holdings

46. In my view, this application passes the first stage of the *Milan Holdings* test. In light of the extraordinary circumstances of the case – and the Director has not provided an adequate, or indeed any, explanation regarding why this complaint was sidelined at the Employment Standards Branch for such a long period of time – I consider that the applicants' tardiness regarding the filing of the two appeals must be considered in a broader context.

47. Second, I am persuaded that the applicants have raised at least a *prima facie* case that the decisions under reconsideration may be tainted by legal error.

48. Finally, I accept that this application raises, as required by the *Milan Holdings* test, "a question of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases".

49. I shall first address the application as it relates to the Corporate Determination.

The Appeal of the Corporate Determination

50. As previously noted, the deadline for appealing the Corporate Determination was December 8, 2014. An Appeal Form was not filed until March 10, 2015, and the appeal was not perfected until April 1, 2015. Indeed, the appeal was never fully perfected because 24/7 Excavating never filed, as required by subsection 112(2)(a)(i.1) of the *Act*, a copy of the delegate's "written reasons for the determination". This latter failing was due, in part, to the fact that the delegate never issued written reasons for the determination concurrently with the issuance of the Corporate Determination and because, when the delegate was eventually asked to provide written reasons, she refused to do so since the request came well after the "7-day post determination" period set out in subsection 81(1.2) of the *Act*.

51. In refusing to grant an extension of the appeal period, Tribunal Member Stevenson placed great weight on the section 122 "deemed service" provisions (see paras. 25 to 31 of BC EST # D066/15). Tribunal Member Stevenson, at para. 32 of his reasons (reproduced at para. 16, above), then set out the basis for his refusal. As I read his reasons, there were three principal factors weighing against granting an extension of the appeal period, none of which is fully supported by the record before me:

- the 3-month delay in filing the appeal was "unreasonable" and not adequately explained;
- 24/7 Excavating was aware of Mr. Tayler's complaint but did not participate in the ongoing investigation and that its legal counsel "was not responsive to any inquiries made for information regarding either contact information for Mr. Larsen or to the invitation for 24/7 to participate in the new investigation"; and
- During the course of the investigation that was conducted following the aborted complaint hearing process, Mr. Larsen "was not 'out of the country' or unreachable" and that 24/7

Excavating either knew, or should have known, that a determination would be issued "with or without" its participation.

52. I accept that the Corporate Determination was validly served on 24/7 Excavating in accordance with section 122 of the *Act* and that the Appeal Form was filed after the statutory appeal period had expired. However, in my view, there are extraordinary circumstances at play in this case that must be taken into account. First, 24/7 Excavating did not fail to participate in the adjudication process – it attended, with legal counsel, the original complaint hearing and, if its former legal counsel is to be believed (and I unreservedly accept his uncontroverted evidence), the hearing ended with the presiding delegate satisfied that Mr. Tayler's complaint should be dismissed. The delegate, of course, should not have engaged in any post-hearing *ex parte* communications with 24/Excavating's representative and legal counsel but that failing cannot in any fashion be attributed to anything 24/7 Excavating's representatives said or did. Following the complaint hearing, 24/7 Excavating quite rightly assumed that the matter would be resolved in its favour. I am not satisfied that the Director has adequately explained why a determination was not issued in a timely manner following the conclusion of the complaint hearing. It most certainly should have been so issued.

53. It would appear that 24/7 Excavating was lulled into a false sense that the matter had simply been abandoned as it heard nothing for *14 months* following the conclusion of the complaint hearing at which point the Employment Standards Branch sent an e-mail to 24/7 Excavating's legal counsel who appeared on its behalf at the hearing stating "the Branch is going to proceed with the investigation". At this point, the legal counsel had no instructions to act and Mr. Larsen was *incommunicado*. Inexplicably – and the Director has not even attempted to explain this delay – the matter then sat *for another year* without any concrete action being taken.

54. In July 2014, the delegate contacted 24/7 Excavating's former legal counsel inquiring whether he continued to represent 24/7 Excavating and, if not, whether he had any contact information for Mr. Larsen. Shortly thereafter, 24/7 Excavating's former legal counsel replied by e-mail stating that he understood Mr. Larsen was out of the country but he would try and locate him. About one month later, on September 9, 2014, he e-mailed the delegate stating that he had been unable to contact Mr. Larsen.

55. On October 8, 2014, the delegate sent a letter to 24/7 Excavating's former legal counsel stating that she intended to issue a determination relating to Mr. Tayler's unpaid wage complaint and that if 24/7 Excavating did not provide any further information relating to the complaint by October 22, 2014, she would "proceed to issue a Determination based on the evidence before me". I do not consider that the delegate's October 8 letter – sent to a lawyer whom the delegate acknowledged in the very same letter as having no instructions to act – constituted any sort of proper notice to 24/7 Excavating. I have grave doubts about whether the delegate's October 8 communication satisfied the dictates of section 77 of the *Act* ("If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.").

56. In any event, 24/7 Excavating's former legal counsel, as outlined earlier in these reasons (see para. 31), indicated that he was not retained by 24/7 Excavating but would try to locate Mr. Larsen (which he was unable to do) and he explained why an investigation would not be appropriate given the credibility issues previously identified at the earlier complaint hearing. The delegate simply proceeded with an investigation and issued the Corporate Determination (and, six weeks later, the Section 96 Determination).

57. In *Niemisto*, *supra*, the Tribunal identified several factors that should be taken into account when considering whether an appeal period should be extended:

i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention; and

iv) the respondent party will not be unduly prejudiced by the granting of an extension;

v) there is a strong *prima facie* case in favour of the appellant.

58. In *Niemisto*, the Tribunal emphasized that the above was "not intended to constitute an exhaustive list".

59. In assessing the various *Niemisto* criteria, I am simply unable to accept the suggestion that the applicants did not advance a credible and reasonable explanation for not having filed timely appeals. The Corporate Determination was properly served on 24/7 Excavating at its registered and records office. However, at the time the Corporate Determination was served, the delegate had information – in the form of a B.C. Corporate Registry search conducted on October 3, 2014 – that the corporation was "in the process of being dissolved" and had not filed an annual report since January 8, 2012. The corporation was no longer actively operating and the registered and records office address – its former business premises – was no longer being occupied by 24/7 Excavating. While a corporation is obliged to maintain current information on file with the BC Corporate Registry, 24/7 Excavating was essentially moribund by October 2014 and this should have been obvious to the delegate. Further, given that the delegate presiding at the complaint hearing had expressly told 24/7 Excavating's principal and its legal counsel that Mr. Tayler's complaint was going to be dismissed, the corporation had no reason to believe that it was important to maintain the corporation in good standing on account of that possible claim.

60. By October 2014, although there had been some communications with 24/7 Excavating's former legal counsel, he expressly indicated he had no instructions to act and further advised that he had not been able to locate Mr. Larsen. I note the delegate (or some other Employment Standards Branch official) was able to track down Mr. Larsen's Mayne Island residential address *after* the two determinations were issued.

61. The uncontroverted facts are that Mr. Larsen first learned (I am here referring to actual, rather than constructive, notice) about the two determinations in early March 2015 as a result of the Director's enforcement proceedings against his residential property and Mr. Larsen immediately contacted legal counsel who, in turn, filed appeals with the Tribunal. I am unable to find anything in the record that suggests Mr. Larsen was actually in contact with his former legal counsel during the period from July 2013 until the dates when the two determinations were issued. Tribunal Member Stevenson erred in finding otherwise. I find, in light of these facts, that there was a reasonable and credible explanation for the late filings and that Member Stevenson erred in concluding, in these highly unusual circumstances, that the delay was "unreasonable" and not adequately explained. Further, in my view, the record clearly shows that both 24/7 Excavating and Mr. Larsen have demonstrated an ongoing *bona fide* intention to appeal the determinations as and from the moment they first learned about their existence.

62. As for the matter of prejudice, I note that the determinations were issued over 3 years after the complaint was filed and about 2 ½ years after the initial complaint hearing. The 2- and 3-month delays in this case, while ordinarily problematic, must be assessed in light of the overall much greater delay that has been associated with the adjudication of this matter. Mr. Tayler does not apparently oppose the extension of the appeal period – indeed, although invited to do so, he did not file a submission in this matter. I do not consider that Mr. Tayler is prejudiced by the 2- and 3-month delays at issue here. In my view, if any party has been unduly

prejudiced by delay (and here I refer to the overall delay, which appears to be uniquely rest on the shoulders of the Employment Standards Branch), it is the present applicants.

63. Finally, at least on a *prima facie* basis, the applicants appear to have meritorious appeals. Clearly, at least one delegate was of the view that Mr. Tayler's complaint should be dismissed. The delegate issued the Corporate Determination without conducting an oral evidentiary hearing and without issuing concurrent reasons. Thus, whether she was alive to, or appropriately weighed, the credibility issues apparently identified by the delegate who presided at the original complaint hearing cannot be determined. There may be a section 77 issue. Mr. Tayler may not be an "employee" for purposes of the *Act*. I pass no judgment whatsoever on the merits of the appeal; I merely say that the appeal is not obviously unmeritorious.

64. Accordingly, in light of the foregoing circumstances and the *Niemisto* criteria, I am of the view that 24/7 Excavating's application for an extension of the appeal period should have been granted. I now turn to the Section 96 Determination.

The Section 96 Determination

65. As previously noted, the applicants' legal counsel incorrectly stated that the appeal relating to the Section 96 Determination was dismissed as untimely (subsection 114(1)(b) of the *Act*) when, in fact, this appeal was dismissed as having no reasonable prospect of succeeding (subsection 114(1)(f) of the *Act*). Tribunal Member Stevenson held that in light of the confirmation of the Corporate Determination, the legal framework governing appeals of director/officer determinations (see *Neudorf*, BC EST # D076/07), and Mr. Larsen's uncontested status as a corporate officer/director at the material time, Mr. Larsen's appeal could not succeed.

66. The lynchpin to Tribunal Member Stevenson's decision was the summary dismissal of the appeal of the Corporate Determination. Since that order is now being set aside, the appeal of the Section 96 Determination now stands on a separate footing since Mr. Larsen's personal liability is predicated on 24/7 Excavating's liability. Accordingly, there is no longer a proper legal foundation for summarily dismissing Mr. Larsen's appeal under subsection 114(1)(f) of the *Act*.

67. Tribunal Member Stevenson did not address Mr. Larsen's application for an extension of the appeal period (see para. 17 above). However, there is a complete record before me relating to that application and logic dictates that if the appeal period relating to the Corporation Determination is being extended, so too should the appeal period relating to the Section 96 Determination.

ORDERS

68. Pursuant to subsection 116(1)(b) of the *Act*, the text of paragraph 34 of BC EST # D066/15 is wholly excised and the following is substituted:

> Pursuant to subsection 109(1)(b) of the *Act*, the appeal period in this matter is extended to April 1, 2015. The Tribunal will notify the parties regarding the filing of further submissions with respect to the merits of the appeal.

69. Pursuant to subsection 116(1)(b) of the *Act*, the text of paragraph 28 of BC EST # D067/15 is wholly excised and the following is substituted:

> Pursuant to subsection 109(1)(b) of the *Act*, the appeal period in this matter is extended to March 31, 2015. The Tribunal will notify the parties regarding the filing of further submissions with respect to the merits of the appeal.

70. The Director is given leave to issue written reasons for the Corporate Determination and to deliver those reasons to the Tribunal within three weeks of the date of this decision.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal