

Citation: Mekdam & Hamilton Construction Inc. (Re)  
2020 BCEST 123

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Mekdam & Hamilton Construction Inc.  
("Mekdam")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**PANEL:** David B. Stevenson

**FILE No.:** 2020/076

**DATE OF DECISION:** October 30, 2020

## DECISION

### SUBMISSIONS

Mekdam Nima	on behalf of Mekdam & Hamilton Construction Inc.
Sarah Vander Veen	delegate of the Director of Employment Standards

### OVERVIEW

1. Mekdam & Hamilton Construction Inc. (“Mekdam”) has filed an appeal under section 112 of the *Employment Standards Act* (the “*ESA*”) of a Determination issued by Sarah Vander Veen, a delegate of the Director of Employment Standards (the “Director”), on October 18, 2019.
2. The Determination associated Mekdam under section 95 of the *ESA* with Colin Hamilton (“Mr. Hamilton”) and found the associated entities to have contravened Part 3, sections 17, 18 and 27, Part 4, section 40, Part 5, sections 45 and 46, and Part 7, section 58 of the *ESA*, and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of David Neilson (“Mr. Neilson”) and ordered Mekdam to pay Mr. Neilson wages in the amount of \$1,106.42 an amount that also included interest under section 88 of the *ESA* and concomitant annual vacation pay, and to pay administrative penalties in the amount of \$3,500.00. The total amount of the Determination is \$4,606.42.
3. This appeal is grounded in failure by the Director to observe principles of natural justice in making the Determination. Mekdam seeks to have the Determination varied to cancel the finding that Mekdam is an associated employer under the *ESA* with Mr. Hamilton and resulting orders made against it. Although not identified as grounds of appeal, Mekdam says the Director erred in associating Mekdam with Mr. Hamilton under section 95 of the *ESA* and seeks to have evidence admitted that was not before the Director at the time the Determination was being made.
4. The appeal was delivered to the Tribunal on May 12, 2020, almost six months after the statutory time period for filing an appeal had expired. Mekdam seeks an extension of the statutory appeal period.
5. There is a companion appeal from Mekdam Nima (“Mr. Nima”) against a Determination under section 96 of the *ESA*, making him personally liable for wages to Mr. Neilson.
6. In correspondence dated May 27, 2020, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and advised that following such review all or part of the appeal might be dismissed.
7. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mekdam and to Mr. Hamilton and Mr. Neilson. An opportunity has been provided to all of those parties to object to its completeness. Mekdam has provided several documents and much information which it says should have been considered by the Director on the section 95 question, but was not.

8. I assessed the appeal and requested submissions from the parties on the merits. A submission has been delivered on behalf of the Director and a response to that submission has been made by Mekdam. Neither Mr. Hamilton nor Mr. Neilson have filed submissions on the merits of the appeal.

## ISSUE

9. There are several issues that are raised in this appeal:
1. whether Mekdam should be given an extension of the statutory appeal period;
  2. if so, should the evidence presented by Mekdam, which was not before the Director at the time the Determination was being made, be admitted into the record and considered; and
  3. did the Director fail to observe principles of natural justice;
  4. do the circumstances and the entirety of the record demonstrate the Director made a reviewable error, either on natural justice principles or at law, in finding Mekdam was liable for wages owed to Mr. Neilson.

## THE FACTS

10. Mr. Neilson filed a complaint with the Director on, or about, January 29, 2019, claiming his employer, Mr. Hamilton, had failed to pay him all regular and overtime wages owing from August 14, 2018, to August 24, 2018.
11. The Director investigated the complaint, unsuccessfully attempted to conduct a mediation session, delivered to Mr. Hamilton a Demand for Employer Records and a Notice of Complaint Hearing and scheduled a complaint hearing for July 8, 2019, which Mr. Hamilton did not attend.
12. In June 2019, Mr. Hamilton advised the Director that he had no employment records for Mr. Neilson. That was confirmed by Mr. Neilson on July 8, where he advised the Director that he received no wage statements from Mr. Hamilton, that he was only paid vacation pay if he included it on the documents he sent for payment and that no income tax or other deductions were taken from the money he received from Mr. Hamilton.
13. Conversations with Mr. Hamilton on June 27, 2019, and again on July 8, 2019, confirmed he was aware of the complaint hearing taking place on July 8, 2019. Mr. Hamilton chose not to attend the complaint hearing. On July 8, 2019, the Director converted the process to an investigation and the complaint hearing to a “fact-finding meeting”.
14. During the early stages of the complaint process, Mr. Hamilton paid some amounts toward what Mr. Neilson claimed he was owed.
15. Mr. Neilson gave information at the July 8<sup>th</sup> meeting relative to his complaint; that information is summarized in correspondence dated July 18, 2019, and in the Determination. He mentioned having started working for Mekdam, which he believed was Mr. Hamilton’s company, in May 2017, adding that sometime near the end of August 2017, Mr. Hamilton said he would be working “for [him] alone” going

forward and that during 2018, he was “usually paid via an e-transfer sent directly from Mr. Hamilton” or, on occasion, paid by Mr. Hamilton in cash.

16. In the July 18, 2019 correspondence, which was sent by registered mail to Mr. Hamilton and Mekdam, the Director indicated, for the reasons outlined in the correspondence, there was enough information to initiate an investigation on whether Mr. Hamilton and Mekdam were associated employers under the *ESA*. The correspondence contained an invitation to Mr. Hamilton and Mekdam to provide any evidence or argument on that matter.
17. The correspondence also attached a Demand for Employer Records to Mekdam for Mr. Neilson.
18. On July 25, 2019, there is an entry in the tracking progress of the material sent to Mekdam, which states: “Recipient not located at address provided. Item being returned to sender”. There is no tracking record for the material sent to Mr. Nima, although common sense would dictate he also was not located at the address provided, as it was the same address as for Mekdam. The record does not include, as it does with later correspondence sent to Mekdam and Mr. Nima, a copy of the envelope in which the material was sent.
19. The Director received no response to the correspondence from any party.
20. In correspondence dated August 20, 2019, sent to Mr. Hamilton by registered mail and copied to Mekdam and Nima Mekdam [*sic*], the Director provided a preliminary assessment of Mr. Neilson’s complaint and of the investigation under section 95 of the *ESA*. In that correspondence, the Director found, “on a preliminary basis”, Mr. Hamilton and Mekdam “are not associated employers”.
21. On September 26, 2019, the Director sent an e-mail to an address for Mekdam Nima (“Mr. Nima”) that she had found in a LinkedIn page for a person named Mekdam Nima. In the e-mail, the Director advised Mr. Nima of potential personal liability if Mekdam was associated with Mr. Hamilton and that it was in his interest to provide any information concerning the relationship between Mekdam and Mr. Hamilton.
22. No response was received from Mr. Nima.
23. The Determination was sent by registered mail to Mekdam and Nima Mekdam [*sic*] on October 18, 2019.
24. Mekdam did not file this appeal until May 12, 2020.
25. Mekdam was incorporated April 8, 2016; Mr. Hamilton and Mr. Nima were directors at the time. Mr. Hamilton ceased to be a director on June 15, 2016. Mekdam had filed an annual report on June 12, 2019, which contained information for the company to its most recent anniversary, April 8, 2018.

## **ARGUMENT**

26. I shall summarize the arguments made by Mekdam and the Director under the various issues raised in this appeal.

### Extension of Statutory Time Period

27. Mr. Nima, speaking on behalf of Mekdam, says neither he nor the company received any correspondence or communications, directly or indirectly, from the Director before May 5, 2020, when he was provided with a copy of the Determination, and reasons, against Mekdam and a director/officer Determination against him, from an Employment Standards Branch (the “Branch”) collection officer.
28. Mr. Nima, on his own behalf and on behalf of Mekdam, contacted the Tribunal and filed appeals on both Determinations on May 12, 2020.
29. Mekdam does not dispute that the address on Kingsway in Vancouver is their registered and records office but says the company is not operating, that the office (at the Kingsway address) is closed. That statement is consistent with the tracking record, that the recipient, Mekdam, was not located at the address provided. Mr. Nima says the company is being continued in the corporate registry to clean up any corporate tax obligations. He says the address he uses for communications with the Canada Revenue Agency (the “CRA”) is his home address, which he has provided to the CRA for that purpose.
30. Mr. Nima says the e-mail address the Director attempted to use in September 2019 is one he had ceased using and abandoned; the operating e-mail address is the one through which the Branch collection officer communicated with him in May 2020 and the one through which Mr. Neilson communicated with him in 2017, when he was employed by Mekdam. He adds that Mr. Neilson also has a telephone number at which he could have been reached. Mr. Nima says Mr. Hamilton also has the e-mail address and the telephone number.
31. Mekdam says that at the time the July 18, 2019 correspondence was sent, the company was closed, was out of business and had no office.
32. The Director says the Determination was sent by registered mail to the registered and records office address for Mekdam and to Mr. Nima by registered mail to his registered address and to an e-mail address. The Director submits section 122 of the *ESA* deems the Determination to have been served and asserts there is also sufficient evidence to conclude Mr. Nima received the Determination against Mekdam on or about October 17, 2019, through the e-mail address to which it was sent.
33. The Director argues Mekdam has not made a sufficiently compelling case for being granted an extension of the statutory appeal period. The Director says Mekdam has not met the criteria set out by the Tribunal in *Re Niemisto*, BC EST # D099/96, see below, for being granted an extension of the appeal period.

### Natural Justice

34. Mekdam submits the Director failed to observe principles of natural justice in making the Determination, contending the Director failed to make reasonable efforts to communicate with Mekdam even though Mr. Neilson had all the contact information for Mr. Nima, and that failure effectively denied Mekdam an opportunity to present its case.

35. Mekdam contends it is a breach of principles of natural justice to investigate an outsider company and issue an unjust and unfair decision against it. Mekdam says this breach was compounded by a refusal to review the decision to associate once Mekdam did respond and provide evidence.
36. Mekdam submits the tone and content of the Director’s submission demonstrates a lack of impartiality – evidenced by the adversarial approach in the submission, extending even to alleging Mr. Nima was not being truthful in saying he did not receive the correspondence and a copy of the Determination from the Director.
37. The Director submits there was no failure to comply with principles of natural justice. The Director contends it is “highly likely” that Mr. Nima did receive the correspondence from the Director and the Determination, but even if he didn’t, the efforts to provide Mekdam and Mr. Nima with all the necessary information to effectively respond was reasonable.

### **Error of Law**

38. Mekdam says the Director erred in associating that company with Mr. Hamilton.
39. The Director says no error was made; that the correct test for deciding whether two entities are associated under the *ESA* was applied to the facts as found.

### **New Evidence**

40. Mekdam says the evidence he has provided with the appeal should be considered because the failure to present this material earlier was because Mekdam received no direct or indirect communication from the Director of an investigation involving potential liability under the *ESA* and no amount of “due diligence” would have made a difference to that fact; he submits the evidence is relevant, credible and probative.
41. The Director says the conditions necessary for the Tribunal to admit new evidence have not been met. Most particularly, the Director reiterates the submission that it is “highly likely” Mr. Nima did receive the correspondence relating to a section 95 investigation and received the Determination. In any event, the Director contends Mekdam’s failure to exercise sufficient diligence to ensure the company’s registered and records office information was correct negates any “due diligence” argument he has made.

### **ANALYSIS**

42. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d) of the *ESA*. The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

43. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto, supra*. The following criteria must be satisfied to grant an extension:
- 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;
  - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - v) there is a strong *prima facie* case in favour of the appellant.
44. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright, BC EST # D132/97*.
45. The delay here is considerable. Is there a reasonable and credible explanation?
46. Mekdam says, simply, it had no knowledge of any proceedings against it under the *ESA* or that a Determination was issued against it. Nothing in the record or in any other material shows that statement to be false. The Director says I should find Mr. Nima, who is the only voice of Mekdam, is not being truthful when he says he did not receive the documents sent by the Director and was not aware, directly or indirectly, of any proceedings involving Mekdam, but has provided no objectively viable evidence to justify my accepting what is a fairly serious allegation; there is no evidence, or even a suggestion, in the record, the Determination or the submissions that Mekdam was in any way alerted to Mr. Neilson’s claim and the Director has provided no satisfactory basis for my concluding it was “highly likely” Mekdam was aware of the correspondence and the Determination.
47. Assessing all of the circumstances, I accept Mr. Nima is being truthful when he says he was unaware of any proceeding under the *ESA* or any Determination against Mekdam or himself until May 2020. I am somewhat fortified in this conclusion by the fact Mr. Nima filed these appeals a week after receiving the Determinations from the Branch collection officer and has continued to press his contention that Mekdam should not have been associated with Mr. Hamilton to the Director and the Tribunal since then in a timely way.
48. Mekdam was not included in the complaint or in the initial investigation of Mr. Neilson’s claim. Its inclusion in the investigation came approximately five months after Mr. Hamilton was notified of the complaint and only after Mr. Neilson commented that he had started working in May 2017 for Mekdam. It does not appear the Director ever went back to Mr. Neilson after he provided that information to either clarify that comment or inquire whether Mr. Neilson had contact information. The Director knew after the return of the July 18, 2019 correspondence, that Mekdam had not been located at its registered and records office address.

49. Mr. Nima can be faulted for the manner in which he attended to his corporate reporting responsibilities, but that does not make his explanation any less reasonable and credible. There is no hint that his inattention to his corporate reporting was done for the purpose of avoiding communication with him or Mekdam, even though, relative to this matter, that was the result. The Tribunal has never been so intransigent in its approach to section 109 of the *ESA* as to reject an explanation for delay on such slender and unsupported grounds as those suggested by the Director. It would have been preferable had Mr. Nima made his assertions in an affidavit, but the Tribunal has not demanded that be a requirement.
50. The Director says under section 122 of the *ESA*, Mekdam was served with the correspondence sent by registered mail. I quite agree, but the “deemed service” provisions cannot be extended so far as to deem knowledge of the material that was served by registered mail. The “deemed service” provision in section 122 of the *ESA*, like any deeming provision, is a statutory fiction enacted to further the policy and purposes of the *ESA*. The policy and purposes served by the “deemed service” is primarily efficiency. However, if applying the statutory fiction leads to “an unjust, anomalous or absurd result”, then it should be limited to the extent needed to avoid such injustice or absurdity. See, for example, *Charles Neil operating as Chuck’s Widow Cleaning*, BC EST # D347/00. It would be unjust if, having accepted Mr. Nima was unaware of the proceedings and Determinations, he is found to have “knowledge” of those matters. Accordingly, I will not infer “knowledge” of the material deemed to have been served based only on “deemed service” under section 122 of the *ESA*.
51. The other criteria applied to a consideration of the request for an extension of the appeal period do not weigh against the request. It is accepted that Mr. Nima was first alerted to the Determinations in May 2020 and filed his appeals immediately. An intention to appeal could only be formed when Mr. Nima became aware of the Determination. The other parties received the appeal once it was filed with the Tribunal. I accept there is some prejudice to Mr. Neilson, but I do not find, in these circumstances, it is “undue” or that it outweighs the prejudice to Mekdam if this appeal is not allowed to proceed. As well, Mr. Hamilton has not appealed the Determination as against him and the Director is free to pursue him for Mr. Neilson’s wages.
52. In respect of the last criteria, I find that on its face, Mekdam has a strong *prima facie* case on the merits. I shall expand on this aspect of the Mekdam’s appeal below, but at this stage an assessment of this factor does not require a complete analysis of all of the arguments raised in the appeal and a decision on the merits of the appeal. Rather, the Tribunal examines whether, on a fair reading of the appeal, it shows sufficient merit to justify a deeper examination. One of the curious elements of the finding that Mr. Hamilton and Mekdam could be associated is that in the preliminary findings, set out in correspondence dated August 20, 2019, the Director concluded the two entities could not be associated, then reached a different conclusion in the Determination without any apparent addition to the factual matrix.
53. Based on the above, I allow an extension of the statutory appeal period for this appeal to May 12, 2020, the date on which it was delivered to the Tribunal.
54. I note again, that a Determination has been made against Mr. Nima under section 96 of the *ESA* and has also been appealed. Mr. Nima has requested an extension of the appeal period on that appeal and I shall address the request in a separate decision.



55. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
  - (b) the director failed to observe the principles of natural justice in making the determination;
  - (c) evidence has become available that was not available at the time the determination was being made.
56. Mekdam has raised the natural justice ground of appeal, and it is apparent from the appeal submission that Mekdam alleges the Director made errors of law in several areas and has introduced evidence with the appeal that is not found in the record. While Mekdam has not specifically raised error of law as a ground of appeal, there are several elements in the appeal submission that argue this ground and require consideration. The Tribunal has taken the position that it should not be “mechanically bound” to the ground of appeal checked on the Appeal Form, but should inquire into the nature of the challenge, or challenges, and address the merits of the appeal in that basis: see, for example, *Triple S Transmission Inc. o/a Superior Transmissions*, BC EST # D141/03.
57. I shall commence my assessment of Mekdam’s appeal with the decision of the Director to associate Mr. Hamilton and Mekdam. The arguments made by Mekdam on this point raise error of law.
58. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  - 2. a misapplication of an applicable principle of general law;
  - 3. acting without any evidence;
  - 4. acting on a view of the facts which could not reasonably be entertained; and
  - 5. adopting a method of assessment which is wrong in principle.
59. The question of whether entities can be associated under section 95 of the *ESA* is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles developed under the *ESA*.
60. A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error. As succinctly expressed by the Panel in *Britco Structures Ltd.*, BC EST # D260/03: “questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests”. A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error. A decision by the Director on a question of mixed law and fact requires deference.

61. I find the Director identified the correct test and made findings of fact. The questions raised in Mekdam’s appeal is whether the Director applied the test correctly and whether the findings of fact upon which the decision to associate was made raise an error of law.
62. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.
63. The test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.
64. To expand the above point, in order to establish the Director committed an error of law on the facts, Mekdam is required to show the findings of fact and the conclusions and inferences reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D041/13, at paras. 26 – 29.
65. Previous decisions of the Tribunal have identified four factors which must be considered before determining whether separate entities constitute a single employer for the purposes of the *ESA* (see, for example, *Re Invicta Security Systems Corp.*, BC EST # D349/96).
66. The Director has correctly identified those factors in the Determination. They are as follows:
1. there must be more than one corporation, individual, firm, syndicate or association;
  2. each of these entities must be carrying on a business, trade, or undertaking;
  3. there must be common control or direction; and
  4. there must be some statutory purpose for treating the entities as one employer.
67. The following comment on the above factors in *0708964 B.C. Ltd.*, BC EST # D015/11, is helpful when considering an association under section 95:
- . . . a section 95 declaration cannot be made against an entity that was completely independent from the business to whom the employee provided services – section 95 requires a common business enterprise and evidence of common direction or control of the associated entities. That said, a section 95 declaration must not be made unless there the statutory criteria are clearly satisfied. In other words, the limiting factors are already present within the language of section 95. There must be at least two entities that are carrying on a “business, trade or undertaking” and there must be evidence of “common control or direction” of those entities.
68. For the purposes of the analysis of this case, the following propositions, which echo and expand the above comment, are relevant and identify what the evidence must show:
- i. the entities must be jointly carrying out some business, trade or other activity although the business, trade or activity in question need not necessarily be the only one that each entity is carrying on;

- ii. “common control or direction” may be determined based on financial contributions from one entity to another (although this factor, standing alone, is not determinative); the fact that one entity is economically dependent on another entity, interlocking shareholdings and directorships; common management principals (e.g., corporate officers and other key employees); sharing of resources (including human resources) among the various entities; asset transfers at non-market transfer prices; operational control by one entity over the affairs of another entity; joint ownership of key assets and operational integration.

69. The circumstances that generate a section 95 association must be present at the time the wages claimed were earned and should have been paid. In this case, that period is August 2018 and the parties must be shown to be carrying on business together.
70. I find the Director did not correctly apply the test for associating Mekdam and Mr. Hamilton, the decision to associate is not grounded in the evidence and must be cancelled.
71. As indicated above, the decision to associate must show the entities being associated clearly fall within the statutory criteria.
72. There is no evidence that Mekdam and Mr. Hamilton were carrying on business together when the wages of Mr. Neilson were earned. There is, in reality, no evidence that Mekdam was carrying on any business when Mr. Neilson’s wages were earned. Even the information provided by Mr. Neilson operates against any presumption that Mekdam and Mr. Hamilton were carrying on business together in 2018, telling the Director that in late August 2017, Mr. Hamilton told him that he was working “for Mr. Hamilton alone” from that point on. All wages paid to Mr. Neilson came directly from Mr. Hamilton, including the payments made to reduce Mr. Neilson’s wage claim. There is not a scent in the material that Mekdam, or Mr. Nima, was involved in contributing to the work done by Mr. Hamilton or to the wages paid to Mr. Neilson in a way that would show they were carrying on business together or there was common control and direction.
73. The references to ConstructionProjects.ca does not advance the conclusion of the Director at all. The first point I note about ConstructionProjects.ca is that the Director found, although I am not certain on what evidence such a finding was made, that Mr. Hamilton ran that “entity” as a sole proprietor under this name. The second point is that there is simply no evidence this “entity” continued to exist or function as a business in 2018 – if in fact it ever functioned or existed as a business. The information the Director acquired on this “entity” was certainly not contemporary being from a June 2016 entry on the internet; the Director says in the Determination: “A historical webpage (ie., one that cannot be accessed through the current ConstructionProjects.ca website) indicates that Nima Mekdam [*sic*] (director of Mekdam) and Colin Hamilton were the executive directors of ConstructionProjects.ca *at some point in time*” (emphasis added). To reiterate, there is no evidence this “entity” existed as an operating entity in 2018 or that it had any relationship to Mr. Neilson’s employment (although Mr. Hamilton clearly did); the reference to ConstructionProjects.ca as having relevance to Mr. Neilson’s claim is speculative and pure conjecture.
74. The Director finding the filing of an annual report for 2018 to “suggest” Mekdam was carrying on business during that year is simply more conjecture and is an insufficient evidentiary basis for a finding that it was carrying on business at the time Mr. Neilson’s wages were earned and, even if that leap could be made, it is not evidence that Mr. Hamilton and Mekdam were carrying on business together.

75. In addition to the absence of evidence that Mekdam even existed as an operating business past September 2017 (when Mr. Nima says all staff were let go) and a similar absence of evidence that Mr. Hamilton and Mekdam were carrying on business together in 2018, there is a complete absence of any evidence showing common control or direction between Mr. Hamilton's business and Mekdam or Mr. Nima. Similarly, Mr. Hamilton's name remaining in the corporate name of Mekdam is an insufficient basis for finding Mr. Hamilton had any direction or control of Mekdam after he ceased to be a director of the company in June 2016.
76. I find the Director's findings on section 95 of the *ESA* are wholly unsupported by the evidentiary record; the findings are not rationally supported. The evidence, as it exists, does not establish the required criteria for meeting the test.
77. As a result, the Director misapplied the test, which requires the statutory criteria be "clearly established"; that the entities to be carrying on business together and common control and direction.
78. The section 95 of the *ESA* finding against Mekdam is cancelled.
79. Based on this finding, I do not need to address either the natural justice arguments or the question of new evidence.
80. If required to consider these matters, I would find the Director did not fail to comply with principles of natural justice in making the Determination. The Director did what was allowed under the *ESA* to provide notice, make demands and effect service on Mekdam. I must admit to being taken aback by the tone and tenor of the Director's submission, but do not need to decide whether it "crossed the line" of the accepted role of the Director in appeals.
81. On the "new evidence" ground, I would accept evidence provided by Mekdam that is relevant and cogent to the section 95 issue, but for the reasons stated above, find it is not necessary to consider such evidence.

## **ORDER**

82. Pursuant to section 115 of the *ESA*, I order that part of the Determination dated October 18, 2019, associating Mr. Hamilton and Mekdam under section 95 of the *ESA* and the accompanying wage liability imposed on Mekdam be cancelled. The remainder of the Determination is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**