Employment Standards TRIBUNAL

An appeal

\- by -

CYOP Systems International Incorporated; Moshpit Entertainment Inc.; Nextlevel.com Inc.; Nextlevel.com Internet Productions Inc.; Wiremix Media Inc. associated corporations under section 95 ESA

(“the associated corporations”)

\- of a Determination issued by -

The Director of Employment Standards

(the "Director")

pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR:	David B. Stevenson
FILE No.:	2002/540
DATE OF DECISION:	January 15, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by CYOP Systems International Incorporated; Moshpit Entertainment Inc.; Nextlevel.com Inc.; Nextlevel.com Internet Productions Inc.; Wiremix Media Inc. associated corporations under section 95 *Employment Standards Act* ("the associated corporations") of a Determination that was issued on October 7, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination decided that the five corporations, CYOP Systems International Incorporated, Moshpit Entertainment Inc., Nextlevel.com Inc., Nextlevel.com Internet Productions Inc. and Wiremix Media Inc., should be associated under Section 95 of the *Act* and that the resulting entity had contravened Part 2, Section 8; Part 3, Sections 16, 17 and 18; Part 7, Section 58; and Part 8, Section 63 of the *Act* in respect of the employment of four employees, Sal Bugliarisi, Stephen Chu, Alexander I. Enchevich and Shelley M. Seidman, and ordered Wiremix to cease contravening and to comply with the *Act* and to pay an amount of $78,747.73.

Wiremix says the Determination is wrong in the following respects:

1. The Director ignored evidence provided by the associated corporations during the investigations;
2. The Director erred in applying Section 95 of the *Act*.
3. The Director failed to allow the associated entities an opportunity to respond; and
4. The Director erred in concluding there had been any false representations made to the complainants and, in any event, improperly characterized the stock option and its value.

There is also an indication in the appeal that the associated corporations disagree with the finding that one of the complainants, Shelley M. Seidman, was an employee for the purposes of the *Act* and that another of the complainants, Alexander I. Enchevich, was not entitled to use the Director as a 'collection agency'.

ISSUE

The issue in this appeal is whether the associated corporations have demonstrated the Determination was sufficiently wrong in its conclusions of fact, in its interpretation of the facts or in its conclusions and decisions in respect of application of the provisions of the *Act* and the resulting amounts owed to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary it and/or refer it back to the Director.

FACTS

The associated corporations are in the business of internet software design, development and marketing.

The complainants alleged they were owed wages and, in some cases, stock options by several of the associated corporations, individually and in combination. The complainants stated the employer was not a single corporation, but a combination of CYOP Systems International Incorporated, Moshpit

Entertainment Inc. and Nextlevel.com Inc. One complainant, Shelley Seidman, alleged the employer also included Nextlevel.com Internet Productions Inc. and CYOP Systems Inc., a company formed under the laws of Barbados. In respect of the findings on the Section 95 decision, the Determination states:

> The **Association** portion of the preliminary findings letter outlines the associated corporations under ESA Section 95. The employers have not responded disputing the finding or providing information to alter the finding of CYOP Systems International Incorporated; Moshpit Entertainment Inc.; Nextlevel.com Inc.; Nextlevel.com Internet Productions Inc.; Wiremix Media Inc., being associated under Section 95 ESA.

The preliminary findings letter included the following information relating to the relationships between the various corporations:

- until April 1, 2002, Moshpit Entertainment Inc. was a wholly owned subsidiary of CYOP Systems International Incorporated;

- CYOP Systems International Incorporated was the operating entity in this province for CYOP Systems Inc., the Barbados company;

- all of the outstanding shares of Moshpit Entertainment Inc. were held by CYOP Systems Inc., the Barbados company;

- Patrick Smyth is identified in documents as the president of the CYOP Systems Inc., the Barbados company, the president of Wiremix Media Inc. and a director and officer of Nextlevel.com Inc.;

- Mitch White (a.k.a. Mitch Ross, Mitch Armstrong and Ross Armstrong) is identified in documents as the sole director and president of CYOP Systems International Incorporated;

- on April 1, 2002, Patrick Smyth and Mitch White authorized a transfer of all of the outstanding shares in Moshpit Entertainment Inc. to Steve White, the sole director and officer of Moshpit Entertainment Inc.;

- in the share transfer agreement, Steve White agreed to assume over $4.8 million in outstanding liabilities, with approximately $2.7 million of that liability arising from unsecured loans from CYOP Systems Inc., the Barbados company and CYOP Systems International Incorporated to Moshpit Entertainment Inc.;

- during the investigation, Patrick Smyth responded to the complaints on behalf of both CYOP Systems International Incorporated and Moshpit Entertainment Inc., and was able to provide proprietary information and documents relating to the business of Moshpit Entertainment Inc. after April 1, 2002;

- Kevin Jamieson was the General Manager of Nextlevel.com Inc. and Nextlevel.com Internet Productions Inc. in this province;

- Nextlevel.com Inc. and Nextlevel.com Internet Productions Inc., CYOP Systems International Incorporated and Moshpit Entertainment Inc. had a working relationship that included CYOP Systems Inc. providing a benefit package for employees of Nextlevel.com Inc. and Nextlevel.com

Internet Productions Inc. and Mr. Jamieson being shown as the contact person for Moshpit Entertainment Inc. with Human Resources Development Canada concerning benefit entitlement for some of the complainants;

- during the investigation, the complainants asserted that, at one time or another during their term of employment, they worked for Nextlevel.com Inc., CYOP Systems International Incorporated and Moshpit Entertainment Inc. and that those corporations effectively operated as one - control and direction was 'seamless';

- documents on file support the assertions made by the complainants.

As well, in earlier decisions made by the Tribunal, *Wiremix Media Inc.*, BC EST #D688/01 and a reconsideration of that decision , BC EST #RD075/02, Wiremix Media Inc. was accepted as a being a subsidiary of Nextlevel.com Inc. The same facts that justified the conclusion found in those decisions would also justify a decision to associate Wiremix Media Inc. with Nextlevel.com Inc. and, ultimately with the other corporations through Nextlevel.com Inc. In the same decisions, it also notes that Nextlevel.com Internet Productions Inc. is a subsidiary of Nextlevel.com Inc.

No additional information has been provided by the associated corporations in the appeal.

Three of the four complainants claimed that amounts were owed to them for stocks or stock options. One of the issues identified in the Determination was whether the stocks or stock options were 'wages' under the *Act*. The Determination concluded that the stock or stock options were wages, as the definition of wages in the *Act* includes, "any money paid to an employee for services rendered or labour provided [and] any incentive related to an employee's work performance, or the performance of the company". The Determination noted that payment of wages must be negotiable in Canadian currency. The Determination also adopted the following comment from the preliminary findings letter:

> For high tech firms there is a need to enter into stock option plans to qualify for high tech firm treatment for overtime purposes. Excerpt from ESA Regulation 37.8(1). In this section: **"high technology professional"** means a person who
>
> (b) in addition to a regular wage, receives a stock options or other performance related compensation package set out in a written contract of employment

The Director valued the stock options at $1.00 per share, basing that valuation on evidence that the shares of Moshpit Entertainment Inc. had 'traded' at that value when its shares were transferred by CYOP Systems Inc., the Barbados company, to Steve White.

The Determination found that the associated corporations had included stock options in the employment contracts of the three affected complainants. The evidence on file indicated that none of the associated corporations had either established stock option plans or issued stock or shares to any employee. The Determination concluded the associated corporations had contravened Section 8 of the *Act* by misrepresenting the wages and conditions of the job which was offered and accepted.

In a letter dated September 26, 2002, Mr. Smyth acknowledged receipt of the preliminary findings letter and requested an opportunity to "seek clarity from third parties with respect to some of the statements and actions of the complainants". Specifically, Mr. Smyth was asking for time to correspond with Canada Customs and Revenue Agency ("CCRA") with respect to whether any of the complainants had filed with

CCRA as contractors, with Human Resources Development Canada ("HRDC") to determine actual benefit dates for the complainants and query the approval process in a specific instance referred to in the preliminary findings letter and, finally, to contact the Certified General Accountants' Association for an opinion with respect to the actions of one of the complainants.

The Determination was issued without any response from the Director to that letter.

ARGUMENT AND ANALYSIS

The burden is on the associated corporations, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)).

The associated corporations have not shown there is any reviewable error arising from the comment in the Determination that efforts were made to have the employers participate in any meaningful way in the investigation and they had not responded. The former part of that comment is obviously a subjective assessment of the value of the participation of the associated corporations in the investigation process. It has no adverse impact on the merits of this appeal. The latter part of that comment relates specifically to the preliminary finding letter, which is dated September 19, 2002. The only reply to that letter is the September 26, 2002 letter from Mr. Smyth which, among other things, refers to earlier responses made on behalf of CYOP Systems International Incorporated but does not dispute any of the specific findings of fact. In any event, it is unclear from that ground of appeal what should flow from that alleged error. The appeal refers to the Director appearing to dismiss all evidence provided by CYOP Systems International Incorporated without clearly identifying what evidence was 'dismissed', why it was wrong to do so and what effect that ought to have on the Determination. Questions about whether the Director gave full consideration to the 'evidence' presented by the associated corporations are properly addressed in the context of specific maters raised in the appeal, not as a vague and general expression of dissatisfaction with the result.

Nor has the associated corporations shown the Director contravened Section 77 of the *Act* when the Determination was issued without allowing the associated corporations to seek 'third party evidence'. None of the 'evidence' described in the September 26 letter has any apparent impact on the conclusions identified in the preliminary findings letter. In respect of whether any of the complainants may have filed tax returns as 'contractors', the Tribunal has said on many occasions that the status of persons under the *Act* will not be determined by how those same individuals are viewed under other legislation. As well, neither the September 26 letter nor the appeal identify how CCRA or HRDC could provide any information relevant to the question of whether wages were owing to the complainants. In that respect, I note from the Determination that except for the contention that Mr. Enchevich and Ms. Seidman were independent contractors and the argument concerning the stock options, the associated corporations did not challenge the wage claims. Finally, the propriety of the conduct of any of the complainants is also irrelevant to whether any of those complainants are employees or are owed wages under the *Act*.

In the preliminary findings letter, the Director set out an extensive analysis of the basis for the decision to associate the various entities. It is not necessary to either set out that analysis or review its elements. The

factual components have been listed above. The entire appeal on the associated corporations decision says:

> CYOP was not carrying on a business, trade or undertaking through any of the other listed corporate entities other than Moshpit Entertainment Inc. ("Moshpit"). Moshpit was a wholly owned subsidiary of CYOP until April 1, 2002. There is no statutory purpose for treating all the entities as one. Only CYOP and Moshpit should fall under an association **while** Moshpit was a wholly owned subsidiary, the other entities are improperly included as reference and in deliverable material from the Director's delegate. CYOP has no control or influence whether the other entities respond to the Director's delegate.

With respect, stating the appeal in this way does not remotely satisfy the requirements for a proper appeal. It simply states the obvious - the associated corporations disagree with the conclusion. The appeal does not state any specific aspects of the decision to associate the five corporations that are wrong. Suffice to say, the Determination provides a sufficiently comprehensive factual foundation to justify the decision. I find the assertions made by the complainants, supported by some of the documents on file, that they worked for all of the corporations comprising the associated corporations and that those corporations effectively operated as one - control and direction was 'seamless', to be particularly compelling.

Finally, the associated corporations argue that the Determination erred in concluding there had been any contravention of Section 8 and in concluding the stocks and stock options promised three of the complainants were 'wages' and could be valued. Section 8 of the *Act* states:

> 8. *An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following*
>
> (a) *the availability of a position;*
>
> (b) *the type of work;*
>
> (c) *the wages;*
>
> (d) *the conditions of employment.*

In *Parsons*, BC EST #D110/00, the Tribunal stated:

> Section 8 is a pre-hiring provision and covers only pre-hiring practices. The prohibition in Section 8 against misrepresenting is not a general prohibition, but is specific to the four matters identified: the availability of a position, the type of work, the wages and the conditions of employment. The tribunal has adopted and applied a basic legal definition of misrepresentation when considering whether an employer has misrepresented any of those four matters. That definition describes misrepresentation in the following terms:
>
>> Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false misrepresentation. That which, if accepted, leads the mind to an apprehension of a condition other or different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.
>>
>> In a limited sense, an intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract and influential in producing it.

The Tribunal also considered the submission in that case that it was not the employer's intention to misrepresent any of the four matters. In response to that submission, the Tribunal said:

> . . . the employer's intention is not relevant to such a decision. As the definition of misrepresentation indicates, the matters of primary relevance are the untruth of the statement, its materiality to the contract and its influence on the party to whom it is made. The intention of the employer may bear on the remedy, but not on whether there has been a misrepresentation made.

The Determination found Section 8 had been contravened by the associated corporations misrepresenting the 'wages' and the 'conditions of employment' in agreeing to provide stock options and failing to do so. That finding depends on whether the stock options were either "wages" or one of the "conditions of employment".

It is clear from the contracts of employment for the affected complainants that stock options were part (and according to the submission of Mr. Enchevich, a very important part) of the wage package offered to three of the complainants (the "affected employees"). The employment agreement, which are set out in the offers of employment to the affected employees, contained the following:

> In exchange for your talent, experience and EXPECTED contribution to Moshpit Entertainment, we are prepared to offer you the following compensation package for your full time employment in this organization:

Annual Salary	-	$50,000
Stock Options	-	20,000
Vacation	-	3 weeks/year with minimum notice of 6 weeks.
Expenses	-	expenses incurred by you for the company will be reimbursed (see Expense Policy)
Start Date	-	September 20, 2000

> Upon completion of a favorable 3 month performance review from the date of hire, your salary will move to $55,000.00/year.

The exact terms of employment differed slightly for each of the affected employees, but the components were all the same and all included stock options. I have not considered the inclusion of 'free standing shares' in Moshpit Entertainment Inc. and the shares in Bingo.com in the affected employees' compensation package in the context of Section 8, as nether of those matters were offered at the 'pre-hiring stage'.

I have no difficulty with the conclusion that the stock options in Moshpit Entertainment Inc. fall within the definition "wages" in the *Act*. That conclusion finds support in the definition of "high technology professional" in Section 37.8 of the *Employment Standards Regulations*, which contemplates stock options and other performance related compensation will be "wages". Based on my conclusion the stock options are "wages", I do not need to consider whether they might also be included in what are "conditions of employment".

For completeness, I will add the following. In addition to the stock options that were included in the employment contracts at the outset, in letters dated March 30, 2001 the employment contracts of each of

the affected employees were amended to include a number of 'free trading shares' of Moshpit Entertainment Inc. in the compensation package and on or around July 15, 2001, each of the affected employees were given shares in an entity identified as Bingo.com. The letters announcing the latter benefit commenced with the following:

> Thank you for your recent efforts. We are pleased to announce that you shall receive the following:

I accept the conclusion in the Determination that these two items also fall within the definition of "wages" in the *Act*.

In the appeal, the associated corporations suggest there was no false representation because stock options can be influenced by a number of factors, including whether the company attained a trading market, acquired a public listing and issued stocks to be traded. As the Director correctly points out, however, there are no qualifications of the type described on the agreement to provide stock options. In fact, the contract for Mr. Chu states he will be given an option on 5000 "after completion of 3 months probation". Clearly, offering stock options as part of wages without either having the present ability to provide those 'wages' or knowing whether such 'wages' will ever be provided as promised is a misrepresentation of the wages of the position. Accordingly, I reject the argument that the Director erred in finding a contravention of Section 8.

However, notwithstanding the finding of a contravention, the Determination does not contain any analysis of whether the affected employees are entitled to a remedy for the contravention of that provision. Subsection 79(2) of the *Act* states:

> *79 (2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the Director may require the employer to do one or more of the following:*
>
> *(a) hire a person and pay the person any wages lost because of the contravention;*
>
> *(b) reinstate a person in employment and pay the person wages lost because of the contravention;*
>
> *(c) pay a person compensation instead of reinstating the person in employment;*
>
> *(d) pay an employee or other person reasonable or actual out of pocket expenses incurred by him or her because of the contravention.*

While the decision to order any remedy for a contravention of Section 8 of the *Act* is discretionary, the Determination must at least show the Director has considered whether a remedy is appropriate and provided some reason for the decision. If it is appropriate to provide a remedy, the Determination must indicate what the remedy ought to be. Because the Determination is silent on that matter, it is incomplete and must be referred back to the Director.

The associated corporations have raised an issue concerning the valuation of the stock options and 'free trading shares' in Moshpit Entertainment Inc. In valuing the stock options, the Director utilized the nominal value ($1.00 a share) placed on the shares in the March 30, 2002 share purchase agreement between CYOP Systems Inc., the Barbados company, and Steve White. In the appeal, the associated corporations submit:

> There is no recognized method of valuing a stock option.

The argument of the associated corporations says it was wrong for the Director to simply value stock options without recognizing that a stock option is just that - an option. The granting of a stock option would only have given the affected employees the right to exercise the stock options by, in effect, buying shares in Moshpit Entertainment Inc. at a specified price. The employees may or may not have exercised their respective options, and even if they did, the resulting 'value' of the shares would have been the difference between the cost to the employees and the value of the shares in the market. The associated corporations say that since there was never a market for Moshpit Entertainment Inc. shares, no value can be attributed the either the stock options or the 'free trading shares'.

The above arguments raise valid concerns about the manner in which the Determination has valued the stock options. In reply to this aspect of the appeal, the Director states:

> The stocks and options were valued based on the information present.

With respect, if I have been provided with all of the 'information present', I am unable to conclude there was sufficient information upon which the value of the stock options could reasonably and rationally be based.

The *Act* provides no assistance in determining the value of employee stock options notwithstanding the acceptance of employee stock options as a legitimate form of wage compensation for high technology professionals.

An employee stock option gives an employee the right to buy a certain number of shares in the company at a fixed price. The price at which the option is granted is normally referred to as the "grant price". Employees who have been given stock options hope the share price will go up and they will be able to 'cash in' by exercising their option (which means purchasing the stock at the "grant price") and selling the stock at the current market price.

There is no single and definitive formula for establishing the value of employee stock options. Applying the most basic formula, the value of an option is equal to the difference between the "grant price" and the market price of the underlying stock at the time the option is exercised. For example, if an option has a "grant price" of $25 and the market price of the underlying stock is $30 when the option is exercised, the value of the stock option (sometimes called its "intrinsic" value) is $5.

In this case, however, even applying the most basic formula demonstrates several problems associated with the valuation of the stock options in the Determination.

The associated corporations say there was no rational basis for fixing the value of Moshpit Entertainment Inc. stock at $1.00 a share and, more specifically, fixing the value of the employees' stock options at $1.00 a share.

The associated corporations argue that because Moshpit Entertainment Inc. never achieved a public listing, no shares were ever issued to the marketplace and no "market price" was ever established. I do not accept the suggestion in the foregoing argument that there needs to be a public offering of shares in order to establish the market price of the underlying stock for the purpose of valuing employee stock options. Stock options are frequently used in private, closely held corporations. There are several accepted methods for valuing the underlying stock of such corporations. Provided the relevant facts and circumstances are considered, the Director can, using accepted valuation methods, set the market price of

the underlying stock of a corporation. In my view, to conclude otherwise would not be consistent with the purposes and objectives of the *Act*.

Having said that, I can find no indication in the Determination that the Director has considered all of the relevant facts and circumstances and applied one of the accepted methods of valuation in fixing the market price of Moshpit Entertainment Inc. shares at $1.00 a share. I accept that one of the facts which warrants consideration is the value placed on the Moshpit Entertainment Inc. shares when they were transferred from CYOP Systems Inc., the Barbados company, to Steve White on March 30, 2002. The are other factors, including, but not limited to, the purpose of the valuation, the value established for similar, or related, companies, the economic climate in which the company operates, the market in which the company operates, any competitive advantage held by the company in the market and the company's financial, operational and economic attributes.

As well, the Determination does not appear to have recognized there is typically a "grant price" paid by the employee for the stock option. Instead the Determination has fixed the value of the stock option as equivalent to the nominal share value expressed in the share transfer agreement. This is effectively a finding that the "grant price" of the employee stock options was $0.00. Such a finding is neither fair nor reasonable. It is unsupported by any facts set out in the Determination or in any of the material on the file. The associated corporations also correctly point out that no stock option plan was ever established. That plan would have included provisions establishing the "grant price", as well as terms relevant to the acquisition, holding period, redemption and disposition of the stock options.

There are other considerations affecting the valuation of the stock options that on the face of the Determination have not been addressed. I accept the associated corporations' point that providing a stock option only gave the affected employees a right to purchase shares in Moshpit Entertainment Inc. The option itself has no cash value. The employees could not sell the option and the only way to convert the option to cash was to exercise it. The desire and ability of each affected employee to exercise their option is based on individual risk preferences and liquidity. The Determination does not analyse the valuation of the stock options in terms of each affected employees' inclination to exercise the option. This consideration is particularly relevant in light of the financial uncertainty of the business.

The Determination must be remitted to the Director to address the errors and concerns raised in this aspect of the appeal.

Finally, the associated corporations have asked the Tribunal to 'dismiss' the claim of Shelley Seidman and Alexander Enchevich, the former on the basis that she was not an employee, but an independent contractor, and the latter on the basis that he accepted employment elsewhere. The Determination dealt with both of those matters. In respect of Ms. Seidman, the Determination contained the following:

> The employee's undisputed evidence is ownership of and direction from Moshpit, CYOP, and NextLevel was seamless. Siedman [sic] was an employee of Moshpit Entertainment Inc. Siedman [sic] was an employee of NextLevel.com Inc. Siedman [sic] was an employee of CYOP Systems International Incorporated. In addition, Seidman was an employee of Wiremix Media Inc.

Nothing filed with the appeal has affected that statement. As the Tribunal has noted in several decisions, the definitions of employee and employer in the *Act* are inclusive, not exclusive. The Act is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and

Helping Hands v. Director of Employment Standards (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). The Tribunal has endorsed the following comment from *Machtinger v. HOJ Industries Ltd.*, *supra*, that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

The fact that Ms. Seidman signed an "Independent Contractor Agreement" with NextLevel Canada is not determinative of her status under the *Act*. Section 4 of the *Act* prohibits agreements that seek to 'contract out' of its provisions. The associated corporations has not satisfied the burden of showing the Determination is wrong in its conclusion that Ms. Seidman was an employee for the purposes of the *Act*.

In the reply to the appeal regarding Ms. Seidman, the Director asks that the Determination be varied to include the value of free trading shares in CYOP Systems Inc. that either were or ought to have been issued to her by NextLevel Canada. The Director says Ms. Seidman did not initially make any claim for shares until after the Determination was issued. The basis for the claim was a clause in the "Independent Contractor Agreement" that she had not recalled at the time she made her complaint (nor, it appears, at any other time between the filing of her complaint and the issuance of the Determination). I am not inclined to vary the Determination in respect of her claim as requested. Neither Ms. Seidman nor the Director have appealed any aspect of the Determination and the associated corporations have not had any real opportunity to respond to the variance requested. The Director may wish to consider whether it is appropriate to exercise her authority under Section 86 of the *Act*.

The request to 'dismiss' the claim of Mr. Enchevich has no merit and is rejected. The fact the letter of February 25, 2002 (upon which the associated corporations bases its claim the Mr. Enchevich had accepted employment elsewhere) is on the letterhead of NextLevel, signed by Mr. Jamieson does nothing more, in my view, than validate the complainants' assertion that the associated corporations effectively operated as one, that control and direction was 'seamless'. Against that letter, Mr. Enchevich has provided a Record of Employment indicating that from September 25, 2001 to April 30, 2002 his employer was Moshpit Entertainment Inc., a T4 for 2001 also showing the employer as Moshpit Entertainment Inc. and the statement portion of payroll cheques for the periods February 16-28 and March 01-15, 2002 from Moshpit Entertainment Inc.

This aspect of the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 7, 2002 be referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal