**BC EST # D267/96**

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act* S.B.C. 1995, C. 38

- by -

Carol Lacroix and Kevin Lacroix
Operating Lone Wolf Contracting
("Lone Wolf")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 96/402

**DATE OF HEARING:** September 11, 1996

**DATE OF DECISION:** September 16,1996

## DECISION

### APPEARENCES

| | |
|---|---|
| for the Appellants: | Kevin Lacroix<br>Carol Lacroix |
| for the Respondents/Complainants: | Gordon Marchand<br>Denise Marchand<br>Grant Louis<br>Dwayne Louis<br>Shawn Louis<br>Scott Duncan |
| for the Director: | Erwin Shultz |

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Carol Lacroix and Kevin Lacroix operating Lone Wolf Contracting ("Lone Wolf") from a Determination, No. CDET 002248, issued by a delegate of the Director of the Employment Standards Branch (the "Director") and dated May 13, 1996. The Determination concluded that Lone Wolf was liable to pay an amount of $7,056.30 to eight former employees. The amount comprised payment for regular and overtime hours, annual vacation on the additional amounts recorded by the director and unauthorized deductions. For its part, Lone Wolf says that the wage and overtime calculations made by the director are wrong and based on inadequate and incomplete records. It also says some of the time characterized as "work" by the director was volunteer training time and none of the complainants should be paid for that time, some of the time characterized as "work" by the director was travel time, the deductions were not made without authorization and the investigating officer acted in bad faith and contrary to the principles of natural justice by failing to provide Lone Wolf an adequate opportunity to be heard.

### ISSUES TO BE DECIDED

This case involves questions respecting complaints by persons engaged by Lone Wolf to participate in a silviculture training program designed by Lone Wolf for First Nations People. The issues include:

- whether, in the circumstances of this matter, volunteer training activity was "work" as that term is defined in the *Act*;

- whether employees were paid for all hours worked;

- whether employees were paid for overtime hours worked;

- whether Lone Wolf made unauthorized deductions from the wages of its employees, and

- whether, in the circumstances of this matter, travel time was "work" as that term is defined in the *Act.*

Also, Lone Wolf has alleged bad faith against the investigating officer and raised the issue of the fairness of the investigation.

**FACTS**

Lone Wolf is a silviculture contracting and training company. In a very basic sense, silviculture is the work of spacing, pruning and brush cleaning within a selected forest area in order to provide maximum opportunity for tree growth. Lone Wolf exists, in part, to provide training for First Nations People in silviculture practices. It does so by lobbying the Ministry of Forests for commitments to provide silviculture work to First Nations People and by working with Native Bands to have their band members trained for the work to be done. Such training could take more than two years.

Between December of 1994 and June of 1995 Lone Wolf had secured commitments from the Ministry of Forests to use Lone Wolf for certain Silviculture Contract Work in the Vernon Forest District and support from the Okanagan Indian Band to cooperate in the training of members of the Okanagan Band in the basics of silviculture practice. By July, 1995 Lone Wolf had secured a Silviculture Work Contract from the Ministry of Forests for work in three areas of the District. By mid July, Lone Wolf had assembled approximately thirty-six persons who responded to an invitation to be trained. Some persons in the group were designated by Lone Wolf to be trained as pruners and the rest were designated to be trained as brush cleaners.

The two sub-groups began their training at a location referred to as "Emery's place". The work performed here was part of an agreement between Lone Wolf and the Okanagan Band to have Lone Wolf perform training work on 20 hectares of the Band's land, in return for which Lone Wolf was to be paid by the Band.

Following one or two weeks at "Emery's place", the pruners began work on the first portion of the contract with the Ministry of Forests. The brush cleaners were assigned by Lone Wolf to clean the graveyard on the Band's land. Some of the pruners also participated at the graveyard as the first portion of the contract wound down.

Just prior to the commencement of the first portion of the contract, Lone Wolf made arrangements for the purchase of raingear and corkboots for the trainees. These items were necessary safety equipment. The cost of this equipment was later deducted from the wages of the trainees. Lone Wolf also made arrangements for a first aid course for the trainees. An amount, identified as the cost of the course for each trainee, was later deducted from their wages. No authorization was acquired by Lone Wolf for the deduction from the wages of the trainees of either the cost of the safety equipment or the cost of the first aid course.

Each of the three portions of the contract were at different locations. Lone Wolf had a crew cab truck which was used to transport the trainees to and from these locations. A marshalling point was designated by Lone Wolf and some of the trainees were picked up and dropped off there. Others were picked up and dropped off at their homes. On the Valentine Mountain portion of the contract, one of the complainants, Gordon Marchand, drove the truck. Kevin Lacroix testified some trainees used their own vehicles for a short time, but they were generally encouraged to come to work in the truck. The trip, from the marshalling point to the job site, took approximately one and one-quarter hour.

Lone Wolf did not keep the payroll records required to be kept by Section 28 of the *Act*. There was no system for maintaining a record of hours worked. Lone Wolf did attempt to maintain a record of hours for a brief period. These records were produced at the hearing. I cannot view them as a reliable record of actual hours worked. The evidence indicates they represent no more than a rationalization for the wages the Lone Wolf paid to the trainees, calculated on 8 hour days. I prefer the evidence of Gordon Marchand and Denise Marchand who testified to the hours of work. That testimony indicates there were few days when the trainees worked less than ten hours in a day, if travel time is included in the hours of work.

**ANALYSIS**

There are several sections of the *Act* directly applicable to the issues raised by Lone Wolf. Section 1, the definition of "**employee"** states, in part:

> **"employee"** includes
>
> (c) a person being trained by an employer for the employer's business,

Each of those persons I have referred to as "trainees" were being trained for the employer's business and are "employees" for the purposes of the *Act*. Section 1 also defines **"work"** as:

> the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

It is unnecessary that to that definition that the employer be paid for the work performed by the employee. In this case, one of the arguments raised by Lone Wolf against treating the work at "Emery's place" and the graveyard as "work" under the *Act* was that Lone Wolf did not receive any money for it. That may have been so, but it was work which was committed by Lone Wolf to be performed for the Band with its work force. The employees were directed to perform the work by Lone Wolf and it was an aspect of the training of those employees. In such circumstances the work is not being done by the employees in any voluntary sense, but as a part of the work required by Lone Wolf to be done and it is responsible to pay wages to the employees for it.

Subsection 40(1) and subsection 40(2) of the *Act* read:

> 40. (1)An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under Section 37 or 38
>
> (a) 1½ times the employee's regular wage for the time over 8 hours, and
>
> (b) double the employee's regular wage for any time over 11 hours.

> (2) An employer must pay an employee who works over 40 hours in a week and is not on a flexible work schedule adopted under Section 37 or 38
>
> (a) 1½ times the employee's regular wage for the time over 40 hours, and
>
> (b) double the employee's regular wage for any time over 48 hours.

The director concluded there was sufficient material provided by some of the complainants to establish the basis for an overtime claim. There was also evidence before me justifying a conclusion that some of the employees worked, but were not paid, overtime. The burden in this appeal is on Lone Wolf to show, on a balance of probabilities, the conclusions reached by the director were wrong and that no employee who received the benefit of the Determination was entitled to overtime. It has not been able to do so, except to the extent specifically addressed later in this analysis.

Section 21 of the *Act* says:

> 21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by this Act.
>
> (3) Money require to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

An employee may provide written authorization allowing an employer to make a deduction from wages. Lone Wolf deducted the cost of raingear, corkboots and a first aid course from the wages of many employees without authorization. They were in breach of the *Act* in doing so and the *Act* says such wages deducted are recoverable.

The most troublesome aspect of this appeal is the issue of whether, in the circumstances of this case, travel time is "work" as that term is defined by the *Act*. The facts upon which the director concluded the travel time was work are set out above. What is absent, in my opinion, is any compelling reason for that conclusion. The circumstances do not demonstrate a situation that is particularly unique. The employer provided a vehicle which he used to pick up employees and transport them to the job site. There was no evidence or indication the employees were without any other alternative method of getting to the job site. A substantial portion of the route between the marshalling point and the job site involved travel on a primary provincial highway. Some employees had taken vehicles to the job site, suggesting the availability of that option. Where travel time is claimed as "work" employees will be required to demonstrate some very compelling reason why that time should be treated as such for the purposes of the *Act*. I do not find any compelling reason in this case to treat the time taken by the employees to travel to and from the job site as "work" and I would allow Lone Wolf's appeal to the extent it challenges the conclusion of the director to require the payment of wages for travel time.

Lone Wolf has alleged bad faith in respect of the role of the delegate assigned to investigate the complaints and make a Determination. I heard no evidence supporting that allegation. There are two points to be made about this allegation: first, I doubt my jurisdiction to address such an allegation unless some nexus can be established between the alleged bad faith and the Determination made; and second, in any event, such a serious allegation would require clear and convincing proof. In this case, there is neither. It is apparent the conclusions reached by the delegate were justifiable and based, for the most part, upon a common sense application of the *Act* to the available facts. Even where I have found disagreement with the conclusion reached on the travel time issue, the delegate was applying what he considered to be Branch policy on the issue. Absent any nexus between the allegations made and the conclusions reached by the delegate, I would not give further consideration to the allegations and I dismiss the argument. I am fortified in this conclusion by the absence of any evidence of bad faith.

Finally, Lone Wolf has raised the issue of fairness in the investigating process, claiming it was not given adequate opportunity to respond to the allegations made in the complaints. On the evidence, I find no merit to this argument. It is my opinion the *Act* does not require strict conformance to the principles of natural justice by an investigating delegate. Section 77 of the *Act* states:

> 77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

The role of the delegate is principally administrative and investigative, not judicial.
The legislative purpose behind the structure of the *Act* is to provide an inexpensive and speedy resolution to complaints. In certain circumstances this overriding purpose will compel a delegate to reach certain conclusions and determinations without providing one of the parties with what they feel is "adequate opportunity" to respond. In reality, what Lone Wolf complains about is their perception that the delegate was predisposed to a certain result and did not appear to be responsive to their version of events. Unfortunately, that is not an uncommon perception from persons not as conversant with the requirements of the *Act* as the investigating delegate. That does not justify a conclusion they were not given a reasonable opportunity to respond. I find they were given reasonable opportunity to respond. In the circumstances, however, there was little relevant response that could be given and I am sure Lone Wolf felt an element of frustration with that state of events.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 002248 be varied to exclude travel time hours from what was concluded to be **"work"** under the *Act* and the wage and overtime calculations adjusted accordingly.

In all other respects the Determination is confirmed.

**David Stevenson**
**Adjudicator**
**Employment Standards Tribunal**