

An appeal

- by -

Kootenay Network Systems Inc. and iDevco, Inc.  
(the "Appellant")

- 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:** W. Grant Sheard

**FILE No.:** 2002/420

**DATE OF DECISION:** October 8, 2002

## DECISION

### OVERVIEW

This is an appeal based on written submissions by Kootenay Network Systems Inc. and iDevco, Inc. (the “Appellant”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination issued by the Director of Employment Standards (the “Director”) on July 19, 2002 wherein the Director’s Delegate (the “Delegate”) ruled that the Appellant had contravened Sections 18 and 58 of the *Act* regarding payment of wages after termination of employment and vacation pay and finding that the two companies were associated companies under Section 95 of the *Act* jointly and severably liable to the Employee for \$2,900.82 including interest.

### ISSUES

1. Are Wages and Annual Vacation Pay owed to the Respondent?
2. Are Kootenay Network Systems Inc. and iDevco, Inc. associated corporations pursuant to Section 95 of the *Act*?

### ARGUMENT

#### *The Appellant’s Position*

In a written appeal form dated August 1, 2002 and filed with the Tribunal August 6, 2002 along with a supplementary one page written submission dated August 2, 2002 the Appellant alleges there was an error made in the facts found, a different explanation of the facts, and other facts that weren’t considered in the Delegate’s Determination and seeks to cancel that Determination. In the supplementary written submission the Appellant says that the Delegate made two errors.

First, the Appellant says that the Delegate erred where it was stated at page 2, paragraph 8 of the Determination that “Despite acknowledging the amount of the outstanding wages, no attempts have been made to pay these amounts.” The Appellant says that this is inaccurate as many of the employees accepted equipment in lieu of wages after they were terminated. Further, the Appellant says that a director of the company iDevco, Inc., Timothy Totten, offered a vehicle to the Respondent for the wages due to him and that, on top of that, another director, Mr. Soukoreff, offered to the Respondent a computer system worth as much or more than the claim, but the Respondent declined to accept these items in lieu of cash.

Second, the Appellant says that the Delegate erred where it was stated at page 4, paragraph 6 of the Determination that “At the time of Lightfoot’s termination Kootenay and iDevco carried on business out of the same location.” The Appellant says that “iDevco’s corporate office where the day-to-day business took place under the guidance of Mr. Sam Conkin was located in a completely different building on the other side of the city and the Kootenay Network Systems office where Mr. Lightfoot worked with Mr. Totten and several other technical employees. The management decisions were always made by the staff in the iDevco office.”

In a further written submission dated September 15, 2002 and made in response to the Respondent's and Delegate's submissions the Appellant says that "As neither company had (or yet has) enough funds to pay any employees or bills, how would it have been possible to pay Mr. Lightfoot in Canadian currency? At least by offering him assets of recoverable value, he would have been able to sell those assets and collect money in Canadian currency. The companies on the other hand could not sell those assets to pay any outstanding dues as any money going into the company is owed first to the Canada Customs and Revenue Agency, before anyone else." Further, the Appellant says that "all future operations of the companies depended upon a major financing that was being worked on for delivery in late July. .... Unfortunately it fell through..... Attempts have been made for the last year to find alternative means to pay the employees". Also, "If Mr. Lightfoot wishes to recover the monies owing to him, his only realistic option is to accept assets of recoverable value, which he can sell to convert into Canadian currency."

#### *The Respondent's Position*

In a written submission dated September 18, 2002 the Respondent says that "During my employment at iDevco, it was never once said to me that I was an employee of KNS. My work was performed for iDevco, and all my work was done on a product sold by iDevco. The day I asked to be laid off, I was told to talk to Sam Conkin, a director of iDevco." In addition, the Respondent supplies a copy of a contract dated July 10, 2000 titled "Employee Intellectual Property Agreement" between iDevco and Kootenay Network Systems Inc. and Keelan Lightfoot. In a preamble to that agreement it states that "The employee has been hired as an employee of iDevco/KNS. That document is signed by Keelan Lightfoot as employee and witnessed by Tim Totten, apparently a director of iDevco. There does not appear to be any signatory or seal attached on behalf of the corporate parties to that agreement.

The Respondent also submits a copy of a stock certificate he received from iDevco and a printed copy of iDevco's website whereon the Respondent is listed as an employee of iDevco.

#### *The Director's Position*

In a written submission dated August 13, 2002 the Delegate says that "the Appellant has not argued that (the Respondent) is not owed wages as outlined in the Determination, however; has asserted that previous attempts were made by the Appellant to resolve (the Respondent's) claim for unpaid wages. Secondly, the Appellant asserts that there were two offices operating in the same city at the time of (the Respondent's) termination of employment."

The Delegate notes Section 20 of the *Act* which provides as follows:

*"An employer must pay all wages*

- a) in Canadian currency,*
- b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or*
- c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement."*

The Director says, therefore, the complainant was not obliged to accept a vehicle and/or computer equipment as payment for wages owed.

The Director acknowledges that the Determination was in error wherein it stated that, at the time of the Respondent's termination, the two companies carried on business out of the same location. The Director notes that a review of the facts indicates that the two companies amalgamated offices during the first week of September 2001 which was shortly after the termination of the Respondent's employment on July 23, 2001. Nonetheless, the Director says that the two companies are still associated corporations pursuant to Section 95 of the *Act* as they were clearly under common control and direction. The Director says that the Employer has not disputed these findings; rather, the Employer acknowledges in their appeal submission that "Management decisions were always made by the staff in the iDevco office".

The Director submits that the Determination should be confirmed.

## THE FACTS

Kootenay Network Systems Inc. ("KNS") is a wholly owned subsidiary of iDevco, Inc. ("iDevco"). KNS operated a computer software development business for which Mr. Lightfoot worked from July 7, 2000 to July 23, 2001 as a computer programmer at the rate of \$2,500.00 per month.

A BC Online Companies Corporate Search dated August 30, 2001 indicates that Mr. Gordon Soukoreff is the sole director/officer of KNS. During the investigation Mr. Soukoreff responded for KNS and confirmed that the wages claimed by Lightfoot were due and owing. Soukoreff informed the Delegate that he "sold" Kootenay to iDevco and that the day to day affairs and financial activities are controlled by iDevco and its chief operating officer, Mr. Sam Conkin, a director/officer of iDevco. He stated that both companies operated out of separate offices until the first week of September 2001. Sam Conkin responded during the investigation for iDevco. He also confirmed that the claim by Lightfoot was undisputed by KNS.

The BC Online Companies Corporate Search conducted by the Delegate further reveals that, with respect to iDevco, Inc., it was registered in BC on March 17, 2000 as an extraprovincial company having been incorporated in Nevada. It also indicates that, in addition to Mr. Sam Conkin, Gordon Soukoreff and Timothy Totten are directors of that company.

The Respondent produced an "Employee Intellectual Property Agreement" dated July 10, 2000 between iDevco, Inc. and Kootenay Network Systems Inc. and Keelan Lightfoot stating in the preamble that "The employee has been hired as an employee of iDevco/KNS". That agreement is signed by Mr. Lightfoot as employee with his signature being witnessed by Tim Totten. There does not appear to be any signature by an authorized signatory or seal by iDevco or KNS.

## ANALYSIS

### 1. *Are wages and annual vacation pay owed to the Respondent?*

The Respondent's claim for wages and vacation pay is not disputed. Rather, the Appellant asserts that the Respondent was offered a vehicle and/or computer equipment in satisfaction of its claim and that "his only realistic option is to accept assets of recoverable value".

I agree with the Director's Delegate that Section 20 of the *Act* (set out above) is determinative of this issue. The employee is not obliged to accept a vehicle and/or computer equipment for wages owed. The *Act* requires wages be paid in Canadian currency.

2. *Are Kootenay Network Systems Inc. and iDevco, Inc. associated corporations pursuant to Section 95 of the Act?*

Section 95 of the *Act* states:

**Associated Corporations**

- 95** *If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and*
  - (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.*

In *Employment Standards in British Columbia Annotated Legislation and Commentary*, Cascadden, Allison, and Corwin, The Continuing Legal Education Society of B.C., Vancouver, 2000 ("*Employment Standards*") at page 11-19 it is said that "This statutory provision allows the Director to pierce the corporate veil and look beyond the legal structure of a business to the relationships of various entities that in reality comprise the substance of the business. There are four preconditions to an application of s. 95 to the circumstances of any matter before the Director: (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."

*Re Invicta Security Systems Corp.*, [1996] B.C.E.S.T.D. No. 340 (QL), (4 December 1996), BCEST #D249/96 (Stevenson, Adj.).

*Re Broadway Entertainment Corp.* (c.o.b. Wharfside Eatery), [1996] B.C.E.S.T.D. No. 180 (QL), (18 July 1996), BCEST #D184/96 (Eden, Adj.).

*Re Manchelsea Investments Ltd.*, [1997] B.C.E.S.T.D. No. 287 (QL), (15 July 1997), BCEST #D315/97 (Kempf, Adj.), reconsideration dismissed (23 October 1997), BCEST #D513/97 (Lawson, Adj.).

*Re Adrenalin III Sports Ltd.*, [1997] B.C.E.S.T.D. No. 98 (QL), (7 March 1997), BCEST #D110/97 (Collingwood, Adj.).

In the present case there is clearly more than one corporation involved and each of them are carrying on a business or trade as is evidenced by the Employee Intellectual Property Agreement which was produced by the Respondent. Further, there is clearly common control or direction. Mr. Soukoreff is a director of both companies. In its submissions, the Appellant acknowledges that "Management decisions were always made by the staff in the iDevco office". Further, in its written submission of September 16, 2002 iDevco and KNS jointly say "All future operations of the companies depended on a major financing that was being worked on for delivery in late July..... unfortunately it fell through....attempts have been made

for the past year to find alternative means to pay the employees”. This statement suggests a connection between the companies in respect of their financing as well.

At page 11-21 of *Employment Standards* (supra) it is said, “The Director’s primary focus when considering Section 94 must be, first, to determine whether or not a particular business enterprise is carried on by two or more individuals or firms and then, second, to determine whether the consolidated enterprise is directed or controlled by a single individual or firm or by a common group of individuals or (regardless of the particular legal form this “joining together” may take) and jointly control and direct a single business enterprise, then a Section 95 order may be appropriate.”

*Re Armstrong*, [1997] B.C.E.S.T.D. No. 20 (QL), (23 January 1997), BCEST #D026/97  
(Thornicroft, Adj.)

In the present case it is apparent by the Employee Intellectual Property Agreement that this particular business enterprise was carried on by the two corporations. Further, it is equally clear for the reasons stated above that the business was, at least as far as the Respondent is concerned, a consolidated enterprise directed or controlled by a common group of individuals. Indeed, this is not disputed by the Appellant.

The onus is on the Appellant to demonstrate on a balance of probabilities an error in the decision made in the Determination. I find that the Appellant has failed to meet that onus.

## **ORDER**

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated July 19, 2002 be confirmed.

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**W. Grant Sheard**  
**Adjudicator**  
**Employment Standards Tribunal**