

Applications for Reconsideration

- by -

Goodwin Gibson, a Director or Officer of VidWRX Inc.  
("Gibson")

- of two Decisions issued by -

The Employment Standards Tribunal  
(the "Tribunal")

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

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE Nos.:** 2017A/23 & 2017A/24

**DATE OF DECISION:** March 24, 2017

## DECISION

### SUBMISSIONS

Roselle P. Wu

counsel for Goodwin Gibson, a Director or Officer of  
VidWRX Inc.

### INTRODUCTION

1. I have before me two applications for reconsideration filed under section 116 of the *Employment Standards Act* (the “*Act*”) by legal counsel for Goodwin Gibson (“Gibson”). The applications concern two decisions issued by Tribunal Member Stevenson on January 18, 2017. These two, essentially identical, applications raise an issue that, prior to these proceedings, had not been explicitly addressed by the Tribunal, namely: Can an individual who is director of a federally-incorporated corporation, extraprovincially registered to carry on business in British Columbia, be held liable for employees’ unpaid wages under section 96(1) of the *Act*?
2. Member Stevenson concluded that such an individual *can* be held liable. I agree. My reasons now follow.

### FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

#### *The Determinations*

3. On June 30, 2016, a delegate of the Director of Employment Standards issued a determination against VidWRX Inc. (“VidWRX”) under section 79 of the *Act* ordering it to pay \$30,988.39 to its former employee, Kirk Hasley (“Hasley”), on account of unpaid wages and section 88 interest. By way of this determination, the delegate also levied three separate \$500 monetary penalties (see section 98 of the *Act*) against VidWRX thus bringing the total amount of the determination to \$32,488.39. I shall refer to this determination as the “First Corporate Determination”.
4. On July 22, 2016, a different delegate issued a second determination against VidWRX ordering it to pay \$131,784.87 to an additional 10 former employees on account of unpaid wages (including compensation for length of service) and section 88 interest. This determination also included three separate \$500 monetary penalties and thus the total amount of the determination was \$133,284.87. I shall refer to this determination as the “Second Corporate Determination”.
5. The time period for appealing the First Corporate Determination to the Tribunal expired on August 8, 2016, and the appeal period relating to the Second Corporate Determination expired on August 29, 2016. Neither the First Corporate Determination nor the Second Corporate Determination was appealed.
6. Concurrent with the First Corporate Determination, the delegate issued a determination against Mr. Gibson under section 96(1) of the *Act* ordering him to pay \$30,988.39 on account of Mr. Hasley’s unpaid wages and interest. The delegate indicated in his accompanying written reasons that he was issuing this latter determination against Mr. Gibson at the same time as the First Corporate Determination “because the Employer is no longer conducting business and there is a risk assets may disappear or be sold” (page R2). I shall refer to this determination as the “First Section 96 Determination”.
7. Similarly, a second section 96 determination was issued against Mr. Gibson on July 22, 2016 (concurrent with the Second Corporate Determination), ordering him to pay the total sum of \$110,999.33 on account of

unpaid wages and interest owed to the ten former VidWRX employees named in Second Corporate Determination (the comparatively lesser amount reflecting, for some former employees, the 2-month unpaid wage liability ceiling set out in section 96(1) of the *Act*). I shall refer to this Determination as the “Second Section 96 Determination”.

### *The Appeal Decisions*

8. Mr. Gibson, through his legal counsel, filed essentially identical appeals of both the First and Second Section 96 Determinations. Counsel advanced several arguments including whether or not Mr. Gibson, as a director of a federal corporation, could be held liable under section 96(1) of the *Act*. The Attorney General for British Columbia provided a written submission in the appeal proceedings, taking the position that there was no federal paramountcy; the Attorney General of Canada declined the Tribunal’s invitation to intervene in the appeal proceedings. As noted above, Tribunal Member Stevenson held that Mr. Gibson could be held liable under section 96(1) and he ultimately confirmed both determinations.
9. Member Stevenson issued two separate decisions, both dated January 18, 2017, each of which is now before me in the instant reconsideration applications. In BC EST # D005/17 (the “First Appeal Decision”), Member Stevenson confirmed the First Section 96 Determination, and in BC EST # D006/17 (the “Second Appeal Decision”), he confirmed the Second Section 96 Determination. Member Stevenson’s reasons relating to the so-called “paramountcy” argument (discussed in greater detail, below) were fully set out in the First Appeal Decision. In the Second Appeal Decision, Member Stevenson briefly addressed the paramountcy, as well as some other arguments that Mr. Gibson advanced, stating at paras. 20 – 23:

With one addition, this appeal makes the identical arguments that were raised in an earlier appeal by Mr. Gibson, which was dismissed in BC EST # D005/17.

In that appeal, Mr. Gibson argued he was not personally liable under section 96 of the *Act* for the wages found owing to the employee in that case because he was never validly appointed as a director of VidwrX, the “functional” director test is not applicable to him and, because he was a director of a company incorporated under the *Canada Business Corporations Act*, R.S. 1985, C-44, section 96 of the *Act* was inoperative against him.

Mr. Gibson also challenged the calculations of the wages found owing the employee in the corporate determination, as he has done in this appeal with the calculations of wages owed to the Complainants.

I adopt and apply all of the reasoning and the decision on those arguments in this appeal and similarly dismiss them.

### **THE RECONSIDERATION APPLICATIONS**

10. As previously noted, I have two applications before me concerning both the First Appeal Decision (Tribunal File No. 2017A/23) and the Second Appeal Decision (Tribunal File No. 2017A/24). Mr. Gibson’s legal counsel advances the identical argument in each application:

...the Tribunal failed to properly apply and interpret both branches of the federal paramountcy test and, specifically, 1) whether there is an operational conflict and 2) whether the provincial law frustrates the purpose of the federal law. In doing so, the Tribunal applied the wrong legal test and failed to provide any analysis with respect to Mr. Gibson’s arguments concerning the due diligence defence available to directors under the *Canada Business Corporations Act*.

11. I am satisfied that these applications raise a serious question, namely, whether corporate directors of federally-incorporated business corporations can be held personally liable for unpaid wages under section

96(1) of the *Act*. This is an issue that, so far as I can determine, the Tribunal has not previously adjudicated other than, of course, in the two appeal decisions at issue in these applications. The determination of this question has serious implications, not only for Mr. Gibson, but for any individual who is a director of a federally-incorporated business and for the employees of those businesses. In light of those considerations, I find that the two applications pass the first stage of the two-stage *Milan Holdings* test (see BC EST # D313/98).

12. That said, however, I am also satisfied that these applications are not meritorious and, accordingly, I see no need to seek any further submissions from any of the respondents or from the federal and provincial attorneys general.
13. In adjudicating these applications, I have reviewed the material filed by Mr. Gibson's counsel and, in addition, I also reviewed the record and the submissions that were before Member Stevenson when he issued the two appeal decisions now before me.

## FINDINGS AND ANALYSIS

14. Businesses may take many legal forms including sole proprietorships, partnerships (of which, at least in British Columbia, there are three forms) and the business corporation. If one or more individuals wish to carry on business in British Columbia through a business corporation, the business can be incorporated under the British Columbia *Business Corporations Act* (the "*BCA*") or federally, under the *Canada Business Corporations Act* (the "*CBCA*"). In the latter case, although the corporation is incorporated under the *CBCA*, save for a few statutory exceptions, it must be extraprovincially registered under Part 11 of the *BCA* "within 2 months after the foreign entity begins to carry on business in British Columbia" (*BCA*, section 375(1)).
15. VidWRX (formerly known as Inveslogic Inc. and Somedia Networks Inc.) was incorporated under the *CBCA* on February 10, 2006, and was extraprovincially registered to carry on business in British Columbia on November 9, 2007. The present applicant, Mr. Gibson, was recorded in the Corporations Canada database as being a director of VidWRX at all times material to this dispute.
16. The relevant statutory provisions for purposes of these applications are, respectively, section 96(1) of the *Act*:

96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

and sections 119(1) and (2) and 123(4) of the *CBCA*:

- 119 (1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.
- (2) A director is not liable under subsection (1) unless
- (a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;
  - (b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or

- (c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the debt has been proved within six months after the date of the assignment or bankruptcy order.

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- 123 (4) A director is not liable under section 118 or 119, and has complied with his or her duties under subsection 122(2), if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on
  - (a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
  - (b) a report of a person whose profession lends credibility to a statement made by the professional person.

17. Turning first to section 96(1) of the *Act*, I note that there is no definition in the *Act* of either a corporate “director” or “officer” nor is there any definition of a “corporation”. Although the B.C. *Interpretation Act* does not include a definition of a corporate “director” or “officer”, a “corporation” is defined in section 29 as follows: “In an enactment: ...**corporation** means an incorporated association, company, society, municipality or other incorporated body, *where and however incorporated*, and includes a corporation sole other than Her Majesty or the Lieutenant Governor” (my *italics*). Thus, VidWRX certainly meets the statutory definition of a “corporation” as it clearly is “an incorporated...company” and there is nothing in the section 29 definition that limits the scope of the definition to corporations only incorporated in British Columbia; indeed, as the italicized portion of the above *Interpretation Act* excerpt states, it does not matter where the corporation was incorporated.
18. Turning now to the *CBCA*, while section 119(1) is broadly similar to section 96(1) of the *Act*, inasmuch as both provisions fix directors with a statutory liability for employees’ unpaid wages, there are, of course, significant differences, most prominently concerning the scope of the liability ceiling (6 months’ wages versus 2 months’ wages). Further, section 96(1) applies to both directors and officer whereas the *CBCA* provision only applies to directors.
19. In addition, the procedures for invoking a claim against a director are very different under the two statutory regimes. Under the *Act*, the moment employees’ unpaid wage claims crystallize (for wages “earned or [that] should have been paid”), the directors of the corporate employer may be held personally liable for those wages subject to the 2-month liability ceiling and any defence provided for in section 96(2). Section 96(3) provides: “This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1)”. Thus, the director’s or officer’s liability could be formalized in a determination (as occurred in this case) and all of the wage recovery options open to the Director under Part 11 of the *Act* may be utilized.
20. By contrast, under the *CBCA* process, and as noted by Member Stevenson at para. 53 in the First Appeal Decision, a director cannot be held liable unless: i) the employee first sued the corporate employer (and within a 6-month limitation period) and was unable to recover the full amount of any judgment issued in the employee’s favour; ii) “the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution”; or iii) “the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the debt has been proved within six months after the date of the assignment or

bankruptcy order” (section 119(2)). There is also a 2-year limitation period for filing a wage claim against a corporate director following the director’s resignation (section 119(3)). Finally, section 123(4) of the *CBCA* provides a “reasonable diligence” defence for the corporate director. Under the *Act*, and as noted by Member Savage (now Savage, J.A.) in *Jiang and Liu*, BC EST # D074/06, there is no “due diligence” defence that may be raised to avoid section 96(1) liability (see also *Rauma*, BC EST # RD054/10).

21. Mr. Gibson’s counsel submits that section 96(1) of the *Act* is inoperative as against Mr. Gibson because his liability can only arise under the *CBCA* which is the constitutionally “paramount” legislation in this case. Insofar as the constitutional “division of powers” (as between the federal and British Columbia provincial governments) is concerned, my analysis commences with the fundamental principle that the employment relationships between VidWRX and its employees are governed by provincial, not federal, employment-related legislation. “Canadian courts have recognized that labour relations are presumptively a provincial matter, and that the federal government has jurisdiction over labour relations only by way of exception [and] this exception has always been narrowly interpreted” (*NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, [2010] 2 S.C.R. 696 at para. 11).
22. VidWRX is (or, was, at all material times) in the video production business and its head office is/was situated in Vancouver. VidWRX’s core business activities presumptively fall under provincial, not federal, jurisdiction. I agree with, and adopt, Member Stevenson’s comment at para. 41 of the First Appeal Decision (which equally applies to the employment of the other employees named in the Second Section 96 Determination):

The key facts are that Mr. Hasley is a provincial employee whose terms and conditions of employment are governed by the provisions of the *Act* and [VidWRX] is a provincial employer. There is no federally regulated employment involved in this case; federal jurisdiction over Mr. Hasley’s employment is not argued, nor does it exist. Mr. Gibson is a director of a provincial employer which has contravened the *Act*.

23. However, Mr. Gibson’s counsel says that federal law (in this case, the *CBCA*) is paramount and supersedes the *Act* insofar as determining Mr. Gibson’s potential personal liability as a corporate director is concerned. In *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327 the Supreme Court of Canada observed (at paras. 15 – 16; 18):

Legislative powers are exclusive, and one government is not subordinate to the other...It is often impossible for one level of government to legislate effectively within its jurisdiction without affecting matters that are within the other level’s jurisdiction...This leads to overlap in the exercise of provincial and federal powers. The tendency has been to allow these overlaps to occur as long as each level of government properly pursues objectives that fall within its jurisdiction...

... In certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level...When there is a genuine “inconsistency” between federal and provincial legislation, that is, when “the operational effects of provincial legislation are incompatible with federal legislation”, the federal law prevails... If both laws are independently valid, however, the court must determine whether their concurrent operation results in a conflict...

A conflict is said to arise in one of two situations, which form the two branches of the paramouncy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

24. Counsel for Mr. Gibson says firstly, that there is an operational conflict as between the *Act* and the *CBCA* regarding a corporate director's unpaid wage liability and, secondly, that Member Stevenson "failed to even ask this question" (*i.e.*, whether there was an operational conflict).
25. I am unable to accept counsel's submission that Member Stevenson did not turn his mind to whether there was an operational conflict. In particular, Member Stevenson found at para. 41 (First Appeal Decision, quoted above), that provincial employment legislation governs in this case. At para. 44, he set out the relevant criteria to be taken into account in a "paramourty" dispute. At paras. 46 – 48, and although he did not specifically use the term "operational conflict", he nonetheless concluded that the two statutes can separately operate without generating a conflict (see also para. 55). Further, at paras. 49 – 50, Member Stevenson expressly held that the section 96(1) of the *Act* does not frustrate the purpose of the *CBCA*. Finally, at para. 57, Member Stevenson specifically held "There is, however, *no conflict* between the *Act* and the *CBCA*; each can be read as applying to those situations identified by its legislative provisions" (my *italics*) (see also para. 45).
26. I endorse Member Stevenson's comments, at para. 51, that the federal government does not have the constitutional authority to intrude on a sphere of exclusive provincial jurisdiction and purport to override a director liability provision contained in a constitutionally valid provincial employment standards law. Further, and in any event, I similarly endorse Member Stevenson's view "that regardless of whether parliament has the constitutional power to immunize directors of companies incorporated federally, it has not done so" (para. 52).
27. While I accept Mr. Goodwin's counsel's argument that, if the former VidWRX employees *had* sued Mr. Gibson for their unpaid wages – and, of course, they would only have been lawfully permitted to do so if all of the *CBCA* s. 119(2) criteria applied – the s. 123(4) "reasonable diligence" defence would have been available to Mr. Gibson. However, no such proceedings were ever filed and thus there is no potential for "overlapping" claims in this case. Further, if the employees had sued Mr. Gibson under the *CBCA*, a subsequent complaint under the *Act* for the same wages, could have been dismissed under section 76(3)(f) and/or (g) of the *Act*. Where former employees file unpaid wage complaints and secure a determination for unpaid wages, section 82 forecloses a subsequent court action for those same wages unless and until the Director of Employment Standards consents in writing or the determinations have otherwise been cancelled.
28. To summarize, the *Act* governs the former VidWRX employees' unpaid wage claims because that corporation was carrying on business in British Columbia and operating a provincial jurisdiction business. Mr. Gibson was a VidWRX director when the former employees' wage claims crystallized. The fact that VidWRX was federally incorporated is irrelevant since the section 96(1) liability applies, by reason of the *Interpretation Act*, to directors of corporations "where and however incorporated". There is no operational conflict as between the director liability provisions contained in *Act* and in the *CBCA* and, finally, there is nothing in the *Act*, properly interpreted, that frustrates the purpose of the *CBCA*.
29. It follows that Mr. Gibson's two reconsideration applications must be dismissed.

**ORDER**

30. Mr. Gibson's applications for reconsideration of the First Appeal Decision and the Second Appeal Decision are refused. Pursuant to section 116(1)(a) of the *Act*, I confirm each of those two appeal decisions.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**