VFX ANIMATORS AWARDED OVERTIME PAY: DECISION SETS HIGH BC BAR FOR "HIGH-TECH PROFESSIONAL"

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In a recent decision[1], a delegate of the Director of Employment Standards (the "**Delegate**") determined that Cinesite Vancouver Inc., formerly known as Nitrogen Studios Canada Inc. (the "**Employer**"), contravened the *Employment Standards Act* (the "Act") by failing to pay its employees overtime. The Employer operates an animation and visual effects studio whose employees were working on the feature film "Sausage Party" when the complaint regarding overtime pay was filed with the Employment Standards Branch. In this instance, the Employer was contracted by the production company to produce computer generated imagery (CGI) animation for use in the film. Animation, visual effects, and video game companies have long relied upon the "high technology professional" overtime exemption in British Columbia when employing workers to produce CGI, and this enunciates the risk in doing so.

Background

In 2016, Unifor Local 2000 filed a third party complaint with the Employment Standards Branch on behalf of non-unionized animators working for the Employer. The complaint alleged that the Employer contravened the Act by failing to pay the animators overtime in accordance with the Act. The Employer acknowledged that it had not complied with the Act because the animators fell within an exemption to the hours of work and overtime rules found in the *Employment Standards Regulation* (the "**Regulations**") that apply to a "high technology professional", in part being:

1. an employee who is primarily engaged in applying his or her specialized knowledge and professional judgment to investigate, analyze, design, develop or engineer an information system that is based on computer and related technologies, or a prototype of such a system, but does not include a person employed to provide basic operational technical support; and
2. an employee who is primarily engaged in applying his or her specialized knowledge and professional judgment to investigate, analyze, design, develop, engineer, integrate or implement a scientific or technological product, material, device or process, or a prototype of such a product, material, device or process, but does not include a person employed to provide basic operational technical support.[2]

Framing it against that exemption, the Employer stated that its sole business is the design, development, and engineering of information systems and technological products and that the animators, whose overtime pay was in dispute, use technology, but also manipulate, change, and create software programming tools, plug-ins, and processes in the production of CGI animation. Thus, the Employer argued, the animators are high technology professionals.

Decision

The Delegate was ultimately not convinced that the animators were high technology professionals and concluded that the Employer had breached the Act by not paying them overtime. Before embarking on an analysis of whether the animators fit the definition of high technology professionals, the Delegate noted that any doubt arising from difficulties in interpreting the language in the Act or Regulations must be resolved in favour of extending protections to employees, and that the definition of a high technology professional ought to be restrictively interpreted, as the definition uses the word "means", not "includes".

In his analysis, the Delegate opined that an information system is a system for creating, organizing, managing, preserving, or effectively using information to assist an organization in making decisions and managing its business operations, and that while creating CGI animation involves using computer software to create visual effects, it is unrelated to organizing information to assist an organization in making decisions or managing its operations. As such, the Delegate concluded that the animators did not fit within this part the definition of high technology professionals.

The second aspect of the definition, which applies to employees working with scientific or technological products, required a more in-depth analysis. The Employer argued that its animators met this part because the vast majority of them use computers or systems based on computer technologies and technological products to produce CGI animation. The Employer also stated that a CGI animated film is materially similar to "games software", which the Employment Standards Branch has indicated is a technological product.[3] The Delegate was also not convinced by this argument. He noted that the definition of "primarily engaged" means that the main purpose of an employee's work activities must be the activities listed in the definition.

Further, the animators to whom this portion of the definition is intended to apply, according to the Delegate's analysis, are those who initiate and develop technological products, materials, devices, or processes before a product is made available for sale or otherwise introduced to the market. The Delegate concluded that the animators' primary work responsibilities did not involve developing tools to create CGI animation and that the development of these tools was incidental to their primary work. He found that their primary job duties were using commercially available computer software developed by others to create CGI effects, which made these employees end users of technological products, not creators or developers of them.

The Delegate ended his analysis by noting that not every employee using computer technology or technological products in his or her work is a high technology professional. While the animators used computers and software in their work, the Delegate noted that other workers designed, tested, and produced the computers and software. Thus, while the animators provided these programs with information to ensure desired output in creating the desired visual effects and using their skills to test and change the input to the programs, they were not primarily involved in developing, assessing, or analyzing computer systems or programs. As such, the Delegate determined that the animators were not high technology professionals under the Regulations and that the Employer must abide by Part 4 of the Act.

Takeaways

In his decision, the Delegate drew an important distinction between companies which provide production or post-production services and those responsible for the final product. This distinction centered around the concepts of creation and control whereby, in this case, the Employer did not create nor have overall responsibility for the final product; therefore failing two key aspects of the applicability test. The Delegate contrasted this situation with that of developers of "games software" which he found to be a "self-contained, complete final product" which the developer ultimately creates and has control over.

This distinction raises a series of important questions for employers in British Columbia and creates significant ambiguity. Are individual "games software" developers who use established third party tools like Unity or Unreal, "creators", or mere "end users"? Is a game development company, who is operating under the strict direction of a publisher, exercising the degree of control and decision making power that rises to the standard established by the Delegate in this decision? It is clear that there is no bright line test for determining whether employees fit under the "high technology professionals" exemption in these complex and interconnected industries.

Vancouver alone is home to over 60 visual effects and animation studios and over 170 game software development studios that employ thousands of professionals and generate billions in annual revenue, and smaller markets like Kelowna and Victoria are seeing increased investments as well. With employers in these industries facing a significant labour shortage, the need for practical advice that is tailored specifically to the operations of the employer, and the role of the employee, is more necessary than ever. A decision like this could dramatically increase the cost of hiring such labour, and, as such, an appeal of this decision or future similar decisions may be expected.

While a negative interpretation has always been a risk for those relying upon this overtime exemption, this decision clearly enunciates that the Employment Standards Branch will narrowly interpret this exemption in favour of extending protections to employees. This decision reinforces that not every employee who uses

technology will be considered a high technology professional and each class of employee must be considered on their own facts. To avoid significant liability for unpaid overtime and penalties, Employers should consult with counsel before relying on BC's "high-technology" exemptions.

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[1] *Cinesite Vancouver Inc., formerly known as Nitrogen Studios Canada Inc. and Third Party Complaint* (2018), ER #426308.
[2] *Employment Standards Regulation*, BC Reg 396/96, s 37.8(1)(a)-(b)
[3] In its Interpretation Guidelines Manual, it states: that a scientific or technological product, material, device or process may include "items such as microscopes and measurement devices for research and lab applications such as chromatographs and spectrometers as well as commercially marketed products such as games software, drugs and medical devices."

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.