BRITISH COLUMBIA

Determination

Sent by Registered Mail

ER # 426308

December 6, 2018

Cinesite Vancouver Inc.,
formerly known as Nitrogen Studios Canada Inc.
708 Powell St.
Vancouver, BC V6A 1H6

Director of Employment Standards – and – Cinesite Vancouver Inc., formerly known as Nitrogen Studios Canada Inc.

I have determined that Cinesite Vancouver Inc., formerly known as Nitrogen Studios Canada Inc. (the "Employer") contravened section 40 of the *Employment Standards Act* (the "Act") by failing to pay its employees overtime. Pursuant to section 79 of the Act, I require the Employer to:

1. Within 30 days of the date of this determination, at its expense, employ a payroll service approved of by the Director to calculate all wages, in accordance with the Act, payable to its employees, and

2. Within 60 days of the date of this determination, pay its employees all wages that the payroll service determines are payable to them and provide proof of payment of wages, including copies of wage statements that comply with section 27 of the Act, to the Director.

Section 98(1) of the Act requires that the Director impose a mandatory administrative penalty on the Employer if the Director imposes a requirement under section 79 of the Act. Section 29(1) of the Regulation sets out the penalty amounts.

Contravention	Work Location	Date of Contravention	Occurrence (within 3 years)	Amount
Section 40 of the Act	708 Powell St. Vancouver BC	April 1, 2016	First	$ 500.00

B. Total Administrative Penalty **$500.00**

I order the Employer to cease contravening the section of the Act determined to have

been contravened and to comply with all of the requirements of the Act and Regulation. I order Cinesite Vancouver Inc., formerly known as Nitrogen Studios Canada Inc. to pay **$500.00**. Please send a certified cheque or money order payable to the Director of Employment Standards, P.O. Box 9570, Stn Prov Govt, Victoria, B.C., V8W 9K1, within five working days. The administrative penalty is not subject to statutory deductions.

Under the Act, directors and officers who authorize, permit, or acquiesce in the Employer's contravention of the Act are also liable for the total administrative penalty amount.

In accordance with section 101 of the Act, the Director may publish information relating to contraventions of the Act or Regulation including the identity of persons named in a Determination.

Rodney J. Strandberg
Delegate of the Director of
Employment Standards

cc: Antony Hunt, Rodger Director
708 Powell St.
Vancouver, BC V6A 1H6

Duncan Rodger, Director
708 Powell St.
Vancouver, BC V6A 1H6

c/o Registered and Records Office
20th Floor, 250 Howe St.
Vancouver, BC V6C 3R8

Nicole Stinn, CEO and President
708 Powell St.
Vancouver, BC V6A 1H6

Barry Dong, Counsel for the Employer

The Complainant

Appeal Information

Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on January 14, 2019.

The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at www.bcest.bc.ca or by phone at (604) 775-3512.

NOTICE TO DIRECTORS / OFFICERS

If a director/officer of the company that is the subject of the attached Determination disputes any of the findings contained in the Determination, he or she should ensure that the company files an appeal within the appeal period noted in the Determination.

If the Determination against the company is not appealed, or is appealed and confirmed by the Employment Standards Tribunal, the Employment Standards Branch will commence collection proceedings if voluntary payment is not made. If the Employment Standards Branch has difficulty collecting against the company, proceedings will be commenced against the directors/officers of the company for the amount of their personal liability as set out in the Act. A director or officer may also be held liable for a penalty imposed on the company if he or she authorized, permitted, or acquiesced in the company's contravention.

If a Determination is issued against a director/officer of a company, the director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination.

There are only three grounds on which a Determination made against a director/officer may be appealed:

1) That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;

2) That the calculation of the director/officer's personal liability is incorrect; and/or,

3) That the director/officer should not be liable for the penalty, where a penalty has been imposed, on the grounds that he or she did not authorize, permit or acquiesce in the company's contravention.

The Employment Standards Branch obtains information about directors and officers from the Registrar of Companies through BC OnLine. If information regarding a director or officer's standing with a company is not current with the Registrar of Companies it is his or her responsibility to provide updated information to the Employment Standards Branch.

EMPLOYMENT STANDARDS ACT
(excerpts)

Section 96: Corporate officer's liability for unpaid wages

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.

(2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,
(b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
(c) vacation pay that becomes payable after the director or officer ceases to hold office, or
(d) money that remains in an employee's time bank after the director or officer ceases to hold office.

(2.1) If a corporation that is a talent agency has received wages from an employer on behalf of an employee and fails to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations,

(a) a person who was a director or officer of the corporation at the time the wages were received is personally liable for the amount received by the corporation from the employer, less any fees allowed under the regulations, and
(b) that amount is considered for the purposes of subsection (3) to be unpaid wages.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1).

Section 98: Monetary penalties

98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.

(1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.

(1.2) A determination made by the director under section 79 must include a statement of the applicable penalty.

(2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

(3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person
(a) has been convicted of an offence under this Act or the regulations, or
(b) is also liable to pay a fine for an offence under section 125.

(4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Director of Employment Standards

Reasons for the Determination

ER # 426308

Cinesite Vancouver Inc.,
formerly known as Nitrogen Studios Canada Inc.

- and -

Third Party Complainant

Delegate: Rodney J. Strandberg
Delegate of the Director
of Employment Standards

Date of Decision: December 6, 2018

I. INTRODUCTION

On August 19, 2016, the Director of Employment Standards received a third party complaint under section 74 of the *Employment Standards Act* (the "Act") alleging that Nitrogen Studios Canada Inc., now known as Cinesite Vancouver Inc. (the "Employer"), contravened the Act by failing to pay animators it employed in accordance with the Act.

I investigated this complaint pursuant to section 76 of the Act. These reasons set out the basis for my decision pursuant to section 81 of the Act.

II. BACKGROUND

The Employer is a company incorporated under the laws of British Columbia. A BC Online: Registrar of Companies – Corporation Search conducted on May 16, 2018 indicates that it was incorporated on October 7, 2003 (Incorporation Number BC0678855). The Employer operated as Nitrogen Studios Canada Inc. when the Director received the complaint, changing its name to Cinesite Vancouver Inc. on July 17, 2017. The Search identifies Antony Hunt and Duncan Rodger as its directors and Nicole Stinn as its CEO and president. The Employer operates an animation studio falling under the Act's jurisdiction.

The Investigation

The Employer provided payroll records and other documents, including employment agreements, addendums to these agreements, and Records of Employment. It also made extensive submissions. I base my decision on the Employer's documents and submissions.

I reviewed the payroll records for a random sample of employees for a one-month period to assist in determining if the Employer was complying with the Act. My review showed that an employee working as an animator worked 12.5 hours on March 23, 2016. On April 1, 2016, the Employer paid the employee one and one-half times the employee's regular wage time for all hours worked. It did not pay the employee two times the regular wage for the half hour over 12 worked on March 23. This indicated that the Employer might not be paying overtime in accordance with section 40 of the Act.

I advised the Employer of this apparent contravention of the Act, asking for its response. My concern was that if, following a review of the limited employee sample, I identified what appeared to be an underpayment of overtime, the Employer might have a systemic problem with its payroll system affecting overtime wages earned by other employees. I gave the employer two options. If it disagreed with my analysis, it could provide daily time records for all employees working more than 12 hours in a day, showing the amount of wages paid to each for those days, and I would investigate wages paid to these employees. If it agreed, it could review its records and rectify any

errors by paying wages at the appropriate rates to any employees working more than 12 hours in a day.

The Employer acknowledged that it had not complied with section 40, advising me that section 37.8 of the Regulation exempted it from the requirement to comply with this section because it was a "high technology company" and its employees fell within the definition of a "high technology professional." It noted that it paid employees overtime, calculated at 1.5 times their regular wage, in accordance with its overtime policy.

I asked the Employer to provide me evidence supporting its position that section 37.8 of the Regulation exempted it from complying with Part 4 of the Act. It did and, after considering it, I provided it with my preliminary finding that section 37.8 of the Regulation did not apply to it. I invited the Employer to provide me any additional evidence, or submissions it wished. It responded, advising me that it had provided substantial evidence, and inquiring what "proof" the Director had to support my preliminary finding. It provided no additional evidence for me to consider.

III. ISSUE

Does section 37.8 of the Regulation exempt the Employer from complying with Part 4 of the Act?

IV. EVIDENCE AND ARGUMENT OF THE EMPLOYER

I advised the Employer of my investigation and provided it opportunities to provide all evidence it felt was relevant.

The Employer advised that film and television production companies contract with it to produce Computer Generated Imagery (CGI) animation to meet creative and technological needs for a film or television episode, which the production companies commercially market. CGI animation forms part of the final product, with others contributing script, voice, and sound production inputs. During the period addressed by my investigation, it was exclusively working on the feature film "Sausage Party."

The Employer stated that "All Nitrogen [the Employer's name at the time] employees use technology in their work, but team members also manipulate, change and create software programming tools, plug-ins, and processes in the production of animation." The vast majority are primarily engaged in designing, developing, and/or engineering information systems based on computer technologies, or technological products, producing CGI animation. Employees create effects through the manipulation of computer software programs, ensuring that the CGI objects adhere to physical laws and meet the design imagery required by clients. To achieve the desired output, employees manipulate software programs including "Maya" ,"Nuke", "Houdini", "Qube!", "Mari", "Arnold", and "Renderman" with plug-ins, applications that run inside the host application helping it perform additional tasks, or by designing computer codes or tools to achieve the desired output.

The Employer provided job descriptions for its employees, including animators and for other occupations. In general, these descriptions require the employee to have proficiency in using a variety of named computer software programs, together with other skills including being well organized, skilled at communication, motivated, and able to work flexible hours, amongst other identified skills.

The Employer argued that section 37.8 of the Regulation originally referred to "computer animator" as a job title falling within the high technology exclusion. The Regulation was revised in 2003. The Employer provided material, including press releases and background information produced by the Government of British Columbia, associated with this revision. This material noted that the revision identified the work performed, and not an employee's job title, as the basis for determining if an employee was a "high technology professional." The Employer argued that this material suggested that the 2003 revision expanded the scope of the exclusion.

It argued that many of its employees including artists, painters, and technical directors fall within the definition of computer animator. These employees' duties require substantial design and development of information systems and technological products to achieve a desired result. Its sole business is the design, development, and engineering of information systems and technological products. It qualifies as a "high technology company." Part 4 of the Act does not apply to it or its employees.

V. FINDINGS AND ANALYSIS

The Act is remedial legislation conferring benefits on, and providing minimum standards for the employment of, employees to increase their economic security. It extends minimum protections to all employees, exempting by regulation only limited classes of employees from these protections. Any doubt arising from difficulties of language is resolved in favour of extending protections to employees.

Section 37.8 of the Regulation

The relevant parts of subsection 37.8 (1) of the Regulation are:

37.8. (1) In this section:

"**high technology professional**" means any of the following:

> (a) 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;
> (b) 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;

Subsection 37.8 (2) states that Part 4 of the Act, except for section 39 relating to excessive hours, does not apply to an employee who is a "high technology professional." The Employer has the onus of proving, on a balance of probabilities, that its employees fall within this definition and the exemption.

The Employer stated that it was a "high technology company." The definition of a "high technology company" in paragraph 37.8 (1), appears in paragraph 37.8 (3), relating to employees who are not a "high technology professional." The Employer's argument, and my analysis, relate to whether its employees are "high technology professionals." I do not need to consider whether the Employer is a "high technology company."

The definition of a "high technology professional" uses the word "means," not "includes." It is a closed definition and is restrictively interpreted. It refers to the activities of employees working with information systems, paragraph 37.8 (1) (a), and those working with scientific or technological products, paragraph 37.8 (1) (b).

Paragraph 37.8 (1) (a)

The Employer's position was that its employees fall within this exemption because their work required substantial design and development of information systems.

I consider an information system to be a system for creating, organizing, managing, preserving, or effectively using information to assist an organization to make decisions and to manage its business operations.

Creating CGI animation involves using computer software to create visual effects. I find that is unrelated to organizing information to assist an organization, whether the Employer or its clients, to make decisions or manage their operations. The definition of a "high technology professional" under paragraph 37.8 (1) (a), relating to employees working with information systems, does not apply to the Employer's employees.

Paragraph 37.8 (1) (b)

If section 37.8 of the Regulation exempts the Employer from complying with Part 4 of the Act, it must be because its employees fall within this paragraph and are primarily engaged in applying their specialized knowledge and professional judgement in working with the scientific or technical items, or prototypes of the items listed in this paragraph.

The Employer's evidence regarding its employees' specialized knowledge is their employment agreements, job descriptions, and its written submissions. It says that its employees working as animators fall within the exemption because the vast majority of them use computers or systems based on computer technologies, and technological

products, to produce CGI animation to meet the needs of its clients by creating the appropriate images on a computer screen. They modify computer software by designing components known as a plug-ins that work with a computer program to achieve a desired result. It argues that a commercially marketed, fully CGI animated feature film is materially similar to "games software," which the Director's Interpretation Guidelines Manual (IGM) defines as a technological product.

Certain aspects of the definition in Paragraph 37.8 (1) (b) do not apply to the Employer's employees.

The Oxford English dictionary defines "scientific" as relating to the structure and behavior of the natural or physical world. The IGM states that scientific or technological products may include microscopes, measurement devices for research and lab application as well as commercially marketed products such as drugs and medical devices. I find that the Employer's employees are not involved with scientific products, materials, devices, or processes or prototypes of these.

The Oxford English dictionary defines a "prototype" as a first or preliminary version from which other forms are developed or copied. The Employer's evidence is that its employees use commercially available software to produce visual effects. I find that the Employers employees are not engaged in applying their specialized knowledge and professional judgement in working with prototypes of the items listed in this paragraph. They use the final form of computer animation software and not prototypes of it.

If the exemption applies, the Employer's evidence must satisfy me that its employees are primarily engaged in applying their specialized knowledge and professional judgment to investigate, analyse, design, develop, engineer, integrate, or implement a technological product, material, device, or process.

The definition of "primarily engaged" means that the main purpose of an employee's work activities must be the activities listed in the definition. The Employer provided no time records, list of the employees' actual work, or any other evidence relevant to the question of the primary engagement of its employees in their activities. In the absence of this, I am unable to conclude that its employees were primary engaged in activities that would bring them within the exemption. On this basis alone, the Employer has not discharged its onus to establish that its employees are "high technology employees" and, accordingly, I find that it must comply with section 40 of the Act.

The Employer's evidence of the software programming tools its employees developed is of little evidentiary value. There is no evidence regarding when, where or which employees, employed in what capacity, developed them. There is, additionally, no evidence about the amount of time any of the employees spent developing these tools, or how the Employer tracked or defined this work to allow me to conclude that the employees were primarily engaged in these activities. It provided no evidence that the development of these tools was a primary component of their work. I conclude that developing these tools was not the primary focus of the employees' work. I find that

their 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. I find that their primary job duties were using commercially available computer software developed by others to create CGI effects.

Employees to whom the exemption applies initiate and develop technological products, materials, devices, or processes before a product is made available for sale until its introduction to the market. All of the nouns used, "investigate, analyse, design, develop, engineer, integrate, or implement" belong to a class of activities relating to the creation and early development of technological products, materials, devices, or processes, and not to using the products, materials, devices, or processes available in the market. I find that the Employer's employees are end users of technological products, materials, devices, or processes, and are not involved in creating or developing them.

I reject the Employer's suggestion that a commercially generated fully CGI animated feature film is materially the same as "games software." The Employer does not handle final voice or sound production or general script writing for a film or television episode. Without overall responsibility for the final product, creating CGI animation as part of the production of a television episode or film is not materially similar to developing "games software." I find that "games software" is a self-contained, complete final product whereas CGI animation represents only a component of a finished film or television episode.

The Employer argued that the revision of the Regulation in 2003 expanded the exemption and that I should conclude that animators remain within the definition of a "high technology professional."

I attach little weight to press releases, background information, or commentator's opinions regarding the revision. The revision simply acknowledged that the content of an employee's work and specific duties, and not the employee's job title, that determines if an employee is a "high technology professional."

Not every employee using computer technology or technological products in his or her work is a "high technology professional." If this were correct, every employee using in his or her employment, a computer, telephone, or motor vehicle would fall within the exemption.

Although the Employer's employees use computers or software in their work, persons other than its employees design, test, and produce the computers and the software used. I find that the Employer's employees are not making substantial or fundamental changes to the operation of computer software programs. I find that they are providing these programs with information needed to ensure the programs provide the desired output. In creating the desired visual effects, they use their judgment and skills to test and change the input to the programs. While computers and computer software facilitates this work, the employees are not primarily involved in developing, assessing, or analysing either computer systems or programs. They are creating visual images

using technology or processes developed by others. I find that they do not fall within the definition of a "high technology professional."

Summary and Conclusion

The Employer has not shown through cogent, relevant, and reliable evidence that its employees, including its animators, and their activities when working, fall within the definition of a "high technology professional." It has not provided sufficient evidence to show that its employees were primarily engaged in the activities specified in section 37.8 of the Regulation to meet this definition. I am satisfied that if any of its employees engaged in the activities specified in this section, these activities were incidental to their normal duties, and not their primary or principal job duties.

I conclude that the Employer's employees are not high technology employees as defined by section 37.8 of the Regulation. The Employer must comply with Part 4 of the Act, including paying all of its employees overtime in accordance with section 40 of the Act. The Employer acknowledged that it did not done so on April 1, 2016. I find that it contravened section 40 of the Act on that date. The mandatory administrative penalty for this contravention is $500.00.The Employer has records of the hours worked by its employees. This is an appropriate circumstance for me to order, pursuant to section 79 of the Act, that it:

1. Cease contravening the section of the Act determined to have been contravened and to comply with all of the requirements of the Act and Regulation,

2. Within 30 days of today's date, at its expense, employ a payroll service approved of by the Director to calculate all wages, in accordance with the Act, payable to its employees, and

3. Within 60 days of today's date, pay to its employees all wages that the payroll service determines are payable to them and provide proof of payment and copies of wage statements that comply with section 27 of the Act to the Director.

Rodney J. Strandberg
Delegate of the Director
of Employment Standards