

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Antepreet Brar
("Brar")

- and -

Mehrzad Lashgari
("Lashgari")

- and -

Keith Stephen
("Stephen")

- and -

Abdolhossain Tabatabai
("Tabatabai")

- and -

David Truscott
("Truscott")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft
FILE No.: 1999/552
DATE OF HEARING: January 28, 2000
DATE OF DECISION: February 29, 2000

DECISION

APPEARANCES:

Mark Olsen, Barrister & Solicitor	for the appellants
Dan Shmilovitch, Director	for Kanaf Security Group Inc.
Andrew Wood, Barrister & Solicitor & Jennifer McNaught, Barrister & Solicitor	for Catamaran Ferries International Inc.
Adele Adamic, Barrister & Solicitor & Rod Bianchini, I.R.O.	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by the Construction and Specialized Workers' Union Local 1611 on behalf of five of its members, namely, Antepreet Brar ("Brar"), Mehrzad Lashgari ("Lashgari"), Keith Stephen ("Stephen"), Abdolhossain Tabatabai ("Tabatabai") and David Truscott ("Truscott"). I shall refer to these latter five individuals, collectively, as the "employees". The employees appeal, pursuant to section 112 of the *Employment Standards Act* (the "Act") and section 8 of the *Skills Development and Fair Wage Act* ("*Fair Wage Act*"), a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on August 20th, 1999 under file number ER 75-536 (the "Determination").

The employees were employed by Kanaf Security Group Inc. ("Kanaf") as security guards and first aid attendants at a North Vancouver shipbuilding facility. The Director's delegate determined that the employees were not entitled to advance unpaid wage claims under the *Fair Wage Act* and, accordingly, dismissed all five complaints.

The delegate dismissed the employees' claims on the ground that the *Fair Wage Act* did not govern the construction site where the employees worked--the Catamaran Ferries International Inc. ("Catamaran") construction site at Pier 94 in North Vancouver. The delegate held that the *Fair Wage Act* did not apply to the so-called "fast ferries" construction site solely because the construction in question was not undertaken by a tendering agency using "Provincial money" as that latter term is defined in section 1 of the *Fair Wage Act*. It should be noted that various other arguments were advanced in support of the position that the *Fair Wage Act* did not govern the employees' employment but those arguments were not addressed in the Determination.

ISSUE TO BE DECIDED

These reasons do not address the merits of the employees' appeal--the merits will be addressed following a further 3-day hearing which is now scheduled to commence on April 3rd, 2000. Prior to that continuance of this appeal hearing, however, counsel for the employees seeks an order for production of certain documents in the possession or control of the Director, Kanaf and Catamaran.

With respect to those documents which are in the custody or control of the Director, at the January 28th, 2000 hearing counsel for the Director gave an undertaking to produce to counsel for the appellants all documents in the Director's file save those protected by solicitor-client privilege and such other documents as may be protected from disclosure by reason of the *Freedom of Information and Protection of Privacy Act*. Accordingly, I see no reason to issue a formal order for production as against the Director although I am prepared to consider making such an order in the event the documents in question are not produced in a timely manner.

THE REQUEST FOR PRODUCTION OF DOCUMENTS

Counsel for the appellant employees also seeks an order for the production of certain other documents in the possession or control of Catamaran and Kanaf described in his letter to counsel for Catamaran dated January 5th, 2000. In particular, appellants' counsel asks that the following documents be produced:

- “1. A list of all contractors and subcontractors that have performed work on the site.
2. A copy of all pre-tender letters sent to prospective bidders.
3. A copy of the tender documents sent to each of the contractors and subcontractors listed under 1 above.
4. A copy of all correspondence to and from B.C. Ferries regarding the [*Fair Wage Act*]. (This should include any memos, motions or minutes).
5. A copy of all correspondence to and from Employment Standards regarding the [*Fair Wage Act*].
6. A copy of all Statutory Declarations filed with Employment Standards.
7. A copy of all correspondence, to and from any Union, whose members work on the site, regarding the [*Fair Wage Act*].
8. A copy of all correspondence to and from the Director's Delegate concerning the [*Fair Wage Act*].
9. A copy of any pre-tender letter to Kanaf.
10. A copy of the tender documents provided to Kanaf.
11. A copy of any letter to Kanaf awarding the contract.”

The documents requested under numbers 5, 6 and 8, above, will be produced in accordance with the terms and conditions of the Director's counsel's undertaking. To the extent that the Director asserts a right to refuse disclosure either on the basis of privilege or third-party privacy rights, the right to disclosure can be addressed in accordance with the procedures set out in the *Freedom of*

Information and Protection of Privacy Act. Further, at the January 28th hearing, counsel for the appellants advised that he was no longer seeking an order for the production of those documents set out in number 7, above.

ANALYSIS

The Tribunal's Authority to make a Prehearing Order For Production of Documents?

Counsel for Catamaran takes that the position that most, if not all, of the documents sought by counsel for the employees are neither relevant, or even possibly relevant, to the issue on appeal, namely, whether or not the construction of the fast ferries was undertaken by a “tendering agency” using “Provincial money”. However, quite apart from the question of relevance, counsel submits, relying on the Supreme Court of Canada’s decision in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association* [1993] 3 S.C.R. 724, that the Tribunal does not have the statutory authority to make a prehearing order for the production of documents. I shall now address this latter submission.

In *Canadian Pacific Air Lines* the pilots’ union made application to the federal labour relations board concerning whether or not two airlines could be declared to be a single employer, or, alternatively, whether there had been a sale of assets between the two airlines. The specific issue before the Supreme Court of Canada, as set out by Gonthier, J. in his majority opinion, was whether “the Canada Labour Relations Board may compel parties, interveners or interested persons to produce documents prior to and outside of the context of a formal hearing held by the Board”. It should be noted that the documents demanded by the labour board were explicitly demanded “at the pre-hearing stage” by the board “acting in its investigative/administrative role as a canvasser of information on the relationships between the various employer-respondents and the applicants with regard to the revision of the bargaining units, sale of businesses and single employer”. It should be further noted that the board purportedly made a prehearing production order under sections 118(a) and 121 of the *Canada Labour Code* which read as follows:

118. The Board has, in relation to any proceeding before it, power
 - (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Board deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;

121. The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by, or as may be incidental to the attainment of the objects of this Part including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board.

Section 118(a) of the *Canada Labour Code* is not materially different from section 15 of the B.C. *Inquiry Act*; Tribunal adjudicators may exercise this latter authority, which is incorporated by reference into the *Employment Standards Act* (see section 108 of the *Act*). In *Canadian Pacific Air Lines* Gonthier, J. noted that the section 118(a) power to compel production of documents could not be divorced from the power to summon witnesses and, accordingly, held that the labour board had no authority to make a prehearing order for the production of documents:

“The power at issue is limited by the words of s. 118(a). They do not provide for a power to compel the production of documents, per se; this power does not stand alone. Rather, the section empowers the Board to require that certain persons attend and to compel them to give evidence, whether it be oral or written, and to produce documents or other things which the Board deems requisite in the circumstances. Those activities are not expressed to be in the alternative, but are outlined as part of one single process. The process is initiated by the summoning and enforced attendance of witnesses, and it is in relation to those persons--witnesses summoned--that the power of the Board to compel the production of documents is conferred. This power must of necessity be exercised with regard to specific individuals, as it is attached to the summoning and testifying of witnesses. The section also requires that those persons give their evidence on oath. The reference to persons summoned to give oral and written evidence on oath is part of the limits on the exercise of the power.”

If the Tribunal’s sole authority to order the production of documents was that set out in section 15 of the *Inquiry Act*, it would seem that Catamaran’s counsel’s argument would have a great deal of force. But that is simply not the case. Unlike the federal labour board in *Canadian Pacific Air Lines*, the Tribunal *does* have the express authority to order the production of documents other than in conjunction with issuing a summons. The Tribunal’s powers set out in section 109 of the *Act* “are in addition to its powers under section 108” and include, *inter alia*, the authority:

- to inspect records that may be relevant [109(1)(e)];
- to “require a person to disclose, either orally or in writing, a matter under this Act and require the disclosure to be made under oath or affirmation” [109(1)(g)]; and
- to “order a person to produce, or to deliver to a place specified by the tribunal, any records for inspection under paragraph (e)” [109(1)(h)].

In other words, the Tribunal does have the very statutory authority regarding the production of documents that was not possessed by the federal labour board.

Furthermore, it should be noted that the appeal hearing in this matter actually commenced on January 28th, 2000 (although that hearing day was devoted almost entirely to the matter of documents) and thus any order that may be made for the production of documents cannot properly be characterized, in my view, as a “prehearing order”.

Finally, even if one was to characterize the January 28th proceeding as a “prehearing conference”, in my view, the Tribunal nevertheless has the authority to make prehearing orders

for the production of documents. Section 109(1)(c) of the *Act* states that the Tribunal may make procedural rules governing appeals and reconsiderations. Section 18(e) of the Tribunal's Appeal Rules of Procedure empower an adjudicator presiding at a prehearing conference to "require one party to disclose to the other, or to the Tribunal, originals or copies of information, documents, records or submissions". It should be noted that Catamaran sought, and has been given, the status of an "interested party" in this appeal.

Although, the Tribunal can issue prehearing document production orders, the Tribunal can only, in my view, order the production of documents that "may be relevant to an appeal, reconsideration or recommendation" [section 109(1)(e)]. I now turn to this latter question.

Is an Order for Production of Documents Appropriate?

In my view, an assessment of what documents "may be relevant" for purposes of a production order must be driven by the Determination itself and by the stated reasons for appealing that Determination. At the broadest level, this appeal concerns whether or not the *Fair Wage Act* governed the five complainants' employment by Kanaf at the North Vancouver Pier 94 site. More narrowly (and in my opinion, more accurately) construed, this appeal only concerns whether or not the delegate was correct in determining that the *Fair Wage Act* did not apply "because Catamaran [did] not receive 'provincial money' as the [*Fair Wage Act*] defined the term" (Determination, page 4). It should be recalled that although Catamaran and Kanaf raised other arguments as to why the *Fair Wage Act* did not apply, these other arguments were not addressed in the Determination.

The obligation to pay "fair wages" is set out in section 5 of the *Fair Wage Act*:

All employees of a contractor, subcontractor or any other person doing or contracting to do the whole or any part of the construction to which this Act applies must be paid fair wages in accordance with the regulations.

"Construction", in turn, is defined in section 1 of the *Fair Wage Act* as meaning "the construction, renovation, repair or demolition of property and the alteration or improvement of land that is undertaken by a tendering agency using Provincial money". I will assume, for the purposes of the present application, that Catamaran is a "Crown agency"; a "tendering agency" means the government or a "Crown agency" that receives "Provincial money" for construction. The issue, then (and the *only* issue thus far addressed by the Director's delegate), is whether or not Catamaran received "Provincial money". "Provincial money" means:

- (a) public money as defined in the *Financial Administration Act*,
- (b) money paid by the government to a Crown agency or public institution, or
- (c) money loaned to a Crown agency or public institution if the payment of all or part of the loan is guaranteed by the government.

With the foregoing in mind, I fail to see how a list of contractors or subcontractors is relevant to the question of whether or not Catamaran received "Provincial money". Nor do I see how copies

of pre-tender letters sent to prospective bidders, or the actual tender documents for each contractor or subcontractor, are relevant to the question of “Provincial money”. The issue as to whether or not Catamaran received “Provincial money” necessitates an inquiry into the relationship between the government and Catamaran; this issue does not concern any contractual or other sort of relationship between Catamaran and other prospective--or actual--contractors or subcontractors. Accordingly, I am not prepared to order the production of the documents described in numbers 1 to 3 of the appellants’ counsel’s document request.

I understand that one reason for seeking the documents listed in categories 1 to 3, above, is that the documents would reflect Catamaran’s espoused view that the *Fair Wage Act* governed all contractors or subcontractors working at the site. However, in my view, the *Fair Wage Act* cannot be said to govern the project on the basis of some sort of estoppel argument. Even if Catamaran took the position with its contractors and subcontractors that the *Fair Wage Act* did apply, such a position does not determine the Tribunal’s inquiry into whether or not, as a matter of law, the *Fair Wage Act* applied to the site in general, or to Kanaf’s employees in particular. Certainly, any such representations that may have been made by Catamaran to its contractors or subcontractors do not speak to the question of whether or not Catamaran received “Provincial money”. For same reason, I cannot see the relevance of any correspondence between Catamaran and the B.C. Ferry Corporation regarding the possible application of the *Fair Wage Act* to the North Vancouver Pier 94 construction site. Accordingly, I am not making any order for production of those documents listed under item number 4 in the appellants’ counsel’s January 5th request.

Finally, since the question of “Provincial money” relates solely to financial arrangements between the province and Catamaran and/or (possibly) the B.C. Ferry Corporation, I similarly do not conceive that documents exchanged between Kanaf and Catamaran (e.g., pre-tender letters, tender documents and any documents relating to Kanaf’s actual contract at the site) are relevant. The documents listed under numbers 9 through 11 may well be relevant to the issue of whether or not Kanaf is a “subcontractor”, or whether Kanaf employees were involved in “construction” at the North Vancouver site but these latter two questions are not presently before the Tribunal (although they may well be at some future point if the project in question is ultimately held to have been carried out using “Provincial money”).

ORDER

The appellants’ request for an order compelling the production of documents is refused.

KENNETH WM. THORNICROFT

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