An appeal

\- by -

Kirk Edward Shaw, a Director or Officer of Guardian Films Inc.
and En Garde Films Inc.

("Shaw")

\- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2010A/71

DATE OF DECISION: August 27, 2010

DECISION

SUBMISSIONS

David G. Wong	Counsel for Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc.
Donald W. Bobert	Counsel for the Writers Guild of Canada
Michelle J. Alman	Counsel for the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal by Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc. ("Shaw") under section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 21, 2010.

2. The Determination accepted the authority of the Director under section 3(8) of the *Act* to enforce a Consent Order against Guardian Films Inc. and En Garde Films Inc. ("the Producers") issued by an arbitrator in British Columbia appointed under an Independent Production Agreement ("the Agreement") between the Writers Guild of Canada and The Canadian Film and Television Production Association, to which the Producers were bound by virtue of having signed a voluntary recognition agreement on January 7, 2005.

3. Exercising the authority allowed under section 3(8), the Director found Shaw was a Director and Officer of the Producers and under section 96 of the *Act* ordered Shaw to pay an amount of $147,579.30.

4. Shaw has appealed the Determination, arguing the Director erred in law and failed to observe principles of natural justice in making the Determination. Under these two grounds of appeal, Shaw identifies seven reviewable errors:

   (a) an error of law in the finding that the work performed by the individuals covered by the Consent Order, with one exception, fell within the jurisdiction of the *Act*;

   (b) an error of law in concluding the individuals covered by the Consent Order, with one exception, were employees under the *Act*;

   (c) a failure to observe principles of natural justice in making the Determination without considering Shaw's submission that the individuals covered by the Consent Order, with one exception, were independent contractors and their work fell outside the jurisdiction of the *Act*;

   (d) an error of law in deciding the Consent Award was a "decision on the merits";

   (e) an error of law in deciding the matter "fulfilled the requirements of section 3(7)" of the *Act*;

   (f) a failure to observe principles of natural justice in making the Determination without considering relevant facts on the issue of whether the amounts in the Consent Order was in respect of wages; and

   (g) an error of law in finding the Consent Order was in respect of wages.

5. The appeal purports to be filed on behalf of Shaw and the Producers. Counsel for the Director has objected to the Producers being included as appellants and has asked the Tribunal to rule the Producers are not properly named as "appellants" in this proceeding. I agree with counsel for the Director on this point. The Producers were neither named as a party in the Determination nor were they served with a copy of the Determination: sections 81(1) and 112(1) of the *Act*. No application has been made to the Tribunal by the Producers for standing as a party in the appeal. I find they are not properly a party to the appeal.

6. The Tribunal has a discretion whether to hold an oral hearing on an appeal: see Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575. None of the parties seeks an oral hearing on this appeal. In this case, the Tribunal has decided an oral hearing is not necessary and this appeal can be decided on the submissions and the material submitted by all of the parties, including the section 112 (5) Record filed by the Director.

ISSUE

7. The issues are whether the Director committed any error of law in accepting jurisdiction under section 3(8) of the *Act* to enforce the Consent Order and whether the Director failed to observe principles of natural justice in making the Determination.

THE FACTS

8. On October 9, 2008, David McPhillips, an arbitrator appointed by agreement between counsel for Insight Film & Video Productions (Guardian Films Inc. and En Garde Films Inc.) and the Writers Guild, issued a Consent Order ordering the Producers to pay the Writers Guild an amount of $147,579.30. The Consent Order listed a number of individuals in an appendix. Presumably, the amount ordered to be paid was for the benefit of these individuals.

9. The Producers failed to comply with the Consent Order.

10. On January 28, 2009, counsel for the Writers Guild sought to have the Director exercise his authority under the *Act* to enforce the Consent Order. On April 14, 2009, Arbitrator McPhillips forwarded to the Director a copy of the Consent Order "pursuant to section 3(8)" of the *Act*. On April 16, 2009, counsel for the Writers Guild made some final submissions on the enforcement request.

11. The Director received and reviewed corporate summaries for the Producers and made a finding that Shaw was a director and officer of both Guardian Films Inc. and En Garde Films Inc. The Director also received and reviewed information and submissions from the Writers Guild, from Shaw and from counsel for Shaw and the Producers. Counsel for Shaw provided a written submission to the Director, arguing section 3(8) could not be engaged because the individuals covered by the Consent Order were not "employees" under the *Act* or at law, the work was performed outside of the jurisdiction of the *Act*, the Consent Order was not a "decision on the merits" and, in any event, the Consent Order was not in respect of wages.

12. In the Determination, the Director found the matter was within the jurisdiction of the Director under the *Act*, relying on the following aspects of the relationship and circumstances relating to the dispute between the Producers and the Writers Guild:

    1. the Producers were situate in the province;

2. the individuals covered by the Consent Order were hired and worked for the Producers on a BC based project;
3. the work was required to be performed for the benefit, advantage, and potentially the profit, of the Producers on a BC based project;
4. the fact that several of the individuals resided outside the province was not relevant to the jurisdiction of the Director; and
5. the work product was submitted to the Producers at an address in the province by electronic means.

13. The Director found the individuals had a "real presence" in the province and their work provided "an ongoing advantage to the BC based Producers". The Consent Order was made in the province by a provincial arbitrator under the *Commercial Arbitration Act*.

14. The Director found the Consent Award to be a "decision on the merits", reasoning the Producers understood the Consent Order would resolve the dispute with the Writers Guild, would be enforceable at law and would be enforced by the Writers Guild if not paid. The Director found the Consent Order fulfilled the requirements of section 3(7). The Director rejected the Producers' argument that the Consent Order was not "in respect of wages". The Director found the Consent Order, on its face, was made in respect of "production fees, retirement and other benefits" and there was no authority for the Director to "go behind" the Arbitrator's Order.

15. The Director found Shaw was a director and officer of the Producers throughout the time the amounts set out in the Consent Order were earned or should have been paid and that the amounts in the Consent Order were within Shaw's statutory liability under section 96 of the *Act*.

ARGUMENT

16. Shaw has provided comprehensive argument on each of the errors that are alleged. Counsel for the Director and counsel for the Writers Guild have responded to those arguments. I will outline the arguments and the responses under the headings as they are set out in the appeal.

Writers not Employees under the Act

17. Counsel for Shaw says the writers, who collectively are the individuals covered by the Consent Order, are not employees under the *Act* for two reasons: first, with one exception, all of the work performed by the writers was performed exclusively outside the province; and second, with one exception, the writers were independent contractors.

18. Counsel for Shaw says the Director applied the wrong test in deciding the *Act* applied to the writers. He says the proper test is described in *Can-Achieve Consultants Ltd.*, BC EST # D463/97 (Reconsideration of BC EST # D099/97). Counsel says all of the writers, except Rick Drew, lived in and worked from various locations in the United States and argues the absence of a real presence in the province does not provide a connection with the province sufficient to make the work subject to the *Act*.

19. Counsel for Shaw also argues the writers, with the exception of James Thorpe, were independent contractors, not employees under the *Act*. He says the Determination contains no discussion on this issue and the Director should not have assumed jurisdiction to enforce the Consent Award without considering and deciding the status of the writers as employees under the *Act*. He argues the failure to do so is an error of

law. On this question, he reiterates the position taken during the Director's consideration of the section 3(8) request that, because of their status as independent contractors, the Director had no jurisdiction.

20. In response to these arguments, counsel for the Director says the Director did not need to decide jurisdiction over the grievance that was before Arbitrator McPhillips. The concern of the Director is only whether section 3(8) applies to the Consent Order. Counsel says if there were issues about whether the individuals covered by the Consent Order were independent contractors performing work outside of the province, those issues should have been made to the Arbitrator or the Labour Relations Board, not to the Director on a matter of enforcement under section 3(8).

21. Counsel for the Director says Shaw should not be allowed to mount what is a collateral attack on the Consent Order through the Director.

22. Counsel for the Writers Guild says Arbitrator McPhillips was an "arbitration board" as that term is defined in the *Act* and, as an "arbitration board", had jurisdiction over the dispute between the Producers and the Writers Guild and powers flowing from provisions of the *Labour Relations Code of British Columbia* that allowed him to make the Consent Order. Counsel also asserts the agreement under which the dispute arose and was submitted to arbitration was a "collective agreement". That term is also defined in the *Act*.

23. Counsel for the Writers Guild submits that without the assistance of the Director under section 3(8), the writers would be without a remedy. He says an application of section 3(8) that produces such a result should be avoided and points out the *Act* is remedial legislation which should be given a large and liberal interpretation.

24. With respect to the extra-territorial jurisdiction argument, counsel for the Writers Guild says there is a burden on Shaw to provide jurisdictional facts to support this argument and has not done so. In any event, counsel says the applicable test is described in *Xinex Networks Inc., in receivership*, BC EST # D575/98, and on the facts the Director's conclusion that the writers had a "real presence" performing employment obligations in the province was both accurate and correct.

25. On the matter of the status of the writers, counsel for the Writers Guild says there is, once again, a paucity of evidence on this matter which must be held against Shaw. He says, in any event, the kind of relationship that existed in this case between the Producers and Mr. Drew (the only writer about which there is any evidence) is an employment relationship, the structure of which is typical in the industry and in past proceedings has not swayed labour boards and arbitrators from recognizing similarly structured relationships as employment relationships.

Failure to Observe Principles of Natural Justice

26. Counsel for Shaw says the Director failed to observe principles of natural justice by making the Determination without considering whether the writers, with the exception of Mr. Shaw, and the work they performed fell within the jurisdiction of the Director under the *Act*.

27. Counsel for the Director says the Director did consider these questions and Shaw's position on them; no failure to observe principles of natural justice is shown.

Error in Applying Section 3(8)

28. Counsel for Shaw says there are three preconditions to the Director assuming enforcement authority under section 3(8): first, there must be a "decision on the merits"; second, it must be in respect of a matter in dispute referred to in subsection (7); and it must be in respect of "wages". Counsel says the Director erred in the findings made on each of these preconditions.

29. Counsel for Shaw says the Consent Order was not a "decision on the merits" and the Director relied on irrelevant considerations – the consensual nature of the Arbitrator's order and efforts made by the Writers Guild to collect on the Order – in deciding otherwise. He argues a Consent Order is not a "decision on the merits" and relies on a decision of the Court in *J.I.F. v. C.E.F.*, 2003 BCSC 227 in support. He also makes reference to the definition of "judgment on the merits" in *Black's Law Dictionary*, 9th Edition, Garner, Bryan A., Thomson Reuters, St. Paul, MN, USA. He argues the Order in this case was made without any consideration of the evidence or the merits of the dispute. Counsel says the language in section 3(8) of the *Act* is unambiguous and clearly demonstrates an intention on the part of the legislature not to give the Director enforcement authority over consent orders. He says this intention is reinforced by the language used in section 3(7) when considered against language the legislature could have used to allow for the authority the Director has assumed in this case and further reinforced by section 3(7), paragraphs (a) and (b), which identify matters that can be included in a collective agreement, grieved and enforced through section 3(8). Counsel argues that without a decision on the merits, the Director is not provided with the basis for the award and, more particularly, whether the matter was in respect of wages.

30. Counsel for Shaw submits the error of the Director is illustrated in the Director's refusal to examine whether the Consent Order was for wages, deferring to what is referred to as "the face of the Arbitration order", when there is nothing on the face of the Consent Order that identifies the amounts agreed to be owing as "wages".

31. Counsel for Shaw also disagrees with the Director basing the conclusion of the Consent Order as a "decision on the merits" on a finding that the Consent Order had the same binding effect and authority as an arbitration decision and was enforceable as such.

32. Counsel for Shaw argues the matters that were the subject of the Consent Order were not matters that are referred to in section 3(7). While the Director found the Consent Order to have been issued "in accordance with section 3(7)" and "fulfils the requirements of section 3(7)", counsel says there is limited discussion in the Determination about how those findings are reached. The submission of counsel tracks the subsections referred to in subsection 3(7) and how each operates to include provisions of the *Act* into a collective agreement. He concludes by submitting the production fees at the heart of the arbitral dispute are not included in any provision which is deemed by the *Act* to be included in a collective agreement.

33. Lastly on this point, counsel for Shaw says the Director erred in finding an absence of authority to "go behind the Arbitrator's file or order" and consider whether the Consent Order comprised wages. Counsel says the production fees at issue were not wages. Counsel submits a finding that an arbitration decision is in respect of wages is a necessary precondition to the Director having authority under section 3(8). The failure to consider this question independently of the Consent Award meant the Director failed to establish one of the essential conditions for the authority that was assumed and is an error of law.

34. Counsel for the Director says, in response to the first aspect of Shaw's argument, that the Consent Order satisfied the requirement of being a "decision on the merits" because it was a final and binding disposition of the grievance that determined the legal position of the parties to the grievance. Counsel says the words

"decision on the merits" should be interpreted in a statutory context, which would recognize that an agreed upon resolution to a collective agreement dispute is equivalent in its effect to a decision on the merits as it cannot be appealed or challenged in subsequent proceedings involving the parties.

35. Counsel for the Director disagrees there was insufficient reasoning in the Determination on the question of whether the Consent Order was in respect of matters referred to in section 3(7). Relying on comments from the Courts considering the sufficiency of reasons in administrative decision making, counsel says the reasoning and analysis provided by the Director, while they "might have been more complete, when viewed in their functional context" were sufficient.

36. Counsel for the Director submits that reference to payment of monies to union members under a collective agreement may co-exist with the deeming into the collective agreement of one or more of those matters referred to in subsections (3) or (4) of section 3 and the Director was able to determine, on the basis of the arguments made by the parties prior to the Determination, the provisions of the collective agreement referred to and the Consent Order itself, that section 3(7) matters were involved and that requirement of section 3(8) was met.

37. Counsel for the Director submits there was no error in law in the Director's finding the Consent Order was in respect of "wages". She says even if the production fees are conditional, there is nothing to differentiate them from contingent bonuses, commissions and other forms of conditional payment that are regularly enforced by the Director.

38. In respect of whether the Consent Order should be considered a "decision on the merits", counsel for the Writers Guild makes many of the same points as counsel for the Director, submitting the Consent Order was, and on policy grounds should be, considered a decision on the merits because it was a final and binding disposition of a matter in dispute under a collective agreement by an arbitrator agreed to by the parties to resolve a dispute under the collective agreement, it prevents any revival of the grievance and it cannot be challenged by either party in subsequent proceedings. He says a finding that the Consent Order was not a "decision on the merits" would be inconsistent with those provisions of the *Act* and *Code* that encourage parties to resolve their disputes efficiently and expeditiously.

39. On the question of whether the dispute involved a matter referred to in section 3(7), counsel for the Writers Guild relies on the decision of the Tribunal in *Roger Ogden, Director/Officer of CJS Victoria Inc., operating Copper John's Café,* BC EST # D093/04, where the Director had enforced an arbitration award under section 3(8) which found a violation of section 17 of the *Act* and, based on that finding, ordered wages be paid to 81 employees. Counsel says there is no rational distinction between this case and that one. He says the collective agreement does not provide for "pay days" or assignments of wages, and accordingly sections 17 and 22 of the *Act* are deemed incorporated into the collective agreement. It follows, he submits, that section 3(7) applies and places the Consent Order within the language of section 3(8). Counsel then provides argument supporting his contention that sections 17 and 22 are incorporated into the collective agreement. Counsel made the same point, but only in respect of section 17, in responding to the submission made by counsel for Shaw to the Director in opposition to the request to engage section 3(8).

40. As his final point, counsel for the Writers Guild argues the production fees are ". . . money paid or payable by an employer to an employee for work" or, alternatively, "money . . . required to be paid by an employer to an employee under this Act" and as such are wages under the *Act*.

Failure to observe Principles of Natural Justice

41. Counsel for Shaw says the failure of the Director to consider anything beyond the Consent Order in deciding whether the matter was in respect of wages was a breach of natural justice.

42. In reply, counsel for the Director says there was no failure by the Director to consider the evidence and submissions made by Shaw on this matter. Counsel notes the Director was provided with a copy of all of the relevant documents relating to the grievance and full submissions from both Shaw and the Writers Guild on all aspects of the section 3(8) request, including whether the Consent Order was in respect of wages. She says there is no basis for asserting those documents and submissions were not considered by the Director. Counsel says it is clear from the Determination that the Director did consider Shaw's submissions on this point, but did not accept them.

43. Counsel for the Writers Guild also submits there was no breach of natural justice as the Director was provided with all the documents relevant to the wages issue and considered these documents in making the Determination.

ANALYSIS

44. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

45. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

46. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

47. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

Natural Justice

48. I will first deal with the natural justice arguments made by counsel for Shaw. As indicated above, a party asserting a failure to observe principles of natural justice bears the burden of establishing such a breach and Shaw has not met that burden. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal has briefly summarized the natural justice concerns that typically operate in the context of this ground of appeal:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.

49. Counsel for Shaw has based the natural justice arguments on an alleged failure by the Director to consider arguments made by Shaw during the process leading to the Determination. However, the material in the section 112(5) Record and the Determination do not support this allegation. Rather, the material indicates that in every respect Shaw was provided with the opportunity required by section 77 of the *Act* and the principles of natural justice to know the case they had to meet, present their position and to respond to the position presented by the other party. A breach of natural justice is not demonstrated by simply showing the Director did not accept Shaw's position or did not provide the extent of analysis on that position Shaw felt was necessary. The Director does not have to set out and address all of the arguments provided by all the parties in making the Determination. Thus, the fact a particular argument is not given a complete analysis in a Determination, when it is apparent from the Determination the argument has been received but not accepted, does not show a failure to observe principles of natural justice. Similarly, the fact the Director takes a particular view of an issue being considered, in this case the matter of the degree of deference accorded to the Consent Order, even if it is reviewable on other grounds, is not demonstrative of a breach of natural justice.

Section 3(8) Requirements

50. In my view, the key aspect of this appeal is whether, on the facts of this case, section 3(8) gives the Director jurisdiction to enforce the Consent Order. I will address the arguments in respect of whether the Director erred in law in finding the pre-conditions for exercising authority under section 3(8) were fulfilled before addressing whether the individuals covered by the Consent Order were employees under the *Act*. If the Director did err in law, there would be no need to provide any definitive answer on the matter of the standing of the individuals under the *Act*.

Statutory Provisions

51. Generally, section 3 manifests a legislative intention to ensure employees covered by a collective agreement have access to the basic standards of compensation and conditions of employment contained in the *Act*, while at the same time protecting the integrity of the collective bargaining process and the dispute resolution mechanisms in the collective agreement. This legislative intention is carried out by allowing certain provisions of the *Act* to be included in a collective agreement through the deeming provisions to fill a void in the collective agreement in respect of those provisions and including other provisions of the *Act* into the collective agreement by necessary implication, but requiring any dispute about the interpretation, application or operation of those provisions in the collective agreement to be resolved under the collective agreement

and enforced through the statutory mechanisms provided for enforcing arbitration awards: see section 102 of the *Code*. In one circumstance, which is described in section 3(8), the legislature has provided a basis for allowing the Director's involvement in the enforcement of a decision of an arbitration board. That provision, and whether it applies to the circumstances of this case, is central to this appeal.

52. Section 3(8), reads:

> ***3*** *(8) Despite subsection (6), if an arbitration Board makes a decision on the merits of a matter in dispute referred to in subsection (7) and the decision is in respect of wages, the arbitration board may refer the decision to the director for the purpose of collecting the wages and, for that purpose, the director may collect the wages under sections 87 to 97 and 99 as if the decision of the arbitration board were an order of the tribunal.*

53. While the provision has two discretionary aspects – the arbitration board "may" refer the decision to the Director and the Director "may" collect under the provision – there are two preconditions which must be present before section 3(8) can be used as a means of collecting wages in an arbitration award:

1. a decision on the merits of a matter in dispute referred to in subsection (7); and
2. the decision is in respect of wages.

54. The arguments in this case, flowing through the Determination and the submissions in this appeal, say that "a decision on the merits" is a distinct precondition. That is a reading of section 3(8) not justified by its language or a plain reading of that language. Grammatically and logically, the two parts of the phrase "*a decision on the merits of a matter referred to in subsection (7)*" describe a single matter and must be read together as one precondition. As a result, the arguments about whether the Consent Order is, generally, a "decision on the merits" are largely irrelevant.

55. The subsections specifically referred to in section 3(8), subsections (6) and (7), read:

> *(6) Parts 10, 11 and 13 of this Act do not apply in relation to the enforcement of the following provisions of this Act in respect of an employee covered by a collective agreement:*
>
> *section 9 [hiring children];*
>
> *section 10 [no charge for hiring or providing information];*
>
> *section 16 [employers required to pay minimum wage];*
>
> *section 21 [deductions];*
>
> *Part 6 [leaves and jury duty];*
>
> *section 64 [group terminations];*
>
> *section 65 [exceptions to section 64];*
>
> *section 67 [rules about notice of termination];*
>
> *section 68 [rules about payments on termination].*
>
> *(7) If a dispute arises respecting the application, interpretation or operation of*
>
> *(a) a Part or provision of this Act deemed by subsection (3) or (5) to be incorporated in a collective agreement, or*

> *(b) a provision specified in subsection (6),*
>
> *the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84 (3) of the Labour Relations Code, applies for the purposes of resolving the dispute.*

56. It is interesting to note that section 3(6) is not a deeming provision. While this section does not come into play in this appeal, it appears to express an intention by the legislature to make the provisions listed in the section applicable to all employees covered by the *Act*, including those covered by a collective agreement and seemingly regardless of whether the collective agreement contains any other provision relating to the matters listed, but to require the enforcement of those provision to be done through the collective agreement. I also note that the provisions listed in that section, as with the provisions listed in the other parts of section 3, include provisions that would require the payment of wages in the context of their enforcement and those that would not. Perhaps the clearest example of this in section 3(6) is in respect of the listing of Part 6 of the *Act*, which sets out the circumstances under which an employee is entitled to unpaid leave as described in sections 50 to 53 of the *Act*. The enforcement of those sections would not involve the payment of wages.

57. Paragraph 3(7) (a) references matters found in subsections (3) and (5). There is no need to reproduce or consider subsection (3) as there is no indication or suggestion the matter in dispute under the Agreement related to hours of work or overtime, statutory holidays, annual vacation or vacation pay or seniority. The reference to subsection (5) includes reference to subsection (4). Those provisions read:

> *(4) If a collective agreement contains any provision respecting a matter set out in one of the following specified provisions of this Act, that specified provision of this Act does not apply in respect of employees covered by the collective agreement:*
>
> *section 17 [paydays];*
>
> *section 18 (1) [payment of wages when employer terminates];*
>
> *section 18 (2) [payment of wages when employee terminates];*
>
> *section 20 [how wages are paid];*
>
> *section 22 [assignment of wages];*
>
> *section 23 [employer's duty to make assigned payments];*
>
> *section 24 [how an assignment is cancelled];*
>
> *section 25 (1) or (2) [special clothing];*
>
> *section 26 [payments by employer to funds, insurers or others];*
>
> *section 27 [wage statements];*
>
> *section 28 (1) [content of payroll records];*
>
> *section 28 (2) [payroll record requirements].*
>
> *(5) If a collective agreement contains no provision respecting a matter set out in a provision specified in subsection (4), the specified provision of this Act is deemed to be incorporated in the collective agreement as part of its terms.*

58. Subsections (4) and (5) have assumed some relevance in the appeal based on the assertion by counsel for the Writers Guild that the Agreement contains no provisions relating to paydays or assignment of wages and, as a

result, sections 17 and 22 are deemed to be incorporated into the agreement. I will return to this assertion later in these reasons.

59. As I have indicated above, there are two pre-conditions to the Director assuming authority under section 3(8): a decision on the merits of a matter in dispute referred to in section 3(7); and that the decision is in respect of wages.

60. Based on these preconditions, it is unnecessary to consider whether the Consent Order, generally, was "a decision on the merits" if it was not also "in respect of a matter in dispute referred to in subsection (7)".

61. Any analysis by the Director of whether this precondition was fulfilled must indicate the basis for deciding the matter in dispute is one referred to in subsection (7). The initial difficulty with the Determination is that it contains no analysis on this question and no reasons for the conclusion reached. The only references relating to the requirements of section 3(7) in the reasons issued by the Director are contained in two statements, one of which indicates the arbitrator issued the Consent Order, "in accordance with section 3(7)" and the other concludes the Consent Order "fulfils the requirements of section 3(7)".

62. The requirement to provide sufficient reasons has both a statutory and legal foundation. The statutory foundation is section 81, which the Director has referred to in the Determination. The legal foundation is expressed in *Kevin Hilliard*, BC EST # D296/97, where the Tribunal said:

> One of the purposes of the Act, as set out in Section 2, is to ". . . promote the fair treatment of employees and employers. . .". Another purpose is to ". . . provide fair and efficient procedures for resolving disputes. . .". In my view, neither of these purposes can be achieved in absence of a clear set of reasons for a decision that either an employee is owed wages or is not owed wages by an employer. In addition, to ensure that the principles of natural justice are met, a person named in a Determination is entitled to know the decision resulting from an investigation and the basis for that decision. Without sufficient reasons, a person cannot assess the decision which includes knowing the case made against them or the case to be met if there is an appeal, and determining whether there are grounds for an appeal.

63. It is an error of law to fail to provide sufficient reasons.

64. Counsel for the Director says the reasons provided by the Director were sufficient. Counsel refers to two court decisions to support her argument: *R. v. R.E.M.,* 2008 SCC 51, [2008] S.C.J. No. 52 (Q.L.), which endorses a functional approach to assessing the sufficiency of reasons in a criminal proceeding and *Clifford v. Ontario Municipal Retirement System*, 2009 ONCA 670, [2009] O.J. No. 3900, which adopts the principles expressed in *R.E.M.* in a civil context. In particular, the Court in the latter case paraphrases the Court in *R.E.M.* in describing sufficiency as reasons, read in context, that explain the basis of the decision and are logically linked to the decision made. That thought is expressed in *R.E.M.* as follows:

> . . . a logical connection between the "what" – the verdict – and the "why" – the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

65. It follows from this analysis that a paucity of reasoning is not necessarily fatal if, as counsel for the Director submits, the overall reasons and analysis of the Director, viewed in their "functional context", support the finding that the requirements of section 3(7) were fulfilled.

66. The difficulty with the argument posited by counsel for the Director is not simply the absence of reasoning but the absence of a clear "path" (using the terminology of *Clifford*) to the resulting decision. Counsel says the

requirement to pay monies under a collective agreement "may co-exist with the deeming into the collective agreement of the matters referred to in subsections (3) and (4) of section 3". However, the Determination contains no reference to such a principle as forming the basis for the Director's finding. Counsel for the Director and counsel for the Writers Guild focus on section 17 of the *Act*, which is a matter set out in subsection (4) and referred to in section 3(7), as being the foundation for the Director's finding the requirements of section 3(7) fulfilled. The Determination makes no reference at all to section 17 of the *Act*, or to any other matter referred to in section 3(7). Counsel for the Writers Guild has also referred to section 22, but that reference has only arisen after the fact in this appeal and, in any event, the same concern expressed about the absence of any reference to section 17 applies to that section.

67. I pause here to note that the Determination, not counsel, must speak to the basis for the conclusion reached by the Director. Speculation by counsel about how the Director reached the conclusion which is being challenged has no place in an appeal. The focus of the analysis on the appeal is the Determination and, to some extent, the section 112(5) Record.

68. Neither counsel for the Director nor counsel for the Writers Guild have attempted to demonstrate how the Director, considering the context and using a functional approach, gets to the conclusion reached in respect of the preconditions in section 3(8). I do not see any logical connection in the Determination between the conclusion that the requirements of section 3(7) were fulfilled and the basis for that finding and counsel have not provided one. Even if counsel are correct that section 17 or section 22 of the *Act* can be used to enforce an award of wages (the "co-existence" argument), those sections were never referred to in the Determination as being part of the dispute under the Agreement and it is not clear how the Director could, in any event, have been able to deem those sections into the Agreement or find there was any dispute under the Agreement in respect of them.

69. I say this for several reasons that are apparent on the material before the Director and on the applicable provisions of the *Act*.

70. First, the opening words of section 3(7): *"If a dispute arises respecting the application, interpretation or operation of . . ."* must be given effect.

71. I have carefully reviewed the documents relating to the matter in dispute between the Producers and the Writers Guild. The initial correspondence in the file, dated February 27, 2007, between the Writers Guild and Shaw speaks of the obligation of the Producers to pay increased production fees based on an increase in production costs for the project described as "Young Guns" and to pay remittances on such increases. The correspondence indicates a grievance is being initiated under the Agreement. The grievance alleges the Producers have failed to meet the obligations found in Article C1003 and Article A13 of the agreement. An October 18, 2007, letter from the Writers Guild to Shaw refers the matter to arbitration. There is correspondence to Arbitrator McPhillips advising him of his appointment, later advising him of a settlement and, still later, providing him with a copy of a Consent, on which Arbitrator McPhillips subsequently based the Consent Order. The Consent Order itself is a brief document. It sets out the parties to the arbitration dispute – the Writers Guild and the Producers – and the form of Order, which is expressed, in its entirety, in the following terms:

> The Parties have agreed that I am properly appointed to hear and determine this matter under the Independent Production Agreement to which the Guild and the Producers are signatories.
>
> By consent of the Parties, the Producers are hereby ordered to pay to the Guild $147,579.30, calculated as set out in Appendix A. This Order shall bear interest from the date hereof in accordance with the *Commercial Arbitration Act*, RSBC 1996, c.55 and the *Court Order Interest Act*, RSBC 1996, c.79.

72. The Consent Order is dated, signed and Appendix A is attached.

73. In the initial request to have the Director enforce the Consent Order, dated January 28, 2009, counsel for the Writers Guild confirmed the grievance was for production fees, which, he said, were "due and payable on April 27, 2006", and for retirement and benefits amounts, "which became due and payable on May 15, 2006". He described both the obligation and the obligation to pay as being "pursuant to the Collective Agreement". He described the production fees as "wages", the amounts of which were calculated in accordance with Article C1004 of the agreement. In later correspondence to the Director, dated April 16, 2009, counsel for the Writers Guild refers to the Consent Order (described in the correspondence as an Arbitration Award) as setting out "wage amounts due and owing" and asks for the Director's help in collecting the wages under section 3(8).

74. Nowhere in any of the correspondence or material relating to the grievance is there an indication that a matter in dispute before Arbitrator McPhillips was one referred to in section 3(7) of the *Act* or that the arbitrator was ever referred to section 3(7) in the context of the matters in dispute that were before him and made the subject of the Consent Order. In sum, there is no basis, factual or otherwise, for concluding the dispute before Arbitrator McPhillips was in respect of the application, interpretation or operation of a matter referred to in paragraphs (a) or (b) of section 3(7). In particular, the dispute was not about the application, interpretation or operation of a paydays or assignment of wages provision in the Agreement. That kind of dispute was never before Arbitrator McPhillips. The grievance was about the obligation of the Producers to pay production fees and make remittances on those fees based on specific and existing provisions in the Agreement.

75. Second, the matters counsel have raised in their arguments, sections 17 and 22, are encompassed in the description in paragraph (a) of section 3(7) as, *"a Part or provision of this Act deemed to be included by subsection (3) or (5) to be incorporated in a collective agreement, . . ."*. Subsection (5) is set out above. It deems the provisions of the *Act* listed in subsection (4) to be incorporated into a collective agreement only where there is no provision in a collective agreement, *"respecting a matter set out in one of the following specified provisions of this Act . . ."*. The matter related to section 17 is *"paydays"* and the matter related to section 22 is *"assignment of wages"*. The comment by counsel for the Director that the Agreement contained no payday provision akin to that contained in section 17(1) is, in my view, not supported by an examination of the Agreement and, in any event, represents an argument that involves an interpretation of the collective agreement and not within counsel's jurisdiction to decide.

76. As I have indicated above, it is clear Arbitrator McPhillips was not asked to make, and did not make, any decision on whether section 17 or 22 of the *Act* should be deemed incorporated into the Agreement. Accordingly, any decision to that effect by the Director would by necessity be based on an independent analysis of the Agreement. While I do not need to address or decide the issue in the context of this appeal, I am of the view that the Director has no authority to independently examine the terms of a collective agreement and decide if the agreement does or does not contain a provision respecting the matters set out in the subsections (2) through (5) of section 3: see *Rand Reinforcing Ltd.*, BC EST # D123/01 (Reconsideration refused, BC EST # RD612/01).

77. However, I will accept for the purposes of this appeal that the Director had the authority to conduct an analysis of the Agreement to determine whether the dispute involved a provision of the *Act* that should be deemed included in the Agreement. Even so, there is no indication the Director ever did so. Both counsel for the Director and for the Writers Guild assert the Agreement contains no provision for paydays and either infer or state that, as a result, section 17 is deemed incorporated into the agreement. Not surprisingly, counsel for Shaw says the dispute was not in respect of any matter deemed into the agreement.

78. There is no indication the Director was ever referred to particular provisions of the Agreement in the context of establishing a basis for deeming any of the *Act*'s provisions into the agreement or engaged in any analysis of the Agreement in the context of considering the requirements of section 3(7). If that had been done, the Director could not rationally have found that either section 17 or 22 could be deemed into the agreement or, even if either were deemed included, that they could – in the words of counsel for the Director – "co-exist" with the requirement to pay production fees and thus fulfill the preconditions to the operation of section 3(8).

79. The grievance invoked Article C10 of the Agreement – Production Fee and Article A13 – Insurance and Retirement Plan, and Deductions from Writer's Fees. Article C10 is a comprehensive provision for the determination, calculation and payment of production fees. The key sentence for the purpose of this analysis is found in C1004, and reads:

> On the first day of principal photography, the Producer shall pay each credited Writer contracted under this agreement his/her share of the Production Fee.

80. Accepting for the moment that production fees are wages, that sentence tells a producer exactly when those wages must be paid. It defies common sense and any principle of interpretation to suggest that sentence is not a provision respecting a payday. A cursory review of the agreement indicates there are other provisions similarly relating to the payment of what might be characterized as wages; Article A11 – Payments and Article C11 – Distribution Royalties establish when amounts owing under those provisions are required to be paid. The Agreement does not contemplate regular and ongoing payments of wages, but there is no analysis of the Agreement that would allow the Director to say the Agreement contains no provisions respecting paydays. The same holds for assignment of wages. Article A13 is a comprehensive provision dealing with contributions required to be made by a Producer and deductions that a Producer is required to take from a writer's fees and pay over to the Guild.

81. In spite of the foregoing, if, for some as yet unknown reason, it could possibly be found that sections 17 or 22 could be deemed into the agreement, it is still not reasonable that such a finding could satisfy the conditions for engaging section 3(8). There are very specific provisions in the agreement dealing with the payment of production fees and making contributions. Sections 17 of the *Act* has no logical place in the Agreement, which is structured around single payments at prescribed times for specifically identified work or events. As well, it makes no sense, and is not consistent with the objective of the deeming provisions, to be replacing provisions in a collective agreement with sections of the *Act*. That is not the statutory objective of section 3. As I have indicated in the opening comments to the analysis of section 3(8), subsections (3) and (5) exist to fill a void in a collective agreement, not to replace collective agreement provisions. Section 3 contains a legislative expression of deference to the product of the collective bargaining process.

82. The provisions of the Agreement, to the extent they relate to the issue in dispute, must be allowed to prevail. Accordingly, even if section 17 were deemed into the Agreement, that does not assist in meeting the preconditions of section 3(8) because section 17 could have no connection to either the issue in dispute or its resolution in the face of specific provisions in the Agreement relating to the payment of production fees. The same point applies to section 22.

83. In sum: there was no finding by the Director, and no basis for finding, that either section 17 or 22 of the *Act* were "in dispute" in the matter before Arbitrator McPhillips; there was no decision by Arbitrator McPhillips to deem either section 17 or 22 into the Agreement; on any reasoned analysis of the Agreement, there was no basis on which the Director could independently make a finding that either section 17 or 22 could be deemed into the collective agreement; and there was no rational basis for concluding there was a dispute respecting the "interpretation, application or operation" of either section 17 or 22.

84. The *Ogden* decision, *supra*, which has been relied on in the submissions of counsel for the Director and the Writers Guild does not assist them in this appeal. The *Ogden* decision involved different circumstances than are present here; there was an arbitration award in that case that identified the issue in dispute as failure to pay employees wages on their regular payday, the relevant provisions in the collective agreement did not include a provision respecting paydays, the arbitrator specifically considered the grievance from the perspective of section 17 of the *Act*, made specific findings on that aspect of the grievance and provided written reasons for the award. In that case, it was the arbitrator exercising the jurisdiction belonging to that arbitrator which formed the basis for the Director being able to assume authority under section 3(8). I also note the appeal of the decision to the Tribunal did not raise the arbitration award or challenge the decision of the Director to enforce the arbitration award under section 3(8). The appeal to the Tribunal was about whether Ogden could be held personally liable for the wages which were found to be owed under section 96 of the *Act*.

85. For the above reasons, I find the Director erred in finding the Consent Order was a decision on the merits of a matter in dispute referred to in subsection 3(7). The preconditions for engaging section 3(8) are not established and the Determination must be cancelled.

86. As a result, I do not need to address the other aspects of the appeal, although, based on the arguments presented and considered against the relevant provisions of the *Act*, were I required to do so, I would likely find the individuals on whose behalf the grievance was brought were employees for the purposes of the section 3(8) of the *Act*, that the Director would have jurisdiction under that provision to enforce the Consent Order and that the production fees were wages.

ORDER

87. Pursuant to section 115 of the *Act*, I order the Determination dated February 27, 2010, be cancelled.

David B. Stevenson
Member
Employment Standards Tribunal