Employment Standards TRIBUNAL

An appeal

- by -

Rand Reinforcing Ltd.
("Rand")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/766

DATE OF DECISION: March 13, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Rand Reinforcing Ltd. ("Rand") of a Determination of the Director of Employment Standards (the "Director") dated October 17, 2000. The Director concluded that provisions of the collective agreement between Rand and the Canadian Iron, Steel & Industrial Workers Union, Local No. 1 (CISIWU or the "Union"), when taken together and compared with the requirements of Part 4, including Section 25, Part 5 and Part 7 of the *Act*, did not meet or exceed the requirements of those Parts of the *Act*. The Director, applying Sections 43, 49 and 61 of the *Act*, decided that the provisions of Part 4, including Section 25, Part 5 and Part 7 of the *Act* were deemed to form part of the collective agreement between Rand and the Union and to replace the corresponding sections of the collective agreement. The Director ordered Rand to send, by registered mail, a copy of the Determination to each of its employees and to post the Determination at all of its work locations. Finally, Rand was ordered to comply with the requirements of the Determination and the remedies contained in it within 30 days of the date of the Determination.

Rand has appealed the Determination on several grounds, which were set out in the appeal as follows:

1. The Director failed to have regard for the law that limits redress to the remedies expressly set out in the legislation. The Director lacked statutory authority to engage in this investigation.

2. The remedies set out in the Determination are not prescribed in the *Employment Standards Act* and are therefore beyond the jurisdiction of the Director.

3. The Director's investigation was motivated by purposes inconsistent with the express purposes of the *Act* and the investigation therefore constituted a breach of natural justice.

4. The Director failed to provide the Employer with its factual and other conclusions before reaching a determination and therefore failed to provide the Appellant a fair hearing.

ISSUE

The issues in this appeal are framed by the above grounds of appeal. The central issue is whether the Director had jurisdiction to conduct an investigation under subsection 76(3) or to order the remedies found in the Determination. The other issues are whether the Director was improperly motivated when exercising her discretion to initiate investigation and whether the Director failed to provide Rand with a fair hearing.

FACTS

The Determination sets out the following background information for the investigation and the Determination:

> Late last year the Branch was advised that there were several collective agreements that did not meet or exceed the Act with regard to Part 4 including Section 25, Parts 5, 7 and 8 pursuant to Sections 43, 49, 61 and 69. This was having a direct impact on union and non-union employers ability to compete with these companies.
>
> . . .
>
> The Director received information that certain collective agreements fell below the minimum standards of the Act. This has adverse affects on employers who are complying with the minimum standards of the Act by creating competitive problems whether they are union or non-union. The Director, as gatekeeper to the legislation covering these matters, was compelled to investigate.
>
> . . .
>
> The Director is not an agent for the employee, the employer or the union. However, she does have a fiduciary duty to ensure the minimum standards of the Act are met.
>
> The Director is statutorily obligated to enforce the Act where there are violations of the Act. Where a collective agreement is substantially deficient, she is bound to remedy the situation.
>
> . . .
>
> The Branch contacted the trade union that was signatory to most of these collective agreements (Canadian Iron, Steel & Industrial Workers Union, Local #1) and opened a dialogue to discuss the matter. Several meetings were held with the Union with the view of obtaining more information and ultimately obtaining voluntary compliance with the legislation. An analysis of several collective agreements was given to the Union which indicated the deficiencies of the collective agreement with regard to the meet or exceed test. On January 10, 2000, a further meeting was held with the Union's legal representative, Tim Charron, who stated the Branch did not have the authority to tell the Union what to do. Mr. Charron went on to say the Act deals with employer/ employee relationships and as the union is not the employer there is no action that can be taken against them. Mr. Charron indicated he would put his position in writing. No correspondence was received from Mr. Charron.

> On March 22, 2000, letters were sent to several companies who were signatory to the Union advising them of an investigation pursuant to Section 76(3) of the Act with regard to their collective agreements and the meet or exceed question. Those letters contained a draft analysis of their collective agreements comparing them to the corresponding relevant Parts and Sections of the Act pursuant to Section 43, 49 & 61. Copies of these letters were sent to the Union.
>
> Conversations and meetings were conducted with the companies who responded to the letters. These companies appeared to have a genuine interest in complying with the basic standards of the Act and wanted to ensure their collective agreements met or exceeded the Act with regard to Part 4 including Section 25, Parts 5 & 7.
>
> In May, the writer reviewed the collective agreement between Rand and the Union. This collective agreement was one which the Branch had received information that may not meet or exceed Part 4 including Section 25, Parts 5 & 7 of the Act.
>
> Rand is a construction company doing concrete reinforcing and placing work. Rand signed a collective agreement with the Union on June 5, 1998. The term of the collective agreement is from May 1, 1997 to April 30, 2002.

The Director, following an analysis of the collective agreement with the minimum requirements of the *Act*, determined:

> . . . that the provisions of the collective agreement when compared to the corresponding relevant sections of the Act contained in Part 4 (including Section 25), Parts 5 & 7 fail to meet or exceed those provisions of the Act.

The Director then issued the following conclusions and remedial orders:

> Pursuant to Sections 43, 49 & 61 of the Act, the provisions of Part 4 (including Section 25), Parts 5 & 7 are deemed to form part of the collective agreement between Rand and the Union and to replace those sections of the collective agreement.
>
> In addition, Rand is required to send, by registered mail, a copy of the Determination to each of its employees. Rand must provide evidence to the Director that they have sent this Determination to their employees.
>
> Copies of the Determination and the Employment Standards Act Part 4 (including Section 25), Parts 5 & 7 must be posted at all work locations of the employer. The posting shall be in locations to allow all employees easy access to read and

> review the Determination and the Parts of the Act that have been deemed to form part of the collective agreement.
>
> Pursuant to s. 79(3) of the Act, Rand Reinforcing Ltd. is ordered to comply with the requirements of this Determination and the remedies contained in it.
>
> The employer must comply with the requirements of this Determination and the Remedies within 30 days from the date of the Determination.

In the Director's reply submission, the following additional background information is provided:

CISIWU was certified as the bargaining agent for Rand on 19 January, 1994 (Certification Code 31387). During the life of this certification, the Director has received several complaints from employees of Rand . . . . The Branch has had ongoing contact with the employer and CISIWU. Due to ongoing concerns with observance of the minimum standards of the *Act*, by the employer and associated corporations, the Director undertook an investigation under Section 125 of the *Act* and the *Offence Act*, R.S.B.C., 1996, c. 338.

The Director adds that there have been ongoing employee complaints, documented payroll record keeping irregularities and industry wide concern that the collective agreement falls significantly below the minimum standards set out in the *Act*.

In any event of the above comments, it is clear that the objective of the investigation and the Determination was not to rectify individual complaints, but to address what the Director perceived to be collective agreement provisions that did not meet or exceed the minimum requirements of the *Act*.

THE RELEVANT PROVISIONS OF THE *ACT*

The parties have referred to the following statutory provisions of the *Act* on the central issue in this appeal:

2. The purposes of this Act are to

> *(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
>
> *(b) promote the fair treatment of employees and employers,*
>
> *(c) encourage open communication between employers and employees, . . .*
>
> *(e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, . . .*

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

. . .

6. (1) An employer must display in each work place, in locations where it can be read by employees, a statement of the employment rights under this Act.

(2) the statement must be in the form provided by the director.

. . .

43. (1) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part and section 25 when considered together, those provisions replace the requirements of this Part and section 25 for the employees covered by the collective agreement.

(2) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part and section 25 when considered together,

(a) the requirements of this Part and Section 25 are deemed to form part of the collective agreement and to replace those provisions, and

(b) the grievance provisions of the collective agreement apply for resolving any dispute about the application and interpretation of those requirements.

49. (1) If the statutory holiday provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part when considered together, those provisions replace the requirements of this Part for the employees covered by the collective agreement.

(2) If the statutory holiday provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part when considered together,

(a) the requirements of this Part are deemed to form part of the collective agreement and to replace those provisions, and

(b) the grievance provisions of the collective agreement apply for resolving any dispute about the application and interpretation of those requirements.

61. (1) If the annual vacation and vacation pay provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part when considered together, those provisions replace the requirements of this Part for the employees covered by the collective agreement.

(2) If the annual vacation and vacation pay provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part when considered together,

(a) the requirements of this Part are deemed to form part of the collective agreement and to replace those provisions, and

(b) the grievance provisions of the collective agreement apply for resolving any dispute about the application and interpretation of those requirements.

. . .

76. (3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

. . .

79. (3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:

(a) require the person to comply with the requirement;

(b) require the person to remedy or cease doing an act;

(c) impose a penalty on the person under Section 98.

ARGUMENT AND ANALYSIS

This appeal is about the jurisdiction of the Director to decide whether provisions of a collective agreement meet or exceed the minimum statutory requirements in Part 4 including Section 25, and Parts 5, 7 and 8 of the *Act*. More precisely, perhaps, it is about the jurisdiction of the Director in Sections 43, 49, 61 and 69 of the *Act*, as those sections contain the only references to a requirement that a collective agreement "meet or exceed" the statutory minimums found in Part

4 including Section 25, and Parts 5, 7 and 8 of the *Act*. From the Director's perspective, the investigation and the Determination proceeded from the presumption that the Director has such jurisdiction under the *Act* and, advancing the presumption to its logical conclusion, also has the jurisdiction to enforce and remedy that decision. While denying any attempt is being made to "arbitrate" a dispute about the application or interpretation of the collective agreement or to interfere with the day to day operation of a collective agreement, the Director says in the Determination that:

> . . . if the collective agreement creates a situation where its application impacts on the Director's ability to meet her statutory obligations by ensuring standards are being met, then the Director may exercise her discretion and use her authority to ensure the collective agreement complies with the minimum requirements of the Act.

The question is whether the above statement and the presumption upon which it is based are correct.

From an analytical perspective, the central issue in this case is not significantly different from the issue considered in a recent Tribunal decision, *Re Director of Employment Standards (Re Walker)*, EST #RD048/01 (Reconsideration of BC EST #D275/00). In that case, the Tribunal was required to consider the interface between the jurisdiction of the Director under the *Act* and the jurisdiction of an arbitrator in the context of a complaint by an individual under Part 2, Section 8 of the *Act*, who had alleged he was persuaded to go to work for his former employer by misrepresentations about the type of work and the conditions of employment. The employer was party to a collective agreement and the individual's employment generally was covered by the provisions of that collective agreement. The original decision, relying on the Supreme Court of Canada's judgements in *Weber v. Ontario Hydro*, (1995) 125 D.L.R. (4th) 583 (S.C.C.) and *Regina Police Assn. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, concluded the grievance arbitration provisions in the collective agreement governed Walker's complaint and the Director had no jurisdiction over it. The Director sought reconsideration. In addressing the reconsideration application, the Tribunal noted that:

> Canada's legal system has grown to recognize many different sources of law relevant to employment-related disputes. For employees working in a unionized workplace, any single dispute may trigger claims under one or more of the common law, the *Charter*, the *Labour Code*, the *Human Rights Code*, the *Workers' Compensation Act* and the *Employment Standards Act*. *Weber v. Ontario* and its progeny have sought to establish a principled framework designed to limit the unnecessary proliferation of litigation in different forums. As we shall see however, they also seek to give maximum respect to the legislative intention to accord the citizen access to specialized regulatory codes designed precisely to ensure the vindication of the statutory rights they support.

When analyzing cases such as *Weber v. Ontario Hydro*, *supra*, and *Regina Police Assn. v. Regina (City) Board of Police Commissioners*, *supra*, the importance of the above statement should not be missed. The task is to give expression to the intention of the legislature as it is found in the legislative scheme that governs the matter in question. In *Weber v. Ontario Hydro, supra*, the Court referred to the comments of Estey, J. in *St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 at 721, which identified the rationale for judicial deference to a comprehensive and exclusive forum for resolving a difference arising from a collective agreement as follows:

> What is left is an attitude of judicial deference to the arbitration process. . . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting.

In the same vein, the Court in Regina Police Assn. v. Regina (City) Board of Police Commissioners, supra, stated:

> The rationale for rejecting these two models [of concurrent and overlapping jurisdiction] was expressed by Estey J., for the Court, in St. Anne Nackawic, supra, at pp. 718-19, and adopted by McLachlin J. in *Weber*, *supra*, at para. 41 as follows:
>
> > The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law. . . . The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.
>
> Therefore, in determining whether an adjudicative body has jurisdiction to hear a dispute, a decision-maker must adhere to the intention of the legislature as set out in the legislative scheme, or schemes, governing the parties.

The argument made by Rand on the central issue is relatively straight forward. Rand argues that if the collective agreement between Rand and the Union does not meet or exceed the minimum requirements of the *Act*, the statutory remedy for replacing the non-conforming provisions of the collective agreement with those of the *Act* is expressly stated in Sections 43, 49, 61 and 69 of the *Act*, that the remedy expressed in those provisions is exclusive and does not allow for what the

Director has done in this case. In that context, Rand says subsection 76(3) of the *Act* only allows the Director to investigate to ensure compliance and since there was no allegation or indication of any non-compliance with the minimum standards in Part 4, including Section 25, Parts 5 and 7 of the *Act*, there was no jurisdiction to investigate. In the same vein, Rand argues the Director had no jurisdiction to order remedies against Rand as subsection 79(3) allows the Director to impose a remedy only upon a finding of a contravention of the *Act* and there was no finding that Rand had contravened any requirement of the *Act*.

Although it is not determinative of the central issue in this case, I digress for a moment to respond to the proposition implicit in the above argument, that subsection 76(3) must be read in a way that would preclude the Director from initiating an investigation under that provision of the *Act* except in the context of an allegation of non-compliance with the minimum standards of the *Act*. That is simply not a proper interpretation of that provision. In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at ¶ 21, the Court directed the following approach to statutory interpretation:

> Today, there is only on principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

The *Act* is remedial legislation and should be given such fair, large and liberal construction as best ensures the attainment of its objects: *Helping Hands Agency Ltd. v. British Columbia (Director or Employment Standards)*, (1995), 17 CCEL (2d) 218. It is basic social legislation, governing employment, a matter described by Mr. Justice Iacobucci in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986, to be "of central importance to our society", (at page 1002). In the same case, he also stated:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance.

The authority to investigate generally for compliance with the legislative scheme is a necessary and essential tool in achieving the key statutory objective of ensuring employees in the province receive at least basic conditions of employment. Sections 43, 49, 61 and 69 of the *Act* only address the statutory minimums in respect of Part 4 including Section 25, Parts 5, 7 and 8. In addition to whatever obligations might arise under those provisions, Rand is required, like every other employer in the province, union or non-union, to comply with the requirements expressed in Parts 1, 2, 3 and 6 of the *Act*. Even where a collective agreement generally governs the employment of an individual, the Tribunal has indicated in *Re Walker*, *supra*, that the essential characteristics of a matter at issue might point to a legislative intention to have that matter resolved through the *Act*. If Rand's argument has any validity at all, it can only be in the context

of their allegation that the investigation was improperly motivated and the Director exercised discretion under subsection 76(3) in bad faith or for a purpose that was unrelated to the purposes and objectives of the *Act*.

Rand also argues that the investigation process was flawed by a failure to notify Rand of the discussions which the Director was having with the Union.

Not surprisingly, the Director disagrees with the arguments made by Rand. The Director says there is no pre-condition to the implementation of subsection 76(3); that the wording of the provision speaks only to its purpose or object - "to ensure compliance". As already indicated above, I agree with the Director on that point. As I have also noted above, my agreement on that point is not determinative of the central issue, which is whether the Director had jurisdiction to decide the collective agreement between Rand and the Union did not meet or exceed the statutory minimums in Parts 4, 5 and 7 of the *Act*.

The Director also says that it is not accurate to say there was no allegation of non-compliance in the circumstances under which the investigation was conducted. The Director was advised that collective agreements between the Union and several employers, which would have included Rand, did not meet the minimum requirements of the *Act*. The Director argues this information constituted an allegation of non-compliance and was a sufficient basis for authorizing an investigation. The Director says that the Determination outlined the areas of non-observance of statutory minimums and argues, based on the substantial authority given to the Director in her role as "statutory fiduciary" responsible for generally ensuring employees receive at least the basic statutory minimums found in the *Act*, that the remedies issued were a proper exercise of that authority and were consistent with the objects and purposes of the *Act*.

The Director relies heavily on the proposition that rights under the *Act* are minimum employment rights to which all employees are entitled and that the Director is a "statutory fiduciary" for employees in enforcing compliance with those rights. The Director says that the statute provides the base; nothing less can be agreed upon except as permitted under Section 43, 49, 61 and 69 of the *Act*. That much is clear when one examines Section 4 of the *Act*. Even in the context of Sections 43, 49, 61 and 69, the *Act* only allows provisions of a collective agreement which, on the comparative analysis prescribed by those sections, meet or exceed the minimum requirements of the *Act*. The position of the Director on the central issue is captured in the following paragraphs in the Determination:

> With regard to the issue of jurisdiction, section 2 of the Act outlines the purposes of the Act (attached) which include a requirement to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. Section 3 outlines the scope of the Act (attached) which states "this Act applies to all employees, other than those excluded by regulation, regardless of the number of hours worked".

> The Act applies to all employees whether they are covered by a collective agreement or not. There is no provision in sections 2, 3 or the regulations, which excludes employees covered by a collective agreement. Section 4 of the Act (quoted above) allows an employer and union to negotiate terms with regard to hours of work and overtime, statutory holidays, annual vacation and termination of employment which differ from the Act as long as they meet or exceed the corresponding Parts of the Act. The overall purpose of the Act is to ensure that minimum standards apply to all employees in the province regardless of whether they belong to a trade union or not unless excluded by regulation. The Director is charged with ensuring compliance with the minimum standards of the legislation, including Parts 4, 5 and 7. (page 8)

The Director does not appear to argue exclusive jurisdiction to decide whether the relevant provisions of a collective agreement, when considered together, meet or exceed the corresponding requirements of the *Act*. Such an argument would be untenable in light of the inclusion in Sections 43, 49, 61 and 69 that the grievance procedure in the collective agreement applies for resolving disputes about the application and interpretation of any statutory requirements deemed to be included in the collective agreement. The Director says only that she has some jurisdiction:

> If the legislators did not intend the Director to be involved in enforcing minimum standards for those covered by a collective agreement, they would not have included sections 43, 49, 61 and 69. Indeed, there would not have been a provision for which an employer and union could negotiate terms and conditions around hours of work and overtime, statutory holidays, annual vacation and termination of employment as long as they met or exceeded the corresponding relevant sections of the Act. By actually including these matters in the Act, the legislators granted the Director jurisdiction in these matters. If the Director were not to have jurisdiction in issues involving employees represented by trade unions, they would have simply excluded them. The lack of such exclusion explicitly implies the Director does have jurisdiction. (page 9)

The Determination refers to an arbitration award of Mr. Don Munroe, *Re Communications, Energy and Paperworkers Union -and- National Representatives Union*, [1999] B.C.C.A.A.A. No. 431, which the Determination indicates "addresses the operation of the Act in conjunction with the collective agreement" and which included the following comment:

> . . . the statutory requirements ". . . are deemed to form part of the collective agreement . . . and . . . the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements". Simply put, once the requirements of the Act are "deemed to be part of the collective agreement", the job of the statute is essentially done. From that point onward, the legislative policy is that the enforcement shall be by the

> grievance arbitration machinery of the collective agreement, just as with all other parts of the collective agreement (such machinery being a mandatory feature of every collective agreement: . . .

From the above statement, The Determination concludes:

> In this context, the operation of the Act and the Labour Relations Code are complimentary [sic] to each other. This is not a case of competing jurisdictions but one which is concurrent. *Sections 43, 49, 61 and 69 require the Director to investigate the collective agreement to compare the relevant provisions of the collective agreement to the corresponding Part of the Act.* If the analysis indicates the collective agreement meets or exceeds that Part of the Act then those provisions of the collective agreement replace the requirement of that Part of the Act. If the analysis shows the collective agreement when considered together do not meet or exceed that Part, then that Part of the Act is deemed to form part of the collective agreement and replace the provisions of the collective agreement. (page 12)
>
> (emphasis added)

The Director's reference to the comments of Mr. Munroe in this award compels a closer examination of it. In my view, the comments of Mr. Munroe have been taken out of context and do not support the point being made.

The award considered a grievance filed by a business representative employed by the Communications, Energy and Paperworkers Union for unpaid overtime. The substance of the grievance letter was set out in the award:

> I am filing a grievance for the payment of overtime
>
> I have worked at least one hundred and eighty-five (185) days of overtime to date, and have taken seventeen (17) days off in lieu [includes ten (10) days unpaid vacation granted in 1993]. The National compounds the problem, as it has and is continuing to schedule more and more functions to either commence on or to conclude on weekends.
>
> The NRU Collective Agreement does not address payment for hours in excess of forty in a week or time off in lieu of hours worked in excess of forty in a week.
>
> I am therefore requesting full redress for all hours worked in excess of forty hours in a week since my date of employment as per the BC Employment Standards Act, which is part of the NRU Collective Agreement as registered in BC.

The award identified the grievance as involving two general issues of liability. The first was described by the arbitrator as being a question of:

> Whether, by operation of Section 43(2)(a) of the Employment Standards Act, 1996, and the corresponding provisions of the 1993 and 1995 versions of the Act, the hours of work and overtime provisions of the Act ". . . are deemed to form part of the [1996-98 and predecessor] collective agreement[s]. . . ." In the words of Section 43(1) and (2) of the 1996 Act, the answer to that question depends on whether the hours of work and overtime provisions (if any) of the collective agreement, when considered together, ". . . meet or exceed the requirements of this part and section 25".

The arbitrator answered all aspects of the question identified in the first issue. It is worthwhile noting that the arbitrator expressed no concern about whether he had the jurisdiction to decide the question raised in this issue or that it was more appropriate for it be decided by the Director.

The arbitrator described the second general issue of liability in the following way:

> If, as the NRU contends, the hours of work and overtime provisions of the Employment Standards Act are deemed to form part of the 1996-98 and predecessor collective agreements, whether the CEP is in breach thereof by its refusal to acknowledge the grievor's overtime claim to any extent whatsoever. That, in turn, requires a consideration of the self-governing nature of the grievor's employment; and it requires as well a decision about the applicability of the doctrine of estoppel, and about the applicability of arbitral discretion as to remedy generally.

The reference in the Determination from this decision was made by the arbitrator while addressing the second issue. The arbitrator was not saying or suggesting that it was a function of the role and authority of the Director acting under the *Act* to investigate and compare the relevant provisions of the collective agreement to the minimum requirements of the *Act*. In fact, the arbitrator was saying that once the statutory minimums were deemed to be included in the collective agreement, the enforcement of those statutory minimums was to be made without reference to the statutory regime set out in the *Act*. It is important to see the full comment from the award in order to appreciate the point being made:

> Section 43 of the *Act* prescribes a regime separate from other circumstances for persons covered by a collective agreement (as do some other provisions of the *Act* dealing with other employment standards: see, for example, Section 49). True, the parties to a collective agreement are not permitted to contract out of the *Act*. But as I have said, the legislative policy is one of a separate regime for such parties. Specifically, the legislative policy is that where the hours of work and overtime provisions of the collective agreement do not meet or exceed the requirements of the *Act* in that regard, the statutory requirements ". . . are deemed

> to form part of the collective agreement . . . and . . . the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements". Simply put, once the requirements of the *Act* are "deemed to be part of the collective agreement", the job of the statute is essentially done. From that point onward, the legislative policy is that the enforcement shall be by the grievance arbitration machinery of the collective agreement, just as with all other parts of the collective agreement (such machinery being a mandatory feature of every collective agreement: see Section 84 of the *Labour Relations Code*). The legislature must be presumed to have known that an arbitrator constituted to hear and decide a dispute under a collective agreement derives his or her arbitral mandate both from the collective agreement and from the *Labour Relations Code*; and that the arbitral mandate includes an application of the doctrine of estoppel in appropriate circumstances: *City of Penticton* (1978) 18 L.A.C. (2d) 307 (B.C.L.R.B). The legislature must also be presumed to have known that an arbitrator under a collective agreement possesses broad remedial discretion generally: *Labour Relations Code*, Section 89. It would of course be incongruous for some parts of a collective agreement to be subject to a different arbitral mandate than other parts; and I think it would be wrong to ascribe to the legislature an intention to that effect.

The above comment, rather than supporting the conclusion of Sections 43, 49, 61 and 69 being complementary to the operation of the *Act* and vesting the Director with a concurrent jurisdiction in respect of some aspects of its operation, suggests those provisions prescribe a regime separate from other requirements of the *Act*, one governed by the arbitration machinery of the collective agreement and by the arbitral mandate derived through the collective agreement and the *Code*. This perspective is consistent with the approach taken by the Labour Relations Board in *Re Community Social Services Employers' Association*, BCLRB Decision No. 551/98, where a panel of the Board reviewed two arbitration awards that had considered the interpretation and application of the "meet or exceed" requirements in Sections 43, 49, 61 and 69 of the *Act*.

In the course of its decision, the Board considered its jurisdiction to review the arbitration awards. Even thought the objective of the analysis made by the Board was to confirm that the application was a matter properly before the Board under Section 99 of the *Code*, as opposed to being a matter of general law under Section 100, the following comments are apposite:

> More specifically, both arbitrators were asked to determine whether provisions of a collective agreement met or exceeded minimum standards in the legislation. This exercise required them to interpret the collective agreement provisions, and compare them to requirements of the *Act*, in order to determine which applied to the employment of the affected employees. An admittedly important step in the chain of reasoning was deciding how the "meet or exceed" test applied in the circumstances. Even if that step in the chain of reasoning involved a matter or

> issue of general law, it is not sufficient to deprive the Board of jurisdiction: *Kinsmen, supra*, at p. 298.
>
> However, we are additionally satisfied that interpretation of the statutory provisions at issue did not involve a matter of general law. Sections 43, 49 and 61 of the Act do not apply to non-union employees. They apply only to employees covered by a collective agreement. The words "collective agreement", "Labour Relations Board" and "trade union" are all defined in Section 1(1) of the *Act* as having the same meaning as defined in the *Code*. Other sections of the *Act* deal with employment relations in a general sense, but the provisions at issue deal solely with labour relations, " . . . which are the relations between employers, on the one hand, and unions and employees collectively represented by unions on the other hand": *Kinsmen, supra* at p. 299.

There are two points that arise from the above excerpt. First, the Board was not at all troubled about the jurisdiction of the arbitrators to decide whether the terms of the collective agreements at issue met or exceeded the minimum statutory requirements of the *Act*. An arbitrator, for the purposes set out in Section 82 of the *Code*, may interpret and apply the *Act* (see Section 89(g) of the *Code*). Second, the Board considered the real substance and determinative constituent of both arbitration awards concerned *"principles expressed or implied in the Code or another Act dealing with labour relations"*, (*ie.* the *Employment Standards Act*, see Section 99 of the *Code*). There have been several other arbitration awards that have considered the "meet or exceed" provisions in the *Act*. In all of those awards, the arbitrator, where required to do so, made the determination on the "meet or exceed" provisions.

The Board examined the legislative history of the "meet or exceed" provisions of the *Act*, considered legislative intent and decided that the "meet or exceed" test in the *Employment Standards Act* required arbitrators to consider together the collective agreement provisions for all employees covered by the agreement, and to compare them to the corresponding requirements of the *Act*, as also considered together for all of the employees. In carrying out this exercise, arbitrators must have regard to the aggregate of the collective agreement provisions which correspond to the aggregate of the statutory requirements in the particular Part of the *Act*. In reaching this result, the Board stated:

> In our view, this interpretation of the test represents an appropriate resolution to the current intersection in British Columbia of employment standards and collective bargaining legislation. The former is intended to ensure employees "receive at least basic standards of compensation and conditions of employment". The underlying rationale for minimum standards, or the harm which the legislation seeks to address, was identified by the Supreme Court of Canada in *Machtinger, supra*, at p. 1003: individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employer. This concern is typically not present in the collective

> bargaining context: the Thompson Report emphasized that the organized labour force by and large enjoys conditions of employment far superior to those provided for by the statute (pp. 25-26). Our interpretation reflects an appropriate balance between ensuring a basic level of protection in the workplace and the autonomy of collective bargaining relationships.

The Board added the following comment:

> We wish to immediately add the caveat that the comparative exercise does not simply involve a surface examination of contractual language in light of the statute. It is permissible, if not necessary, to go behind the words of the agreement and consider the composition of the bargaining unit, progression of employees over time and possibly other factors which affect actual entitlement. In other words, arbitrators must consider real-life operation of the collective agreement provisions.

This comment raises another concern about the argument of the Director. Even if I were to accept that the Director had jurisdiction to decide whether a collective agreement met or exceeded the corresponding statutory minimums, there is nothing in the *Act*, or in any other legislation, that would bind an arbitrator to that conclusion. In the context of an actual grievance arbitration requiring an arbitrator to do a comparative analysis of the requirements of the *Act* and the provisions of the collective agreement, it is open to an arbitrator to reach a different conclusion than the Director. Further, the Board has supervising authority over arbitrators in this province and has told the arbitral community how it expects the "meet or exceed" test to be applied. The Board does not have supervising authority over the Director. That role falls to the Tribunal. The Director, as she has said many times in the reply submission, is mandated to fulfill the purposes and objects of the *Act*. On the other hand, the Board, as indicated in *Re Community Social Services Employers' Association, supra,* is mandated in these circumstances to protect the autonomy and integrity of the collective bargaining process. The potential consequence, one which the Supreme Court of Canada sought to avoid, is a multiplicity of forums and inconsistent jurisprudential development.

While I am not bound by the Board's decision, the analysis done by the Board make good sense and provides strong support for a conclusion that the legislature intended Sections 43, 49, 61 and 69 of the *Act* to be administered within the statutory scheme created for administering any other provision of a collective agreement; that all aspects of the enforcement of statutory minimums be addressed within the grievance arbitration machinery of the collective agreement, just as with all other parts of the collective agreement; and that any disagreement with the comparative analysis of the relevant provisions of the collective agreement with the corresponding parts of the *Act* be reviewed through Section 99 or Section 100 of the *Code*, the statutory mechanism designed for reviewing arbitration awards.

Sections 43, 49, 61 and 69 are specifically identified exclusions to the minimum statutory requirements of the *Act*. Section 4 makes the general prohibition against agreements waiving the minimum requirements of the *Act* to be *"subject to sections 43, 49, 61 and 69"*. All of these sections apply exclusively to situations where a collective bargaining relationship exists and where employees are covered by a collective agreement negotiated on their behalf by a trade union. The legislative intent of these provisions, in the limited circumstances covered, is to allow the protection of individual rights in the *Act* to be subject to negotiated terms of collective agreements which potentially, and in most cases, provide greater benefits for the majority of employees covered by those collective agreements. The provisions also respect the legislative intent of the *Labour Relations Code*, R.S.B.C. 1996, c. 344, the *"Code"*) that disputes arising under a collective agreement should be resolved through the arbitration provisions in the collective agreement (see Sections 82 and 84 of the *Code*).

The Director notes that each of the four sections of the *Act* containing the "meet or exceed" requirements include the following paragraph:

> *(b) the grievance provisions of the collective agreement apply for resolving any dispute about the application and interpretation of those requirements.*

The Director says that *"those requirements"* is a reference to the relevant statutory minimums. I disagree with the Director in her characterization of that reference. It is not entirely incorrect to characterize the phrase as a reference to the statutory minimums found in the relevant parts of the *Act*, but in the context in which that reference is found, it is a more complete and accurate characterization to say *"those requirements"* is a reference to statutory minimums that are *"deemed to form part of the collective agreement"*. Further, *"those requirements"* are *"deemed to form part of the collective agreement"* only when it has been decided that the relevant provisions of the collective agreement, when considered together, do not "meet or exceed" the requirements of the corresponding part of the *Act*. This point is at least inferentially recognized in the Determination, where it is stated:

> Once a part of the Act is deemed to form part of the collective agreement and to replace those provisions of the collective agreement then the grievance provisions of the collective agreement apply for resolving any disputes.

The Director also says "that there is no dispute as to the application or interpretation of these minimum standards"; that Rand, in its appeal, acknowledges an obligation to meet certain statutory minimums that are set out in the *Act*. This submission suggests that jurisdiction may reside with the Director because there is no "live" issue between the Union, or an employee, and Rand under the collective agreement and hence no "dispute", which of course would unquestionably invoke the grievance procedure in the collective agreement. The *Code* defines "dispute":

> *"dispute" means a difference or apprehended difference between an employer or group of employers, and one or more of his or her or their employees or a trade union, as to matters or things affecting or relating to terms and conditions of employment and work done or to be done;*

In my opinion, it is an unnecessarily narrow view of the term "dispute" to confine it to "live" issues between an employee and an employer. In the context of labour relations matters arising under the *Code*, which includes matters involving the interpretation and application of the collective agreement, the term is framed in terms sufficiently broad to capture an *"apprehended difference"* between an employer and its employees *"relating to terms and conditions of employment"*. Clearly, a question about whether existing provisions of a collective agreement ought to be replaced by the relevant statutory minimums and thereafter govern the employment of person working under that collective agreement is captured by the definition.

Fundamentally, an analysis under Sections 43, 49, 61 and 69 of the *Act* requires an examination and interpretation of the relevant provisions of the collective agreement. Nowhere in the *Act* is the Director given any jurisdiction to interpret or apply a collective agreement. An arbitrator, on the other hand, is given jurisdiction to *"interpret and apply an Act intended to regulate the employment relationship of the persons bound by the collective agreement . . ."* in Section 89(g) of the *Code*. The Director says that the decision in *Re Health Labour Relations Association v. Prins et al.*, (1982) 140 D.L.R. (3d) 744 is authority for the proposition that the Director has jurisdiction to receive and investigate a complaint from an employee covered by a collective agreement. I will say only two things about that case in the context of this appeal. First, that case was decided before the Supreme Court of Canada's judgements in *Weber v. Ontario Hydro*, *supra*, and *Regina Police Assn. v. Regina (City) Board of Police Commissioners*, *supra*, and, at least implicitly, accepts the concurrent jurisdictional model that was rejected in those decisions. Neither the Court's decision nor the Court of Appeal's decision contain any indication that the exclusive jurisdictional model ultimately adopted and refined by the Supreme Court of Canada was argued or considered. Second, nothing in this decision should be interpreted as saying the Director will never have jurisdiction over a complaint filed by an employee covered by a collective agreement. There will be circumstances where the Director has jurisdiction over such a complaint, but those circumstances will be determined by the analysis endorsed in *Re Walker*, *supra*.

There is a concern expressed in the Determination and echoed in the reply submission of the Director on the appeal that employees of Rand specifically, and members of the Union generally, have "little or no chance of obtaining a remedy by pursuing a grievance under the collective agreement". That may be so in reference to this particular employer and union, but such cases are the exception, not the rule. In most cases, as noted by Mr. Thompson in his report, this concern is typically not present in the collective bargaining context; he emphasized that the organized labour force by and large enjoys conditions of employment far superior to those provided for by the statute (pp. 25-26). One might wonder what rationale exists for continuing to recognize an organization that is unwilling or unable to negotiate even minimum standards for its

members as a trade union for the purposes of the *Code*, but that is a matter for the Board to address if the opportunity arises.

DECISION

I find that the Director had no jurisdiction to exercise any authority within Sections 43, 49, 61 and 69 of the *Act*, including deciding whether the provisions of a collective agreement meet or exceed the statutory minimums in the relevant corresponding Part of the *Act*. In light of my conclusion on this point, I do not find it necessary to consider any other argument raised by Rand, except to say I agree with the submission of the Director that an evidentiary foundation for the arguments alleging bad faith, bias and failure to provide a fair hearing is absent.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 17, 2000 be cancelled.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal