EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Annabel Webb
(the " Employee ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 1999/642

DATE OF HEARING: January 25, 2000 and February 4, 2000

DATE OF DECISION: July 18, 2000

DECISION

APPEARANCES:

Mr. Michael D. Smith	on behalf of Ms. Annabel Webb (the "Employee or "Appellant")
Mr. Delayne Sartison	on behalf of Family Services of Greater Vancouver ("Family Services" or the "Employer")

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on October 1, 1999. The Determination concluded that Ms. Webb was not owed wages by the Employer.

THE DETERMINATION

From the Determination, the following useful background for the appeal may be obtained and, in any event, much of this is not in dispute between the parties. The Appellant, Ms. Webb, and another employee, Ms. Andrea Smith ("Smith"), filed complaints pertaining to overtime. Both were employed as Street Youth Outreach Workers with Family Services of Greater Vancouver. Ms. Webb was employed on a full- time basis, and Smith on a part-time basis. This appeal deals with Ms. Webb's appeal only and I am not aware if Smith has filed an appeal. I understand that Ms. Webb was employed from November 7, 1994 to July 31, 1988, the last two years on a full-time basis. She was paid a salary, usually working 35-40 hours per week. Ms. Webb's overtime claim pertains to the period July 31, 1996 to July 31, 1998. The Employer is a non-profit charitable organization providing a variety of services, programs and assistance to families and persons in need, including street youth. The Employer maintained, before the delegate, that it encouraged employees to set their own shifts, not to exceed 40 hours in a week for full-time employees and did not pay overtime. The Employer relied on Section 34(1)(r) of the *Employment Standards Regulation* (the "*Regulation*").

The delegate defined the issues before him:

1) was the complainant working hours in excess of 8 in a day?

2) if the complainant worked overtime hours, was she paid for those hours? and

3) was the claim, in any event, barred by the *Act* and/or the *Regulation*, in particular Section 34(1)(r) of the *Regulation*?

From the Determination it appears that the delegate considered various information from the Employer, including various definitions of "disability" (supplied by the parties), a description of the scope and requirements of the Appellant's position, and a written opinion from Dr. Whynot

supporting the Employer's position was that the "majority" of street youth is disabled or, in any event, are "otherwise disabled".

The delegate also considered information from the Appellant, who took the position that street youth cannot be considered "disabled" within the meaning of Section 34(1)(r) and urged the delegate to accept a narrow construction of the term "disabled". The Appellant noted:

> "Street youth are exposed to adverse *social* conditions such as abuse, homelessness, and poverty. These conditions do not lead, in and of themselves, to impairment of physical or mental function, nor do they derive from injury or disease...."

The delegate found that Ms. Webb had worked overtime hours and had not been paid for these hours. He turned to the issues arising out of Section 34(1)(r):

> a) "Any of the following who are employed by a charity". Both complainants were employed by a charity. Both, at the very least, counselled youth.
>
> b) "To assist in a program of therapy, treatment or rehabilitation". Clearly Family Services hired the complainants to assist in their programs designed to help, treat, and guide street youth. They were child care workers.
>
> c) "of physically, mentally or otherwise disabled persons". While it is likely true that all street youth would not be classified as physically or mentally disabled, many would meet one or both criteria."

The delegate considered various dictionary definitions of the terms "otherwise" and "disabled" and reasoned:

> "I am swayed and of the view, that the complainants to some degree could regulate and control their own daily work hours. There was flexibility in this work. I am also of the view (sic) little if any daily overtime would have resulted if either complainant had protested strongly, or had not structured their shifts in this manner or direction accordingly (sic). There were no employer driven directives or ultimatums given in this regard that set out the daily hours of work and the shifts, as worked. I have seen no such evidence.
>
> The complainants as per part of their job requirements, counselled, instructed, educated, referred and consoled street youth. The employer is a charity. Through its programs it is directly involved in assisting street youth outreach workers (sic), who in turn provide counselling and assistance to street youth in need by utilizing their training, experience, education and child care skills. This work is accomplished through Family Services own programs and by referrals. The problems and needs of the youth and the work performed is not trivial."

In the result, the delegate accepted the Employer's position that Section 34(1)(r) applied and that Ms. Webb was not entitled to overtime pay.

PRELIMINARY ISSUE

The Employer sought to call an expert witness, Dr. Elisabeth Whynot, who had written the opinion concerning the "target population" of street involved youth, mentioned earlier and attached to the Determination.

Counsel for Ms. Webb objected to Dr. Whynot testifying as an expert on a variety of bases, including that the issue of "disability" was for the Tribunal to decide as a matter of law, not an expert witness. He also questioned the probative value of her testimony. He argued that there was nothing to suggest that the Tribunal could not properly decide the issues in dispute without expert testimony.

Counsel for the Employer argued that Dr. Whynot had knowledge of the so-called target population of street youth and their medical conditions, as well as the outreach program, and that her testimony would, indeed, assists the Tribunal in reaching a decision. She agreed that the ultimate question of whether street youth are disabled is for the Tribunal to decide.

Having heard the evidence of Dr. Whynot's qualifications, which included extensive work with, among others, the street involved youth, as a Medical Health Officer and physician in private practice and in various clinics and community agencies in the Downtown Vancouver area, as well as her academic credentials, and a demonstrated familiarity with the conditions of street youth and their medical concerns, I accepted her as an expert witness. I was impressed with her knowledge of the target population. One of the leading cases in this area is the decision of the Supreme Court of Canada in *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 which articulated the following principles:

1) the expert evidence must be shown to be relevant;

2) evidence may be excluded if its probative value is overborne by its prejudicial effect;

3) expert evidence must be reliable;

4) expert evidence must be necessary in the sense that it provides information outside the experience of the trier of fact; and

5) the evidence must be given by a witness who have the peculiar or specialized knowledge through study or experience.

In my view, the testimony met this test.

However, as mentioned at the hearing, the decision on the ultimate question, whether the street youths are "disabled" rests with the Tribunal.

ISSUES

The parties agree that the issues before me in this appeal arise out of the exemptions with respect to hours of work and overtime requirements (*Employment Standards Regulation* Section 34(1)(r)) and are:

1) the proper interpretation of "physically, mentally or otherwise disabled persons" in the context of "street youths". This, in my view, boils down to whether or not street youth can be considered "disabled"; and

2) the proper interpretation of "employed ... to assist in a program of therapy, treatment or rehabilitation". Was Ms. Webb so employed?

FACTS

At the hearing, Ms. Webb testified on her own behalf. Dr. Whynot and Ms. Cheryl Mixon testified on behalf of the Employer.

Ms. Webb has a bachelor's and a master's degree from University of British Columbia, in psychology and counselling, respectively. She wrote her thesis on child sexual abuse. She first became employed by Family Services in 1994 and worked there until March 1998, when she went on leave. Before coming to work for Family Services, she worked and volunteered for a number of agencies. Since leaving the Employer, she has focussed on advocacy work in the mental health area. All in all, it is clear that she is an engaged individual with extensive experience in her chosen field.

Ms. Webb testified that a "program overview", entered into evidence at the hearing, was an accurate description of the relevant services provided by the Employer. According to the program overview, since 1987, the Street Youth Services (SYS) Outreach Program had been providing "a variety of services to a large diverse population." The clients range from 12 - 24 years of age. A large component of the program consists of street outreach where workers connect with youth in the Downtown South area of Vancouver "in an effort to identify and refer new young people, or to provide or recommend service to those already street involved." The services provided include: referral, information, advocacy and crisis intervention.

Street youth are a marginalized group. Ms. Webb explained that the most prominent issues are: homelessness, poverty and sexual exploitation and that the outreach workers focus on the basic needs of the clients. As I understood her evidence, most of the street involved youth are homeless and go without food and that she regarded the primary focus of her job as to ensure that those needs were met. To that end, Ms. Webb would provide a connection between the resources available and the clients, for example, to get them into a limited number of "safe houses" or detox beds. From Ms. Webb's point of view, street youth as a group cannot be described as "disabled", rather they are very capable, as they have to be, in order to survive on the street. She did agree that "young people from the target population might be disabled". In other words, some of the target population might on their own meet a narrow definition of disability.

An internal job posting set out the components of her position. The key responsibility areas are: client outreach and identification, public and community relations and individual team and program development. Ms. Webb testified that the vast majority of her work with respect to client outreach and identification was focussed on

- establishing a trusting and respectful rapport with the street involved youth;
- identifying and assessing new street involved youth (a large part of her work);

- advocacy and referral to community resources (a large component of her work);
- providing information and involving clients in community services and opportunities; and
- walking children into community services (this involved acting as an advocate in meetings).

Ms. Webb explained that she had little ongoing involvement on a "one on one" basis with the youth, though she "would run into them on the street" or see them at the "drop-in centre". She testified that there was neither an ongoing therapeutic relationship nor a program of treatment. She compared her work as an outreach worker with her current employment where she is involved in structured ongoing and regular one-on-one (or group) relationship with clients. As an outreach worker, she explained, it was a "luxury to spend more than a few minutes" with clients.

Dr. Whynot explained that street youth are "pre-disposed" to a number of problems which make them more vulnerable and, as a result of which, they are disabled in the sense that they are "unable to look after themselves with respect to the normal tasks of living":

- Street youth have a high incidence of substance abuse, *i.e*., drug and alcohol abuse. 50-60% of street youth are actively engaged in substance abuse--some on a daily basis, some periodically or episodically. Some use heroin and "coke", virtually all use alcohol.

- Some 85% suffer from post traumatic stress ("PTS") disorder caused by physical and sexual abuse in varying degrees. In that context, Dr. Whynot explained that "you don't see many fully functioning kids among street kids."

- Mental illness is often associated with poverty. Dr. Whynot explained that the target population have a high incidence of personality disorders, mood disorders, including schizophrenia and depression. The former is common among drug users.

- There is a high proportion of fetal alcohol syndrome ("FAS") among street involved youth.

- A high incidence of chronic infections, such as HIV and Aids. Dr. Whynot could not put a number on the proportion of street youth affected and suggested that an estimated 10-35% of street youth may suffer from HIV. Between 35 and 40% (of the general population of) of intravenous drug users suffer from HIV and Aids. The incidence of hepatitis is high, almost all intravenous drug users have hepatitis C. Malnutrition is a contributing factor.

In cross examination, Dr. Whynot acknowledged that there was no study of Vancouver youth confirming that 80-85% suffer from PTS. She agreed that the symptoms vary from mild to severe, but that once a person meets the criteria, that person may be classified with PTS. She maintained that the "street kids", she has come into contact with, have shown significant symptoms of PTS. She did not agree that they were at the less severe end of the continuum. She contended that a person with PTS would be disabled to a degree. When the question was put to her, if her view that street youth is "disabled" is commonly accepted, she stated that she had not had the discussion but that it was recognized that street youth is a group with special difficulties and special needs.

Dr. Whynot was directed to a report on street involved youth "You Have Heard This Before: Street-Involved Youth and the Service Gap". This report defines street youth:

> "... as '... teenagers who have lost their family ties and social support systems, lack dependable sources of food and shelter, and have gravitated to the urban downtown as a last resort for survival and freedom...' and youth who have grown up in the urban downtown become involved in street life."

She agreed that the definition did not refer to disabilities.

As mentioned above, Ms. Mixon also testified for the Employer. She has worked for Family Services since 1988. From 1993 to the present, she has been the Assistant Director (Youth) for the Employer. Between 1970 and 1988, she worked for a variety of agencies, including the Ministry of Social Services. She explained that Family Services provides a variety of services and programs with respect to family, parenting, sexual abuse, substance abuse and youth.

Youth Services provide a continuum of services to youth in a significant way with community partners and government agencies. The front end--outreach workers, "Dusk to Dawn" (a drop-in, safe place) and Options-- provide a "funnel of access". A significant job for the outreach workers is assessment of the street youth. They handle a large number of youths. In February and March 1999, 640 youth were serviced. It is critical to engage the youth and identify those most in need and provide the appropriate referral. Outreach is the link with other services, including those provided by the Employer, clinics, hospitals, street nurses, and mental health. The outreach workers "walk the area" or meet youth at the "drop-in" services.

Youth Services involve a number of services and programs, including:

> **"Creative Opportunities for Youth (COFY)**
> This program offers employment and career counselling, on-the-job training, or school placements for street-involved youth. Assistance with resume writing and overcoming other barriers to employment or training is provided....
>
> **Street Youth Support Program**
> Provides one-to-one support services to street-involved youth 13-18 years old, coping with drug misuse, sexual exploitation, homelessness, health problems etc.
> - Referral from Ministry for Children and Families' social worker necessary for service...
>
> **The Unloading Zone**
> A twelve week group program for youth that teaches decision making skills and how to manage frustration, anger and aggression.....
>
> **Providing Resources and Independence for Youth with Disabilities (PRIYD)**
>
> Through one-to-one and group support for special needs children and their families, helps them to achieve the greatest integration and independence possible.
> - Referral from social worker required....

> **Street Youth Services (SYS)**
> An outreach and drop-in service for street-involved youth and young adults in the Granville Mall/Downtown South area that provides referral to services, advocacy and information, as well as day-to-day crisis management....
>
> **Dusk to Dawn Youth Resource Centre**
> A drop-in, safe place for street involved youth 21 years old and under. Hours of operation: Sunday - Thursday 8:00 p.m. to 6:30 a.m. Provides information, referral, peer counselling, hot meals, showers, laundry facilities and activities (pool table, exercise equipment, TV, etc.). This program was designed for and by youth.
>
> **Safe House**
> A voluntary, residential program for youth 16-18 years old needing a safe place to stay. Self-referral, 24 hours per day, 365 days per year ....
>
> **Youth Detox**
> A voluntary, residential, non-medical detoxification program for Downtown South, street-involved youth 24 and under. Self-referral 9:00 a.m. - 9:00 p.m. Monday to Friday, on a first-come, first-served basis....
>
> **Youth Detox Options**
> A voluntary, drop-in program for youth ages 13-24 struggling with drug and/or alcohol misuse. Provides support services, recreational and educational groups, referral to Youth Detox, pre and post-detox support, information, and referral to treatment sources....."

Outreach provides the front end to the services and programs, and assist in connecting youth and services and programs. In their Employer's terminology they are the "funnel" to the programs and services. The Street Youth Support Program (above) is the only "gated" program, in the sense that a referral from the Ministry is required.

Ms. Mixon also testified with respect to the problems facing street youth--lack of trust, post traumatic stress disorder, sexual abuse (Ms. Mixon estimated that 1/4 of females have experienced abuse and that the proportion for street youth is higher), abandonment or banishment from family and communities, a higher degree of substance abuse than outside the target population of street-involved youth--make is difficult for them to access services available. The employees interact with the Ministry of Children and Families and provide advocacy. The information obtained at the front end is vital with respect to the assessment of the risk factors. There is an ongoing relationship with the youths who do not necessarily immediately access the services and the employees are constantly involved in linking youths with service providers.

According to the annual report of Family Services (1998/99):

> "Homelessness continues to be a major issue for our target population. It is not uncommon to have 3-5 youth sleeping outside the Seymour Street building on the front and back porches when staff arrive in the morning. Lack of affordable

> housing is a serious issue. In attempting to locate housing, youth face a high degree of discrimination based on age, income and perceived lifestyle.
>
> IV heroin use along with a plethora of other drugs continue to impact the street youth population. We are continuing to see a significant number of youth (13-16 years of age) IV drug users. Part of the reason for this is that heroin is cheap and easily available in high concentration in the downtown south area. Over the last year a significant number of young persons with mental health issues along with other challenges, such as drug misuse, have accessed services.
>
> Trends in the population included:
>
> - conversion to full blown AIDS and death
> - continued high incidence of young IV drug users, and related medical problems
> - increase in homelessness
> - increase in diagnosis/mental health issues."

Ms. Mixon suggested that 80-95% of street youth use drugs and that 15% are IV drug users. There is also among street youth an alcohol abuse problem. From her experience it is "obvious" that drug and alcohol abuse results in other problems, such as psychotic episodes, depression and respiratory problems. IV drug use carries with it an increased risk of HIV/AIDS.

A critical component of the work of Family Services is advocacy and referral. As well, the work is integrated with other service providers and agencies. According to the annual report, referred to above:

> "SYS continues to be represented at various community meetings. The SYS staff have daily informal meetings with ASU assessment staff, and attend Reconnect, Kid-specific and Downtown South Service Providers meetings, as well Dusk to Dawn Service Provider Meetings. Outreach staff network regularly with the Vancouver Police Department ... ASU, DEYAS, Covenant House, PACE, the safe houses, Ministry of Children and Families, Greater Vancouver Mental Health ... etc. Furthermore, Outreach Workers provide drop-in and support to Dusk to Dawn Youth Resource Centre and Boys R Us. In the past year the Outreach Workers have significantly increased the amount of collaborative work done with other programs. ..."

In the result, outreach workers are "extremely aware" of the resources and able to assist youth accessing information and services. Outreach workers will occasionally "walk" youths to the service provider. Outreach workers are of critical importance in the continuum of services because the youth need support and information, and to establish trust relationships, prior to accessing mainstream services and have their needs met. In order to do that they must be able to use different approaches and "tools". This requires a certain skill level. From the standpoint of the Employer it is, therefore, important that they either have the theoretical and practical

foundation, or both. Generally, a diploma or a university degree (B.A.) in a related field is required. Ms. Mixon believes that Ms. Webb had a B.A. when she was hired and was working towards her master's degree. The outreach workers must have basic counselling skills, as well as knowledge of child and adolescent development.

Ms. Mixon testified that outreach workers are supposed to work three 10 hour days and one 5 hour day. This schedule is based on the preference of the outreach workers and the view that it would be more efficient and better from the standpoint of "burnout". The general expectation is that they work 35 hours per week. If they work in excess of those hours, the Employer's policy is that up to 40 hours per week, no pre-approval is required; over 40 hours, pre-approval is required. Hours worked up to 40 in a week accrues to the employees time bank. Over 40, where approved, the hours are paid or banked at time and one half. Ms. Mixon explained that the Employer's policy is to discourage employees from working in excess of 40 hours because it is not healthy to work such long hours and, if they are, to pay for such time.

In cross examination, Ms. Mixon did not agree that she did not have direct contact with the program. She maintained that she was in regular contact with the population of street involved youth. She agreed that the program was a high volume program. However, outreach cannot be viewed on it's own, but must be seen as a part of a larger system--the "bridging component". She did not, therefore, agree that the outreach workers did not provide a program of therapy. They are part of a program of services, if not the program itself.

In the fiscal year, covered by the annual report, referred to above, Youth Services had some 3000 "check-ins". It appears that a relatively small number was taken up by crisis intervention related to drugs or alcohol (54). Ms. Mixon agreed that the statistics does not contain any reference to disability. She agreed that a major component of the outreach workers' position was to ensure that basic needs were met. She explained that without those needs covered, youths would be unable to link up with the services successfully. She agreed that lack of resources and access to services were problems.

Ms. Mixon maintained that street youth were disabled because of their experiences. She did not agree that other marginalised groups such as gays, lesbians and native women would be considered disabled because of their experiences. In her view, if they could not participate in the mainstream society they would be considered disabled. She agreed that the definition of street involved youth in the report, referred to above, "You Have Heard This Before: Street-Involved Youth and the Service Gap" was accurate:

> "... as '... teenagers who have lost their family ties and social support systems, lack dependable sources of food and shelter, and have gravitated to the urban downtown as a last resort for survival and freedom...' and youth who have grown up in the urban downtown become involved in street life."

She also stated that the definition could be expanded. She agreed that the term disability does not occur in the job description for the outreach workers. She agreed that Family Services in the brochure describing youth services appeared to distinguish between disabled and street youth. However, as she explained, the brochure was prepared by the youth--in their language-- and reflected their perspectives, how they "identify themselves". Street youth do not identify themselves as disabled. She also agreed that there was not necessarily a diagnosis of individual

street youth as disabled. At the end of the day, she agreed that her impression of the target population was based on her experience. Ms. Mixon maintained that street youth are disabled to varying degrees. She explained that "youth wouldn't make the choice to live on the street"--they are not there by choice. They are there because they are unable to get off the street, they are disabled.

ARGUMENT

The Appellant starts from the premise that the exclusions ought to be given a narrow interpretation. The Appellant argues that an interpretation of the Act and Regulation that extends its protection to as many employees as possible is preferable to one that does not (*Shore v. Ladner Downs*, May 5, 1998, CA023187, BCCA). The minimum standards of the *Act* should be given a "fair, large and liberal" interpretation, while exclusions to those standards should be given a narrow construction to preserve the intent and purpose of the statute (*Awassis Home Society*, BCEST #D019/97, reconsideration denied BCEST #D155/97). Individuals should not be excluded unless there is clear and compelling evidence that the legislature intended to exclude. While the parties supplied a number of definitions of "disability" for the purposes of Section 34(1)(r) of the *Regulation*, the Appellant urges that I do not import definitions from other statutory regimes, which have different purposes, for example from the Human Rights arena, and adopt a restrictive approach. The phase "otherwise disabled" in Section 34(1)(r) should not be read so as to expand the meaning of "disability". The Employer is basically arguing for an open-ended meaning. The phrase "otherwise disabled" was included in recognition of disabilities "that are analogous to mental and physical causes, but may not be readily classified as such." "Disability" must be read in conjunction with the terms "therapy, treatment and rehabilitation" connoting a mental or physical condition. In the instant case, the key characteristics of the target population--"street youth"--incorporates two elements: youth and homelessness/poverty. The Appellant does not dispute that there are a variety of "secondary characteristics" affecting this group, such as post-traumatic stress disorder and substance abuse. The Appellant does not agree with the expert testimony of Dr. Whynot that the target population is "disabled" and say that her characterization is a departure from a conventional definition and is "exceedingly broad". Dr. Whynot's opinion is based principally on her own clinical experience, which does not provide a reliable basis for the inference that street youth are "disabled."

With respect to the second aspect of the appeal, the Appellant says that the *Awassis* case, above, suggests that the exclusion in Section 34(1)(r) only applies if the program of "therapy, treatment or rehabilitation" exists at the work place or as a part of its regular functions. The Appellant argues that her functions at Family Services were attending to basic needs, such as securing food, shelter and transportation. She did not spend much time with the clients. She agreed that drug misuse was prevalent among street youths, but that was not the focus of the program. Crisis intervention for suicide and mental health issues was rare. She played an occasional and limited role in case planning for the clients. Ms. Webb also states that Street Youth Services does not provide a program of "therapy, treatment or rehabilitation" rather it refers clients to others services.

The Respondent Employer seeks to uphold the Determination and says that the conclusion that Ms. Webb was excluded under Section 34(1)(r) is correct. Family Services does not disagree

that the exemptions ought to be given a narrow construction. On the other hand, the plain language adopted by the legislature ought to be given meaning. The Employer notes that the Appellant Employee has the onus of proving on a balance of probabilities that the Determination is wrong. The Employer relies on the expert testimony of Dr. Whynot who has "extensive professional and practical experience treating "street youth", both as a private physician and during many years as a Medical Health Officer." Dr. Whynot testified that the population "street youth" faces a number of medical problems which significantly affects the ability of street youth to function "normally" and they are impaired in their ability to access assistance and look after themselves. Ms. Mixon testified much to the same effect.

The Respondent refers to Section 34(1)(r) of the *Regulation*. The delegate was correct in determining that Ms. Webb assisted in a program of therapy, treatment and rehabilitation. The Respondent argues that "the primary objective of Ms. Webb's job was to identify street-involved youth and facilitate their treatment and rehabilitation through individual action plans." The outreach workers are the "first step" in treating street youth and is a fundamental part of the services provided by the Employer and other agencies in addressing other disabling conditions. In the result, the Employer says, Ms. Webb assisted in a "program of therapy, treatment or rehabilitation". The Employer also argues that she was a "counsellor, instructor, therapist or childcare worker". Ms. Webb did provide guidance to homeless, neglected children on personal, social and psychological problems and, as such was both a counsellor and a childcare worker. Essentially what the Employer says is that the undisputed evidence is that a statistically significant number of street youth suffer from "one or more disabling physical, mental and emotional conditions, including post-traumatic stress disorder" and that 50-60% are dependent on drugs and/or alcohol. By any definition, they are physically or mentally disabled.

In the alternative, street youth fall within "otherwise disabled". For that phrase to be given any meaning, it must be interpreted to describe forms of disability other than "physical" or "mental", including "homelessness, poverty, social marginalization, cultural isolation, and adherence to a destructive lifestyle." The Employer does not disagree that exclusions must be given a narrow construction, however, the *Regulation* must be interpreted in a manner that gives meaning to the words used by the legislature. The purpose of the language is to ensure the availability of assistance for disabled individuals. The plain words should not be read down as suggested by the Appellant: it ignores the word "otherwise" and cannot bear the restrictive interpretation urged by the Appellant.

The Appellant argues that she has met the burden of proving the Determination wrong. She says that the Respondent Employer did not present any "reliable evidence demonstrating the actual prevalence or severity of these conditions among street youth." The Appellant takes issue with what she says are the "weak" factual underpinnings of Dr. Whynot's evidence and says that it must be accorded little weight. A small proportion of street youth are legitimately classified as disabled according to conventional definitions of disability, due to physical injuries or disease, or mental health problems. The Appellant says that she does not have to call evidence specifically refuting Dr. Whynot's factual assertions, since those assertions are incapable of supporting the conclusion that street youth are disabled within the meaning of Section 34(1)(r). The broad definition supported by the Employer would include any marginalised group.

The Appellant disputes the characterization of the primary objective of her job. Her primary task was to identify street youth and help them with their immediate needs, though referral to other services. The characterization of the outreach workers being the "first step" in a continuum of coordinated services is theoretical, Ms. Webb was not involved in any ongoing program of therapy, treatment or rehabilitation.

ANALYSIS

1. General Principles

In previous cases, the Tribunal has determined that an appeal is not a *trial de novo* and that the appellant has the burden to prove that the Determination is wrong (*World Project Management Inc*., BCEST #D325/96). I agree with those principles.

I now turn to the issues presented in this appeal. It is not in issue that the Employer is a charity. As well, it is not in issue that Ms. Webb was employed as a counsellor or childcare worker. In other words, the issues between the parties boils down to, first, whether street youth are "disabled"--"physically, mentally or otherwise", and, second, whether Ms. Webb was employed to assist in a "program of therapy, treatment or rehabilitation".

I set out the relevant sections of the *Act* and *Regulation*.

The purposes of the *Act* are set out in Section 2:

> 2. The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communications between employees and employers;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.

The scope of the *Act* is set out in Section 3:

> 3. This Act applies to all employees, other than those excluded by regulation, regardless of the number of hours worked.

For ease of reference I set out Section 34 of the *Regulation* which provides, *inter alia*:

> 34. (1) Part 4 of the Act does not apply to any of the following:
>
> (r) any of the following who are employed by a charity to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons:
>
> (i) a counsellor;
>
> (ii) an instructor;
>
> (iii) a therapist;
>
> (iv) a child care worker;

Part 4 of the *Act* deals with hours of work and overtime.

I start my analysis of the exclusion from the hours of work and overtime provisions under *Regulation* 34(1)(r) from the following propositions: First, an interpretation of the *Act* and *Regulation* that extends the protection is preferable to one that does not. It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and, accordingly, an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Second, I agree with the principles enunciated in *Awassis Home Society*, BCEST #D019/97, upheld on reconsideration in BCEST #D155/97. In other words, exceptions to the minimum requirements, such as Section 34 of the *Regulation*, "must be interpreted in the most narrow manner in order to preserve the intent and purposes of the *Act*." In the reconsideration decision, the Adjudicator specifically agreed with those principles. In any event, there is dispute between the parties with respect to these basic principles.

The parties referred me to the *Awassis* decision. In that decision, the Adjudicator concluded that a residential home for (primarily) native youth was not covered by Section 34(1)(r) of the *Regulation*. The key passage in the decision, for the present purposes, is the following:

> "Para. 86 The evidence of Laboucane was that the board of AHS had determined that of the purposes of the Society was the care and healing of families through the use of traditional First Nations culturally-specific activities. This stated intent of the board however was not carried out at the facility except on an infrequent and intermittent basis. The evidence was that the board was aware that the staff at the facility were not utilizing the traditional First Nations culturally-specific activities on any regular or consistent basis and, in fact, there was no evidence that the board took any step to correct this matter. I am not persuaded that the performance of traditional First Nations culturally-specific activities on an intermittent basis can be considered a "program of therapy, treatment or

> rehabilitation". Furthermore, there was no evidence provided that there was in existence at the AHS facility during all relevant times, any program of therapy, treatment or rehabilitation for employees to "assist". The absence of any such program clearly removes this work place from the exclusion contemplated by Section 34 of the regulation."

Although not expressly dealt with in the analysis portion of the decision, there was some evidence before the Adjudicator that the children were, at least by the employer, considered to be "disabled":

> "Para. 22 Laboucane stated that she had reviewed the files of AHS and those files revealed that while there were some children who would be considered physically or mentally disabled, the majority of the children were, in her view, otherwise disabled. Laboucane stated that a number of the chldren had been diagnosed with Fetal Alcohol Syndrome ("FAS") or Fetal Alcohol Effect ("FAE"), both of which require special treatment. Laboucane stated a great number of the children placed in the home and their parents were personally known to her."

2. Disability--Mental, Physical or Otherwise

It is clear that the parties are coming to the "disability" issue from two different perspectives. The Appellant describes street youth as primarily homeless and poor. The Respondent says that statistically, street youth have a high degree of incidence of disabling conditions.

Dr. Whynot testified for the Employer. Her evidence may be summarized as set out in her letter, referred to earlier:

> "This program targets street youth. It has been well established in studies and recognized in policies of various provincial ministries that this is a group with special problems resulting both in significant risk and an inability to make use of main stream services. I believe this population can reasonably be classified as "disabled" on the basis of a variety of predisposing and chronic factors, including post-traumatic stress disorders (secondary to physical and sexual abuse), substance abuse, chronic infectious diseases such as HIV and Hepatitis, and emotional and psychiatric symptoms."

I am prepared to accept Dr. Whynot's testimony. Based on her experience, Dr. Whynot says that "the population of street youth have a very high prevalence of problems with a degree of disability" that is "statistically significant." The Employer does not agree with the Appellant's characterization that Dr. Whynot's opinions are "controversial" or "not commonly accepted" and notes that the Appellant did not offer any expert evidence to contradict Dr. Whynot's testimony. Moreover, her evidence about the characteristics of street youth was not contradicted by any evidence. I agree that the Appellant is not required to call expert testimony. However, she has the onus of proving the Determination wrong and, in my view, she did not in any meaningful sense contradict the evidence brought out by the Employer. Given her experience with the target group, I would have expected that she would have been in a position to question whether or not a "majority" of street youth, as stated in the Determination, are afflicted by the conditions suggested by the Employer. While I appreciate the Appellant's position--that she does not agree

with Dr. Whynot's conclusions and factual assertions--I also do not agree that Dr. Whynot's evidence was controversial. In any event, if the Appellant had wanted to go behind her opinion, She could have requested disclosure and production of documents pertaining thereto.

Whynot's testimony was that the population "street youth" faces a number of medical problems and a significant presence of:

- HIV/AIDS and hepatitis (10-30%);
- drug and alcohol abuse and addiction (60%);
- fetal alcohol syndrome;
- post-traumatic stress disorder (80-85%);
- mental health issues;
- personality disorders; and
- learning disabilities.

Dr. Whynot's testimony that "she didn't see many fully functioning kids among street kids" is telling. As argued by the Employer, this evidence was not contradicted by any other evidence, including that of the Appellant, Ms. Webb. As I indicated immediately above, I am concerned that Ms. Webb on cross examination appeared reluctant to share her knowledge of the medical conditions facing street youth. While Ms. Webb's counsel in his reply notes that she "candidly acknowledged that generally she was not in a position to diagnose particular clients, or to obtain information about diagnoses that might have been made", I expected more from her, given her experience. I am cognizant of the fact that the Employer's evidence speaks to the population in a statistical sense. It means that the target population as a whole has the characteristics. It does not mean, obviously, that each street youth is disabled in the sense that he or she is affected by any one or more of these conditions. The Employer's evidence recognized this. Street youth do not identify themselves as disabled. Ms. Mixon agreed that there was not necessarily a diagnosis of individual street youth as disabled. However, she maintained that street youth are disabled to varying degrees. She explained that "youth wouldn't make the choice to live on the street"--they are not there by choice but because they are unable to get off the street. It is clear to me that the Employer's concern is not simply the fact that youth are living on the street but that they suffer from the conditions discussed. All in all, Ms. Mixon's testimony with respect to the population of street youth is very much in line with Dr. Whynot's. In my view, the evidence supports a finding that the target population of street youth is affected in varying degrees by the conditions described above.

The parties have provided me with a variety of definitions. From those definitions, it is clear to me that word "disability" is capable of a number of interpretations. There may well be, as argued by the Appellant, a broader and a more narrow interpretation. I agree that "[a]ny doubt arising from difficulties of language should be resolved in favour of the claimant" (*Rizzo & Rizzo, above*, para. 36).

The *Canadian Oxford Dictionary* (1998) defines "disability":

> "**1 a** a physical or mental handicap, either congenital or caused by injury, disease etc. **b** the condition of having such a handicap. **2** a lack of some asset, quality or

> attribute that prevent one's doing something. **3** incapacity created or recognized by law"

A publication titled Disability Lens contains several definitions:

> "The Disability Lens accepts, but is not limited to, the World Health Organization's (WHO) definition of **disability**, which defines disability as "the loss or reduction of functional ability and activity that is consequent upon impairment", and **impairment** as "any disturbance of or interference with the normal structure and functioning of the body, including the systems of the mental function" ....A **handicap** is an environmental or attitudinal barrier that limits the opportunity for a person to participate fully."

From a decision of the B.C. Human Rights Council, *Dhaliwal v. Westcoast Cellufibre Ltd.*, [1995] B.C.C.H.R.D. No. 16, the following definition is offered for my consideration:

> "Para. 25 The Human Rights Council has consistently taken a broad approach when interpreting the meaning of disability. In *Boyce v. The Corporation of the City of New Westminster* (1994), unreported (B.C.C.H.R.) My colleague, Judith Williamson, summarized the law as follows:
>
> > 'The protected ground of physical or mental disability is not defined in the Act. In B.C. its scope has tended to be an "open question to be determined on the facts and circumstances of each case": .... The concept of physical disability, for human rights purposes, generally indicates a physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life: ...'"

In the Disability Program Act, a

> "person with disability" means a person who at the time this section comes into force was a handicapped person under the *Guaranteed Available Income for Need Act* or a person
>
> (a) who is 18 years of age or older,
> (b) who, as a direct result of severe mental or physical impairment,
> > (i) requires extensive assistance or supervision in order to perform daily living tasks within a reasonable time, or
> > (ii)requires unusual and continuous monthly expenditures for transportation or for special diets or for other unusual but essential and continuous needs, and
>
> (c) who has confirmation from a medical practitioner that the impairment referred to in paragraph (b) exists and
> > (i) is likely to continue to exist for at least 2 years, or
> > (ii) is likely to continue for at least one year and is likely to recur."

I have considered those definitions. I agree that the definition adopted in the Human Rights arena, while developed for a different statutory purpose, is instructive, at least with respect to physical disability. I do not find the definition set out in the *Disability Program Act* helpful. In my view, it is too restrictive. The *Regulation* in question does not, for example, speak to a "severe" impairment which requires "extensive assistance" and "confirmation from a medical practitioner". Section 34(1)(r) simply speaks to "physically, mentally or otherwise disabled". To adopt such a definition would import requirements into the *Regulation* which the legislature could have provided for had it so desired. Though not clearly articulated, it seems to me that the appellant is really arguing that each individual in the target group must meet the disability criteria. In my opinion, that is not required. In my view, it is sufficient if the group as a whole possesses the characteristics to bring it into the exemption. The World Health Organization's (WHO) definition of **disability**, defines disability as "the loss or reduction of functional ability and activity that is consequent upon impairment", and **impairment** as "any disturbance of or interference with the normal structure and functioning of the body, including the systems of the mental function" I find the WHO definitions helpful.

The Appellant argues that I ought to adopt a restrictive approach. In order that a person is disabled the following must be present:

a) the genesis of the disability is organic or unique to an individual, rather than social in nature, and usually derives from injury or disease;

b) the disability results in severe impairment of most aspects of daily functioning;

c) the disability is subject to medical diagnosis and confirmation;

d) the disability is relatively permanent; and

e) the disability is involuntary, in the sense that it is beyond the control of the individual to eliminate it.

This interpretation, says the Appellant, is supported by the words "therapy, treatment or rehabilitation" which, "connotes a mental or physical condition." I do not agree. The words "therapy, treatment or rehabilitation" are not restricted in that sense. I am guided by the definitions provided in the Canadian Oxford Dictionary in that regard:

> "**therapy 1** the treatment of physical or mental disorders, other than by surgery. **2** a particular type of such treatment"
>
> **treatment 1** a process or manner of behaving towards or dealing with a person or thing. **2** the application of medical care or attention to a patient ...
>
> **rehabilitate 1 a** restore (a person) to effectiveness or normal life by training etc., esp. after imprisonment, injury or illness **b** heal (an injury etc.) ..."

In my opinion, the definition proposed by the Appellant is too restrictive. For example, there is no requirement in the *Regulation* at issue that the impairment be "severe". On the other hand, the impairment must go beyond the trivial. While I agree that "disability" must be given a

narrow construction, in accordance with the authorities, the conditions faced by a majority of street youth are not trivial and would, in my opinion, be captured by the plain--and restrictive--meaning of "disability" as "a physical or mental handicap, either congenital or caused by injury, disease etc.". The conditions, such as, HIV/Aids and hepatitis (10-30%), drug and alcohol abuse and addiction (60%), fetal alcohol syndrome, post-traumatic stress disorder (80-85%), personality disorders and learning disabilities, would on their own meet the plain and restrictive definition of "disability".

Given the evidence, particularly Dr. Whynot's testimony regarding the high incidence of PTS, substance abuse, HIV/AIDS and hepatitis, fetal alcohol syndrome, and mental health problems, I am inclined to accept the Employer's argument that the target group can reasonably be characterized as physically or mentally disabled. The services and programs offered by the Employer caters to those needs. In my opinion, it is sufficient that a substantial majority of the target group--or a statistically significant portion of the group--is afflicted by one or more of the disabling conditions to characterize the group as disabled for the purposes of the *Regulation*. Whether that is the case is a matter of evidence in each particular case. I also add that whether the exemptions applies depends, as well, on whether other parts of the test is met, *i.e*. whether the persons are employed to "assist .. in a program ..." in certain capacities.

Ms. Webb argues that I ought not to adopt an expansive interpretation of the term "otherwise disabled". The appellant argues that the term was included to recognize "those disabilities that are analogous to mental and physical causes, but may not be readily classified as such." However, I have to give meaning to the language adopted in the *Regulation*. That does not mean that I accept the Employer's argument that "homelessness, poverty, social marginalization, cultural isolation and adherence to a destructive lifestyle" falls within "otherwise disabled". In my view, such a definition expands "otherwise disabled" to an untenable degree and would not be in keeping with the principles enunciated by the Supreme Court of Canada. I agree with the general tenant of the Employer's argument that Section 34(1)(r) was drafted to "incorporate a broad, not narrow, definition of disability." However, that definition must be given the most narrow construction. There must be some connection to disability in a conventional sense. Were it otherwise, the word "disability" would not be given any meaning. In any event, I agree that street youth as a group could be considered "otherwise disabled" based on the evidence before me.

In my opinion, the evidence supports a conclusion that the target group of street involved youth can be considered disabled, "mentally, physically or otherwise". In other words, I am inclined to reject Ms. Webb's argument on this point.

3. Program of Therapy, Treatment or Rehabilitation

The appellant Ms. Webb relies heavily on the *Awassis* case, above. While I accept that a major part of Ms. Webb's job was to ensure that basic needs were met--and on my recollection of the evidence that was not in dispute--I do not accept her characterization of the evidence.

In my view, the evidence supports the conclusion reached by the delegate, namely that Ms. Webb assisted in a program of therapy, treatment or rehabilitation. I have referred to definitions of those words above and do not intend to repeat them. In my view, the Legislature intended that the excluded activities be defined to include medical treatment and "restoring" a person to

normal life by training. Certainly, as described above, the work performed by Family Services and other service providers include such programs and services.

I find that the primary objective of her employment was to identify street involved youth and facilitate their treatment and rehabilitation. In my view, the outreach workers functioned as a "first step" or "front end" of the programs provided by Family Services for street youth. I accept that there was not a great deal of individual counselling given the volume and time constraints on the outreach workers. However, they performed a significant function in the package of programs and services offered by the Employer and other service providers. Cheryl Mixon, the Employer's associate director of youth services, explained that the Employer has a number of programs designed to assist youth, including parenting support, support programs for street youth with respect to addiction, sexual abuse and exploitation, HIV etc., outreach and drop-in services. Outreach workers must have basic counselling and intervention skills and knowledge of adolescent development. Mixon testified that the Appellant was responsible for establishing a trusting, non-exploitive rapport with street youth, identifying and assessing street youth, developing a case plan for one-to-one group counselling, advocating and referring youth to community services, educating youth in areas of safe health practices, life skills, conflict resolution and available community resources, and educating with respect to IV drug use and prostitution. Outreach workers regularly interact with other program workers. Unlike the situation in the *Awassis* case, *above*, where the activities were offered only on an "intermittent basis", the services and programs offered by the Employer in the instant case are offered on a "regular or consistent" basis. The Employer offers an array of programs to assist street youth.

Moreover, I note that the *Regulation* specifically uses the words "to assist". In other words, it is not required that the employees in question perform the services themselves. It is sufficient if they fall within the specific classifications set out in the *Regulation*.

ORDER

Pursuant to Section 115 of the Act, I order that Determinations in this matter, dated October 1, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal