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-

Urban Native Indian Education Society
("UNIES" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/250
DATE OF HEARING:	July 14th, 1999
DIRECTOR'S WRITTEN SUBMISSION RECEIVED:	July 15th, 1999
EMPLOYER'S REPLY RECEIVED:	July 16th, 1999
DATE OF DECISION:	August 24th, 1999

DECISION

APPEARANCES

Roger McAfee	Agent for Urban Native Indian Education Society
Marcia B. Krawll	on her own behalf
Raymond LaPerrière	on his own behalf
Dave MacKinnon, I.R.O.	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Urban Native Indian Education Society ("UNIES" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 1st, 1999 under file number ER 1330 (the "Determination").

The Director's delegate determined that UNIES owed its former employees, Marcia B. Krawll ("Krawll") and Raymond LaPerrière ("LaPerrière"), the sums of, respectively, $17,795.57 and $8,273.13, on account of unpaid wages and interest. Further, by way of the Determination, the Director also levied a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Regulation.*

UNIES's appeal was heard on July 14th, 1999 at the Tribunal's offices in Vancouver, however, because the employer failed to deliver the appropriate notices required by section 8(2) of the B.C. *Constitutional Question Act*, the employer's argument that the employer is not subject to the *Act* by reason of its status as "an aboriginal organization controlled from an Indian Reservation" (see "Issues to be Decided", below) was adjourned pending the delivery of the appropriate notices.

Thus, the July 14th appeal hearing only addressed the employer's first and third grounds of appeal (see below).

I advised the parties on July 14th that, should it prove necessary to do so, the "constitutional issue" will be addressed after receipt of the parties' (including the provincial and federal attorneys-general should they wish to make submissions) written submissions.

ISSUES TO BE DECIDED

UNIES's appeal is based on three principal grounds, set out in its "Amended Appeal" filed with the Tribunal on April 29th, 1999. The employer alleges that the Director's delegate erred by:

> i) "making the Determination taking into account documentary evidence without giving UNIES an opportunity to makes [sic] submissions thereon, contrary to the laws of natural justice and fairness";
>
> ii) "making a Determination, despite the fact that UNIES is an aboriginal organization controlled from an Indian Reservation, and, as such, is not subject to the Provincial Employment Standards Legislation"; and
>
> iii) "making a determination without taking into account the fact that instructors are exempt from the overtime and hours of work provision of the Employment Standards legislation."

As noted earlier, a decision with respect to the employer's second ground has been deferred; these reasons address only the employer's first and third grounds of appeal.

FACTS AND ANALYSIS

Reasonable Opportunity to Respond

Section 77 of the *Act* states that "If an investigation [of a complaint] is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond". The employer says that the Determination ought to be cancelled because the Director's delegate failed to afford the employer the "reasonable opportunity to respond" to which it was entitled. After hearing the employer's submission on this particular point, I dismissed this ground at the appeal hearing. My reasons for so doing are now briefly set out below.

The Determination is a lengthy document, running some 30 pages; in addition, some 58 separately numbered documents were appended to the Determination as "attachments"--these latter documents comprise a few hundred pages. As detailed in his June 10th, 1999 submission to the Tribunal, Mr. McAfee says that the delegate, during her investigation, neglected to provide six documents to the employer (all other documents were apparently disclosed)--documents that are referred to in the Determination--and that this failure to allow the employer to make submissions with respect to these documents resulted in the employer not being given a reasonable opportunity to respond.

I start with the proposition that, in my view, section 77 does not, nor was it intended to, create a "discovery" obligation such as that found in the B.C. Supreme Court Rules whereby documents are presumptively inadmissible--and therefore cannot be relied on by a party--in the absence of prior disclosure. On the other hand, where the documents in question are key documents, *i.e.*, documents that seemingly have significant probative value insofar as the complaint is concerned, such documents (or at least a summary of their contents) ought to be disclosed prior to the issuance of a determination so that the person under investigation may respond to the documents if they wish.

With the foregoing in mind, I cannot find that the failure to disclose the six documents in question in any fashion prejudiced the employer's statutory right to respond. One of the documents--"attachment 46"--being a "fax cover sheet" for document 47 (which was disclosed) can hardly be characterized as an important document. The other documents allegedly not disclosed prior to the issuance of the Determination all relate to the question of whether or not the complainants were

"managers" as defined in section 1 of the *Regulation* and thus not entitled to claim overtime pay. Inasmuch as the employer now concedes--and quite rightly--that the two complainants were not managers, I do not consider that the failure to disclose certain correspondence relating to this issue to now be of any particular moment.

In sum, I am entirely satisfied that the employer was afforded a fair and full opportunity to respond in accordance with the provisions of section 77 of the *Act.*

Are the complainants "Instructors" as defined by section 34(u) of the Regulation?

Pursuant to section 34 of the *Regulation,* employees in certain occupations are excluded from the provisions of Part 4 of the *Act, i.e.,* the "Hours of Work and Overtime" provisions. Included in the list of excluded occupations is section 34(u): "an instructor, counsellor, librarian or administrator who is employed by an institution as defined in the *College and Institute Act* or by the British Columbia Institute of Technology".

Although UNIES concedes that the complainants were not employed directly by a college, university college or a provincial institute as defined in section 1 of the *College and Institute Act*, or by the British Columbia Institute of Technology, UNIES says that by reason of its contractual relationship with Vancouver Community College ("VCC"), the complainants are nonetheless not entitled to the benefit of Part 4 of the *Act.*

Krawll was employed by UNIES from December 1st, 1995 until her employment ended in early November 1996. LaPerrière's employment with UNIES spanned the period from mid-January to late November 1996. The testimony of both complainants disclosed that each undertook what might be fairly characterized as "instructional" and "administrative" duties while employed by UNIES.

Krawll's evidence was that she spent about 25% of her time instructing in what was called the "Native Youth Worker Training Program", an outreach program whereby young adults were trained to work with predominantly, if not exclusively, native youth who found themselves "on the street"; her instructional duties focused on training youth workers in basic counselling skills. The balance of her time was spent in administrative duties relating to the program such as arranging for guest speakers, coordinating the other other instructors' schedules and their evaluations, and students' "practicums".

LaPerrière worked in UNIES's Native Alcohol and Drug Counsellor Program--his main function was to help train adult aboriginals to become drug and alcohol counsellors. LaPerrière was one of several instructors and, in addition, he had quite a number of administrative duties regarding the delivery of the 1-year program.

While VCC is a "college" as defined by the *College and Institute Act,* UNIES is not. Both Krawll's and LaPerrière's uncontradicted testimony before me was to the effect that neither was aware of the relationship between UNIES and VCC until the matter was raised by Mr. McAfee at the appeal hearing on July 14th, 1999. I do have in evidence before me two agreements between the "Native Education Centre" (which I understand falls under the the auspices of UNIES) and VCC for the years 1995-96 and 1998-99. Pursuant to these two agreements--which are essentially identical save for the funding amounts--VCC funnelled monies to the Native Education Centre to

be used to deliver certain specified programs. VCC was to provide approximately $1.1 million dollars to the Native Education Centre in each year of the agreements. The agreements appear to anticipate that, in some instances, students will receive VCC course credit for programs completed through the Native Education Centre. It is not clear, from the evidence before me, whether or not the programs in which the complainants were involved were funded under the agreements with VCC, but for the purposes of this appeal I will assume that to be the case.

As noted above, I am of the view that both complainants might be fairly characterized as having been employed as "instructors" and/or "administrators" with UNIES. However, and this is the crux of the matter, were they *"employed by* an institution as defined in the *College and Institute Act* or by the British Columbia Institute of Technology" to use the specific language of section 34(u) of the *Regulation?* In my view, neither Krawll nor LaPerrière were so employed.

It must be remembered that the effect of section 34 of the *Regulation* is to exclude employees in certain occupations from the minimum statutory entitlements, such as overtime pay, provided for in Part 4 of the *Act.* While the provisions of the *Act* should be given a "large and liberal interpretation" [see *Machtinger v. HOJ Industries* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands Agency Ltd. v. British Columbia* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.)], in my view, regulatory provisions that have the effect of excluding employees from some or all of the *Act's* provisions ought to be interpreted narrowly. As Iacobucci, J. observed in *Machtinger* (at page 507): "...an interpretation of the Act which encourages employers to comply with the minimum provisions of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not." Thus, by extension, regulatory exclusions ought to be narrowly construed so as to ensure that "as many employees as possible" receive at least the minimum statutory entitlements set out in the *Act.*

It is clear that both complainants were "employed by" UNIES and not by VCC. Indeed, UNIES has never denied that it was their employer. Both complainants were hired by, paid by, were directed and supervised by, and, ultimately, terminated by UNIES and not by VCC. It was UNIES who issued records of employment (showing UNIES to be the employer) to the complainants when their employment was terminated. As noted above, neither complainant was even aware of the funding agreements between VCC and UNIES during their employment. VCC never purported to act as the "employer" of either complainant and, in my view, the simple fact that VCC may have funded certain programs delivered by UNIES does not, of itself, in turn constitute VCC to be the employer (or co-employer) of those UNIES employees who are involved in the delivery of those programs. Taken to its logical--and I would submit, absurd--conclusion, any lender (for example, a bank that provided operating funds to an employer) would, by reason of that fact alone, become an employer vis-à-vis the borrower's workforce.

Accordingly, I am of the view that neither Krawll nor LaPerrière was disentitled from claiming overtime pay by reason of section 34(u) of the *Regulation.*

Other Issues

Mr. McAfee, in his submission dated July 16th, 1999 and previously at the appeal hearing confirmed his position that, assuming the two complainants were entitled to claim overtime pay, the delegate correctly determined their respective overtime pay entitlements.

I have now found that the complainants were not excluded from the Hours of Work and Overtime provisions of the *Act* (*i.e.,* Part 4) by virtue of section 34(u) of the *Regulation.* However, the employer asserts that the complainants are nonetheless "estopped" from claiming overtime because:

> "They both took jobs, entered into an employee/employer relationship, took the employer's money, never raised any issue of overtime payment until after they had ceased to be employed...". (UNIES's June 10th, 1999 submission at page 2)

I do not see that the doctrine of promissory estoppel has any application whatsoever in this case. There certainly never was a representation by either complainant to the employer that they would not be compensated for their overtime hours. Indeed, the evidence before me is that the parties arranged between themselves for some sort of "time off in lieu of hours worked" arrangement, albeit one that did not comply with the "time bank" provisions of section 42 of the *Act.*

In my view, the employer cannot rely on an unlawful payment of overtime scheme in order to avoid paying employees overtime in accordance with the provisions of Part 4 of the *Act.* The time off in lieu policy is, at its core, an undisguised attempt to contract out of the *Act,* something prohibited by section 4 of the *Act* which states that the provisions of the Act are minimum requirements and cannot be waived by agreement.

I have now addressed (and rejected) all of the arguments raised by the employer in its appeal, save the constitutional issue.

The Constitutional Issue

As noted above, when the the appeal hearing was convened on July 14th, 1999 the employer had not delivered the requisite notices mandated by section 8 of the *Constitutional Question Act.* On July 14th, I ordered the employer's agent, Mr. McAfee, to deliver the appropriate notices to the provincial and federal attorneys-general. Further, the Tribunal has now also delivered such notices.

At the appeal hearing on July 14th, all parties agreed that the constitutional issue could appropriately be dealt with on the basis of written submissions.

ORDER

Accordingly, if the employer wishes to pursue its second ground of appeal it is hereby directed to deliver **six copies** of its full submission with respect to this ground to the Tribunal **by no later than 4:00 P.M. on Friday, September 10th, 1999.** In the event the employer does not deliver its submission on the constitutional issue as directed herein, this ground of appeal will be dismissed as abandoned.

The Tribunal will, in turn, deliver the employer's submission on the constitutional issue to the respondent employees as well as to the Director and the provincial and federal Attorneys-General and make will further directions regarding the delivery of the such parties' reply submissions.

Once all of the parties' submissions are in hand, I will issue a written decision on the constitutional issue.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal