BRITISH COLUMBIA

Employment Standards Tribunal
#504, 815 Hornby Street
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November 6, 1996 **BC EST No. D318/96**

To Interested Parties

Dear Sirs/Mesdames:

Re: **Employment Standards Act - Part 12 Section 109(1)(a)**
The Council of Trade Unions on BC Rail
Application for repeal of an exclusion under Section 34(1)(o) of the *Employment Standards Regulation*
Tribunal Exclusion File Number: E009/96

DECISION

This decision addresses the question of whether and to what extent the Director of Employment Standards ("the Director") may participate in the process being utilized by the Tribunal to develop recommendations to Cabinet under Section 109(1)(a) of the *Employment Standards Act*, S.B.C. 1995, c. 38 ("the *Act*").

The larger matter within which this decision arises is an application filed with the Tribunal on July 3, 1996 by the Council of Trade Unions on BC Rail ("Council of Trade Unions"), requesting the Tribunal to recommend to the Lieutenant Governor in Council that Section 34(1)(o) of the *Employment Standards Regulation* ("the *Regulation*") be repealed. The *Regulation* excludes listed categories of BC Rail Employees from Part 4 of the *Act*, which deals with hours of work and overtime.

Upon receipt of the Council of Trade Unions application, the Registrar invited the Director to make submissions on the Council of Trade Unions submission. The Director responded by letter dated August 9, 1996. That letter prompted a response, dated September 4, 1996 from counsel for BC Rail taking objection to the Director's participation in this matter. It is that objection to the Director's participation which is the subject of this decision.

On September 16, 1996 the Registrar wrote to the Director, the Council of Trade Unions and BC Rail and requested submissions on the following questions:

> "a) should the Director be granted standing to make submissions in a Section 109 proceeding?; and
> b) if so, should there be any limitations placed on the Director's participation?"

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Counsel for the Director filed a submission dated September 27, 1996 on behalf of the Director. Counsel for the Council of Trade Unions filed a submission dated October 15, 1996. Counsel for BC Rail filed submissions dated October 15, 1996 and October 23, 1996 in reply. Along with BC Rail's original letter of objection dated September 4, 1996, I have reviewed and considered each of these submissions at length.

The Nature of the Tribunal's Function under Section 109(1)(a)

The Tribunal cannot properly consider and resolve the issues raised by the submissions that have been filed without first articulating a clear understanding of the statutory function it is performing in this matter. That function is described in Section 109(1)(a) of the *Act*, which provides that the Tribunal, in addition to its powers under section 108 and Part 13, may:

> *(a) make recommendations to the Lieutenant Governor in Council about the exclusion of classes of persons from all or part of this Act or the Regulation...*

Section 109(1)(a) has a number of unique features. The first is its very existence. As is well known, the Lieutenant Governor in Council conducts its deliberations in private and, in deciding whether to enact, modify, or repeal regulations, it is entitled to take advice and receive "recommendations" from whomever it pleases: *Attorney General of Canada v. Inuit Tapirisat*, [1980] 2 S.C.R. 735. Government departments will almost always have input into Cabinet decision-making, particularly in respect of changes to existing regulations. Cabinet could not be prevented from seeking policy advice from the Government department with the greatest experience and knowledge in the relevant program area. It is certainly reasonable to expect that in the ordinary policy-making process, the Employment Standards Branch would participate in the formulation of advice and making recommendations to Cabinet about changes to the *Employment Standards Regulation*. Typically, policy advice to Cabinet is confidential.

Cabinet's prerogative to take policy advice as it pleases is not ousted by Section 109(1)(a). However, the specific creation of an independent tribunal to make recommendations "about the exclusion of classes of persons from the *Act*" strongly suggests the Legislature's recognition of the sensitivity of these sorts of issues and the intent that Cabinet should have the benefit of an external and independent source of advice which is based on a thoroughly principled inquiry and assessment of the advantages and disadvantages of excluding classes of persons from all or part of the *Act* or *Regulation*. Of course, Cabinet is in no way bound to carry out the Tribunal's recommendations.

The second unique feature of Section 109(1)(a) is that it confers on the Tribunal the power of making a recommendation, rather than rendering a final decision. Recommendatory bodies are generally afforded a great deal of flexibility in how they wish to conduct their processes. The general proposition that tribunals are "masters of their own procedures" applies with even greater force to recommendatory bodies.

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The third unique feature of Section 109(1)(a) is that the *subject matter* of the section essentially involves the giving of policy advice with regard to exclusions. Flexibility and inclusion are important components in the development of sound policy advice. In sharp contrast to the other functions of the Tribunal, which involve adjudicating appeals from decisions of the Director based on existing law (Part 13 of the *Act*), this function essentially invokes a law reform role with regard to the exclusion of classes of persons from all or part of the *Act*. The exercise of this function may require obtaining a thorough knowledge of widely disparate industries, and may give rise to a number of outcomes, including recommendations that an existing exclusion be removed, that an existing exclusion be retained, or that a new exclusion be added. In some circumstances, the recommendation made could, if accepted, have structural implications for an industry or class of persons.

The Role of the Director in view of the Tribunal's Section 109(1)(a) function

What issues arise from BC Rail's submission that the Director has no role to play in a section 109(1)(a) proceeding?

The first which arises is BC Rail's assertion that, at law, the Tribunal would somehow be "biased" if it were to allow the Director to make a submission in respect of the Union's application. The assertion that the Tribunal and the Director are part of the same "Branch" reflects, with respect, a failure to appreciate the independent decision-making and recommendatory role assigned to the Tribunal by the Legislature. The Tribunal is established by Part 12 of the *Act*. Like other independent administrative agencies, such as the Labour Relations Board, the Human Rights Council, the Securities Commission and the Arbitration Review Panel (to name a few), the Employment Standards Tribunal has been intentionally established outside the lines of any ministry for which a minister of the Crown can dictate policy or be held accountable.

While the Tribunal, like all the agencies just listed, necessarily relies on government in relation to budgets and resources, it is strictly independent in the exercise of its substantive statutory functions. This means that it would be totally improper for a minister to direct what policy or decision the Tribunal can take in a matter coming before it and, in turn, no minister is politically accountable for individual decisions or recommendations of the Tribunal. The Tribunal is directly accountable to the Legislature alone. The rationale for this independence lies in the need for an agency outside government that is able to provide a meaningful, specialized and efficient alternative to the courts to resolve with some finality disputes by employers or employees with decisions of the Director. The independence of the Tribunal having been established, the Legislature has sought to rely on this independence by assigning the Tribunal a recommendatory function to Cabinet in the sensitive area discussed herein.

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This understanding of the relationship between the Tribunal and Director must be brought to any analysis of cases such as *MacBain v. Canadian Human Rights Commission* (1985), 22 D.L.R. (4th) 119 (F.C.A.), which deal with reasonable apprehension of bias. Even assuming that the Tribunal is subject to the common law principles regarding bias in the exercise of its Section 109(1)(a) function, the facts of *MacBain* are fundamentally different from those present here. In *MacBain*, the tribunal appointed to hear the human rights complaint was appointed by the very agency that investigated the complaint, found it to be substantiated, and that was prosecuting the case. In the words of the Court at p. 128:

> "After considering a case and deciding that the complaint has been substantiated, the "prosecutor" picks the Tribunal which will hear the case".

In contrast, the Director has not appointed the Tribunal, she has not exercised any statutory power of decision and the matter itself does not involve a prosecution, but a question of policy.

There being no common law constraint upon the Tribunal in allowing the Director to participate in this matter, does the "silence of the statute" imply, as the *BC Rail* submits, that the Director was not intended to play any role in the development by the Tribunal of recommendations under Section 109(1)(a)?

The statute's silence - a silence which, it should be noted, applies equally to the employer and the union - must be considered in light of the common law reality that tribunals are masters of their own procedure: *Re American Airlines Inc. v. Competition Tribunal*, [1989] 1 S.C.R. 236; *Board of Education of the Indian Head School District v. Knight*, [1990] 1 S.C.R. 653. A tribunal may, subject only to the constraints of procedural fairness, hear from whatever persons it considers necessary in order to carry out its functions. This proposition applies with even greater force when the Tribunal is engaged in developing policy recommendations with a view to a possible legislative change by the Cabinet. Neither the common law, nor the nature of the function conferred, supports the contention that the Tribunal is prohibited from hearing from the Director in developing recommendations under Section 109(1)(a). This does not of course mean that the Director has a right to participate. In this regard, I have concluded that the law of standing, which concerns itself with identifying relevant "interests" in judicial and quasi-judicial proceedings, is of limited assistance in the present inquiry which is informal, recommendatory and policy oriented. This is not a question about the "right" of the Director to participate; it is about the Tribunal's own policy decision as to the utility in allowing such participation, and of any constraints that the Tribunal may wish the Director to abide by if she chooses to participate.

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The pertinent issue, upon which all the parties' submissions have touched, relates to the actual substantive assistance made available to the Tribunal by allowing the Director's participation given the task conferred by Section 109(1)(a). Because the present decision may be seen as providing guidance for practice in future applications it is relevant to consider in general any experience, expertise and resources that the Director may have that can assist the Tribunal. BC Rail, argues that "the Director is not in a position to make a useful contribution outside of that already submitted to the Tribunal by BC Rail and the Council" (October 15, 1996 submission, p. 4). On the other hand, the Director has emphasized (at p. 6) her knowledge and experience both in the administration of the *Act* and in respect of policy development:

> Generally, it is employers who make the exclusion applications and these employers likely do not have an interest in the broader issues or repercussions associated with general exclusions from the *Employment Standards Act*.
>
> Likewise, even if affected employees are notified and make submissions (which is not always the case), the perspective put forward quite understandably is likely one related to the effects of exclusion on their constituency alone.

Having given careful consideration to this matter, it is my view that the Director's participation in this matter will be of assistance to the Tribunal. I arrive at this conclusion not only because of the considerations set out by the Director with regard to her knowledge and experience, but because I believe that it would benefit the parties to be in a position to respond to the Director's submissions, stated "openly", and because Cabinet would be confident that this Tribunal's recommendations have taken into account the perspective of the pertinent government ministry.

Having confirmed the utility of the Director's participation in this process, I propose next to address the policy question regarding what manner of participation would be of greatest assistance to the Tribunal. In this regard, this Tribunal's decision in *BWI Business World* [BC EST #D050/96], was subject to discussion in some of the submissions. In that decision, the Tribunal outlined a series of guidelines to govern the participation of the Director, consistent with her overall role under the *Act*, in her appearances before the Tribunal in its appellate decision-making function.

There are significant differences between this process and the appellate process which would render inappropriate the blanket adoption of the *BWI* decision to this context. For example, this is an originating application. It is a policy exercise. There is no substratum of a decision or adjudication already made by the Director, and no decision to be made by the Tribunal by which it may remit the matter back to the Director.

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This said, however, the Tribunal does feel that some guidelines or principles are appropriately articulated with regard to the participation of the Director in the Section 109(1)(a) process.

The first such principle is that the Director, even in a non-adjudicative context, probably should refrain from categorically accepting "facts" that she has not independently investigated. While it is not improper to make a submission on the *assumption* that particular facts are true, there is a risk that to "accept" factual assertions made by one party, particularly when the other party has not yet commented on those facts, could lead to an erroneous, incomplete and somewhat embarrassing situation.

A second principle flows from the first. It would appear to be appropriate for the Tribunal, as a matter of policy, to request the Director to furnish her views only after both sides of the issue have been filed with the Tribunal (this of course would not apply where only one party is making submissions). While there is no illegality in the Tribunal's procedure in this matter to date, this has been a (perhaps understandably) sensitive issue for the Employer:

> We were also very surprised that the Director of Employment Standards would make a submission strongly supporting one party to an Employment Standards dispute after reviewing only that party's submission and prior to receipt and review of the responding party's submission: (BC Rail's September 4, 1996 letter, p. 2.)

The Director's status leads to a third principle, namely that any submission that the Director makes with regard to the desirability or otherwise of an exclusion must be sensitive to the fact that, if an exclusion is repealed, it is the Director who will be charged with ruling on the desirability of granting a variance. The Director should, therefore, be careful to ensure that any statements she makes with regard to the "intent of the *Act*" in a Section 109(1)(a) matter be specifically tailored to the exclusion context and not be taken to compromise her impartiality or reflect prejudgment should a variance application arise in the very same context at some future time: *Act*, Section 73(1)(b).

Having set these principles, I wish to make it clear that they should not be taken as reflecting any adverse comment on the Director's submission of August 9, 1996.

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Order

For all of the reasons given above I order, pursuant to my authority under Section 104(1)(a) of the *Act*, that the Director's submission dated August 9, 1996 shall be struck from the record. However, I also order that the Director may, upon receipt of all parties submissions on the merits, file with the Tribunal a new submission in accordance with the guidelines set out above.

In making this order I find it appropriate, on behalf of the Tribunal, to accept responsibility for having invited the Director to make a submission at the same time as other interested parties were invited to make their submissions. I should also apologize to the parties for any inconvenience which may have been caused by the lack of formal rules concerning Section 109 proceedings. That is a matter which will be remedied in the near future.

A letter from the Registrar will be issued under separate cover inviting the parties to make any further submissions on the merits of the application. These submissions will be forwarded by the Tribunal to the Director for her reply.

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Geoffrey Crampton
Chair
Employment Standards Tribunal

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