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 -

Williston Navigation Inc.
(“Williston”

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/273

DATE OF DECISION: October 17, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Williston Navigation Inc. ("Williston") of a Determination that was issued on March 21, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Williston had contravened the *Act* in respect of the employment of Clayton Bye ("Bye"), Andrew Maillet ("Maillet") and James Wood ("Wood") and ordered Williston to cease contravening and to comply with the *Act* and to pay an amount of $47,558.99.

Williston says the Determination is wrong for two reasons:

1. In determining the vessel Williston Transporter, and all other vessels operated by Williston Navigation, are not "chartered boats" and therefore not exempt under Section 34(1)(n) of the *Employment Standards Regulations* (the *"Regulations"*); and

2. In determining that Maillet was not a Manager and therefore not excluded from the hours of work and overtime requirements of the *Act* and *Regulations*.

ISSUE

The issues are framed by the above reasons for appeal: whether the Determination was wrong in concluding the Williston Transporter, and all other vessels operated by Williston, was not a "chartered boat" for the purposes of the *Act*; and whether the Determination was wrong to conclude that Maillet was not a Manager under the *Act*.

THE FACTS AND ARGUMENT

1. Background

In 1995, Finlay Navigation (1994) Ltd. completed construction of a vessel for transporting logs on Williston Lake, near McKenzie, British Columbia. In order to finance the construction of such a vessel, Finlay Navigation (1994) Ltd. had entered into a long term agreement with Fletcher Challenge Canada Limited ("Fletcher Challenge"), a forest products company which had operations on Williston Lake and which also held leases and foreshore rights essential to the implementation and operation of a year round system for transporting logs. The contract between Finlay Navigation (1994) Ltd. and Fletcher Challenge was dated for reference the 24th day of May, 1994 and was for a term of fifteen years commencing July 1, 1995. On September 22,

1995, the interest of Finlay Navigation (1994) Ltd. was assigned to a wholly owned subsidiary, Finlay Navigation Ltd. ("Finlay"). On July 23, 1999, Finlay changed its name to Williston Navigation Inc.
Fletcher Challenge was purchased by Timberwest Forest Limited in May, 1996 and Timberwest Forest Limited was purchased by Slocan Forest Products Limited ("Slocan") in June, 1997. It would appear that Slocan presently holds the interest of Fletcher Challenge in the agreement.

2. The Facts

For the period covered by the claims, the three individuals were employed by Finlay. However, for ease of reference and to avoid any possible confusion, I shall refer to the employer, and the operator of the vessel, as Williston. Similarly, when referring to the long term agreement dated for reference the 24th of May, 1994, I shall refer to the contracting parties as Williston and Fletcher Challenge.

The vessel that is primarily involved in this appeal is named the Williston Transporter. Of the three individuals, Wood worked only on the Williston Transporter. Bye worked on the Williston Transporter and one other vessel. Maillet worked on three vessels. The majority of the individuals' work was performed on the Williston Transporter. The other vessels on which Bye and Maillet worked are known as F.N. 1 and F.N. 2. Very little information has been provided concerning those two vessels.

The Determination notes the following about the work of each of the three individuals:

- Bye worked from September, 1994 to June 10, 1998 as a deckhand at an hourly rate up to $22.16 per hour;

- Maillet worked from June, 1992 to May 23, 1998 as a first mate, second mate and deckhand up to an hourly rate of $28.55

- Wood worked from December, 1996 to February 4, 1999 as an equipment operator at an hourly rate of $22.18 per hour.

There is an issue in this appeal about the conclusion respecting Maillet.

The Williston Transporter is 360 feet long by 100 feet across the beam. It is equipped with full facilities, including sleeping quarters and kitchen. It operates 24 hours a day, all year round. The vessel has been ticketed by the Coast Guard for passenger use in 1994, but has never carried any passengers. It does not have any accommodations for passengers, although it does have the required number of lifeboats. It is not insured to carry anyone other than the crew. It travels approximately 130 kilometres to various landing sites on Williston Lake where it loads the logs which are transported to Fletcher Landing in McKenzie. The length of time for trips made by the Williston Navigator vary, depending on the time of year and the landing site being loaded. The longest trip, made in winter when the vessel must break through ice on Williston Lake, would be nine days. The agreement, in Schedule "A", sets out anticipated cycle times for round trips from the millsite at Fletcher Landing to the various landing sites.

A vessel can be in dock for up to two days. For reasons related safety and operational requirements, the crew is not allowed to leave a vessel while it is in dock.

The agreement between Williston and Fletcher Challenge is identified as a "Ferry Services Agreement" and the Williston Transporter is identified as a "Ferry" and is defined in the agreement as:

> . . . the self-propelled vessel meeting those specification described in Schedule "A" to be built an operated by [Williston] on Williston Lake under this agreement and to be named the "Williston Transporter".

The Determination set out paragraphs 5.01 and 5.04 of the agreement:

> 5.01 **[Williston] to Operate:** [Williston] shall, at its own expense, provide all required labour, supplies and equipment, including the Ferry, and the Equipment, but not including Lake Infrastructure, to transport and shall (when in its reasonable opinion it is safe to do so) transport Logs, Passengers, fuel trucks, and other freight between the Landing Sites and the Millsite for Fletcher Challenge in accordance with the terms of this Agreement. [Williston] shall also provide Ferry Services to other locations on Williston Lake on notice from Fletcher Challenge. When required by Fletcher Challenge to so do, it will transport Logs for F.F.I. and other parties, and such services shall be considered part of the Ferry Services under this Agreement.
>
> . . .
>
> 5.04 **Other Users:** [Williston] may provide services using the Ferry to other users on the following basis only:
>
> (a) [Williston] shall not provide such services to other users if Fletcher Challenge reasonably apprehends that such services might adversely impact upon the business of Fletcher Challenge;
>
> (b) where the Ferry is on a scheduled run or on notice from Fletcher Challenge under paragraph 5.01, Fletcher Challenge shall have priority for space on the Ferry over all other users and that priority extends to any Logs and any other freight being transported by Fletcher Challenge on behalf of any other party;
>
> (c) [Williston] shall not under any circumstances transport wood fibre products on the Ferry for anyone other than Fletcher Challenge without the written consent of Fletcher Challenge.

The Determination noted that F.F.I. use of the Williston Transporter is approximately 5 - 10% annually. The annual free time of the Williston Transporter, which I gather is the amount of time available to provide services to other users, is estimated at 60 days.

The Determination analysed the question of whether the Williston Transporter was a chartered boat under the *Act* and concluded:

> I am of the view that the word "charter" does not apply to the Williston Transporter for the following reasons:
>
> - A charter is available to the public on a temporary basis. The contract for use of the Williston Transporter was signed in 1995 and does not expire until 2010.
> - The Williston Transporter is not available for use to the general public when requested. Its use is restricted to prior authorization from Slocan Forest Products Ltd.
> - Space on the vessel cannot be rented out to a competitor as the contract between [Williston and Fletcher Challenge] all but prohibits it . . .
> - Concerning the interpretation of the Regulations in Kosick Holdings Ltd. (BC EST #D362/96), the Tribunal made the following comments at page 15:
>
>   The variance issued by the Director is an exception to the minimum requirements set forth in the Act, and while I agree that the minimum requirements of the Act should be interpreted with Section 8 of the Interpretation Act, R.S.B.C. 1979, chap. 206, that is, in manner that is "fair, large and liberal", <u>I am of the view that exceptions to those minimum requirements such as this variance must be interpreted in the most narrow manner in order to preserve the intent an purposes of the Act.</u> (emphasis added)
>
> - In Re Health Labour Relations Association of British Columbia et al and Prins et al (1982) 140 DLR (3d) 744 (BCSC) at page 748, the Supreme Court of British Columbia said:
>
>   It would take the clearest kind of language to exclude the right of any citizen to the direct remedy furnished by this (the ESA) legislation.
>
> - Moreover as stated in Rizzo:
>
>   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.
>
> - And as required by Section 8 of the BC Interpretation Act:
>
>   "Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." . . .

- There is no difference between "employees on boats for hire by a charter party" and "a master or crew of a boat that has been chartered". The intent of the original Regulation, and of the current one, is that where the use of a vessel is beyond the control of its owner, (where the client determines the purpose and duration of its use), those employees involved in its operation are not entitled to the overtime provisions of the Act.

- In this instance, the employer operated a ferry service for a particular client. It was a means to deliver logs to a mill. In its way, it is no different than from contracting with a truck company. A driver of a log truck would not lose entitlement to overtime because the services had been retained on the basis of a long term contract. Not more, therefore, should the crew of a vessel.

In their respective appeals, counsel for Williston and the Director also note several additional provisions of the agreement each considered relevant to the issues raised in this appeal. Counsel for Williston refers to paragraphs B and C of the opening recitals, which state:

B. [Williston] is a marine shipping company that builds and operates vessels for the purpose of transporting logs.

C. Fletcher Challenge wishes to implement a system of transporting logs by ferry on Williston Lake as a year-round operation and [Williston] wishes to operate that ferry.

Counsel also refers to paragraphs 5.08(a) and (c) of the agreement, which state:

5.08 **Carriage of Goods by Water Act:** [Williston] and Fletcher Challenge acknowledge and agree as follows:

(a) that the Ferry service which [Williston] is required to provide to Fletcher Challenge pursuant to the terms of this Agreement shall be, and shall be deemed for all purposes to be, provided pursuant to a space charter between [Williston], as owner, and Fletcher Challenge, as charterer, whereby [Williston] agrees to make available to Fletcher Challenge, space on the Ferry for the purpose of carrying the Logs and Fletcher Challenge's logging and forestry related traffic including pulpwood and chip trailers; . . .

(c) that nothing contained in this Agreement shall be, or be construed as, a demise of the Ferry by [Williston] to Fletcher Challenge;

Lastly, Counsel notes that Williston is allowed under the agreement to provide services to other users involving the carriage of goods if there is space available on the Ferry not being used by Fletcher Challenge.

In addition to making reference to Articles 5.01 and 5.04 of the agreement, the Direct notes Article 5.06, which describes the responsibilities of Williston in loading and unloading logs at the various landing sites and the Millsite.

During the investigation, as it does in this appeal, Williston made the argument that Maillet was a Manager. The Determination reached the following conclusions in respect of that Maillet's position:

> The "Williston Transporter" was always staffed with a skipper. The skipper was in complete charge of the crew. Maillet's duties were to navigate the vessel and relay instruction from the skipper to the crew. As and when instructed by the skipper, he would work hands on with the deckhands and the engineer. He also ran the loader and cat. He was never a skipper of the "Williston Transporter".
>
> – Maillet could not schedule vacations, or approve or disapprove overtime
>
> – Maillet cold not hire or fire employees
>
> – Maillet did not have any financial decision making authority
>
> – Maillet did not attend any management meetings

Nothing in the appeal addresses any of these conclusions.

3. The Arguments

The First Issue

Counsel for Williston says that the Williston Transporter, and all other boats operated by Williston for the same purpose, are "chartered boats" for purposes of the *Act* and, as such, by application of Section 34(1)(n) of the *Regulations*, Part 4 of the *Act* does not apply to Bye, Maillet (even if he is not a Manager) and Wood. The relevant provision of the *Regulations* reads:

> *34. (1) Part 4 of the Act does not apply to any of the following:*
>
> *(n) a master or crew of a chartered boat;*

Counsel notes that the *Act* and *Regulations* do not define "chartered boat" and submits that the definition of that terms must take its meaning from industry practice and custom and from common law definitions relating to the notion of what is a "chartered boat". Counsel contends that at common law, a "chartered boat" is the vessel contemplated to be used in "charterparty", which, generally speaking, is a contract under which a vessel, or some principal part of that vessel, may be used or employed by another party, the "charterer", for a voyage, a series of voyages or for a period of time, usually for the purpose of transporting cargo by sea from one location to another. From that premise, counsel for Williston contends that the agreement between Williston and Fletcher Challenge is a "charterparty" and, by extension, the Williston Transporter and the other vessels are "chartered boats".

In respect of the issue regarding Maillet, Counsel for Williston argues that Maillet was a manager for the purposes of the *Act* because, as Navigator, "he had 2 crew members working below him whom he managed."

In reply, the Director says that the Williston Transporter and all other boats operated by Williston for the same purpose are not "chartered boats" for the purposes of the *Act*. The Director argues that the rationale for the exemption in Section 34(1)(n), which is said to be historically linked to a predominantly federal jurisdiction over shipping and maritime operations, is absent in the circumstances of this case. The Director says that, historically, the exemption would have applied to those situations where the owner of a boat effectively turned over control over the working conditions of the crew to the person who hired the boat.

The argument of the Director notes that the divesting by the owner of control over the crew and the vessel is an essential aspect of the concept of a charterparty at common law and, on the material, no such divesting has taken place. The Director says that Williston at all times retains control of the vessel and of the crew and the contractual arrangement, even if one were to characterize the arrangement in maritime law terms, would be more akin to a contract of affreightment, or "linershipping" than to a charterparty. The Director's submission includes the following definition of "linershipping:

> <u>One may choose to describe ocean traffic from several angles</u>, but the most important distinction in practice is between liner service and chartering since these reflect basically different business ideas. . . .
>
> In linershipping, the shipowner (carrier, operator) runs a regular service between more or less fixed ports and usually on a fixed time schedule. The liner operator acts as a common carrier, accepting all general cargo between the ports covered by his service. (pp. 70-71)
>
> [emphasis added]

The Director also submits that, in any event, the complainants fell outside the accepted notion of "master or crew of a chartered boat" in Section 34(1)(n) of the *Regulations* in respect of some of their work, that involving loading, unloading and weighing the logs, which was unrelated to the actual operation of the vessel. The Director also notes that there is no evidence that, as counsel for Williston put it in the appeal submission, "all other vessels operated by Williston" are "chartered boats".

In reply to the Director's argument, counsel for Williston takes issue with the proposition that a divesting of control of the vessel and its crew is an essential aspect of a "charterparty" at common law and argues that the question of who has control of the vessel and/or the crew is not determinative of whether the vessel is operating as a "chartered boat". Counsel also takes issue with the factual assertion that the Williston Transporter is not under the control of Fletcher Challenge. He says that Williston, under the agreement, has ceded control of the vessel to Fletcher Challenge.

Counsel also takes issue with the argument that the Williston Transporter ceases to be a "chartered boat" because other parties are allowed to transport cargo on the vessel if there is room. In reply to the argument concerning the scope of the complainants' duties, counsel submits that they do not lose their status as "master or crew" for the purposes of the *Act* by performing duties that are not exclusively connected to the operation of the vessel.

The Second Issue

Counsel for Williston says, in any event of the first issue, that Maillet should be considered a "manager", as that term is defined in the *Regulations*. The entire submission on this issue is stated in one paragraph:

> Williston Navigation respectfully disagrees with the Determination of the Director and respectfully submits that Maillet was at all times a Manager as defined in the Regulations. The skipper was the main manager but Maillet, as navigator, was also in a management position because he had 2 crew members working below him whom he managed. There were very few management decisions that had to be made.

ANALYSIS

I will first dispose of two matters raised in the arguments and the appeal.

First, there is no basis for disturbing the conclusion that Maillet was not a Manager as that term is defined in the *Regulations* (see *Re 429485 B.C. Ltd., carrying on business as Amelia Street Bistro*, BC EST #D479/97 (Reconsideration of BC EST #D170/97) and *Re Northland Properties Ltd*., BC EST #D423/98 (Reconsideration of BC EST #D004/98)).

Second, I do not accept the argument that the complainants did not fall within the accepted notion of "master or crew" in respect of their involvement in duties that were not exclusively related to the operation of the Williston Transporter. Such a distinction would lead to an absurd result, where Part 4 of the *Act*, potentially, could apply and not apply to the employees several times over the course of a work day and would, as well, be practically unworkable from Williston's perspective. In any event, this is a new argument being raised by the Director after the fact. The Determination itself implicitly accepted that the complainants were employed as "crew members" on the vessels operated by Williston in respect of the totality of their duties and in that sense, the Director's argument challenges that finding without ever having appealed it. Even if the Determination did not explicitly conclude that the complainants were employed as crew members on Williston's vessels, neither does it reach the conclusion that the complainants were *not* within the accepted notion of "master or crew" in Section 34(1)(n) of the *Regulations* and it is inappropriate for me to make that decision for the Director in the context of this appeal.

Returning to the issue of whether the Williston Transporter is a "chartered boat", the debate between counsel for Williston and the Director has resolved itself to whether or not the agreement between Williston and Fletcher Challenge falls neatly within any of the three main

categories of "charterparty" or whether, as contended by the Director, it is not a charter agreement at all but more akin to a contract of affreightment, or "linerfreighting".

I do not agree with counsel for Williston that that the definition of what is a "chartered boat" for the purposes of Section 34(1)(n) of the *Regulations* must take its meaning from "industry practice and custom and common law definitions". The concepts relied on by counsel for Williston were developed in a maritime law context for purposes that are significantly different from the purposes and objectives of the *Act*. That is not to discount entirely any reference to shipping industry practice and custom or to definitions developed in a maritime law context. It may be helpful to consider those sources in determining the interpretive issue for the purposes of the *Act*, but in the final analysis, the Tribunal will be guided on this issue, and in its interpretation of the *Act* and *Regulations* generally, by the comments from the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27:

> Today there is only one 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.

I agree with and accept the position of the Director, which was also stated in the Determination, that the *Act* is remedial legislation providing minimum employment standards and that exceptions to those minimum standards are narrowly interpreted and should clearly express an intention to exclude the application of minimum standards to the employees affected by the exclusion. Even in that context, however, the words of the statute must be capable of the sustaining the meaning sought to be ascribed to them. Ultimately, I am required to make some sense of the words found in Section 34(1)(n) of the *Regulations* and in doing so I must give some effect to the ordinary meaning of the words used in a manner that accords with the scheme, objectives and intention of the *Act*.

Clearly, the Williston Transporter would be included in what is contemplated by the term "boat" in Section 34(1)(n). The more complicated task is to determine whether the arrangement between Williston and Fletcher Challenge is a charter such that the Williston Transporter was, and is, for the purposes of the *Act*, a "chartered" boat. In examining what meaning should be given to the term "chartered" in Section 34(1)(n) of the *Regulations*, I echo the words of the Court in *Seaway Forwarding Ltd. v. Western Assurance Company et al*, [1981] I.L.R. 5325 at 5327:

> I do not intend to engage in any extensive review of the meaning of the word "charter" or to examine the history of the use of that word. It originally connoted a writing of great importance, such as Magna Carta. It was later used as written evidence of a crown grant of a valuable privilege. It later came to be used in relation to arrangements respecting commercial shipping and was well known in the expression "charter party". In some circumstances, the word "charter" is now used to mean "hire", but I think it is only done when, what is hired, is a means of transportation.

As the term "chartered" is used in Section 34(1)(n), it is clearly intended to be associated with the hiring of a boat. In that sense, the term has assumed an accepted meaning that is reflected both in its general application and in the dictionary meaning given to it. In *Meriam-Webster's Collegiate Dictionary* the term is defined, as a noun, as "the mercantile lease of a vessel or some principal part of it" and, as an adjective, it is "to hire, rent or lease for usually temporary use". In *Webster's Revised Unabridged Dictionary*, the term is similarly defined as a mercantile lease of a vessel, and the definition there adds, "by which the owners of a vessel let the entire vessel, or some principal part of it, to another person, to be used by the latter in transportation for his own account, either under their charge or his". The fact of a "charter" is frequently expressed in a written contract that has come to be known as a "charterparty". Notwithstanding the development of a comprehensive and complex set of common law principles and statutory provisions that govern the interpretation and application of those types of contract, at its core the term simply describes the existence of an arrangement, "whereby an entire vessel or some principal part of her may be used or employed by the charterer for a voyage or a series of voyages or for a period of time" (*Halsburys Laws of England*, Vol. 43(2): Shipping and Navigation, Para. 1411).

The Determination considered the history of the exemption, which in its original form exempted "employees on boats for hire by a charter party", and concluded, among other things, that:

> The intent of the original Regulation, and of the current one, is that where the use of the vessel is beyond the control of the owner, (where the client determines the purpose and duration of its use), those employees involved in its operation are not entitled to the overtime provisions of the Act.

This conclusion was adopted and expanded upon in the argument of the Director. The Director argues that the meaning to be attributed to the term "chartered boat" in the *Regulations* should recognize the history of the exemption and should also consider the general legislative purpose of the *Act* and rationale the exemptions found in Section 34. The Director submits:

> The purpose of the exemption [in Section 34] is to recognize the manner in which work is organized in selected industries. One of the common features to many of the 26 [categories of employees who are exempt from hours of work and overtime requirements] is that the control and direction of the employees by an employer is affected either by the nature of the work or the professional designation of the employees.

I do not agree that the exemptions found in Section 34 of the *Regulations* are based, to any significant degree, on the extent to which an employer can maintain "control and direction" of an employee. I do agree that the exemptions are related to the nature of the work being contemplated by the exemptions.

The *Act* is broad based public policy legislation. The fact that the exclusions in Section 34 exist at all suggests the legislature has accepted that, as a matter of public policy, it would be inconsistent with the *Act's* objectives, as well as being unfair, to require that such work be performed within the framework of the hours of work and overtime requirements of the *Act*. For the most part, the work performed by excluded employees has unusual or unique features that do

not allow it to conform with the requirements found in Part 4 of the *Act*. In my view, the following statement, noted in the Determination as having been made by Williston during the investigation, is a reasonably accurate description of the basis for the exclusions found in Section 34 of the *Regulations*:

> . . . in looking at the type of worker that is exempt from Part 4 of the Employment Standards Act it would appear that the distinction is based on the inability of the employer to function in business if they were held to the strict standards of Part 4. The Act recognizes that some occupations have built into them a need or expectation of different hours of work or overtime due to the nature of the employment.

The above statement is supported by Professor Mark Thompson in *Rights and Responsibilities in a Changing Workplace: A Report on Employment Standards in British Columbia* at page 31 of the Report, where he says that:

> . . . exclusions should be based on factors inherent to the work performed.

The characteristics of the accepted meaning of the term "charter" identify factors inherent in the work performed by a master or crew of a chartered boat and justify their exclusion from Part 4 of the *Act*. The vessel is hired, rented or leased for a period of time. That period of time might be indeterminate, it might be approximately determined by the length of the voyage contemplated by the charter agreement, by the purpose for which the vessel is chartered or it might be a specified period of time determined by agreement between the parties. What is contemplated by a charter is a voyage - a departure from one port and an arrival at another port and could include a series of departures and arrivals over the course of the voyage. A charter could also involve a series of voyages, but in any event, as a practical the master and crew are bound to the vessel and to the work required to be done on, or associated with, the vessel the for each voyage. In the context of the definition of work in the *Act*, the vessel may become the employee's residence, but more probably it would not. The existence of work and the commencement of the work depends on the charterer. As such, the employer may not be able to predict the need for employees to report for work or to organize that work in the manner contemplated by Section 31 of the *Act*. The work is not continual and typically, there will be periods of inactivity between voyages.

Turning to Section 34(1)(n), the Director contends that an historical analysis indicates the exclusion was intended to apply only where the party who hired, or "chartered", the boat also exercised exclusive "control and direction" over the crew of the boat and where the affected employees performed work on only one "chartered" vessel.

I have two difficulties with the above contention. First, there is nothing in the historical analysis of the exemption to suggest that the exemption was limited to circumstances where the crew and the vessel were completely beyond the control of the owner. The wording of the exemption as it originally stood, which encompassed "employees on boats for hire by a charter party", did not state that the party hiring the boat had to exercise "control and direction" of the employees. As well, the accepted meaning of the term "charter" is not limited to circumstances where the owner of the vessel gives up control and direction of the crew. That would seem to be an overly restrictive application of the accepted meaning of that term, which, as indicated above, can

include an arrangement such as the one between Williston and Fletcher Challenge, where the entire vessel is hired by the charterer for a period of time with the crew remaining under the control of the owner of the vessel. The reality is, however, that Fletcher Challenge, through the agreement with Williston, does exercise a substantial degree of control over when, and what, work is required to be performed by the complainants.

Second, the position of the Director does not accord with the rationale for the exemptions in Section 34, which relates to the nature of the employment and the hours of work and overtime requirements of that employment rather than on whether someone other than the employer has “control and direction” of the employee. Based on the rationale for the exclusions in Section 34, there is no indication from the Director how the nature of the work done by the master or crew of the Williston Transporter, or a chartered boat generally, would be different whether they were under the control and direction of the owner or the charterer.

The Director says that a key factor is the control held by Williston over the assigning of work to the employees. Even if I accepted that controlling the initial assignment of the employees to a particular trip was a relevant factor (and I am not particularly compelled by the argument), it does not address that the most significant part of the claim by the employees arises from work that is performed on a daily basis once the employee is on the vessel. In other words, regardless of the initial assignment, once an employee is assigned to the trip, that employee is unable to leave the vessel until the trip is completed, whether the trip lasts two days or two weeks.

The Director also argues, in relation to the historical analysis, that:

> The rationale for that exemption (Section 34(1)(n)) can be linked to the fact that historically labour relations in all forms of shipping, commercial shipping and maritime operations were under federal jurisdiction. . . . [T]he Employment Standards exemption would have applied to only those situations outside federal jurisdiction . . .

From that premise, the Director suggests that what would be a “chartered boat” for the purpose of the *Act* would be much more limited than what might be indicated by the general reference to “chartered boat”. I cannot, however, find anything in the *Act* or *Regulations* to support that suggestion. If the legislature intended the exemption to apply to only specific types of charters, such as the coastal fishing charter example given by the Director, it could easily have done so.

The Determination reasoned that a “chartered boat” under the *Regulations* is one which must be generally available to the public on a temporary basis. Again, there is nothing in the accepted meaning of the term “charter” which compels a conclusion that a “chartered boat” must be generally available to the public for hire and no authority for that proposition has been provided. Additionally, I am not persuaded by anything in the material or by the arguments that the term of the arrangement, while lengthy, is not temporary.

As directed by *Rizzo and Rizzo Shoes Ltd.*, *supra*, the grammatical and ordinary sense of the words “chartered boat” should read in the entire context and in harmony with the scheme of the *Act*, the object of the *Act*, and the intention of the legislature. In my opinion, a conclusion that the Williston Transporter is a “chartered boat” and that the employment of its crew is excluded

from Part 4 of the *Act* is not inconsistent with the scheme of the *Act*, its objectives or the intention of the legislature.

There is simply no basis for disagreement that a key objective of the *Act* is to ensure employees receive the minimum terms and conditions of employment required by the *Act*. Notwithstanding, the *Act* does contemplate that some employees will be excluded from all or some of the requirements of Part 4. As I have indicated earlier in this decision, those exclusions are based predominantly on a recognition by the legislature that the nature of some types of employment do not allow for compliance with the requirements of the hours of work and overtime requirements in the *Act*.

The nature of the employment of the employees on the Williston Transporter is consistent with the basis for the exclusions under Part 4. The Determination includes an overtime calculation report indicating that the employment of the complainants is characterized by periods of work, ranging from 1 day to 18 consecutive days, and periods of time off work, ranging from 1 day to 24 consecutive days. The Determination notes that the periods of work involve the employees travelling from McKenzie to locations on Williston Lake, loading logs and returning to McKenzie. From the commencement of the trip to its completion, the employees do not leave the vessel. It appears from the material that during the trips, the employees would regularly work a 12 hour shift. From time to time the employees would work less than that number of hours in a day and occasionally would work longer than 12 hours in a day, but the reasons for those variations are not apparent on the face of the material. The hours and days of work are predominantly determined by the nature of the work being done.

The Determination noted, for the purpose of rejecting an argument raised by Williston that the vessel could be considered a "towboat" under Section 34(1)(l) of the *Regulations*, that:

> . . . "towboat means a ship used exclusively in towing another ship or floating object astern or alongside or in pushing another ship or object ahead".
>
> By its very appearance, the Williston Transporter does not fit the above description.

I do not disagree with the conclusion that the Williston Transporter is not a "towboat", but what the Determination does not appear to appreciate is that, relative to the exclusion found in Section 34(1)(l), the Williston Transporter performs a function that is very similar, if not identical, to that performed by a towboat involved in a commercial logging operation. Section 34(1)(l) reads:

> *34. (1) Part 4 of the Act does not apply to any of the following:*
>
> *(l) a person employed on a towboat other than*
>
> *(i) a boom boat,*
>
> *(ii) a dozer boat,*
>
> *(iii) a camp tender*
>
> *in connection with a commercial logging operation;*

In *Re Hajek*, BC EST #D435/98, the Tribunal considered an appeal from a Determination that had concluded Hajek, who operated a tugboat on Quesnel Lake, was excluded from Part 4 of the *Act* by Section 34(1)(l). The Tribunal's decision described the work being done by the appellant and the Director's conclusion in respect of that work:

> Hajek was employed by Clearwater Tug Ltd. to operate a tugboat which was used to tow logs and barges carrying heavy equipment, supplies and provisions in connection with a commercial logging operation on Quesnel Lake.
>
> The Director made the following findings of fact concerning the vessel on which Hajek was employed:
>
> > . . . according to the Marine Safety Regulations, "tow-boat" means a ship used exclusively in towing another ship or floating object astern or alongside or in pushing another ship or floating object ahead. This appears to describe exactly what you were doing, whether you call it towing or barging.

In respect of the function being performed by the Williston Transporter, it is the same as that described above - transporting logs and heavy equipment in connection with a commercial logging operation.

In *Re Hajek*, *supra*, the appellant suggested the exemption found in Section 34(1)(l) was an oversight on the part of legislature based on a mistaken assumption that his employment was federally regulated. In response, the Tribunal stated:

> I also do not agree that the exclusion of persons employed on a towboat in connection with a commercial logging operation is an oversight by the legislature based on an incorrect assumption that all shipping, including towboats associated with commercial logging, is federally regulated. First, such a conclusion would be inconsistent with the application of the rest of the Act to the employment of such persons. Second, there are a number of other persons whose employment is excluded from all or certain sections of Part 4 of the Act, including interior logging truck drivers who, like Hajek, are employed to transport logs in connection with commercial logging operations.

I note that the exemption for interior logging truck drivers is now confined to those drivers paid on a compensation system other than an hourly rate. That does not, however, alter the observation that provisions of the *Regulations*, such as Section 34(1)(l) and Section 37.2, express an intention on the part of the legislature to exclude employees engaged in transporting logs in connection with a commercial logging operation from all or part of Part 4 of the *Act*.

In the final analysis, the Determination does not provide any cogent reason for its conclusion that the Williston Transporter is not a "chartered boat" for the purposes of the *Act*.

In all the circumstances and for the above reasons, I conclude that the Williston Transporter is a "chartered boat" for the purposes of the *Act*. The appeal, as it relates to the Williston Transporter is successful.

As indicated at the outset of this decision, the appeal by Williston contended that the Williston Transporter, *and all other vessels operated by Williston Navigation*, were "chartered boats for the purposes of the *Act*. There was no material on file relating to the operation of the other vessels F.N. 1 and F.N. 2, on which two of the complainants were employed for brief periods. On July 13, 2000, the Tribunal asked counsel for Williston to provide information relating to the operation of the other two vessels involved. On July 28, 2000, counsel provided a brief submission and attached to that submission a ferry services agreement relating to the operation of a vessel described as the Babine Charger, which is not a vessel upon which any of the complainants worked. This failure to respond to the Tribunal's request means there is no basis on which the conclusion in the Determination respecting the vessels F.N. 1 and F.N. 2 may be considered or altered. While Counsel indicated to the Tribunal that he had been advised by his client that the other two vessels were chartered "on arrangements similar" to the Williston Transporter and the Babine Charger, that is simply a statement of his client's opinion. The obligation imposed on Williston by the Tribunal was to provide material supporting the contention that *all other vessels operated by Williston Navigation*, specifically those two vessels upon which two of the complainants were employed, are "chartered boats" for the purposes of the *Act*. If it is not already apparent from what has been stated in this decision, exclusions from the minimum standards and requirements of the *Act* are limited and the basis for such an exclusion must be clearly established. Williston has failed to do this in respect of the other two vessels and their appeal in respect of the Determination on those vessels is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 21, 2000 be cancelled and the matter referred back to the Director to recalculate the overtime owed to any of the complainants for work performed on F.N. 1 and/or F.N.2.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal